

The Antitrust Constitution

Thomas B. Nachbar*

ABSTRACT: Antitrust is today viewed almost exclusively in strictly economic terms. Under the nearly ubiquitous “rule of reason,” conduct is condemned or saved by courts largely based on their evaluation of the conduct’s effect on economic efficiency. But many aspects of antitrust law cannot be explained by efficiency analysis. The full sweep of antitrust makes sense only when one considers other values that underlie the antitrust laws, values contained in the allocation of public and private power inherent in the larger constitutional order. This Article attempts to provide a more comprehensive understanding of antitrust as policing the private exercise of regulatory power.

*This Article considers both the dominant, efficiency-maximizing approach to antitrust and the “societal” alternatives offered by critics. The two approaches are more alike than they are different, and gaps in each suggest a missing factor in both approaches: a recognition that a harm to competition consists of both a harm to efficiency (a “market harm”) and a harm to freedom of choice (a “regulatory harm”). After developing a conception of “regulation” as control over property separated from ownership, this Article explores the constitutional law of private regulation—the constitutional prohibition against delegations of governmental power to private parties—followed by a discussion of the same principles in the specific context of antitrust and identifies the nature of the right to choice that the antitrust laws protect. This Article then considers specific implications of recognizing the role of regulatory harms in antitrust, including changes to how antitrust treats horizontal and vertical restraints and mergers, the ability to explain some cases—especially in the area of tying—often considered outliers when viewed exclusively through the lens of economic analysis, and the possibility of a renewed role for concepts that have been largely forgotten in the rise of the rule of reason, such as conduct, intent, and the role of the *per se* rule in antitrust.*

* Professor of Law, University of Virginia School of Law. I would like to thank Peter Carstensen, Barry Cushman, Neil Duxbury, Scott Hemphill, Ariel Katz, Ed Kitch, Alan Meese, Barak Orbach, Barak Richman, Glen Robinson, Rich Schragger, Chris Sprigman, Spencer Waller, Tim Wu, and the participants of the 13th Annual Loyola Antitrust Colloquium for helpful comments and suggestions. I am also indebted to Phillip Brown, Reba Mendoza, Jacob McCloy, and Jed Moody for excellent research assistance.

INTRODUCTION	59
I. THE ECONOMIC CONCEPTION OF ANTITRUST	61
A. <i>ANTITRUST AS A RULE OF EFFICIENCY</i>	62
B. <i>"SOCIETAL ANTITRUST"</i>	66
C. <i>MICROECONOMIC EFFICIENCY ANALYSIS AND SOCIETAL ANTITRUST AS PARALLEL APPROACHES</i>	67
D. <i>ANTITRUST AND REGULATORY HARM</i>	69
II. ANTITRUST AND REGULATION	69
A. <i>PROPERTY AND REGULATION</i>	70
B. <i>THE DISTANCE BETWEEN PROPERTY RIGHTS AND REGULATORY CONTROL</i>	71
C. <i>CARTELS, MONOPOLIES, AND REGULATORY EFFECTS</i>	73
D. <i>PROPRIETARY CONTROL, REGULATORY CONTROL, AND ANTITRUST</i>	74
E. <i>REGULATORY EFFECTS, REGULATORY HARM, AND PRIVATE REGULATION</i>	77
III. THE PUBLIC/PRIVATE DISTINCTION IN MARKET REGULATION	79
A. <i>THE PRIVATE NONDELEGATION DOCTRINE</i>	79
B. <i>PRIVATE REGULATION AND THE NEW DEAL</i>	82
IV. ANTITRUST AS A RULE AGAINST PRIVATE REGULATION	88
A. <i>ANTITRUST'S EPILOGUE TO THE NEW DEAL</i>	89
B. <i>ANTITRUST AND THE CONFLICT BETWEEN PUBLIC AND PRIVATE REGULATION OF COMMERCE</i>	90
C. <i>PRIVATE REGULATION AS A CHALLENGE TO PUBLIC REGULATORS</i>	92
V. THE IMPLICATIONS OF REGULATORY HARM FOR ANTITRUST	93
A. <i>ANTITRUST AND PUBLIC REGULATION</i>	93
B. <i>DISTINGUISHING BETWEEN PROPRIETARY AND REGULATORY CONTROL</i>	95
C. <i>THE HORIZONTAL/VERTICAL DISTINCTION IN ANTITRUST</i>	97
1. <i>Market Harm, Regulatory Harm, and Vertical Restraints</i>	97
2. <i>The Limits of Verticality: Exclusion</i>	98
D. <i>THE ROLE OF CONDUCT AND INTENT IN ANTITRUST</i>	105
1. <i>Conduct Generally</i>	105
2. <i>Purchasing Both Property and Control: The Case of Mergers</i>	106
3. <i>Intent</i>	108
E. <i>THE REDISCOVERED ROLE OF THE PER SE RULE</i>	109
CONCLUSION	113

INTRODUCTION

The U.S. fashion industry of the late 1930s faced a problem. High-end textile manufacturers and apparel makers were willing to invest considerable time and expense in devising the new and distinctive designs consumers wanted, but those designs were being copied by knock-off manufacturers shortly after being released, preventing the designers from recouping the cost of their investment. The industry solved the problem by organizing the Fashion Originators' Guild, through which the manufacturers enlisted the help of apparel retailers in collectively agreeing to refuse to do business with any apparel maker who copied original designs created by Guild members.¹ Normally, intellectual property protections like those adopted by the Guild are thought to be socially beneficial by making it possible to engage in creative activity,² and it is possible that the Guild rules increased economic output and hence consumer welfare for just that reason. On the other hand, it is possible that the limitation on the business of both apparel manufacturers and retailers outweighed the benefit of the rules, causing a net reduction in output and a harm to consumer welfare. Without knowing more about the nature of the restraints, the fashion industry, and the apparel and textile markets, it would be impossible to know whether the Guild rules increased or decreased social wealth.

Antitrust usually deals with restraints that have ambiguous effects on social wealth by applying the "rule of reason," which balances the procompetitive and anticompetitive effects of a restraint to determine its net effect on economic output and hence consumer welfare.³ We will never know how the Guild's style protection regime would have fared under that approach, though, because, when the Federal Trade Commission sued the Guild, the Supreme Court did not analyze the style protection system under the rule of reason but rather declared the system a "per se" violation of the antitrust laws, striking the Guild's style protection system more for the threat it posed to Congress's legislative power than the threat it posed to consumers' buying power.⁴

1. *Fashion Originators' Guild of Am. v. FTC.*, 312 U.S. 457, 462–63 (1941).

2. *See Mazer v. Stein*, 347 U.S. 201, 219 (1954) (recounting the economic theory of individual incentive and social benefit underlying U.S. copyright law).

3. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007).

4. *See Fashion Originators' Guild*, 312 U.S. at 465 ("[T]he combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce . . . and thus "trenches upon the power of the national legislature and violates the statute."").

There is some reason to believe the Guild's rules would have fared considerably better under the rule of reason. The Guild successfully defended an antitrust suit brought by a retailer in which the First Circuit applied the rule of reason. *See Wm. Filene's Sons Co. v. Fashion Originators' Guild of Am.*, 90 F.2d 556, 560 (1st Cir. 1937). A special master found specifically "that the object of The Guild and its members and affiliates was beneficial, rather than

Fashion Originators' Guild, though, is the exception, not the rule. Antitrust is now generally accepted to be an instrument for protecting markets as a source of consumer welfare, leading antitrust courts to migrate toward near-universal application of the rule of reason. As the rule of reason has taken over antitrust analysis, though, values other than increasing economic wealth through the efficient operation of markets have potentially been lost.

The current efficiency-dominated conception of antitrust, though, offers little insight to a wide variety of questions posed by antitrust. Antitrust generally maximizes consumer choice, purportedly as a path to maximizing market-supported efficiency, but many aspects of antitrust law—including ones as fundamental as the difference between the Sherman Act Section 1 (“Section 1”) prohibition on restraints of trade and the Sherman Act Section 2 (“Section 2”) prohibition on monopolization⁵—seem to depend not on any particular harm to markets but on how both producers and consumers make choices. The question is whether there is room in antitrust for a non-instrumental justification for protecting commercial choice—a form of “liberty”—without regard to the likelihood that any particular restriction on choice will harm efficiency.

This Article suggests that, far from being singularly focused on increasing output and efficiency, the antitrust laws include in them just such a justification, one predicated on distinctions between public and private power that permeate our constitutional order—a prohibition against private regulation of the kind condemned by the Court in *Fashion Originators' Guild*. Understood in this light, the Sherman Act is not merely a protector of efficient markets but is an inherent part of the American constitutional structure.

This Article begins in Part I by describing both the dominant efficiency-maximizing approach to antitrust and the “societal” alternative posed by critics. Both being singularly focused economic outcomes, the efficiency-maximizing and societal views of antitrust are more alike than they are different, and both ignore fundamental aspects of antitrust that police certain types of control—what I call “private regulation”—rather than just the economic consequences of that control. A view of antitrust as policing private regulation requires a conception of regulation, which is developed in Part II. Law, including antitrust, generally privileges the exercise of property rights, and so it is necessary to separate “proprietary” control over property from “regulatory” control—control that is either exercised over property that one does not own or control in excess of that granted by generally cognizable property rights. After defining regulation as control divorced

prejudicial, not only to the interests of the dress industry but as well to the interests of the public.” *Id.*

5. Sherman Act, 15 U.S.C. §§ 1–7 (2006).

from ownership, Part III explores the constitutional law of private regulation—the constitutional prohibitions against delegations of legislative power to private parties—followed in Part IV by a discussion of the same principles in the specific context of antitrust in cases like *Fashion Originators' Guild*, and identifies the nature of the right to choice—the “liberty”—that antitrust laws protect. Having developed an understanding of how antitrust laws prevent regulatory harms, Part V considers specific implications for antitrust of recognizing regulatory harm as a component of competitive harm. Recognizing the relationship between antitrust and private regulation has direct application to the way antitrust accommodates regulation by states and local governments (antitrust’s “act of state” doctrine), but it also has broad implications for the distinctions between Section 1 and Section 2 and the differing treatment of horizontal and vertical restraints. Further, it provides an explanation for antitrust’s skepticism of vertical interbrand foreclosure and suggests a renewed role for concepts that have been largely forgotten in the rise of the rule-of-reason approach, such as conduct (which itself suggests reconsideration of antitrust’s treatment of mergers) and intent, and even a renewed role in antitrust for the per se rule.

I. THE ECONOMIC CONCEPTION OF ANTITRUST

The rise of the rule of reason as the preferred form of antitrust analysis has accompanied the rise of efficiency as the goal of antitrust. Prompted by a shift in antitrust that recognized consumer welfare as the core concern of antitrust and identified efficient markets as the path to maximizing consumer welfare, courts and commentators developed a convincing case for evaluating restraints based on their overall effect on the efficiency underlying markets. That evaluation takes place under the rubric of the rule of reason, which applies microeconomics to analyze a variety of economic effects of a restraint, but necessarily ignores non-economic effects. At the same time, there has remained in antitrust a vocal opposition that questions both the efficiency of markets and the economic assumptions underlying them and insists that antitrust should serve other, social purposes as well as economic ones. Frequently offered as “political” or “non-economic” approaches to antitrust, these societal conceptions of antitrust generally rely on a conception of competition that requires balanced economic power among the various market participants and therefore suggest a distributive role for antitrust. Both the efficiency-based and societal forms of antitrust ask essentially the same question, though—how to maximize social welfare—even if they define social welfare somewhat differently. Neither approach adequately considers the role that antitrust plays in preserving choice, both for consumers and producers, apart from the value of choice to maximize social wealth—an interest in preventing regulatory harms rather than market harms.

A. ANTITRUST AS A RULE OF EFFICIENCY

It would be difficult to find an area of the law more profoundly affected by economic analysis than antitrust. Economics has provided an attractive and adaptable source of guidance for applying the vague standards included in many of the federal antitrust statutes. Both Section 1 and Section 2 state their prohibitions in terms, respectively “restraint of trade”⁶ and “monopolize,”⁷ that are not only non-intuitive but, as in the case of Section 1, even counterintuitive. After all, as the Supreme Court has frequently pointed out, *every* contract is in restraint of trade,⁸ necessarily requiring some limiting principle to prevent every sales contract from being a Section 1 violation. In dealing with the vague text of Section 1 and Section 2, the Court has landed comfortably on the concept of “reasonableness.”⁹

The role of reasonableness in antitrust law itself has expanded over time, as the Court has shifted away from *per se* rules of unlawfulness in favor of an approach in which it applies the rule of reason to most restraints. As the role of reasonableness has expanded, so too has it come to be interpreted to depend on the net effect of a practice on competition. All restraints help to channel resources and alter behavior in ways that can both increase and decrease competition. The rule of reason balances the procompetitive and anticompetitive effects of a restraint to determine its net effect on competition and provides a structure to that inquiry. As stated by Justice Breyer, the net effects question breaks “down into four classical, subsidiary antitrust questions: (1) What is the specific restraint at issue? (2) What are its likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? (4) Do the parties have sufficient market power to make a difference?”¹⁰

As an historical matter, it is far from clear what the purpose of the antitrust laws is—the legislative history contains a disconnected scattering of seemingly unrelated and occasionally contradictory justifications from a variety of sources¹¹—but most modern arguments about antitrust policy have come to revolve around an economic understanding of the relationship

6. *Id.* § 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.”).

7. *Id.* § 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 felony.”)

8. *See* *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 98 (1984) (“[E]very contract is a restraint of trade, and as we have repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade.”).

9. *Id.*; *see also* *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (“Congress intended to outlaw only unreasonable restraints.”).

10. *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 782 (1999) (Breyer, J., dissenting).

11. *See* Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. L. REV. 1, 5 (2008) (“[T]he Sherman Act’s legislative history is notoriously tortured and unhelpful.”).

between competition and efficiency, influenced to a great extent by Judge Robert Bork's work in the 1970s, which placed consumer welfare at the center of antitrust law, which in turn leads to an emphasis on efficiency, and in particular allocative efficiency.¹² Under this view, restraints are a tool for increasing productive efficiency, which through the operation of competitive markets increases allocative efficiency for society as a whole. Assuming rational actors, consumer welfare is maximized by maximizing allocative efficiency, leading many in the antitrust community to settle on allocative efficiency as the standard by which to measure the reasonableness of restraints. To the extent there is debate in antitrust today, it is about how antitrust should be tailored to maximize allocative efficiency, or, as Michael Jacobs put it, "the disputants are in complete agreement . . . that considerations of allocative efficiency alone should guide antitrust policy. Their debate centers on the answers to subsidiary questions regarding the best means of attaining that agreed-upon end."¹³ The Supreme Court has embraced just that approach. Although the Supreme Court divided five to four in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* over whether to apply the rule of reason to a particular restraint, all nine Justices seemingly agreed on what the rule of reason itself entails: an inquiry into whether the restraint, on net, negatively affects efficiency and consequently consumer welfare.¹⁴ The rule of reason's power to maximize efficiency—as stated by

12. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 61–62 (1978).

13. Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219, 259 (1995); see also 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." (footnote omitted)). Despite the influence of Judge Bork's work, there is disagreement over the form of efficiency that antitrust should attempt to maximize, with many keying on allocative efficiency but others doubting the link among productive efficiency, allocative efficiency, and consumer welfare, e.g., John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191 (2008); but see Alan J. Meese, *Reframing the (False?) Choice Between Purchaser Welfare and Total Welfare*, 81 FORDHAM L. REV. 2197 (2013) (disputing the importance of the distinction for many provisions of antitrust law), and still others emphasizing distinctions between static efficiency and dynamic efficiency, see Frank H. Easterbrook, *Ignorance and Antitrust*, in ANTITRUST, INNOVATION, AND COMPETITIVENESS 119 (Thomas M. Jorde & David J. Teece eds., 1992). Questions over forms of efficiency are not necessarily irrelevant to my analysis, but neither are they critical, and so in the name of avoiding unnecessary complexity, I will distill the "efficiency debate" into an argument regarding "efficiency" generally.

14. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889 (2007) ("[I]t is necessary to examine, in the first instance, the economic effects of vertical agreements to fix minimum resale prices [to determine their legality]."). Compare *id.* at 886 ("In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest."), with *id.* at 909 (Breyer, J., dissenting) ("In determining the lawfulness of particular

Judge Richard Posner, “the essential spirit of the Rule [of Reason] is to condemn only those practices that are, on balance, inefficient in the economic sense”¹⁵—consequently fits perfectly with the dominant view that antitrust is centered on questions of competition and efficiency—as put succinctly by Judge Frank Easterbrook, “[t]he goal of antitrust is to perfect the operation of competitive markets.”¹⁶

A heavy emphasis on efficiency has a number of largely salubrious implications for antitrust law. The economic effects of a restraint are at least capable of objective measurement and expression and allow (at least as a relative matter) considerable certainty to potential antitrust litigants. Another major benefit of a singular focus on efficiency is its compatibility with the kind of balancing called for by the rule of reason. Any restraint can be broken down into a number of effects, and economics renders those effects perfectly commensurable, and hence balanceable. Effects on efficiency can be re-stated as scalars, which vastly simplifies rule-of-reason balancing.

Such simplicity does come at a price, though. Evaluating restraints by their effect on efficiency necessarily excludes other potential criteria for legality. As Lawrence Sullivan trenchantly quipped, “Chicago theory makes for an attractively tidy antitrust world.”¹⁷ In addition to risks posed by imperfections intrinsic to economic methods, the attempt to simplify antitrust into purely economic terms misses something important about the nature of antitrust law. If antitrust has normative components based in moral or political conceptions that are not reflected by the effect of a restraint on output, those normative components will likely be lost in cases applying the modern rule of reason. Some might applaud the exclusion of other considerations as distracting and leading to suboptimal outcomes, but

practices, courts often apply a ‘rule of reason.’ They examine both a practice’s likely anticompetitive effects and its beneficial business justifications.”).

15. Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 16 (1977). The widespread influence of allocative efficiency in antitrust likely requires no citation. Richard Posner found the adoption of the economic approach to be so complete that he dropped “An Economic Perspective” as the subtitle to the second edition of his book on antitrust law because, in the years between the first (1976) and second (2001) editions, “the other perspectives have largely fallen away.” RICHARD A. POSNER, *ANTITRUST LAW* vii (2d ed. 2001). The degree to which economic analysis has captured antitrust is exemplified by the fact that a recent article entitled “Morality and Antitrust” addressed not whether antitrust has a moral component but rather whether antitrust should be deemed to have a moral component in order to capture the purely instrumentalist, deterrent capacity of labeling antitrust violations immoral. See Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443; see also Herbert Hovenkamp, *Antitrust and Innovation: Where We Are and Where We Should Be Going*, 77 ANTITRUST L.J. 749, 750 (2011) (“Neither antitrust nor intellectual property law has any moral content. Their sole purpose is to make the economy bigger.”).

16. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 1 (1984).

17. Lawrence Anthony Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214, 1216 (1977).

that criticism is itself the expression of a normative judgment, as a self-reflective economist will tell you.¹⁸

The view of antitrust as a pro-consumer set of rules designed to maximize output does run into some obstacles as an explanation for the full range of antitrust doctrines. The distinction between treatment under Section 1 and Section 2, for instance, cannot be explained by resort to theories about efficiency, since monopoly is not punished under Section 2 even when it has the same effects as a cartel that would be punished under Section 1. Nor, for that matter, is the requirement of agreement under Section 1 itself well connected to efficiency concerns—if the harm being addressed by the conduct is the harm to output, that harm can be duplicated by oligopoly absent the agreement necessary to form a cartel. Even more profoundly, the requirement of monopolization conduct under Section 2 is difficult to justify as a matter of efficiency, since the real harm is not from engaging in (potentially wasteful rent-seeking) monopolization conduct itself but from the extraction of rents that results from the successful acquisition and maintenance of monopoly power. Yet, while the acquisition or maintenance of monopoly power is punishable under the antitrust laws, the extraction of rents made possible by that monopoly power is not.¹⁹ We might think it wrong (a normative rather than an economic concept)—or maybe just that it would induce parties to engage in sub-optimally risk-averse behavior—to penalize individuals for participating in oligopolistic or monopolistic markets, but surely such concerns could be addressed by calibrating the remedy to induce optimal compliance. If the over-arching goal of antitrust is avoiding the market dislocation caused by rent-extraction, an absolute rule of zero liability can't possibly be the right rule, yet that is the rule we have.

A singular focus on efficiency also finds some resistance in both the text of the antitrust laws themselves and the language used by legislators and courts to describe the antitrust laws. Justice Holmes pointed out that the word “competition” does not appear in either Section 1 or Section 2,²⁰ and neither does the word “efficiency.” Senator John Sherman described the

18. See Daniel Crane, *Rationales for Antitrust: Economics and Other Bases*, in THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS (Roger D. Blair & D. Daniel Sokol eds., (forthcoming 2014)) (on file with author) (describing the choice between two economic rationales for antitrust—avoiding allocative inefficiency and avoiding wealth transfers from consumers to suppliers—as “normative”); Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1212 (1977) (“While efficiency is objective in its nature, it is a phenomenon much admired by economists as normatively desirable.”).

19. *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.”).

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

antitrust laws as a “bill of rights and charter of liberty”²¹—not words one would use to describe a statute directed at efficiency—and even the Supreme Court has occasionally identified the antitrust laws as a source of liberty (and even equality) rather than wealth:

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.²²

Some have seized upon such rhetoric in seeking to identify broader social purposes for the antitrust laws.

B. “SOCIETAL ANTITRUST”

It is difficult to find in either antitrust caselaw or scholarship an avowedly *non-economic* understanding of antitrust. Louis Brandeis may be the most famous proponent of a view of antitrust that looks beyond the efficiency effects of a particular combination or restraint to the broader social effects of domination of the market by a few, large entities. The result, according to Brandeis, was a form of economic despotism exercised by managers who wield absolute authority. In both his description of the problem and his solution, Brandeis borrowed heavily from politics:

Here you have a corporation that has made it its cardinal principle of action that its employees must be absolutely subject to its will . . . Must not this mean that the American who is brought up with the idea of political liberty must surrender what every citizen deems far more important, his industrial liberty? Can this contradiction—our grand political liberty and this industrial slavery—long coexist? Either political liberty will be extinguished or industrial liberty must be restored.

The real cause that is disturbing business today is not the uncertainty as to the interpretation of “reasonable” or “unreasonable” restraint of trade; it is this social unrest of our people in this struggle with which none in our history save the Revolution and the Civil War can be compared.²³

21. 21 CONG. REC. 2461 (1890) (remarks of Sen. Sherman).

22. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

23. LOUIS D. BRANDEIS, *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* 38, 39 (Osmond K. Fraenkel ed., 1934).

Many sophisticated students of modern antitrust have borrowed from such political conceptions of antitrust²⁴ and, while accepting the dominant role of neoclassical economics in antitrust, criticize its seemingly exclusive role by pointing to other values that antitrust may represent,²⁵ a movement Arthur Austin described as “societal antitrust,”²⁶ a label that I borrow.

C. MICROECONOMIC EFFICIENCY ANALYSIS AND SOCIETAL ANTITRUST AS PARALLEL APPROACHES

Far from being analytically incompatible with the efficiency analysis, most societal approaches to antitrust are largely stated in the same instrumentalist terms as the neoclassical microeconomic approach they seek to challenge,²⁷ even though most “political” theories of societal antitrust are not stated in terms of their benefit to *competition* but rather as a means to some *other* end, such as Brandeis’s “industrial liberty.” What separates the

24. The degree to which Brandeis’s concerns were political or economic is open to some question. Brandeis himself relied heavily on economic arguments, challenging the potential for economies of scale to lead to efficiency, highlighting that there is a point at which increased scale leads to decreased efficiency, and arguing that no major concentration in American industry has been the product of efficiency. LOUIS D. BRANDEIS, *The Regulation of Competition Against the Regulation of Monopoly*, in THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS, *supra* note 23, at 109, 109–11 [hereinafter BRANDEIS, *Regulation*]; see also LOUIS D. BRANDEIS, *Competition*, in THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS, *supra* note 23 at 112, 112–16 [hereinafter BRANDEIS, *Competition*]. Brandeis’s solution was also largely economic: the balancing of the market power held by large corporations by enabling a robust labor movement. At the same time, the social ordering that follows from strong labor unions has obvious political consequences outside the industrial context itself, lending a broader political air to many of Brandeis’s proposals to solve the ostensibly economic problem of optimal industrial organization.

25. See, e.g., F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 18–19 (3d ed. 1990) (emphasizing the value of antitrust in preventing accumulations of political power); Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 381 (1965) (accepting the role of economic efficiency but nonetheless explaining that “we doubt that antitrust, as an integral part of the economic constitution of the United States, can be defended solely on this ground”); John J. Flynn, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1182, 1187–88 (1977); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979) (“There probably has never been a period comparable to the last decade, however, when antitrust economists and lawyers have had such success in persuading the courts to adopt an *exclusively* economic approach to antitrust questions. In this paper, I will urge a different view. It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws.”); Sullivan, *supra* note 17, at 1235 (describing the benefits that sociological analysis can bring to antitrust).

26. Arthur D. Austin, *The Emergence of Societal Antitrust*, 47 N.Y.U. L. REV. 903 (1971); see also Barbara Ann White, *Countervailing Power—Different Rules for Different Markets? Conduct and Context in Antitrust Law and Economics*, 41 DUKE L.J. 1045, 1055–57 (1992) (using the term “Modern Populist School”).

27. Jacobs, *supra* note 13, at 261; cf. Austin, *supra* note 26, at 904 (“[J]udicial decisions interpreting the Act have relegated socio-political value judgments to the status of peripheral asides. Societal antitrust, in marked contrast, exalts socio-political judgments to a first priority status.” (footnote omitted)).

societal antitrust movement from the neoclassical microeconomic approach to antitrust, though, is their baseline understandings about the operation of efficiency—one informed by distributive justice concerns.²⁸ Most societal antitrust theories are largely an attempt to reframe the economic analysis²⁹ in a different way by taking account of other forms of inefficiency (in some cases non-allocative, political inefficiency) when considering the net benefit or cost of a particular act or industry structure,³⁰ an approach mirrored in modern, decidedly economic so-called “post-Chicago school” efficiency analysis,³¹ which is rooted in concerns over dynamic rather than static efficiency.³² The economic nature of most societal antitrust arguments has left them amenable to evaluation—and for the most part rejection—by the same economic criteria they seek to criticize.³³ Professor Kenneth Elzinga, for example, has demonstrated how various “equitable” goals such as income redistribution,³⁴ promotion of small businesses,³⁵ and the neutral treatment of minorities,³⁶ are not well-served by the non-efficiency approach to antitrust enforcement.

28. Austin, *supra* note 26, at 906 (“What separates the present movement from earlier flamboyant muckraking episodes and contributes to the ascendance of societal antitrust is the existence of a broadly based popular front of reform, converging from many sources, with the singular goal of changing the economic and social systems.”); *see also* David W. Barnes, *Nonefficiency Goals in the Antitrust Law of Mergers*, 30 WM. & MARY L. REV. 787, 854–61 (1988) (discussing the effect of wealth distribution on “social efficiency”); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1182 (1981) (“There are four major historical goals of antitrust, and all should continue to be respected. These are: (1) dispersion of economic power, (2) freedom and opportunity to compete on the merits, (3) satisfaction of consumers, and (4) protection of the competition process as market governor.”); David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1287 (1988) (“Governmental dedication to general welfare therefore required a citizenry possessing personal independence grounded in economic security. Unless there were a balanced distribution of wealth, extreme disparities would inevitably destabilize governmental processes.”).

29. *See* Crane, *supra* note 18 (manuscript at 18) (“Even the intellectual traditions in competition policy most closely identified with an ‘non-economic’ [sic] orientation rely heavily on economic ideas and arguments to advance their normative claims.”).

30. *See, e.g.*, David W. Barnes, *Revolutionary Antitrust: Efficiency, Ideology, and Democracy*, 58 U. CIN. L. REV. 59, 73–74 (1989) (considering the externalities generated—such as the effects on a community losing jobs or on consumers by increasing consumption—by the efficiency benefits of a merger).

31. Jacobs, *supra* note 13, at 261.

32. *See, e.g.*, Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L.J. 513 (1995).

33. *See* Jacobs, *supra* note 13, at 239 (“The victory of a purely economic analysis . . . over the Modern Populist School could hardly seem more complete.”); Elzinga, *supra* note 18, at 1194.

34. Elzinga, *supra* note 18, at 1194.

35. *Id.* at 1196.

36. *Id.* at 1202; *see also* Robert H. Bork, *Contrasts in Antitrust Theory: I*, 65 COLUM. L. REV. 401, 412–15 (1965) (responding to Blake & Jones, *supra* note 25); Ward S. Bowman, *Contrasts in Antitrust Theory: II*, 65 COLUM. L. REV. 417, 417 (1965) (same).

D. ANTITRUST AND REGULATORY HARM

There is room for a different approach, though. Economics may play an important role in antitrust analysis, but the roots of antitrust are political rather than economic. In the words of Carl Kaysen and Donald Turner, “[i]n our democratic, egalitarian society, large areas of uncontrolled private power are not tolerated.”³⁷ But our society does allow vast accumulations of private *economic* power in the form of property ownership, and nothing in the antitrust laws provides any real constraint on the amount of property one can own—the antitrust laws do practically nothing to stand in the way of accumulations of private power so long as they are not used to harm competition. Rather, if antitrust is the product of a concern about accumulations of power, it must be forms of power distinct from the type of economic power one exercises through simple property ownership. The question, then, is how to situate such a concern over allocations of power within the antitrust law.

Because competition serves to cabin not only economic power but other forms of control, a harm to “competition” is better viewed as consisting of two distinct harms: a harm to efficiency—a “market harm”—and a harm to the freedom of choice felt by those participating in the market—what I describe below as a “regulatory harm.” In this sense, antitrust is of a piece with a much larger body of law that governs the proper exercise of regulatory authority, a body of law more closely associated with constitutional theory than economic theory. Although it does protect against harms to efficiency, antitrust also protects interests similar to those protected by the public/private distinction in constitutional law. Not merely a rule of economic regulation, antitrust is a rule against private regulation.

II. ANTITRUST AND REGULATION

This Part develops a conception of regulation necessary to consider the role of regulatory effects in antitrust law. Although an intuitive concept when exercised by government, distinguishing “regulatory” power from other forms of control is less intuitive when we cannot use the identity of the actor as a cue to identifying the nature of the power, as in the case of private exercises of regulatory power. What generally distinguishes government from private entities is the ability to exercise control over property the government does not own, and so regulation is best conceived of as control separated from a generally recognized property interest—control over property owned by others. Distance between ownership and control can

37. CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 5 (1959); *see also* RICHARD HOFSTADTER, THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 233 (1965); Sullivan, *supra* note 17, at 1219 (explaining that it is “a perennial American impulse to find ways to divide, limit and diffuse both governmental and nongovernmental power”).

exist in a number of ways. For instance, in a cartel, cartel members exercise control over the property of other cartel members, and, more generally, whenever those with market power exercise that power in a way that gives them control over others' property. Recognizing regulatory power as power exercised apart from property rights provides an explanation for many of the distinctions in antitrust law that cannot be accounted for by the likelihood of market harm.

A. PROPERTY AND REGULATION

To say that antitrust is centrally concerned with "private regulation" requires a definition of "regulation."³⁸ Regulation is a form of control, but not all forms of control are regulatory. Control through brute force, for instance, might be perfectly effective, but most would not consider it "regulatory" absent a normative claim to obedience.³⁹ One could label the exercise of property rights as regulation; by exercising property rights (which, following Locke, include control over one's own labor—I will use "property" to describe both labor and physical property throughout⁴⁰) we control others' behavior if in no other way than by denying them the use of certain resources. But equating the influence one has over the actions of others though the power to dispose of one's property with "regulation" also seems to stretch the meaning of regulation beyond our usual conception. If A owns a snow shovel and B would like to use it, we wouldn't say A "regulates" B's use of the shovel by refusing to give it to B even if we might say that A "controls" B's use of the shovel.

At its most general, what I mean by "regulation" is a form of control most commonly observed through the operation of law—the means through which governments operate on private interests.⁴¹ When governments control behavior through law, they are clearly regulating. Regulation is therefore easy to identify when exercised by governments,⁴² but in the

38. Concepts like regulation have a long history in antitrust. Industry regulation—in the sense of common-carrier or utility regulation—is frequently considered as an alternative to antitrust, and I am certainly not using the term in that sense. The juxtaposition of antitrust and industry regulation is not only irrelevant to my inquiry but presupposes public rather than private regulation. See Dennis W. Carlton & Randal C. Picker, *Antitrust and Regulation* (Univ. of Chi. L. & Econ., Olin Working Paper No. 312, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=937020.

39. See H.L.A. HART, *THE CONCEPT OF LAW* 22–24 (2d ed. 1994).

40. JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* 245 (Univ. of Mich. Digital Library Prod. Serv. 2003) (1690) ("[E]very Man has a *Property* in his own *Person* The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his."), available at <http://quod.lib.umich.edu/e/eebo/A48901.0001.001/1:7.5?rgn=div2;view=fulltext>.

41. See DONALD BLACK, *THE BEHAVIOR OF LAW* 2 (1976).

42. Indeed, the close identity between government action and regulation has led at least one scholar to define "regulation" strictly with reference to government action. See Barak Orbach, *What is Regulation?*, 30 YALE J. ON REG. ONLINE 1, 10 (2012), available at <http://www.calameo.com/read/002053469fc8d2d8deaf4?authid=wZiHtxpGFhJg&view=scroll&iframe=true>

absence of government action, identifying distinctly regulatory control becomes more difficult. Typically, the control exercised by private entities over their property—as when A chooses to shovel her own driveway instead of lending the shovel to her neighbors—is what we would normally call “proprietary,” not “regulatory.”

B. THE DISTANCE BETWEEN PROPERTY RIGHTS AND REGULATORY CONTROL

In the simple case of control over property, the problem of identifying regulation by a private entity is largely a matter of distinguishing the type of control one normally obtains through ownership from other forms of control. Put another way, whether an act of control is appropriately described as “regulatory” (versus “proprietary”) is a function of the distance between the given exercise of control and a recognized property right. This conception of regulation fits nicely with our intuitions about public regulation. The control the government exercises over our property is “regulation” because the government does not own our property.

Defining regulation as control distant from a recognized property right does raise several complications. First, it is an avowedly relative definition. Under such a definition, it is impossible to tell whether a form of control is regulatory without knowing what baseline property rights are. Those adhering to the belief that the exercise of property rights is itself regulation (as many proponents of societal antitrust might⁴³) would not be willing to accept property rights as a baseline,⁴⁴ since property rights (Locke notwithstanding⁴⁵) are a matter of social rather than natural fact. The control associated with ownership of property is itself contingent on social choices regarding allocations of power; property rights represent a choice about how much power to give those who “own” property, just as capitalism represents a social choice to allocate resources through competitive markets. But defining regulation in relation to a baseline of property rights is hardly an exercise in postmodernist line-drawing. Although logically contestable, the particular baseline of property rights does not seem to be practically

&width=100%&height=100% (“Regulation is *state* intervention in the private domain, which is a byproduct of our imperfect reality and human limitations.” (emphasis added)).

43. See, e.g., LOUIS D. BRANDEIS, *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* (Osmond K. Fraenkel ed., 1934); Louis Jaffee, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 221 (1937) (“Tolerated, covert monopolies—power exercised indirectly—may be much more difficult to attack or to ameliorate than the edicts of majorities arrived at openly and according to the forms of law.”). See generally Neil Duxbury, *Lord Wright and Innovative Traditionalism*, 59 U. TORONTO L.J. 265, 292–93 (discussing the “classic American legal realist deployment of this argument” which “tended to lament the capacity of big business to exercise private government over vulnerable individuals.”).

44. See Jaffee, *supra* note 43, at 214–15 (discussing the contingent nature of both property and contract law).

45. Cf. LOCKE, *supra* note 40, at 314 (“Government has no other end but the preservation of Property.”).

contested in American society, as demonstrated by the demise of not only the societal antitrust movement itself but also of other wealth redistribution schemes premised on the alteration of property rights, such as Marxism.

Second, defining regulation by the distance between a given form of control and a property right make the determination of whether a form of control is proprietary or regulatory a matter of degree. Unlike the case of public regulation, in which the identity of the regulator—the government—allows one to readily distinguish regulation from ownership, whether the private exercise of control is proprietary or regulatory cannot be determined by so simple a test. The point at which control crosses over from being proprietary to being regulatory necessarily varies based on both the content of property law and the circumstances of how the control is created and exercised.

Contract considerably complicates the inquiry into regulation because, unlike property rights, which are the product of relatively settled positive law, contracts are the product of varied and ever-changing private law and necessarily alter underlying property rights. Defining “regulation” as control that deviates in any regard from baseline property rights would include in the definition of regulation all contracts, since it is the purpose of contracts to alter underlying property rights. On the other hand, excluding from the definition of regulation all rules adopted through contract would similarly eviscerate the distinction by essentially obviating even the possibility of private regulation. It is thus impossible to either categorically include or exclude all contracts from the definition of regulation.

There is, however, one form of contract that we can categorically exclude from regulation: a contract that is no more than an exchange of control for either money or property; the one way “regulators” do *not* obtain control is by buying it. That is not to say that contracts in which control is exchanged for money cannot be antitrust violations—my enterprise in this Article is not to perfectly describe antitrust liability as anything “regulatory.” It is only to say that the kind of control that is obtained through purchase is not regulatory control. It is possible that one party may exercise regulatory control in obtaining *consent* to a contract, but it would strain the definition to describe the contract *itself* as regulation.⁴⁶ Thus, a state regulates when it

46. Many, including Brandeis and Professor Louis Jaffee, have described the control that monopolists exercise in terms sounding in regulation: a monopolist is someone who owns all there is of a particular item, and so a monopolist's exercise of property rights could amount to regulation of the use of that item. *See, e.g., supra* note 43. That is a claim that reaches far beyond the content of U.S. antitrust law—acquiring or maintaining a monopoly is a violation of Section 2, but exercising monopoly power by charging supracompetitive prices or refusing to sell at all is not. *See Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.”). Even for those like Brandeis or Jaffee who would go beyond antitrust doctrine and subject monopoly

forces private parties to accept the price it offers in an eminent domain proceeding, but it is the compulsion to enter into the sale, not the sale itself, that is the essence of regulation.

C. CARTELS, MONOPOLIES, AND REGULATORY EFFECTS

Conceiving of regulation as a separation between ownership and control opens up the possibility of distinguishing between the various harms that can result from restraints, harms that are highlighted by the case of cartels. Recall the snow shovel example. Imagine our snow shovel owner (A) owns the only snow shovel in town on a snowy morning. If A sets a high price for her snow shovel, she is simply capitalizing on the value of her proprietary control; we wouldn't call her high prices "regulation" of her snow shovel or snow shovels generally, even though she effectively controls the use of all snow shovels by virtue of her control over the only snow shovel. The effect of supracompetitive pricing occurs through the operation of markets and its primary harm is to the ability of markets to optimally allocate resources—a market effect of the monopoly. On the other hand, if A inserts a clause in her sales contract with B to the effect that B may use the shovel to shovel his driveway but not to shovel other people's driveways, A would be attempting to control not only the property subject to the contract (the snow shovel) but also property not subject to the contract (the other people's driveways that B cannot use the shovel to clear and even B's property interest in his labor). In that case, we could say that the use restriction is an attempt to regulate property that A does not own, and the restraint would exhibit a regulatory effect.

Imagine A is not a monopolist but forms a cartel in conjunction with C, who owns the only other snow shovel in town. If A and C agree to a price at which they will sell their shovels, they have jointly regulated each other's use of their own snow shovels. Thus, regulatory control (at the very least, control ceded to other members of the cartel) is present in every cartel;⁴⁷ whether the form of control exercised by the cartel on *others* is regulatory depends on the nature of the restraint agreed to. A cartel that merely seeks to raise prices will exhibit regulatory control over the members' property but not over others. Just as we wouldn't describe consumers subject to a monopolist as being regulated by the monopolist, we wouldn't describe the effect the cartel has on those who pay high prices as regulatory—it, too, is a market effect. If A and C agree, however, that neither of them will sell snow shovels to B, then they have both regulated their *own* property (the shovels themselves) and B (by denying him the ability to buy a shovel). Cartels that

itself to greater scrutiny, it is not the property right but rather the industrial structure that drives them to liken private businesses to regulators.

47. See, e.g., *United States v. First Nat'l Pictures, Inc.*, 282 U.S. 44, 54 (1930) ("The obvious purpose of the arrangement is to restrict the liberty of those who have representatives on the Film Boards and secure their concerted action.").

engage in a concerted refusal to deal seek to parlay that first form of regulatory control (over each other's property) into control over non-members or their property. The effect of the concerted refusal to deal operates on B directly to control B's use of B's own property—a regulatory effect.

The distinction between these two different forms of regulatory control highlights a key difference between cartels and monopolists, at least when it comes to the exercise of regulatory control. By unifying ownership and control, a monopolist is capable of exercising only the second form of regulatory control, control over others, which (as shown above) depends on the type of restraint the monopolist adopts. Any time a cartel agrees to restrain the use of the members' property, though, it is exercising regulatory control over the property of the cartel members, regardless of the nature of the restraint the cartel adopts.

So understood, every restraint displays some combination of market and regulatory effects. The question is whether a restraint's regulatory effects are relevant to antitrust law in a way distinct from the restraint's market effects.

D. PROPRIETARY CONTROL, REGULATORY CONTROL, AND ANTITRUST

Many of the distinctions between proprietary and regulatory control have analogs in antitrust law. Even at the most general level, the distinction between Section 1 (which outlaws agreements in restraint of trade) and Section 2 (which outlaws monopolization) embodies a concern about the proximity between ownership and control. The threshold for liability is frequently lower under Section 1 than under Section 2,⁴⁸ and some violations—such as price fixing—exist only under Section 1.

Antitrust generally privileges control exercised in close connection with ownership. Control that is exercised by *refusing* to part with ownership is entirely privileged under Section 1⁴⁹ and receives considerable deference (for fear of interfering with legitimate property rights) even under Section 2.⁵⁰ Respect for proprietary control explains why antitrust does not respect

48. See *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2208–09 (2010) (“Section 1 applies only to concerted action that restrains trade. Section 2, by contrast, covers both concerted and independent action, but only if that action ‘monopolize[s],’ or ‘threatens actual monopolization,’ a category that is narrower than restraint of trade.” (alteration in original) (citations omitted)).

49. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

50. *Verizon*, 540 U.S. at 408. Of course, the distinction between lack of liability under Section 1 and the deference under Section 2 afforded refusals to deal is itself economically irrational. See Glen O. Robinson, *On Refusing to Deal with Rivals*, 87 CORNELL L. REV. 1177, 1187 (2002) (“Some commentators argue that collective activity should be scrutinized more closely than single-firm activity because it has a greater potential for harm. As a general proposition this is dubious. Power is power, whether exercised by one firm acting alone or four firms acting in collusion.”).

the corporate form as unifying ownership and control—under the *Copperweld* doctrine,⁵¹ neither a corporation acting alone nor in concert with its wholly owned subsidiary can violate Section 1. Indeed, antitrust is so sensitive to the relationship between control and ownership that control and ownership must be completely unified in order to warrant the application of *Copperweld*, a recognition of the problems associated with allowing a group of property owners to collectively control property they do not jointly own, even if by doing so they can maximize the value of the shared property.⁵²

The distinction is not limited to the differences between Section 1 and Section 2; the connection between an ownership interest and control is also present in perhaps the most profound distinction in antitrust: the differing treatment of vertical restraints (restraints that travel along the chain of distribution of property) and horizontal ones (those among competitors). Vertical restraints (such as A's insistence that B not use the snow shovel for anyone else's driveway) are more closely related to a property interest than are horizontal restraints (such as A's agreement with C to fix the prices of snow shovels, in which A is attempting to control not only her own shovel but also C's). Today, horizontal restraints like price fixing⁵³ and horizontal market allocation⁵⁴ retain per se treatment regardless of their actual market harm, while no vertical restraints are subject to strict per se treatment,⁵⁵ and many similar restraints are considered unproblematic in purely vertical form but receive much higher scrutiny when they appear in horizontal form.⁵⁶

In the mixed horizontal/vertical case of joint ventures, the ancillary restraint doctrine adjusts the degree of antitrust scrutiny, largely dependent on the distance between the res of a joint venture agreement and the restraint in question.⁵⁷ In *Polygram Holding, Inc. v. FTC*, the D.C. Circuit examined a joint venture between PolyGram and Warner to produce a new recording of José Carreras, Plácido Domingo, and Luciano Pavarotti—the

51. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

52. *See Am. Needle*, 130 S. Ct. at 2212–13.

53. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007); *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006).

54. *See Leegin*, 551 U.S. at 886.

55. *Cf. id.* at 907 (removing the last vertical restraint, minimum resale price maintenance, from per se treatment). Even the “modified per se” rule applicable to vertical tying arrangements requires market power, and hence the likelihood of market harm, as a condition for liability. *See Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 35 (2006).

56. *Compare Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58–59 (1977) (vertical exclusive territory arrangement analyzed under rule of reason), *with United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972) (exclusive territory arrangement in conjunction with horizontal, retailer-controlled buying cooperative per se illegal).

57. Under the ancillary restraint doctrine, “courts must determine whether the nonventure restriction is a naked restraint on trade, and thus invalid, or one that is ancillary to the legitimate and competitive purposes of the business association, and thus valid.” *Texaco*, 547 U.S. at 7.

“Three Tenors.”⁵⁸ The Three Tenors had previously made recordings together in both 1990 (for which PolyGram owned the distribution rights) and 1994 (for which Warner owned the distribution rights). PolyGram and Warner agreed to jointly distribute the Three Tenors’ 1998 concert recording (Warner in the U.S. and PolyGram elsewhere) with the worldwide profits shared between them.⁵⁹ In anticipation of the release, PolyGram and Warner agreed to cease advertising their individually owned 1990 and 1994 Three Tenors albums.⁶⁰ The D.C. Circuit found that the agreement restricting marketing of the separately owned 1990 and 1994 albums violated Section 1. The problem, as the court saw it, was the extension of the restraint beyond the res of the underlying agreement. Although the decision not to compete with the earlier albums might make sense from the perspective of the parties, the parties could not use their shared interest in one product to justify shared control over another. As the court explained,

[t]he ‘free-riding’ to be eliminated by the moratorium agreement . . . was nothing more than the competition of products that were not part of the joint undertaking. Why not an agreement by which PolyGram and Warner would eliminate advertising and price competition on all their records for a time while they focused exclusively upon promoting the new Three Tenors album?⁶¹

None of these distinctions captured in antitrust law are dependent for either their existence or their scope on the presence or absence of inefficiency. The distinction in firm organization that separates Section 1 from Section 2 is irrelevant from the standpoint of efficiency. The market harm from cartels is no different from that produced by monopolies; it is the restraint combined with market power that results in allocative displacement, not the collective nature of the agreement.⁶² Antitrust is nevertheless much more suspicious of control exercised collectively than unilaterally, and for reasons having nothing to do with market harm.⁶³ Similarly, it is difficult to identify an interest in efficiency that would warrant

58. *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 31 (D.C. Cir. 2005).

59. *Id.*

60. *Id.* at 32.

61. *Id.* at 38. For a counter-example, consider *Polk Bros., Inc. v. Forest City Enterprises*, 776 F.2d 185 (7th Cir. 1985) (Easterbrook, J.), in which the Seventh Circuit upheld a covenant not to compete on certain types of household products as part of a lease agreement between two household products chain stores to share a building. The covenant not to compete, applicable to operations taking place in the building subject to the lease, was considered ancillary to the lease agreement. It is hard to imagine a similar result if the covenant not to compete, while still contained in the lease for the shared building (perhaps given by one party to the other in exchange for lower rent) restricted competition in the two chains’ other stores.

62. *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2209 (2010) (“Monopoly power may be equally harmful whether it is the product of joint action or individual action.”).

63. *United States v. Colgate & Co.*, 250 U.S. 300 (1919) (holding that unilateral refusals to deal absolutely were privileged under Section 1 because they lack agreement).

the *Copperweld* doctrine, since a parent and child with market power are just as capable of injuring competitive markets as would be colluding distinct firms. Nor is the scope of the *Copperweld* doctrine—the requirement of complete unity of interest—dependent on the differing degree of harm to markets stemming from the exercise of common but non-unitary interests. Yet *Copperweld* is a fundamental element of American antitrust law. The disparate treatment of vertical and horizontal restraints is frequently justified on grounds of economic efficiency, but it needn't be. The per se rule applicable to some horizontal restraints requires no market power, but the rule-of-reason analysis applicable to almost all vertical restraints (and even the “modified” per se rule applicable to tying⁶⁴) makes market power a virtual requirement for antitrust liability.⁶⁵ Like the cartel/monopolist distinction, though, the differing treatment of vertical and horizontal agreements cannot be justified as a matter of market harm. There is no more possibility of market distortion in a horizontal agreement where the parties do not collectively possess market power than there is in a vertical one lacking market power; conversely, in a vertical arrangement any degree of market power held by anyone along the distribution chain would result in equal market distortions (greater, actually, given the unstable nature of most cartels) as if the arrangement were horizontal. Nor does the close connection between restraints and the res of a joint venture insisted upon by the ancillary restraint doctrine sound in economics. It is entirely possible that the exclusivity promised by the competition restrictions on the earlier albums in the Three Tenors case were necessary to induce both parties to invest in distributing the 1998 recording, but evidence about the procompetitive benefits of the restraint was rejected by the D.C. Circuit as “a frontal assault on the basic policy of the Sherman Act.”⁶⁶ Allocative displacement does little to explain these aspects of antitrust law. Unless distinctions like those between Section 1 and Section 2, horizontal and vertical agreements, and the scope of the ancillary restraint doctrine are aberrations, interests other than concerns over efficiency must be at play in antitrust.

E. REGULATORY EFFECTS, REGULATORY HARM, AND PRIVATE REGULATION

Whether a restraint is problematic by virtue of its regulatory effects has little to do with whether the restraint harms markets, the only concern of a view of antitrust as a rule of efficiency. If A inserts a clause in her contract with B that prohibits B from buying snow shovels from others, it likely produces infinitesimal allocative displacement, especially if there are plenty

64. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12–18 (1984).

65. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885–86 (2007).

66. *Polygram*, 416 F.3d at 38 (quoting *Nat'l Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679, 695 (1978)) (internal quotation marks omitted).

of other snow shovel buyers and sellers, but it nevertheless offends our sensibilities as an attempt by A to privately regulate both others' snow shovels (by denying them to B) and the snow shovel market, regardless of its efficacy or actual harm.

Just as all agreements restrain trade, though, all agreements exhibit some sort of regulatory effect; a reading of the antitrust laws that outlaws all regulatory effects would condemn every agreement, an implausible interpretation at best.⁶⁷ The question is at what point a "regulatory effect" becomes a "regulatory harm" to be addressed by the antitrust laws. Unlike the rule-of-reason approach that has come to dominate antitrust law for the evaluation of *market* harms, there is no ready source of comparison to determine the magnitude or nature of regulatory effects produced by a particular restraint. Although the choice of efficiency as a criterion may itself be a value judgment, the results of competitive markets can at least be objectively determined (or at least estimated) and compared with those produced by a restraint. Analysis of conduct potentially causing regulatory harm requires comparison not to optimal economic outcomes but rather to some other set of norms.

To say that antitrust's prohibition against regulatory harms requires the use of normatively derived criteria for evaluating restraints should not be taken as license to unhitch antitrust law from either a structured form of antitrust analysis or meaningful limiting principles. The degree to which control is regulatory rather than proprietary can, like the degree to which a restraint harms efficiency, be measured: by the proximity of the control being exercised to a cognizable property interest. A restriction closely connected to the res of a contract, for instance, is unlikely to be regulatory. Control surrendered to another private entity (as in a cartel) and control obtained over others' property (as in some refusal-to-deal cases) is distinctly regulatory in nature and signifies a potential regulatory harm.

67. Cf. *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238–39 (1918) (“[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. . . . [T]he evidence admitted makes it clear that the rule was a reasonable regulation of business consistent with the provisions of the Anti-Trust Law.”). The Court’s seeming embrace of private “regulation” in *Chicago Board of Trade* presents at least some challenge to the idea that antitrust law is about preventing private regulation, but the rules at issue in *Chicago Board of Trade* related directly to trading taking place on the exchange, thus connecting the rules to the joint economic undertaking and limiting the reach of the rules as affecting property unrelated to the exchange. See Peter C. Carstensen, *The Content of the Hollow Core of Antitrust: The Chicago Board of Trade Case and the Meaning of the “Rule of Reason,”* in *Restraint of Trade Analysis*, 15 RES. L. & ECON. 1, 62 (1992) (“The *Board of Trade* decision taken as a whole in light of the briefs, record, and prior decisions, focuses on the need for and right of an organized exchange to regulate its members’ conduct in connection with and having the functional objective of making that exchange operate as an efficient joint endeavor. So the application of the second standard (regulation) to the case relates the restraints to that primary activity.”).

And, just as the determination of whether control being exercised is proprietary or regulatory is informed by the content of property law, the determination of whether a particular regulatory effect is permissible or harmful is informed by the law of regulation: the law allocating regulatory authority between public and private actors. The antitrust norm against private regulation is part of a broader prohibition in American law against the private exercise of regulatory power. Once “regulation” is understood as describing a specific relationship (or, rather, a distance) between control and a recognized property interest, antitrust’s protections against regulatory harm are simply one part of a comprehensive prohibition against similar types of private regulation throughout public law, most notably in the constitutional law pertaining to market regulation. After considering the constitutional law of private market regulation more generally, I will return to how those rules are instantiated in antitrust law.

III. THE PUBLIC/PRIVATE DISTINCTION IN MARKET REGULATION

Modern American lawyers take for granted that private entities may not engage in regulation. Although cases concerning the legality of private regulation do occasionally arise, the only contested issues in them are whether the entity engaged in regulation is actually “private” or whether its conduct amounts to “regulation”—the constitutional prohibition itself is not subject to dispute.⁶⁸

Today’s clear separation of public regulators from private market participants was not always so clear, though. The mixing of business and regulatory activities was a staple of the English tradition of trade regulation from which the modern American economic and political order sprang. Although history has steadily evolved away from mixing public and private functions, the New Deal, as it did in many areas, pushed upon legal distinctions between public and private in pursuit of recovery from the Great Depression. Many of the constitutional New Deal cases display a strong connection to the principles underlying antitrust law, and in particular antitrust’s treatment of attempts to engage in private regulation.

A. *THE PRIVATE NONDELEGATION DOCTRINE*

The distinction between public and private control is so well established in modern American legal circles as to be largely taken for granted in all but the most extreme cases, but it was not always so. During most of the common law pre-history to the Sherman Act, regulatory power over trade practices was exercised not by disinterested public officials but rather by merchant guilds, which evolved into trade guilds made up of members of

68. See *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454 (Tex. 1997).

the relevant trade.⁶⁹ In England, the distinction between practice and regulation was not fully realized until the 1835 Municipal Corporations Act,⁷⁰ which formally separated the commercial and governmental functions.⁷¹

During this era, the disputes that eventually came to be included in the introductory chapter of most antitrust casebooks were motivated not by concerns that defendants were diminishing consumer welfare or efficiency but rather that they were depriving others of “liberty”—not the liberty of consumers to purchase low-priced goods but the liberty of other tradesmen (i.e., competitors) to practice their trade.⁷² *Darcy v. Allen*, the case abolishing the famous playing card monopoly, was brought not by consumers seeking damages for overcharges but by the Mayor and Aldermen of the City of London because Darcy’s monopoly (issued by the Crown) conflicted with the trade privileges exercised by the established livery companies.⁷³ The Statute of Monopolies was not a prohibition against monopolization in modern terms; it was a reallocation of power (essentially regulatory power) from the Crown (acting through monopolies issued by letters patent) to the trading companies (which were expressly exempted from the Statute’s application in Section 9).⁷⁴

The merging of commercial and regulatory activity survived the trip across the Atlantic to American shores. (It fared even better during the voyage to India, resulting in the establishment of the British East India Company, a trading firm with its own government and armed forces.⁷⁵) The companies that were originally granted charters to establish colonies in America included both stockholders and governors.⁷⁶ At one time, *all* corporations were required to have a “public” purpose in order to be worthy

69. See Thomas B. Nachbar, *Monopoly, Mercantilism, and the Politics of Regulation*, 91 VA. L. REV. 1313, 1320–21 (2005).

70. Municipal Corporations Act, 1835, 5 & 6 Will. IV, c. 76.

71. Nachbar, *supra* note 69, at 1366–67.

72. See, e.g., *Darcy v. Allen* (The Case of Monopolies), (1603) 77 Eng. Rep. 1260, 1262–63 (K.B.) (striking a playing-card monopoly as “against the common law, and the benefit and liberty of the subject”); *East-India Co. v. Sandys* (The Great Case of Monopolies), (1685) 10 St. Tr. 371, 523 (K.B.) (Jeffries, C.J.) (the right to manufacture “remain[s] with the most liberty by the common law,” compared to the right to conduct, inland or foreign trade, which are protected to declining degrees); *Mayor of Winton v. Wilks*, (1705) 92 Eng. Rep. 247, 248 (K.B.) (noting that “every man at common law might use what trade he would without restraint”).

73. See Nachbar, *supra* note 69, at 1355–56; see also D. Seaborne Davies, *Further Light on the Case of Monopolies*, 48 L.Q. REV. 394, 395, 411 (1932).

74. Nachbar, *supra* note 69, at 1349–51.

75. See JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* 21–26 (2003).

76. 2 WILLIAM ROBERT SCOTT, *THE CONSTITUTION AND FINANCE OF ENGLISH, SCOTTISH AND IRISH JOINT-STOCK COMPANIES TO 1720*, at 150–52 (1910).

of receiving the privilege of a charter.⁷⁷ In America, the distinction between public and private power has grown with the distinction between public and private corporations, to the point that we no longer think of corporations as “arms of the state.”⁷⁸

The lack of serious regard for inefficiency and consumer welfare in the early trade regulation cases has rightly been jettisoned with the mercantilist economic order underlying it, but the basic objection to allowing one group of private tradesmen to combine in order to regulate the conduct of others has not. Scholars are fond of questioning whether there is even such a thing as the “nondelegation doctrine,”⁷⁹ but those sentiments apply only to a rule against legislative delegations to *public* administrative agencies. The prohibition against private regulation, including delegations of regulatory authority to private actors, is so ingrained in constitutional law as to go almost unnoticed. There are few recent cases holding that private entities cannot exercise regulatory authority, but that seems to be because the principle is so widely accepted that such delegations are simply not attempted. Disputes over delegation of regulatory authority to private actors are not over the existence of a private nondelegation doctrine, but over whether the power exercised is “regulatory” or the entity granted that power is “private.”⁸⁰ When the answers to both questions are affirmative, though, the constitutional rule against private regulation is both clear and universal.⁸¹

77. See Janet McLean, *The Transnational Corporation in History: Lessons for Today?*, 79 IND. L.J. 363, 375 (2004).

78. See Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1425 (1982).

79. See, e.g., Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

80. See *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 469–70 (Tex. 1997).

81. *Id.* at 471. There has been considerable attention paid to the privatization of governmental functions, but such cases generally involve the use of private entities to execute government-sponsored programs, such as Medicare, Medicaid, education, and the operation of prisons, e.g., PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* (2007); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003), not the delegation of the power of government to regulate the conduct of others, although some examples come close to the line with regard to actions related to security, see VERKUIL, *supra*, at 25–56 (discussing the example of security screeners and private military contractors, who may cross the line into inherently governmental functions such as the “discretionary application of lawful coercion or violence”). While such occurrences surely take place, their illegality is a commonplace topic among constitutional lawyers and a violation of both law and stated federal policy. See *id.* at 29; Harold J. Krent, *The Private Performing the Public: Delimiting Delegations to Private Parties*, 65 U. MIAMI L. REV. 507, 542 (2011) (explaining that a “focus on ‘altering the legal rights, duties and relations’ of others has salience in the private delegate context. Private individuals and entities can provide advice, work as initial factfinders, and implement details of

The lack of modern attempts to push the boundaries between public and private regulation means that there is little fodder for constitutional thinking on the topic, but desperate times call for desperate measures, and the Roosevelt administration during the Great Depression faced nothing if not desperate times. The cases stemming from the New Deal reforms provide important insights into the constitutional limits on regulation by private parties, insights with implications that go beyond constitutional law to antitrust law.

B. PRIVATE REGULATION AND THE NEW DEAL

Reflecting distrust of competition in the wake of the 1929 stock market crash, the Roosevelt administration set about making a comprehensive plan of regulation of the economy that would enlist the expertise of private business in formulating optimal regulation.⁸² The National Industrial Recovery Act (“NIRA”)⁸³ and the Bituminous Coal Conservation Act⁸⁴ gave regulatory bite to that distrust by providing for a combination of government and private planning to properly organize industries. The two statutes had a similar structure, and both were predicated on a vision of harnessing the expertise of private business to prevent wasteful competition. Under the NIRA, the more general of the two statutes, an industry would collectively propose a code of “fair competition” to the President. The President could approve codes that “impose no inequitable restrictions on admission to membership and are truly representative,” “are not designed to promote monopolies or eliminate or oppress small enterprises and will not operate to discriminate against them,” and “will effectuate the policy” of the Act.⁸⁵ The President could also prescribe a code on his own initiative, without any request from the industry.⁸⁶ Violation of an approved code was a crime, carrying a \$500 fine.⁸⁷

federal governmental programs under governmental supervision, but the Constitution does not countenance delegation of the power to make binding decisions.”).

82. See generally ROBERT F. HIMMELBERG, *THE ORIGINS OF THE NATIONAL RECOVERY ADMINISTRATION: BUSINESS, GOVERNMENT, AND THE TRADE ASSOCIATION ISSUE, 1921–1933*, at 181–82 (2d ed. 1993); Alan J. Meese, *Section 2 Enforcement and the Great Recession: Why Less (Enforcement) Might Mean More (GDP)*, 80 *FORDHAM L. REV.* 1633, 1652–53 (2012). The Roosevelt administration’s reliance on industry as a source of competition regulation was a piece of Herbert Hoover’s own embrace of “New Competition” and “scientific management” in the years prior to Roosevelt’s election, although Hoover resisted providing governmental imprimatur to convert industry information sharing and collective action into actual regulation. ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* 22–23 (1966); HIMMELBERG, *supra*, at 10–11, 27–28.

83. National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933) (repealed 1966).

84. Bituminous Coal Conservation Act, ch. 824, 49 Stat. 991 (1935) (repealed 1937).

85. National Industrial Recovery Act § 3(a).

86. *Id.* § 3(d).

87. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 521–23 (1935) (describing the NIRA).

The Act was challenged in *A.L.A. Schechter Poultry Corp. v. United States* as both an illegal delegation and in excess of Congress's power under the Commerce Clause. The code at issue in *Schechter Poultry*, the Live Poultry Code applicable to those engaged in the poultry industry in the "New York metropolitan area," regulated such aspects of the poultry business as the number, hours, age, and collective bargaining rights of employees and the terms under which chickens could be bought or sold in New York poultry markets. It was administered by an "industry advisory committee" selected by the local trade associations and members of the industry and a "code supervisor" appointed, with the approval of the industry advisory committee, by agreement between the Secretary of Agriculture and the Administrator for Industrial Recovery.⁸⁸ Schechter was cited for selling unfit chickens, selling chickens to unlicensed butchers, violating the wage and hour restrictions and inspection recordkeeping requirements, and for the decidedly procompetitive activity of allowing retail dealers and butchers to select individual chickens from coops and half coops.⁸⁹ The Court found the statute unconstitutional on both the nondelegation and Commerce Clause grounds.⁹⁰

Schechter Poultry is a seemingly confounding case for those interested in the public/private distinction because it does not separately address the NIRA's delegation to the executive branch (a delegation to a public entity) from its delegation to the code association (a delegation to a private entity). The bulk of the section of the case on "Delegation of Legislative Power" concerns Section 3 of the Act, which pertains to the President's authority to approve and prescribe codes; scant mention is made of the role of the ostensibly private advisory committee and the code supervisor, who was appointed by agreement of the private committee and two public officials.⁹¹ The Court found the delegation to the President to be without adequate restrictions on his "approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country," and therefore unconstitutional as an attempt to delegate legislative power to the executive branch of government.⁹²

The question of *private* delegations came up in *Schechter Poultry* somewhat circuitously. It was primarily in response to the government's claim that the codes—as the product of industry associations—would "consist of rules of competition deemed fair for each industry by representative members of that industry—by the persons most vitally

88. *Id.* at 523–25.

89. *Id.* at 527–28.

90. *Id.* at 551.

91. *See id.* at 529–42 (comparing the delegation provided for in the NIRA to other delegations to federal executive and independent agencies).

92. *Id.* at 542.

concerned and most familiar with its problems.”⁹³ The argument was intended defend the scope of the power afforded to the President on the ground that his discretion would be informed by the expertise of industry participants,⁹⁴ but it had a somewhat different effect. The Court’s response was as short as it was sweeping:

But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And, could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in section 1 of title I? The answer is obvious. Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.⁹⁵

In attempting to justify a delegation to the President by pointing to a delegation to private industry, the government had argued its way out of the frying pan and into the fire. A delegation to the President was problematic but was at least conceivably constitutional so long as it was adequately constrained. Unlike delegations to other branches of government, a delegation to a private entity was antithetical to the constitutional order. It would seem, therefore, that such delegations would be measured not according to the sliding scale applied to delegations to executive and independent government agencies (whether they left the delegate’s discretion “virtually unfettered”)⁹⁶ but rather were categorically unconstitutional—a violation of constitutional nondelegation principles as a matter of kind, not of degree.⁹⁷

93. *Id.* at 537 (internal quotation marks omitted).

94. *See* Jaffee, *supra* note 43, at 236–37.

95. *Schechter Poultry*, 295 U.S. at 537.

96. *Id.* at 542. *See generally* J.W. Hampton, Jr., & Co., v. United States, 276 U.S. 394, 409 (1928) (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).

97. In his concurrence, Justice Cardozo did address the problem of the private delegation, arguing that the “purely advisory role” of the trade associations did not worsen the case for approving the delegation to the President. *See Schechter Poultry*, 295 U.S. at 552 (Cardozo, J., concurring) (“Nor is the substance of the power changed because the President may act at the instance of trade or industrial associations having special knowledge of the facts. Their function is strictly advisory; it is the *imprimatur* of the President that begets the quality of law. When the task that is set before one is that of cleaning house, it is prudent as well as usual to take counsel of the dwellers.” (citation omitted)).

The private nondelegation question was also obliquely raised in an earlier part of the decision, and it was treated in a way that foreshadowed the simplicity of the Court's handling of the issue when it arose explicitly.

The further point is urged that the national crisis demanded a broad and intensive coöperative effort by those engaged in trade and industry, and that this necessary coöperation was sought to be fostered by permitting them to initiate the adoption of codes. But the statutory plan is not simply one for voluntary effort. It does not seek merely to endow voluntary trade or industrial associations or groups with privileges or immunities. *It involves the coercive exercise of the law-making power. The codes of fair competition which the statute attempts to authorize are codes of laws.* If valid, they place all persons within their reach under the obligation of positive law, binding equally those who assent and those who do not assent. Violations of the provisions of the codes are punishable as crimes.⁹⁸

When viewed from this perspective, it was the role of the President in approving the codes—not the participation of industry associations—that made the delegation question even arguable in *Schechter Poultry*. The prohibition against private regulation was the easy question. Once the Court attributed the codes to industrial organizations and identified them as “lawmaking” and “codes of laws,” but for the President's role in approving the codes, their illegality would not even have been debatable.

If the Court responded to the possibility of regulation by private entities dismissively when it came up as a side issue in *Schechter Poultry*, it responded with outright hostility when first squarely confronted with the question the following year in *Carter v. Carter Coal Co.*⁹⁹ Under the Bituminous Coal Conservation Act, coal producers were required to pay a 15% tax on all bituminous coal produced, with 90% of the tax being refunded if they would comply with the provisions of a Bituminous Coal Code (adopted by an ostensibly public agency).¹⁰⁰ In addition to price restrictions established by the public commission, code members were required to adopt the maximum daily and weekly hours agreed to in contracts between a supermajority of producers and labor representatives (at the national level) and minimum wages agreed to between a similar supermajority of producers and labor representatives (at the “district” level).¹⁰¹ In addition to the question of whether this was a valid exercise of the commerce power, the question was raised whether coal producers could be bound to wage and hour restrictions agreed to by a sub-group of producers and workers.

98. *Id.* at 529 (majority opinion) (emphasis added).

99. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

100. *Id.* at 280–81.

101. *Id.* at 283–84.

That question prompted a long paragraph filled with an eclectic assortment of derisive adjectives:

The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. . . . Some coal producers favor the code; others oppose it; and the record clearly indicates that this diversity of view arises from their conflicting and even antagonistic interests. The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. *Schechter Corp. v. United States*, 295 U.S. at p. 237.¹⁰²

As had been the case in *Schechter Poultry*, the question itself was an easy one once the action was characterized as both private and regulatory.¹⁰³

By the time of *Currin v. Wallace* in 1939, the argument advanced by the government in *Schechter Poultry*—that the involvement of a private entity can render an unconstitutional delegation to the executive constitutional by providing a limit on executive discretion—became completely inverted, with private involvement in the exercise of executive discretion being advanced as an argument against the constitutionality of an otherwise valid delegation.¹⁰⁴ The provision in question authorized the Secretary of Agriculture to “designate” individual tobacco markets and to adopt inspection and grading rules at those markets, with failure to comply with such requirements at designated markets being a misdemeanor.¹⁰⁵ The

102. *Id.* at 311–12.

103. In his dissent on the delegation question, Justice Cardozo argued that the delegation included an intelligible standard but quizzically ignored the private delegation question, referring obscurely to “administrative agencies.” *See id.* at 332–34 (Cardozo, J., concurring and dissenting). We are consequently left without the benefit of Justice Cardozo’s thinking on the private delegation question, although his concurrence in *Schechter Poultry* suggests that the question should be determined on the nature of the public delegation alone. *See supra* note 97.

104. *Currin v. Wallace*, 306 U.S. 1 (1939).

105. *Id.* at 6–7.

Secretary was limited in his discretion, though, in that he could not designate a market for regulation unless the designation was supported by a vote of two-thirds of the relevant growers voting in a special referendum.¹⁰⁶

The Court rejected the characterization of the statute as a delegation to the growers,¹⁰⁷ since, unlike *Carter Coal*, where the industry essentially authored the regulation, the regulation at issue in *Currin* had already been defined by Congress, and so the up/down vote of the growers in each market over whether to support the designation did not constitute any delegation at all.¹⁰⁸ Rather, the Court viewed the regulation as being defined by Congress as depending on some future event: the growers' affirmative vote.¹⁰⁹ A "condition subsequent" approach to legislation that sets ratification by some other group as a condition raises an interesting logical question of whether the ultimate regulatory authority in any particular market rests with Congress or the body of ratifiers. Indeed, Chief Justice Hughes identified the limits on the use of such ex post approvals in *Carter Coal* itself.¹¹⁰ But both the limited nature of the growers' discretion (a binary choice) combined with its occurrence after Congress had already settled on a policy (albeit an optional one) tilted what might logically be an equal role for Congress and growers into what the Court perceived as a circumstance where "the power has already been exercised legislatively by the body vested with that power under the Constitution" before the growers were ever given the opportunity to vote.¹¹¹ Even if one might quibble with the logic as undermining in practice the principle prohibiting private delegations, the principle itself remained unquestioned.¹¹² Later that term, the Court upheld a plan with a similar condition-subsequent ratification scheme (this time for

106. *Id.*

107. *Id.* at 15 ("So far as growers of tobacco are concerned, the required referendum does not involve any delegation of legislative authority.").

108. *Id.* at 15–16 (distinguishing *Carter Coal*, 298 U.S. at 310, 318).

109. *Id.* at 16 ("Here it is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required favorable vote upon the referendum is one of these conditions.").

110. *See Carter Coal*, 298 U.S. at 318 (opinion of Hughes, C.J.) ("The government invokes the analogy of legislation which becomes effective on the happening of a specified event, and says that in this case the event is the agreement of a certain proportion of producers and employees, whereupon the other producers and employees become subject to legal obligations accordingly. I think that the argument is unsound and is pressed to the point where the principle would be entirely destroyed. It would remove all restrictions upon the delegation of legislative power, as the making of laws could thus be referred to any designated officials or private persons whose orders or agreements would be treated as 'events,' with the result that they would be invested with the force of law having penal sanctions.").

111. *See Currin*, 306 U.S. at 16 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 407 (1928)).

112. Unlike in *Schechter Poultry*, having found the growers' up/down vote not to be a private regulation, the Court found the vote's occurrence, along with guidance provided by the statute in choosing which markets to designate, served as a limit on the Secretary's discretion, militating in *favor* of finding a constitutional delegation to him. *Id.* at 17–18.

the regulation of milk prices, with orders issued by the Secretary of Agriculture requiring an affirmative vote by milk producers and handlers) based in large part on the role of the statute's procedural requirements in limiting the Secretary's discretion.¹¹³ In considering the delegation-based challenge to the ratification provisions, the Court cited *Curran* but took an *a fortiori* approach to the problem: If Congress could adopt the legislation without the approval of anyone, the granting of a right of election to producers did not violate nondelegation principles.¹¹⁴ That approach may again have pushed the limits of logic because the very nature of nondelegation is that there are things that Congress can do itself that it cannot do in conjunction with others. The Court may have made a mistake in how it applied the norm against private regulation, but, if anything, its cursory treatment of the question reflects the Court's unquestioning acceptance of the principle itself. Whether the Court would have eventually discovered the same error Chief Justice Hughes did is an open question, because the demise of the code-based regulation of the NIRA eventually gave way to the rise of public administrative agencies and the development of the exceptionally deferential "public" nondelegation doctrine we are familiar with today. Delegations of regulatory authority to private entities have remained essentially untested in courts because they are so far outside the normal understandings of constitutional due process that they remain untried in legislatures.

IV. ANTITRUST AS A RULE AGAINST PRIVATE REGULATION

The distinction between public and private regulation apparent in the nondelegation cases is also reflected in antitrust. The same principles that prevent Congress from delegating regulatory power to private entities—a restriction contained in constitutional law—also prevent private entities from taking regulatory power for themselves—a restriction contained in the antitrust laws. The New Deal constitutional cases and the antitrust cases of the same era apply two sides of the same principle, with one industry's attempt to emulate New Deal regulation becoming an early example of antitrust's prohibition against private regulation. Even earlier, though, antitrust law recognized the challenge that private regulation posed to public control of markets.

113. *United States v. Rock Royal Coop., Inc.*, 307 U.S. 533, 576 (1939).

114. *See id.* at 577–78 (“In considering this question, we must assume that the Congress had the power to put this Order into effect without the approval of anyone. Whether producer approval by election is necessary or not, a question we reserve, a requirement of such approval would not be an invalid delegation.” (citing *Curran*, 306 U.S. at 15)); *id.* at 578 (“This objection, too, falls before the answering argument that inasmuch as Congress could place the Order in effect without any vote, it is permissible for it to provide for approval or disapproval in such way or manner as it may choose.”).

A. ANTITRUST'S EPILOGUE TO THE NEW DEAL

The tight connection between antitrust and nondelegation principles is captured no better than in the course of events leading up to *United States v. Socony-Vacuum Oil Co.*¹¹⁵ *Socony-Vacuum* is well known among antitrust students for the rule that a scheme to manipulate prices can be “price fixing” (and therefore subject to per se liability) even if the scheme does not center on an identified price or even reflect an agreement to control prices but merely to affect them. But the case provides an even starker example of the divide between public and private regulation of markets. The restraint at issue in *Socony-Vacuum*—a comprehensive and complicated arrangement among many of the nation’s leading oil companies to stabilize the price of unregulated or “hot” oil coming out of independent oil fields—appears at first blush to be the worst kind of stereotypical fat-cat, smoke-filled-room collusion possible, but for the fact that the conspiracy was formed with the tacit approval of the Secretary of Commerce. The price control mechanism the oil companies attempted to construct in *Socony-Vacuum* closely resembled the policies underlying the NIRA industry codes; it was intended to increase stability in an otherwise volatile market.¹¹⁶ With the NIRA falling to constitutional challenge in both *Panama Refining* (which specifically concerned the regulation of hot oil through a “Petroleum Code”),¹¹⁷ and *Schechter Poultry*, the government sanction for such codes necessarily vanished,¹¹⁸ the result being that what on one day could be described as a patriotic attempt to further national economic policy the next became a criminal violation of the U.S. Code.

Antitrust’s approach to private regulation even played a role in the New Deal cases themselves, with the government relying on an antitrust case approving some degree of private control over coal markets—*Appalachian Coals, Inc. v. United States*¹¹⁹—in its argument in support of private delegation in *Schechter Poultry*.¹²⁰ As it happens, though, *Appalachian Coals* was as exceptional as a matter of antitrust law as the Roosevelt administration’s aggressive approach to private regulation was as a matter of constitutional law.¹²¹ Although its value as a rule of public regulation has largely been

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

116. See generally Daniel Crane, *The Story of United States v. Socony-Vacuum: Hot Oil and Antitrust in the Two New Deals*, in ANTITRUST STORIES 91–119 (Eleanor M. Fox & Daniel A. Crane eds., 2007).

117. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 408–10 (1935).

118. See Crane, *supra* note 116, at 98–99.

119. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933).

120. See Brief for United States at 4, 91, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (Nos. 854, 864).

121. The Hoover administration similarly favored a restrained approach to competition but rejected private regulation as a means, with antitrust law serving as the obvious way to fight private regulation. See *supra* note 82 and accompanying text. When the Hoover administration

forgotten by modern practitioners, antitrust has long been a bane of those seeking to break down the distinctions between the public and private spheres.¹²² *Appalachian Coals* notwithstanding, concern over private regulation is as much a bedrock of antitrust law as it is of constitutional law.

B. ANTITRUST AND THE CONFLICT BETWEEN PUBLIC AND PRIVATE REGULATION OF COMMERCE

Private regulation has been a matter of concern in American antitrust law for as long as there have been American antitrust laws. It is notoriously difficult to make conclusive statements about the history of the Sherman Act, but the relationship between antitrust and private regulation has appeared since the earliest cases to reach the Supreme Court.

Like the possibility of modern private delegations, the relationship of antitrust to allocations of regulatory authority is rarely at issue in modern cases, largely because the federal government's plenary regulatory authority with regard to commerce is so widely accepted. In late 1894 though, when six manufacturers of iron pipe entered into an agreement allocating among themselves the sales opportunities in an area of the United States encompassing thirty-six States and territories, the scope of Congress's power to prohibit such an agreement was far from settled.¹²³ It is no surprise, then, that the question of how antitrust relates to allocations of authority was explored most thoroughly in 1899's *Addyston Pipe & Steel Co. v. United States*, not in response to an argument regarding the legality of the restraint, but rather in response to an argument regarding Congress's authority to regulate.¹²⁴ The pipe makers challenged Congress's power to prohibit the agreement under the Sherman Act, posing a direct conflict between the power of the pipe manufacturers to agree and the power of Congress to prohibit the agreement. It was the pipe makers themselves who first drew the analogy between their agreement and regulation, arguing that the commerce power "is limited to its protection from acts of interference by state legislation or by means of regulations made under the authority of the State by some political subdivision thereof,"¹²⁵ an argument apparently based on an interpretation of the Commerce Clause as empowering

concluded that "scientific management" had exceeded its legal bounds, it brought the antitrust case that led to *Appalachian Coals*. See Meese, *supra* note 82, at 1653.

122. See Blake & Jones, *supra* note 25, at 377-78 (describing the disdain for antitrust held by both "socialists" and "planners," the latter being distinguished from the former by "their willingness to permit substantial administration to remain in the hands of private—but socially responsible—business managers").

123. The Court had, just four years earlier, ruled that the Sherman Act could not be constitutionally applied to an interstate monopoly in the manufacture of sugar because the manufacture of sugar is not "commerce." See *United States v. E.C. Knight Co.*, 156 U.S. 1, 12-13 (1895).

124. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

125. *Id.* at 227.

Congress to regulate only to “insure uniformity” among the States.¹²⁶ Justice Peckham accepted the invitation to draw the comparison between States and cartels, a comparison in which the cartel did not fare as well as they had apparently thought they would. The Court first dismissed the pipe makers’ claim regarding the reach of Congress’s power before turning the argument back on the pipe makers when applying the statute itself¹²⁷: “If a State, with its recognized power of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?”¹²⁸ And, bringing the argument back to the matter of power as between the cartel and the *federal* government:

[A]nything which directly obstructs and thus regulates that commerce which is carried on among the States, whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce. . . .

. . . .

Regulation, to any substantial extent, of such a subject by any other power than that of Congress, after Congress has itself acted thereon, even though such regulation is effected by means of private contracts between individuals or corporations, is illegal¹²⁹

Once the Court conceived of the restraint as a form of “regulation” (a word the Court used to describe the restraint at least eleven times), merely positing the question as one of regulatory power provided the answer, just as it would in the later New Deal cases considering private delegations. As an attempt to control interstate commerce, the cartel “trenches upon the power of the national legislature and violates the statute.”¹³⁰ By the end of the first decade of the Sherman Act’s existence, the Supreme Court developed in *Addyston Pipe* a comprehensive understanding of antitrust’s role in the *constitutional* allocation of regulatory authority in the American federal system: the federal government regulates interstate commerce; state

126. *Id.*

127. *Id.* at 229 (“If certain kinds of private contracts do directly, as already stated, limit or restrain, and hence regulate interstate commerce, why should not the power of Congress reach those contracts just the same as if the legislation of some state had enacted the provisions contained in them?”).

128. *Id.* at 230 (quoting *In re Debs*, 158 U.S. 564, 581 (1895)) (internal quotation marks omitted); *see also id.* at 230 (“[T]he direct results of such contracts might be the regulation of commerce among the states, possibly quite as effectually as if a state had passed a statute of like tenor as the contract.”).

129. *Id.* at 230–31.

130. *Id.* at 242; *see also id.* at 241–42 (“The power to regulate such commerce, that is, the power to prescribe the rules by which it shall be governed is vested in Congress.”).

governments regulate intrastate commerce, and private entities may regulate nothing.¹³¹

C. PRIVATE REGULATION AS A CHALLENGE TO PUBLIC REGULATORS

Given both the clarity and simplicity of the regulatory analogy, it is unsurprising that when a group of textile and apparel manufacturers attempted in the late 1930s to devise and operate their own regime of intellectual property protection, the Court was quick to equate their conduct to private regulation in the process of condemning it as a violation of the Sherman Act. In *Fashion Originators' Guild of America v. FTC*, the Court confronted a collective boycott adopted by a large group of apparel and textile makers.¹³² The textile and apparel makers claimed to produce "original and distinctive designs" that, shortly after they were marketed, would be copied by other textile and apparel makers, a practice considered "unethical and immoral" by the members of the Guild, who labeled it "style piracy."¹³³ Such copying may indeed be "unethical and immoral," but it is not illegal, an omission in the law the Guild attempted to cure through a comprehensive system of property rights (tracked by "Design Registration Bureaus") and enforcement. The defendants employed both "shoppers" to visit retailers to determine whether registered designs were being copied and sold by others and auditors to monitor the books of Guild members to assure compliance. Alleged copying violations were brought before tribunals (trial and appellate), which had the power to levy substantial fines.¹³⁴ The key to the success of the system, though, was the Guild members' group boycott of retailers who sold garments made by non-Guild members based on designs copied from Guild members.¹³⁵ The Federal Trade Commission argued that the agreements violated Section 3 of the Clayton Act against exclusive dealing contracts; the Court found them to similarly violate both Section 1 and Section 2 of the Sherman Act.¹³⁶

131. See *id.* at 247 (describing the relative roles of the federal and state governments with regard to interstate and intrastate commerce).

132. *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457 (1941).

133. *Id.* at 461.

134. *Id.* at 462–63. On the development of the Guild and its rules to prevent copying, see C. Scott Hemphill & Jeannie Suk, *The Fashion Originators' Guild of America: Self-Help at the Edge of IP and Antitrust*, in *INTELLECTUAL PROPERTY AT THE EDGE: THE CONTESTED CONTOURS OF IP* (Rochelle C. Dreyfuss & Jane C. Ginsburg eds. (forthcoming 2013)) (on file with author).

135. *Fashion Originators' Guild*, 312 U.S. at 461. Thus, the restraint operated at three levels, with textile makers and apparel makers (who bought the textiles) both agreeing to boycott retailers who failed to comply with the restraint. Retailers were invited to pledge to "cooperate" with the boycott (although it is not clear that the retailers promised to boycott manufacturers who dealt in copied designs) under threat of boycott for failing to do so. See *id.* at 461–62. The restraint, though, went beyond the copying restriction and related boycott to include restrictions on such things as retail advertising and the size of discounts that could be offered and prohibitions on residential and other non-retail-outlet sales. *Id.* at 463.

136. *Id.* at 463–65.

The Court was quick to spot the regulatory harm, drawing immediately upon *Addyston Pipe*. The problem went beyond the obvious competitive harms (such as the reduction in the number of outlets for apparel); the real problem with the regime was its relationship to the act of governing: “[T]he combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus ‘trenches upon the power of the national legislature and violates the statute.’”¹³⁷

As in *Addyston Pipe*, once the regime was identified as a form of private regulation, it was necessarily a violation of the antitrust laws. That would have been true even if the underlying copying itself had actually been illegal.¹³⁸ The violation was not merely in the creation of a new intellectual property right, but in the concerted attempt to enforce it. Establishing and enforcing property rights are functions of the state, and so antitrust responds to the regulatory harm when private entities combine to do so,¹³⁹ quite apart from whether the privately established property right also results in a market harm.

V. THE IMPLICATIONS OF REGULATORY HARM FOR ANTITRUST

Conceptually, recognizing a role for regulatory harm in antitrust analysis is a fairly simple matter even if the exact scope of what constitutes a regulatory harm—an inquiry with a variety of both economic and normative components—is itself fairly complicated. Although much modern thinking in antitrust conflates “competitive harm” with the “market harm” to inefficiency, the history of antitrust suggests concerns over competitive harms that are not based solely on the market harm resulting from restraints. Identifying regulatory harm as a separate and distinct component of competitive harm affects antitrust analysis generally, but it has particular salience for a number of doctrines.

A. ANTITRUST AND PUBLIC REGULATION

137. *Id.* at 465–66 (quoting *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 242 (1899)); see also *Associated Press v. United States*, 326 U.S. 1, 19 (1945).

138. *Fashion Originators’ Guild*, 312 U.S. at 468 (“[E]ven if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law.”).

139. See Harlan M. Blake & William K. Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 430 (1965) (“[C]ombinations of private businessmen are not to be permitted to assume quasi-governmental functions . . .”).

Several aspects of antitrust are directly connected to government regulation, and those areas are best informed by considering the regulatory rather than the market harm presented by certain conduct. States themselves (and state officials acting in their public capacity)¹⁴⁰ and private defendants complying with state regulation¹⁴¹ are largely immune from antitrust liability—antitrust’s “state action” doctrine. That immunity has nothing to do with the lack of market harm stemming from such regulatory schemes (indeed, the express purpose of such regulation is frequently to disrupt the effects of free markets) but rather acknowledges and accommodates the States’ constitutional power to regulate.¹⁴² Similarly, the regulatory interests of foreign states are acknowledged by antitrust, both with regard to acts by individuals pursuant to foreign law (the “act of state” doctrine)¹⁴³ and by foreign sovereigns themselves (both through the “act of state” doctrine and as part of a broader body of federal law regarding foreign sovereign immunity).¹⁴⁴

What is perhaps most interesting about these doctrines is not the lack of a connection between market harm and the justification for the immunities but the role that concepts of regulation play in defining the scope of these immunities. The state action doctrine, for instance, is closely calibrated to comport with intuitions regarding public regulatory power. Although municipalities do not have the same broad antitrust immunity as the States, their immunity is considerably broader than that of private individuals acting pursuant to state regulation. In order for individuals to qualify for state action immunity, their conduct must be “actively supervised” by the State.¹⁴⁵ Although municipalities must be delegated regulatory authority by the State in order to claim the immunity (which is of a piece with the constitutional law regarding municipal power generally), they do not similarly need to be either compelled to act or actively supervised by the State in order for their conduct to be immune. Thus, in *Town of Hallie v. City of Eau Claire*, a city was accused of monopolization in the market for sewage transportation and disposal services.¹⁴⁶ Although the city was ostensibly a

140. *Parker v. Brown*, 317 U.S. 341 (1943).

141. *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

142. *Parker*, 317 U.S. at 350–51 (“We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.”).

143. See *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977).

144. See *Int’l Ass’n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1358 (9th Cir. 1981).

145. *Midcal*, 445 U.S. at 105 (quoting *Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978)).

146. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

participant in the market (as a provider of services rather than a regulator of other service providers), the Court found the immunity applied even in the absence of both compulsion and active supervision by the State of Wisconsin.¹⁴⁷ Again, the difference between public and private was not in the likelihood of market harm, which is either equal or greater for a restraint undertaken by public rather than private hands. The distinction was in the “governmental” rather than “private” nature of the conduct.

Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests¹⁴⁸

As an aspect of antitrust law that explicitly serves the regulatory distinction, the scope of state action immunity can only be determined by reference to regulatory rather than efficiency interests.¹⁴⁹ Antitrust law’s role in protecting against a distinct regulatory harm suggests that the removal of antitrust immunity for these types of organizations is more serious than it might appear to be at first glance, with effects implicating republican values more directly than market harms such as predictable effects on pricing. Recognizing a role for private regulatory harm goes beyond antitrust, though. Just as nondelegation principles serve to curtail the private exercise of regulatory power generally, similar concerns should inform our understanding of measures in tension with antitrust that lend government sanction to the influence of quasi-governmental entities over markets, such as the Capper–Volstead Act.¹⁵⁰

B. DISTINGUISHING BETWEEN PROPRIETARY AND REGULATORY CONTROL

^{147.} *Id.* at 45–47.

^{148.} *Id.* at 47; *see also* FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003, 1011 (2013) (“But unlike private parties, such entities are not subject to the ‘active state supervision requirement’ because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies.” (quoting *Hallie*, 471 U.S. at 46–47)).

^{149.} *See* Peter C. Carstensen & Bette Roth, *The Per Se Legality of Some Naked Restraints: A [Re]Conceptualization of the Antitrust Analysis of Cartelistic Organizations*, 45 ANTITRUST BULL. 349, 376 (2000) (“The question is not whether a particular regulation is itself desirable, but rather whether the type of private regulation is recognized or authorized. By focusing on authority, the courts can maintain consistency in their antitrust inquiry with the broader principle that antitrust law does not judge the actual merits of naked restraints—authorized or not.”).

^{150.} Co-operative Marketing Associations (Capper–Volstead) Act, 7 U.S.C. §§ 291–292 (2012).

Accounting for regulatory effects is important in considering the public/private distinctions that antitrust law helps to reinforce, as in *Addyston Pipe* and *Fashion Originators' Guild*, but regulatory effects are also important for distinguishing between largely unproblematic proprietary interests and potentially violative regulatory ones, as in the case of the single entity doctrine, discussed above.¹⁵¹ As they pertain to antitrust, then, regulatory effects are implicated both by the public/private distinction and the proximity between a particular restraint and the exercise of a legally cognizable property right.

In Part II, I suggested that whether to describe an interest as “proprietary” or “regulatory” should be determined by measuring the distance between a particular exercise of control and a legally cognizable property interest. The regulatory/proprietary distinction tracks the public/private distinction closely. What separates government from private interests is the ability to burden individuals’ ability to enter into contracts with others. Although entering into a contract with a private party may have the effect of limiting one’s options to enter into a similar contract with others (when A sells her only snow shovel to B, she is physically precluded from also selling it to C), the loss of discretion incident to a normal contract between private parties is just that: incident. It is normally both specific in that it is connected to a specific piece of property or labor and collateral in that the effect on A’s ability to contract with others is not the object of the restraint. Governments are unique in their ability to burden individuals’ ability to enter into contracts other than as an incident to some other exchange of property—to intentionally and generally restrain individuals’ freedom to enter into contracts. Thus, the test for whether control should be deemed “regulatory” (the distance between the interest being asserted and a legally cognizable property right) is identical under both the regulatory/proprietary or public/private conceptions of regulatory control. That distance can grow in two ways: by the degree to which the form of control being exercised pertains to the property covered by an otherwise valid transaction (as in the ancillary restraint doctrine) and by the degree of identity between those exercising control over a piece of property and those who own the property (either as among cartel members or in attempts to control the behavior of others not party to an agreement, such as in a collective refusal to deal).¹⁵²

Both forms of distance are readily discernible in many antitrust cases. In *Fashion Originators' Guild*, the restraints in question were regulatory in virtually every sense. The members of the Guild, by agreeing to boycott retailers who did business with “style pirates” had surrendered discretion over their property to the collective; the retailers under threat of boycott by

151. See *supra* text accompanying notes 51–52.

152. See *supra* Part II.B.

the Guild effectively lost the ability to contract with the “style pirates” (as, conversely, did the “style pirates,” who lost the ability to contract with the retailers); and the regime sought to regulate property (ostensibly the capital held by the retailers but even more directly, the apparel manufactured by the “style pirates”) not subject to any transaction to which the Guild members were a party.¹⁵³ In this sense, collective refusals to deal are—from the perspective of regulatory harm—the worst kind of restraint, since they implicate both forms of private regulatory control: that among the cartel members and that seeking to control the activity and property of non-cartel members.

Returning to the Section 1/Section 2 distinction, while cartel cases under Section 1 always demonstrate some element of regulatory control by virtue of the individual members surrendering elements of control over their property to the cartel, Section 2 cases involving unilateral activity by monopolists do not.¹⁵⁴ A Section 2 case involving a unitary monopolist can involve regulatory control, but, since a unitary monopolist does not surrender control to a collective the same way a cartel member does, that control is likely to be described solely by the distance between the restriction and a legitimate property interest in the property underlying the transaction. This kind of regulatory harm is demonstrated by both tying and exclusive dealing—restraints that seek to convert control over property owned by one party (the monopolist) into control over both the buyer’s freedom to contract with competing sellers and the competing sellers’ property.

C. THE HORIZONTAL/VERTICAL DISTINCTION IN ANTITRUST

1. Market Harm, Regulatory Harm, and Vertical Restraints

Identifying and distinguishing the regulatory harm from market harm in various restraints can provide valuable insights into some of the most fundamental elements of antitrust, including the distinction between vertical and horizontal restraints. As an element of competitive harm, market harm occurs along the axis on which prices themselves operate: the vertical. Yet antitrust law has, for decades, been more permissive toward vertical restraints than horizontal ones,¹⁵⁵ to the point that the last vertical distributional restraint subject to *per se* treatment—minimum resale price maintenance—shifted to rule-of-reason analysis in 2007.¹⁵⁶ Even vertical interbrand foreclosure requires market power in order to be an antitrust

153. See *supra* text accompanying notes 132–36.

154. See *supra* Part II.D.

155. See *supra* note 56 and accompanying text.

156. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007).

violation, unlike its horizontal counterpart.¹⁵⁷ One explanation given is that vertical restraints present less risk of allocative displacement than horizontal ones,¹⁵⁸ but that is a conclusion that simply begs the question of what the source of market power is. It is market power that results in allocative displacement; from the perspective of efficiency, it is irrelevant whether that market power is the result of horizontal agreements or held unilaterally and exercised vertically.¹⁵⁹ Vertical and horizontal agreements are likely to have very different regulatory effects, though, for the reasons described above. Disposal of one's property may lead to market harms, but many vertical agreements, particularly vertical distributional restraints, will not result in any regulatory harm. The close relationship between rent-seeking and the exercise of the proprietary (as opposed to regulatory) control—the connection to the exercise of property rights—provides a better justification for antitrust's increased deference for vertical restraints than any approach predicated on market harm. Nor is the deference to property rights limited to the distinction between horizontal and vertical agreements. The charging of supracompetitive prices is itself privileged under Section 2, a privilege that can be attributed to the difficulty in distinguishing between rightful and wrongful exercises of the otherwise uncontroversial—and unremarkably proprietary—right to dispose of one's property. The requirement of monopolization conduct itself—on which more below—can be viewed as one aspect of antitrust law that honors the distinction between regulatory and proprietary control. The reason for providing increased deference for vertical restraints over horizontal restraints is not because they are less likely to lead to market harm; it is because of the relationship between vertical restraints and the exercise of a legitimate property interest (and consequently, the lack of a regulatory harm).

2. The Limits of Verticality: Exclusion

The potential for regulatory harm also suggests the limits of theories that help justify antitrust's preference for vertical restraints. The "one monopoly rent theorem" posits that monopolists will not attempt to extend their control into related markets because they can extract all of the potential monopoly profits by controlling any single product along the

157. Compare *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 35 (2006) (market power required for tying violation), with *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972) (per se treatment of horizontal interbrand foreclosure).

158. See *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977) ("[W]hen interbrand competition exists . . . it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product.").

159. *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2209 (2010) ("Monopoly power may be equally harmful whether it is the product of joint action or individual action.").

vertical chain.¹⁶⁰ The one monopoly rent theorem is thus a compelling argument against strict antitrust scrutiny for restraints with largely vertical effects because the market harm is a product of the market power the monopolist (assumedly legally) possesses in any one market and is not increased by the restraint. But the one monopoly rent theorem addresses only market harms; if a vertical restraint presents a regulatory harm in addition to the (admittedly unlikely) market harm, the one monopoly rent theorem is of only limited value in formulating the appropriate response. Although the one monopoly rent theorem provides a compelling response to theories of market harm of interbrand foreclosure, it does not address the attendant regulatory harms.

Practically no restraint has been more profoundly affected by the one monopoly rent theorem than tying. Tying presents the archetypal case of a monopolist in one market attempting to extend its monopoly into another market.¹⁶¹ Tying frequently enhances efficiency, and the one monopoly rent theorem explains why tying is ill-suited to actually enlarging either market power or the rents market power garners rather than merely shifting the market from which a “single” monopoly rent can be extracted.¹⁶² Similarly, many exclusive dealing agreements increase efficiency by providing buyers and sellers assured sources of supply and sales, and the vertical nature of exclusive dealing arrangements makes them unlikely generators of additional market power.¹⁶³ Given the procompetitive nature of many tying and exclusive dealing arrangements, combined with their limited ability to increase market power, the Court has generally shifted away from suspicion of both tying¹⁶⁴ and exclusive dealing,¹⁶⁵ in the former case evolving away from an absolute per se rule against tying and toward a modified per se rule that requires the defendant to have market power in the tying product

160. See *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990); Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957); Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281 (1956).

161. On tying and the “simple” leverage approach, see HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 459–60 (2011).

162. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 35–36 (1984) (O’Connor, J., concurring); HOVENKAMP, *supra* note 161.

Others doubt the validity, or at least the applicability, of the one monopoly rent theorem, see, e.g., Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397 (2009), but such responses largely accept the theorem’s validity but doubt the degree to which it minimizes the harm that tying poses to efficiency. Regardless of the apparent limits of the theorem, the current shape of tying law owes much to the theorem’s explanatory power.

163. See HOVENKAMP, *supra* note 161, at 479.

164. See *Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 35–36 (2006) (recounting the historical rejection of an absolute per se prohibition against tying based largely on the procompetitive benefits of many ties).

165. See *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 305–07 (1949) (describing the procompetitive benefits of exclusive dealing arrangements).

market as an element of a “per se” prohibition against tying,¹⁶⁶ and in the latter case by adopting a rule-of-reason approach to exclusive dealing as an interpretation of the statutory prohibition contained in Section 3 of the Clayton Act against all exclusive dealing arrangements that “substantially lessen competition.”¹⁶⁷

Viewed from the perspective of regulatory harm, though, restraints like tying and exclusive dealing aimed at interbrand foreclosure present risks that intrabrand distributional restraints, such as resale price maintenance, do not. Interbrand foreclosure seeks to limit the ability of buyers to engage in contracts for property unrelated to the contract—in the case of exclusive dealing, contracts for identical goods; in the case of tying, contracts for complementary goods. It is perhaps for this reason that the Supreme Court has had such difficulty articulating exactly what harm it is that the prohibition against tying seeks to avoid. In *Jefferson Parish Hospital District No. 2 v. Hyde*, Justice Stevens’ majority opinion disclaimed harm to consumers in the form of being forced to buy a product (the tied product) they do not want, since that additional purchase does not displace demand for the tied product but is effectively the same thing as a seller with market power extracting a higher price, which is not problematic.¹⁶⁸ Instead, Justice Stevens keyed on the ability of a monopolist to “force a purchaser to do something that he would not do in a competitive market.”¹⁶⁹ Exactly what purchasers would “do,” is unclear, since Justice Stevens cited a litany of potential harms, some visited upon consumers (such as price discrimination, which frequently does not harm consumers,¹⁷⁰ and full-line forcing,¹⁷¹ both of which simply allow monopolists to more fully extract rents), some upon competitors (such as increasing the cost of entry), and some upon unidentified victims (such as “insulating” an inferior product from competition in the tied product market, which appears to be a general term

166. *Ill. Tool Works*, 547 U.S. at 34–35.

167. Compare Clayton Act § 3, 15 U.S.C. § 14 (2012), with *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961) (“In practical application, even though a contract is found to be an exclusive-dealing arrangement, it does not violate the section unless the court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected.”). On the use of the rule-of-reason approach for exclusive dealing cases, see HOVENKAMP, *supra* note 161, at 485–86.

168. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984).

169. Compare *Jefferson Parish*, 466 U.S. at 16 (“[W]hen a purchaser is ‘forced’ to buy a product he would not have otherwise bought even from another seller in the tied-product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.”), with *id.* at 13–15 (explaining the problem of the purchaser being forced to do something they would not do in the tied product market).

170. See George J. Stigler, *United States v. Loews, Inc.: A Note on Block-Booking*, 1963 SUP. CT. REV. 152.

171. See *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 513–14 (1969) (discussing full-line forcing in the context of rent extraction).

for reduced competition that could result either in higher prices for consumers or foreclosure of competitors, or maybe both).¹⁷² None of the examples cited by Justice Stevens would survive rigorous application of the one monopoly rent theorem, as Justice O'Connor pointed out in her concurrence in *Jefferson Parish*.¹⁷³ Rather, what Justice Stevens seems to have been getting at is the way that tying arrangements interfere with choice itself, not any particular economic consequence of restricting choice—a regulatory harm rather than a market harm:

[F]rom the standpoint of the consumer—whose interests the statute was especially intended to serve—the freedom to select the best bargain in the second market is impaired by his need to purchase the tying product, and perhaps by an inability to evaluate the true cost of either product when they are available only as a package. In sum, to permit restraint of competition on the merits through tying arrangements would be, as we observed in *Fortner II*, to condone “the existence of power that a free market would not tolerate.”¹⁷⁴

So understood, tying presents the possibility of both a market harm in the form of rent extraction that results in inefficiency (the viability of which is subject to the one monopoly rent theorem) and a separate regulatory harm to consumers’ freedom to buy from competitors and competitors’ freedom to enter markets (which is not). Only by recognizing these two separate harms can one rationalize the current shape of tying doctrine.

Exclusive dealing arrangements ostensibly present the same harm to choice, but the identical nature of the property covered by the contract and the property the buyer is prohibited from buying elsewhere frequently provides its own justification for the restriction.¹⁷⁵ The restrictions in exclusive dealing contracts are no different than those in a tying contract as a matter of market power, but they are much more proximate to the res of the contract than in a tie because they restrict access to an identical product. The proximity of the restriction to the res is not perfect (because the restriction extends to property owned by other sellers, who are not party to the agreement) but is much closer than in a tying case, where the restriction pertains to a completely different product. The difference in relative proximity between tying and exclusive dealing arrangements goes some way toward explaining the disparate treatment of exclusive dealing contracts (which must foreclose a “substantial share of the relevant market”) and tying

172. See *Jefferson Parish*, 466 U.S. at 14–15.

173. See *id.* at 36–37 (O'Connor, J., concurring).

174. *Id.* at 15 (majority opinion) (quoting *U.S. Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 617 (1977)).

175. The distinction between tying and exclusive dealing can be elusive, and many restraints may qualify as both. See HOVENKAMP, *supra* note 161, at 481–82.

contracts (which are per se illegal under *Jefferson Parish* merely if the defendant has market power in the tying market).

Perhaps more importantly, disaggregating the regulatory harm from the potential market harm of interbrand foreclosure more clearly identifies the direction in which the harm flows. As described above with regard to market power generally, the market harm realized by a simple, leveraged tie would be realized through the extraction of rents from consumers. The regulatory harm is suffered both by consumers, whose choices are limited, and by competitors, whose choices and property are likewise burdened by the restriction. By separately identifying the regulatory harm inherent in certain vertical restrictions, we can more clearly identify the *horizontal* effects of certain vertical restraints—effects that implicate the legitimate interests of competitors as much as they do consumers.

Accounting for regulatory effects can also help to make sense of some cases otherwise in tension with neoclassical microeconomic principles. In addition to better explaining Justice Stevens' concerns in *Jefferson Parish*, the effect on choice-as-choice that describes regulatory harm provides a better justification for other tying cases seemingly at odds with economic analysis, such as *Eastman Kodak Co. v. Image Technical Services, Inc.*, in which Kodak was accused of tying copier replacement parts to service (that is, Kodak required customers who wanted parts to also purchase service from Kodak).¹⁷⁶ That case, decided eight years after *Jefferson Parish*, pushed upon the market-power requirement for the illegality of tying as announced in *Jefferson Parish* because parts were necessary only for Kodak copiers and Kodak did not have market power in the *copier* market. To explain the possibility that Kodak might have market power for replacement parts for a product when Kodak lacked market power in the product itself, Justice Blackmun, writing for the majority, keyed upon the possibility that copier buyers may not be able to account for the increase in the price of parts and service resulting from the restraint because those expenditures come after the initial copier purchase,¹⁷⁷ a rather complicated theory that suggested that large firms who buy and both use extensively and service their own copiers were economically irrational in their purchasing decisions, prompting an excoriating dissent from Justice Scalia on that ground.¹⁷⁸ If Justice Scalia is right and copier buyers are economically rational, it is impossible to build a convincing argument of how the tie in *Kodak* can be economically harmful.

176. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 457–58 (1992).

177. *Id.* at 473 (“Respondents offer a forceful reason why Kodak’s theory, although perhaps intuitively appealing, may not accurately explain the behavior of the primary and derivative markets for complex durable goods: the existence of significant information and switching costs. These costs could create a less responsive connection between service and parts prices and equipment sales.”).

178. *See id.* at 496 (Scalia, J., dissenting) (“[W]e have never before premised the application of antitrust doctrine on the lowest common denominator of consumer.”).

It is possible, however, to identify the regulatory effect of the arrangement as separate from the market harm: it regulates the ability of both Kodak copier buyers and independent service providers to contract for service of Kodak copiers. Indeed, based on the combination of restraints, it appears that Kodak's primary target was not their customers (in the form of supracompetitive prices for service) but rather the independent service providers themselves.¹⁷⁹

The same lack of market harm is evident in other tying cases that are inexplicable on rent-seeking grounds, such as *Northern Pacific Railway v. United States*,¹⁸⁰ which involved the tying of railroad shipping services to land sales, and *International Salt Co. v. United States*, which involved the tying of salt tablets to patented machines using salt.¹⁸¹ Neither restraint was well-calibrated to cause any real form of market harm even under the "simple" form of leveraging abandoned in *Jefferson Parish*—the provisions in both cases allowed buyers to buy from competitors if their prices were lower, negating the possibility of rent extraction through the ties.¹⁸² Instead, the Court appeared to be concerned with the effect of the restraints on choice itself, which more closely tracks concerns over foreclosure than rent extraction. In response to the assertion that the provisions did not allow rent extraction in *Northern Pacific Railway*, Justice Black essentially conceded the lack of market harm but found the restraint harmful nonetheless: "[H]owever that may be, the essential fact remains that these agreements are binding obligations held over the heads of vendees which deny defendant's competitors access to the fenced-off market on the same terms as the defendant."¹⁸³ In *International Salt*, the Court identified two potential reasons for finding the provisions illegal: as "price fixing" (which, given the absence of a horizontal agreement among suppliers, they certainly were not) and unreasonable per se as a foreclosure of the market to competitors, citing *Fashion Originator's Guild*.¹⁸⁴ If one takes seriously the prohibition against private regulation, competitive foreclosure provides some basis—a better basis than does the likelihood of market harm—for outlawing the restraints in *Kodak*, *Northern Pacific Railway*, and *International Salt*.

That is not to say that the restraints in *Kodak*, *Northern Pacific Railway*, and *International Salt* should necessarily be illegal on the basis of their ability

179. Kodak was willing to sell parts to its copier *customers* without requiring them to buy service; they refused to sell parts only to the independent service providers. *Id.* at 458 (majority opinion).

180. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958).

181. *Int'l Salt Co. v. United States*, 332 U.S. 392, 394–95 (1947).

182. *See N. Pac. Ry.*, 356 U.S. at 11–12; *Int'l Salt*, 332 U.S. at 396–97.

183. *N. Pac. Ry.*, 356 U.S. at 12; *see also Int'l Salt*, 332 U.S. at 397 ("We do not think this concession relieves the contract of being a restraint of trade, albeit a less harsh one than would result in the absence of such a provision.").

184. *Int'l Salt*, 332 U.S. at 396; *see also N. Pac. Ry.*, 356 U.S. at 8 (buyers "got the land they wanted by yielding their freedom to deal with competing carriers").

to exclude competitors. Identifying the regulatory effect of a restraint is not to condemn it, but it does provide a distinct way to think about the effects of restraints in foreclosing competition and does so in a way that connects those effects to larger principles about private regulation as embodied in the constitutional public/private distinction. It also opens the possibility of outlawing interbrand foreclosure solely based on its power to restrict choice regardless of the effect on economic output.

A shift in antitrust analysis to make more room for foreclosure-based approaches to harm has the potential to privilege the interest of competitors, since competitive foreclosure is a harm suffered primarily by competitors rather than consumers. “The purpose of the antitrust laws . . . is ‘the protection of *competition*, not *competitors*,’”¹⁸⁵ and the societal antitrust movement has been rightly criticized for frequently placing the interests of competitors ahead of those of consumers. That error has occurred largely because of the societal antitrust movement’s failure to clearly identify a harm befalling competitors that does not operate through the choice of consumers to patronize large businesses—to identify a way to protect competitors without harming consumers,¹⁸⁶ which is hard to square with the volumes of pro-consumer rhetoric associated with the antitrust laws. Antitrust does provide benefits to both competitors and consumers, but many of the benefits that antitrust provides to competitors are better stated in terms of regulatory harm rather than market harm.

Unlike the societal antitrust movement, introducing the competitor-sensitive consideration of regulatory harm does not elevate the interest of competitors above those of consumers for two reasons. First, consumers rightly retain their central place in evaluating market harms; nothing about disaggregating regulatory harm from market harm suggests that we ignore efficiency (and its benefits to consumers) in antitrust analysis. Second, the

185. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007) (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990)).

186. Although many in the societal antitrust movement simply argued against the existence or scope of economies of scale themselves, see, e.g., BRANDEIS, *Regulation*, *supra* note 24, at 109, 109–11; BRANDEIS, *Competition*, *supra* note 24, at 112, 112–16; Louis B. Schwartz, *Institutional Size and Individual Liberty: Authoritarian Aspects of Bigness*, 55 NW. U. L. REV. 4, 17–18 (1960), the trade-off between the interests of small businesses and those of consumers has always been transparent in the limitation of consumer choice in laws seeking to legislate smallness in the economy, see *Leegin*, 551 U.S. at 906 (“The rationales for . . . provisions [preserving small retailers as against large manufacturers] are foreign to the Sherman Act. Divorced from competition and consumer welfare, they were designed to save inefficient small retailers from their inability to compete. The purpose of the antitrust laws, by contrast, is ‘the protection of *competition*, not *competitors*.’”). The argument that limiting the size of business, which will in-turn empower labor to demand higher wages, will somehow lead to lower prices has always been complex and counterintuitive, even in the few cases where it might be accurate. By limiting bigness, many societal antitrust arguments necessarily favor the interests of small business at the cost of consumers, even if their goal is, in the end, to maximize consumer welfare. Cf. Flynn, *supra* note 25, at 1188 (describing “a preference for ‘a system of small producers’”).

reduction in choice that describes a regulatory harm is felt by both consumers and competitors; including the regulatory harm felt by competitors is not (unlike considering the economic impact of restraints on competitors) generally at odds with the interests of consumers.

D. THE ROLE OF CONDUCT AND INTENT IN ANTITRUST

A rule of antitrust analysis fixated on the effect of restraints on markets provides diminishing room for other elements, such as conduct and intent. A strict rule of inefficiency, for instance, would provide a remedy to any accretion or exercise of market power, which is a much broader standard of liability than generally imposed by the antitrust laws. By shifting antitrust analysis away from market effects, a theory that accounts for regulatory effects provides more room for conduct and intent—both of which inform whether a particular effect should be considered “regulatory”—to figure in antitrust analysis.

1. Conduct Generally

Acknowledgement of antitrust’s interest in regulatory harm has the potential to enlarge the reach of the antitrust laws to cover conduct with less market effect than under the current, rule-of-reason-dominated approach, or even no market effect at all (on which more below). Justice Stevens’ view of tying in *Jefferson Parish* is broader than Justice O’Connor’s (and recognition of the place of foreclosure effects in cases like *Kodak*, *Northern Pacific Railway*, and *International Salt* at least suggests the possibility of walking back the general liberalization of the prohibition against tying). The effect of considering regulatory harm, though, is not solely (or necessarily even on balance) in the direction of antitrust expansion.

Regulatory control is distinct from proprietary control in that it is exercised apart from a cognizable property right, and so conduct associated with property ownership is potentially less problematic under a view of antitrust that includes consideration of regulatory effects. Antitrust already accommodates proprietary control in several ways, such as the scope of the intra-enterprise liability doctrine, the legality of rent extraction itself, and the deference to vertical, intrabrand restraints.¹⁸⁷ The accommodation of proprietary control places restraints imposed unilaterally in a different stead than restraints imposed collectively—a distinction recognized in the differences between Section 1 and Section 2—but suggests a specific reason for doing so. In the language of *Carter Coal*, making business decisions pertaining to one’s own property is “[t]he difference between producing coal and regulating its production.”¹⁸⁸

187. See *supra* text accompanying notes 53–56.

188. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

2. Purchasing Both Property and Control: The Case of Mergers

As explained previously, while “regulators” may obtain their control in a variety of ways, they rarely buy it,¹⁸⁹ which means that including regulatory effects in antitrust analysis suggests some tension in imposing antitrust liability for acquisitions of control (including exploitable market power) that accompanies the acquisition of property. Conduct has always occupied an uneasy place in monopolization claims, with Judge Learned Hand suggesting that practically any activity short of having a monopoly “thrust” upon oneself can satisfy the conduct requirement of Section 2.¹⁹⁰ Courts have since stepped back from so broad an interpretation of Section 2, requiring instead some form of anticompetitive conduct in combination with market power.¹⁹¹ Section 7 of the Clayton Act, which outlaws the acquisition of monopoly through merger or the acquisition of assets,¹⁹² essentially redefines the Section 2 requirement of exclusionary conduct to include the purchase of market power. It may make sense to do so from the standpoint of avoiding the market harm of allocative displacement (since buying a monopoly may be the easiest, if not the cheapest way to obtain one), but, by unifying ownership and control, mergers present little risk of regulatory harm.

Long before the advent of Section 7, the lack of a distinct harm arising from the purchase of market power formed the basis of the earliest objections outlawing mergers under Section 1. In *Northern Securities Co. v. United States*, the Court found a merger between competing railroads to be a violation of the Sherman Act.¹⁹³ Justice Holmes, joined by Chief Justice Fuller and Justices White and Peckham, drew a strong distinction between

189. See *supra* Part II.B.

190. See *United States v. Aluminum Corp. of Am.*, 148 F.2d 416, 431 (2d Cir. 1945) (expansion of capacity sufficient to violate Section 2).

191. On the various definitions of the requisite conduct, see HOVENKAMP, *supra* note 161, at 297–301.

192. Clayton Act § 7, 15 U.S.C. § 18 (2012).

193. *N. Sec. Co. v. United States*, 193 U.S. 197 (1904). The merger was attacked under both Section 1 and Section 2; the Court did not distinguish in its opinion between Section 1 and Section 2, but the judgment appears to have rested on Section 1. See *id.* at 354–55 (“By the decree in the circuit court it was found and adjudged that the defendants had entered into a combination or conspiracy in restraint of trade or commerce among the several states, such as the act of Congress denounced as illegal; and that all of the stocks . . . was acquired, and is by it held, in virtue of such combination or conspiracy, in restraint of trade and commerce among the several states.”). Justice Brewer concurred to point out that, while the stock purchase might be valid if undertaken by an individual, it was not because it was done by combination between the competing railroads, seemingly drawing a distinction between solitary liability under Section 2 and liability for collective action under Section 1. See *id.* at 362 (Brewer, J., concurring) (“But no such investment by a single individual of his means is here presented. There was a combination by several individuals, separately owning stock in two competing railroad companies, to place the control of both in a single corporation.”).

mergers, which unify ownership, and contracts and combinations in restraint of trade, which do not:

Contracts in restraint of trade are dealt with and defined by the common law. They are contracts with a stranger to the contractor's business (although, in some cases, carrying on a similar one), which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would. . . .

Combinations or conspiracies in restraint of trade, on the other hand, were combinations to keep strangers to the agreement out of the business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large. . . .

But the provision has not been decided, and, it seems to me, could not be decided without a perversion of plain language, to apply to an arrangement by which competition is ended through community of interest—an arrangement which leaves the parties without external restriction. . . . It simply requires that a party's freedom in trade between the states shall not be cut down by contract with a stranger.¹⁹⁴

In so doing, Justice Holmes keyed on the distinction between ownership and control embodied in an understanding of regulatory effects—a distinction not implicated in merger cases.¹⁹⁵ The objection to contracts in restraint of trade was that they gave non-owners—"strangers"—control over the owner's business; combinations attempted to control the business of non-parties to agreements by excluding them from markets.¹⁹⁶ As attempts to control property owned by others, both contracts and combinations in restraint of trade were violations of public policy long before the rise of neoclassical understandings about the inefficiency generated by the accumulation of market power. If regulatory harm figures at all in the balance of deciding whether particular conduct should raise antitrust concerns, its absence in the case of mergers and acquisitions suggests less of a central role for Section 7—and in general for restraints that essentially

194. *Id.* at 404–06 (Holmes, J., dissenting).

195. *See id.* at 361 (Brewer, J., concurring) ("Further, the general language of the act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen.").

196. *Id.* at 406 (Homes, J., dissenting) ("Contracts in restraint of trade, I repeat, were contracts with strangers to the contractor's business, and the trade restrained was the contractor's own.").

involve the purchase of market power—in the body of antitrust law and militates against broader antitrust regulation of mergers.

3. Intent

Like conduct, intent has not featured prominently in many modern antitrust cases, perhaps because intent is largely irrelevant to the market effects of a particular restraint while introducing intent not only increases the cost of litigation but is actually likely to introduce errors in ascertaining the effects of a restraint on competition.¹⁹⁷ A shift in antitrust analysis to include regulatory effects, though, by focusing on aspects of restraints unrelated to market harm, suggests a much larger role for intent, because intent features prominently in regulation and does so in a variety of ways.

Just as in efficiency-driven rule-of-reason analysis, intent can provide information about the likely regulatory effects of a restraint. As the Court explained in *Chicago Board of Trade*, “knowledge of intent may help the court to interpret facts and to predict consequences.”¹⁹⁸ Translated to the context of regulatory effects, a restraint intended to control others’ choices is more likely to do so than one adopted for another purpose.

Intent plays a more prominent role in the classification of a restraint as regulatory, though, because regulation is itself an act determined by the intent underlying it. Unlike economic effects, regulatory effects necessarily include a normative component connecting their effect to their intent.¹⁹⁹ When A sells her snow shovel to B, she effectively limits both B’s freedom to buy other snow shovels and C’s freedom to sell a snow shovel to B. Whether we would consider that act “regulatory” wouldn’t depend on the degree or certainty to which she’d limited B’s and C’s freedom, but rather on A’s (and maybe B’s) intent on entering into the sales contract. The sale of a good is not “regulatory” regardless of whether it completely forecloses competition because it is just that: a sale. Ties can exercise both proprietary (a vertical condition of sale of the tying product) and potentially regulatory (a horizontal market foreclosure in the tied product market) power. Accounting for the regulatory interest in antitrust law suggests that the extent to which each effect should be weighed in the evaluation of the tie depends in at least some degree on the intent underlying the tie.

197. See *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401–03 (7th Cir. 1989) (Easterbrook, J.). Some, challenging the assumptions of neoclassical microeconomics, have suggested a larger role for intent in interpreting the economic effects of particular restraints, see, e.g., Maurice E. Stucke, *Is Intent Relevant?*, 8 J.L. ECON. & POL’Y 801 (2012), but that is not my enterprise. The point is not that intent should be relied upon to determine market effects, but rather that intent is relevant for determining the regulatory effects of a restraint even if it is irrelevant for determining its market effects.

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

199. See *Washington v. Davis*, 426 U.S. 229 (1976).

The use of intent to distinguish between private regulation and the normal conduct of business is hardly new to the antitrust laws. Just as the Court identified the difference between regulating business and participating in it in *Carter Coal*, it identified the role of intent in distinguishing between a “direct” and “indirect” effect on commerce for the purposes of applying the antitrust laws in *Addyston Pipe*. An agreement entered into for a legitimate business purpose does not become “regulation” of commerce—and consequently a violation of the antitrust laws—simply because it has an effect on commerce:

[W]hen it is seen that the agreement entered into does not directly relate to and act upon and embrace interstate commerce, and that it was executed for another and entirely different purpose, and that it was calculated to attain it, the agreement would be upheld, if its effect upon that commerce were only indirect and incidental.²⁰⁰

In this way, intent can function with regard to regulatory harms the same way it operates in Section 1 cases generally, reclassifying restraints with indirect regulatory effects into ones that impose direct regulatory harms.²⁰¹

E. THE REDISCOVERED ROLE OF THE PER SE RULE

200. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 244 (1899). When the reach of federal power to regulate intrastate commerce was more heavily contested, intent also featured prominently in determining whether a particular scheme had a sufficient nexus with interstate commerce as to bring it within the reach of the Commerce Clause and hence the Sherman Act. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 547 (1935) (“Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. But where that intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to the federal statute, notwithstanding its broad provisions.” (citation omitted)); see also *Carter v. Carter Coal*, 298 U.S. 238, 304–05 (1936) (“*Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, 310 [(1925)], and kindred cases, involved conspiracies to restrain interstate commerce in violation of the Anti-trust laws. The acts of the persons involved were local in character, but the intent was to restrain interstate commerce, and the means employed were calculated to carry that intent into effect. Interstate commerce was the direct object of attack; and the restraint of such commerce was the necessary consequence of the acts and the immediate end in view. The applicable law was concerned not with the character of the acts or of the means employed, which might be in and of themselves purely local, but with the intent and direct operation of those acts and means upon interstate commerce. ‘The mere reduction in the supply of an article,’ this court said in the *Coronado Co.* case, ‘to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act.’” (citations omitted)).

201. See *United States v. Columbia Steel Co.*, 334 U.S. 495, 522 (1953) (“[A] restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal per se.”).

Recognizing a distinct regulatory harm seemingly complicates antitrust analysis because the current dominant approach—the rule of reason—is premised on the balancing of procompetitive and anticompetitive effects, leaving little room for other values. A regulatory harm is largely incommensurable with the effect on efficiency emblematic of market harms. In this sense, the rule of reason, although ostensibly endlessly flexible in its application because of its ability to consider a limitless number of factors in determining the overall effect of the restraint, is actually extremely narrow for its inability to consider non-efficiency-based values in deciding antitrust cases. The rule of reason itself is an obstacle to accommodating a distinct regulatory harm as a component in evaluating the legality of restraints. Instead, a better vehicle for reintroducing the concept of regulatory harm into antitrust is a revitalized *per se* rule.

The *per se* rule has occupied an uneasy place in antitrust law for the last several decades, which have seen a dramatic decline in the number of restraints subject to *per se* liability. As understood by the Court in *Leegin*, the *per se* rule is simply a shortcut to deciding the legality of a restraint that would otherwise certainly fail after receiving a full rule-of-reason analysis:

Resort to *per se* rules is confined to restraints, like those mentioned, “that would always or almost always tend to restrict competition and decrease output.” To justify a *per se* prohibition a restraint must have “manifestly anticompetitive” effects and “lack . . . any redeeming virtue.”

As a consequence, the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason.²⁰²

It only makes sense, then, that as the Court has become more sophisticated in evaluating the market effects of particular restraint, it has become less necessary to rely on rough and imprecise guides like the *per se* rule.²⁰³ With the Court becoming so good at conducting the balancing of procompetitive and anticompetitive effects called for by the rule of reason, the *per se* rule is limited to a small set of cases in which the anticompetitive effects are so patent as to require no real conversation about effects at all.

The rule of reason itself, though, is more than capable of deciding such cases—a restraint satisfying the current *per se* formulation would almost

202. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886–87 (2007) (citations omitted); *id.* at 909 (Breyer, J., dissenting) (“Nonetheless, sometimes the likely anticompetitive consequences of a particular practice are so serious and the potential justifications so few (or, e.g., so difficult to prove) that courts have departed from a pure ‘rule of reason’ approach.”).

203. See Posner, *supra* note 15, at 39–40.

certainly fail under the rule of reason, with the only real question being what the relative burdens are of the plaintiff and defendant at different stages of the litigation. That does not mean that rule-of-reason analysis needs to be applied with all its features in every case. Most negligence actions are governed by the tort standard of “reasonableness,” but that does not mean that every slip-and-fall or fender-bender case requires mountains of discovery and expert witness reports. The normal vehicles for summary adjudication can be applied in rule-of-reason cases, a question the Court addressed in *California Dental Ass’n v. FTC*,²⁰⁴ in which the Court debated the relative burdens of plaintiff and defendant in the conduct of rule-of-reason cases.²⁰⁵ The rule of reason is a standard of liability for antitrust violations as much as it is a process for reaching that determination; it can be applied in a variety of ways depending on the availability of information about the procompetitive and anticompetitive effects of a restraint. If the anticompetitive effects so patently outweigh the procompetitive ones, then it is irrelevant whether we label the form of analysis “rule of reason” or “per se,” for the outcome will be the same.²⁰⁶ The per se rule is an imprecise proxy for adjudicating cases based on the allocative effects of a particular restraint, and as such, it necessarily gets some outcomes wrong. Normally the reason for adopting a heuristic would be because its simplicity reduces decision costs, but it’s hard to identify much relative simplicity in the per se rule. Indeed, the moniker “per se” has become somewhat misleading, as cases determining *whether* to apply the per se rule or the rule of reason become as long as ones actually applying the rule of reason itself.²⁰⁷ The per se rule might be defended on many grounds, but its relationship to welfare-maximizing outcomes is perhaps its weakest one.

The per se rule, though, provides a perfect vehicle for courts to consider the possibility that the harm of a particular restraint relates not to its market effect but rather to its regulatory effect. The rise of the rule of

204. *Cal. Dental Ass’n v. FTC*, 526 U.S. 756 (1999).

205. *Compare id.* at 775–76 (defendant’s assertion of a plausible procompetitive justification triggers full rule-of-reason analysis), *and id.* at 779 (requiring rule of reason treatment but not necessarily “the fullest market analysis”), *with id.* at 791–92 (Breyer, J., dissenting) (requiring evidence of procompetitive effects to allow defendant to proceed past summary adjudication).

206. *See id.* at 779 (majority opinion) (“The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like ‘per se,’ ‘quick look,’ and ‘rule of reason’ tend to make them appear. We have recognized, for example, that ‘there is often no bright line separating *per se* from Rule of Reason analysis,’ since ‘considerable inquiry into market conditions’ may be required before the application of any so-called ‘*per se*’ condemnation is justified.”).

207. *Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1 (1979), for instance, was a thirty-eight-page case about whether the restraint should be subject to the per se rule or the rule of reason. *See also* *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 (1984) (“[W]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition.”).

reason has accompanied a loss of understanding about the values that competition represents beyond its ability to produce efficient outcomes. In *Trenton Potteries*, for example, the Court identified the problem presented by price fixing as being not so much about the likely effects on efficiency (because whether fixed prices lead to efficient allocation of resources depends on the circumstances of the market and the prices chosen) but rather about the choice between fixed prices and competitive markets as representing “a choice between rival philosophies”²⁰⁸ for organizing markets. Similarly, excluding evidence about the effects of the restraints in *Fashion Originators’ Guild* was proper, because demonstrating the reasonableness of the restraint was not only fruitless, it was irrelevant.²⁰⁹

Although the rule of reason is an extraordinary tool, it is neither designed, nor able, to measure the philosophy underlying a particular restraint, a defect that has led the Court to strain the boundaries of rule-of-reason analysis in cases in which the problem with a particular restraint was not its inability to lead to efficient outcomes but rather its inconsistency with the “philosophy” of the Sherman Act. Thus, in *National Society of Professional Engineers v. United States*,²¹⁰ the Court chose to apply the rule of reason²¹¹ to a prohibition against “the submission of any form of price information to a prospective customer which would enable that customer to make a price comparison on engineering services,”²¹² but it did not reject the restraint as, on balance, harmful to efficiency. Indeed, there are many circumstances when consumers have extremely limited information about the overall characteristics of a product and up-front prices for one part of the product (the engineering services) mask long-term costs that are difficult to either

208. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 398 (1927).

209. *Fashion Originators’ Guild of Am. v. FTC*, 312 U.S. 457, 468 (1941) (“Under these circumstances it was not error to refuse to hear the evidence offered, for the reasonableness of the methods pursued by the combination to accomplish its unlawful object is no more material than would be the reasonableness of the prices fixed by unlawful combination.”).

210. *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679 (1978).

211. Exactly why the Court chose to apply the rule of reason is unclear. The parties argued the question in the briefs (the United States arguing for per se treatment and the Society arguing for rule-of-reason analysis), and the D.C. Circuit had labeled the restraint “illegal without regard to claimed or possible benefits.” *See id.* at 686 (quoting *United States v. Nat’l Soc’y of Prof’l Eng’rs*, 555 F.2d 978, 984 (D.C. Cir. 1977)). But the Court did not address its choice of analysis in the opinion; it simply labeled its analysis “rule of reason” and proceeded from there. It is possible that the Court simply chose to carry forward the solicitude for professional organizations it had adopted in *Goldfarb v. Virginia State Bar*, and, since the restraint failed the more generous rule of reason analysis on its face, there was little need to decide which form of analysis to apply. *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975); *see Prof’l Eng’rs*, 435 U.S. at 696 (“We adhere to the view expressed in *Goldfarb* that, by their nature, professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary. Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason.”).

212. *Prof’l Eng’rs*, 435 U.S. at 683 (quoting *United States v. Nat’l Soc’y of Prof’l Eng’rs*, 389 F. Supp. 1193, 1206 (D.D.C. 1974), *vacated*, 422 U.S. 1031 (1975)).

detect or evaluate. That, in essence, was the Court's theory underlying the potential harm of the tie in the *Kodak* tying case, and the Court conceded that the Engineers could be correct in their assertion that pricing information leads to sub-optimal results.²¹³ Rather, the Court rejected the Engineers' argument—that "competition among professional engineers was contrary to the public interest"²¹⁴—wholesale. Instead of rejecting the Engineers' understanding of how the market operated, the Court rejected the role the Engineers had asserted in attempting to impose their understanding of how the market should operate: "Even assuming occasional exceptions to the presumed [efficiency-enhancing] consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad."²¹⁵ Congress, having decided in favor of a policy of competition, the Engineers were not free to adopt a contrary policy, even one potentially improving efficiency. *Professional Engineers*, which engaged in none of the balancing that has come to describe rule-of-reason analysis, is much better described in per se terms.

Rather than as a shortcut to handle restraints that will always fail rule-of-reason analysis, the per se rule is a more useful tool for cases like *Professional Engineers*, in which there is *no* set of industry or market conditions that would warrant the restraint.²¹⁶ If the evolution of antitrust analysis—the gradual abandonment of per se approaches to virtually every restraint—teaches anything, it is that there are very few restraints that will harm efficiency with the constancy necessary to justify their absolute prohibition in all circumstances. The best case for applying a per se rule is when the justification for prohibiting the restraint does not depend on its effects on output or efficiency—if it would still be illegal under the policy embodied in the Sherman Act *even if* the restraint were efficiency enhancing. *Professional Engineers* distinguishes between the competitive policy of the Sherman Act and the product of individual restraints in a way that the rule of reason itself cannot when being applied in any particular case. The same is true of cases in which the harm stemming from the restraint is not market harm but rather regulatory harm.

CONCLUSION

In the end, antitrust demands neither efficient markets nor any particular balance of power between industrial concerns and consumers (or

213. *Id.* at 694 ("[I]ndeed, petitioner has provided ample documentation for that thesis."); *id.* at 694 n.21 ("Congress has decided not to require competitive bidding for Government purchases of engineering services.").

214. *Id.* at 684.

215. *Id.* at 695.

216. See *Polygram Holding, Inc., v. FTC*, 416 F.3d 29, 37–38 (D.C. Cir. 2005) (applying the rule of reason to evaluate a restraint rejected as inconsistent with the policy of the Sherman Act while acknowledging the possibility that the agreement might increase output).

laborers); what antitrust demands is that economic actors be free from restraints on the ability to use and enjoy their property. Frequently, antitrust protects that freedom because of its power to enhance efficiency and increase social wealth, but it is that freedom itself and not the efficiency of markets that antitrust demands. An inefficient but free market is of no concern to antitrust; a controlled market that produces perfectly efficient outcomes is an almost certain antitrust violation. Although regulation is essential to the operation of a free society, centuries of constitutional tradition demand that such regulation come from public rather than private sources. Private regulation is anathema to our system of ordered liberty, and the antitrust laws are a part of a larger constitutional structure that polices such improper restrictions on liberty.

That is not to say that the antitrust laws are indifferent to the efficient operation of markets. Many restraints do not alter choice in clear ways; many restraints that on their face reduce freedom of choice actually enhance it by making possible the delivery of a particular product or service that could not exist absent the restraint. But, regardless of the effect of the restraint on economic efficiency, harm to freedom of choice is relevant to antitrust analysis, and the current, economically driven approach to the rule of reason fails to account for that harm.

A harm to competition includes not only an injury to the efficiency of markets but also a restriction on the liberty of others to make their own choices. Only by recognizing the independent role that choice plays in competition can the antitrust laws be realized as Sherman's ideal of "a charter of liberty."