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The Profound Nonsense of Consumer Welfare Antitrust

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Abstract
Despite being the prevailing wisdom, consumer welfare antitrust rests on a bed of nonsense. First, consumer welfare antitrust is built on false history and a rewriting of legislative intent. Second, it relies on a false conception of the market and submerges the state construction of the economy. Third, it depends on, and is informed by, false assumptions about business conduct. While the third falsehood suggests an analytical renovation and better antitrust economics are sorely needed, the first two falsehoods show that empirical improvements are necessary but not enough. These falsehoods together mean that the entire enterprise at present is built on a bed of sand and that a fundamental reconstruction of antitrust is required. An antitrust that promotes an equitable economy and protects democratic institutions will be true to legislative intent, recognize the state construction of the marketplace, and informed by empiricism.

Keywords
Antitrust goals, consumer welfare, Chicago School, legal realism

I. Introduction

In 1979, the Supreme Court, citing Robert Bork, declared that the "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[1] Since the late 1970s, the Supreme Court and the federal antitrust agencies (the Department of Justice [DOJ] and the Federal Trade Commission [FTC]) have reinterpreted antitrust law accordingly. Over the past four decades, they have revised legal doctrines, policy guidance, and enforcement priorities to advance this consumer welfare objective. Within the community of antitrust specialists, this objective was accepted on a bipartisan basis. Until recently, the debates within the antitrust world concerned how best to promote consumer welfare, not whether it is the right objective.

Despite being the prevailing wisdom, consumer welfare antitrust rests on a bed of nonsense. First, consumer welfare antitrust is built on false history and a rewriting of legislative intent. Second, it relies

1. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting Robert H. Bork, The Antitrust Paradox 66 (1978)).

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on a false conception of the market and submerges the state construction of the economy. Third, it depends on, and is informed by, false assumptions about business conduct. While the third falsehood suggests an analytical renovation and better antitrust economics are sorely needed, the first two falsehoods indicate that empirical improvements are necessary but not enough. These falsehoods together undermine the entire enterprise and call for a fundamental remaking of the field of antitrust.

An antitrust that promotes an equitable economy and protects democratic institutions will be built on very different foundations than the present antitrust system. First, it would recover and revive the antimonopoly vision of the framers of the antitrust laws. Second, instead of naturalizing the market and obscuring the state action on which it depends, it would recognize the state construction of the economy and how every market requires rules of one type or another. In this light, effective antitrust structures the economy to promote a more equitable distribution of power. Third, in place of developing doctrines and rules from deductive reasoning, it would use induction and careful study of firms and institutions to formulate antitrust rules. These philosophical changes would represent a break with forty years of antitrust policy and practice and be a paradigmatic shift undergirded by history, law, and realism.

II. The False Reading of Congressional Intent

The Congresses that enacted the principal antitrust laws sought to control the economic and political power of trusts and monopolies. They recognized that large corporations exercise power over consumers, workers, farmers, suppliers, rivals, and citizens. Accordingly, they enacted the antitrust laws to control corporate power writ large, not merely one manifestation of this private power.

Since the 1970s, however, the Supreme Court and the federal antitrust agencies have disregarded this legislative history and substituted their own policy objectives for those of Congress. In lieu of the economic and political goals announced by the legislature, the judiciary and executive branch have interpreted the antitrust laws, in particular the Sherman Act, as a "consumer welfare prescription."[2] They have reinterpreted the antitrust laws based on the false historical analysis of Robert Bork.

A. Congressional Goals in Enacting the Antitrust Laws

In enacting the Sherman, Clayton, and Federal Trade Commission Acts, Congress aimed to constrain corporate power broadly. The drafters of these landmark statutes sought to restrict corporate power over consumers, workers, suppliers, and rivals.[3] And they also targeted corporate clout in the political system. Informed by republican ideology, they recognized that concentrated corporate power threatened the maintenance of democratic governance.[4]

Congress enacted the antitrust laws to protect consumers and sellers from the power of monopolies and trusts. As Robert Lande has detailed, the framers of the principal antitrust laws wanted to protect consumers from the tribute exacted by corporations with pricing power.[5] Monopolistic and cartelistic prices were described as unjust wealth transfers and condemned as "robbery"[6] and "theft."[7] They

2. *Id.*
3. *E.g.*, Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Reexamination of the Consumer-Welfare Hypothesis*, 53 J. Econ. Hist. 359 (1993); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 Oh. St. L.J. 257 (1989); John J. Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 Antitrust Bull. 259 (1988).
4. David Millon, *The Sherman Act and the Balance of Power*, 61 S. Cal. L. Rev. 1219 (1988).
5. Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L.J. 65 (1982).
6. 21 Cong. Rec. 2614 (1890) (statement of Rep. Coke); *id.* at 4103 (statement of Rep. Fithian).
7. 51 Cong. Rec. 13223 (1914).

similarly sought to prevent these corporate giants from depressing wages and prices paid to workers and other producers.[8] Case in point: The protection of ranchers from the beef trust was an important theme in the debates leading up to the enactment of the Sherman Act in 1890.[9]

In addition to this prevention of unjust wealth transfers, Congress aimed to protect freedom of opportunity for new and small firms. It wanted to stop monopolies and other dominant businesses from using their power to exclude rivals unfairly. Members of Congress condemned corporations' use of their superior market or financial power to muscle out and stifle smaller competitors.[10] Senator Sherman declared, "It is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances. This is industrial liberty and lies at the foundation of the equality of all rights and privileges."[11] During the same debates, Senator George lamented that the trusts "[b]y the use of this organized force of wealth and money the small men engaged in competition with them are crushed out; and that is the great evil at which all this legislation ought to be aimed."[12] Reviewing the legislative intent informing one of the principal antitrust laws, Eleanor Fox has written that "[i]f there is one central theme of the legislative history of the Clayton Act, it is freedom of economic opportunity."[13]

Just as much as Congress wanted to restore and protect a fair marketplace, it aimed to protect democracy from concentrated private power. Corporations' ability to subvert democratic decision-making and make decisions of public import was not lost on the sponsors of the laws.[14] Indeed, representatives and senators understood that corporate interests had already obtained disproportionate influence over politics in the United States and abroad and feared what would happen if this trend were not stopped and reversed.[15] Similarly, they observed the awesome planning power of the monopolists and trusts and attacked their authority to make decisions of public consequence without public input or validation. Senator Sherman pointedly asked, "[W]hether, on the whole, it is safe in this country to leave the production of property, the transportation of our whole country, to depend upon the will of a few men sitting at their council board in the city of New York."[16]

8. *See* Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 Antitrust L.J. 707, 714 (2007) ("The legislative history leaves no doubt that Congress intended to protect sellers victimized by trusts and other conduct within the scope of the Sherman Act's prohibitions."). For instance, Senator John Sherman declared that the trusts "regulate prices at their will, depress the price of what they buy and increase the price of what they sell." 21 Cong. Rec. 2461 (1890).
9. John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers From Anticompetitive Conduct*, 81 Fordham L. Rev. 2425, 2435 (2013). Representative Taylor condemned the beef trusts for cheating both farmers and consumers and asserted, "this monster robs the farmer on the one hand and the consumer on the other." 21 Cong. Rec. 4098 (1890). Senator Allison similarly described the trust's power over both ends of the market. *Id.* at 2470.
10. Eleanor M. Fox, *Modernization of Antitrust: A New Equilibrium*, 66 Cornell L. Rev. 1140, 1149, 1153 (1981).
11. 21 Cong. Rec. 2457 (1890).
12. *Id.* 11 at 3147.
13. Fox, *supra* note 10, at 1149.
14. Spencer Weber Waller, *Antitrust and Democracy*, 45 Fla. St. U.L. Rev. (forthcoming 2019).
15. *See*, *e.g.*, 21 Cong. Rec. 3146 (1890) (remarks of Sen. Hoar) ("The complaint which has come from all parts and all classes of the country of these great monopolies, which are becoming not only in some cases an actual injury to the comfort of ordinary life, but are a menace to republican institutions themselves, has induced Congress to take the matter up."); 95 Cong. Rec. 11486 (1949) (statement of Rep. Celler) ("I want to point out the danger of this trend toward more and better combines. I read from a report filed with [the former Secretary of War] as to the history of the cartelization and concentration of industry in Germany: 'Germany under the Nazi set-up built up a great series of industrial monopolies in steel, rubber, coal and other materials. The monopolies soon got control of Germany, brought Hitler to power and forced virtually the whole world into war.'").
16. 21 Cong. Rec. 2570 (1890).

B. The Supreme Court and the Federal Antitrust Agencies Rewrite the Antitrust Laws Based on the False History of Robert Bork

While the Congresses that enacted the antitrust laws sought to control the economic and political power of corporations, the Supreme Court and federal antitrust agencies have reinterpreted the purpose of these laws. The Supreme Court, beginning in the 1970s, recast the Sherman Act to be a "consumer welfare prescription."[17] As to the Clayton Act, the DOJ and the FTC followed suit in the early 1980s under the leadership of officials appointed by President Reagan. This consumer welfare objective is inconsistent with the legislative history, described above, and rooted in the false historical analysis of Robert Bork.

Two Supreme Court cases, decided two decades apart, illustrate the radical reinterpretation of the Sherman Act. In a 1958 decision, the Court had declared a quasi-constitutional vision of the antitrust laws in line with legislative intent. In *Northern Pacific Railway Co. v. United States*, the Court stated:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.[18]

The Sherman Act was a set of public rules controlling private power. Just two decades later, the Court, following a rightward shift in composition, described a much more modest statute. Citing Robert Bork's analysis of legislative debates,[19] the Court wrote, "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[20] Since then, the Court has consistently held that the Sherman Act is intended to promote consumer welfare or consumer interests.[21]

The federal antitrust agencies adopted consumer welfare as the purpose of the antitrust laws starting in the early 1980s. The DOJ in the 1982 Merger Guidelines offered its interpretation of the Clayton Act's antimerger section and stated, "The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance 'market power' or to facilitate its exercise."[22] Market power is

17. Reiter, 442 U.S. at 343. Consumer welfare remains an ill-defined and incoherent concept, which appears to have no consistency except for elasticity. *See* generally Mark Glick, *How Chicago Economics Distorts "Consumer Welfare" in Antitrust*, Antitrust Bull. (forthcoming 2019).
18. 356 U.S. 1, 4 (1958).
19. In his landmark book on antitrust law and policy, Bork analyzed the legislative history of the Sherman Act and concluded that Congress sought to protect consumer welfare (defined in neoclassical terms) above all other goals. Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself 66, 81 (1978).
20. Reiter, 442 U.S. at 343.
21. *See*, *e.g.*, Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19–20 (1979) (internal citations omitted) ("More generally, in characterizing this conduct under the per se rule, our inquiry must focus on whether the effect and, here because it tends to show effect, the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to increase economic efficiency and render markets more, rather than less, competitive."); Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 726–27 (1988) ("There has been no showing here that an agreement between a manufacturer and a dealer to terminate a 'price cutter,' without a further agreement on the price or price levels to be charged by the remaining dealer, almost always tends to restrict competition and reduce output."); Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340 (1990) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition."); Pacific Bell Telephone Co. v. Linkline Communications, Inc., 555 U.S. 438, 451 (2009) ("To avoid chilling aggressive price competition, we have carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low.").
22. U.S. Dep't of Justice, 1982 Merger Guidelines § 1 (1982).

defined in relation to pricing power.[23] Subsequent iterations of the Merger Guidelines affirmed the consumer welfare objective. In the 2010 Horizontal Merger Guidelines, the most recent version, the DOJ and the FTC declared, "The Agencies normally evaluate mergers based on their impact on customers. The Agencies examine effects on either or both of the direct customers and the final consumers."[24] In a 2015 speech, Democratic FTC Chair Edith Ramirez made the bipartisan commitment to consumer welfare clear. Describing the FTC's recent record approvingly, she stated that the Commission "has confined its Section 5 cases to conduct that diminishes consumer welfare by harming competition or the competitive process, as opposed to conduct that merely harms individual competitors or poses public policy concerns unrelated to competition."[25] Consumer welfare is competition, competition is consumer welfare. Antitrust does not consider other harms from the exercise of business power.

Other guidance and advocacy documents express the consumer welfare goal in similar and sometimes more explicit terms. The agencies' Antitrust Guidelines for Collaborations Among Competitors state that the DOJ and FTC will evaluate competitor joint ventures and other collaborations based on their likely benefits and harms to consumers.[26] In their Antitrust Guidelines for the Licensing of Intellectual Property, the agencies exhibited intellectual imperialism and exported consumer welfare into another area of law. They wrote, "The intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare."[27] Notably, this consumer welfare goal extends into the agencies' competition advocacy work too. Through letters and other submissions to state and local governments, the agencies have encouraged these entities to evaluate their market rules through the prism of consumer welfare.[28]

This transformation of antitrust into a consumer welfare statute was based on false history. As discussed above, Congress had multiple goals when it enacted the Sherman, Clayton, and FTC Acts. To be sure, the protection of consumers from market power was a major animating theme, but it was not the only one. Robert Bork reviewed the legislative debates and offered an interpretation that elevated his personal ideology above that of the drafters of the antitrust laws. Scholars studying the legislative histories of the antitrust laws have overwhelmingly concluded that Bork misread the intent of the drafters.[29] James Boyle offers a scathing account of Bork's analysis:

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23. *See id.* ("Th[e] ability of one or more firms profitably to maintain prices above competitive levels for a significant period of time is termed 'market power.'"). Ignoring the probabilistic language of the Clayton Act and its prophylactic nature, one Reagan-era antitrust enforcer asserted, *see* 15 U.S.C. § 18 (emphases added) (prohibiting mergers and acquisitions whose effects "*may* be substantially to lessen competition, or to *tend* to create a monopoly"). "Antitrust enforcers should only block mergers when they conclude, based on sound economic analysis, that a particular transaction *will* adversely affect competition." J. Paul McGrath, Assistant Attorney Gen., Antitrust Div., Merger Policy Today, Remarks before the National Association of Manufacturers 2 (Mar. 8, 1984) (emphasis added).
24. U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 1 (2010).
25. Chairwoman Edith Ramirez, Fed. Trade Comm'n, Address at Competition Law Center at George Washington University Law School 4–5 (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf.
26. Fed. Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors §§ 2.1–2 (2000).
27. U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property § 1 (2017).
28. *E.g.*, Letter from Andrew I. Gavil, Richard A. Feinstein, Charles A. Harwood, & Howard Shelanski, Fed. Trade Comm'n, to Debbie Ossiander, Municipality of Anchorage 2 (Apr. 19, 2013); Letter from Tara Isa Koslov, Ginger Zhe Jin & Deborah Feinstein, Fed. Trade Comm'n, to Peggy Lehner, Ohio State Senate 7 (Mar. 3, 2017).
29. *See generally* Grandy, *supra* note 3; Lande, *supra* note 5; Millon, *supra* note 4. *See also* John J. Flynn & James F. Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U.L. Rev. 1125, 1137 (1987) ("Judge Bork's analysis of the legislative history of the antitrust laws is a case of 'believing is seeing' rather than 'seeing is believing.' Neoclassical price theory and its concept of efficiency were unknown when the major federal antitrust laws were adopted. Moreover, the leading economists of the

> Most historians would agree that one of the goals of the antitrust rules was to prevent the concentration of economic power in American society. Those who wrote and passed the statutes believed enormous concentrations of economic power to be inherently subversive of the American republic. But this is exactly the kind of egalitarian claptrap Mr. Bork will not tolerate. Consequently, he feels free to apply the wisdom of modern economic analysis to rectify the errors of Congress and the courts.[30]

In short, Bork substituted his personal ideology for the vision of the drafters of the antitrust laws.

III. The False Naturalization of the Market

A market economy is a state-constructed institution. Government action establishes the foundational rules of an economy—rules without which an economy cannot function. Among other things, government at different levels creates property rights, enforces contracts, charters corporations, issues money, awards copyrights and trademarks, and establishes consumer and worker rights. Antitrust rules are part of this dense layer of rules that enable and shape market activity. Despite frequent invocations of "free markets" and the "private sector" in public discourse, a market does not emerge spontaneously but depends on extensive state action.

The Supreme Court and the DOJ and the FTC, explicitly or implicitly, suppress the constitutive function of state action. Instead, in line with the paradigm of the law and economics school in general, they rely on a false conception of the market. The Court and the agencies treat existing market arrangements as somehow natural or efficient and view antitrust as exogenous government intervention that should be circumscribed. Rather than treat antitrust law as part of the state-constructed system of market rules, judges and enforcers view antitrust as an incursion on the Edenic marketplace.

A. The State Construction of the Market

Government, at federal and state levels, establishes the conditions and rules necessary for a market to function. It creates and protects property rights, enforces contracts, charters corporations, and issues money. These are illustrative and just some examples of the state structuring and governance of the market. Without these rules and a coercive authority to enforce them, a market activity could not exist, let alone flourish. In other words, a market economy is not and cannot be "free" but is instead constructed through government action.

The state defines and enforces rules of property. The state decides what qualifies as property and offers holders of property rights, whether in land or over intangibles, the right to call on coercive state action when their interest has been infringed. And the question of what constitutes property is not stable. State action has both narrowed and broadened property. For example, the Civil War and the ratification of the 13th Amendment abolished and outlawed slavery—property rights in human beings.[31] In other ways, the state has expanded the scope of property. Property over intangibles has expanded over the course of American history. For example, Congress and the courts have broadened

day, largely of the classical school, either opposed or ignored the adoption of the antitrust laws. It is difficult to believe that the legislators, adopting a statute over the objections or ignorance of the professional economists of the day, meant nonetheless to implement the values and goals of that group. If Judge Bork is claiming that the Congresses that adopted the antitrust laws meant to pursue the values that neoclassical economic theory later suggested ought to be the goals of the antitrust laws, that claim is simply false. Scholars who have made detailed studies of the legislative history of the antitrust laws reject such a reading and find that the legislative histories indicate that Congress had multiple goals in mind.").

30. James Boyle, *A Process of Denial: Bork and Post-Modern Conservatism*, 3 YALE J. LAW HUMAN. 263, 279 (1991).
31. U.S. Const. amend. XIII, § 1.

the subject matter entitled to exclusivity rights[32] and extended the length of copyright terms.[33] The Supreme Court in *Goldberg v. Kelly* in 1970 recognized that the meaning of property is indeterminate and that common law conceptions are not preserved in an amber encasement for eternity.[34]

The government also facilitates the making of contracts. Courts stand ready to enforce contracts and award relief in the event one party fails to fulfill its commitments and breaches the contract. Without this coercive power, contracts would not carry the force of law. In ruling that racially restrictive covenants in housing are unconstitutional, the Supreme Court described how the purportedly private world of contract is backed by public power. The Court stated:

> These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell.[35]

Courts also withhold enforcement of other contracts. For instance, in many states, credit contracts with interest rates in excess of the state cap are unenforceable.[36] Similarly, the State of California bars the judicial enforcement of noncompete clauses against workers.[37]

Market governance is not and cannot be neutral. In addition to being illustrative of how state action constructs a market, property and contract show how the state decides who wields power in the economy. The government through property, contract, tort, banking regulation, consumer protection, and numerous other areas of law not only sets the rules of the game but also allocates who has enforceable rights.

In expanding or narrowing legal rights, the government decides who possesses power and who does not. Workers who can organize boycotts and sympathy strikes have much greater power to unionize firms and industries and reach favorable terms with employers than workers who do not possess this right, such as American workers at present. Similarly, consider state law on noncompete clauses. A state that enforces noncompete clauses against workers tilts the balance of power in the employment relationship in favor of employers, relative to a state that does not enforce these restraints.

Against this background of market-creating state action, antitrust modifies existing legal entitlements and redistributes power within the economy. It reconfigures state construction of the economy.

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32. *See*, *e.g.*, Diamond v. Chakrabarty, 447 U.S. 303 (1980) (holding that genetically modified bacteria are entitled to patent protection).
33. Pub. L. 105–298.
34. *See* 397 U.S. 254, 262 n.8 (1970) (quoting Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965)) ("It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that '(s)ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced.'").
35. Shelley v. Kraemer, 334 U.S. 1, 19 (1948).
36. Lauren Saunders, Nat'l Consumer Law, Ctr., Why 36%? The History, Use and Purpose of the 36% Interest Rate Cap 3 (2013), https://www.nclc.org/images/pdf/pr-reports/why36pct.pdf.
37. Cal. Bus. & Prof. Code § 16600.

The late antitrust scholar John Flynn situated antitrust against this background of state action and wrote:

> Antitrust policy should be viewed as it originally was in the legislative history of the antitrust laws and the *Addyston Pipe & Steel* case as part of the fundamental laws defining the scope of property and contract rights, rather than as a bothersome limitation upon the unfettered right to invoke the community's law to exercise such rights.[38]

Consider two important ways in which antitrust reshapes common law legal entitlements. First, antitrust limits the ways in which property holders can acquire and use these legal entitlements. For example, the Clayton Act abridges the right of businesses to acquire the property rights of competing or otherwise related businesses.[39] In limiting the property rights of some entities, it grants greater freedom to customers, suppliers, and others affected by the power associated with concentrated property holdings. Second, the antitrust laws limit the scope of contract law. The Sherman Act prohibits contracts that restraint trade or monopolize markets. For instance, it prohibits price-fixing contracts that raise or lower prices.[40] In limiting the contractual freedom of certain parties, the Sherman Act protects, for instance, consumers from unduly high prices for essentials and workers from unfairly low wages for their labor.[41]

Antitrust law is analogous to nuisance law. Nuisance law restricts how property owners exercise their rights—for example, by prohibiting the operation of furnaces that produce noxious fumes that are carried downstream by the wind—to protect other property owners' right of quiet enjoyment on their land. In a similar vein, antitrust law restricts the liberty of powerful actors to use their property rights as they wish and thereby protects the property rights and liberty of others. Like nuisance, antitrust law does not abridge rights categorically but instead reallocates them, limiting the discretionary power of corporations and enhancing the freedom of consumers, sellers, small firms, and rivals.

B. The Supreme Court and Federal Court Naturalize the Common Law Rules of the Market

In adopting and implementing consumer welfare antitrust, the Supreme Court and the antitrust agencies have naturalized the legal construction of the market. Much of this has been implicit. Their embrace of consumer welfare meant an embrace of the law and economics ideology that asserts self-regulating markets in which the state "intervenes" after the fact, for better or for worse. Against this background of a natural market and natural common law rules, antitrust is treated as a "statist" encroachment that should be treated skeptically and circumscribed. While this market naturalization is generally implicit in antitrust opinions and guidance documents, the FTC does surface it in its competition advocacy work and reveals its belief in an Edenic, prepolitical marketplace.

The law and economics ideology that has informed contemporary antitrust submerges the state action underlying a market economy. Indeed, law and economics has more deeply shaped antitrust than any other field of law. The framework of law and economics posits a market preexisting the state. The market emerges as a force of nature. The state follows and intervenes in response to discrete market failures in which existing markets do not conform to certain textbook criteria (the optimistic view of the state) or in response to political pressures from well-connected individuals and organizations (the pessimistic view of the state). In this framework, the legal construction of the existing market and economy is erased.

38. Flynn, *supra* note 3, at 304 n.94.
39. 15 U.S.C. § 18.
40. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).
41. Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235-36 (1948).

By naturalizing the existing rules, this ideology obscures the legal and political choices that created today's market. Indeed, the political choices that created today's market economy are implicitly deemed "efficient" or superior to proposed alternative rules. This denial, however, cannot erase these political choices. In a 1987 essay, Duncan Kennedy captured the relationship between law and economics and the legal construction of the market. He wrote:

> The judge-made private law rules that define the market are really just the common law as it stood at some hypothetical moment in the nineteenth century. But these rules have a peculiar, almost sacred status as symbols of 'the efficient market solution.' Most economists don't seem to have or to feel the need for any knowledge of their content, or of the reality of their supposed inner responsiveness to the ideas of property and contract. They appear as a neutral background in everyone's interest (efficiency), that is constantly threatened by the more partial, political, interest-group based or ideologically based initiatives of legislatures.[42]

Applying this worldview of "natural" common law rules, courts and agencies treat antitrust as an irksome encroachment. The courts, in applying consumer welfare antitrust, restrict antitrust "intervention" to discrete market failures, generally tied to "artificial" market power. Enforcers and courts define this market failure as the elevation in price or reduction in output due to some business practice.[43] The judicial adoption of the rule of reason, which typically requires showing of anticompetitive effects (defined as short-term increases in price and/or reductions in output), in place of per se rules and presumptions of illegality reflects this ideological shift.[44] Outside of horizontal price fixing and similar collusion, antitrust enforcers should, in the absence of the showing of so-called anticompetitive effects, stay their hand and allow the market to flourish.[45] In other words, the existing configuration of state action and market rules are given a strong presumption of validity and legitimacy. Antitrust should "intervene" under only exceptional circumstances. Courts and agencies assert a justness or efficiency to current market rules that should be modified only in rare cases.

This fettering of antitrust rules is especially strong against property rights. Property is a state-created institution, and courts and other state actors define the metes and bounds of property. Historically, antitrust was one important limitation on the property rights of large corporations.[46] The Supreme Court, however, today grants broad deference to firms' exercise of their state-created

42. Duncan Kennedy, *The Role of Law in Economic Thought: Essay on the Fetishism of Commodities*, 34 Am. U.L. Rev. 939, 964 (1985).

43. *See*, *e.g.*, Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007) (internal citations omitted) ("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[.]").

44. *See id.* at 901 ("In more recent cases the Court, following a common-law approach, has continued to temper, limit, or overrule once strict prohibitions on vertical restraints."); State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) ("[M]ost antitrust claims are analyzed under a 'rule of reason,' according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect.").

45. *See*, *e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 58–9 (D.C. Cir. 2001) (articulating framework of rule of reason and stating "the plaintiff, on whom the burden of proof of course rests, must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect").

46. *See*, *e.g.*, Lorain Journal Co. v. United States, 342 U.S. 143, 155 (1951) (internal citations omitted) ("The publisher claims a right as a private business concern to select its customers and to refuse to accept advertisement from whomever it pleases. We do not dispute that general right. But the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified. The right claimed by the publisher is neither absolute nor exempt from regulation. Its exercise a[s] a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act.").

property rights. It treats the existing scope of property rights as optimal and sacrosanct and, over the past three decades, restricted antitrust limits on the corporate exercise of property rights.[47] This intersection of property and antitrust encapsulates judicial thinking on state action. Presently constituted property rights (one type of state action) are natural and presumptively valid, whereas antitrust rules (another form of state action) are artificial and presumptively suspect. This choice of presumptions about two types of state action reflects a deep naturalization of the common law of the 19th century.[48]

The FTC has laid bare the ideological assumptions about the market in its competition advocacy work. The FTC routinely files letters to state and local officials offering its viewpoint on occupational licensing and other public interest regulations. In the FTC's account, these rules are impositions on a market that are presumptively illegitimate. The FTC consistently admonishes state and local governments to "narrowly craft" these rules to addressing market failures that reduce consumer welfare.[49] The FTC deems nonconsumer welfare goals as suspect or illegitimate.[50]

These ideological assumptions were made clear in a 2014 FTC letter to the Chicago City Council concerning municipal rules on ride-hailing apps such as Uber and Lyft. The letter told council members that "[u]nless regulation is necessary to achieve some legitimate public interest, markets should be left unfettered to permit competition to flourish."[51] Per the FTC's account, certain rules that construct a market, such as the prevailing interpretations of property, contract, and tort, are legitimate and not "regulation," whereas other rules, such as licensing and municipal cab codes, are "regulation" and should be enacted under only special circumstances. In the words of Duncan Kennedy, for the FTC, the former "appear as a neutral background in everyone's interest (efficiency), that is constantly threatened by the more partial, political, interest-group based or ideologically based initiatives of legislatures."[52] The FTC's advocacy against licensing dramatically exemplifies this confrontation between the purportedly "neutral" and the supposedly "partial" rules of the market.

IV. The False Assumptions About Business Conduct

Empirical research, especially in recent years, has shed important light on the effects of certain business conduct. The research on mergers and predatory pricing, in particular, is worth highlighting.

47. Two Supreme Court decisions have greatly limited the scope of refusal to deal claims and expressed general skepticism about this antitrust cause of action. Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004); Pacific Bell Telephone Co. v. Linkline Communications, Inc., 555 U.S. 438 (2009). For a comprehensive account of the courts' deference to property rights in antitrust cases, *see* Ramsi A. Woodcock, *Inconsistency in Antitrust*, 68 U. Miami L. Rev. 105 (2013).

48. In contrast to this deference to property rights, the courts do not accord similar protection to the freedom of association of workers and small producers. *See*, *e.g.*, FTC v. Superior Court Trial Lawyers Association, 493 U.S. 411 (1990) (holding that public defenders' collective boycott of Washington, D.C.'s public defender service is a per se violation of antitrust law).

49. *E.g.*, Letter from Andrew I. Gavil, Richard A. Feinstein, Charles A. Harwood, & Howard Shelanski, Fed. Trade Comm'n, to Jacques P. Lerner, District of Columbia Taxicab Commission 4 (June 7, 2013), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comments-district-columbia-taxicab-commission-concerning-proposed-rulemakings-passenger/130612dctaxicab.pdf.

50. *E.g.*, Letter from Tara Isa Koslov, Bruce Hoffman & Michael G. Vita, Fed. Trade Comm'n, to Laura Ebke, State Capitol 4–5 (Jan. 17, 2018), https://www.ftc.gov/system/files/documents/advocacy_documents/federal-trade-commission-staff-comment-nebraska-state-senate-regarding-nebraska-lb299-occupational/v180004_ftc_staff_comment_to_nebraska_state_senate_re_lb_299_jan-18.pdf; for a critique of the FTC's anti-licensing efforts, see generally Sandeep Vaheesan & Frank A. Pasquale, *The Politics of Professionalism: Reappraising Occupational Licensure and Competition Policy*, 14 Ann. Rev. L. & Soc. Sci. 309 (2018).

51. Letter from Andrew I. Gavil, Deborah L. Feinstein & Martin S. Gaynor, Fed. Trade Comm'n, to Brendan Reilly, Chicago City Council 4 (Apr. 15, 2014), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf.

52. Kennedy, *supra* note 42, at 964.

First, retrospective analyses of corporate mergers have found that they often lead to higher prices and markups. And they generally do not yield productive efficiencies and indeed have often produced *inefficiencies*. Second, research has found that dominant firms can use below-cost pricing to eliminate and discipline rivals and maintain or augment their power.

Notwithstanding this empirical research, the courts and the agencies rely on simplistic theoretical assumptions about mergers and predatory pricing. In their policy and practice, the DOJ and the FTC continue to presume that mergers generally enhance productive efficiencies. They tolerate consolidation on the grounds that mergers will allow firms to reduce costs of production and potentially lower prices for consumers. In a similar disregard for empirical research, the Supreme Court has asserted that "predatory pricing is rarely tried, and even more rarely successful"[53] and rewritten doctrine based on this false assumption. In short, antitrust enforcers and the courts have established pro-merger and pro-predation policy based on speculative theories and ignored a wealth of contrary research findings.

A. The Evidence on Horizontal Mergers and Predatory Pricing

Empirical research has documented that large horizontal mergers and predatory pricing can and do often reduce consumer welfare. In other words, even taking consumer welfare as the appropriate goal of antitrust, corporate consolidation and below-cost pricing by dominant firms should be a serious concern. Economic research, especially in recent years, has found that mergers frequently result in higher prices and price-cost markups and rarely produce the promised productive efficiencies. Other research has shown that dominant firms can use predatory pricing to maintain or extend their market control.

1. Mergers. Economics research has shown that mergers in concentrated markets often lead to higher prices and higher price-cost markups. John Kwoka reviewed dozens of merger retrospectives and found that approximately 80% of the studied mergers led to higher prices and reduced output.[54] A comprehensive study of mergers in the manufacturing sector found that these consolidations generally led to higher prices and higher price markups.[55] Studies of specific mergers in concentrated markets have similarly found higher prices and price markups.[56]

A related line of literature has concluded that market concentration is associated with higher prices and markups. A 2017 study found a nearly fourfold increase in markups since 1980 and attribute this rise to increased market power.[57] Similarly, a recent article finds that the economy-wide increase in concentration has contributed to higher profit margins.[58] In a meta-study of analyses of concentration and price, Leonard Weiss found the positive correlation between concentration and price to be "overwhelming."[59] More recently, based on a review of the empirical literature, Herbert Hovenkamp and Carl Shapiro concluded, "[C]oncentrated industries tend to perform poorly in serving consumers, as they displayed higher prices, higher price/cost margins, and higher profits than less concentrated industries."[60]

53. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986).
54. John Kwoka, Mergers, Merger Control, and Remedies 112–13 (2015).
55. Bruce A. Blonigen & Justin R. Pierce, *Evidence for the Effects of Mergers on Market Power and Efficiency* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 22750, 2016).
56. Peter C. Carstensen & Robert H. Lande, *The Merger Incipiency Doctrine and the Importance of "Redundant" Competitors*, 2018 Wis. L. Rev. 804–06 (2018).
57. Jan De Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 23687, 2017).
58. Gustavo Grullon et al., *Are U.S. Industries Becoming More Concentrated?*, 23 Rev. Fin. 697, 698–99 (2019).
59. Leonard W. Weiss, *Conclusions*, *in* Concentration and Price, at 283 (Leonard W. Weiss ed., 1989).
60. Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 Yale L.J. 1996, 2001 (2018).

The empirical literature has found that mergers generally failed to yield their promised efficiencies. In a major 1987 study, economists David Ravenscraft and Frederic Scherer found that mergers generally were not efficiency enhancing and indeed often produced inefficiencies.[61] Other research since then has generally been in line with their findings. The study on mergers and acquisitions in manufacturing, noted above, found that these transactions typically did not lead to plant- or firm-level improvements in efficiency.[62] In the merger retrospectives he reviewed, John Kwoka found little evidence of firm efficiency improvements from consolidation.[63] Examining the empirical research on corporate mergers, economist Melissa Schilling wrote, "A considerable body of research concludes that most mergers do not create value for anyone, except perhaps the investment bankers that negotiated the deal."[64]

2. Predatory Pricing. Empirical evidence has found that dominant firms have engaged in predatory pricing. They have used temporary below-cost pricing to eliminate or discipline rivals and protect their own market power. Economists have documented this conduct in many industries, including airlines, coffee, ocean shipping, telecommunications, and tobacco.[65] The airline and tobacco studies deserve special attention.

Multiple airlines have resorted to aggressive, below-cost pricing to protect their hub dominance. In response to limited entry by rivals, certain dominant hub carriers have dramatically expanded seat capacity and slashed fares below the cost of service on newly competitive routes. Through this temporary but steep price discounting, they have eliminated the new competitors and restored their own dominance.[66] Once the entrants have exited the market, incumbent carriers have reduced capacity and raised fares, sometimes to levels above the pre-entry levels.[67] In a 2001 report, the Department of Transportation (DOT) found significant evidence to suggest predation and concluded that predation in the industry was real and indeed common. According to the DOT, this predation eliminated competition in the target markets and helped deter entry against hub incumbents in general.[68] According to the DOT, American Airlines at its Dallas/Fort Worth hub, Delta Air Lines at its Atlanta hub, and Northwest Airlines at its Detroit hub appear to have engaged in successful below-cost pricing against new rivals.[69]

The tobacco industry has also witnessed several episodes of predatory pricing. The industry, which has been highly concentrated for more than a century, is infamous for its regular, lockstep price increases and substantial profit margins.[70] Cigarette manufacturers have responded to threats from either newcomers or smaller rivals with bursts of below-cost pricing. For instance, in the 1930s and 1980s, cigarette makers, in concert or independently, slashed prices and sustained significant

61. David J. Ravenscraft & Fredric M. Scherer, Mergers, Sell-Offs, and Economics Efficiency 194–204 (1987).
62. Blonigen & Pierce, *supra* note 55, at 24. *See also* Grullon et al., *supra* note 58, at 735 ("[W]hether the higher market concentration benefits consumers or other stakeholders such as employees is questionable; the increase in profit margins without a corresponding economically significant increase in efficiency suggests the opposite.").
63. Kwoka, *supra* note 54, at 148.
64. Melissa Schilling, *Potential Sources of Value from Mergers and Their Indicators*, 63 Antitrust Bull. 183, 183 (2018).
65. *See* Sandeep Vaheesan, *Reconsidering Brooke Group: Predatory Pricing in Light of the Empirical Learning*, 12 Berk. Bus. L.J. 81, 84–94 (2015) (summarizing the empirical literature on predatory pricing).
66. Ashutosh Dixit et al., *Aggressive and Predatory Pricing: Insights and Empirical Examination in the Airline Industry*, 25 J. Pub. Pol'y Mktg. 172, 179–82 (2006).
67. *Id.* at 182.
68. U.S. Dep't of Transp., Enforcement Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry 57–61 (2001).
69. *Id.* at 57–58. For more details on predatory pricing allegations against dominant hub airlines, *see* Spirit Airlines, Inc. v. Northwest Airlines, Inc., 431 F.3d 917 (6th Cir. 2005); United States v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003).
70. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 213 (1993).

losses and successfully eliminated rivals or pressured them to follow coordinated pricing practices again.[71]

B. The Courts and Agencies Treat Theory as Fact in Evaluating Mergers and Predation

Despite the evidence on mergers and predatory pricing, the antitrust agencies and courts continue to rely on simplistic theories to inform enforcement policy and legal doctrine. Since the early 1980s, the agencies have adopted a permissive approach to mergers and presumed that mergers have great potential to yield productive efficiencies. The DOJ and the FTC, in general, only challenge horizontal mergers in highly concentrated markets and almost never challenge nonhorizontal mergers. On predatory pricing, the Supreme Court has shown a similar disregard for empirical evidence and instead formulated doctrine based on deductive reasoning.

1. Mergers. The federal agencies have liberalized merger law based on economic theory. Although the Supreme Court has not overruled its strong antimerger precedents from the 1960s,[72] the agencies have revised merger law through the Horizontal Merger Guidelines. Through the Guidelines, they have reoriented merger law toward consumer welfare and abandoned the law's anticoncentration purpose.

In implementing the new consumer welfare objective, the agencies have adopted a strong presumption in favor of consolidation. Since the early 1980s, the agencies have adopted a steadily more tolerant posture toward corporate consolidation. At present, the agencies typically challenge or remedy only horizontal mergers in highly concentrated markets. The agencies have raised the market concentration thresholds for competitively suspect mergers[73] and, in embracing an effects-based approach over a structural approach, have steadily raised their own burden for showing a merger is illegal.[74] In practice, only mergers that reduce the number of competitors from five to four or four to three are likely to draw agency interest.[75] Agency tolerance of consolidation has increased markedly since the 1990s, when they challenged mergers at a lower level of concentration.[76]

The agencies have justified this reorientation citing unsupported theory. Notwithstanding the evidence to the contrary, the agencies have presumed that mergers yield productive efficiencies. First, they have asserted that mergers often generate efficiencies. The 1982 Merger Guidelines represented a

71. For a history of predation in the tobacco industry, including in the 1930s and 1980s, *see* Walter Adams & James W. Brock, *Predation, "Rationality," and Judicial Somnambulance*, 64 U. Cin. L. Rev. 811 (1996).

72. *See*, *e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 346 (1962) ("We cannot avoid the mandate of Congress that tendencies toward concentration in industry are to be curbed in their incipiency, particularly when those tendencies are being accelerated through giant steps striding across a hundred cities at a time. In the light of the trends in this industry we agree with the Government and the court below that this is an appropriate place at which to call a halt.").

73. *Compare* U.S. Dep't of Justice, 1982 Merger Guidelines § III.A (defining a market with a Herfindahl-Hirschman index [a common measure of market concentration] of 1800 or above as "highly concentrated") *with* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 5.3 (2010) (defining a market with a Herfindahl–Hirschman Index of 2500 or above as "highly concentrated").

74. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 5.3 (2010) ("The purpose of these thresholds is not to provide a rigid screen to separate competitively benign mergers from anticompetitive ones, although high levels of concentration do raise concerns. Rather, they provide one way to identify some mergers unlikely to raise competitive concerns and some others for which it is particularly important to examine whether other competitive factors confirm, reinforce, or counteract the potentially harmful effects of increased concentration.").

75. John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns?*, 81 Antitrust L.J. 837, 869 (2017).

76. *Id.* at 868–69.

profound shift from the 1968 iteration.[77] In the Guidelines, the DOJ declared the pro-merger theory that would guide its enforcement:

> [M]ergers generally play an important role in a free enterprise economy. They can penalize ineffective management and facilitate the efficient flow of investment capital and the redeployment of existing productive assets. While challenging competitively harmful mergers, the Department seeks to avoid unnecessary interference with that larger universe of mergers that are either competitively beneficial or neutral.[78]

While subsequent versions have not been quite as explicit, they have continued to presume that mergers, in general, are beneficial for consumers,[79] notwithstanding the growing evidence showing mergers do not yield efficiencies. Second, despite Supreme Court's explicit rejection of an efficiencies defense in a trio of decisions in the 1960s,[80] the agencies recognized an efficiencies defense for otherwise illegal mergers in the 1984 Merger Guidelines.[81]

The agencies' remedial approach to illegal mergers exemplifies their belief in the efficiency-enhancing potential of corporate mergers. When reviewing a merger in a highly concentrated market, the agencies' strong instinct, especially strong in recent decades, is to remedy the merger, with divestitures and other fixes—not to challenge the merger in court.[82] The agencies seek to excise mergers of their anticompetitive portions—say force merging supermarkets to divest one of the two competing grocery stores serving the same neighborhood—and permit them to be completed. These remedies are sometimes very complicated, especially compared to simply blocking them in court.[83] The apparent assumption is that these mergers, for the most part, are beneficial or neutral and should be

77. *See* U.S. Dep't of Justice, 1968 Merger Guidelines § 2 ("[T]he Department's enforcement activity under Section 7 is directed primarily toward the identification and prevention of those mergers which alter market structure in ways likely now or eventually to encourage or permit non-competitive conduct.").
78. U.S. Dep't of Justice, 1982 Merger Guidelines § I.
79. *See*, *e.g.*, U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (2010) ("Competition usually spurs firms to achieve efficiencies internally. Nevertheless, a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products.").
80. *See Brown Shoe*, 370 U.S. at 344 ("Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization."); United States v. Philadelphia National Bank, 374 U.S. 321, 371 (1963) ("We are clear . . . that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial."); FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967) ("Possible economies cannot be used as a defense to illegality."). One district judge noted that some lower courts no longer followed these older Supreme Court precedents. *See* FTC v. Cardinal Health, Inc., 12 F. Supp. 2d. 34, 61 (D.D.C. 1998) ("Several older Supreme Court cases rejected the consideration of efficiencies. . . . Yet while the Supreme Court has traditionally frowned on the use of efficiencies to rebut a prima facie case, more recent Circuit Court law has departed from the historic rule.").
81. U.S. Dep't of Justice, 1984 Merger Guidelines § 3.5.
82. John E. Kwoka, *Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes*, 78 Antitrust L.J. 619, 638 (2012). *E.g.*, of the thirteen mergers that the FTC "challenged" in 2018, it sought to stop only three of them in court and accepted remedies in the remaining ten. Fed. Trade Comm'n, Merger Enforcement Actions, https://www.ftc.gov/system/files/attachments/data-sets/ftc_merger_enforcement_actions-q3.csv.
83. *E.g.*, Press Release, U.S. Dep't of Justice, Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish (July 26, 2019), https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package; Press Release, U.S. Dep't of Justice, Justice Department Secures Largest Negotiated Merger Divestiture Ever to Preserve Competition Threatened by Bayer's Acquisition of Monsanto (May 29, 2018), https://www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened.

allowed to proceed in modified form. These remedies have a mixed track record and, on occasion, failed in spectacular fashion.[84]

2. Predation. The Supreme Court has scaled back predation as an antitrust claim, practically to the point of making predation per se illegal. The Court, informed by the hypotheses of Robert Bork and other Chicago School writers, claimed that predation is an "irrational" business strategy and that alleged predation is often just healthy price competition. Ignoring the empirical research, the Court has asserted that "predatory pricing is rarely tried, and even more rarely successful."[85]

In two 1986 decisions, the Supreme Court announced the theoretical foundations for subsequently limiting predatory pricing as an antitrust claim.[86] The Supreme Court's reasoning has built on a series of assumptions drawing on the writings of Chicago School thinkers. It has deemed predation irrational because, in the Court's understanding, the practice entails a certain loss today (below cost prices) in exchange for an uncertain gain in the future (greater pricing power).[87] Further, it has posited that higher prices in the future would attract entry and quickly erode the predator's enhanced power over price.[88] On these grounds, it has dismissed the threat of predation.[89] It ignored the evidence, cited by the dissenting justices,[90] that the plaintiffs had credibly alleged predation.

Building on these theoretical foundations, the Supreme Court announced a restrictive test that gave dominant firms latitude to maintain or extend market control through below-cost pricing. In *Brooke Group Ltd. v. Brown & Williamson Co.*, the Court held that plaintiffs alleging predatory pricing must satisfy a two-part test.[91] First, they must show that the defendant priced its products below an appropriate measure of cost.[92] Second, they must establish that the defendant has a dangerous probability of recouping its upfront losses in the future.[93] Due to the *Brooke Group* decision, few plaintiffs have brought successful predation claims in the past three decades.[94]

84. Kwoka, *supra* note 54, at 120; Fed. Trade Comm'n, A Study of the Commission's Divestiture Process 10 (1999). For an especially massive merger remedy failure, *see* the failed divestiture in the Albertsons/Safeway merger. Brent Kendall & Peg Brickley, *Albertsons to Buy Back 33 Stores It Sold as Part of Merger With Safeway*, Wall St. J. (Nov. 24, 2015), https://www.wsj.com/articles/albertsons-to-buy-back-33-stores-it-sold-as-part-of-merger-with-safeway-1448411193.
85. Matsushita, 475 U.S. at 589.
86. *Id.*; *see also* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 119 n.15 (1986) ("In order to succeed in a sustained campaign of predatory pricing, a predator must be able to absorb the market shares of its rivals once prices have been cut. If it cannot do so, its attempt at predation will presumably fail, because there will remain in the market sufficient demand for the competitors' goods at a higher price, and the competitors will not be driven out of business.").
87. Matsushita, 479 U.S. at 589.
88. *Id.*
89. *Id.* at 589–90.
90. *See id.* at 603–04 (White, J., dissenting) (citations omitted) ("The DePodwin Report alone creates a genuine factual issue regarding the harm to respondents caused by Japanese cartelization and by agreements restricting competition among petitioners in this country. No doubt the Court prefers its own economic theorizing to Dr. DePodwin's, but that is not a reason to deny the factfinder an opportunity to consider Dr. DePodwin's views on how petitioners' alleged collusion harmed respondents. The Court, in discussing the unlikelihood of a predatory conspiracy, also consistently assumes that petitioners valued profit-maximization over growth. In light of the evidence that petitioners sold their goods in this country at substantial losses over a long period of time, I believe that this is an assumption that should be argued to the factfinder, not decided by the Court."). At the time Matsushita was decided, economists had shown that predation was real, not just a theoretical possibility. *See* generally Richard O. Zerbe, Jr. & Donald S. Cooper, *An Empirical and Theoretical Comparison of Alternative Predation Rules*, 61 Tex. L. Rev. 655 (1983).
91. 509 U.S. 209, 222–24 (1993).
92. *Id.* at 223.
93. *Id.* at 224. The Supreme Court subsequently extended this two-part test to predatory bidding claims against powerful buyers. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007).
94. Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 Colum. L. Rev. 1695, 1740–41 (2013).

V. Conclusion: Time to Return to History, Law, and Realism

Consumer welfare antitrust is built on three profound falsehoods. First, it is based on false history. Congress, in enacting the primary antitrust statutes, had broader aims than protecting "consumer welfare." Second, it is based on a false conception of the market. The state constructs and structures the market through legal rules: The market is not a force of nature as the law and economics ideology underpinning antitrust presumes. Third, it is based on false economics. Extensive empirical research has shown, for example, that mergers do not promote consumer welfare and that predatory pricing is real. Despite this evidence, the federal antitrust agencies and courts continue to evaluate mergers and predatory pricing claims relying on simplistic toy models of the world.

These myths have freed corporations from antitrust rules and supercharged their power over the economy, politics, and society. First, antitrust enforcers and federal judges have rewritten legislative intent to focus exclusively on one manifestation of corporate power and downplay or outright ignore other aspects of it. Second, they have naturalized corporate prerogatives and omitted their foundation in law and policy. Third, they have developed and disseminated theories that depict the enhancement and exercise of corporate power as generally beneficial to consumers. Jointly, the three myths function as a potent punch for entrenching corporate privilege.

The present state of antitrust demands fundamental reconstruction. A project to strengthen antitrust rules based on empirical economics is worthwhile but wholly inadequate. It would not address the other foundational nonsense on which contemporary antitrust is based. A coherent antitrust requires deeper change and be built on law and realism, not myths. Going forward, antitrust should be true to congressional intent, acknowledge the legal and political construction of the market, and informed by real-world evidence. Current-day antitrust is built on a bed of nonsense—false history, false concepts, and false economics—that have been useful to powerful corporate interests and deeply damaging for everyone else.

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