

Antitrust, Regulatory Harm, and Economic Liberty

Alan J. Meese*

I. NACHBAR’S “CONSTITUTIONAL” APPROACH: BANNING REGULATORY RESTRAINTS	115
II. A BETTER “CONSTITUTIONAL” APPROACH: HOW REGULATORY RESTRAINTS CAN ADVANCE LIBERTY	122
III. THE CONTENDING APPROACHES AND CURRENT LAW	130
CONCLUSION	135

I. NACHBAR’S “CONSTITUTIONAL” APPROACH: BANNING REGULATORY RESTRAINTS

For decades scholars and jurists have disagreed about the ultimate goal of antitrust law, what one might call antitrust’s “normative premise.” For some, antitrust regulation is simply analogous to Pigouvian externality regulation and thus should only ban agreements and other practices that reduce overall wealth.¹ For others, the Sherman Act serves broader social and political values and should, for instance, ban practices that lead to undue concentration of wealth and political power.² Still others have articulated a normative premise that is somewhere in between these two, contending that the Congress that passed the Sherman Act meant to ban those contracts and practices that reduce the welfare of purchasers in the relevant market, even if such contracts or practices on balance increase economic welfare.³

* Ball Professor of Law and Cabell Research Professor of Law, William and Mary Law School.

1. See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 81–89, 107–115, 405–07 (1993); DONALD TURNER & CARL KAYSEN, *LAW AND ECONOMICS OF ANTITRUST POLICY*, 12 n.11 (1959) (expressly analogizing antitrust regulation to Pigouvian regulation).

2. See generally David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219 (1988); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979).

3. Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 93–96 (1982) (arguing that legislative history of the Sherman Act demonstrates concern with harm to purchasers, not allocative

Thomas Nachbar articulates a fourth organizing principle for antitrust, what he calls a “Constitutional” approach to the subject.⁴ In particular, Nachbar contends that the Sherman Act mirrors the Constitution’s own prohibition on legislative delegation of regulatory authority to private parties.⁵ Using the National Industrial Recovery Act as an example, Nachbar claims that delegating the state’s authority to private parties to determine the content of regulation deprives regulated individuals and firms of their liberty without due process of law, contrary to the Fifth Amendment.⁶ In the same way, he says, courts should read the Sherman Act to ban contracts (and other conduct) that restrain individual liberty and thus produce what he calls “regulatory harm.”⁷

Of course, the Sherman Act does not implement the Due Process Clause, which, by its terms, applies only to “state action.”⁸ While state definition and enforcement of property and contract rights is necessary for markets to function, the Act is an exercise of the Commerce Power and not Section 5 of the Fourteenth Amendment.⁹ Still, Nachbar contends that some private conduct can produce the same “regulatory harms” as official deprivations of liberty backed by public force and thus is an appropriate object for public intervention via legislation.¹⁰ More precisely, he draws a common sense distinction between economic conduct that is “proprietary,” on the one hand, and that which is “regulatory,” on the other. Proprietary conduct, he says, entails at its core a firm’s disposition of its own property

efficiency and total welfare); see also Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 N.Y.U. L. REV. 659, 661–62 (2010) (describing the “total welfare,” “purchaser welfare,” and “populist” schools of antitrust thought).

4. Thomas B. Nachbar, *The Antitrust Constitution*, 99 IOWA L. REV. 57 (2013).

5. See *id.* at 88–92.

6. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935) (rejecting argument by the United States that reliance on private industry to write Codes of Fair Competition thereby rendered delegation harmless). Nachbar also invokes the 1935 Bituminous Coal Act, which the Court also struck down, as exemplifying such an inappropriate delegation. Nachbar, *supra* note 4, at 82–88; see also *Carter v. Carter Coal*, 298 U.S. 238 (1936). Similar delegations, it should be noted, took place before the Depression. See Alan J. Meese, *Competition Policy and the Great Depression: Lessons Learned and a New Way Forward*, 23 CORNELL J.L. & PUB. POL’Y 255 (2013) (describing “codes of fair competition” imposed during the 1920s by the Federal Trade Commission after consulting with industry representatives at so-called “trade practice conferences”).

7. Nachbar, *supra* note 4, at 69.

8. See generally *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989); *The Civil Rights Cases*, 109 U.S. 3 (1883).

9. See *The Civil Rights Cases*, 109 U.S. at 11 (explaining that Section 5 of the Fourteenth Amendment “does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers”); see also *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940) (“The addition of the words ‘or commerce among the several States’ . . . was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes . . .”).

10. Nachbar, *supra* note 4, at 93–95.

and includes setting the price for such disposition.¹¹ By contrast, regulatory conduct entails contracts that by their terms restrict the manner in which one's trading partners deal with their own property.¹² A classic example of regulatory conduct is a tying contract, whereby the seller of one product (the tying product) obtains an agreement from the purchaser to purchase an additional, distinct item (the tied product) from the same seller.¹³ Such an agreement, it is said, "regulates" the purchaser's use of his or her own property—including apparently, the money he or she would use to purchase the tied product—and thus restricts the purchaser's freedom of choice with respect to property that the seller of the tying product never owned.¹⁴ Between these two polar opposites, conduct that is plainly proprietary and that which is plainly regulatory, stands conduct that shares attributes of both and is thus more ambiguous.¹⁵ To determine which position on the spectrum a restraint occupies, Nachbar says courts should measure the "distance" between the "ownership" of a defendant's property, on the one hand, and the control exercised by the restraint.¹⁶

Relying upon this creative taxonomy, Nachbar contends that the Sherman Act bans, or should ban, conduct that is sufficiently regulatory as to produce "regulatory harm," whether or not such conduct is inefficient, for instance.¹⁷ The article also claims that the Sherman Act properly declines to ban some proprietary conduct, such as unilateral monopoly pricing, that produces the same allocative harm as cartel price fixing and thus would be unlawful under an efficiency standard.¹⁸ Failing to ban conduct that produces regulatory harm, Nachbar says, leaves firms free to engage in private regulation of others' economic liberty, without the legitimizing process of legislative approval. While undeniably private, he

11. See *id.* at 96–97. This price, it should be noted, could be infinite, as when a party simply refuses to deal with potential buyers altogether.

12. *Id.*

13. See generally *IBM Corp. v. United States*, 298 U.S. 131 (1936) (evaluating IBM's requirement that purchasers of its adding machines also purchase punch cards needed to operate the machine from IBM).

14. Nachbar, *supra* note 4, at 100.

15. For instance, Nachbar recognizes that exclusive dealing agreements are to some extent regulatory but treats them as less regulatory (and more proprietary) than tying contracts because the former, he says, govern products that are "identical" to those sold by the manufacturer who seeks and enforces the exclusivity provision. By "identical," Nachbar apparently means occupying the same product market. Thus, an agreement between Ford and its dealers that the latter will not sell automobiles made by competing manufacturers governs "identical" products. Nachbar does not address, say, a requirement that Ford dealers not sell snowmobiles or motorcycles. Nachbar, *supra* note 4, at 96–97.

16. *Id.* at 71.

17. For instance, Nachbar asserts that most tying contracts imposed by firms with market power are efficient but that courts still properly condemn such contracts because they produce regulatory harm. See *id.* at 99.

18. See *id.* at 73–74; see also BORK, *supra* note 1, at 263–79 (treating cartel price fixing as a quintessential example of conduct that an efficiency-based standard should condemn).

says, such restraints nonetheless restrict private choice and thus liberty in the same way as analogous public regulation written by private parties. By banning such contracts, then, the Sherman Act, properly interpreted, can further constitutional values and enhance individual liberty. Nachbar does not deny that, like some public regulation, such “private regulation” can enhance the allocation of resources and thus increase total welfare.¹⁹ Nonetheless, he contends that an antitrust regime based solely upon efficiency, while maximizing total economic welfare, will not maximize personal liberty, a value that competes with efficiency.²⁰

Nachbar does more than claim that this liberty-based account of antitrust is normatively attractive. He also contends that the “proprietary/regulatory” taxonomy sheds light on important facets of antitrust law that the efficiency and other accounts do not explain. For instance, the article claims that only the “proprietary/regulatory” dichotomy explains antitrust’s fundamental distinction between unilateral pricing decisions, on the one hand, and concerted or collective agreements on price, on the other.²¹ Under current law, of course, unilateral pricing decisions are lawful per se, even when a monopolist of a properly-defined relevant market protected by barriers to entry sets unreasonable prices that gouge consumers.²² By contrast, naked agreements between two or more independent units to set prices, whether above or below the market price, are always unlawful per se. This is true even if the resulting prices are more reasonable than those set by the free market, and even if such price fixing might serve important social purposes, such as enhancing the quality of legal services for the indigent or improving the quality of bridges.²³ According to

19. That, after all, was the point of the police power, pursuant to which states abridged liberty and property so as to combat market failure and thereby increase total welfare. *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937 & nn.199–201 (1991) (arguing that, during the *Lochner* era, the Supreme Court only sustained abridgements of contractual liberty designed to combat market failure).

20. Nachbar, *supra* note 4, at 60.

21. *See generally* *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (holding that purely unilateral conduct cannot violate Section 1 of the Sherman Act and articulating the distinction between unilateral and concerted action).

22. *See* *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (“[T]he possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.”); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 (1984) (explaining that antitrust law draws a distinction between using market power to charge high prices, on the one hand, and using that power to impose tying contracts, on the other), *abrogated on other grounds by* *Ill. Tool Works, Inc. v. Indep. Ink., Inc.* 547 U.S. 28 (2006); *Standard Oil Co. of La. v. United States*, 221 U.S. 1, 55 (1911) (observing that the Sherman Act does not forbid “monopoly in the concrete”); *see also* *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 356–57 (1982) (concluding that unilateral price fixing between partners is “perfectly proper” despite the resulting elimination of price competition).

23. *See generally* *FTC v. Super. Ct. Trial Lawyers Ass’n*, 493 U.S. 411 (1990) (banning group boycott by court-appointed lawyers for the indigent seeking increased compensation); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679 (1978) (rejecting ethical rule banning competitive bidding without considering concededly possible safety benefits of the

Nachbar, efficiency considerations cannot explain such vastly different treatment of conduct—supracompetitive prices—that produces the very same harm regardless of whether such prices are the result of unilateral fiat or collective action.²⁴ Indeed, one might even conclude that unilateral pricing by an actual monopolist is *more* likely to produce allocative harm than a randomly-selected horizontal price fixing agreement, the latter of which may be between firms that occupy only a small subset of a relevant market and, unlike a monopolist, overestimate their ability to affect market prices.²⁵

The article also claims that the proprietary/regulatory distinction offers the most robust explanation of antitrust's disparate treatment of vertical and horizontal restraints.²⁶ To be sure, proponents of an exclusive efficiency norm would emphasize that a single firm with market power at one level of the production process cannot necessarily add to that power by imposing restraints on downstream dealers.²⁷ By contrast, horizontal agreements combine the market position of two or more previously independent market actors and thus pose a greater threat of competitive harm.²⁸ According to Nachbar, however, this distinction is completely illusory and has no efficiency origins.²⁹ That is, such an analysis ignores the legally constructed

ban); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 223 (1940) (banning horizontal price fixing regardless of reasonableness, rejecting a “reasonable price” defense as “wholly alien to a system of free competition,” and condemning defendants’ practices because they thwarted “determination . . . of prices by free competition alone”).

24. Nachbar, *supra* note 4, at 76. See generally Donald F. Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1212–13 (1969) (equating harm from monopoly and oligopoly). Cf. *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 467 (1992) (stating that legal presumptions in the antitrust context should rest on “actual market realities” and not formalistic line drawing).

25. See BORK, *supra* note 1, at 268–69 (explaining how even a commission-fixing agreement between two realtors in New York City is unlawful per se).

26. Nachbar, *supra* note 4, at 77; see, e.g. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 47–59 (1977) (holding that vertical non-price intrabrand restraints are properly judged under a forgiving rule of reason); *id.* at 50, n.16, (distinguishing *United States v. Topco Assoc., Inc.*, 405 U.S. 596 (1972), which condemned non-price intrabrand restraints as unlawful per se, on the ground that the Topco restraints were horizontal). Compare *Catalano v. Target Sales, Inc.*, 446 U.S. 643 (1980), with *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

27. See generally Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373 (1966) (relying on this argument to conclude that vertical intrabrand restraints should be lawful per se, regardless of the manufacturer’s market power).

28. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768–69 (“Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit.”); see also BORK, *supra* note 1, at 269 (explaining that once courts define price fixing as unlawful per se, “[v]ery few firms that lack power to affect market prices will be sufficiently foolish to enter into conspiracies to fix prices. Thus, the fact of agreement defines the market”).

29. Nachbar, *supra* note 4, at 62–63.

nature of a single firm's unilateral ability to exercise market power upstream, unmolested by antitrust regulation—a status that itself owes its origins to the proprietary/regulatory distinction, and not any efficiency considerations.³⁰ Thus, this dichotomy, and not efficiency concerns, explains antitrust's horizontal/vertical distinction.

Nachbar has offered an original and coherent account of antitrust that resonates with values, including liberty and accountability, that any free society should foster. To be sure, Nachbar does not attempt a comprehensive analysis of the original meaning of the Sherman Act or offer criticism of those analyses that have reached different (albeit conflicting) conclusions.³¹ There is, however, some rhetorical support in the Sherman Act's legislative history and other sources for such a “constitutional” approach. After all, Senator Sherman decried the “kingly prerogatives” that monopolistic combinations conferred on their owners and opined that the nation, would “not endure a king as a political power [and] . . . should not endure a king over the production, transportation, and sale of any of the necessities of life.”³² It is thus no surprise that Senator Sherman described the bill that he introduced as a “bill of rights and charter of liberty.”³³ Moreover, early case law, including the *Standard Oil* decision, contains language implying that the propensity of an agreement to restrain individual liberty was a factor militating in favor of a finding that an agreement violated

30. *Id.* Cf. Alan J. Meese, *Intrabrand Restraints and the Theory of the Firm*, 83 N.C. L. REV. 5, 49–64 (2004) (explaining that so-called “unilateral conduct” in fact is the result of concerted action between various economic actors cooperating under the auspices of a legally constructed business enterprise).

31. Cf. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966) (examining legislative history of the Sherman Act and concluding that Congress meant to ban only those restraints and other practices that reduced total economic welfare); *see also* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 82–83 (1982) (contending that Congress meant to ban all restraints that reduced the welfare of purchasers in the relevant market).

32. Bork, *supra* note 30, at 39 (“If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.” (quoting 21 CONG. REC. 2461 (1890) (remarks of Sen. Sherman))).

33. *See* Nachbar, *supra* note 4, at 65–66 (quoting 21 CONG. REC. 2461 (remarks of Sen. Sherman)).

Section 1.³⁴ One can find apparent references to similar concerns in the pre-Sherman Act common law.³⁵

Moreover, twentieth century case law abounds with statements that the Sherman Act protects the “freedom” of private parties from the restraining effect of private contracts.³⁶ Consider, for instance, *United States v. Topco*, a decision Nachbar invokes to illustrate how concerns over excessive regulatory control motivate much greater scrutiny of horizontal restrictions than vertical, regardless of economic harm.³⁷ There, several small grocery chains formed a joint venture to manufacture and distribute so-called private label goods in competition with large chains who had their own private label products.³⁸ The venture assigned each member a territory and

34. See *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (“The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade.”); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 51, 57–58 (1911) (concluding that English common law, which informed the Sherman Act, prohibited contracts entered “with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy” (emphasis added)).

35. See, e.g., *Or. Steam Navigation Co. v. Winsor*, 87 U.S. 64, 68 (1873) (“There are two principal grounds on which the doctrine is founded, that a contract in restraint of trade is void as against public policy. One is, the injury to the public by being deprived of the restricted party’s industry; the other is, the injury to the party himself by being precluded from pursuing his occupation and thus being prevented from supporting himself and his family.”)

36. See, e.g., *Albrecht v. Herald Co.*, 390 U.S. 145, 152 (1968) (banning maximum resale price maintenance because the practice “cripple[s] the freedom of traders and thereby restrain[s] their ability to sell in accordance with their own judgment”) (quoting *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 213 (1951), *overruled by State Oil Co. v. Khan*, 522 U.S. 3 (1997); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966) (condemning quasi exclusive dealing contract because it “take[s] away freedom of purchasers to buy in an open market”); *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959) (condemning group boycott as unlawful *per se* because the practice “takes from Klor’s its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants’ products. It deprives the manufacturers and distributors of their freedom to sell to Klor’s at the same prices and conditions made available to Broadway-Hale, and in some instances forbids them from selling to it on any terms whatsoever”).

37. See Nachbar, *supra* note 4, at 75 n.56. Specifically, Nachbar argues that:

[t]oday, horizontal restraints like price fixing and horizontal market allocation retain *per se* treatment regardless of their actual market harm, while no vertical restraints are subject to strict *per se* treatment, and many similar restraints are considered unproblematic in purely vertical form but receive much higher scrutiny when they appear in horizontal form.

Id. at 75 (footnotes omitted). Unlike Nachbar, I doubt that *Topco* is still good law after *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 100–04 (1984) (explaining that horizontal restrictions in one portion of the market could enhance competition in other portions of the market and that such restrictions should be analyzed under the Rule of Reason); see also *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 226, 228–29 (D.C. Cir. 1986) (explaining that decisions such as *NCAA* overruled *Topco sub silentio*).

38. *Rothery Storage*, 792 F.2d at 225.

provided that members would not sell products made or distributed by the venture in other members' territory.³⁹

The Supreme Court held that the propensity of horizontal territorial restraints to overcome free riding and thus enhance *interbrand* competition was not a "redeeming virtue" that could prevent per se condemnation.⁴⁰ Simply put, the Court said the Sherman Act was "the Magna Carta of free enterprise" and preserved "economic freedom" in the same way that the Bill of Rights preserved political freedoms.⁴¹ That economic freedom, the Court said, included the "freedom to compete," unrestrained by contracts whereby "private citizens or groups" "foreclose[d]" such freedom in one sector of the economy so as to "promote greater competition in a more important sector of the economy."⁴² Any decision to reduce competition in one sector of the economy to increase it elsewhere, the Court said, while perfectly legitimate if accomplished by Congress (or, presumably a State) could not be made by "private forces."⁴³ Thus, the *Topco* Court plainly analogized the restraints before it to regulation of economic activity by private parties and condemned such private "regulation," consistent with Nachbar's theory.

II. A BETTER "CONSTITUTIONAL" APPROACH: HOW REGULATORY RESTRAINTS CAN ADVANCE LIBERTY

Despite this non-trivial rhetorical support for Nachbar's "constitutional" interpretation of the Act, I am skeptical that such an approach can improve upon an efficiency-based perspective. In particular, instead of protecting and expanding the sort of liberty protected by the Due Process Clause, Nachbar's constitutional approach would actually thwart economic liberty, particularly the liberty of individuals to cooperate with others in a joint enterprise in a manner that improves society's welfare.

I am happy to agree with Nachbar that an actual legislative delegation of coercive regulatory power to private entities would deprive regulated parties of their economic liberty and offend the Due Process Clause of the Fifth Amendment. Nachbar is to be commended for calling this issue to our attention in the antitrust context. After all, even though promulgated by private parties, enforcement of such "legislation" via jail time and/or fines

39. *Id.*

40. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607 (1972).

41. *See id.* at 610.

42. *See id.* It should be noted that the brief of the United States echoed similar themes. For instance, the government analogized the restraints before the Court to barriers to entry and contended that State-imposed barriers were more legitimate. *See* Brief for the United States of America at 26, *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972) (No. 70-82).

43. *Topco*, 405 U.S. at 611 ("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 . . ."); *see also* *Parker v. Brown*, 317 U.S. 341 (1943) (sustaining California's imposition of cartel-like output restrictions as consistent with the Sherman Act and dormant commerce clause).

would restrict individual liberty, including liberty of contract, without the minimum accoutrement of legislative due process.⁴⁴ The defendants in *Schechter Poultry* (and, for that matter, their employees and customers) learned this the hard way when the United States indicted them on 60 counts of violating the “Live Poultry Code.” Such violations included, for instance, failing to pay minimum wages, allowing employees to exceed maximum hours, failing to report prices to the code authority, and allowing customers to select individual chickens instead of forcing purchasers to take bad chickens with the good.⁴⁵ A political society that enforced such legislation banning harmless cooperation between its citizens at the behest of other private parties would too closely resemble the State of Nature that man left to protect his liberty and property from arbitrary deprivations by brutish force.⁴⁶ Purely private conduct that works the same deprivation of liberty, it would seem, should be just as unlawful.

I am also happy to agree that private contracts limiting the parties’ discretion are just as “private” as private decisions on the content of legislation. But there is still a separate question to which, in my view, Nachbar gives insufficient attention. That is, do such purely private contracts, such as those before the Court in *Topco*, or tying agreements, or naked horizontal price fixing, infringe the “liberty” properly understood of the parties to them? Such an infringement, of course, is a necessary condition of any analogy to deprivations of liberty under the Due Process Clause enforced by the threat of jail or fines. The answer, I think, is “no.”

Take the agreements in *Topco*, which the Court (and Nachbar, apparently) attributed to “private forces” that restricted the “economic freedom” of the Association’s members.⁴⁷ Certainly a law or regulation that dictated where the various members of *Topco* could sell *Topco* products would restrict the liberty of these members, just as the NIRA codes restricted the liberty of the *Schechters* and others. But what about purely private agreements? Do they restrict “economic liberty,” properly understood? Looking to the Warren or Burger Courts for an answer to this question is a bit like asking the President of PETA for hunting tips. After all, both Courts refused to provide any protection for economic liberty against actual

44. Cf. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 519 nn. 1, 2 (1935) (reporting that the United States indicted the petitioners on 60 counts of violating the “Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and about the City of New York”).

45. See Meese, *supra* note 6 (describing *Schechter* indictment).

46. See THE FEDERALIST NO. 51, at 296 (James Madison) (Am. Bar Assoc’n ed., 2009) (“In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves . . .”).

47. See *supra* text accompanying notes 36–39.

deprivations by the State.⁴⁸ There is no reason to expect that the *Topco* Court had any appreciation for whatever conception of liberty informed the Sherman Act.

Fortunately, we need not rely solely upon decisions from the 1950s through the 1970s. Claims, like Nachbar's, that the Sherman Act and other antitrust statutes protect "liberty" from private restraint, including restraints imposed by cartels, are nearly as old as the Sherman Act itself. During antitrust's formative era, defendants often sought shelter for challenged practices in liberty of contract or the sanctity of property rights that courts were protecting in other contexts.⁴⁹ Proponents of an expansive reading of the Sherman Act or state antitrust laws sometimes responded with liberty-based arguments of their own, claiming that the challenged restraints themselves infringed on the liberty of others, including parties to them, thereby justifying legislative interference with private agreements.⁵⁰

The most complete articulation and consideration of such an argument can be found in *Hopkins v. United States*.⁵¹ There, the Supreme Court evaluated bylaws of the Kansas City Livestock Exchange, horizontal restraints prohibiting members from sending telegrams to cattle farmers in other states and limiting the numbers and salaries of agents the members could employ to solicit consignment sales from such farmers.⁵² The defendants claimed that an antitrust prohibition of such conduct would abridge liberty of contract and thus violate the Fifth Amendment.⁵³ In reply, the United States claimed that similar limitations imposed by the government would abridge private liberty and be void.⁵⁴ In the same way, the United States said, the private bylaw provisions, while creatures of contract, deprived members of their liberty to conduct business as they saw fit, burdened the flow of cattle from state to state, and thus were direct restraints of interstate commerce in violation of the Sherman Act.⁵⁵

48. See generally *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955).

49. See Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1, 27, 35 (1999).

50. *Id.* at 34-35.

51. See *Hopkins v. United States*, 171 U.S. 578 (1898).

52. *Id.* at 581-82.

53. See Statement of Case, Brief, & Argument for Appellants at 216-21, *Hopkins v. United States*, 171 U.S. 578 (1898) (no. 533).

54. See Brief for the United States at 132, *Hopkins v. United States*, 171 U.S. 578 (1898) (No. 533) (claiming that the challenged restrictions interfered with the "right" of cattlemen to sell their products in a competitive market); *id.* at 188-90 (contending that the challenged restrictions deprived rivals of their right to pursue a lawful calling).

55. See *id.* at 132, 180-89; see also *id.* at 190 ("It is the right and privilege of any man to engage in the commission business at the Kansas City stock yards, or, having so engaged in that business, it is his right to continue. A combination whose efforts are directed to prevent him from transacting such business is one which the law will not tolerate.") (citing *The Slaughterhouse Cases*, 83 U.S. 36 (1873); *Barr v. Essex Trades Council*, 53 N.J. Eq., 101, 127 (1894); *Temperton v. Russell*, (1893) 1 Q.B. 715 (Eng.)).

The Court rejected this argument in a unanimous opinion by Justice Peckham. Peckham conceded that statutes imposing similar restrictions on freedom of action may well infringe liberty of contract.⁵⁶ He also conceded that such contracts might “greatly restrain[] and limit[]” the autonomy of the parties.⁵⁷ However, he rejected any automatic parallel between the sort of public regulation hypothesized by the government, on the one hand, and contractual restraints, on the other. After all, he said, the “liberty” of a citizen to send as many solicitors as he might wish into another territory included the liberty “to curtail that right . . . for what he thinks good reason.”⁵⁸ So long as such agreements were voluntary, he said, the agreements found shelter in liberty of contract. This shelter applied no matter how much they restrained the *autonomy* of the parties, *unless* they directly restrained interstate *commerce* and thus produced the sort of *economic* harm (not regulatory harm) that would justify regulation.⁵⁹ Applying this standard to the restrictions before the Court, Peckham determined that that the restraints in question were merely indirect restraints.⁶⁰ Thus, the agreements did not violate the Sherman Act, despite the extent to which they restrained the parties’ autonomy.⁶¹

Other formative era decisions reached similar results. For instance, when challenging the *Addyston Pipe* cartel, the United States sought to rebut the defendants’ invocation of liberty of contract by analogizing the bid-rigging agreement before the Court to the worst form of private control over others, namely, human slavery and the sort of “liberty” advocated by Stephen Douglas before the Civil War.⁶² In another unanimous opinion by Peckham,

56. See *Hopkins*, 171 U.S. at 602–03.

57. *Id.* at 603.

58. *Id.*

59. See *id.* at 602–03 (“We say nothing against the constitutional right of each one of the defendants and each person doing business at the Kansas City stock yards to send into distant States and Territories as many solicitors as the business of each will warrant. This original right is not denied or questioned. But cannot the citizen, for what he thinks good reason, contract to curtail that right? To say that a State would not have the right to prohibit a defendant from employing as many solicitors as he might choose, proves nothing in regard to the right of individuals to agree upon that subject in a way which they may think the most conducive to their own interests. *What a State may do is one thing, and what parties may contract voluntarily to do among themselves is quite another thing.* The liberty of contract, as referred to in *Allgeyer v. Louisiana*, 165 U.S. 578, is the liberty of the individual to be free, under certain circumstances, from the restraint of legislative control with regard to all his contracts, but *the case has no reference to the right of individuals to sometimes enter into those voluntary contracts by which their rights and duties may properly be measured and defined and in many cases greatly restrained and limited.*” (emphasis added)); see also Meese, *supra* note 48, at 43 (explaining that, during the formative era, the Supreme Court defined as “direct” only those restraints that produced economic harm in the form of prices above the competitive level).

60. See *Hopkins*, 171 U.S. at 602.

61. See *id.* at 603.

62. See Points for the U.S. in Reply at 8, *Addyston Pipe and Steel Co. v. United States*, 175 U.S. 211 (1899) (No. 269) (“[The defendants’ argument] suggests the sacred right of self-government, contended for by Senator Douglas and described by Mr. Lincoln: ‘The sacred

the Court rejected the defendants' claim that direct restraints of interstate commerce found shelter in liberty of contract, noting that such restraints could have the same impact on interstate commerce as analogous (direct) restraints imposed by states.⁶³ He also determined that the restraints were in fact direct. In so doing, he rejected the defendants' claim that the prices set by the cartel were reasonable, invoking factual findings below by William Howard Taft, that the restraints had resulted in prices 25% above cost plus a reasonable rate of return, with the result that "the effect of the combination was to enhance prices beyond a sum which was reasonable."⁶⁴

Responding to claims that the scheme did not reduce the number of contracts for pipe, Peckham opined that "[t]otal suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade."⁶⁵ It also mattered, he said, that the restraint "restrict[ed] the right of each of the members [of the cartel] to transact business in the ordinary way."⁶⁶ Peckham made it plain, however, that this restriction was not problematic because of its impact on personal liberty. Instead, he said, the restraint was direct and thus unlawful because of its necessary tendency to obtain a "higher price [that] would operate as a direct restraint upon trade,"⁶⁷ thereby implicitly rejecting the government's analogy between cartels and slavery. The ultimate question, he said, "is as to the *effect* of such combination *upon the trade in the article*, and if that effect be to destroy competition and thus advance the price, the combination is one in restraint of trade."⁶⁸ As in *Hopkins*, Peckham announced and applied a test for antitrust liability that ascribed no independent significance to any "regulatory" effect of the challenged contracts, choosing instead to draw a line between restraints that exercised market power to the detriment of consumers, on the one hand, and those that did not, on the other.⁶⁹

As unanimous and nearly contemporary expositions of the Sherman Act by a Court particularly jealous of economic liberty, *Hopkins* and *Addyston Pipe* are certainly some evidence of the appropriate relationship, for antitrust purposes, between private contractual restraints and economic liberty.⁷⁰

right of self-government amounts to this, that when two men agree to enslave another no third man shall interfere.' So with [defendants'] sacred liberty of contract. It means that when six shops agree with one another to destroy their individual freedom of contract and of competition, and to put themselves in slavery to the pool, the [g]overnment cannot interfere.").

63. See *Addyston Pipe*, 175 U.S. at 229–30.

64. *Id.* at 235–38.

65. *Id.* at 244–45.

66. *Id.* at 245.

67. *Id.*

68. *Id.* (emphasis added).

69. See Meese, *supra* note 48, at 37–42, 73–74, and 76–77 (discussing state supreme court and lower federal court decisions evaluating "liberty from contract" arguments).

70. Shortly before *Hopkins*, of course, the Court announced, again unanimously, that the Due Process Clause of the Fourteenth Amendment protects private liberty of contract against

Moreover, as a normative matter, the logic of both decisions on this point appears entirely sound and would require a different result and rationale in *Topco*. No one compelled any member of *Topco* to join the association or compelled the association to promulgate the licensing provisions that effectively granted members exclusive territories. On the contrary, the district court found, and the Supreme Court did not dispute, that members demanded such territorial exclusivity as a condition of entering the venture in the first place.⁷¹ The same district court found that there was good reason for such demands, namely, without such exclusivity, individual *Topco* members would not be able to capture the benefits of promotional investments.⁷² Absent such investments, the court found (again without contradiction by the Justices) that *Topco*'s private label products would be at a competitive disadvantage vis-à-vis private label products sold by integrated chain stores like Safeway and A & P.⁷³

Liberty is the absence of coercion, whether perpetrated by the state itself or by other members of society.⁷⁴ The minimum wages imposed by the Live Poultry Code interfered with such liberty and thus reduced the economic liberty of the Schechters, their employees and potential employees, and the firm they owned. By contrast, the intrabrand restraints at issue in *Topco* were the result of a purely voluntary process of negotiation between private parties, none of whom coerced other members to participate. As a result of this negotiation, each member of the association exercised its liberty by agreeing to confine its distribution of the *Topco* product to its own territory, so long as other members of the association voluntarily exercised their liberty to do the same. Such bargaining in a low transaction-cost setting allowed the *Topco* members to restructure their relationship to avoid the costs of anticipated opportunism—thus preventing the emergence of market failure.

To be sure, such voluntary agreements, if enforced, limited the *future* choices of each member of the association. But as the Supreme Court has reminded us for nearly a century, such limitations are in the nature of

abridgments that exceed the police power. *Allgeyer v. Louisiana*, 165 U.S. 578, 589–90 (1897) (Peckham, J.).

71. See *United States v. Topco Assocs.*, 319 F. Supp. 1031, 1040 (N.D. Ill. 1970), *rev'd*, 405 U.S. 596 (1972).

72. See *id.* at 1040–42.

73. *Id.* at 1043 (“[T]he relief which the government here seeks [, voiding the exclusive territories,] would not increase competition in *Topco* private label brands but would substantially diminish competition in the supermarket field. The antitrust laws are certainly not intended to accomplish such a result. Only the national chains and the other supermarkets who compete with *Topco* members would be benefitted. The consuming public obviously would not.”).

74. See F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 11–21 (1960).

contract.⁷⁵ Such limitations, if voluntarily entered, do not thereby reduce the sort of liberty that a free society values. Moreover, as the *Hopkins* Court recognized, true freedom, whether the freedom to speak, worship, work, or marry, includes the freedom to *refrain* from any of these activities.⁷⁶ Indeed, in the term preceding the Court's decision in *Hopkins*, Peckham explained, again for a unanimous Court, that the "liberty" protected by the Due Process Clauses included the right of persons to enjoy

all of his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.⁷⁷

Less than a decade later, of course, Peckham would reiterate and implement this vision in *Lochner v. New York*.⁷⁸ This freedom also extends to a firm's decision to promote and sell a product anywhere the firm might wish. Possessing this freedom, the Topco members then agreed to decline to exercise it, in return for similar promises by others possessing the same freedom. Far from "regulating" anyone, such voluntary agreements were instead a straightforward *exercise* of contractual liberty, an exercise that facilitated cooperation with others so as to better accomplish mutually beneficial plans, without coercion.⁷⁹ In the same way, of course, the vertically integrated chains employed the institution of contract to prevent their employees from selling private label products to rivals.⁸⁰

75. See, e.g., *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238–41 (1918) ("Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.").

76. See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 713–17 (1977) (protecting freedom of New Hampshire residents not to display "Live Free or Die" on license plates).

77. *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

78. *Lochner v. New York*, 198 U.S. 45 (1905), *overruled in part* by *Ferguson v. Skrupa*, 372 U.S. 726 (1963); see also Daniel A. Crane, *Lochnerian Antitrust*, 1 N.Y.U. J.L. & Liberty 496, 505 (2005) ("Lochnerianism views governmental power—not market power—as the threat to contractual liberty that must be checked.").

79. See HAYEK, *supra* note 73, at 208 ("The whole network of rights created by contracts is as important a part of our own protected sphere, as much the basis of our plans, as any property of our own. The decisive condition for mutually advantageous collaboration between people, based on voluntary consent rather than coercion, is that there be many people who can serve one's needs . . ."). The Topco venture, which association members created de novo, certainly satisfied this condition.

80. See R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 391 (1937) (explaining that the business firm is in fact a special form of contract pursuant to which employers are authorized to dictate employees actions "within certain limits"); see also, e.g., *Ill. Corporate Travel Inc. v. Am. Airlines, Inc.*, 806 F.2d 722, 724–25 (7th Cir. 1986) ("Employment relations do not violate the antitrust laws; Sears may tell the managers of its stores at what price to sell lawn mowers.").

Other restraints that Nachbar identifies as producing “regulatory harm” are equally voluntary and thus further the liberty of the parties. Take cartel agreements, which Nachbar offers as another quintessential example of harmful private regulation, given the distance between the property owned by each member and the type of regulatory “control” exercised over the liberty and property of others. Certainly legislative imposition of prices and output would infringe upon the economic liberty of industry participants. Indeed, courts once denied states the power to “fix prices” via regulatory fiat, unless the industry in question was “affected with a public interest.”⁸¹ However, while courts still call cartel agreements “price fixing,” such nomenclature cannot obscure the fact that such agreements are, without more, purely voluntary and presumably enhance the joint welfare of the parties to them.⁸² An antitrust policy concerned with these parties’ “liberty” then, would seem to require a “hands off” approach to such agreements. The same conclusion is true for many tying contracts, even those imposed by firms with market power. Nachbar concedes that most such agreements are efficient.⁸³ If so, then presumably such agreements, which arise in low transaction cost settings, are the result of purely voluntary contractual integration, unlike, for example, the coerced block booking imposed by *Schechter’s Live Poultry Code*.⁸⁴ As a result, enforcement of such restraints, like enforcement of the restraints in *Topco*, will enhance the liberty of the parties, who have exercised that liberty in cooperation with others exercising their own. It is no surprise then that, during the *Lochner* era, the Supreme Court characterized tying agreements as resulting from “the right of the individual to exercise reasonable discretion in respect of his own business methods” and read the Federal Trade Commission Act so as not to ban such restraints, which it found necessary “[i]f real competition [was] to continue.”⁸⁵

To be sure, such liberty need not be absolute. Within the “efficiency” paradigm, the “right” to agree on price, output or the location of sales ends

81. *Williams v. Standard Oil Co of La.*, 278 U.S. 235, 239 (1929) (quoting *Charles Wolff Packing Co. v. Ct. of Indus. Relations of Kan.*, 262 U.S. 522, 631 (1923)) (quotation marks omitted) (referring to price regulation as “fix[ing] prices” and declaring such regulation unlawful), *overruled in part by* *Olsen v. Nebraska*, 313 U.S. 236 (1941).

82. John Shepard Wiley, Jr., *Reciprocal Altruism as a Felony: Antitrust and the Prisoner’s Dilemma*, 86 MICH. L. REV. 1906, 1906 (1988).

83. See Nachbar, *supra* note 4, at 99.

84. See Alan J. Meese, *Tying Meets the New Institutional Economics: Farewell to the Chimera of Forcing*, 146 U. PA. L. REV. 1, 67 (1997) (explaining how proponents of tying contracts obtain voluntary agreement to efficient ties even when sellers possess market power).

85. See *FTC v. Gratz*, 253 U.S. 421, 428–29 (1920), *overruled in part by* *FTC v. Brown Shoe Co.*, 384 U.S. 316, 320–21 (1966). *Brown Shoe*, of course, read the antitrust laws as protecting the “freedom” of retailers from voluntary contracts that had no plausible anticompetitive effect. Order in Regard to the Alleged Violation of the Federal Trade Commission Act, 62 F.T.C. 679 (1963) (finding it irrelevant that challenged agreements governed only one percent of the nation’s shoe retailers), *aff’d Brown Shoe Co.*, 384 U.S. 316.

where a market failure in the form of reduced output and misallocation of resources begins. In such circumstances the harm principle justifies regulatory intervention to ban such wealth reducing conduct. However, such bans do not advance liberty but instead reduce it, all in the name of increasing society's economic welfare. Voluntary restraints that produce no harms, by contrast, most likely create benefits, regardless of the extent of apparent regulatory control that such restraints might exercise. Indeed, overcoming certain market failures *requires* contracts that act at a great distance from the property of the proponent of the agreement.⁸⁶ As the Court held in *Standard Oil Co. of New Jersey v. United States*, the Sherman Act leaves unmolested all "normal" or "usual" agreements, banning only those that produce the economic consequences of monopoly.⁸⁷ This decision, and the principle it espoused, has been the cornerstone of Section 1 jurisprudence for over a century. No modern Supreme Court Justice has questioned *Standard Oil's* correctness.⁸⁸ Extending the scope of antitrust regulation beyond that approved in *Standard Oil*, *Addyston Pipe*, and *Hopkins* would further restrict liberty, traditionally defined, and reduce economic welfare without any corresponding benefits.

Far from banning such agreements, a national government that valued individual liberty would leave such agreements unmolested and, in addition, protect such agreements from abridgment by other sovereigns, including individual states. Banning such agreements, by contrast, may thereby invite more invasive and less efficient public regulation to combat the same market failures.

III. THE CONTENDING APPROACHES AND CURRENT LAW

Proponents of Nachbar's normative premise might respond that, philosophical theorizing to one side, the "proof is in the pudding," given Nachbar's claim that only a "constitutional" approach can explain key facets of antitrust law. If in fact Nachbar's theory provides the best explanation for the content of antitrust doctrine, then perhaps it deserves a second look, regardless of whether his account rests upon a normatively attractive conception of liberty. However, in my view, one need not rely upon the proprietary/regulatory distinction to explain the major facets of antitrust law that the article invokes. Moreover, the proprietary/regulatory distinction cannot explain certain other facets of antitrust law.

Take the distinction between unilateral pricing by a monopolist, on the one hand, and naked price fixing agreements, on the other. The former is,

86. See Meese, *supra* note 82, at 61–66 (describing three different types of market failures that voluntarily obtained tying contracts can overcome).

87. Namely, higher prices, reduced output or reduced quality. See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 58 (1911); see also Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77, 84–89.

88. See Alan J. Meese, *Standard Oil as Lochner's Trojan Horse*, 85 S. CAL. L. REV. 783, 787 (2012).

without more, lawful per se, no matter how strong the monopoly, how high the price, and how much allocative harm results. Moreover, the latter is unlawful per se, even if the parties to the agreement have a miniscule collective share of a market characterized by easy and free entry, and even if the agreement produces no allocative harm (aside from the wasted transaction costs of negotiating and enforcing the agreement). Strange as this distinction may seem at first blush, there are very sound administrative and efficiency reasons for it unrelated to any concerns about regulatory harm or the lack thereof. To begin with, any efficiency-based ban on monopoly prices would require a court to ascertain whether the challenged price is above-cost and thus inefficient at a particular moment in time. Moreover, any such determination would be subject to constant revision as market conditions bearing upon the efficient price changed. By contrast, an outright ban on any and all price fixing agreements requires no such reasonable price determination and no continuing regulatory oversight. That, as William Howard Taft explained, is one of the virtues of such a per se rule, given that the alternative would force judges to “set sail on a sea of doubt” and base their determinations of reasonableness upon shifting and controversial views of political economy, e.g., whether some industries (perhaps those characterized by innovation that produces positive externalities) should be entitled to higher returns than others.⁸⁹ Simply put, where unilateral conduct is concerned, there is no apparent legal rule analogous to a per se ban on price fixing agreements between two independent entities accompanied by integration. Then Judge Breyer was absolutely correct when he explained that, despite its common law flexibility, antitrust law simply cannot always force firms to replicate the price and output that an omniscient social planner would require.⁹⁰

What if, however, courts *could* costlessly determine the competitive price of a monopolist, relying upon this information to sanction those firms that had exceeded this price? It is by no means clear that such a regime would enhance the allocation of resources compared to the current, conduct-driven regime. After all, firms do not obtain monopoly by accident. As Judge Learned Hand put it, “no monopolist monopolizes unconscious of what he is doing.”⁹¹ Instead, firms acquire such power by engaging in conduct that wrests the patronage of consumers from rivals. Sometimes such conduct consists of pure “competition on the merits,” such as building a better

89. See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

90. See *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (“[W]hile technical economic discussion helps to inform the antitrust laws, those laws cannot precisely replicate the economists’ (sometimes conflicting) views Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve.”).

91. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 432 (2d Cir. 1945).

mousetrap or realizing economies of scale and underpricing rivals without pricing below cost. Sometimes, of course, firms gain monopoly by means of unlawful exclusion. But firms rarely gain and maintain such power via unlawful exclusion alone. As Herbert Hovenkamp has explained, firms that obtain or maintain monopoly unlawfully have generally engaged in much welfare-enhancing conduct at the same time.⁹² The Microsoft case provides a perfect example of this phenomenon in two different ways. First, even the United States, which would later obtain a judgment against the firm for unlawful monopolization, admitted that Microsoft had acquired its monopoly by creating and producing a superior product.⁹³ Second, while the courts found that Microsoft had maintained its monopoly unlawfully, none doubted that the firm had simultaneously engaged in various forms of procompetitive conduct, such as vastly improving the quality of its internet browser and vigorously encouraging distribution of the same through various lawful means, conduct that also tended to maintain the firm's monopoly.⁹⁴

As a result, price regulation of a monopolist could be counterproductive, especially in those cases in which firms gain or maintain their monopoly by means of competition on the merits or other wealth-creating conduct, such as efficient non-standard agreements.⁹⁵ As courts and scholars have noted, the lure of monopoly profits can encourage firms to make those investments that result in quality improvement, better distribution and/or lower costs, thereby improving the allocation of resources.⁹⁶ Indeed,

92. HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 214 (3d ed. 2005) ("It is usually very difficult for a nondominant firm to become dominant *simply* by doing anticompetitive things. In most cases such firms also have superior products or lower costs than their rivals, at least during the period when their monopoly is developing.").

93. See *United States v. Microsoft Corp.*, 56 F.3d 1448, 1452 (D.C. Cir. 1995); see also Brief for Appellant United States at 4, *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995) (Nos. 95-5037, 95-5039) ("[T]here was no basis for an antitrust challenge to Microsoft's acquisition of monopoly power in the market for operating system software for IBM-compatible personal computers . . ."); Declaration of Kenneth J. Arrow at 11, *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995) (Nos. 95-5037, 95-5039), available at www.justice.gov/atr/cases/exhibits/2517.pdf ("Clearly, the six-fold growth in the installed base [of consumers using the Windows Operating System] is primarily the result of the extraordinary commercial success of the IBM-compatible PC platform, in which Microsoft's product development and marketing played a part.").

94. See *United States v. Microsoft Corp.*, 253 F.3d 34, 68 (D.C. Cir. 2001) (en banc) (per curiam) (holding that improving a product and giving it away was lawful "competition on the merits" despite any exclusionary impact); see also Alan J. Meese, *Don't Disintegrate Microsoft (Yet)*, 9 GEO. MASON L. REV. 761, 776-80 (2001) (explaining how various forms of perfectly lawful conduct tended to exclude Netscape and other rivals from the marketplace).

95. See generally Alan J. Meese, *Monopolization, Exclusion, and the Theory of the Firm*, 89 MINN. L. REV. 743, 822-27 (2005) (explaining how non-standard agreements including tying and exclusive dealing can be procompetitive methods of obtaining or maintaining a monopoly).

96. See *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (opining that the prospect of obtaining temporary monopoly profits via legitimate

Professors Areeda and Turner expressly opined that “competition on the merits” should be lawful per se precisely because the prospect of obtaining market power incentivized market actors to innovate and reduce costs.⁹⁷

What, though, about the Article’s attempt to explain the supposed disparate treatment of horizontal and vertical restraints?⁹⁸ Here again, Nachbar’s theory does not improve our explanation of the legal landscape. For one thing, there is far less to the “horizontal” and “vertical” distinction than meets the eye. To be sure, nearly all vertical restraints are now analyzed under the Rule of Reason; ties obtained by firms with market power being the only exception. But one can say nearly the same thing for horizontal restraints. That is to say, all horizontal restraints are analyzed under the Rule of Reason.⁹⁹ There is but one exception: horizontal restrictions that are “naked,” namely reduce rivalry without any prospect of creating redeeming virtues. Moreover, there are very good efficiency reasons for treating naked horizontal restraints differently from any vertical restraints, as Robert Bork explained nearly five decades ago.¹⁰⁰

At the same time, important facets of antitrust law contradict Nachbar’s normative premise. For instance, according to Nachbar’s logic, all tying contracts should be unlawful per se, because of the great regulatory distance

activity provides incentives for firms to exercise “business acumen” in ways that enhances consumer welfare); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 (1984) (explaining that firms obtain the market power supposedly necessary to obtain a tying contract because “presumably [the seller’s] product enjoys some justifiable advantage over its competitors”), *abrogated on other grounds by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

97. Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 707 (1975) (“Moreover, a monopolist whose power was legitimately acquired by patents cannot be denied monopoly profits without subverting the purpose of the patent laws. Similarly, denying monopoly profits to those whose power was obtained by superior skill, foresight, and industry could eliminate the primary incentive to develop such competitive skill. Finally, price restrictions would have perverse effects on the efficiency and innovation aspects of a monopolist’s on-going performance by eliminating the reward.”).

98. Nachbar, *supra* note 4, at 97–98.

99. See, e.g., *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 779–80 (1999) (holding that horizontal restraints imposed by a trade association should be analyzed under the Rule of Reason); *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101–03 (1984) (describing various horizontal restraints between member schools that were properly analyzed under the Rule of Reason); *Chi. Prof’l Sports, LP v. NBA*, 95 F.3d 593, 600–01 (7th Cir. 1996) (holding that horizontal restriction of output of televised basketball games was properly analyzed under the Rule of Reason); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 214 (D.C. Cir. 1986) (holding that horizontal minimum price fixing was ancillary to a valid joint venture and thus properly analyzed under the Rule of Reason); *Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 190 (7th Cir. 1985) (holding that horizontal product allocation agreement was properly analyzed under the Rule of Reason); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280–82 (6th Cir. 1898) (describing five different horizontal restraints that are properly analyzed under the rule of reason), *aff’d*, 175 U.S. 211 (1899).

100. See Bork, *supra* note 26, at 383–84, 397–405 (explaining why naked horizontal restraints do not produce any efficiencies and distinguishing such restraints from horizontal restraints and vertical restraints that produce efficiencies).

between the tying product, on the one hand, and the control that such contracts exercise over the purchaser's decisions, on the other.¹⁰¹ However, that has never (quite) been the law. Even at the height of the inhospitality era, the Supreme Court declared that ties obtained by firms without market power escaped *per se* condemnation.¹⁰² To be sure, the Court defined "market power" quite liberally, equating any departure from perfect competition with such power for a few decades.¹⁰³ However, the Court backtracked from this approach over three decades ago, holding that a plaintiff seeking to invoke the *per se* rule must establish what some call structural market power, that is, more than mere product differentiation.¹⁰⁴ As the law currently stands, most ties survive *per se* condemnation, contrary to the predictions of Nachbar's normative premise.

The same can be said for the sort of "self-regulation" Nachbar's normative vision would seemingly condemn. Take collegiate sports. Such competition exists in its current form because of a massive horizontal agreement between rivals restricting various forms of competition for various sports' most important input, namely, players. And yet, nearly three decades ago, the Supreme Court declared that such restrictions are to be analyzed under the Rule of Reason, despite the distance between say, Florida State's athletic program and Colorado State's, because unbridled rivalry for players would result in a market failure, undermine the quality of the collegiate athletic contests, and reduce competition with other

101. See Nachbar, *supra* note 4, at 99–100; see also *id.* at 102–03 (contending that the tie in *Eastman Kodak* should have been unlawful even if the buyers had full information before signing the contract, despite the resulting absence of market power). In the same way, of course, Nachbar contends that all cartels should be unlawful *per se*, whether or not any member possesses *ex ante* market power or is forced to participate.

102. See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5–6 (1958), *superseded by statute*, 1988 Patent Misuse Reform Act, Pub. L. No. 100-107, 102 Stat. 4674, as recognized in *Tex. Instruments, Inc. v. Hyundai Elecs. Indus. Co.*, 49 F. Supp. 2d 893 (E.D. Tex. 1999). The author disagrees with the assertion by the *Texas Instruments* court that the Patent Misuse Reform Act in any way undermined the holding of *Northern Pacific*, as the statute did not purport to alter the standards governing tying contracts under Section 1 of the Sherman Act. *Eastman Kodak v. Image Technical Servs.*, 504 U.S. 451, 461–62 (1992) (articulating and applying traditional tying test without mentioning the 1988 Patent Misuse Reform Act). For a further discussion of the Supreme Court's requirement of proof of market power in tying arrangements during the inhospitality era, see Alan J. Meese, *The Market Power Model of Contract Formation: How Outmoded Economic Theory Still Distorts Antitrust Doctrine*, 88 Notre Dame L. Rev. 1291, 1334 (2013).

103. *United States v. Loew's, Inc.*, 371 U.S. 38, 45 (1962) (holding that the possession of a copyright confers economic power for purposes of tying doctrine), *abrogated on other grounds by Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006); see also *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 50 (9th Cir. 1971) (holding that trademark conferred economic power for purposes of the *per se* rule), *abrogated by Rick-Mik Enters. v. Equilon Enters.*, 532 F.3d 963 (9th Cir. 2008).

104. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), *abrogated on other grounds by Ill. Tool Works*, 547 U.S. 28; *U.S. Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610 (1977).

entertainment options.¹⁰⁵ To be sure, not all such cooperation survives such scrutiny. However, the ultimate treatment of such restraints turns upon their impact on economic welfare, and not the regulatory distance between proponents of such agreements and the parties whose future autonomy they limit.¹⁰⁶ Courts have reached similar results with respect to horizontal restraints imposed by professional sports leagues and trade associations.¹⁰⁷ In short, antitrust law contains no general prohibition against self-regulation that takes the form of horizontal restrictions on competitive activities, contrary to the predictions of Nachbar's theory.

CONCLUSION

Free societies should protect liberty from both public and private infringement. Nachbar is right to consider whether courts could expand liberty by banning, under the aegis of the Sherman Act, private restraints that contract it. Unfortunately, Nachbar's proposal to ban restraints that produce "regulatory harm" would not accomplish this objective. In particular, Nachbar's methodology for identifying regulatory harm would result in judicial condemnation of numerous forms of purely voluntary contractual integration. Far from constricting liberty, such agreements exercise such freedom, and many also increase economic welfare. Thus, Nachbar's proposal would likely reduce liberty and not expand it.

None of this is to say that all voluntary restraints should be lawful under the Sherman Act. Courts properly condemn certain voluntary agreements, such as naked cartels, because they distort the allocation of resources and harm third parties. Thus, the line between lawful and unlawful restraints does not and should not turn on whether such agreements enhance or reduce the autonomy of the parties to them. Instead, following *Standard Oil v. United States*, courts should respect contractual liberty unless the challenged agreement unduly restrains *commerce* by exercising market power, distorting the allocation of resources and producing a net reduction in economic wealth.

105. See *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101–03 (1984). To be sure, these rivals operate under a common trademark, but then so did the rivals in *Topco*, a decision Nachbar apparently approves as consistent with his theory. If *Topco* is correct, then the horizontal restraints necessary to keep amateur sports amateur are unlawful per se, contrary to NCAA's express statement to the contrary.

106. See, e.g., *Law v. NCAA*, 134 F.3d 1010, 1023–24 (10th Cir. 1998).

107. *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 779–80 (1999) (holding that horizontal restraints on advertising imposed by a trade association should be analyzed under the Rule of Reason); *Chi. Prof'l Sports, LP v. NBA*, 95 F.3d 593, 600–01 (7th Cir. 1996) (holding that horizontal restriction of output of televised basketball games was properly analyzed under the Rule of Reason); see also *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238–39 (1918) (sustaining as reasonable horizontal limitation on price setting between members of a commodities exchange).