

# ANTITRUST ANTITEXTUALISM

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*Judges and scholars frequently describe antitrust as a common-law system predicated on open-textured statutes, but that description fails to capture a historically persistent phenomenon: judicial disregard of the plain meaning of the statutory texts and manifest purposes of Congress. This pattern of judicial nullification is not evenly distributed: when the courts have deviated from the plain meaning or congressional purpose, they have uniformly done so to limit the reach of antitrust liability or curtail the labor exemption to the benefit of industrial interests. This phenomenon cannot be explained solely or even primarily as a tug-of-war between a progressive Congress and conservative courts. The judges responsible for these decisions were far from uniformly conservative, Congress has not mobilized to overturn the judicial precedents, nor, despite opportunities to do so, have the courts constitutionalized their holdings to prevent congressional overriding. Antitrust antitextualism is best understood as an implicit political arrangement in which Congress writes broad statutes expressing anti-bigness republican idealism, and then the courts read down the statutes pragmatically to accommodate competing demands for efficiency and industrial progress.*

## INTRODUCTION

Scholars and judges widely agree that the U.S. antitrust statutes are open-textured, vague, indeterminate, and textually unilluminating.<sup>1</sup> They

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1 ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 372–75, 409 (1978) (describing antitrust statutes as “open-textured”); WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* 4 (Random House 1965) (1954) (“From the beginning many men have criticized the [Sherman] Act as vague, its meaning as elusive, its commands as ambiguous.”); Roger D. Blair & John E. Lopatka, *Albrecht Overruled—At Last*, 66 *ANTITRUST L.J.* 537, 552 (1998) (critiquing the Sherman Act’s “indefinite language” and “elusive meaning”); Douglas H. Ginsburg, *An Introduction to Bork* (1966), *COMPETITION POL’Y INT’L*, Spring 2006, at 225, 225 (“The open-textured nature of the [Sherman] Act—not unlike a general principle of common law—vests the judiciary with considerable responsibility . . . to choose among competing values.”); William H. Page, *Interest Groups, Antitrust, and State Regulation: Parker v. Brown in the Economic Theory of Legislation*, 1987 *DUKE L.J.* 618, 659 (“[T]he Sherman Act is so open

further agree that little use can be made of the statutes' legislative histories.<sup>2</sup> It follows that the antitrust statutes are best understood as a legislative delegation to the courts to create an evolutionary and dynamic common law of competition.<sup>3</sup> As the Supreme Court explained in its landmark *Leegin* decision on resale price maintenance, "From the beginning the Court has treated the Sherman Act as a common-law statute. . . . Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on 'restraint[s] of trade' evolve to meet the dynamics of present economic conditions."<sup>4</sup> In other words, the statutory texts disclose little of importance; the action is all in dynamic judicial interpretation.

This view is so widely entrenched in the legal profession's understanding of the antitrust laws—including, it must be admitted, this author's—that it seems presumptuous to claim that the conventional wisdom is wrong, or at least significantly overstated. But it is. While the antitrust statutes may be lacking in some important particulars, they present a readily discernable

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textured and the legislative history so vague, that any standard the Court adopts is ultimately a judicial creation.”).

2 *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 688 (1978) (“Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations.”); *THE POLITICAL ECONOMY OF THE SHERMAN ACT: THE FIRST ONE HUNDRED YEARS 20–160* (E. Thomas Sullivan ed., 1991); George E. Garvey, *The Sherman Act and the Vicious Will: Developing Standards for Criminal Intent in Sherman Act Prosecutions*, 29 *CATH. U. L. REV.* 389, 390, 417 (1980) (noting that the Sherman Act's legislative history demonstrates that the Sherman Act “was deliberately intended to be indefinite with specificity to be provided by the judiciary”); Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 *N.C. L. REV.* 219, 232 (1995) (describing prevailing views that the Sherman Act's legislative history is “confused” (quoting *From Von's to Schwinn to the Chicago School: Interview with Judge Richard Posner, Seventh Circuit Court of Appeals*, *ANTITRUST*, Spring 1992, at 4, 4)).

3 I PHILLIP E. AREEDA & HERBERT HOVENKAMP, *1 ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 62 (3d ed. 2006) (stating that the Sherman Act “invest[ed] the federal courts with a jurisdiction to create and develop an ‘antitrust law’ in the manner of the common law courts”); William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the “Common Law” Nature of Antitrust Law*, 60 *TEX. L. REV.* 661, 663 (1982) (“Congress adopted what is in essence enabling legislation that has permitted a common-law refinement of antitrust law through an evolution guided by only the most general statutory directions.”); Frank H. Easterbrook, *Statutes' Domains*, 50 *U. CHI. L. REV.* 533, 544 (1983) (“The statute books are full of laws, of which the Sherman Act is a good example, that effectively authorize courts to create new lines of common law.”); Frank H. Easterbrook, *Workable Antitrust Policy*, 84 *MICH. L. REV.* 1696, 1705 (1986) (“The Sherman Act set up a common law system in antitrust.”); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 *U. CHI. L. REV.* 1, 44–45 (1985) (describing antitrust statutes as delegating to courts power to develop common law of antitrust).

4 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (alteration in original); see also *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732–33 (1988) (describing Sherman Act adjudication as a common-law process, drawing on pre-Sherman Act common law precedents and dynamic common law); *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 688 (“The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.”).

meaning on many others. As Daniel Farber and Brett McDonnell have argued, “For the conscientious textualist, the statutory texts [of the antitrust laws] have considerably more specific meaning than the conventional wisdom would suggest.”<sup>5</sup> And it is not simply the case that the meaning of the statutory texts could be rendered through ordinary methods of statutory interpretation but the courts have failed to see it. Rather, the courts frequently acknowledge that the statutory texts have a plain meaning, and then refuse to follow it.

But it gets worse. The courts have not merely abandoned statutory textualism or other modes of faithful interpretation out of a commitment to a dynamic common-law process. Rather, they have departed from text and original meaning in one consistent direction—toward reading down the antitrust statutes in favor of big business. As detailed in this Article, this unilateral process began almost immediately upon the promulgation of the Sherman Act and continues to this day. In brief: within their first decade of antitrust jurisprudence, the courts read an atextual rule of reason into section 1 of the Sherman Act to transform an absolute prohibition on agreements restraining trade into a flexible standard often invoked to bless large business combinations; after Congress passed two reform statutes in 1914, the courts incrementally read much of the textual distinctiveness out of the statutes to lessen their anticorporate bite; the courts have read the 1936 Robinson-Patman Act almost out of existence; and the Celler-Kefauver Amendments of 1950, faithfully followed in the years immediately after their promulgation, have been watered down to textually unrecognizable levels by judicial interpretation and agency practice. It is no exaggeration to say that not one of the principal substantive antitrust statutes has been consistently interpreted by the courts in a way faithful to its text or legislative intent, and that the arc of antitrust antitextualism has bent always in favor of capital.

Unlike in many debates over statutory interpretation, the issue in antitrust is not a contest between strict textualism and purposivism, including resort to legislative history.<sup>6</sup> This Article uses “antitextualism” as a shorthand for the phenomenon of ignoring any bona fide construction of what a statute means, whether in the plain meaning of its words, linguistic or substantive interpretive canons, legislative history, or other ordinary markers of legislative meaning. Uninterested in these methods, the courts have treated the antitrust laws as a virtually unbounded delegation of common-law powers when, in important ways, the statutes quite clearly say something other than that.

Inquiring into the nature and implications of antitrust antitextualism is particularly salient at the present when, for the first time in a generation, there is widespread dissatisfaction with antitrust enforcement and impetus

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5 Daniel A. Farber & Brett H. McDonnell, “*Is There a Text in this Class?*” *The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619, 623 (2005).

6 See, e.g., John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006) (examining differences between textualist and purposivist theories of statutory interpretation).

for potential reform legislation.<sup>7</sup> As was true at each of the prior moments of reformist sentiment, the call is for statutory reforms to curb the power of big business.<sup>8</sup> We have seen this play before, and also its sequel. In the play, Congress announces that the antitrust laws are too weak and that reforms are necessary to protect the nation from the power of big capital. In the sequel, the courts (often abetted by the antitrust agencies and other antitrust elites) read down the statutes to accomplish less than their texts suggest or Congress meant. Will anything be different this time around, or are the legislative reforms currently on the table predestined to a similar fate?

To begin informing an answer to that question, this Article undertakes to diagnose and analyze the longitudinal phenomenon of antitrust antitextualism. Part I sets the stage by contextualizing antitrust law within broader jurisprudential conceptions of statutory regimes, statutory interpretation, and legislative-judicial dynamics. More specifically, it presents the conventional understanding of the Sherman Act as a “super-statute” delegating broad common-law powers to the courts, thus removing antitrust law from usual controversies over statutory interpretation methodologies.<sup>9</sup> It then establishes that, if the conventional wisdom is wrong and the antitrust statutes have determinate meanings that the courts are consistently ignoring in favor of big capital, the most obvious inference is that the courts have an ideological bias at odds with congressional purpose. Part I concludes by establishing a framework for assessing whether antitrust antitextualism generally represents a conservative judicial bias against the will of a more progressive Congress.

Part II subjects the historical record of antitrust antitextualism to the analytical framework described in Part I. It presents the consistent pattern of judicial disregard of the antitrust statutes’ text and purpose across all five of the principal substantive antitrust statutes—the Sherman Act of 1890, the FTC and Clayton Acts of 1914, the Robinson-Patman Act of 1936, and the Celler-Kefauver Act of 1950, and shows that the pattern of judicial disregard has a unilateral direction—toward softening the blow of the antitrust laws on big business. However, Part II also shows that the progressive Congress/con-

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7 See Daniel A. Crane, Essay, *Antitrust’s Unconventional Politics*, 104 VA. L. REV. ONLINE 118 (2018) (detailing rising political interest in antitrust law and reform). Bills to reform antitrust law include: 21st Century Competition Commission Act of 2017, H.R. 4686, 115th Cong. (2017); Merger Retrospective Act of 2017, H.R. 4538, 115th Cong. (2017); Merger Enforcement Improvement Act, S. 1811, 115th Cong. (2017); *A Better Deal: Cracking Down on Corporate Monopolies*, SENATE DEMOCRATS, <https://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf> (last visited Oct. 4, 2020); *Klobuchar Introduces Legislation to Crack Down on Monopolies That Violate Antitrust Law*, U.S. SENATOR AMY KLOBUCHAR (Aug. 2, 2019), <https://www.klobuchar.senate.gov/public/index.cfm/2019/8/klobuchar-introduces-legislation-to-crack-down-on-monopolies-that-violate-antitrust-law> (describing bill to add penalties for antitrust violations).

8 See ELEANOR M. FOX & DANIEL A. CRANE, U.S. ANTITRUST LAW IN GLOBAL CONTEXT 787–801 (4th ed. 2020).

9 See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1231–37 (2001) (analyzing Sherman Act as a “super-statute”).

servative courts hypothesis fails to capture the burden of the historical record. In particular, the judges responsible for reading down the antitrust statutes were not generally conservative by conventional measures, Congress has not shown much interest in overriding the judicial recasting of the statutes, and the courts have not undertaken to constitutionalize their holdings in order to prevent congressional overrides, even though they had many occasions to do so. Something other than ideological conflict between the legislative and judicial branches must be behind the phenomenon.

Part III offers a counterhypothesis—that the antitrust laws reside in perennial tension between two fundamental impulses of the American political psyche: the romantic and idealistic attachment to smallness over bigness, and the pragmatic and often grudging realization that large-scale organization may be necessary to achieve economic efficiency. Congress expresses populist idealism through legislative pronouncements reining in big business, but then implicitly acquiesces as the courts (often in conjunction with the executive branch) read down the statutes to strike a balance between the aspirational and pragmatic impulses. For better or for worse, this is the way things have worked for 130 years. Part III concludes by considering the implications of the idealistic Congress/pragmatic courts thesis for future legislative reforms, the dynamism of the antitrust system, and jurisprudential understanding of legislative/judicial dynamics more generally.

## I. ANTITRUST AS COMMON LAW

### A. *The Sherman Act as Indeterminate Super-Statute*

The jurisprudence and theory of statutory interpretation is fraught with conflict over interpretive modes and ideological bias.<sup>10</sup> Textualists insist on adherence to the plain or grammatical meaning of statutory language, informed by linguistic canons of interpretation, while purposivists insist on a wider set of interpretive tools, including resort to legislative history.<sup>11</sup> Scholars debate whether judges tend to follow their interpretive commitments genuinely, or whether they instead follow their political or ideological commitments under cover of ostensibly neutral interpretive principles.<sup>12</sup> Schol-

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10 See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1997); ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006).

11 See generally AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* (Sari Bashi trans., 2005); Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 Nw. U. L. Rev. 269 (2019); Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—And the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685 (2014); Manning, *supra* note 6.

12 WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 227 (2d. ed. 2006) (arguing that judicial ideology plays important role in statutory interpretation); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 Nw. U. L. Rev. 1239, 1245–47, 1272 (2002) (challenging view that judicial ideology plays a significant role in statutory interpretation); Jeffrey A. Segal, *Separation-of-Powers*

ars also analyze statutory interpretation as an ideologically driven exchange between Congress and the courts, with swings in congressional ideology affecting interpretive ideology on the courts.<sup>13</sup>

Antitrust law has largely been immune to such analysis as a mode of contestable statutory interpretation because, across the ideological spectrum, judges and scholars have assumed that the antitrust statutes do not behave like ordinary statutes, with discernable, concrete mandates or meanings.<sup>14</sup> Instead, antitrust has been assumed to operate as a broad delegation from Congress to the courts to create a common law of competition within the institutional constraints specified in the statute.<sup>15</sup> In a leading theoretical account, William Eskridge and John Ferejohn included the Sherman Act in their roster of “super-statutes,” which

(1) seek[ ] to establish a new normative or institutional framework for state policy and (2) over time does “stick” in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute.<sup>16</sup>

Such statutes are often interpreted “beyond” their “plain meaning,” and “[o]rdinary rules of construction are often suspended or modified when such statutes are interpreted.”<sup>17</sup> Eskridge and Ferejohn understand the Sherman Act as a statute without much textual specificity that created an “ongoing economics-focused dialogue among judges, executive branch officials, private attorneys, academics (especially economists), and legislators and their staffs.”<sup>18</sup> Interpretation of the statute is “purposive rather than simple text-bounded or originalist,” and the statute “generate[s] a dynamic common law implementing its great principle and adapting the statute to meet the challenges posed to that principle by a complex society.”<sup>19</sup>

This view of the Sherman Act as common law unbounded by statutory text enjoys virtually uncontested support across the ideological spectrum. Thus, both a liberal like Justice John Paul Stevens and a conservative like

*Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 40, 42–43 (1997) (finding that from 1947 to 1992, Supreme Court Justices did not generally temper sincere ideological preferences to rationally anticipate overrides by Congress); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 302–307 (2004) (empirically studying effects of judicial ideology on statutory interpretation); Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 563 (2005).

13 Mario Bergara, Barak Richman & Pablo T. Spiller, *Modeling Supreme Court Strategic Decision Making: The Congressional Constraint*, 28 LEGIS. STUD. Q. 247, 262, 267–68 (2003) (finding that percentage of liberal statutory interpretation decisions increased with liberalism of key congressional players).

14 See *supra* note 9 and accompanying text.

15 See *supra* note 9 and accompanying text.

16 Eskridge & Ferejohn, *supra* note 9, at 1216.

17 *Id.*

18 *Id.* at 1232.

19 *Id.* at 1234.

Justice Antonin Scalia could agree that, as to antitrust, the usual stakes over statutory interpretation are off and all of the action is in applied common-law decisionmaking.<sup>20</sup> Of course, this does not mean that Stevens and Scalia agreed on *how* to conduct common-law reasoning in antitrust cases. In an apparent role reversal from their ideological priors, on common-law methodology Scalia played the progressive and Stevens the conservative. Scalia argued for the “dynamic potential” of the common law, since the Sherman Act invokes “the common law itself, and not merely the static content that the common law had assigned to the term in 1890.”<sup>21</sup> Stevens by contrast, wished for the Sherman Act to be interpreted “in the light of its common-law background,” meaning that pre-Sherman Act common-law cases should be considered particularly important to the ongoing meaning of the statute.<sup>22</sup> While, in his colloquy with Stevens in *Sharp*, Scalia insisted the Court should “not ignore common-law precedent concerning what constituted ‘restraint of trade’ at the time the Sherman Act was adopted,”<sup>23</sup> on another day he would join with his conservative colleagues in “reaffirm[ing] that ‘the state of the common law 400 or even 100 years ago is irrelevant’” to contemporary, economically informed Sherman Act jurisprudence.<sup>24</sup> One can fault the conservatives for inconsistency over whether the pre-Sherman Act common law is entirely irrelevant or weakly relevant to contemporary antitrust common law, but the important point for present purposes is that, in antitrust cases, neither the conservatives nor progressives on the Court place any stock in conventional contests over statutory interpretation methodology, accepting instead common-law methodology as their battleground.

It bears underlining that, despite the consensus that antitrust is textually unmoored common law, judicial and political ideology do play a significant role in antitrust law, and the Supreme Court does sometimes split in predictable left/right patterns on antitrust issues.<sup>25</sup> Recent examples include conventionally conservative/liberal 5–4 divides over two-sided markets,<sup>26</sup> price squeezes,<sup>27</sup> and resale price maintenance.<sup>28</sup> But, again, these debates are not expressed as contests over fidelity to statutory text or congressional purpose, but rather as engagements over applied economic or institutional policy on such questions as the robustness of markets or the evolution of

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20 See, e.g., *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (Scalia, J., majority opinion); *id.* at 736–37 (Stevens, J., dissenting).

21 *Id.* at 732 (majority opinion).

22 *Id.* at 736–37 (Stevens, J., dissenting).

23 *Id.* at 731 (majority opinion).

24 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 888 (2007) (quoting *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 n.21 (1977)).

25 For a collection of critiques of the courts as excessively influenced by conservative Chicago School economics in antitrust cases, see generally *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST* (Robert Pitofsky ed., 2008).

26 *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

27 *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009).

28 *Leegin*, 551 U.S. at 880, 882.

industrial organization theory, and the capacity of various players in the system (i.e., generalist Article III judges, juries) reliably to decide such questions.<sup>29</sup> Conservatives trust markets and distrust regulatory interventions; with progressives, it's just the opposite, but these things can be hashed out in a common-law style rather than parsing statutory texts or interrogating legislative history. By consensually denominating antitrust "common law," judges across the ideological spectrum agree to hash out their differences outside of the framework of statutory interpretation, and all of its ideological baggage. The conservatives, who usually demand statutory textualism in other fields,<sup>30</sup> free themselves to argue for their preferred economic theories, as do the progressives, who on other occasions might insist on a purposivist reading of the statute.

*B. A Framework for Considering Alternatives to the Common Law Thesis*

At the risk of disturbing the pan-ideological consensus, this Article challenges the conventional wisdom that the antitrust statutes are textually indeterminate delegations of common-law power to the courts. Coming next, Part II will show that the antitrust statutes often have readily discernable meanings that the courts simply ignore. Moreover, contra Eskridge and Ferejohn's suggestion that that courts may be guided by a purposivist methodology, Part II will show that the courts have consistently ignored not only what Congress *said* in text, but what Congress evidently *meant*, as evidenced by legislative history and other markers of congressional purpose.

But there is an even more significant reason to question the view that the courts are simply gliding over statutory text in service of a flexible and adaptive common-law strategy: over antitrust law's 130-year history, the courts have consistently deviated from text and purpose in a single direction—toward reading down the antitrust statutes in favor of business interests and against populist anti-bigness sentiment.<sup>31</sup> If the Sherman Act and its progeny were simply super-statutes delegating common-law powers to the courts, one would expect to observe a more balanced pattern of deviation from the textual midline. That the pattern is so consistently one-sided undermines any inference that it is merely methodological as opposed to directive. Something other than, or additional to, interpretive methodology must lie at the root of antitrust's antitextualism.

Once the claim that the antitrust statutes merely delegate common-law powers to the courts is debunked, we are back to the terrain covered by most disputes over interpretive methodology—the search for ideological subtext.<sup>32</sup> An obvious hypothesis to explain the pattern of judicial nullification

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29 See William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 53, 69.

30 Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 801 n.204 (1999); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 668 (1990).

31 *Infra* Section III.A.

32 See, e.g., Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 947–60 (2016); Eben Moglen & Richard J. Pierce, Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory*



of apparent congressional will in order to favor big capital is that the Congresses that passed the substantive antitrust statutes were more progressive or anticorporate than the courts that then interpreted and applied those statutes. So, intuitively, the interpretive phenomenon of antitrust antitextualism may reduce to a simple proposition: progressive Congress, conservative courts.

Part II will dispute that simple view, but first two caveats. The first caveat is definitional and tautological. If by “progressive” one means willing to vote for a statute that textually reins in big business and by “conservative” one means unwilling to give that statute its full textual or purposivist rendering, then by definition antitrust antitextualism equates to comparatively progressive Congresses and conservative courts. However, as discussed further below, a definitional and tautological approach fails to capture the legislative-judicial dynamic in a way that provides meaningful insight.

Second, the comparative political ideology of the Congress and courts in a conventional “left-right” sense does have some obvious explanatory power, particularly when considered temporally. For example, there is no doubt that the New Deal Congress that passed the Robinson-Patman Act was more populist, progressive, and anti-bigness than courts, influenced by the Chicago School and conservative economic movements of the 1970s and ’80s, that curtailed the Act.<sup>33</sup> The question under consideration is not whether conventional political ideology has played some role in antitrust antitextualism, but whether it is the entire or even the leading explanation. There are good reasons to believe that it is not.

If antitrust antitextualism were primarily a manifestation of conventional left/right ideology, one would expect to observe three kinds of markers. First, the judicial decisions that nullified legislative text or purpose would tend to be written by judges associated with the political right over the dissents of judges associated with the political left. As noted previously, common-law contestation over antitrust policy often codes in conventional left/right terms, with more laissez-faire or pro-business judges often favoring defendants whereas their peers to the left express more pro-regulatory or anti-business views. So one key question is whether the judicial voting patterns reflecting antitrust antitextualism’s pro-business bias are identifiably conservative by conventional measures.

Second, as is often the case in tussles between progressive legislatures and conservative courts, Congress would react to judicial decisions that flaunted its will by overriding those decisions by reform legislation. When Congress disapproves of statutory construction by a court, it often overrides the judicial decision by amending the statute.<sup>34</sup> For example, in recent

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*Interpretation*, 57 U. CHI. L. REV. 1203, 1215, 1232, 1243 (1990); Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769 (2008).

<sup>33</sup> *Supra* note 25.

<sup>34</sup> See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511 (2009).

decades, Congress has overridden numerous conservative judicial decisions regarding civil rights<sup>35</sup> and disabilities.<sup>36</sup> A 1991 empirical study by William Eskridge concluded that “Congress and its committees are aware of the Court’s statutory decisions, devote significant efforts toward analyzing their policy implications, and override those decisions with a frequency heretofore unreported.”<sup>37</sup> Eskridge’s study found that, between 1967 and 1990, Congress passed 187 override statutes overriding 344 judicial decisions.<sup>38</sup> Eskridge’s study found that one factor that contributed to congressional overrides was “an ideologically fragmented Court.”<sup>39</sup> Another empirical study found that, between 1969 and 1988, Congress overrode Supreme Court interpretation of statutes in 26.8% of cases involving economic regulation, far more than in other areas.<sup>40</sup> As with other important areas of federal policy, the explanation for this congressional acquiescence in the courts’ antitrust antitextualism cannot be that interested parties in or with access to Congress were unaware of, or indifferent to, the common-law evolution of antitrust policy. An empirical study of congressional consideration of overruling antitrust decisions by the courts found 110 bills introduced to modify or overrule antitrust decisions of the courts between 1950 and 1978 (of which only six became public law).<sup>41</sup> If judicial decisions reading down the antitrust statutes were primarily the product of ideological contestation, one would expect to see reaction by Congress in the form of periodic legislative amendments to override the judicial interpretations.

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35 Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2, 16, 29, and 42 U.S.C.); see Eskridge, *supra* note 34, at 333 n.4 (explaining that Civil Rights Act overrode twelve Supreme Court decisions).

36 ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 29 and 42 U.S.C.).

37 Eskridge, *supra* note 34, at 334.

38 *Id.* at 338; see also Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1318–19 (2014) (expanding and improving on earlier Eskridge study, and finding that statutory overrides fell off after 1998).

39 Eskridge, *supra* note 34, at 334.

40 Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 445 (1992); see also Nancy C. Staudt, René Lindstädt & Jason O’Connor, *Judicial Decisions as Legislation: Congressional Oversight of Supreme Court Tax Cases, 1954–2005*, 82 N.Y.U. L. REV. 1340, 1353–54 (2007) (finding that Congress overrode eight percent of Supreme Court tax decisions).

41 Beth Henschen, *Statutory Interpretations of the Supreme Court: Congressional Response*, 11 AM. POL. Q. 441, 446 (1983). The article does not identify the six bills that became public law. The article concludes that “Congress rarely responds to the statutory decisions of the Court” in antitrust cases. *Id.* at 453. However, the period of the study, 1950 to 1978, coincides with the period of most aggressive antitrust enforcement in American history and ends just when the Chicago School revolution began to swing judicial decisions in a radically different direction. This would therefore not be a period in which the pattern of a more progressive Congress overruling a more conservative Supreme Court on antitrust issues would be likely observed.

A final test on the progressive Congress/conservative courts hypothesis is the extent to which the courts have stretched the boundaries of constitutional doctrines to immunize their preferred antitrust doctrines from legislative overriding. By constitutionalizing antitrust doctrines in favor of big business, the courts could prevent congressional end runs through reform bills. There is no shortage of examples of courts constitutionalizing doctrines that might have been left to statutory interpretation absent a suspicion that Congress would override the doctrines through legislation. Consider, for instance, the constitutionalization of citizen standing doctrines through Article III injury requirements,<sup>42</sup> or of *Miranda* warning as against congressional intermeddling.<sup>43</sup>

The Court's practical ability to constitutionalize a preferred doctrine is limited by the reasonable elasticity of the relevant constitutional text or established doctrines. A court in an ideological battle with Congress is more likely to deploy constitutional doctrines when such moves are within the contestable range of constitutional law than when constitutionalization would be widely regarded as doctrinally illegitimate and hence call into question the Court's legitimacy. The courts' failure to constitutionalize key aspects of antitrust law would be more significant in assessing the courts' atextual statutory readings if there were readily available constitutional doctrines that could have been deployed than if such moves would have required constitutional adventures. Thus, the analysis that follows considers the courts' failure to constitutionalize aspects of antitrust law as most relevant when constitutional doctrines were readily available to immunize judicial doctrines from congressional overriding.

The following Part presents the historical narrative of antitrust antitextualism, with particular reference to whether the emerging pattern supports the progressive Congress/conservative courts hypothesis. In particular, it asks whether the courts that read down the antitrust statutes were predominantly conservative by conventional measures, whether Congress responded by overriding the judicial interpretation, and whether the courts attempted to draw on available constitutional doctrines to immunize their rulings from congressional overrides.

## II. ANTITRUST ANTITEXTUALISM AS IDEOLOGICAL CONFLICT

Congress has legislated substantively on antitrust on five principal occasions—in 1890 with the passage of the landmark Sherman Act,<sup>44</sup> the foundational American antitrust law; in 1914 with the passage of the Progressive-era Clayton<sup>45</sup> and Federal Trade Commission Acts;<sup>46</sup> in 1936 with the passage of

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42 James E. Pfander, *Scalia's Legacy: Originalism and Change in the Law of Standing*, 6 BRIT. J. AM. LEGAL STUD. 85 (2017).

43 *Dickerson v. United States*, 530 U.S. 428, 444 (2000).

44 Sherman Act, ch. 647, 26 Stat. 209 (1890).

45 Clayton Antitrust Act, Pub. L. No. 63-212, 38 Stat. 730 (1914).

46 Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914).

the anti-chain-store Robinson-Patman Act;<sup>47</sup> and in 1950 with the passage of the Celler-Kefauver Act,<sup>48</sup> designed to arrest a “rising tide of economic concentration” in the post-War economy.<sup>49</sup> Each of these statutes has been subject to extensive interpretation by the courts, and each of them has been read down from its plain textual meaning and legislative understanding in favor of business. However, with some exceptions, this pattern of judicial disregard for text and legislative purpose did not track conventional ideological patterns. The judges reading down the statutory texts were not predominantly conservative, Congress usually did not overrule the judicial interpretation through reform legislation, and, despite ample grounds to do so, the courts did not constitutionalize their decisions to insulate them from congressional overrides.

### A. *Section 1 of the Sherman Act*

Section 1 of the Sherman Act provides: “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 hereby declared to be illegal.”<sup>50</sup> Whatever else “contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce” means, it is textually inescapable that all such contracts are illegal. And so the Supreme Court recognized in its first foray into interpreting the Sherman Act—*United States v. Trans-Missouri Freight Ass’n*.<sup>51</sup> The defendant railroads invoked a “rule of reason” and argued that their cartel agreement should be deemed lawful as a reasonable restraint of trade.<sup>52</sup> Justice Peckham’s majority opinion accepted the government’s interpretation of section 1 of the Sherman Act<sup>53</sup> and rejected the cartellists’ argument on textualist grounds, finding no textual room for a rule of reason in section 1. The “strict language of the act” permitted “no escape from the conclusion” that all agreements in restraint of trade were illegal.<sup>54</sup>

47 Robinson-Patman Act, Pub. L. No. 74-692, 49 Stat. 1526 (1936).

48 Celler-Kefauver Act, Pub. L. No. 81-899, 64 Stat. 1125 (1950).

49 *Brown Shoe Co. v. United States*, 370 U.S. 294, 315 (1962).

50 Sherman Act, ch. 647, § 1, 26 Stat. 209, 209 (1890) (codified as amended at 15 U.S.C. § 1).

51 166 U.S. 290 (1897).

52 *Id.* at 303.

53 Judson Harmon, *Brief for the United States in the Case of the United States of America v. the Trans-Missouri Freight Association*, 6 YALE L.J. 295, 304, 311–13 (1897).

54 *Trans-Mo. Freight Ass’n*, 166 U.S. at 312. Justice White’s dissenting opinion put the government’s textual argument, accepted by the majority, most directly: “Congress has said every contract in restraint of trade is illegal. When the law says every, there is no power in the courts, if they correctly interpret and apply the statute, to substitute the word ‘some’ for the word ‘every.’ If Congress had meant to forbid only restraints of trade which were unreasonable it would have said so; instead of doing this it has said *every*, and this word of universality embraces both contracts which are reasonable and unreasonable.” *Id.* at 345 (White, J., dissenting).

Peckham rested the Court's rejection of the rule of reason on text and disdained any inquiry into the Sherman Act's legislative history out of "a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body."<sup>55</sup> However, had he inquired into the legislative history, he would not have found anything compelling a revision of his *Trans-Missouri* holding. Although the Sherman Act's legislative history may be too muddled to be of great help interpretatively,<sup>56</sup> what themes can be gleaned from it are at best mixed on the question of grafting a rule of reason of the open-ended kind eventually adopted in *Standard Oil* and subsequently elaborated in Justice Louis Brandeis's *Chicago Board of Trade* opinion.<sup>57</sup>

No sooner had the Court resisted the siren song of antitextualism than it began to succumb. The year after rejecting the rule of reason under section 1 in *Trans-Missouri*, Justice Peckham wrote again for the Court in *United States v. Joint Traffic Ass'n*,<sup>58</sup> this time appearing to apply a form of the rule of reason, albeit in continuing to find liability under section 1.<sup>59</sup> A year later, the Court affirmed then-Judge Taft's rule of reason analysis in *United States v. Addyston Pipe*,<sup>60</sup> again finding liability under section 1 but holding out the possibility that a reasonable ancillary restraint of trade might be lawful despite section 1's textual absolutism.

The Court's equivocation between fidelity to statutory text and engrafting a rule of reason into section 1<sup>61</sup> ended in 1911 in *Standard Oil*<sup>62</sup> (and

55 *Id.* at 318 (majority opinion).

56 *Supra* note 2 and accompanying text.

57 See Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 263 (1986) (rejecting idea that legislative history shows that Congress meant to make a broad delegation of rule of reason determinations to courts); Gary R. Roberts, *The Evolving Confusion of Professional Sports Antitrust, the Rule of Reason, and the Doctrine of Ancillary Restraints*, 61 S. CAL. L. REV. 943, 999 (1988) (arguing that neither text nor legislative history of Sherman Act support importation of rule of reason into section 1 of Sherman Act).

58 171 U.S. 505 (1898).

59 WILLIAM HOWARD TAFT, *THE ANTI-TRUST ACT AND THE SUPREME COURT* 90 (1914) (asserting that "the much-criticized 'rule of reason' of the Chief-Justice was only a change of phrase from the expression which Mr. Justice Peckham had himself used as the guide to a proper construction of the statute"). The Supreme Court has attributed the origins of the rule of reason to *Joint Traffic*. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997); *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 342-43 (1982).

60 *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 278, 296 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

61 In 1904 in *Northern Securities*, Justice Harlan's majority opinion interpreted the Court's earlier decisions, particularly *Trans-Missouri*, as holding that section 1 "is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces *all* direct restraints imposed by any combination, conspiracy, or monopoly upon such trade or commerce." *N. Secs. Co. v. United States*, 193 U.S. 197, 331 (1904). In concurrence, and underscoring the longer trajectory of the Court's movement away from statutory text, Justice Brewer expressed regrets for having signed off on

again two weeks later in *American Tobacco*),<sup>63</sup> with Justice White prevailing in the antitextualist views he had expressed in dissent in *Trans-Missouri*.<sup>64</sup> The government maintained the textual position that Peckham had launched in *Trans-Missouri*, insisting that the “language of the statute embraces every contract, combination, etc., in restraint of trade, and hence its text leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibitions to every case within its literal language.”<sup>65</sup> Justice White, however, attempted to evade the need to insert the adjective “unreasonable” into the statutory text by insisting that the rule of reason sprang directly from the common-law meaning of “restraint of trade,” against which Congress had created the Sherman Act.<sup>66</sup>

If it were plausible to read “restraint of trade” as a common-law term of art inherently calling for a reasonableness analysis, that possibility was belied by the Court’s subsequent opinions, which made explicitly clear that the rule of reason syntactically required distinguishing reasonable restraints of trade from unreasonable ones. Justice Brandeis showed the Court’s cards in *Chicago Board of Trade*,<sup>67</sup> beginning with the observation that the category of “restraint[s] of trade” was broad and general insofar as “[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.”<sup>68</sup> The “true test of legality” for a restraint of trade was its reasonableness or unreasonableness, viz. whether it “regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition,”<sup>69</sup> an inquiry that required resort to a litany of open-ended factors.<sup>70</sup>

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*Trans-Missouri*’s rejection of the rule of reason in light of the “long course of decisions at common law” affirming reasonable restraints of trade. *Id.* at 360–61 (Brewer, J., concurring). In *Shawnee Compress Co. v. Anderson*, 209 U.S. 423, 434 (1908), the Court again repeated in passing that section 1 prohibited not merely unreasonable restraints of trade, but “all direct restraints of trade,” inserting an adjective (“direct”) quite as atextual, and as serviceable in loosening the Sherman Act’s strict prohibition on restraints of trade, as “unreasonable.”

62 *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 66 (1911).

63 *United States v. Am. Tobacco Co.*, 221 U.S. 106, 180 (1911).

64 *Standard Oil*’s adoption of a rule of reason was largely a foregone conclusion by 1911. LETWIN, *supra* note 1 at 265 (arguing that White’s opinion in *Standard Oil* changed nothing); Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 801–05 (1965) (asserting that substance of law was not changed at all in *Standard Oil*).

65 *Standard Oil*, 221 U.S. at 63.

66 *Id.* at 63 (“[I]t is obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether if the act is within such classes its nature or effect causes it to be a restraint of trade within the intendment of the act.”).

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

68 *Id.* at 238.

69 *Id.*

70 *Id.* (holding that relevant rule of reason considerations include “the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint

Following *Chicago Board of Trade*, the Court abandoned any pretense that its rule of reason jurisprudence was in service of identifying “restraints of trade” rather than figuring out which ones were reasonable or unreasonable. Unreasonable restraints of trade were unlawful,<sup>71</sup> and reasonable ones were lawful.<sup>72</sup> Over time, the Court began to acknowledge explicitly that its section 1 jurisprudence was atextual, or even antitextual,<sup>73</sup> best encapsulated in the Court’s announcement in *National Society of Professional Engineers* that “the language of § 1 of the Sherman Act . . . cannot mean what it says.”<sup>74</sup> Whether or not it could mean what it said, the Court had certainly interpreted it not to.

Up through *Standard Oil*, the immediate consequences of engrafting a rule of reason onto section 1 were small, since the restraints of trade in question were usually found unlawful even under the rule of reason. But, *Chicago Board of Trade* opened the door for rule of reason analysis to result in exoneration of the challenged restraint, and, over time, rule of reason analysis became a “euphemism for nonliability.”<sup>75</sup> In recent years, rule of reason analysis has swung in the direction of a genuine mode of analysis leading to

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was imposed; the nature of the restraint and its effect, actual or probable[;] [t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained”).

71 See, e.g., *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 455 (1986) (restraint illegal because it “was an unreasonable and conspiratorial restraint of trade in violation of § 1”); *United States v. Gen. Motors Corp.*, 384 U.S. 127, 139 (1966) (asking whether location clause was “unreasonable restraint of trade in violation of the Sherman Act”); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396 (1927) (“That only those restraints upon interstate commerce which are unreasonable are prohibited by the Sherman Law was the rule laid down by the opinions of this Court in the *Standard Oil* and *Tobacco* cases.”).

72 See, e.g., *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (recognizing that “this Court has not taken a literal approach” to the language of section 1 but has held that “‘Congress intended to outlaw only *unreasonable* restraints’”) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (emphasis in original)); *Associated Press v. United States*, 326 U.S. 1, 14 (1945) (“[T]rade restraints might well be ‘reasonable,’ and therefore not in violation of the Sherman Act.”); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 217 (1940) (observing that restraint in *Chicago Board of Trade* survived because it was “a reasonable restraint of trade”); *Nat’l Ass’n of Window Glass Mfrs. v. United States*, 263 U.S. 403, 413 (1923) (“It is enough that we see no combination in unreasonable restraint of trade . . .”).

73 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (“While § 1 could be interpreted to proscribe all contracts, see, e.g., *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918), the Court has never ‘taken a literal approach to [its] language,’ *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). Rather, the Court has repeated time and again that § 1 ‘outlaw[s] only unreasonable restraints.’ *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).” (alterations in original)); *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 342–43 (1982) (“In *United States v. Joint Traffic Assn.*, 171 U.S. 505 (1898), we recognized that Congress could not have intended a literal interpretation of the word ‘every’ . . .”).

74 *Nat’l Soc’y of Pro. Eng’rs v. United States*, 435 U.S. 679, 687 (1978).

75 Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 14 (1977); see also Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67, 71 (1991) (describing rule of reason analysis as a rule of de facto nonliability).

potential condemnation of the challenged restraint,<sup>76</sup> but section 1 jurisprudence remains fundamentally at odds with the statute's absolutist text. A flat prohibition on contracts, combinations, and conspiracies in restraint of trade has become a mandate for courts to decide, based on shifting social and economic theories, which restraints are good and which are bad.<sup>77</sup>

Although the Supreme Court's Sherman Act jurisprudence evidences disregard for the text and evident purpose of section 1, it does not track conventional political ideology. If there is one case decided during antitrust's formative period that best encapsulates conventional understandings of judicial ideology relating to business regulation, it is *Lochner v. New York*.<sup>78</sup> The majority opinion in *Lochner* was authored by the laissez-faire New York Democrat Rufus Peckham, a confidant of J.P. Morgan, Cornelius Vanderbilt, and John D. Rockefeller, often suspected of a pro-business disposition because of his personal relationships with the Robber Barons.<sup>79</sup> But it was Peckham who wrote the *Trans-Missouri* opinion insisting on antitrust textualism and rejecting the rule of reason.<sup>80</sup> Meanwhile, it was the *Lochner* dissenter (Southern Democrat) Edward Douglass White who led the charge for the rule of reason through his dissent in *Trans-Missouri* and ultimate triumph (as Chief Justice) in *Standard Oil*.<sup>81</sup> Only one Justice—John Marshall Harlan—dissented from the Court's adoption of the rule of reason in *Stan-*

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76 See, e.g., *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013) (upholding pharmaceutical company's liability for pay for delay patent settlements under the rule of reason); *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239 (9th Cir. 2020) (finding NCAA's rules limiting compensation to student athletes unlawful under rule of reason); *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015) (finding NCAA's rules prohibiting student athletes from profiting from their image or likeness violated rule of reason); *United States v. Visa USA, Inc.*, 344 F.3d 229 (2d Cir. 2003) (finding Visa and Mastercard's exclusivity rules violated rule of reason).

77 One could dispute that the courts were antitextual in reading a rule of reason into the Sherman Act on the grounds that various members of the Congress that adopted the Sherman Act insisted that they were merely enacting existing common-law principles and that the principal drafters of the Sherman Act's language, particularly George Edmunds and George Hoar, were experienced commercial lawyers familiar with the common-law meaning of "contracts in restraint of trade." See LETWIN, *supra* note 1, at 94–95; Felix H. Levy, *The Federal Anti-Trust Law and the "Rule of Reason,"* 1 VA. L. REV. 188, 188–90 (1913). But, in that case, there was a much easier path to textual fidelity than engrafting a rule of reason onto section 1 of the Sherman Act—the path Justice White suggested in *Standard Oil* of hanging section 1 analysis on the historical meaning of "restraint of trade." As noted in this Article, the Supreme Court abandoned that position after *Standard Oil* in favor of self-described antitextualism.

78 198 U.S. 45 (1905).

79 HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II* 116 (5th ed. 2008); MELVIN I. UROFSKY, *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 351 (1994).

80 *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290 (1897); *supra* notes 53–54 and accompanying text.

81 *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 30 (1911); *Trans-Mo.*, 166 U.S. 290, 343 (White, J., dissenting); *supra* notes 63–65 and accompanying text.



*Standard Oil*.<sup>82</sup> *Lochner* dissenters Holmes, White, and Day joined the majority, as did the newly appointed (former Progressive New York Governor and Supreme Court centrist) Charles Evans Hughes.<sup>83</sup>

*Standard Oil* was not the product of *Lochnerism*, but the Supreme Court's endorsement of the rule of reason provoked a sharp political response. The 1912 Democratic Party platform expressed "regret that the Sherman anti-trust law has received a judicial construction depriving it of much of its efficiency" and pledged "the enactment of legislation which will restore to the statute the strength of which it has been deprived by such interpretation."<sup>84</sup> But, even after Woodrow Wilson's victory in 1912 and with the Democratic Party controlling both houses of Congress in 1914, neither of the 1914 reform statutes expelled rule of reason analysis from section 1 of the Sherman Act. To the contrary, the legislative history reveals that Congress intended the 1914 reform statutes to play an "educational role" to help inform business people of the content of the rule of reason.<sup>85</sup> Far from rejecting the rule of reason, the 1914 statutes implicitly codified it by not overriding it.<sup>86</sup> Four years later, Justice Louis Brandeis, Woodrow Wilson's chief advisor on antitrust issues and the 1914 legislative reforms,<sup>87</sup> would author the Supreme Court's archetypal recitation of the rule of reason in *Chicago Board of Trade*.<sup>88</sup>

Turning to the final evaluative factor concerning the progressive Congress/conservative courts hypothesis, the federal courts have declined to constitutionalize their Sherman Act jurisprudence, despite frequent invitations to do so and the ready availability of constitutional doctrines that could have served.<sup>89</sup> From *Joint Traffic Ass'n*<sup>90</sup> through *Nash*,<sup>91</sup> litigants repeatedly

82 *Standard Oil*, 221 U.S. at 82 (Harlan, J., dissenting).

83 *Lochner*, 198 U.S. at 65 (Harlan, J., joined by White & Day, JJ., dissenting); *id.* at 74 (Holmes, J., dissenting).

84 1 NATIONAL PARTY PLATFORMS, 1840-1956, at 168-69 (Donald Bruce Johnson comp., rev. ed. 1978)

85 Thomas B. Leary, *The Muris Legacy*, ANTITRUST SOURCE, Nov. 2004, at 1, 7; *see also* Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 278 (discussing FTC and Clayton Acts as response to, but not overruling of, *Standard Oil*'s endorsement of rule of reason).

86 Similar patterns emerge in other areas where Congress passed antitrust reform statutes. For instance, the Miller-Tydings Act of 1937, which permitted states to pass resale price maintenance laws that would otherwise have contravened the Sherman Act as the Supreme Court had interpreted it, arose in reaction to the Supreme Court's decision in *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911). *See* Peritz, *supra* note 85, at 297-98. However, Congress did not go so far as to overrule *Dr. Miles*, but only created an option for states to opt out of *Dr. Miles*'s rule, which remained the baseline. *Id.*

87 Kenneth G. Elzinga & Micah Webber, *Louis Brandeis and Contemporary Antitrust Enforcement*, 33 TOURO L. REV. 277, 285 (2017) (explaining Brandeis's role as Wilson's economic adviser and architect of FTC Act).

88 *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 235 (1918).

89 The one important exception is the Court's early, narrow definition of interstate commerce for purposes of the Sherman Act, *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), a framework the Court quickly walked back in *Swift & Co. v. United States*, 196 U.S.

raised constitutional challenges to application of the Sherman Act, sounding in both substantive and procedural due process (void for vagueness) and equal protection, and the courts soundly rejected them.<sup>92</sup> Application of due process or equal protection constraints to limit the reach of federal antitrust law was well within the range of available constitutional doctrines, as evidenced by the Court's willingness to invalidate state antitrust statutes<sup>93</sup> and other federal statutes<sup>94</sup> on similar grounds.<sup>95</sup> Yet, even while reading down the statutory texts, the courts declined to constitutionalize their holdings, for example by suggesting that such atextual readings were required by constitutional principles.<sup>96</sup>

The atextual creation of the rule of reason during antitrust's formative period certainly reflected a collision of interpretive, social, and political commitments, but not in a way that substantiates the inference of an ideological contest between Congress and the courts in conventional left/right terms.

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375 (1905), and buried in *Standard Oil*. See Bruce Johnsen & Moin A. Yahya, *The Evolution of Sherman Act Jurisdiction: A Roadmap for Competitive Federalism*, 7 U. PA. J. CONST. L. 403, 414–15 (2004).

90 *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 559, 565–66 (1898).

91 *Nash v. United States*, 229 U.S. 373, 376, 378 (1913).

92 Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1, 61, 64 (1999).

93 *Cline v. Frink Dairy Co.*, 274 U.S. 445, 456 (1927) (invalidating on vagueness grounds Colorado law allowing fixing of prices if they were reasonable); *McFarland v. Am. Sugar Refin. Co.*, 241 U.S. 79, 81, 86–87 (1916) (invalidating on equal protection grounds Louisiana statute making payment to out-of-state refiners of higher prices than those paid to in-state refiners prima facie evidence of antitrust violation); *Int'l Harvester Co. of Am. v. Kentucky*, 234 U.S. 216, 223 (1913) (invalidating on vagueness grounds Kentucky statute prohibiting “combining to depreciate below its real value any article, or to enhance the cost of any article above its real value”).

94 *United States v. L. Cohen Grocery*, 255 U.S. 81, 89–91 (1921) (invalidating on vagueness grounds provisions of Lever Act prohibiting conspiracies to charge unreasonable prices).

95 See Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 847 (1965) (observing that interpretive problem faced by Justices Peckham, Taft, and White with respect to the Sherman Act was not unlike the problem they faced in the statutes the Court invalidated on vagueness grounds); Matthew G. Sipe, *The Sherman Act and Avoiding Void-for-Vagueness*, 45 FLA. ST. U. L. REV. 709, 717 (2018) (observing that text of Sherman Act was just as vague as that of Lever Act invalidated in *Cohen Grocery*).

96 The Court's interpretive moves in antitrust cases sometimes channeled the Court's constitutional values. For example, the Supreme Court's decision in *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), permitting manufacturers to announce a minimum resale price and refuse to do future business with any retailer not adhering to it, expresses *Lochner*-era freedom of property and contract themes. See Edward P. Krugman, *Soap, Cream of Wheat, and Bakeries: The Intellectual Origins of the Colgate Doctrine*, 65 ST. JOHN'S L. REV. 827, 829, 835 (1991). But while interpreting the Sherman Act in the light of its constitutional values, the Court did not go so far as to constitutionalize its statutory decisions in a way that would have precluded Congress from overriding them.

## B. *The Clayton Act*

### 1. Labor Exemption

From the beginning, labor was antitrust's *bête noire*. A statute obviously designed to rein in the capitalist class—the trusts—was quickly turned against labor organizations and boycotts, with the consequence that out of the first thirteen successful prosecutions under the Sherman Act, twelve were directed against labor.<sup>97</sup> By 1914, Congress had decided to remove the labor question from antitrust entirely. It did so with simple elegance in section 6 of the Clayton Act, stating that “the labor of a human being is not a commodity or article of commerce.”<sup>98</sup> The following sentences of section 6 went on to exclude labor, agricultural, and horticultural organizations from the reach of the antitrust laws, a coda that would create interpretive confusion down the road.<sup>99</sup> Section 20 of the Clayton Act prohibited the issuance of injunctions

in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application.<sup>100</sup>

The combined effect of sections 6 and 20 was meant to “immunize pressure or agreements with the purpose of fixing the price of labor or stabilizing labor standards” and to eliminate the “issuance of injunctions specifically against primary strikes and boycotts, peaceful patrolling, refusals to patronize, and related acts” in the context of labor disputes.<sup>101</sup>

It did not take long for the Supreme Court to thwart the plain meaning of the statutes. In *Duplex Printing Press Co. v. Deering*<sup>102</sup> and *American Steel Foundries v. Tri-City Central Trades Council*,<sup>103</sup> the Court held that sections 6 and 20 only prevented the issuance of injunctions as to disputes between employers and employees in a direct employment relationship. In *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n of North America*,<sup>104</sup> the Court

97 HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836–1937*, at 229 (1991).

98 Clayton Act, ch. 323, § 6, 38 Stat. 730, 731 (1914) (codified as amended at 15 U.S.C. § 17).

99 *Id.* (“Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.”)

100 Clayton Act § 20 (codified as amended at 29 U.S.C. § 52).

101 Milton Handler & William C. Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 COLUM. L. REV. 459, 469 (1981).

102 254 U.S. 443, 471–74 (1921).

103 257 U.S. 184, 202 (1921).

104 274 U.S. 37, 55 (1927).

held that section 20 did not immunize secondary boycotts, conduct that had been unlawful prior to 1914. Most significantly and doing the greatest violence to the text of the Clayton Act, in *Apex Hosiery*, the Supreme Court read the “commodity or article of commerce” clause of section 6 as merely a preamble to the subsequent “labor organization” provisions, giving the prior clause no independent force or effect.<sup>105</sup>

The Court’s dismissal of the “commodity or article of commerce” clause was preemptory, treating seriously neither the statute’s text nor legislative history.<sup>106</sup> As a textual matter, the excision of any independent force or effect to the “commodity or article of commerce” clause would have been difficult to defend. The “commodity or article of commerce” clause applies solely to human labor; the subsequent provisions to labor, agriculture, and horticulture. The provisions regarding agricultural and horticultural organizations function on a freestanding basis without any prior qualification or introduction, so there is no textual necessity or function for a clause merely introducing a limited exemption for labor organizations. Unless the “commodity or article of commerce” clause has some meaning independent from the subsequent clauses regarding organizations, the former clause is mere surplusage—a result the Court otherwise insists must be avoided in construing statutes.<sup>107</sup> Nor does the Clayton Act’s legislative history support the evisceration of the “commodity or article of commerce” clause. What legislative history there is suggests that while Congress did not have a definite idea of the meaning or reach of the “commodity or article of commerce” clause and understood it as related to the subsequent provision regarding labor organizations, it also understood the clause as freestanding and independently significant.<sup>108</sup> The Court effectively excised that clause from the statute in *Apex*

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105 *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 515 (1940) (“The reference in the last clause to ‘such organizations’ has manifest reference to what precedes, and the immunity conferred is only with respect to the ‘lawfully carrying out’ of their ‘legitimate objects.’” (quoting Clayton Act § 6)).

106 By contrast, in 1970, Judge Walter Mansfield, a federal district judge soon to be elevated to the United States Court of Appeals for the Second Circuit, engaged in a more thorough analysis of the issue, reaching the same conclusion: “[I]n the light of the statute’s legislative history, [the statute’s additional language] convinces us that the sole purpose and effect of the section is to exempt activities and agreements on the part of labor, agricultural or horticultural organizations with respect to their furnishing labor in the market place.” *Cordova v. Bache & Co.*, 321 F. Supp. 600, 605 (S.D.N.Y. 1970). As noted above, Judge Mansfield’s analysis is inconsistent with both the text of the statute and the legislative history showing that Congress intended for the “commodity or article of commerce” clause to have independent effect.

107 *E.g.*, *Direct Mktg. Ass’n v. Brohl*, 135 S. Ct. 1124, 1132 (2016) (observing that Court tries to construe to avoid superfluity).

108 The clause was drafted by Samuel Gompers, President of the American Federation of Labor, and proposed in the Senate debate over the Clayton Act in response to Gompers’s claim that it was “an outrage upon our language” to construe the Sherman Act as applicable to “men and women who own nothing but themselves and undertake to control nothing but themselves and their power to work.” 2 THE LEGISLATIVE HISTORY OF THE FEDERAL ANITRUST LAWS AND RELATED STATUTES 1260–63, 1794 (Earl W. Kintner ed.,

*Hosiery* and has never looked back.<sup>109</sup> The consequence of the judicial disregard of the “commodity or article of commerce” clause has been that the statutory labor exemption and judicially created nonstatutory exemption focus almost exclusively on unilateral labor bargaining around unionization activity, as opposed to immunizing from antitrust scrutiny the full set of agreements around transactions in human labor.<sup>110</sup>

As with the Sherman Act, however, conservative judicial ideology is not a fitting explanation for the Court’s reticence to enforce section 6 of the Clayton Act’s removal of all labor issues from antitrust. *Apex Hosiery* was written by the political moderate Justice Harlan Stone, over dissents by Chief Justice Hughes, the archconservative anti–New Dealer James McReynolds, and Owen Roberts who often joined the “Four Horsemen” in striking down New Deal legislation. Since *Apex*, the Supreme Court has treated the “commodity or article of commerce” clause as a dead letter without objection from any ideological quarter, nor any effort to constitutionalize antitrust’s application to labor.

The Supreme Court’s pre–New Deal labor/antitrust decisions did meet with limited congressional override, but only on the issue of injunctions. The Norris-LaGuardia Act of 1932 eliminated federal equity jurisdiction over enumerated conduct arising in the context of “labor disputes,” and was intended to overturn judicial interpretations of section 20 of the Clayton Act that had allowed courts to continue to issue injunctions against labor strikes despite

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1978). In response to a proposed amendment by Senator Culberson that would have combined the “commodity or article of commerce” clause with the subsequent sentence, Senator Cummins argued that the clause would be “more impressive and more logical” if deployed as “a sentence by itself” and should not be commingled with the subsequent sentence, which also applied to agriculture and horticulture. 3 *id.* at 2378. The clause was meant to make a categorical moral statement removing human labor from antitrust.

109 The only viable defense of the Court’s atextual reading of the Clayton Act’s labor provisions would be that the passage of further federal statutes addressing labor injunctions and labor relations—particularly the Norris-LaGuardia Act of 1932 and the Wagner Act (National Labor Relations Act) of 1935—amended the effect of the Clayton Act. So the Court suggested in Justice Frankfurter’s opinion in *United States v. Hutcheson*, observing that the Sherman Act, section 20 of the Clayton Act, and the Norris-LaGuardia Act read as a “harmonizing text of outlawry of labor conduct.” 312 U.S. 219, 231 (1941). Such interpretive harmonization may be plausible as to section 20 and Norris-LaGuardia, but no post-1914 statute has amended or implicated section 6’s declaration that human labor isn’t commerce, full stop.

110 See *Clarett v. Nat’l Football League*, 369 F.3d 124, 131 (2d Cir. 2004) (examining contemporary scope of statutory and nonstatutory labor exemptions). Thus, for example, when a group of D.C. lawyers serving indigent criminal defendants agreed not to take any new representations until the D.C. court system increased their compensation, the D.C. Circuit observed that they would not qualify for the Clayton Act’s labor exemption because they were not a “labor organization” within the meaning of section 6. Superior Ct. Trial Laws. Ass’n v. FTC, 856 F.2d 226, 230 n.6 (D.C. Cir. 1988). Nevermind that, under the plain language of section 6, if defendants were selling their labor, they were not engaged “in commerce” within the meaning of the antitrust laws, and hence should not have been covered whether or not they constituted a “labor organization.” The text that would have created their defense had long since been read out of the statute.

the clear language of the statute.<sup>111</sup> The Court then read the Sherman, Clayton, and Norris-LaGuardia Acts in combination to immunize peaceable union strikes from any form of remedy or liability, whether injunctive, criminal, or damages.<sup>112</sup> But neither the Norris-LaGuardia nor Wagner Act overturned *Apex Hosiery's* excision of the "commodity or article of commerce" clause from section 6 of the Clayton Act,<sup>113</sup> with the effect that the Clayton Act's sweeping removal of labor from antitrust's purview remains a statutory dead letter. Congress, having insisted in the Clayton Act that human labor categorically does not count as commerce subject to the antitrust laws, has implicitly acquiesced in a long line of judicial decisions treating human labor as ordinary commerce unless it falls within the purview of collective bargaining-related activities.

## 2. Private Right of Action

Section 7 of the Sherman Act included a private right of action for treble damages,<sup>114</sup> a provision repeated with slight modifications in section 4 of the Clayton Act.<sup>115</sup> The operative words give the right of action to "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act."<sup>116</sup> Like the "every" in section 1 of the Sherman Act, the "any" in section 4 of the Clayton Act does not admit of textual qualification. Straightforwardly, any person injured in his or her business or property by a violation of the antitrust laws should have a right of action for treble damages.

Undeterred by the statute's plain meaning, the Supreme Court has imposed two atextual limitations on the private right of action for treble damages. The first, announced in 1977 in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, is the antitrust injury requirement: that "[p]laintiffs must prove . . . injury of the type the antitrust laws were intended to prevent and that flows

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111 Robert H. Lande & Richard O. Zerbe, Jr., *Anticonsumer Effects of Union Mergers: An Antitrust Solution*, 46 DUKE L.J. 197, 205 (1996).

112 *Hutcheson*, 312 U.S. at 236–37; Elinor R. Hoffmann, *Labor and Antitrust Policy: Drawing a Line of Demarcation*, 50 BROOKLYN L. REV. 1, 26–27 (1983).

113 Hoffmann, *supra* note 112, at 25.

114 Sherman Act, ch. 647, § 7, 26 Stat. 209, 209 (1890) (amended 1914) ("Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.").

115 Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 15) ("That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.").

116 Sherman Act § 7 (amended 1914).

from that which makes defendants' acts unlawful."<sup>117</sup> The second, announced also in 1977 in *Illinois Brick*<sup>118</sup> and continuing in a line of cases on both purchaser standing and standing by other parties,<sup>119</sup> denies standing to parties who do not have a sufficiently direct connection to the violation. In combination, these rules have the effect of denying a private right of action for antitrust treble damages to a wide swath of parties who are quite clearly "injured in [their] business or property"<sup>120</sup> by virtue of antitrust violations.

Neither the antitrust injury rule nor the standing rules could be, or were, justified on textualist or legislative history grounds. In *Brunswick*, the Court found it odd to imagine that Congress meant "to mandate damages awards for all dislocations caused by unlawful mergers despite the peculiar consequences of so doing," and found no support for such a result in section 4's legislative history.<sup>121</sup> But the most that can be said about the legislative history of section 4 is that Congress meant the remedy to be broad and had not fully considered the implications of giving standing to anyone suffering a loss from an antitrust violation.<sup>122</sup> There is no affirmative case in the legislative history to override the clear import of the statutory text.

As with respect to the Sherman Act, the Supreme Court eventually came to acknowledge that the glosses it wrote onto section 4 of the Clayton Act could not be justified on textual grounds.<sup>123</sup> Nonetheless, it has shown little indication of interest in reviving a textual reading of section 4, with one potential, recent exception: In 2019, in *Apple Inc. v. Pepper*,<sup>124</sup> Justice Kavanaugh's majority opinion finding that purchasers of Apple smartphone apps were direct purchasers with standing to sue Apple purported to rely on statutory textualism. His opinion began with the text of section 4, quoted it with "*any person*" italicized, and insisted that any ambiguity of in the *Illinois Brick* line of precedents should be resolved "in the direction of the statutory text."<sup>125</sup> And the Court granted antitrust standing to app purchasers, per-

117 429 U.S. 477, 489 (1977).

118 *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977).

119 *See, e.g., Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 521, 543 (1983).

120 Clayton Act § 4.

121 *Brunswick*, 429 U.S. at 488.

122 Daniel Berger & Roger Bernstein, *An Analytical Framework for Antitrust Standing*, 86 *YALE L.J.* 809, 811–12 (1977); C. Douglas Floyd, *Antitrust Victims Without Antitrust Remedies: The Narrowing of Standing in Private Antitrust Actions*, 82 *MINN. L. REV.* 1, 23–24 (1997); Todd Marcus Young, Note, *Unestablished Businesses and Treble Damage Recovery Under Section Four of the Clayton Act*, 49 *U. CHI. L. REV.* 1076, 1082 (1982).

123 *Holmes v. Secs. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992) (describing Court's section 4 jurisprudence as adopting a "judicial gloss that avoided a simple literal interpretation" (quoting *Associated Gen. Contractors*, 459 U.S. at 534)); *Associated General Contractors*, 459 U.S. at 529–31 (acknowledging that literal reading of statutory text would support standing for plaintiffs and that, like section 1 of the Sherman Act, section 4 "cannot mean what it says" (quoting *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 687 (1978))).

124 139 S. Ct. 1514 (2019).

125 *Id.* at 1520, 1522.

sons surely “injured in [their] business or property” under the plain meaning of the statutory text.<sup>126</sup> But while *Apple* could be seen as a textualist turn in antitrust jurisprudence after a century of textual neglect, the case’s narrow holding and the Court’s apparent lack of interest in revisiting the overall structure of the *Illinois Brick* direct purchaser rule simply underscore the Court’s general lack of interest in the statutory text of the antitrust law except in limited and idiosyncratic cases.

Justice Kavanaugh’s weakly textualist gesture in *Apple* may reflect the influence of conservative ideology on statutory interpretation, but to the disadvantage of big business. As a general matter, no case could be made that the Court’s reading down of section 4 and the private right of action reflects the triumph of laissez-faire ideology. The Supreme Court had few occasions to interpret the private right of action created by section 4 until the post-War period.<sup>127</sup> When the Court began to layer atextual antitrust injury and standing requirements onto the statute in the 1970s, it hardly did so in a conventionally ideological way. The antitrust injury requirement was announced in *Brunswick* by the civil rights veteran Justice Thurgood Marshall for a unanimous Court.<sup>128</sup> The Court’s two other major antitrust injury decisions limiting the scope of the private right of action under section 4 were authored by the liberal lion Justice William Brennan.<sup>129</sup> The *Illinois Brick* decision limiting purchaser standing to seek treble damages to direct purchasers casts a liberal-conservative shadow with Justice White writing for the more conservative members of the Court over dissents by Brennan, Marshall, and Blackmun,<sup>130</sup> but the Court later extended the direct injury rule to limit nonpurchaser standing in an opinion by liberal Justice John Paul Stevens over a single dissent by Justice Marshall.<sup>131</sup>

Here again, Congress has acquiesced through inaction. The atextual imposition of limitations on section 4’s private right of action—the antitrust injury and standing requirements—have thus far gone unchallenged. Although twenty-six states have responded with disapproval of the Supreme Court’s *Illinois Brick* rule reserving standing to a direct purchaser,<sup>132</sup> Congress has let the ruling stand as to federal law. Further, despite an invitation to do so, the Court unanimously declined to constitutionalize its antitrust standing doctrines, permitting the states to abrogate the federal rule at

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126 *Id.* (quoting 15 U.S.C. § 15(a) (2018)).

127 DANIEL A. CRANE, *THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT* 51–56 (2011).

128 *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 478, 489 (1977).

129 *See Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 331 (1990); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 105, 111 (1986).

130 *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 723, 748 (1977).

131 *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 520, 543, 546 (1983).

132 John C. Brinkerhoff Jr., Note, *Ropes of Sand: State Antitrust Statutes Bound by Their Original Scope*, 34 *YALE J. ON REGUL.* 353, 376 & n.144 (2017) (listing the twenty-six state “Illinois Brick Repealer” statutes (and District of Columbia’s ordinance)).



will.<sup>133</sup> Disregarding the statute's plain language and legislative history, the courts have treated antitrust's private right of action as their common-law turf, and Congress has acquiesced.

### 3. Tying and Exclusive Dealing

Section 3 of the Clayton Act prohibits firms to sell or lease goods on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.<sup>134</sup>

On its face, section 3 covers two species of anticompetitive behavior—exclusive dealing contracts (where a firm requires its trading partners not to purchase the good it is selling from a rival) and tying agreements (where a seller requires its customers to purchase a secondary good from the seller if they wish to purchase a primary good). One immediately apparent textual implication is that section 3 must be broader than section 1 of the Sherman Act, otherwise there would be no need for it, since everything prohibited by section 3 would already be prohibited by sections 1 and 2. Textually, the words “substantially lessen competition or tend to create a monopoly”<sup>135</sup> must have reference to standards of exclusion broader than those comprehended by sections 1 and 2 of the Sherman Act's prohibitions on “restraint[s] of trade” and “monopoliz[ing].”<sup>136</sup>

While recognizing the inevitable implications of the textual differences between the Sherman and Clayton Acts, the courts have largely given these implications feeble lip service only. On the one hand, the courts have recognized that, as to exclusive dealing and tying, the coverage of section 3 of the Clayton Act must be broader than that of section 1 of the Sherman Act. In *Times-Picayune*, the Supreme Court suggested, in dicta, that section 3 might apply if either the seller has power in the tying market or a substantial volume of commerce in the tied market is restrained, whereas both criteria would have to be met to make out a section 1 claim.<sup>137</sup> Likewise, in *Tampa Electric*, the Court observed that, as to exclusive dealing contracts, section 3 has a “broader prescription” than section 1 of the Sherman Act.<sup>138</sup> Lower courts have interpreted this to mean that “a greater showing of anti-competi-

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133 *California v. ARC Am. Corp.*, 490 U.S. 93, 94, 101 (1989) (holding state “Illinois Brick Repealer laws” are not preempted by Supreme Court interpretations of Sherman Act).

134 Clayton Act, ch. 323, § 3, 38 Stat. 730, 731 (1914) (codified as amended at 15 U.S.C. § 14).

135 *Id.*

136 Sherman Act, ch. 647, §§ 1–2, 26 Stat. 209, 209 (1890) (codified as amended at 15 U.S.C. §§ 1–2).

137 *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 608–09 (1953).

138 *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 335 (1961).

tive effect is required to establish a Sherman Act violation than a § 3 Clayton Act violation in exclusive-dealing or requirements contracts cases.”<sup>139</sup> But despite such dutiful recitations of a lower threshold of illegality in section 3 cases, the recitation is functionally a dead letter. In practice, courts uniformly apply the same standards for tying under the Clayton and Sherman Acts.<sup>140</sup>

Moreover, the courts have functionally inverted the textual weight of the Clayton Act’s concern with exclusive dealing or tying agreements “tend[ing] to create a monopoly”<sup>141</sup> and section 2 of the Sherman Act’s concern with persons that “monopolize, or attempt to monopolize.”<sup>142</sup> Whereas a person has not “monopolized” unless she has actually obtained a monopoly and has not “attempted to monopolize” unless she has had a specific intent to monopolize and come dangerously close,<sup>143</sup> textually conduct might “tend” toward monopoly without having yet completed the act or being specifically meant to do so. But courts hold just the opposite, permitting claims under section 2 of the Sherman Act to proceed after rejecting claims under section

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139 *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1275 (9th Cir. 1975); *accord CDC Techs., Inc. v. IDEXX Lab’ys, Inc.*, 186 F.3d 74, 79 (2d Cir. 1999) (observing that a greater degree of market foreclosure would be required in a Sherman Act case than in a Clayton Act section 3 case); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1304 n.9 (9th Cir. 1982) (“[A] greater showing of anticompetitive effect is required to establish a Sherman Act violation than a section 3 Clayton Act violation in exclusive-dealing cases.”).

140 9 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTI-TRUST PRINCIPLES AND THEIR APPLICATION* 218 n.22 (2d ed. 2004) (collecting cases). While there is a division of authority in the lower courts as to whether, in principle, the amount of market foreclosure necessary to make out a section 3 exclusive dealing claim is lower than in a comparable Sherman Act case, *id.*; *see also United States v. Microsoft Corp.*, 253 F.3d 34, 69 (D.C. Cir. 2001) (collecting cases), the distinction turns out to be functionally irrelevant since, as a practical matter, exclusive dealing claims are evaluated “under the same rule of reason” whether arising under the Sherman or Clayton Act. *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 281 (3d Cir. 2012) (citing *LePage’s Inc. v. 3M*, 324 F.3d 141, 157 & n.10 (3d Cir. 2003) (en banc)). Where a plaintiff asserts both section 3 and section 1 claims, the courts’ usual practice is to dispose solely of the section 3 claim and then declare that whatever it decided as to that claim also controls the section 1 claim. *See, e.g., Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1233 n.16 (8th Cir. 1987) (“The parties did not extensively address the Section 1 claim in this appeal, but our resolution of the Clayton Act claim disposes of the issue.”). Often, courts formulaically recite the difference between the Clayton Act and Sherman Act standards, and then move on with their analysis without any further attention to statutory differences. *See, e.g., Eastman v. Quest Diagnostics Inc.*, 724 Fed. App’x. 556, 558 (9th Cir. 2018). Where a party asserts just a section 1 claim, the analysis is, in practice, no different.

141 Clayton Act, ch. 323, § 3, 38 Stat. 730, 731 (1914) (codified as amended at 15 U.S.C. § 14).

142 Sherman Act, ch. 647, §§ 1–2, 26 Stat. 209, 209 (1890) (codified as amended at 15 U.S.C. §§ 1–2).

143 *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993).

3 of the Clayton Act.<sup>144</sup> As with section 1 of the Sherman Act, the courts have essentially subsumed section 3's antimonopoly language into section 2 of the Sherman Act's antimonopoly provision, even though section 3 textually has an evidently broader scope.

The Clayton Act's legislative history does not provide support for abnegation of the statutory text either. Arguing to the contrary, the Areeda-Hovenkamp treatise dismisses the possibility that section 3 of the Clayton Act must be given a broader scope of operation than the Sherman Act, observing that "the Clayton Act was enacted not because Congress was sure that the Sherman Act would not cover the same ground but because Congress was uncertain about the coverage of that statute after the *Standard Oil* case promulgated the vague 'rule of reason.'"<sup>145</sup> But a closer look at the Clayton Act's legislative history reveals that Congress was concerned not merely with the uncertainty created by *Standard Oil's* adoption of the rule of reason, but with more particular implications of Supreme Court precedent on tying. After the Clayton bill had passed the House, the Senate struck the provision that became section 3 (dealing with tying and exclusive dealing contracts) on the ground that such provisions could be addressed by the Federal Trade Commission under the then-pending FTC bill.<sup>146</sup> Senator Reed of Missouri successfully urged reconsideration,<sup>147</sup> on the grounds that the FTC would be unlikely to outlaw agreements of the type the Supreme Court had upheld in the *A.B. Dick*<sup>148</sup> case in 1912. Section 3 was thus directed not just against a vague rule of reason, but against the particular doctrine of *A.B. Dick*, as the Supreme Court subsequently held.<sup>149</sup> Yet while the Court's tying jurisprudence, under both the Clayton and Sherman Acts, reflected hostility toward tying arrangements from the 1920s to the 1970s, tying law subsequently swung back to a much more receptive view to tying,<sup>150</sup> including resurrecting a number of doctrinal points enunciated in *A.B. Dick*.<sup>151</sup> As the courts

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144 *LePage's Inc.*, 324 F.3d at 157 n.10; *Barr Lab's, Inc. v. Abbott Lab's*, 978 F.2d 98, 110–12 (3d Cir.1992); *SmithKline Corp. v. Eli Lilly & Co.*, 427 F. Supp. 1089, 1092 (E.D. Pa. 1976), *aff'd*, 575 F.2d 1056 (3d Cir. 1978).

145 AREEDA & HOVENKAMP, *supra* note 140, at 216.

146 See 51 CONG. REC. 14,088–92 (1914); see also *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 297 n.4 (1949) (recounting legislative history of section 3 of the Clayton Act).

147 *Standard Oil*, 337 U.S. at 297 n.4.

148 *Henry v. A.B. Dick Co.*, 224 U.S. 1, 14, 48, 49 (1912).

149 *Motion Picture Pats. Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 518 (1917) (holding that *A.B. Dick* "must be regarded as overruled").

150 *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 35 (2006) ("Over the years, however, this Court's strong disapproval of tying arrangements has substantially diminished.").

151 These included: (1) the exclusive rights granted by Congress through the patent system are not the type of monopolies with which the antitrust laws are concerned, compare *A.B. Dick*, 224 U.S. at 27–28 (explaining that patent monopolies are not those attacked by antitrust laws), with *Indep. Ink*, 547 U.S. at 31 (abrogating post-*A.B. Dick* precedents holding that presence of a patent in tying market creates conclusive presumption of market power for antitrust purposes); (2) tying arrangements are not harmful to competition if

reformed the law to be much more lenient toward tying, they treated the question almost entirely as one of antitrust common law rather than inquiring into the text or legislative history of section 3 of the Clayton Act. Typical is Justice Blackmun's statement in *Dawson Chemical Co. v. Rohm & Haas Co.* that *A.B. Dick* provoked "what may be characterized through the lens of hindsight as an inevitable judicial reaction," followed by an acknowledgment in a footnote that "[i]n addition to this judicial reaction, there was legislative reaction as well."<sup>152</sup> In antitrust cases, the courts tend to treat judicial common law as text and statutes as footnotes.

There is no clear moment when section 3's distinctive prohibitions on tying and exclusive dealing were subsumed within the Court's Sherman Act jurisprudence; it occurred accretively in a succession of decisions. But this much is clear: The shift of judicial attitude toward tying and exclusive dealing that resulted in the weakening of section 3 did not come about primarily as a judicial putsch from the right. Justice Stevens's opinions for unanimous Courts<sup>153</sup> in *Fortner II*,<sup>154</sup> *Jefferson Parish*,<sup>155</sup> and *Independent Ink*<sup>156</sup> did as much to resurrect *A.B. Dick*'s treatment of tying as any decision.<sup>157</sup> And it was Justice Clark's 1961 opinion for seven Justices in *Tampa Electric*, at a time when the Court could not plausibly be thought conservative on antitrust issues, that created the template for contemporary, economically informed exclusive dealing analysis under section 3.<sup>158</sup>

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they only affect the sales of the tied product when used with the tying product and not the general market, *compare A.B. Dick*, 224 U.S. at 31–32 (explaining that tying arrangement in question only affected sales in relevant market relating to use of defendant's mimeograph machines), *with Indep. Ink*, 547 U.S. at 41–43; (3) a patentee might lawfully decide to sell his patented goods at cost and take his profits from higher prices in the tied market, *compare A.B. Dick*, 224 U.S. at 32 (explaining that *A.B. Dick* had pursued such a strategy), *with Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 478–79 (1992) (acknowledging that "[a] pricing strategy based on lower equipment prices and higher aftermarket prices could enhance equipment sales by making it easier for the buyer to finance the initial purchase" and that such a strategy would not violate the antitrust laws, although declining to decide whether that efficiency explanation was justified on the facts of *Kodak*).

152 *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 191 & n.10 (1980).

153 All three opinions were unanimous in the judgment, although there were concurring opinions in *Fortner II* and *Jefferson Parish*.

154 *U.S. Steel Corp. v. Fortner Enters., Inc. (Fortner II)*, 429 U.S. 610, 622 (1977) (departing from Supreme Court holdings that tying arrangements are almost always illegal). *See, e.g.*, *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 305–06 (1949) ("Tying agreements serve hardly any purpose beyond the suppression of competition.").

155 *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 4–5 (1984).

156 *Indep. Ink*, 547 U.S. at 28, 45.

157 While *Fortner II*, *Jefferson Parish*, and *Independent Ink* arose only under the Sherman Act, the Court's *Independent Ink* opinion lumped tying cases arising under sections 1 and 2 of the Sherman Act, section 5 of the FTC Act, or section 3 of the Clayton Act into a single analytical bucket. *Indep. Ink*, 547 U.S. at 34–35; *see also Indep. Ink*, 547 U.S. at 32; *Jefferson Par.*, 466 U.S. at 4; *Fortner II*, 429 U.S. at 611.

158 *See Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 335 (1961); Harlan M. Blake & William K. Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 453 (1965) (describing *Tampa Electric* as requiring inquiry into whether "effective

Further, while Congress has shown interest in tying as a question of patent misuse and on several occasions overturned Supreme Court precedents interpreting the patent statute,<sup>159</sup> it has undertaken no intervention to override the Court's atextual interpretations weakening section 3 of the Clayton Act. As with the balance of the antitrust statutes, Congress has acquiesced in the courts' treatment of the Clayton Act as their common-law domain, despite having said, and apparently meant, something quite different than that at the time of the statute's passage.

### C. *Federal Trade Commission Act*

The companion statute to the Clayton Act, the Federal Trade Commission Act, articulated the most comprehensive and succinct antitrust rule imaginable: "Unfair methods of competition in or affecting commerce . . . are hereby declared unlawful."<sup>160</sup> It is admittedly difficult to glean much meaning from a plain reading of the statutory text, but one thing is readily apparent—section 5 of the FTC Act is concerned with business ethics; it proscribes "unfair" methods of competition. It is also textually apparent that section 5 is more open-textured and general than sections 1 and 2 of the Sherman Act, and therefore that section 5 must prohibit everything that the Sherman Act prohibits, and more. Thus, for example, the textual prohibition on "unfair methods of competition in or affecting commerce" facially does not require any general market effect of the kind facially required by section 2 of the Sherman Act (monopoly) or read into section 1 of the Sherman Act (market power). An unfair competitive act is simply illegal.

Section 5's legislative history confirms the textual inferences that Congress was chiefly concerned with policing practices inconsistent with business morality. Senator Newlands, a leading proponent of the bill, argued for a catchall phrase like "unfair methods of competition" because

"it would be utterly impossible for Congress to define the numerous practices which constitute unfair competition and which are against good morals in trade." Unfair competition "covers every practice and method between competitors upon the part of one against the other that is against public

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functioning of the market is [ ] threatened and where the transaction promotes economic efficiency").

159 Act of July 19, 1952, ch. 950, 66 Stat. 792 (codified as amended at 35 U.S.C. §§ 1–390) (excluding some conduct, such as a tying arrangement involving the sale of a patented product tied to an essential or nonstaple product that has no use except as part of the patented product or method, from scope of patent misuse); Act of Nov. 19, 1988, Pub. L. No. 100-703, 102 Stat. 4676 (eliminating presumption that patents used to tie confer market power).

160 15 U.S.C. § 45(a)(1) (2018). The 1938 Wheeler-Lea Amendments added a prohibition on "unfair or deceptive acts or practices." Wheeler-Lea Act of March 21, 1938, Pub. L. No. 75-447, 52 Stat. 111.

morals . . . or is an offense for which a remedy lies either at law or in equity.”<sup>161</sup>

When another Senator objected that “‘public morals’” was a “‘pretty broad category,’” Senator Newlands doubled down on public morals being “a very good test.”<sup>162</sup> In the House, Representative Covington, a key bill proponent, explained that “the term may be said now to embrace those unjust, dishonest, and inequitable practices by which one seeks to destroy or injure the business of a competitor.”<sup>163</sup> Proponents of the bill argued that “unfair methods of competition” were not restricted to firms with market power; for instance, a small firm that employed industrial espionage would equally have violated the statute.<sup>164</sup>

Unavoidably, the courts recognized that the Commission’s powers under section 5 are at least coextensive with the substantive reach of the Sherman Act—in other words, that anything that is illegal under the Sherman Act is also illegal under the FTC Act.<sup>165</sup> The Supreme Court also held that the FTC may go further than the Sherman Act and “stop in their incipiency acts and practices which, when full blown, would violate those Acts.”<sup>166</sup> Thus, “[t]he standard of ‘unfairness’ under the FTC Act . . . encompass[es] not only practices that violate the Sherman Act and the other antitrust laws . . . but also practices that the Commission determines are against public policy for other reasons.”<sup>167</sup> So far, so good, for textual interpretation.

However, the pro forma recognition that the FTC Act must be broader than the Sherman Act has not resulted in an operationally wider scope for the FTC Act than the Sherman Act. Once again, judicial resistance contributed to the reading down of the statute. In a series of cases in the late 1970s and early 1980s, the federal courts of appeal rejected the FTC’s efforts to assert an independent section 5 jurisprudence that would capture trade practices not unlawful under the Sherman Act.<sup>168</sup> After taking its licking in the courts, the FTC largely fell back on bringing conventional Sherman Act cases, essentially tying the meaning of the FTC Act to the judicial interpreta-

161 Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935, 1945 (2000) (alteration in original) (quoting Senate Consideration (H.R. 15613; S. 4160), in 5 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3936, 3968 (Earl W. Kintner ed., 1982) [hereinafter KINTNER]).

162 *Id.* (quoting Senate Consideration (H.R. 15613; S. 4160), *supra* note 161, at 4414).

163 *Id.* at 1946–47 (quoting Conference Consideration (H.R. 15613), in KINTNER, *supra* note 161, at 4726).

164 *Id.* at 1946 (citing Senate Consideration (H.R. 15613; S. 4160), *supra* note 161, at 4141, 4135, 4146).

165 *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948).

166 *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966) (quoting *FTC v. Motion Picture Advert. Co.*, 344 U.S. 392, 394–95 (1953)).

167 *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986).

168 *E.I. duPont de Nemours & Co. v. FTC*, 729 F.2d 128, 130 (2d Cir. 1984); *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 577–81 (9th Cir. 1980); *Off. Airline Guides, Inc. v. FTC*, 630 F.2d 920, 921 (2d Cir. 1980).

tion of the Sherman Act.<sup>169</sup> In recent years, the Commission has cautiously (and controversially) tried to recapture the possibility of an independent “unfair methods of competition” jurisprudence, but thus far there is no indication of whether the courts will go along.<sup>170</sup>

One striking consequence of the jurisprudential melding of the FTC and Sherman Acts has been the complete excision of the word “unfair” from section 5. Since the rise of the consumer welfare standard in the late 1970s, the Supreme Court has interpreted the Sherman Act in amoral terms, as a purely consequentialist statute aimed at maximizing economic efficiency.<sup>171</sup> As the leading antitrust scholar Herbert Hovenkamp has put it, “antitrust has no moral content”<sup>172</sup> and its “sole purpose is to make the economy bigger.”<sup>173</sup> As a positive description of current U.S. antitrust doctrine, that observation is correct. The Supreme Court has gone to great lengths to explain that the antitrust laws do not remedy purely immoral acts between competitors, even acts “of pure malice” among competitors.<sup>174</sup> Note the excision of “unfair competition” from antitrust in the canonical statement of this principle from *Brooke Group*:

Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or “purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.”<sup>175</sup>

Perhaps this is a plausible reading of the Sherman Act, which does not use morally loaded terminology, but that statement could not apply textually to section 5 of the FTC Act, which begins with the words “unfair methods of competition.” Nonetheless, in coupling the meaning of section 5 with the meaning of the Sherman Act, the courts have excised the entire phrase

169 CRANE, *supra* note 127, at 136.

170 FED. TRADE COMM’N, STATEMENT OF ENFORCEMENT PRINCIPLES REGARDING “UNFAIR METHODS OF COMPETITION” UNDER SECTION 5 OF THE FTC ACT (Aug. 13, 2015), <https://www.ftc.gov/public-statements/2015/08/statement-enforcement-principles-regarding-unfair-methods-competition>; Intel Corp., No. 9341, 2009 WL 4999728 (F.T.C. Dec. 16, 2009) (Statement of Chairman Leibowitz and Commissioner Rosch).

171 Maurice E. Stucke, *Reconsidering Antitrust’s Goals*, 53 B.C. L. REV. 551, 563–66 (2012) (collecting cases showing federal courts’ commitment to consumer welfare and economic efficiency).

172 Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 609 (2003) (“[A]ntitrust has no moral content and is unconcerned about the distribution of wealth.”); *see also* HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 10, 54 (2005) (same).

173 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.”).

174 *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993); *see also* *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 137 (1998) (warning against transforming “cases involving business behavior that is improper for various reasons, say, cases involving nepotism or personal pique, into treble-damages antitrust cases”).

175 *Brooke Grp.*, 509 U.S. at 225 (quoting *Hunt v. Crumboch*, 325 U.S. 821, 826 (1945)).

“unfair methods of competition”—which is the *only* operational idea in section 5—from the statute. For example, in rejecting the FTC’s challenge to Rambus’s exploitation of patents that were not disclosed to a standard setting organization, the D.C. Circuit held that deceptive conduct to thwart competitors that does not harm competition generally is not actionable under the FTC Act, and then cited *Brooke Group’s* “pure malice” language in support.<sup>176</sup> Even courts that uphold FTC challenges to anticompetitive behavior insist that the action can succeed only if the Commission can prove general market effects, and not merely wrongful acts harming a competitor,<sup>177</sup> and that FTC cases are tried “in the court of consumer welfare.”<sup>178</sup> “Unfair,” pregnant with morality, has been read entirely out of the statute as to antitrust cases and replaced with the consequentialist jurisprudence of neoclassical economics.

But, again, the judicial transformation of the FTC Act away from its text and original purpose cannot be read in primarily left/right ideological terms. The excision of fairness and morality from the “unfair methods of competition” text of section 5 of the FTC Act has been accomplished in a succession of judicial decisions and with the implicit consent of the Commission itself. The Supreme Court’s unanimous 1931 *Raladam* decision limited section 5’s coverage to acts that harmed specific competitors or competition generally, which removed from section 5’s coverage deceptive or oppressive acts that harmed consumers without harming competitors.<sup>179</sup> Congress fixed this gap in 1938 with the Wheeler-Lea Amendments, which granted the Commission explicit power to enjoin “unfair or deceptive acts or practices,” even if they did not harm competition or consumers.<sup>180</sup> Functionally, this new grant of power gave the Commission a consumer protection mission separate from its antitrust mission, but the two missions always played in concert. Excessive adventurism by the Commission in its consumer protection mission in the 1970s that led to social and political backlash, coupled with the conservatism of the Reagan years and defeats in the lower courts in a few antitrust cases,<sup>181</sup> moved the Commission to adopt a cautious stance in its enforce-

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176 *Rambus Inc. v. FTC*, 522 F.3d 456, 464 (D.C. Cir. 2008) (“Deceptive conduct—like any other kind—must have an anticompetitive effect in order to form the basis of a monopolization claim. ‘Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws,’ without proof of ‘a dangerous probability that [the defendant] would monopolize a particular market.’” (alteration in original) (quoting *Brooke Grp.*, 509 U.S. at 225)).

177 *E.g.*, *McWane, Inc. v. FTC*, 783 F.3d 814, 835 (11th Cir. 2015) (observing that “the government must demonstrate that the defendant’s challenged conduct had anticompetitive effects, harming competition”); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 32–33 (D.C. Cir. 2005) (observing that Commission must show harm to competition or output reduction).

178 *Polygram*, 416 F.3d at 37.

179 *FTC v. Raladam Co.*, 283 U.S. 643, 652–54 (1931).

180 Wheeler-Lea Act of March 21, 1938, Pub. L. No. 75-447, 52 Stat. 111; *see also* CRANE, *supra* note 127, at 138; Calkins, *supra* note 161, at 1949–50.

181 *See supra* text accompanying notes 168–69.



ment actions. If the Commission tied its antitrust enforcement actions to the same Sherman Act jurisprudence applicable to the Justice Department and private litigants, the Commission could hardly be accused of regulatory imperialism. Thus, the reading out of unfairness from section 5 did not happen principally or solely due to conservative judicial construction of the statute, but due to a confluence of judicial, legislative, and administrative decisions over the course of decades.

With one exception, Congress has also acquiesced through inaction in the courts' progressive excision of fairness and ethics from the FTC Act's prohibition on "unfair methods of competition." As noted earlier, the 1938 Wheeler-Lea Amendments, which created the FTC's mandate to enjoin "unfair or deceptive acts or practices," came about in reaction to the Supreme Court's *Raladam* decision holding section 5 inapplicable to conduct unharmed to competition or competitors.<sup>182</sup> But the effect of the amendment was to create new consumer protection authority for the Commission separate from its antitrust mission, leaving the antitrust mission to the mercy of previous and future judicial interpretation. As subsequent courts gutted section 5 of its textually distinctive moral and ethical meaning and tied the FTC Act functionally to consequentialist judicial interpretations of the Sherman Act, Congress showed no interest in an override.

If an antitrust statute ever made an ample target for a constitutional challenge, it was section 5 of the FTC Act, which drips with vagueness in its prohibition of "unfair methods of competition." Although the Supreme Court sometimes alluded to generalized liberty interests in its construction of the FTC Act,<sup>183</sup> the vagueness issue has not squarely reached the Supreme Court. The Seventh Circuit upheld the statute against a void for vagueness challenge<sup>184</sup> and the Supreme Court embraced the enterprise of deciding the statute's coverage on a case-by-case basis.<sup>185</sup> The Supreme Court then upheld the independence of the agency from the executive branch,<sup>186</sup> permitting section 5 jurisprudence and enforcement to float free from the President's enforcement of the Sherman Act. When the court iteratively read unfairness and business ethics out of the statute and aligned section 5 atextually with the Sherman Act, it did so without constitutional leverage or overtones.

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182 *Supra* note 170.

183 *See, e.g.*, *FTC v. Sinclair Refin. Co.*, 261 U.S. 463, 475–76 (1923) ("The powers of the Commission are limited by the statutes. It has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition. The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs.")

184 *Sears, Roebuck & Co. v. FTC*, 258 F. 307, 310–12 (7th Cir. 1919).

185 *FTC v. Gratz*, 253 U.S. 421, 427 (1920).

186 *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935).

#### D. *Robinson-Patman Act*

Section 2 of the Clayton Act prohibited sellers “to discriminate in price between different purchasers of commodities . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce.”<sup>187</sup> The rise of large chain stores like the Great Atlantic & Pacific Tea Company (“A&P”) around the time of the First World War and the pressure they put on “mom and pop” retail stores led to a populist push for amendments to the Clayton Act that would tighten the prohibition on price discrimination.<sup>188</sup> In particular, critics argued that chain stores were able to leverage their buyer power to obtain bulk discounts from suppliers and then undercut the retail prices offered by smaller independent stores.<sup>189</sup> In 1936, Congress passed the Robinson-Patman Act to add further prohibitions to section 2 of the Clayton Act. Reflecting the prevailing view that chain store buyers were often the culprits in obtaining volume discounts, the Robinson-Patman Act made buyers liable if they “knowingly . . . induce or receive” a discriminatory price prohibited by the Act.<sup>190</sup> Further, and most significantly for textualist purposes, the Act added to the “substantially lessen competition or tend to create a monopoly” criteria an additional category of cognizable competitive harms for price discrimination that tends to “injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.”<sup>191</sup> The evident purpose of this addition was to create liability in circumstances where the discriminatory price might not have a general market effect but might nonetheless impair the ability of some rival to compete with the firm giving the discriminatory price or a firm receiving it.<sup>192</sup> Textually, “lessen competition or tend to create a monopoly” have reference to general market effects, whereas the focus on injury to competition with a particular person made the new Robinson-Patman criterion personal to individual market actors. As Herbert Hovenkamp has noted, “[n]othing in the statute required an injury to competition in the economic sense, which would be lower output or higher prices.”<sup>193</sup>

From early days of judicial interpretation, the courts worried that the Robinson-Patman Act could be “viewed as an act of Congressional schizo-

187 Clayton Act, ch. 323, § 2, 38 Stat. 730, 730 (1914) (codified as amended at 15 U.S.C. § 13(a)).

188 See Kenneth G. Elzinga, *The Robinson-Patman Act: A New Deal for Small Business*, in REGULATORY CHANGE IN AN ATMOSPHERE OF CRISIS: CURRENT IMPLICATIONS OF THE ROOSEVELT YEARS 63, 66 (Gary M. Walton ed., 1979).

189 See *id.* at 66.

190 Robinson-Patman Act, Pub. L. No. 74-692, § 2, 49 Stat. 1526, 1527 (1936) (codified as amended at 15 U.S.C. § 13(f)).

191 *Id.* § 2, 49 Stat. at 1526 (codified as amended at 15 U.S.C. § 13(a)).

192 *Chroma Lighting v. GTE Prods. Corp.*, 111 F.3d 653, 654 (9th Cir. 1997); Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 ANTITRUST L.J. 125, 133–34 (2000) (collecting precedents, although disagreeing with them).

193 Herbert Hovenkamp, *Progressive Antitrust*, 2018 U. ILL. L. REV. 71, 83 (2018).

phrenia, an anti-competitive island situated in an otherwise turbulent sea of pro-competitive efficiency and maximization of consumer welfare, the hallmarks of the Nation's antitrust laws" and hinted that the Act might have to be judicially harmonized with broader currents of the antitrust laws.<sup>194</sup> From the New Deal to the 1970s, the Robinson-Patman Act was vigorously enforced by the Federal Trade Commission, the Justice Department, and private litigants. But the Act eventually fell out of favor with the agencies. The Justice Department last brought a Robinson-Patman case in 1977 and the FTC stopped bringing cases in the 1980s.<sup>195</sup> This abdication of enforcement by the federal antitrust agencies left the contestation over interpretation of the Act to private litigants.

Reflecting rising hostility to the Robinson-Patman Act among economists, academics, and the antitrust establishment, the courts moved to bring the statute's interpretation in line with the establishment's preferences.<sup>196</sup> Textually, the Robinson-Patman Act makes unlawful discriminatory discounts that harm competition at the level of the firm granting the discriminatory price ("primary line") or those receiving it ("secondary line").<sup>197</sup> In *Brooke Group*, the Supreme Court announced that cases of primary-line price discrimination would require the same showing as a plaintiff would have to make in a predatory pricing case under section 2 of the Sherman Act—pricing below an appropriate measure of cost and a dangerous probability of recoupment through the imposition of supracompetitive prices.<sup>198</sup> The Court cast all primary-line Robinson-Patman cases in the consumer-welfare model: "That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'"<sup>199</sup> This assertion is flatly contrary to the plain text and legislative history of the Robinson-Patman Act, which protects the competitor regardless of effects on competition more generally.

Textually, there is no reason to interpret the competitive harm requirement in a primary-line case differently than in a secondary-line case, since in either case the statutory language of the third prong focuses on injury to a person rather than to the market. However, some lower courts reacted to *Brooke Group* by holding that the third (Robinson-Patman Act) proviso applies only in secondary-line cases.<sup>200</sup> Such an approach would have the

194 *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1138 (D.C. Cir. 1988).

195 See HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 579 (3d ed. 2005).

196 See generally Harry Ballan, Note, *The Courts' Assault on the Robinson-Patman Act*, 92 COLUM. L. REV. 634 (1992).

197 DANIEL A. CRANE, *ANTITRUST* 129 (2014).

198 *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–24 (1993).

199 *Id.* at 224 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

200 See, e.g., *George Haug Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 143 (2d Cir. 1998); *Chroma Lighting v. GTE Prods. Corp.*, 111 F.3d 653, 654–55 (9th Cir. 1997); *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc.*, 63 F.3d 1267, 1272–73 (3d Cir. 1995);

arguable virtue of rescuing secondary-line cases from the reach of *Brooke Group*, but it is not textually sustainable to limit the reach of the third proviso to secondary-line cases, since the proviso applies to competition with persons whether they “grant” or “receive” a discriminatory discount, thus comprehending both primary and secondary-line cases.<sup>201</sup> In any event, the Supreme Court largely abrogated this possibility in *Reeder-Simco*, holding in a secondary-line case (citing *Brooke Group*) that the Robinson-Patman Act should be interpreted “consistently with broader policies of the antitrust laws” and that “we would resist interpretation geared more to the protection of existing competitors than to the stimulation of competition.”<sup>202</sup> Following *Reeder-Simco*, the Robinson-Patman proviso has been essentially read out of the statute as to both primary- and secondary-line cases.<sup>203</sup> The Third Circuit summed up the implication of *Reeder-Simco* with the observation that “the RPA should be narrowly construed,”<sup>204</sup> which is surely not what Congress had in mind in 1936. A statutory amendment that was designed to expand the Clayton Act’s price discrimination prohibition beyond general market harms has been interpreted to require proof of general market harms. Prevailing Robinson-Patman Act jurisprudence would be unrecognizable to the Congress that passed the Act.

Although Chicago School consumer welfarism contributed to the Robinson-Patman Act’s ultimate demise, it would be anachronistic to pin the blame primarily on conservative economic views. The Act fell into disfavor among the antitrust establishment within two decades of its passage, long before Chicago had made an appreciable mark on the courts, academy, or antitrust establishment. Beginning with the 1955 *Report of the Attorney General’s National Committee to Study the Antitrust Laws*, a succession of bipartisan commissions called the Act into question. The 1955 Committee called on the courts to interpret the Act consistently with the “broader antitrust policies” and “accommodat[e] all legal restrictions on the distribution process to dom-

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Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1447 (9th Cir. 1995); J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1533 (3d Cir. 1990).

201 Hovenkamp, *supra* note 192, at 135 (“[T]he plain language of the statute makes clear that this interpretation is incorrect. Secondary-line injury is the injury suffered by a firm that must compete with someone who receives the benefit of a price discrimination. In such cases, the disfavored purchaser is injured to the extent it must compete with the favored purchaser’s lower price. By contrast, primary-line injury is the injury suffered by a firm that competes with someone who grants the benefit of such discrimination. In that case the injured firm is the rival competing in the defendant’s low-price market. In sum, the provision that was added in 1936, with its more aggressive injury standard, was clearly intended to apply to both primary- and secondary-line situations.” (footnote omitted)).

202 *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 181 (2006) (quoting *Brooke Grp.*, 509 U.S. at 220).

203 See, e.g., *Cash & Henderson Drugs, Inc. v. Johnson & Johnson*, 799 F.3d 202, 213 (2d Cir. 2015) (rejecting secondary-line Robinson-Patman case for failure to show harm to competition generally); *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 227–28 (3d Cir. 2008); *Smith Wholesale Co. v. R.J. Reynolds Tobacco Co.*, 477 F.3d 854, 864 (6th Cir. 2007).

204 *Toledo Mack Sales*, 530 F.3d at 227.

inant Sherman Act policies,”<sup>205</sup> and the 1968–69 Neal Report opined that “the Robinson-Patman Act requires a major overhaul to make it consistent with the purposes of the antitrust laws.”<sup>206</sup> In 1977, President Carter’s Justice Department called for “serious consideration” to be given to repealing the Robinson-Patman Act,<sup>207</sup> and the 2007 bipartisan and congressionally appointed Antitrust Modernization Commission called outright for the Act’s repeal.<sup>208</sup> It was against a background of rising bipartisan dissatisfaction with the Act that the Supreme Court’s *Brooke Group* decision jettisoned the jurisprudence of the more textually faithful *Utah Pie*<sup>209</sup> opinion and rolled primary-line cases into Sherman Act section 2 jurisprudence.<sup>210</sup> The Court split 6–3 along conventional ideological lines in *Brooke Group*, with the conservatives in the majority and the liberals in dissent.<sup>211</sup> However, the ideological contest in *Brooke Group* was not about whether the Robinson-Patman Act should require a showing of likely harm to competition (as opposed to specific competitors)—a proposition accepted by Justice Stevens’s dissent<sup>212</sup>—but rather over the plausibility of predatory pricing and recoupment. Any doubt over whether the judicial excision of the “with any person” statutory prong should be understood in conventional ideological terms was put to rest with Justice Ginsburg’s *Reeder-Simco* secondary-line opinion for seven Justices (over a dissent by Justice Stevens joined by Justice Thomas), calling for the Robinson-Patman Act to be harmonized with the remainder of the antitrust laws.<sup>213</sup>

Congress has done nothing to check this apparent judicial insubordination. The Robinson-Patman Act was a reform statute, but its target was not disapproved judicial interpretations of section 2 of the Clayton Act, but rather changing economic circumstances—the rise of the chain store.<sup>214</sup> When the courts began disregarding the statute’s plain meaning and legislative intent in the 1980s and rolling the statute into Sherman Act jurisprudence advancing a consumer-welfare standard, Congress looked on with either approval or disinterest.

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205 REPORT OF THE ATTORNEY GENERAL’S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 132 (1955).

206 PHIL C. NEAL ET AL., REPORT OF THE WHITE HOUSE TASK FORCE ON ANTITRUST POLICY, *reprinted in* ANTITRUST L. & ECON. REV., Winter 1968–69, at 11, 41.

207 DEP’T OF JUST., DEPARTMENT OF JUSTICE REPORT ON THE ROBINSON-PATMAN ACT 260–61 (1977).

208 ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 312 (2007).

209 *Utah Pie Co. v. Cont’l Baking Co.*, 386 U.S. 685, 702–03 (1967).

210 *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993).

211 *Id.* at 211.

212 *Id.* at 253 (Stevens, J., dissenting) (“In this case, then, Liggett need not show any actual harm to competition, but only the reasonable possibility that such harm would flow from B&W’s conduct.”).

213 *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 168, 181 (2006).

214 *Supra* text accompanying note 188.

*E. Clayton Act Section 7 and the Celler-Kefauver Amendments*

The most recent substantive amendment to the antitrust laws arrived in 1950 with the passage of the Celler-Kefauver Act, which amended section 7 of the Clayton Act to strengthen the prohibition on anticompetitive mergers and arrest the “rising tide of economic concentration” of the post-War American economy.<sup>215</sup> Among other things, the Act clarified that section 7 reached “incipient” trends toward increasing concentration levels which might threaten competition with a view to “arrest[ing] restraints of trade in their incipency and before they develop into full-fledged restraints violative of the Sherman Act.”<sup>216</sup>

The story of judicial interpretation of the Celler-Kefauver Act and its relevance to this Article’s antitextualism narrative is complicated by subsequent statutory and institutional developments. Between 1950 and the mid-1970s, the Justice Department and Federal Trade Commission aggressively pursued an antimerger agenda. The courts largely rubber-stamped their actions, leading to Justice Stewart’s lament in 1966 that “[t]he sole consistency that I can find is that in litigation under § 7, the Government always wins.”<sup>217</sup> By the mid-1970s, the Chicago School’s challenge to the structuralist paradigm, which undergirded the economic theories opposing mergers, had begun to prevail, and a new generation of judges and antitrust lawyers were becoming skeptical of aggressive antimerger enforcement. However, the shift in policy did not occur primarily in the courts, but rather in the antitrust enforcement agencies. This was due to the passage of the Hart-Scott-Rodino Act of 1976, which created a system of premerger notification that shifted the locus of decisionmaking on most contestable mergers from the courts to the antitrust agencies.<sup>218</sup> As a result, the big shift from aggressive to less aggressive antimerger enforcement occurred primarily as the agencies brought fewer antitrust cases rather than because of any interpretative shift by the courts.

Still, judicial interpretation of section 7 has played a role in the shift away from aggressive antimerger enforcement in two significant ways. First, although continuing to pay lip service to the “incipiency” standard pregnant in the language of the statute, the courts have increasingly held the government to the burden of proving probable harm to competition in the form of higher prices. As courts have at times noted, the qualifiers “may be” and “tend to” in “may be substantially to lessen competition or tend to create a

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215 *Brown Shoe Co. v. United States*, 370 U.S. 294, 315 (1962). The Act was also intended to serve political purposes, including preventing levels of economic concentration that had fueled the rise of fascism in Europe and could facilitate the rise of communism. Daniel A. Crane, *Fascism and Monopoly*, 118 MICH. L. REV. 1315, 1324 (2020).

216 *Brown Shoe*, 370 U.S. at 323 n.39 (quoting S. REP. NO. 81-1775, at 6 (1950) (Conf. Rep.)).

217 *United States v. Von’s Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

218 CRANE, *supra* note 127, at 72, 103–04.

monopoly”<sup>219</sup> suggest that the government should bear a lesser burden of probabilistic proof than if the statute required that the merger in question “substantially lessen competition or create a monopoly.”<sup>220</sup> But, while continuing to recite the incipency standard, the courts have shifted away from prohibiting mergers that move the market toward greater concentration even if they have no immediate anticompetitive effect to requiring the government to prove by a preponderance of the evidence that the merger will result in higher prices or reduced output.<sup>221</sup> For instance, in *AT&T/Time Warner*, the D.C. Circuit held that the government’s prima facie case requires a “‘fact-specific’ showing that the proposed merger is ‘likely to be anticompetitive’” and dismissed the government’s case for failing to meet that showing.<sup>222</sup> What the court meant by an “anticompetitive effect” was evident from the focus of its opinion—whether the merger would result in increased prices to consumers.<sup>223</sup> Other recent merger decisions have similarly required the government to prove the likelihood that the merger will result in higher prices or reduced output.<sup>224</sup>

If the government bears the burden of proving that the merger will likely lead to price increases, the words “may be” and “tend to” are doing no distinctive work in the text of section 7. In any civil case, the plaintiff does not have to prove certainties, but bears only the burden of proving the facts supporting liability by a preponderance of the evidence—likelihood. This would be the government or a private plaintiff’s burden in a Sherman Act case. The text and legislative history of the Celler-Kefauver Act make clear that Congress did not want the FTC or Justice Department to have to prove the likelihood of price effects to the certainty standards of a Sherman Act case,<sup>225</sup> but under current caselaw there is no discernable difference in the

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219 Robinson-Patman Act, Pub. L. No. 74-692, § 2, 49 Stat. 1526, 1526 (1936) (codified as amended at 15 U.S.C. § 13(a)).

220 Peter C. Carstensen & Robert H. Lande, *The Merger Incipency Doctrine and the Importance of “Redundant” Competitors*, 2018 WIS. L. REV. 783, 792–94.

221 *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 137 (E.D.N.Y. 1997) (“[T]he Government has the burden of proof and seeks to: (1) define the relevant product market; (2) define the relevant geographic market; and (3) prove that the merger will be anti-competitive and will result in an increase in prices above competitive levels for a significant period of time.”).

222 *United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019) (quoting Joint Statement on the Burden of Proof at Trial at 3–4, *United States v. AT&T Inc.*, 310 F. Supp. 3d 161 (D.D.C. 2018) (No. 17-cv-02511)).

223 *Id.* at 1036 (focusing on evidence that merger would result in “net price increases to consumers”).

224 See, e.g., *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 719 (D.C. Cir. 2001) (observing that Commission does not bear the burden of proving likely price increases with certainty, but only with reasonable probability); *United States v. Baker Hughes Inc.*, 908 F.2d 981, 992 (D.C. Cir. 1990) (rejecting government’s challenge to merger where defendant’s counter-evidence suggested that merger would not lead to price increases); *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986) (same).

225 See *supra* note 216.

operational burden of proof standards in Sherman Act and Clayton Act cases.

Second, the courts have rejected a number of government merger challenges for failure to meet the strict requirement of proving a relevant geographic or product market.<sup>226</sup> But the statutory language—“in any line of commerce or in any activity affecting commerce in any section of the country”<sup>227</sup>—was not meant to require technical market definition. As the Supreme Court noted in *Brown Shoe*, the legislative history of the Celler-Kefauver Act makes clear that Congress wished to avoid “exclusively mathematical tests” in determining whether mergers had undesirable effects on commerce.<sup>228</sup> Reflecting the statutory text and history, cases decided in the 1950s and '60s held that section 7 cases did not require formal relevant market definition of the kind required in Sherman Act cases, and that any product with “peculiar characteristics and uses” was a line of commerce within the meaning of section 7.<sup>229</sup> Whether or not sound as a matter of economic analysis and policy, this approach was surely more faithful to the text, legislative history, and spirit of the Clayton and Celler-Kefauver Acts than an approach requiring the government to bear the difficult burden of proving a relevant market employing the technical cross-elasticity of demand test characteristic of Sherman Act cases.<sup>230</sup>

The federal courts undoubtedly became more pro-business in merger cases in the wake of the Chicago School revolution of the late 1970s, but the antitextual turns in merger law—abrogation of the incipency standard and insistence on formal market definition using the cross-elasticity of demand test—are not primarily attributable to the advent of Chicago School ideology. The Justice Department’s equation of “line of commerce” and “section of the country” with market definition began with its promulgation of the first Horizontal Merger Guidelines in 1968.<sup>231</sup> The same guidelines called for according “primary significance” to the market shares of the acquiring and acquired firms in horizontal merger analysis, as well as considering the concentration

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226 *FTC v. Lundbeck, Inc.*, 650 F.3d 1236, 1239–40, 1243 (8th Cir. 2011); *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1051–53 (8th Cir. 1999); *United States v. Engelhard Corp.*, 126 F.3d 1302, 1305, 1308 (11th Cir. 1997); *FTC v. Freeman Hosp.*, 69 F.3d 260, 271–72 (8th Cir. 1995); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1175–76 (N.D. Cal. 2004); *United States v. Mercy Health Servs.*, 902 F. Supp. 968, 978–87 (N.D. Iowa 1995).

227 15 U.S.C. § 18 (2018).

228 *Brown Shoe Co. v. United States*, 370 U.S. 294, 321 n.36 (1962).

229 Note, *Product Market Definition Under the Sherman and Clayton Acts*, 110 U. PA. L. REV. 861, 871–72 (1962) (collecting cases).

230 See Herbert Hovenkamp, *Markets in Merger Analysis*, 57 ANTITRUST BULL. 887, 890–91 (2012); J. Douglas Richards, *Is Market Definition Necessary in Sherman Act Cases When Anticompetitive Effects Can Be Shown with Direct Evidence?*, ANTITRUST, Summer 2012, at 53, 56–57. The cross-elasticity of demand test for defining relevant markets comes from *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 394–95 (1956).

231 1968 *Merger Guidelines*, U.S. DEP’T OF JUST., <https://www.justice.gov/archives/atr/1968-merger-guidelines> (Aug. 4, 2015).



of the market as a whole using a four-firm concentration ratio.<sup>232</sup> Successive modifications to the guidelines in 1982, 1984, 1992, and 1997 only furthered the agencies' insistence on predicting the effects of mergers on prices and output through formal economic analysis including market definition, identification of market participants, and computation of the Herfindahl-Hirschman Index to determine market concentration.<sup>233</sup> Only in the Obama Administration's 2010 revisions did the agencies attempt to break away from the necessity of defining relevant markets.<sup>234</sup> By that time, however, the federal courts had become so accustomed to looking for market definition based on the enforcement agencies' own enforcement guidelines that the need to predict anticompetitive price effects in a properly proven relevant market had become firmly lodged in section 7 jurisprudence.<sup>235</sup>

As first the antitrust agencies through their merger guidelines and then the courts through endorsement of the agencies' approach systematically shifted merger policy away from the incipiency standard and began requiring formal market definition and probability of adverse price effects, Congress acquiesced through inaction. Whatever else it said in 1950, Congress has thus far shown itself willing to let the courts and antitrust agencies reshape merger law in a form far more favorable to business consolidation.

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In sum, from the courts' earliest forays into interpreting the Sherman Act up through contemporary antitrust jurisprudence, the courts have manifested a systematic tendency to interpret the substantive antitrust statutes contrary to their texts, legislative histories, and often their spirit.<sup>236</sup> Sometimes, as with the rule of reason and labor exemption, the judicial disregard of text and purpose has occurred fairly immediately. In other cases, as with the Robinson-Patman and Celler-Kefauver Acts, an initial period of statutory fidelity has slipped gradually into a period of statutory infidelity. In some cases, as with respect to section 5 of the FTC Act and section 3 of the Clayton

232 *Id.*

233 See generally Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771 (2006).

234 U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 7 (2010), <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010>; James A. Keyte & Kenneth B. Schwartz, "Tally-Ho!": UPP and the 2010 Horizontal Merger Guidelines, 77 ANTITRUST L.J. 587, 591–92 (2011) (explaining how 2010 Merger Guidelines "[m]arginalize the [r]ole of [m]arket [d]efinition").

235 See Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CALIF. L. REV. 371, 415 (2006) (describing market definition as a stumbling block in merger cases).

236 Scholars have also argued that the courts have disregarded the textual meaning and legislative purpose of the Tunney Act—a statute requiring federal courts to give approval to antitrust consent decrees entered into in actions brought by the Justice Department. See Darren Bush, *The Death of the Tunney Act at the Hands of an Activist D.C. Circuit*, 63 ANTITRUST BULL. 113 (2018); John J. Flynn & Darren Bush, *The Misuse and Abuse of the Tunney Act: The Adverse Consequences of the "Microsoft Fallacies"*, 34 LOY. U. CHI. L.J. 749 (2003).

Act, the courts continue to proclaim their fidelity after they functionally move to infidelity. In many cases, the courts stop pretending after a while and admit quite candidly that they are taking liberties with the statute.

If this antitrust antitextualism is merely the product of common-law methodology, one would expect to see movement away from the statute's text in both permissive and restrictive directions, or, to put it more crassly, both in favor of big capital and against it. But the movement has all been in one direction: loosening a congressional check on big capital. Thus, the rule of reason allowed courts to bless large combinations of capital that the courts deemed reasonable; narrowing the labor exemption frustrated labor's ability to countervail capital's power; restricting the private right of action for treble damages significantly curtailed the private-litigation check on business; judicial narrowing of the Clayton Act's exclusive dealing and tying restrictions allowed (mostly big) firms to exploit market power; reading "unfair" out of the FTC Act eliminated section 5 as a check on business morality; eviscerating the Robinson-Patman Act protections for small and independent businesses favored large and powerful businesses; and requiring proof of likely price increases and technical relevant market definition in merger cases immunized many large-scale mergers from legal challenge. Throughout the history of American antitrust law, the courts have shown a systematic tendency to read down the antitrust statutes in favor of big capital.

But the story of antitrust antitextualism is not simply one of conservative/progressive ideological struggle between Congress and the courts. Much of the action away from statutory text and purpose was accomplished by, or with the support of, judges of the political left. Unlike in other fields, Congress has not responded with statutory overrides. And far from buttressing its atextual statutory readings of the antitrust laws through veiled constitutional warnings about congressional overreaching, the Court has repeatedly pulled in the opposite direction, asserting quasi-constitutional reverence for antitrust law.<sup>237</sup> Despite ample opportunity to do so, the Court has not removed antitrust law from the reach of congressional reconsideration by constitutionalizing its atextual readings. Antitrust antitextualism does not follow a conventional left/right ideological pattern. Its actual pattern is more subtle.

### III. THE IDEALISTIC CONGRESS, PRAGMATIC COURTS THESIS AND ITS IMPLICATIONS

Thus far, this Article has made an empirical observation—that, from the beginning of antitrust history, the courts have atextually read down the antitrust statutes in favor of big business and considered and rejected a potential explanation: that this phenomenon primarily represents an ideological tug-of-war between a progressive Congress and more conservative courts. This

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<sup>237</sup> *Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 415 (2004) ("The Sherman Act is indeed the 'Magna Carta of free enterprise['] . . ." (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972))).

final Part searches for an alternative understanding, one that is perhaps less obvious but more fitting, and then considers its systemic implications for the antitrust enterprise.

A. *The Idealistic/Pragmatic Thesis*

Congress writes expansive statutes reining in business power, the courts (either immediately or over time) disregard the plain text of the statutes and trim them down in favor of capital, and Congress acquiesces through inaction. Why? The best-fitting explanation is this: the antitrust laws reside in perennial tension between two fundamental impulses of the American political psyche—the romantic and idealistic attachment to smallness over bigness, and the pragmatic and often grudging realization that large-scale organization may be necessary to achieve material advantages. The romanticism and idealism of the anti-bigness impulse pushes it to the fore in the popular political arena. Congress legislates on the popular aspiration for an egalitarian economy organized around small proprietors and independent local businesses and freedom from economic dominance. When the statutes come to the courts or antitrust agencies, judges and antitrust enforcers play the pragmatic role of balancing those popular aspirations against the contending impulse for efficiency and material benefit. This balancing act induces them to give less effect to the statutes than the broad statutory texts suggest. So long as the judicial decisions achieve results that strike a politically acceptable outcome between the aspirational and pragmatic impulses, Congress is content to leave the judicial and enforcement decisions alone.

It will be impossible decisively to prove or disprove such a general thesis, but its building blocks are well established. A quixotic affinity for small-scale organization of production runs from the colonial period, through the nineteenth century, and into the twentieth century and beyond. In his classic essay *What Happened to the Antitrust Movement*, Richard Hofstadter wrote of a “characteristically American” antimonopoly romance born from the lack of competing “aristocratic, militaristic, and labor-socialist theories,” manifested in a “nation of farmers and small-town entrepreneurs—ambitious, mobile, optimistic, speculative, anti-authoritarian, egalitarian, and competitive,” and taking it for granted that “property would be widely diffused [and] that economic and political power would be decentralized.”<sup>238</sup> The anti-bigness idealism runs from Jefferson’s republican agrarianism, through Jackson’s antibank populism, and into the legislative history of the Sherman Act, where Senator Sherman equated the power of the trusts with the power of a king<sup>239</sup> and Senator Edmunds argued that the accumulation of private power justi-

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238 RICHARD HOFSTADTER, *What Happened to the Antitrust Movement*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 188, 195–96 (1952).

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

fied riots and revolutions.<sup>240</sup> In the twentieth century, Brandeis encapsulated the Jeffersonian sentiment in his famous title *The Curse of Bigness*,<sup>241</sup> while William O. Douglas called for power to be “scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men.”<sup>242</sup> Learned Hand may have captured the impulse most forthrightly when he asserted that the antitrust laws existed “to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.”<sup>243</sup>

Hand’s candor about the “possible cost” of the Jeffersonian impulse underlines its idealism and inevitable clash with a conflicting American impulse: economic pragmatism.<sup>244</sup> In competition with the Jeffersonian romance with the yeoman farmer and household artisan is the Hamiltonian vision for the commercial firm and the bank. If Jefferson was “the poet of the American founding,” Hamilton was the “nation builder who infused the essential elements of permanence and stability in the American system.”<sup>245</sup> Hamilton’s ideological heirs—corporate capitalists—would have little patience for the fetishization of a productive smallness that would deny business the scale and scope to advance industry for the national good. Arguing that large-scale industrial firms were inevitable and should be regulated rather than broken up, Theodore Roosevelt asserted that “[b]usiness cannot be successfully conducted in accordance with the practices and theories of sixty years ago unless we abolish steam, electricity, big cities, and, in short, not only all modern business and modern industrial conditions, but all the modern conditions of our civilization.”<sup>246</sup> When Woodrow Wilson accused Roosevelt of preferring to regulate monopoly rather than regulating competition,<sup>247</sup> he was not far off the mark. The Hamiltonian tradition accepts industrial bigness, even dominance, as the hard-nosed reality of a progressive economy.

Although the Jeffersonian and Hamiltonian impulses are perpetually contending, they sound in different registers—the first lyrical; the second

240 21 CONG. REC. 2726 (1890) (statement of Sen. Edmunds) (justifying antitrust as antidote to “tyrannies, grinding tyrannies, that have sometimes in other countries produced riots, just riots in the moral sense”).

241 THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS (Osmond K. Fraenkel ed., 1934).

242 *United States v. Columbia Steel Co.*, 334 U.S. 495, 536 (1948) (Douglas, J., dissenting).

243 *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429 (2d Cir. 1945).

244 See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 13–29 (1993).

245 Stephen Knott, “*Opposed in Death as in Life*”: *Hamilton and Jefferson in American Memory*, in *THE MANY FACES OF ALEXANDER HAMILTON: THE LIFE AND LEGACY OF AMERICA’S MOST ELUSIVE FOUNDING FATHER* 25, 26 (Douglas Ambrose & Robert W.T. Martin eds., 2006).

246 Theodore Roosevelt, *The Trusts, the People, and the Square Deal*, in DANIEL A. CRANE & HERBERT HOVENKAMP, *THE MAKING OF COMPETITION POLICY: LEGAL AND ECONOMIC SOURCES* 107, 112 (2013).

247 LETWIN, *supra* note 1, at 269.

prosaic. The rhetoric of smallness is laudatory and that of bigness defensive; compare Peckham's paean to the "small dealers and worthy men"<sup>248</sup> to Taft's protestation that "the law does not make mere size an offence."<sup>249</sup> Scalia had to abandon his considerable pride as a stylist and indulge in a verboten triple negative to save monopoly from a presumption of illegality: "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."<sup>250</sup> Americans venerate small business almost religiously; the family entrepreneur is arguably more important as a cultural icon than as a backbone of the economy.<sup>251</sup> Conversely, candidates for political office would never find it expedient to extol the praises of big business as such, but only to defend the benefits it may bring. Smallness speaks to the heart; bigness to the stomach.

When Congress writes antitrust laws, it tends to speak aspirationally, from the Jeffersonian lobe: *all* combinations in restraint of trade are illegal; human labor is not crass commerce; unfair competitive acts are forbidden; anyone hurt can sue to be made whole and more; big businesses may not procure better prices than small ones; the first step toward concentration makes an acquisition illegal. Taken at face value, these mandates would require a dramatic reordering of industry in the direction of economic atomism. But the courts and agencies do not take them at face value. Rather, they seem to assume—whether consciously or unconsciously—that the antitrust statutes are partly substantive and partly aspirational and that the judicial and executive function is to operationalize the substantive principles while honoring the mere aspirations in their breach. The courts speak of the Sherman Act as representing a "competitive ideal,"<sup>252</sup> a "comprehensive

248 *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 323 (1897).

249 *United States v. U.S. Steel Corp.*, 251 U.S. 417, 451 (1920); *see also* *United States v. Int'l Harvester Co.*, 274 U.S. 693, 708 (1927) ("The law . . . does not make the mere size of a corporation, however impressive, or the existence of unexercised power on its part, an offense, when unaccompanied by unlawful conduct in the exercise of its power.").

250 *Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

251 Mansel G. Blackford, *Small Business in America: A Historiographic Survey*, 65 *BUS. HIST. REV.* 1, 8 (1991) ("If small businesses have been vital to America's economic development, they have perhaps been even more important as a component of American culture."); *see also* George L. Priest, *Small Business, Economic Growth, and the Huffman Conjecture*, 7 *J. SMALL & EMERGING BUS. L.* 1, 2 (2003) ("In the United States, largely for political and, perhaps, historical reasons, small business has attained a status of veneration as constituting the most basic foundation of growth in the economy." (footnote omitted)); Richard Sylla, *Small-Business Banking in the United States, 1780–1920*, in *SMALL BUSINESS IN AMERICAN LIFE* 240, 241 (Stuart W. Bruchey ed., 1980) (observing that "small-business ideology has been present throughout American history").

252 *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 (1984); *see also* *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1203 (9th Cir. 2012); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 476 (3d Cir. 1992); *Ne. Tel. Co. v. Am. Tel. & Tel. Co.*, 477 F. Supp. 251, 258 n.11 (D. Conn. 1978).

charter of economic liberty,”<sup>253</sup> or the “Magna Carta of free enterprise.”<sup>254</sup> The loftiness of these renderings express both veneration and malleability—the fount of the nation’s economic ideals is too important to be taken technically or literally. Congress, in turn, declines to take umbrage at the courts’ pragmatic recalibration of the balance between Jeffersonian and Hamiltonian impulses in applying the statutes. It is as if Congress too understands that it has spoken ideals that are best not fully realized.

To be sure, the congressional idealism/judicial pragmatism thesis does not obviate the existence of genuine ideological contestation over the operation of antitrust law between Congress and the courts, within Congress, within the courts, and within the antitrust agencies. Statutes have consequences and can shift antitrust enforcement significantly for a period of time—see especially the decades following the 1914 reform statutes, the Robinson-Patman Act, and the Celler-Kefauver Act. The idealism/pragmatism thesis is not that Congress writes statutes that are *only* aspirational or idealistic, but rather that Congress tends to manifest anti-bigness aspirations through the employment of statutory language and expressions of purpose that reach more broadly than the pragmatic center of the American political spectrum will tolerate. Whether consciously or unconsciously, Congress and the courts have fallen into a pattern where Congress speaks broadly and the courts construe narrowly, without much overt hostility or recognition of conflict between the two institutions. Combined with the executive functions of the antitrust agencies in dialogue with the courts and Congress, the system as a whole manifests an implicit compromise between the Jeffersonian and Hamiltonian ideals, where Congress expresses the Jeffersonian ideal through legislation and the courts and agencies pragmatically mitigate its reach through interpretation and enforcement.

The congressional idealism/judicial pragmatism thesis is descriptive, not prescriptive. Many objections could be raised to operating the antitrust system this way, from normative commitments to judicial textualism as essential to democratic legitimacy to a view that the reading down of the antitrust statutes has contributed to overly tepid antitrust enforcement and excessive agglomeration of economic power. Nonetheless, although other factors (such as judicial disapproval of Congress’s ideological commitments, as previously discussed) surely play some role as well, the congressional idealism/judicial pragmatism thesis provides the most complete account for a phenomenon that has spanned over a century of antitrust history.

### B. Systemic Implications

The idealism/pragmatism explanation of antitrust antitextualism raises systemic questions about the operation of U.S. antitrust law and potential strategies for those who would reform it. In particular, how should reformist Congress write new antitrust statutes given that the courts may be inclined to

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253 N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

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

disregard some of their textual import? And, if writing clear statutes is no guarantee that the courts will honor the text, are there alternatives to achieving antitrust reform? Finally, what are the more general implications for the jurisprudence of statutory interpretation?

### 1. Limitations of Writing Clear Statutes

This Article has shown that, historically, the judiciary has treated the antitrust statutes as broad delegations to the courts to create a pragmatic common law of competition, even when the statutes plainly said something more specifically prohibitory. What, then, are the strategies available to a reformist Congress seeking to rein in business power through remedial antitrust legislation?

The one strategy that does not seem especially promising is simply writing clearer statutes. The antitrust statutes that the courts wrote down in favor of big business did not suffer from a lack of clarity or, if they did, not in the textual implications the courts chose to ignore. Strikingly, the courts continue to insist that the antitrust statutes are indeterminate delegations of common-law power, even while admitting in candor that they have simply chosen to ignore the statutes' plain meaning in favor of a common method of deciding antitrust cases. For instance, in *Professional Engineers*, Justice Stevens remarked for the Court that "the language of § 1 of the Sherman Act . . . cannot mean what it says" and therefore that Congress must not have intended "the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations," thus justifying the courts in shaping the "statute's broad mandate by drawing on common-law tradition."<sup>255</sup> Given over a century's tradition of interpreting antitrust statutes as invitations to continue a common-law process whatever else is suggested by the statute's text, it is difficult to see how simply accumulating stern new language in new texts would lead to a different result.

Even where reform statutes are textually honored in their immediate aftermath, history shows a creeping judicial tendency to begin integrating the reform statutes into the mainstream of antitrust jurisprudence within a few decades. This has been the fate of the four major antitrust reform statutes—the FTC, Clayton, Robinson-Patman, and Celler-Kefauver Acts—each of which was meant to rein in capital in ways that the Sherman Act did not. In all four instances, however, the courts incrementally began mainstreaming the statutes into Sherman Act precedent, creating a homogenous antitrust jurisprudence that read the textual distinctiveness out of the reform statutes. Thus, today, cases under the FTC Act, section 3 of the Clayton Act, and the Robinson-Patman Act are largely indistinct from Sherman Act cases,<sup>256</sup> and merger cases have been rolled into the same modes of price-theoretic analysis that would be employed in a Sherman Act case.<sup>257</sup> Given that neither

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255 *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 687–88 (1978).

256 *Supra* text accompanying notes 140–43, 165–70.

257 *Supra* text accompanying notes 209–12.

statutory text nor legislative history seems to have deterred the courts from this process within a few decades after the passage of the statutes, there is little reason to believe that a “this time we mean it” statutory reform would not meet the same fate. If the courts continue to understand aspects of the antitrust statutes as aspirationally motivated and operationally impracticable, the previously observed pattern is likely to continue.

Again, it would be an overstatement to claim that statutory words have no consequences or that antitrust reform statutes are doomed ab initio to judicial culling. But the courts’ pattern of antitrust antitextualism and their perennial insistence that the antitrust statutes are delegations of common-law power rather than textually actionable injunctions in all of their particulars provide a cautionary tale for future legislatures: the dynamic of antitrust legislation, enforcement, and adjudication plays out against a longstanding backdrop of contestation over bigness, power, and efficiency that has muted the ordinary importance of statutory language. Writing more definite statutes will not necessarily curb these habits of mind.

## 2. Importance of Institutions

If statutory texts have shown relatively little sustained power to reform antitrust, what has been effective? The answer, in short, is institutions.<sup>258</sup> Although statutory amendments to the substance of antitrust law have not achieved the full reforms their texts and legislative histories would suggest on a lasting basis, significant and durable shifts in antitrust enforcement have come about as a result as institutional reforms and institutional factors. Section 5 of the FTC Act may have added nothing to the Sherman Act substantively, but the creation of the Federal Trade Commission has had lasting implications for federal antitrust enforcement.<sup>259</sup> The courts may not have interpreted the private antitrust remedy nearly as broadly as section 4 of the Clayton Act reads, but the delegation of antitrust enforcement authority to “private attorneys general” has had very important long-term effects for the substantive development of antitrust law.<sup>260</sup> The Celler-Kefauver amendments could not achieve sustained increases in antimerger enforcement levels, but the Hart-Scott-Rodino Act’s creation of a premerger notification regime radically shifted the locus and texture of merger law and policy from adjudication before generalist judges to administrative negotiations with agency technocrats.<sup>261</sup> For better or for worse, changes in institutional design have proven more consequential to antitrust enforcement than statutory recalibrations of the substantive standards.

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258 On the structure and interactions of antitrust’s institutions, see generally CRANE, *supra* note 127.

259 *See id.* at 135.

260 *Id.* at 51–58; *see also* Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. L. REV. 1, 54 (2008).

261 CRANE, *supra* note 127, at 103–04.



This suggests that a Congress serious about changing the course of anti-trust enforcement should pay at least as much attention to questions of institutional design and capacity as to the wording of substantive liability rules and standards. Over time, the courts may interpret the antitrust statutes away from their plain wording and legislative history, but courts have less interpretive power to rework institutional design. In some cases, as with respect to Hart-Scott, the consequence of the institutional design has been significantly to reduce the courts' role and transfer primary responsibility to other actors. If Congress is concerned that future judicial interpretation may diminish the vitality of a statute, one potential solution is to create an institutional framework for enforcement that does not depend heavily on judicial interpretation.

Of course, shifting custody of the antitrust statutes from the courts to another institution of government does not guarantee more vigorous enforcement. As previously noted, much of the impetus for reading down the enforcement norms expressed in Robinson-Patman and Celler-Kefauver came from the antitrust agencies and presidential commissions, not the courts. Shifting enforcement in any direction—whether more or less aggressive—and then sustaining the shift ultimately depends on political and ideological assent by key institutional actors. To the extent that antitrust antitextualism is merely one symptom of a broader pan-institutional impulse to balance industrial policy between competing Jeffersonian and Hamiltonian commitments, a systemic tendency toward antitrust moderation may be inevitable until social, political, or economic currents recalibrate the longstanding balance between those commitments.

### 3. Implications for Interpretation

The phenomenon of antitrust antitextualism is important for understanding the U.S. antitrust system, its history, and the possibilities for its reform, but it also has significance for more general understandings of how statutes are written and how their interpretation functions or should function. Scholars have argued that Congress sometimes means statutory language to be purely expressive, indeed that it means for the courts *not* to give that language legal effect.<sup>262</sup> But the story of antitrust antitextualism goes far beyond judicial excision of stray words or phrases from the antitrust statutes. In important instances, particularly with respect to the FTC and Robinson-Patman Acts, the courts have entirely rewritten the textual meaning and legislative purpose of the statute.<sup>263</sup> Through a chronic cycle of legislative enactment, judicial disregard, and implicit legislative acquiescence, Congress and the courts have constituted the common-law system that judges and scholars across the political spectrum now consider normalized and perhaps even inevitable.

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262 See, e.g., Jesse M. Cross, *When Courts Should Ignore Statutory Text*, 26 GEO. MASON L. REV. 453 (2018).

263 *Supra* text accompanying notes 165–68, 196–204.

This pattern of judicial/legislative engagement (with the executive playing an enabling role) raises both analytical and normative questions for the jurisprudence of statutory interpretation. Analytically and descriptively, is antitrust law *sui generis*, or do other statutory domains exhibit a similar, but perhaps unrecognized, dynamic? Do the antitrust laws idiosyncratically operate in a space of equipoise between Jeffersonian idealism and Hamiltonian pragmatism, with Congress implicitly assigning itself the role of idealist orator while acquiescing as the courts provide pragmatic counterbalance? Or is this yin and yang phenomenon, disguised in the interpretive rhetoric of broad delegations and common-law method, a more general one, in maybe unappreciated ways? Once a pattern is observed in one legal domain, it tends to be observed soon in others as well. Finding a recurrence of the antitrust pattern elsewhere could provide new insights on statutory interpretation, separation of powers, and the de facto institutional roles of the legislative and judicial branches.

Normatively, there is much to question about the democratic legitimacy of the implicit system of legislative declaration and judicial reformation described in this Article. There seems little in it that either a committed textualist or a committed purposivist could defend, since the system entails the courts honoring neither what Congress wrote nor what it meant. To rehabilitate the system's democratic legitimacy, a subtle purposivist might say that what Congress actually meant—in a deep sense—must be gathered from the norms of the system itself rather than from conventional evidence such as floor statements by members of Congress, committee reports, or other contemporaneous sources of public meaning. Perhaps members of Congress legislate against a backdrop of expectation that the courts will continue to read down new statutes to accommodate pragmatic efficiency interests, and consenting to this implicit system, the members feel liberated to express more in the statute than they actually mean as prescriptive. But if that is wholesome democratic practice, that case is yet to be made.

Finally, if the system lacks democratic legitimacy, there is the question of how to begin unwinding it—and whether anyone has the incentive to try. Most committed textualists are also committed economic conservatives;<sup>264</sup> it would take abundant motivation from pure principle for the average Federalist Society judge to restore the original meaning of the Robinson-Patman Act or the Clayton Act's incipency presumption, much less mount a cataclysmic return to section 1's absolutist prohibition on agreements restraining trade. Progressive judges, perhaps looking for leverage to unwind the perceived laxity of Chicago School antitrust, might invoke statutory text or original meaning as a foil, but they too face Pandora's Box. To insist on taking at face value Congress's words and ostensible purposes—words and purposes to which Congress itself might not have been fully committed—would risk considerable backlash after the long reign of moderating common law and the

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264 Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 183 (2018).

system's reliance on the courts to correct Congress's textual overstatements. So maybe it should count in favor of the system's normative legitimacy that it has worked for 130 years without anyone complaining too much.

#### CONCLUSION

It turns out that the pervasive rhetoric that the antitrust laws are a delegation of common-law powers to the courts is a bit of a fig leaf covering the courts' declination to enforce the antitrust statutes as written. But something more than judicial insubordination to the will of Congress is happening. The pattern of engagement between the courts and Congress over American antitrust law's 130-year history suggests an implicit division of responsibility for the management of competing political impulses for industrial smallness and bigness. Congress expresses an idealistic preference for smallness, the courts balance that impulse against pragmatic recognition that larger scale can bring material benefits, and both institutions implicitly accept the other's role.

That it has been this way since the beginning does not mean that it must continue to be this way forever. At this moment of growing political and social interest in antitrust and revival of antimonopoly sentiment, the balance could tip decisively in favor of Brandeisianism and against the "Curse of Bigness." Judges could be trained (or retrained) to begin taking the antitrust statutes seriously as statutory texts and begin applying them faithfully using the (contested) methodologies they use as to other statutes. But if judges began taking the texts of antitrust statutes seriously, query whether Congress would continue to write such broad statutes, or whether hydraulic pressures would induce a more sparing approach to antitrust legislation.

Then again, for all we know, the impulse to antitrust antitextualism may have a long tail. Words enacted today, in the fervor of another political moment for antitrust, may take on new meaning to the judges that examine them in a few years' time. Old habits die hard, and the habit of antitrust antitextualism grows from the very roots of antitrust history.

