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DEBUNKING THE PURCHASER WELFARE ACCOUNT OF SECTION 2 OF THE SHERMAN ACT: HOW HARVARD BROUGHT US A TOTAL WELFARE STANDARD AND WHY WE SHOULD KEEP IT

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The last several years have seen a vigorous debate among antitrust scholars and practitioners about the appropriate standard for evaluating the conduct of monopolists under section 2 of the Sherman Act. While most of the debate over possible standards has focused on the empirical question of each standard's economic utility, this Article undertakes a somewhat different task: It examines the normative benchmark that courts have actually chosen when adjudicating section 2 cases. This Article explores three possible benchmarks—producer welfare, purchaser welfare, and total welfare—and concludes that courts have opted for a total welfare normative approach to section 2 since the formative era of antitrust law. Moreover, this Article will show that the commitment to maximizing total social wealth is not a recent phenomenon associated with Robert Bork and the Chicago School of antitrust analysis. Instead, it was the Harvard School that led the charge for a total welfare approach to antitrust generally and under section 2 in particular. The normative consensus between Chicago and Harvard and parallel case law is by no means an accident; rather, it reflects a deeply rooted desire to protect practices—particularly "competition on the merits"—that produce significant benefits in the form of enhanced resource allocation, without regard to the ultimate impact on purchasers in the monopolized market. Those who advocate repudiation of the longstanding scholarly and judicial consensus reflected in the total welfare approach to section 2 analysis bear the heavy burden of explaining why courts

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should, despite considerations of stare decisis, suddenly reverse themselves and adopt such a different approach for the very first time, over a century after passage of the Act.

INTRODUCTION

The last several years have seen a vigorous debate among antitrust scholars and practitioners about the appropriate standard for evaluating the conduct of monopolists under section 2 of the Sherman Act. Many of these individuals have advocated a "no economic sense" test, under which courts ask whether the monopolist's conduct would have been economically rational for the firm in question without regard to its exclusionary impact. Others have proposed a more intrusive "consumer welfare balancing test," under which courts seek to determine the net impact of a monopolist's conduct on purchasers in the relevant market. Under this approach, courts would ban any conduct that reduced the welfare of such purchasers, without regard to the conduct's overall impact on the welfare of society.

Most of the debate about these and other possible standards has focused on their economic utility. In the lexicon of antitrust policy, debate has centered on the question of which test produces the optimal mix of false positives (instances in which courts condemn conduct they should not) and false negatives (cases in which courts fail to condemn conduct they should). This debate is largely empirical, with the outcome depending upon factors such as the competence of courts at interpreting complex economic data, the impact of various standards—including the availability of treble damages—upon primary conduct, and the extent to which economic forces—for example, the entry of new competitors—will undermine monopolies that courts mistakenly decline to condemn.

Lurking in the background, though, is a more fundamental question, the answer to which necessarily determines what counts as a false negative or a false positive: What is it that renders conduct properly subject to condemnation in the first place? There are several possible answers to this question. For some, the mere fact that a monopolist's conduct injures a rival may suffice to establish unlawful monopolization.[1] This "populist" or "producer welfare" standard would thus condemn a firm that, for instance, obtains a monopoly by realizing economies of scale that allow it to underprice its smaller rivals. Others would only condemn conduct that reduces the total wealth of society, regardless of its impact on rivals or purchasers in the relevant market. Under this "total welfare" approach, which is generally attributed to Robert Bork and the Chicago School of antitrust analysis,[2] the same firm could underprice its rivals, drive them from the market, and increase prices above the preexisting level, so long as the productive

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1 *Cf.* Albrecht v. Herald Co., 390 U.S. 145, 152–53 (1968) (condemning maximum resale price maintenance agreements because, inter alia, practice could disadvantage small dealers unable to realize efficiencies necessary to adhere to prices set by such agreements), *overruled by* State Oil Co. v. Khan, 522 U.S. 3 (1997); Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) (suggesting that efficiencies that would result from merger militated *against* transaction because new entity would outcompete smaller rivals). As noted later, the populist or producer welfare approach has fallen out of favor with the Court and many scholars. *See infra* note 35 and accompanying text.

2 *See* ROBERT H. BORK, THE ANTITRUST PARADOX 107–15 (1978) [hereinafter BORK, ANTITRUST PARADOX] (articulating economic model informing total welfare approach); Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966) [hereinafter Bork, *Legislative Intent*] (examining legislative history and concluding that, in passing Sherman Act, Congress favored total welfare framework); *see also infra* note 149 (collecting authorities attributing this view primarily to Bork).

efficiencies from economies of scale outweigh the so-called "deadweight loss" resulting from the misallocation of resources flowing from the resulting monopoly power. A third group would ban all conduct by a monopolist that reduces the welfare of purchasers in the market that the defendant has purportedly monopolized, even if such conduct increases society's overall welfare.[3] Under this middle-ground "purchaser welfare" standard, the acquisition of monopoly due to economies of scale would be unlawful whenever purchasers in the relevant market pay higher prices, even if the benefits of these economies far outweigh the deadweight loss associated with monopoly pricing. In any event, the choice among the standards is inescapably normative: Neither economic theory nor empirical inquiry can make this choice for courts or the rest of society.

Whether a particular result counts as a false negative or a false positive depends upon which normative premise one chooses. For instance, condemnation of a restraint that injures rivals but increases the welfare of purchasers and the rest of society will result in a false positive for those who embrace the purchaser welfare or total welfare benchmarks. However, the *failure* to condemn such conduct will produce a false *negative* for those operating under a framework focused on the welfare of the monopolist's rivals. Likewise, for those who embrace a purchaser welfare standard, validation of a restraint that increases society's total wealth will lead to a false negative if the restraint nonetheless slightly increases the prices paid by purchasers in the relevant market. At the same time, condemnation of such a restraint will produce a false positive if the operative standard is the maximization of total social welfare.

Despite the pivotal nature of this choice between normative premises, scholars and others who advocate various tests for section 2

[3] *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 93–96 (1982) (arguing that legislative history of Sherman Act demonstrates concern with harm to purchasers, not allocative efficiency); Robert Pitofsky, *Past, Present and Future of Antitrust Enforcement at the Federal Trade Commission*, 72 U. CHI. L. REV. 209, 217 (2005) [hereinafter Pitofsky, *Antitrust Enforcement*] (endorsing comparison of efficiency effects with adverse impacts on consumers); Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit Sacrifice Standard*, 73 ANTITRUST L.J. 311, 329–33 (2006) (endorsing so-called "consumer welfare effect standard" whereby courts determine whether restraint on balance injures purchasers in relevant market); Robert Pitofsky, Testimony at a Public Hearing of the Antitrust Modernization Commission 97–99 (Sept. 29, 2005) [hereinafter Pitofsky, Testimony], *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/050929_Exclus_Conduct_Transcript_reform.pdf (endorsing balancing test where ultimate touchstone is "welfare of consumers," i.e., well-being of purchasers in relevant market); *see also* Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147, 148 (2005) (advocating test whereby court weighs harm to purchasers against benefits of challenged practice and bans practice when harms are disproportionate to benefits).

liability generally avoid meaningful examination of this question. Some argue that their preferred test should apply regardless of which normative framework one accepts.[4] Others—including leading enforcement officials—casually assert that their proposed approach is consistent with the purported normative framework underlying a mere handful of Supreme Court and circuit court precedents or that the normative premise underlying section 2 should automatically replicate that applied under section 1,[5] where courts at least purport to balance a restraint's benefits against any harms imposed upon purchasers in that market.[6] Still others proceed without any apparent recognition that the test for analyzing alleged monopolistic conduct could turn on the choice between competing normative frameworks.[7] Another scholar claims that the case law is ambiguous on the issue of

[4] *See, e.g.*, A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 ANTITRUST L.J. 375, 389–93 (2006) (providing arguments for "sacrifice test" that span justifications underlying different normative premises and arguing that test "reflects widely shared normative intuitions").

[5] *See* Jonathan A. Jacobson & Scott A. Sher, *"No Economic Sense" Makes No Sense for Exclusive Dealing*, 73 ANTITRUST L.J. 779, 793 (2006) (citing only three Supreme Court and appellate court cases in support of argument against "no economic sense" test); Pitofsky, *Antitrust Enforcement*, *supra* note 3, at 217 (invoking single Supreme Court case and single appellate court decision as basis for proposed balancing test); Pitofsky, Testimony, *supra* note 3, at 5 (same); Salop, *supra* note 3, at 333–35; *see also* Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Vigorous Antitrust Enforcement in This Challenging Era, 11–14 (May 12, 2009), *available at* http://www.justice.gov/atr/public/speeches/245777.pdf (reading two Supreme Court decisions as requiring determination of "whether on balance the net effect of [a monopolist's] conduct harms competition and consumers" and ignoring numerous decisions taking different approach).

[6] Whereas section 2 of the Sherman Act focuses on anticompetitive *single-firm* conduct, section 1 bans only *concerted* action "in restraint of trade." 15 U.S.C. §§ 1–2 (2006); *see also* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767–78 (1984) ("The conduct of a single firm is governed by § 2 alone . . . ."). Section 1 claims are generally judged under the "rule of reason" test first described in *United States v. Standard Oil Co.*, 221 U.S. 1, 66 (1911), and later applied in many section 1 cases. *See, e.g.*, NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 111–13 (1984) (holding that benefits purportedly produced by restraint did not counterbalance harms for purposes of section 1 rule-of-reason analysis given factual finding that restraint resulted in prices higher than they otherwise would have been).

[7] *See* Ronald A. Cass & Keith N. Hylton, *Preserving Competition: Economic Analysis, Legal Standards, and Microsoft*, 8 GEO. MASON L. REV. 1, 30–36 (1999) (defending preferred test without attempting to justify particular welfare standard); Marina Lao, *Defining Exclusionary Conduct Under Section 2: The Case for Non-universal Standards*, 2006 FORDHAM COMPETITION L. INST. 433, 434–35 (deriving commendably precise section 2 standards without recognizing specific role of normative premises); *see also* ANTITRUST DIV., U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT *passim* (2008), http://www.justice.gov/atr/public/reports/236681.pdf (withdrawn Apr. 2009) (repeatedly invoking "consumer welfare" as touchstone of section 2 analysis without articulating definition of that term).

normative premises.[8] Finally, some scholars make arguments that depend upon one framework or the other without expressly embracing or justifying their chosen premise.[9]

There are, of course, various ways to determine which normative standard should apply in evaluating a monopolist's conduct and thus in assessing the validity of various tests. For instance, one could evaluate each standard in light of some independent moral criterion, such as utility maximization, inherent justice, or the consequences of various standards for the health of our political system.[10] Such an approach would inevitably require one first to explain why the chosen criterion is preferable to others. Or, one could take the more mundane approach of discerning the original meaning of section 2—that is, determining which particular standard Congress meant courts to apply. Over the past few decades, antitrust scholars have expended considerable energy in attempting to discern the original meaning that Congress attributed to the term "monopolize" in section 2 of the Sherman Act.[11]

This Article undertakes a somewhat different inquiry, one that fills a significant gap in the scholarly literature: What is the normative

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8 Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 21–23 (2004) (contending that case law is not clear on which effects matter when examining conduct by monopolist that both creates market power and produces benefits).

9 *See, e.g.*, Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15–16 (1984) (resting argument for relatively permissive antitrust rules on unelaborated assumption that misallocation of resources is only harm from monopoly pricing).

10 For instance, some scholars have embraced a form of economic democracy as a moral criterion, arguing that protecting smaller, less efficient firms from more efficient rivals can preserve a decentralized marketplace and thus reduce the risk of corporate fascism. *See* Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1053–54 (1979) (suggesting that some monopolies could have disruptive political effects). It should be noted that a "total utility" standard might produce results different from those produced by a "total economic welfare" standard, particularly if one assumes a diminishing marginal utility of wealth. For instance, a merger to monopoly that increases total economic welfare by producing economies of scale may nonetheless reduce overall social utility by transferring a significant share of income from poor consumers to the rich shareholders of the resulting monopoly. *See generally* Oliver E. Williamson, *Allocative Efficiency and the Limits of Antitrust*, 59 AM. ECON. REV. 105, 108–09 (1969). *But see* Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1704 (1986) ("The observation that money is worth different amounts at the margin to different people could as easily direct income toward the 'utility monster' (the person who gets fabulous pleasure from oodles of extra money or from gruesome deeds) as toward consumers or small businesses.").

11 *See, e.g.*, David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1275–92 (1988) (describing political and economic assumptions that shaped Congress's view of meaning of Sherman Act); Bork, *Legislative Intent*, *supra* note 2, at 26–31 (arguing that concerns about consumer welfare and efficiency were central to legislators' understanding of Sherman Act's prohibitions).

framework that courts actually have chosen when adjudicating section 2 cases? The Article concludes that, despite some twists and turns along the way, courts have not embraced purchaser welfare as the fundamental value underlying section 2. Indeed, the author is aware of no decision in which a court implementing section 2 has employed purchaser welfare as the operative standard. At the same time, courts have repeatedly adopted tests that effectively implement a total welfare approach to antitrust regulation.

The Article also evaluates the claim, made by those who support a purchaser welfare approach, that support for the total welfare approach originated with, and is limited to, Robert Bork and the Chicago School of antitrust. To be sure, Bork has been the most vociferous proponent of a total welfare approach to antitrust law. However, the modern total welfare approach enjoys much broader academic support and deeper roots than its opponents care to admit. This Article traces the origins of the total welfare standard to the influential Harvard School of antitrust analysis, which can in turn trace *its* origins to the late 1930s and the work of Edward Mason, then a leading member of the Harvard Economics Department. The Harvard School treated antitrust law as a vehicle for implementing neoclassical price theory's industrial organization paradigm as a means of ensuring an allocation of productive resources that maximized overall economic welfare.[12] This school of thought, which included Mason disciples Carl Kaysen, Donald Turner, and Joe Bain, exercised significant influence on antitrust law both directly and indirectly via the work of Phillip Areeda, Turner's co-author during the 1970s.

While Harvard and Chicago have on occasion supported different rules governing particular categories of conduct, particularly under section 1 of the Sherman Act, their disagreements often rest on different appraisals of the economic impact of particular conduct and not on different normative premises. Moreover, with regard to section 2, the normative consensus between Chicago and Harvard and parallel case law is by no means ambiguous or accidental: It reflects a well-considered and deeply rooted desire to protect practices—particularly "competition on the merits"—that produce significant benefits in the form of enhanced resource allocation, without regard to the ultimate impact of the practice on purchasers in the particular market served by the monopolist. Those who advocate repudiation of the long-standing scholarly and judicial consensus reflected in the total welfare approach to section 2 analysis bear the heavy burden of explaining

[12] *See infra* Part IV.B.

why courts should, despite considerations of stare decisis, suddenly reverse themselves and adopt such a different approach for the very first time, over a century after passage of the Act.

Part I of this Article describes three possible normative frameworks that courts could adopt when implementing section 2 and briefly explains the consequences of each for antitrust doctrine. The choice between these frameworks largely depends upon what counts as harm for the purposes of the antitrust laws. Part II examines the normative framework courts adopted in the formative era of antitrust law—1890 through the 1920s—particularly as illustrated by the first iteration of *United States v. United Shoe Machinery Co.*[13] Part III examines the most intrusive approach to section 2 that a court has adopted. Decided shortly after World War II, *United States v. Aluminum Co. of America*[14] (*Alcoa*) implicitly rejected the total welfare approach to section 2 embraced during the formative era. Yet Judge Hand, *Alcoa*'s author, did *not* embrace a purchaser welfare approach, endorsing instead an approach designed to further the noneconomic values of decentralization and deconcentration. Part IV describes the Harvard School's embrace of a total welfare approach, derived from the workable competition model of neoclassical price theory. This approach, it is shown, found its way into section 2 doctrine in the reprise of *United States v. United Shoe Machinery Co.*,[15] in which the presiding judge relied on a special law clerk from the Harvard School in announcing a distinction between "competition based on pure merit," including the realization of economies of scale on the one hand, and "conscious business policies," such as exclusionary agreements, on the other. The former was lawful per se, without regard to the impact upon purchaser welfare; the latter was unlawful. The decision's creation of a safe harbor for competition on the merits set the tone for modern monopolization doctrine, a sensibility reinforced by the Harvard School's future academic work, which repeatedly reiterated *United Shoe*'s determination that competition on the merits should be lawful per se, even when such conduct led to higher prices for purchasers in the relevant market. Part V describes modern section 2 doctrine, which continues to adopt a total welfare standard, again at the behest of the Harvard School. This Part also explains why such doctrine has an especially strong claim under the principle of stare decisis. Part VI examines and finds wanting two possible counterarguments against this Article's claim that section 2 law

[13] 247 U.S. 32 (1918).

[14] 148 F.2d 416 (2d Cir. 1945).

[15] United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954) (per curiam).

rests upon a total welfare foundation. The total welfare standard is not, as some claim, an exception that applies to a small subset of conduct by monopolists but is instead the rule that applies to all conduct that courts analyze under section 2. Further, the recent decision in *United States v. Microsoft Corp.*,[16] with its invocation of standards derived from section 1's rule of reason, did not in any way undermine the judicial commitment to total welfare as the operative section 2 standard.

I
What's Harm and What's Not: Section 2's Possible Normative Premises and Why the Choice of Premise Matters

Section 2 of the Sherman Act forbids "monopoliz[ation]" and "attempt[s] to monopolize."[17] From the beginning, antitrust courts have required plaintiffs invoking section 2 to prove two elements: 1) that the defendant possesses monopoly power in a relevant, properly defined market, and 2) that the defendant has acquired or maintained that power by means of exclusionary conduct.[18] Thus, mere possession of a monopoly, even a durable one, does not violate section 2.[19] Instead, a defendant must have also employed some undesirable, i.e., "exclusionary," conduct to acquire or maintain that power.[20]

As a conceptual matter, analysis of a monopolist's conduct entails two discrete questions. First, what resulting effects render conduct undesirable? And second, what effects does that conduct actually produce? Economic theory and related techniques of empirical investigation can help answer the second question by informing courts about the effects that conduct has in the real world. At the same time, although economic theory can suggest different normative premises, it cannot itself answer the first question; that is, it cannot tell courts

16 253 F.3d 34 (D.C. Cir. 2001).

17 15 U.S.C. § 2 (2006).

18 *See, e.g.*, Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407 (2004); Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 480–81 (1992); United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966); *see also* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 595–96 (1985) (quoting instructions to this effect with approval).

19 *See* Standard Oil Co. v. United States, 221 U.S. 1, 62 (1911) (stating that Sherman Act does not forbid "monopoly in the concrete").

20 *See, e.g.*, United States v. Int'l Harvester Co., 274 U.S. 693, 708 (1927) (stating that section 2 does not make mere size an offense); United States v. United Shoe Mach. Co., 247 U.S. 32, 69 (1918) (stating that section 2 does not forbid normal conduct that preserves monopoly); United States v. Am. Tobacco Co., 221 U.S. 106, 178–79 (1911) (stating that section 2 only forbids "undu[e]" restraints that lead to or protect monopoly).

which effects constitute the sort of harm that section 2 is designed to police.[21]

Antitrust scholars have articulated three possible organizing normative principles that could drive antitrust doctrine. The "populist" or "producer welfare" school argues that the Sherman Act, including section 2, bans any conduct that restrains the autonomy of traders or results in a concentrated marketplace.[22] Under this approach, tying or exclusive dealing agreements should be unlawful without more if entered into by a monopolist because such agreements restrain dealers and disadvantage the firm's rivals.[23] By the same token, above-cost pricing that drives less efficient firms from the market would also violate section 2, even if such pricing reduced the prices paid by purchasers in the relevant market over the short, medium, *and* long term.[24]

On the opposite extreme are those who advocate a "total welfare" approach to the Act. These scholars and jurists contend that antitrust law bans only those contracts or practices that reduce society's overall economic welfare.[25] Under this approach, values such as autonomy and decentralization are irrelevant—only wealth matters.[26] Also under this approach, conduct that creates wealth on balance should be lawful even if purchasers in the relevant market pay higher prices as a result of the practice. For these proponents, the only

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[21] *See* MILTON FRIEDMAN, *The Methodology of Positive Economics*, *in* ESSAYS IN POSITIVE ECONOMICS 1, 5–8 (1953) (explaining how positive economics can inform policy judgments but cannot itself tell policymakers what normative principles to embrace).

[22] *See, e.g.*, Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1147 (1981) (concluding that Sherman Act was designed in part to protect small firms from power of trusts); *id.* at 1184 (endorsing per se rule against vertical minimum and maximum price fixing because "sellers of goods should have the freedom to charge the price they see fit").

[23] *See* Eleanor M. Fox, Eastman Kodak v. Image Technical Services, Inc.: *Information Failure as Soul or Hook*, 62 ANTITRUST L.J. 759, 759–61 (1994) (articulating this vision of section 2).

[24] *See, e.g.*, Indus. Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336, 1342–43 (9th Cir. 1970) (finding violation of section 2 in efficiency-based forward integration that injured rivals); *see also* Albrecht v. Herald Co., 390 U.S. 145, 152–53 (1968) (treating above-cost maximum price-setting as harmful for section 1 purposes), *overruled by* State Oil Co. v. Khan, 522 U.S. 3 (1997).

[25] *See* BORK, ANTITRUST PARADOX, *supra* note 2, at 107–15; *see also* Easterbrook, *supra* note 10, at 1703 ("[T]he dominant theme [of the legislative history] is the protection of consumers from overcharges. This turns out to be the same program as one based on 'efficiency.' There are differences at the margins, such as what if anything to do about price discrimination . . . but the differences are not very important.").

[26] *See* BORK, ANTITRUST PARADOX, *supra* note 2, at 107–15 (arguing that "all antitrust problems" turn on "only two factors"—"allocative inefficiency and productive efficiency"); *see also* Easterbrook, *supra* note 10, at 1703 (arguing that statements in legislative history of Sherman Act evincing concern for welfare of small firms were "a sideshow").

cognizable harm for antitrust purposes is what economists call the "deadweight loss"—the loss in total economic welfare that occurs when the exercise of monopoly power results in higher prices, lower consumption, and an incremental reduction in output.[27] This welfare loss, in turn, equals the difference between the value that consumers would have placed on the foregone output and the cost of producing it. Because this cost reflects the value of the next best use of the productive resources in question, the difference between value and cost represents a misallocation of resources to other, less valuable uses.[28] The classic example of conduct that increases total wealth while increasing purchaser prices—that is, conduct that would not violate section 2 under a total welfare approach—is a merger to monopoly that enhances the remaining firm's market power and increases prices in the relevant market, but also results in productive efficiencies that outweigh the deadweight losses that result from additional market power.[29] Indeed, Professor Oliver Williamson has shown that a merger to monopoly that reduces production costs by one or two percent may create more wealth than it destroys, even if the transaction results in higher prices in the relevant market.[30]

Under a third approach, what this Article calls the purchaser welfare standard, courts should ban all conduct that creates market power and thus raises prices that parties pay in the relevant market.[31] It does not matter for these scholars if a practice produces benefits that counterbalance allocative losses and thus enhances total welfare. Congress, these scholars say, passed the Sherman Act to provide purchasers with a legal entitlement to purchase goods and services at low prices.[32] For these scholars, proof that conduct produces efficiencies is only relevant if those efficiencies counteract any price effects and prevent the

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27 *See* BORK, ANTITRUST PARADOX, *supra* note 2, at 108 (noting that deadweight loss diagram "can be used to illustrate all antitrust problems").

28 *Id.* at 107–10; *see also* F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 15–17 (1970) (describing how monopoly pricing results in inefficient allocation of resources).

29 *See* BORK, ANTITRUST PARADOX, *supra* note 2, at 107–10 (invoking allocative inefficiency-productive efficiency tradeoff model as paradigmatic approach to all antitrust problems).

30 *See* Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 22–23 (1968).

31 *See* John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 201, 203 (2008); Lande, *supra* note 3, at 93–96; *see also* Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 21–24 (1989) (endorsing Professor Lande's reading of Act's legislative history to support purchaser welfare theory).

32 *See* Lande, *supra* note 3, at 93–96 (arguing that Congress was concerned with ability to "'unfairly' extract wealth from consumers," not allocative efficiency).

conduct in question from increasing prices or, better yet, reduce such prices.[33]

Though once deemed controversial,[34] the purchaser welfare standard has gained ground in recent years. At the same time, support for the populist or producer welfare standard seems to have waned significantly in recent years, leaving the total welfare and purchaser welfare approaches as the most likely rivals for the best account of section 2.[35] Accordingly, this paper focuses on the rivalry between these two views.

The distinction between the purchaser welfare and total welfare standards is not always apparent. For one thing, both schools agree on numerous doctrinal results; for example, both support the absolute prohibition of cartel agreements.[36] Moreover, and perhaps more importantly, both camps have described their goals using the same label: the maximization of consumer welfare.[37] However, despite this common label, the respective schools embrace quite distinct principles. One camp would protect the welfare of *all* consumers, including those who are also shareholders in large firms with market power.[38]

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[33] *See* Salop, *supra* note 3, at 317–18, 330–31; *cf.* Alan A. Fisher, Frederick I. Johnson & Robert H. Lande, *Price Effects of Horizontal Mergers*, 77 CAL. L. REV. 777, 785–88 (1989) (advocating similar approach in merger context).

[34] *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power over Price*, 96 YALE L.J. 209, 279 (1986) (opining that treatment of "monopoly transfer" from producers to consumers as aspect of consumer welfare is "controversial").

[35] Indeed, one prominent and former supporter of the populist approach to the Sherman Act has more recently advocated a purchaser welfare approach. *Compare* Pitofsky, *Antitrust Enforcement*, *supra* note 3, at 217 (endorsing comparison of efficiency effects with adverse effects on purchasers), *and* Pitofsky, Testimony, *supra* note 3, at 97–99 (endorsing balancing test where ultimate touchstone is welfare of consumers, i.e., purchasers in the relevant market), *with* Pitofsky, *supra* note 10, at 1051 (advocating approach whereby courts consider political values such as decentralization of power when constructing antitrust doctrine).

[36] *See* BORK, ANTITRUST PARADOX, *supra* note 2, at 66–67 (discussing per se ban on price fixing); Robert H. Lande & Howard P. Marvel, *Three Types of Collusion: Fixing Prices, Rivals, and Rules*, 2000 WIS. L. REV. 941, 944–46 (same); *see also* Easterbrook, *supra* note 10, at 1703 (noting that there are only "differences at the margins" between purchaser welfare and total welfare approaches). Both schools of thought would also, by their own terms, ban mergers that create market power without creating any offsetting efficiencies as well as mergers that create efficiencies so trivial that they do not offset the deadweight losses created by the transaction.

[37] *See* Salop, *supra* note 3, at 331 (conceding that "consumer harm" might be better term for his proposed standard than "consumer welfare"). *Compare id.* at 329–35 (repeatedly invoking "consumer welfare" to refer to welfare of purchasers in monopolist's market), *with* Bork, *Legislative Intent*, *supra* note 2, *passim* (repeatedly using "consumer welfare" to refer to overall welfare of *all* consumers, including shareholders of defendants).

[38] *See* BORK, ANTITRUST PARADOX, *supra* note 2, at 110 (noting that shareholders of monopolists are also consumers and that their welfare should count for antitrust purposes).

The other camp, by contrast, would protect only the welfare of those consumers who happen to be purchasers in the market in which the defendant is operating at the time of litigation.[39] As a result, this Article has, for the sake of exposition, renamed the schools and employs the neutral and more precise terms "total welfare" and "purchaser welfare" to denote the normative premises embraced by these competing camps.

The total welfare and purchaser welfare standards naturally suggest different tests for determining whether a monopolist's conduct should be condemned. If administrative costs were zero, courts would simply examine challenged conduct with care and determine whether it enhanced the welfare of purchasers or society as a whole, depending upon the normative standard selected. However, administrative costs are real; courts cannot simply replicate a flawless economic analysis in every antitrust case.[40] Thus, antitrust rules are necessarily imperfect efforts to implement a particular normative standard in light of the limited institutional capacities of courts.[41] That is to say, a rule may seek to implement a particular normative standard without actually condemning every instance of conduct that offends that standard in the real world.

Recent debate over a particular test for liability illustrates the role that both normative and administrative concerns can play in debates over appropriate liability rules and highlights the possible consequences of choosing one normative standard over another. Several scholars have advocated a "no economic sense" test, whereby a monopolist only violates section 2 if its conduct "would make no economic sense for the defendant but for the tendency to eliminate or lessen competition."[42] Under this test, a monopolist will avoid liability if its conduct produces nontrivial benefits that would explain its behavior in the absence of monopoly power or the desire to protect or obtain it.[43] While proponents of the test rarely invoke a specific normative standard,[44] the test most plausibly reflects a total welfare

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[39] *See* Salop, *supra* note 3, at 331 (discussing harm to consumers in context of specific market).

[40] *See* Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983) (discussing practical constraints on court's economic investigation imposed by administrative costs).

[41] *See id.* (justifying existence of per se antitrust violations based on "the administrative virtues of simplicity").

[42] Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 ANTITRUST L.J. 413, 413 (2006).

[43] *Id.* at 415–17.

[44] Werden, for instance, invokes "consumer welfare" as the object of the test without defining that term. *See, e.g.*, *id.* at 415, 419.

approach. In particular, the test's safe harbor for conduct that creates significant benefits can be seen as reflecting an assumption, consistent with Professor Williamson's tradeoff analysis, that the benefits of nontrivial efficiencies generally will outweigh any deadweight losses resulting from enhanced market power.[45] Although the harmful effects of market power and misallocation may sometimes predominate, the cost of isolating such instances is presumably greater than the benefits of doing so.

To be sure, some have argued that, in light of administrative costs, the "no economic sense" test is also the best vehicle for implementing a purchaser welfare normative standard.[46] These scholars argue that close scrutiny of a monopolist's conduct would chill beneficial innovation and the realization of efficiencies, thereby harming the monopolist's purchasers in the long run.[47] At the same time, these scholars generally reserve this argument for specific types of conduct, such as pricing and output decisions,[48] while advocating a competing and more intrusive "consumer welfare balancing test" to examine other practices that purportedly raise greater risk of harm to purchasers, such as exclusionary agreements.[49] Under this so-called consumer welfare balancing test, courts examine directly whether such practices, on balance, injure purchasers in the relevant market, in the same way that courts purportedly "balance" the benefits of challenged agreements against resulting harms when conducting a rule-of-reason analysis under section 1 of the Sherman Act.[50]

Arguments for a "no economic sense" test based on a purchaser welfare standard are necessarily contingent upon contestable pessimistic assumptions about the capacity of advocates, courts, and agen-

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[45] *See* Easterbrook, *supra* note 9, at 15–16 (resting argument for relatively permissive antitrust rules on assumption that misallocation of resources is only harm from monopoly pricing); *see also supra* note 29–30 and accompanying text (describing Williamson's tradeoff analysis).

[46] *See, e.g.*, Lao, *supra* note 7, at 461–62 (arguing that, for certain forms of conduct, proof of procompetitive benefits should serve as "absolute" affirmative defense, regardless even of availability of alternatives that are less harmful to purchasers).

[47] *See, e.g.*, *id.* (reasoning that too much scrutiny will hinder "product redesign and development decisions").

[48] *See, e.g.*, *id.* at 462–63.

[49] *See, e.g.*, *id.* at 456–58, 461–62 (advocating purchaser welfare balancing test for monopolist's distribution strategies on theory that such conduct poses greater risk of overall harm to purchasers than purely unilateral pricing decisions).

[50] *See* Salop, *supra* note 3, at 329–35 (endorsing what amounts to consumer welfare balancing test whereby courts determine whether restraint on balance injures purchasers in relevant market); Pitofsky, *Antitrust Enforcement*, *supra* note 3, at 217 (endorsing comparison of efficiency gains with adverse effects on purchasers); *see also infra* notes 309–11, 316 and accompanying text (discussing purported balancing test akin to rule-of-reason analysis).

cies to distinguish beneficial conduct from that which creates harm and to quantify the positive and negative consequences of such conduct.[51] In September 2008, the Department of Justice's Antitrust Division rejected the purchaser welfare effects test for exactly these reasons.[52] Just eight months and one presidential election later, the Division reversed itself, apparently embracing a purchaser welfare effects test and rejecting the sort of administrative concerns that had motivated the 2008 conclusion.[53] Thus, it seems plain that the selection of one normative standard over another can have a significant and perhaps dispositive impact on the choice between possible tests for evaluating a monopolist's conduct.

II
TOTAL WELFARE IN THE FORMATIVE ERA

A. *The Safe Harbor for "Normal" Conduct and the Efficient Monopolist*

Proponents of a total welfare account of section 2 doctrine can trace the theory's roots back almost a century to *Standard Oil Co. v. United States*[54] and *United States v. American Tobacco Co.*,[55] decided in the same month in 1911. These and subsequent decisions during antitrust law's formative era embraced standards that were consistent with a total welfare approach—and inconsistent with a purchaser welfare standard—to section 2, at least in those industries in which firms could acquire and maintain monopoly power by engaging in efficient conduct. Moreover, as explained in subsequent Parts, the section 2 standards announced during the formative era survive to this day and apply even in those industries in which firms may acquire and maintain permanent monopoly power by means of conduct that is unambiguously beneficial.

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[51] Adjudicatory and forensic techniques may even evolve in response to the choice of a particular standard. *Cf.* Williamson, *supra* note 10, at 113 (contending that recognition of efficiency defense in merger context would cause parties and others to develop new techniques measuring impact of such transactions).

[52] *See* COMPETITION AND MONOPOLY, *supra* note 7, at 37–38 (noting criticism of "effects-balancing test" as "not easily administrable").

[53] *See* Press Release, U.S. Dep't of Justice, Justice Department Withdraws Report on Antimonopoly Law (May 11, 2009), *available at* http://www.justice.gov/atr/public/press_releases/2009/245710.htm (announcing and explaining rationale for withdrawal); Varney, *supra* note 5, at 11–14 (explaining withdrawal of Section 2 Report and endorsing test that determines "whether on balance the net effect of [a monopolist's] conduct harms competition and consumers").

[54] 221 U.S. 1 (1911).

[55] 221 U.S. 106 (1911).

Like earlier formative-era decisions, both *Standard Oil* and *American Tobacco* read sections 1 and 2 of the Sherman Act narrowly so as not to infringe upon liberty of contract.[56] Some have even criticized the decisions on this ground.[57] During this era, the Due Process Clauses of the Fifth and Fourteenth Amendments placed meaningful limits on the ability of Congress and the states to regulate private economic activity, including pricing decisions and commercial contracts.[58]

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[56] *Am. Tobacco*, 221 U.S. at 179–80; *Standard Oil*, 221 U.S. at 58–63; *see also* Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1, 34–67 (1999) (detailing influence of liberty of contract considerations on Sherman Act doctrine from 1890 until 1911); RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA, 1888–1992, at 58 (1996) ("*Standard Oil* can be understood as closing *Lochner*'s circle of individual liberty, its vision of a private sphere defined in opposition to a public, majoritarian domain.").

Some have suggested that *Standard Oil*'s invocation of and reliance upon liberty of contract to narrow the scope of the Sherman Act was a departure from earlier case law which, it is said, preferred a more interventionist approach that banned any restraint of trade without regard to reasonableness. *See Standard Oil*, 221 U.S. at 85–97 (Harlan, J., dissenting) (contending that earlier case law and terms of statute rejected rule of reason); Edwin S. Corwin, *The Antitrust Acts and the Constitution*, 18 VA. L. REV. 355, 369 (1932) (characterizing *Standard Oil* as "judicial legislation" on these grounds); Millon, *supra* note 11, at 1288 n.314 (claiming that early decisions applied statute literally, and *Standard Oil* changed that course); PERITZ, *supra*, at 26–29, 50–58 (contending that early case law rejected liberty of contract in favor of more expansive interpretation of Sherman Act but that *Standard Oil* reversed course of earlier decisions).

However, as I have argued elsewhere, the reasonableness approach taken by the *Standard Oil* Court was entirely consistent with previous Sherman Act case law. Meese, *supra*, at 12; *see also Standard Oil*, 221 U.S. at 64–65 (explaining that previous decisions had implicitly resorted to reason when looking to "nature" and "character" of challenged contracts); United States v. Joint Traffic Ass'n, 171 U.S. 505, 567–68 (1898) (stating that section 1 of Sherman Act does not forbid restraints of trade where effect is "indirect or incidental only" because Act "must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it" (quoting Hopkins v. United States, 171 U.S. 578, 600 (1898))); 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) [hereinafter Bork, *Rule of Reason I*] (arguing that substance of law was not changed at all in *Standard Oil*); WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 265 (1956) (arguing that White's opinion in *Standard Oil* changed nothing). Moreover, William Howard Taft agreed that *Standard Oil* was entirely consistent with previous case law. *See* Cline v. Frink Dairy Co., 274 U.S. 445, 460–61 (1927) (Taft, C.J.) (stating that *Standard Oil* "fully confirmed" earlier case law); WILLIAM HOWARD TAFT, THE ANTITRUST ACT AND THE SUPREME COURT 89 (1914) ("[T]hose who charged that the court had narrowed the act, or had not comprehended the settled public opinion that found expression in it, spoke without knowledge.").

[57] *See* Corwin, *supra* note 56, at 367–71 (criticizing Court's decision as "predetermined result").

[58] *See, e.g.*, Adair v. United States, 208 U.S. 161, 179–80 (1908) (voiding federal statute that outlawed discharge of employees due to labor union membership); Lochner v. New York, 198 U.S. 45, 64 (1905) (voiding state maximum hours legislation); Allgeyer v. Louisiana, 165 U.S. 578, 591 (1897) (voiding state effort to regulate terms of insurance contract entered in another state).

As a result, the Court said, the Sherman Act does not ban so-called "normal" or "ordinary" contracts or combinations, even if they restrain trade as a matter of plain meaning.[59] Indeed, the Court said, a ban on such agreements would grind interstate commerce to a halt and destroy contractual liberty instead of facilitating its exercise, as intended.[60] Moreover, the Court said, the Sherman Act did not forbid "monopoly in the concrete," but, instead, only monopoly acquired or maintained by means of "undu[e]" or "improper[ ]" tactics.[61] In so doing, the Court reached the result presaged almost a decade earlier in *Northern Securities Co. v. United States*, where the controlling vote opined that the rights to own and dispose of property and to make ordinary contracts place significant limits on the scope of the Sherman Act, including section 2, with the result that the Act bans only unreasonable restraints.[62]

The implication of these decisions seems obvious: While firms may not obtain or sustain monopoly power via undue restraints, they may do so via restraints or other tactics that are "ordinary," "normal," or "due." Moreover, while the Court did not define the category of

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[59] *Am. Tobacco*, 221 U.S. at 183; *see also Standard Oil*, 221 U.S. at 60 (arguing that, despite language that was "broad enough to embrace every conceivable contract," Sherman Act "necessarily called for the exercise of judgment" in evaluating challenged agreements); *see also Joint Traffic Ass'n*, 171 U.S. at 568 ("An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the Act, although the agreement may indirectly and remotely affect that commerce.").

[60] *See Am. Tobacco*, 221 U.S. at 180 (stating that *Standard Oil* Court gave term "'restraint of trade' . . . a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce"); *Standard Oil*, 221 U.S. at 63 (noting that literal application of statute "would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce"); *Joint Traffic Ass'n*, 171 U.S. at 567–68 (reading Act narrowly lest it ban all manner of normal and ordinary contracts); *see also* Whitwell v. Cont'l Tobacco Co., 125 F. 454, 460–61 (8th Cir. 1903) (Sanborn, J.) ("There is nothing in the [Sherman Act] which deprived any of these competitors of these rights [of contract]. If there had been, the law itself would have destroyed competition more effectually than any contracts or combinations of persons or of corporations could possibly have stifled it.").

[61] *Standard Oil*, 221 U.S. at 62 ("[T]he omission of any direct prohibition against monopoly in the concrete . . . indicates a consciousness that the freedom of the individual right to contract when not unduly or improperly exercised was the most efficient means for the prevention of monopoly . . . ."); *see also Am. Tobacco*, 221 U.S. at 179 ("It was therefore pointed out [in *Standard Oil*] that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose.").

[62] 193 U.S. 197, 361 (1904) (Brewer, J., concurring) ("[T]he general language of the [Sherman] [A]ct is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen.").

"normal" or "ordinary" conduct with great precision, close analysis suggests the Court had in mind practices that a firm would have adopted without regard to whether it possessed or expected monopoly power.[63] Or, as the Court put it in *Standard Oil*, the statute did not ban those contracts "entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade . . . ."[64] While such agreements might incidentally obtain or sustain a monopoly, they were nonetheless normal or usual and thus lawful.[65] It seems, therefore, that a restraint could be normal or ordinary under the *Standard Oil* formulation even if it (incidentally) facilitated the exercise of market power to the detriment of purchasers in the relevant market.

The Court confirmed this reading of "normal" or "ordinary" just seven years after *Standard Oil* and *American Tobacco* in *United States v. United Shoe Machinery Co.*[66] There, the United States argued that the defendant had monopolized the market for shoe machinery, first by merging with several rivals, and then by adopting various purportedly exclusionary practices that helped United Shoe acquire and maintain its monopoly. These practices included United Shoe's policy of leasing its machines instead of selling them outright, as well as its use of so-called "full capacity clauses," which required lessees to employ machines leased from United Shoe whenever the lessee had work appropriate for United's machines, in preference to those purchased or leased from others.[67] The firm also required lessees to employ its aftermarket maintenance and repair service, and it provided these services free of charge.[68]

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[63] *See* Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77, 83–89 (making this argument in more detail); *see also Joint Traffic Ass'n*, 171 U.S. at 568 (holding that Sherman Act only reaches contracts whose main purpose is to restrain trade).

[64] *Standard Oil*, 221 U.S. at 58; *see also id.* at 55–56 (explaining with approval English legislation repealing bans on engrossing and forestalling, because acts condemned by such statutes "tended to fructify and develop trade" and that "an individual's right to trade could not be protected by destroying such right").

[65] *See Joint Traffic Ass'n*, 171 U.S. at 568 (defining as "indirect" those restraints entered "for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce"); United States v. Hopkins, 171 U.S. 578, 600 (1898) (arguing that Sherman Act was not intended to cover indirect or remote effects on commerce). As I have explained elsewhere, the *Joint Traffic Ass'n* Court held that the Act does not ban "indirect" restraints as a means of avoiding regulation of what it called "ordinary contracts and combinations." Meese, *supra* note 56, at 53–54.

[66] 247 U.S. 32 (1918).

[67] *See id.* at 61–63 (detailing various lease provisions challenged by United States).

[68] *See id.* at 56 ("There is a service force as well, estimated at 6,000 men, to repair immediately breaks or deterioration without extra charge.").

There was no doubt that such agreements disadvantaged rivals and thus protected the defendant's monopoly position in the shoe machinery market.[69] Nonetheless, the Court considered this factor to be beside the point, finding that the agreements in question produced benefits independent of any propensity to obtain or maintain monopoly power.[70] In particular, the Court described specific benefits created by the restraints and found that the transactions in question were motivated by considerations that "move[ ] and may move the transactions of men."[71] Moreover, the Court also found it noteworthy that each of the firms that had merged to form the defendant had, before the merger, employed the very same restraints.[72] The previous employment of such restraints in a less concentrated market apparently suggested to the Court that the agreements produced benefits unrelated to the creation or maintenance of market power, i.e., they were "normal" or "usual," as the *Standard Oil* Court used those terms.[73] It did not matter to the Court that the firm had become a monopoly, as such market dominance was "at once the result and

69 *Cf. id.* (noting that company had "magnitude," which was both "result and cause of efficiency").

70 That is to say, the decision was an application of what is now known as the "no economic sense" test. *See, e.g.*, Werden, *supra* note 42 (articulating and arguing for this test); Melamed, *supra* note 4, at 389–92 (articulating so-called "sacrifice test," which is functionally equivalent to Werden's "no economic sense" test, *supra*, whereby conduct is deemed anticompetitive "if, but only if, it makes no business sense or is unprofitable for the defendant but for the exclusion of rivals and resulting supracompetitive recoupment").

71 *United Shoe*, 247 U.S. at 65; *see id.* at 63–64 (explaining that practice of leasing machines helped finance entry of small shoe manufacturers and ensured that machines were used in proper relation to other machines); *id.* at 64 (explaining that requirement that lessees also lease accessory machines created "great economic advantage"); *see also* William H. Page, *Legal Realism and the Shaping of Modern Antitrust*, 44 EMORY L.J. 1, 16–17 (1995) (explaining how *United Shoe* decision rested upon determination that challenged provisions were voluntary arrangements that benefitted both parties).

72 *See United Shoe*, 247 U.S. at 63 ("As we have seen, the leasing of their respective machines was the practice of the constituent companies before their union and [the leases] were substantially the same after union as before—in instances better.").

73 *Id.* at 65. Similarly, some modern courts and scholars have contended that restraints that arise in unconcentrated markets are presumptively efficient. *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 22 (1979) (finding that adoption by smaller firms of so-called "blanket licenses" suggested that such agreements produced benefits independent of any market power and should thus be analyzed under rule of reason); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 221 (D.C. Cir. 1986) (Bork, J.) (noting that absence of market power creates inference that challenged restraints produce efficiency benefits); Polk Bros. v. Forest City Enter., 776 F.2d 185, 190–91 (7th Cir. 1985) (Easterbrook, J.) (stating that absence of market power suggests restraint is beneficial or benign); *see also* Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 384–85 (1966) [hereinafter Bork, *Rule of Reason II*] ("This inference that the price-fixing agreement enhances the efficiency of a contract integration may safely be taken as conclusive without proof . . . since the apparent market share of the parties makes it highly improbable that the real purpose or effect of the

cause of efficiency."[74] In more modern parlance, United Shoe was an efficient monopolist. The Court reiterated these principles into the 1920s in its section 2 jurisprudence.[75]

Viewed from a modern perspective, these paradigmatic decisions embrace the total welfare view of section 2 at the expense of the purchaser welfare view. Long before there was a Chicago School of antitrust analysis, these decisions declined to interfere with monopolies—and thus monopoly pricing—when the monopolist in question obtained or maintained its power by engaging in normal or ordinary practices that produced efficiencies. Such efficiencies, in turn, presumably outweighed any deadweight loss resulting from enhanced monopoly power, thereby justifying validation of the practice.[76] "Mere size," without more, was not an offense, even if such size empowered a firm to charge monopoly prices.[77]

Moreover, such a result is consistent with—perhaps even compelled by—the Supreme Court's more general attitude toward economic regulation during this period.[78] According to the *Lochner*-era Court, the unequal distribution of wealth was an inevitable consequence of the state's fundamental obligation to protect what Madison had called the "faculties of acquiring property."[79] This unequal distri-

arrangement is to restrict output."); Easterbrook, *supra* note 9, at 19–23 (proposing so-called market power filter for restraints analyzed under rule of reason).

74 *United Shoe*, 247 U.S. at 56.

75 *See* United States v. Int'l Harvester Co., 274 U.S. 693, 708 (1927) (stating that section 2 of Sherman Act does not make "mere size" an offense); United States v. U.S. Steel Corp., 251 U.S. 417, 440–41 (1920) (holding that defendant did not violate section 2 where "[i]t resorted to none of the brutalities or tyrannies that the cases illustrate of other combinations"); *id.* at 450–51 (stating that mere size is not offense if obtained without exclusionary tactics); Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918) (noting that mere fact that restraint adopted by important industry participants alters prices does not render it unlawful); *see also* MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890–1916, at 136 (1988) ("[During the formative era] a literal monopoly of manufacture or production achieved by a person or firm or corporation through superior efficiency, or through effective and otherwise lawful competition, or through expansion by the purchase of property, remained unobjectionable.").

76 *See* Williamson, *supra* note 30, at 20–22 (contending that small increase in efficiency can outweigh allocative harm resulting from merger to monopoly).

77 *Int'l Harvester*, 274 U.S. at 708; *see also U.S. Steel*, 251 U.S. at 440–41 (finding no violation of section 2 absent "brutalities or tyrannies").

78 *See* Coppage v. Kansas, 236 U.S. 1, 17 (1915) (noting that disparity in bargaining position does not justify legislative interference with liberty of contract); *see generally* Adair v. United States, 208 U.S. 161, 175 (1908) (holding that Congress cannot ban so-called "yellow dog" contracts that prohibit employees from joining unions).

79 THE FEDERALIST No. 10, at 73 (James Madison) (Clinton Rossiter ed., 1961) ("The protection of these faculties is the first object of government."); *see also Coppage*, 236 U.S. at 17 ("[I]t is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.").

bution might confer bargaining power on the manufacturer, including the power to charge prices above (or provide wages below) the level that competition might produce.[80] However, such power and the distribution of property that created it was the necessary result of a system of free contract and private property and could not itself justify regulation.[81]

Although the state could regulate private commercial activity that fell within the "police power," this power has been described as the power to combat "externalities" and nothing more.[82] Such power did not include the general authority to abridge liberty of contract for the bare purpose of transferring income from one class of individuals to another.[83] Indeed, in *Lochner* itself, the Court characterized a law with such an objective as a "labor law," a demeaning epithet within the *Lochner* paradigm.[84] While the state could regulate prices charged by firms "clothed with a public interest," such regulation simply interdicted cartel or monopoly pricing that exercised market power (and thus misallocated resources) without any offsetting benefits.[85] Absent

[80] *See Coppage*, 236 U.S. at 17 (conceding that parties will have different levels of bargaining power). *But cf.* Alan J. Meese, *Will, Judgement, and Economic Liberty: Mr. Justice Souter and the Mistranslation of Liberty*, 41 WM. & MARY L. REV. 3, 38–39 (1999) ("There is no logical relationship between an employer's wealth and its bargaining power."). Or, as Judge Easterbrook explained in the antitrust context: "A dollar yardstick never measured *market power* . . . . To show market power, a plaintiff must establish that the defendant's sales loom so large . . . that a reduction in output by the defendant could not quickly be made up by other firms' increased output." L.A.P.D., Inc. v. Gen. Elec. Corp., 132 F.3d 402, 405 (7th Cir. 1997) (Easterbrook, J.).

[81] *Coppage*, 236 U.S. at 17; *see also* Page, *supra* note 71, at 15–17 (contending that *United Shoe* and other decisions of era reflected *Coppage*-like reasoning).

[82] *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 200 (1994) (explaining how scope of police power recognized in *Lochner*-era decisions replicated scope of externality regulation endorsed by classical economic paradigm); Meese, *supra* note 56, at 15–23 (describing scope of police power within classical economic paradigm that *Lochner*-era Court embraced).

[83] *See* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 878 n.27 (1987) (explaining that *Lochner*-era jurisprudence rested upon strong preference for redistribution via generally applicable laws instead of regulation of private contracts); *see also* Adkins v. Children's Hosp., 261 U.S. 525, 557–59 (1923) (holding that state could not regulate wages to ensure health and welfare of employees because such welfare was not employers' responsibility).

[84] Lochner v. New York, 198 U.S. 45, 57 (1905) ("Viewed in the light of a purely labor law, with no reference whatsoever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act.").

[85] Munn v. Illinois, 94 U.S. 113, 133 (1876). *Compare* Sinking Fund Cases, 99 U.S. 700, 747 (1878) (Bradley, J., dissenting) (reading *Munn* as approving price regulation where "practical monopoly" was of such importance that "a tribute can be exacted from the community," thereby creating "common charge" or "burden on the citizen"); *with* Charles Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522, 524, 538–44 (1923) (Taft, C.J.) (holding that meatpacking factory was not sufficiently "clothed with a public interest"

any proof that a contract or other practice reduced overall welfare, a mere showing that the contract reflected a purportedly unfair bargain between the parties to it would not justify regulation under this paradigm.[86] Under this view, purely normal business conduct that created efficiencies, thereby producing or fortifying a monopoly, would be beyond the scope of legitimate police power regulation and would thus be protected by liberty of contract.[87]

B. Two Possible Caveats

There are, however, two caveats to any reliance upon formative-era jurisprudence to support a "total welfare" approach to section 2.

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to justify wage regulation when plant had only 300 employees and $600,000 in capital stock, and there were "many other packing houses in Kansas, of greater capacity").

[86] *See* Meese, *supra* note 56, at 83–86 (developing this argument in more detail). To be sure, the *Lochner* Court did sustain antitrust regulation that banned certain horizontal cartels against liberty of contract claims. *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 227–38 (1899) (holding that liberty of contract does not protect direct restraints of interstate trade forbidden by Sherman Act and finding that challenged cartel raised prices well above level that ordinary competition would produce and thus was "direct restraint"). Nonetheless, such cartel agreements were not "normal" conduct in the sense used here because they produced no benefits—aside from above-cost pricing by the defendants. *See id.* at 238–45 (finding that horizontal restraint that raised prices above competitive level deprived defendants of right of ordinary competition and directly restrained interstate commerce). Also, regulation of such restraints did more than simply transfer income from conspiring producers back to purchasers. It also eliminated the sort of deadweight allocative loss produced by naked cartel pricing, without destroying any offsetting efficiencies. Thus, these precedents do not indicate that *Lochner*-era courts could plausibly have read the Sherman Act to ban monopoly obtained by means of "normal" conduct.

Some have argued that the framers of the Sherman Act could not have understood that cartel pricing would result in a misallocation of resources, citing the fact that Alfred Marshall did not publish his *Principles of Economics*, which first popularized the concepts of deadweight loss and allocative inefficiency, until 1890—the same year that Congress passed the Sherman Act. *See, e.g.*, Louis Kaplow, *Antitrust, Law and Economics, and the Courts*, 50 LAW & CONTEMP. PROBS. 181, 207–08 & n.140 (1987). As a result, these scholars conclude that Congress must have meant to ban above-cost pricing simply because it reduced the welfare of purchasers, without regard to any efficiencies created. However, Alfred Marshall was not the first economist to recognize that above-cost pricing could reduce total welfare. In 1776, Adam Smith argued that state-created monopolies would "derange" the "natural distribution of the stock [capital] of society" and that "every derangement of the natural distribution of stock is necessarily hurtful to the society in which it takes place." ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 682–83 (Edwin Cannan ed., Modern Library 1994); *see also* E.G. West, *The Burdens of Monopoly: Classical Versus Neoclassical*, 44 S. ECON. J. 829, 836–38 (1978) (arguing that Adam Smith understood allocative inefficiency as one burden of monopoly). In any event, this Article examines the content of case law, announced and enforced by judges, and not the intent of the Congress that passed the Sherman Act in 1890.

[87] *See* United States v. Joint Traffic Ass'n, 171 U.S. 505, 566–68 (1898) (holding that Sherman Act does not reach "ordinary contracts and combinations" that restrain interstate commerce only indirectly).

First, an argument that this jurisprudence rejected a purchaser welfare version of section 2 rests upon the assumption that a firm can, in fact, acquire or maintain a monopoly and raise purchaser prices simply by engaging in what *Standard Oil*, *American Tobacco*, and *United Shoe* would call "normal conduct." Absent this assumption, there would be no such thing as an "efficient monopolist";[88] all monopolies would be the product of at least *some* conduct that excludes rivals without producing any benefits whatsoever. If so, then the era's safe harbor for "normal" conduct would not reflect a decision to reject a purchaser welfare standard, since such conduct could never, by itself, injure purchaser welfare if it could not create or maintain a monopoly.

However, modern antitrust scholars uniformly assume that a firm may obtain or maintain a monopoly simply by means of normal conduct.[89] The paradigmatic example of such conduct is above-cost pricing that falls below competitors' prices (due perhaps to economies of scale) and that drives less efficient firms from the marketplace, thereby empowering the monopolist to raise prices.[90] This is what is known as the "efficient monopolist."

The assumption that there could be an efficient monopolist was, at the very least, controversial during the formative era. Indeed, according to the classical economic paradigm, which was ascendant in the nineteenth century, a firm could not maintain a monopoly absent some assistance from the state or the use of private violence.[91] Adam

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[88] *See generally* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 29–31 (3d ed. 2005) (describing natural monopoly achieved because of economies of scale).

[89] *See, e.g.*, LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 73 (2000) (assuming that firms can achieve dominance by merit and concluding that current law does not interdict such monopolies); Herbert Hovenkamp, *The Monopolization Offense*, 61 OHIO ST. L.J. 1035, 1039–41 (2000) (listing forms of conduct that constitute "competition on the merits" and "are welcomed by the Sherman Act"); John E. Lopatka & William H. Page, *Monopolization, Innovation, and Consumer Welfare*, 69 GEO. WASH. L. REV. 367, 387–92 (2001) (arguing that false positives will deter societally productive conduct by monopolists); Thomas A. Piraino, Jr., *Identifying Monopolists' Illegal Conduct Under the Sherman Act*, 75 N.Y.U. L. REV. 809, 824–28 (2000) ("To punish a firm simply because it has achieved a monopoly is to discourage superior business performance.").

[90] *See* HOVENKAMP, *supra* note 88, at 29–31.

[91] *See* HOVENKAMP, *supra* note 82, at 282–83 ("Within the classical paradigm, monopoly prices could never be earned . . . unless people were artificially restrained from entering."); Meese, *supra* note 56, at 15–23 (detailing assumptions of classical paradigm and its conclusion that firms could not charge monopoly prices without state aid); *see also, e.g.*, ADAM SMITH, LECTURES ON JURISPRUDENCE 363 (R.L. Meek et al. eds., 1978) ("[I]f any trade is overprofitable all throng into it till they bring it to the naturall price, that is, the maintenance of the person and the recompense of the risque he runs . . . ."); Thomas M. Cooley, *Limits of State Control of Private Business*, 1 PRINCETON REV. 233, 259–60 (1878) (contending that, absent state aid, firms could not price above competitive level unless they departed from "regular business" methods and resorted to "violence and

Smith had even suggested that those who feared the survival of monopoly without state assistance might just as well fear witchcraft.[92] This assumption was so powerful that it led some jurists to argue that price regulation of firms that had not received state aid was unconstitutional, even if the regulated firms were colluding with one another in a concentrated market.[93] According to these jurists, free entry would prevent incumbent firms from pricing above the competitive level, with the result that any regulation setting a price below that set by the market would necessarily confiscate a portion of the defendant's property by preventing him or her from charging a reasonable price.[94]

Formative-era courts seemed to reject the assumption that state assistance or independently tortious conduct was a sine qua non of successful cartelization or achievement of monopoly. To be sure, early decisions that banned cartel price-fixing by railroads emphasized that the parties to the cartel, like the defendants in *Joint Traffic*, had received special assistance from the state in the form of outright grants of land and delegation of the power of eminent domain.[95] Such state-created advantages raised the cost of entry for firms that had not received such advantages.[96] Still, less than ten years after the Sherman Act was passed, the Court banned horizontal price fixing among com-

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terror"); George Gunton, *The Economic and Social Aspects of Trusts*, 3 POL. SCI. Q. 385, 403 (1888) ("If the gates for the admission of new competitive capital are always open, the economic effect is substantially the same as if the new competitor were already there . . . .").

92 SMITH, *supra* note 86, at 570–72.

93 *See* Budd v. New York, 143 U.S. 517, 548–52 (1892) (Brewer, J., dissenting); Munn v. Illinois, 94 U.S. 113, 142–53 (1876) (Field, J., dissenting). In both *Munn* and *Budd*, the regulated firms had apparently agreed on common prices. *See Munn*, 94 U.S. at 131 (explaining how prices charged and received for storage were agreed upon and established by different warehouses in Chicago from year to year).

94 *Budd*, 143 U.S. at 548–52 (Brewer, J., dissenting); *Munn*, 94 U.S. at 136–54 (Field, J., dissenting); *see also* LOUIS D. BRANDEIS, *Competition*, *in* THE CURSE OF BIGNESS 114 (Osmond K. Fraenkel ed., Kennikat Press 1965) ("[N]o monopoly in private industry in America has yet been attained by efficiency alone."). It should be noted that at least some judges recognized that a firm might obtain what economists would now call a natural monopoly by realizing economies of scale. *See* People *ex rel.* Annan v. Walsh, 22 N.E. 682, 693 (N.Y. 1889) (Peckham, J., dissenting) (referring to example of matchstick company that, because of greatness of its facilities, could make article cheaper and sell it at lower price than its competitors). However, these jurists also believed that capital was sufficiently mobile that, whenever a natural monopolist priced above normal level, another monopolist would immediately take its place. *See Walsh*, 22 N.E. at 693 (Peckham, J., dissenting) (opining that such monopoly could continue to exist only so long as other citizens chose to keep out of business).

95 *See, e.g.*, United States v. Joint Traffic Ass'n, 171 U.S. 505, 569–71 (1898).

96 *See* Meese, *supra* note 56, at 54–55 & n.270 (explaining how classical jurists assumed that grant of eminent domain raised barriers to entry and thus protected incumbent cartelists from competition).

peting firms simply because the cartel agreement had resulted in prices well above the firms' costs plus a reasonable rate of return.[97] The defendants had received no special benefits from the state and had not engaged in tortious activity that disadvantaged rivals. Moreover, in *Standard Oil* and *American Tobacco*, the Court condemned the defendants for obtaining and fortifying monopolies without any aid from the state, by means of conduct that was neither violent or tortious, on the one hand, nor normal or ordinary, on the other.[98] That is to say, the Court recognized that firms could create and maintain a monopoly without state assistance or private violence.[99] This recognition was consistent with the work of several economists of the era, who argued that very large firms could realize efficiencies not available to smaller entities.[100]

At the same time, the Court still seemed to assume that purely normal conduct could not lead to anything more than a transient monopoly. When explaining why the Sherman Act did not forbid "monopoly in the concrete" or ban "normal" or "ordinary" contracts entered by defendants, the *Standard Oil* Court opined that the Act depended upon the assumption that protection of the right of all market participants to make normal and ordinary agreements of the sort protected by liberty of contract would itself prevent sustained monopoly:

> [T]he operation of the centrifugal and centripetal forces resulting from the right to freely contract was [according to the framers of the Sherman Act] the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no

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[97] *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 235–40 (1899) (rejecting claim that restraint was indirect based upon lower court's findings that arrangement resulted in prices well above cost plus reasonable rate of return). The Court quoted extensively from then-Judge Taft's findings in the Sixth Circuit that the challenged cartel had charged unreasonable prices. *See id.* at 235–38 (quoting Addyston Pipe & Steel Co. v. United States, 85 F. 271, 291–93 (6th Cir. 1898) (Taft, J.)).

[98] *See* Standard Oil Co. v. United States, 221 U.S. 1, 75 (1911) (finding that defendant dominated industry "not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed"); United States v. Am. Tobacco Co., 221 U.S. 106, 181 (1911) ("[T]he history of the combination is so replete with the doing of acts . . . demonstrative . . . of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade by driving competitors out of business.").

[99] *See generally* HOVENKAMP, *supra* note 82, at 268–95 (contending that rise of neoclassical economics resulted in revised conception of "coercion" that justified additional regulation).

[100] *Id.* at 218–21 (describing increasing recognition by economists during this era that large combinations could create economies of scale).

> right to make unlawful contracts having a monopolistic tendency were permitted. In other words that freedom to contract was the essence of freedom from undue restraint on the right to contract.[101]

Thus, even if one firm employed ordinary or normal contracts to obtain a (temporary) monopoly, the right of others to employ the very same ordinary tactics would allow such other firms to enter the market and undermine that temporary monopoly.[102] To the extent that the formative-era Court believed that efficient conduct could not, by itself, create or maintain a permanent monopoly, the safe harbor for "normal" or "ordinary" conduct would not necessarily depend upon a normative choice between purchaser welfare, on the one hand, and total welfare, on the other.[103] In this case, the Justices may have seen no conflict, as purely positive economics taught them that efficient conduct could not by itself maintain a monopoly for long.[104] Thus, such conduct would necessarily enhance the welfare of both purchasers *and* the rest of society.

It is important not to overstate this point, however. Judicial assumptions aside, it seems clear that, as some contemporary scholars recognized, there were in fact efficient monopolists during this era such that the test applied under section 2 fostered efficient monopolies to the detriment of purchaser welfare.[105] Moreover, while decisions such as *Standard Oil* assumed that monopolies obtained through efficiency were necessarily transient, others exhibited no such assumption and, if anything, suggested the opposite. The United Shoe Machinery monopoly, for instance, had thrived for nearly two decades, maintained by conduct the Court held to be normal.[106] Nor did the rationale of the decision suggest or imply any expectation that the firm's monopoly would dissipate any time soon. One might even

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101 *Standard Oil*, 221 U.S. at 62.

102 *See* People *ex rel.* Annan v. Walsh, 22 N.E. 682, 693 (N.Y. 1889) (Peckham, J., dissenting) (opining that new entrant could displace natural monopoly if latter raised price above reasonable level).

103 *But cf.* United States v. United Shoe Mach. Co., 247 U.S. 32, 63–65 (1918) (holding that defendant had maintained its durable monopoly via purely normal tactics).

104 *Cf.* FRIEDMAN, *supra* note 21, at 5–6 (explaining how positive economics can inform policy judgments).

105 *See, e.g.*, Arthur T. Hadley, *Private Monopolies and Public Rights*, 1 Q.J. ECON. 28, 28 (1887) ("[C]orporations, in many instances, have a virtual monopoly in their own line of business, which is at variance with all our theories of industrial freedom. . . . Where large management is more economical and productive than small management, we shall find large concerns or none at all.").

106 *See United Shoe*, 247 U.S. at 56 ("The company, indeed, has magnitude, but it is at once the result and cause of efficiency, and the charge that it has been oppressively used is not sustained. . . . There has been saving as well in the cost of manufacture of shoes."); *id.* at 65 ("We see nothing else in the circumstances of the parties than that which moves and may move the transactions of men.").

characterize *United Shoe*'s more realistic approach as a bridge to modern decisions holding that competition on the merits and other forms of efficient conduct survive section 2 scrutiny,[107] regardless of any impact on the welfare of purchasers in the relevant marketplace.

This brings us to the second consideration that could undermine the force of the formative era's protection for "normal" conduct. Simply put, recognition that a particular doctrinal choice had its source in *Lochner* and its support for liberty of contract may not recommend it in the eyes of most scholars or lawyers. *Lochner*, after all, is generally viewed as a paradigmatic example of judicial activism, in which the Court identified and protected a right—liberty of contract—found nowhere in the actual Constitution.[108] And of course, the Supreme Court began to repudiate the doctrine of economic due process more than seven decades ago.[109] Thus, to the extent that decisions such as *United Shoe* and *Standard Oil* were, in the Court's view, compelled by its liberty of contract jurisprudence, the repudiation of *Lochner* and its progeny would, some might argue, drain these decisions of any precedential significance and require modern courts to look elsewhere for guidance when deciding which welfare standard to embrace under section 2.[110] Some might therefore be dubious of efforts to derive the current meaning of the Sherman Act from formative-era decisions that read the Act to comply with constitutional norms that have been repudiated.

Nonetheless, there is little evidence that courts have found the formative-era cases corrupted by association with *Lochner*. After all,

[107] *See infra* Part IV.B (describing use of total welfare approach in second *United Shoe* case); Part V.B (discussing Court's acceptance of total welfare framework in modern cases).

[108] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 861–62 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (opining that *Lochner* was properly overruled); *id.* at 957 (Rehnquist, C.J., concurring in part and dissenting in part) (same).

[109] *See* Ferguson v. Skrupa, 372 U.S. 726 (1963) (declining to examine whether ban on debt-adjusting by non-lawyers infringed liberty of contract); Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955) (according only rational basis scrutiny to state law that prohibited opticians from fitting or duplicating lenses without prescription from ophthalmologist or optometrist); United States v. Carolene Prods., 304 U.S. 144 (1938) (finding Filled Milk Act, which prohibited shipment of certain ostensibly adulterated dairy products in interstate commerce, to be constitutional); W. Coast Hotels v. Parrish, 300 U.S. 379, 388–400 (1937) (upholding minimum wage statute over constitutional challenge), *overruling* Adkins v. Children's Hosp., 261 U.S. 525 (1923).

[110] At the same time, one could not plausibly argue that the repudiation of *Lochner* and its progeny *mandates* the rejection of a total welfare standard under section 2 once and for all. Congress may well have chosen or anticipated that courts would apply a total welfare standard under section 2, independent of any constitutional considerations. Indeed, Robert Bork, a fierce opponent of substantive due process—and thus of protection for liberty of contract—has argued exactly that, without invoking *Lochner* or its progeny. *See infra* Part IV.A (describing Bork's arguments to this effect).

while modern courts profess no love for liberty of contract and similar economic liberties, they repeatedly invoke *Standard Oil* as a foundational decision from which they derive various antitrust principles, decades after *Lochner* and its progeny were cast aside.[111] Moreover, since *Lochner*'s demise, Congress has been free to overrule *Standard Oil* by legislation but has declined to do so. The ignominy of *Lochner* notwithstanding, liberty of contract lives on in antitrust doctrine until Congress decides otherwise.

III
ALCOA'S POPULIST DETOUR

It would be difficult, if not impossible, to examine the development of monopolization law without discussing Learned Hand's famous *Alcoa* decision. Repeatedly cited by courts, scholars, and advocates, the decision is often invoked for the proposition that so-called "competition on the merits" cannot violate section 2.

After *Lochner*'s repudiation, *Standard Oil*—with its reliance on liberty of contract—itself fell into some disrepute as an exemplar of judicial activism and an unduly narrow interpretation of the Sherman Act.[112] Soon thereafter, the scope of section 2 reached its maximum in *United States v. Aluminum Co. of America*[113] (*Alcoa*). There the United States claimed that Alcoa had maintained its lawfully-obtained monopoly through a variety of predatory tactics, including overbuying of bauxite and exclusionary contracts with suppliers of electricity.[114] The government also charged Alcoa with repeatedly expanding its capacity to meet new demand for its product, thereby preempting and discouraging new entry.[115] At the same time, there was no allegation that Alcoa had priced its output of aluminum ingot below any measure of cost.

The trial court found that Alcoa had not, in fact, entered exclusionary agreements with input suppliers or engaged in other predatory

[111] *See, e.g.*, Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988) (citing *Standard Oil* approvingly for reasonableness standard); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 687–92 (1978) (describing rule-of-reason analysis as rising out of *Standard Oil*); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 211 (1959) (referring with approval to *Standard Oil* as "landmark case" that articulated fundamental section 1 principles).

[112] *See* Corwin, *supra* note 56, at 366–69 (criticizing narrowness of *Standard Oil* Court's interpretation of Sherman Act).

[113] 148 F.2d 416 (2d Cir. 1945).

[114] For instance, the government claimed that Alcoa purchased more bauxite than it required and also entered into exclusive agreements with firms that generated hydropower; both tactics were allegedly intended to prevent rivals from entering the market. *See id.* at 432–34 (describing these allegations).

[115] *Id.* at 430–31.

tactics and entered judgment for the defendant.[116] Because several Justices of the Supreme Court recused themselves, the case was assigned to a panel of the Second Circuit to act for the Supreme Court. In an opinion by Judge Learned Hand, the court affirmed the trial court's factual findings with one or two minor exceptions.[117] This decision seemed to set up a clean question of law: whether a firm that maintained a monopoly solely via "normal" or "usual" conduct—here, expanding to meet consumer demand—offended section 2.

After determining that Alcoa was, in fact, a monopolist, Hand recognized that mere possession of a monopoly did not violate section 2.[118] Reviewing the authorities with great care, he acknowledged various decisions stating that the acquisition or maintenance of monopoly by means of ordinary or normal conduct did not, without more, violate section 2.[119] And, he said, there was a strong argument for this position. After all, some firms may obtain a monopoly "merely by virtue of . . . superior skill, foresight and industry."[120] To be sure, the failure to intervene in such cases might "expose the public to the evils of monopoly."[121] But such conduct was the very thing the Sherman Act was designed to encourage, so that any monopoly was "the resultant of those very forces which it is its prime object to foster: *finis opus coronat*."[122] Or, as Hand even more colorfully put it, "The successful competitor, having been urged to compete, must not be turned upon when he wins."[123]

Scholars, judges, and practitioners alike have repeatedly quoted this language as evidence that Hand embraced a safe harbor for efficient monopolists, thereby embracing, at least implicitly, a total welfare test.[124] And yet, Hand seemed to distance himself—and the law—from this colorful phrasing, claiming that cases evincing this view were no longer good law.[125] Instead of relying upon the larger body of

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116 United States v. Aluminum Co. of Am., 44 F. Supp. 97, 306 (S.D.N.Y. 1941).

117 *See Alcoa*, 148 F.2d at 432–39 (affirming most of trial court's factual findings but reversing trial court's finding that Alcoa had not engaged in "price squeeze" that helped it acquire power in downstream market for sheet aluminum).

118 *See id.* at 429 ("It does not follow because 'Alcoa' had such a monopoly, that it 'monopolized' the ingot market: it may not have achieved monopoly; monopoly may have been thrust upon it.").

119 *Id.* at 429–30.

120 *Id.* at 430.

121 *Id.*

122 *Id. Finis opus coronat* is traditionally translated as: "The end crowns the work."

123 *Id.*

124 *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (per curiam) (quoting this statement with approval); Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 65 F.3d 1406, 1413 (7th Cir. 1995) (Posner, J.) (same); PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 622a (1978) (same).

125 *See Alcoa*, 148 F.2d at 430.

formative-era case law, Hand cited a single Supreme Court decision for the proposition that a monopolist's size carried with it an opportunity for abuse and that such abuse would violate section 2.[126] He did not elaborate on the definition of "abuse."

After suggesting that section 2 should not "turn[ ] upon" efficient monopolists, Hand seemed to do exactly that, condemning Alcoa because it had repeatedly expanded its output to meet the needs of consumers.[127] As Hand put it:

> It was not inevitable that [Alcoa] should always anticipate increases in the demand for ingots and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections, and the elite of personnel.[128]

Hand did not claim that Alcoa had priced its output of ingot below any measure of cost or that Alcoa's conduct was only rational for a firm that possessed or hoped for market power. In short, Judge Hand condemned what modern antitrust courts and scholars would call "competition on the merits."[129]

While Hand rejected a safe harbor for efficient monopolists, he did not embrace a purchaser welfare standard. At no point did he endorse balancing the conduct's costs or harms against its benefits or otherwise attempting to determine whether the exercise of "skill, foresight and industry" that maintained Alcoa's monopoly enhanced or reduced purchaser prices. To the contrary, when examining whether Alcoa in fact possessed a monopoly, he noted that any comparison of costs and benefits of a firm's conduct, while proper under section 1 of the Sherman Act, was out of bounds whenever "the contract is made with intent to set up a monopoly."[130] Moreover, in discussing the rationale for the prohibition of monopoly, Judge Hand opined that Congress meant to ensure a particular, deconcentrated market struc-

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126 *Id.* at 430 ("Mere size . . . is not an offense against the Sherman Act unless magnified 'to the point at which it amounts to a monopoly . . . but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past.'" (quoting United States v. Swift & Co., 286 U.S. 106, 116 (1932))).

127 *Id.*

128 *Id.* at 431.

129 *See* A. A. Poultry v. Rose Acre Farms, 881 F.2d 1396, 1403–04 (7th Cir. 1989) (explaining that expanding to meet new demand is quintessential competition that law encourages); *see also infra* notes 176–82 and accompanying text (describing judicial creation of safe harbor for competition on merits).

130 *Alcoa*, 148 F.2d at 428.

ture, for reasons unrelated to costs and prices.[131] In support of this assertion, Hand cited dicta in the Court's early decision in *United States v. Trans-Missouri Freight Ass'n*, suggesting that the Sherman Act was designed to protect "small dealers and worthy men" from cartels that *reduced* prices.[132] In this way, Judge Hand anticipated a similar conclusion by the Supreme Court more than a decade later in the context of mergers and section 1. In 1962, the Court suggested that the propensity of a merger to create efficiencies actually militated *against* it, since the transaction could disadvantage smaller firms.[133] Four years later, the Court held that mergers would offend section 7 of the Clayton Act if they produced a certain level of concentration, even if they resulted in lower consumer prices.[134] Each decision cited Hand's assertion that the Sherman Act aimed at a decentralized market structure despite the possible cost of such a policy to purchasers in the relevant market.[135] A few years later, the Court condemned maximum resale price maintenance, in part because the practice could injure inefficient dealers.[136] Thus, Hand rejected both total and purchaser welfare standards, in favor of a populist, producer welfare standard that advanced noneconomic values such as the decentralization of economic decisionmaking.

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131 *See id.* at 429 ("Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible costs, an organization of industry in small units which can effectively compete with each other.").

132 *See* 166 U.S. 290, 323 (1897). The language in question was dicta because there was no allegation that the challenged cartel reduced prices or otherwise injured small dealers. Moreover, the actual rationale of the decision was quite narrow, holding that restraints between firms such as railroads that had received special privileges from the state were unlawful regardless of the reasonableness of the price set. *See* Meese, *supra* note 56, at 43–46.

133 *See* Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) (recognizing Congress's "desire to promote competition through the protection of" small business even if that promotion came at expense of efficiencies and higher prices for consumers).

134 United States v. Von's Grocery Co., 384 U.S. 270, 278 (1966); *see also* 15 U.S.C. § 18 (2006) (banning anticompetitive mergers); Timothy J. Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 30 CASE W. RES. L. REV. 381, 403–13 (1980) (detailing this era's hostility toward mergers that disadvantaged rivals by reducing costs of newly-created firm).

135 *Von's*, 384 U.S. at 275 n.9; *Brown Shoe*, 370 U.S. at 316 n.28.

136 *See* Albrecht v. Herald Co., 390 U.S. 145, 152–53 (1968) (treating contract's propensity to disadvantage smaller dealers by channeling distribution through larger, more efficient dealers as harmful result), *overruled by* State Oil Co. v. Khan, 522 U.S. 3 (1997).

IV
THE HARVARD SCHOOL, *UNITED SHOE*, AND THE TOTAL WELFARE STANDARD

Alcoa rejected both purchaser welfare and total welfare as the animating values of section 2. However, Hand's producer welfare vision of the Act has not fared well, either in academia or in the courts. Most scholars reject Hand's account as an inappropriate interpretation of the Sherman Act,[137] and the Supreme Court has taken a different approach as well.[138] Both the Court and most scholars have opined that the Sherman Act pursues "consumer welfare" to the exclusion of other values. At the same time, however, scholars disagree about the appropriate definition of "consumer welfare." Some refer to purchaser welfare, that is, the welfare of purchasers in the market dominated by the monopolist.[139] Others refer to total welfare, that is, the welfare of all consumers, whether or not they are participants in the relevant market.[140] Moreover, proponents of the purchaser welfare standard attribute the total welfare standard to Robert Bork and the Chicago School, with the effect—if not the intent—of downplaying the extent and longevity of support for this approach. As shown below, however, Bork and Chicago were latecomers to a total welfare standard, a standard that the Harvard School of antitrust analysis began to embrace in the work of Edward Mason, Carl Kaysen, and Donald Turner—over a decade before Bork. This work influenced the pivotal decision in *United States v. United Shoe Machinery Corp.*, another challenge to United Shoe's monopoly.[141] For that case, Kaysen, a student of Mason, served as a special law clerk assisting a district judge in his efforts to evaluate a renewed challenge to conduct by a monopolist that had escaped condemnation just three decades earlier. The second *United Shoe* case created a safe harbor for "competition based on pure merit," without regard to whether such conduct enhanced the welfare of purchasers in the relevant market, consistent with the safe harbor for "normal" conduct recognized during the formative era.

[137] *See* AREEDA & TURNER, *supra* note 124, ¶ 626b & n.14 (endorsing *United Shoe* formulation over that employed in *Alcoa*); Easterbrook, *supra* note 10, at 1703 (opining that legislative history suggesting concern for noneconomic values was "a sideshow"); *infra* Section A (detailing Bork's criticism of *Alcoa* opinion); *infra* Section B (detailing criticism of *Alcoa* by Kaysen, Mason, and Turner).

[138] *See infra* Part V.B (detailing Supreme Court's acceptance of total welfare approach).

[139] *See supra* note 39 and accompanying text.

[140] *See supra* note 38 and accompanying text.

[141] United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954) (per curiam).

A. *Robert Bork's (Tardy) Attack on* Alcoa

Two decades after *Alcoa*, Robert Bork famously launched an attack on Judge Hand's account of the normative foundations of antitrust law as part of a larger examination of the original meaning of section 1 and section 2 of the Sherman Act. Bork performed an exhaustive review of the Act's legislative history as well as the early case law.[142] Both sources, Bork said, pointed in the same direction: The Sherman Act did not empower courts to pursue social and political values at the expense of purchasers.[143] Bork did not, however, embrace a purchaser welfare standard, nor did any other members of the Chicago School. Instead, his critique of Hand rested on his conclusion that Congress had meant courts to adopt antitrust standards that maximized what Bork called "consumer want satisfaction."[144] In so doing, Bork drew upon neoclassical price theory, both to help model and explain business behavior *and* to supply the requisite normative framework.[145] Thus, Bork equated "want satisfaction" with the welfare of *all* consumers or, in other words, society's total welfare (what he also called the "maximization of wealth"), and not just those consumers who happened to purchase in the market where the defendant did business.[146] There was, Bork said, no other conceivable value that

[142] *See* Bork, *Legislative Intent*, *supra* note 2, at 11–47 (examining legislative history); Bork, *Rule of Reason I*, *supra* note 56, at 775, 781–829 (examining early case law).

[143] *See* Bork, *Legislative Intent*, *supra* note 2, at 8–14 (summarizing Hand's view as well as Bork's basis for disagreement); *id.* at 26–31 (reaching this conclusion with respect to section 2 in particular); Bork, *Rule of Reason I*, *supra* note 56, at 781–829 (examining early case law); *id.* at 829–32 (arguing that "implicit in the approach of the main tradition" found in early case law "is the policy of assisting the economy to maximize wealth").

[144] *See* Bork, *Legislative Intent*, *supra* note 2, at 7 ("My conclusion, drawn from the evidence in the Congressional Record, is that Congress intended the courts to implement (that is, take into account in the decision of cases) only that value we would today call consumer want satisfaction."); Bork, *Rule of Reason I*, *supra* note 56, at 829 (defining wealth maximization as "consumer want satisfaction"); *id.* at 830 ("[W]e can extrapolate [from the early cases] the policy that necessarily underlies the decisions . . . even though that policy may never have been explicitly formulated in the judge's mind. The policy . . . is the maximization of wealth or consumer want satisfaction."); *id.* at 830–31 ("The disparity [between mergers and naked cartels] is indeed provocative but, as analysis demonstrates, it is far from anomalous. . . . The operative significance thus given to efficiency in the production and distribution of goods and services necessarily derives from a desire to increase the wealth of the society.").

[145] *See* BORK, ANTITRUST PARADOX, *supra* note 2, at 107–10 (arguing that Williamson's tradeoff model can illustrate all antitrust problems); *see also id.* at 116–17 (contending that price theory is only methodology capable of informing rational antitrust policy); Richard A. Posner, *The Chicago School of Antitrust*, 127 U. PA. L. REV. 925, 932 (1979) ("The Chicago School has largely prevailed with respect to its basic point: that the proper lens for viewing antitrust problems is price theory.").

[146] Bork, *Legislative Intent*, *supra* note 2, at 7; *see* Robert H. Bork, *The Goals of Antitrust Policy*, 57 AM. ECON. REV. 242, 245 (1967) [hereinafter Bork, *Goals of Antitrust*] (arguing that Sherman Act's "preference for competitive rather than monopolistic

could explain the distinctions formative-era courts and members of Congress had repeatedly drawn between naked cartels, on the one hand, and various forms of productive integration, on the other.[147] Under this approach, a practice that created wealth on balance would be lawful even if it injured the welfare of purchasers in the particular market in question.[148]

B. *Bork's (Not So Distant) Ancestors: Edward Mason, Carl Kaysen, and the Reprise of* United Shoe

Some scholars attribute the total welfare approach to Robert Bork and the Chicago School (and only the Chicago School), with the effect of minimizing the apparent support for such a standard within the antitrust community at large.[149] Bork is certainly a strong supporter of the total welfare approach, having deployed several complementary arguments in its defense in four different works, starting in 1965.[150] Still, Bork began this defense over a decade *after* antitrust scholars in Cambridge, Massachusetts were embracing a total welfare standard. Thus, academic support for the total welfare approach is far more widespread and deeply rooted than its detractors might imagine.

Before Bork attended law school, Edward Mason was busy founding the so-called "Harvard School" of antitrust policy.[151] Begin-

resource allocation is . . . based upon a desire to maximize output as consumers value it" and defining "consumer welfare" to require "minimizing restrictions of output and permitting efficiency, however gained, to have its way"); Bork, *Rule of Reason I*, *supra* note 56, at 829-30 (equating maximization of "consumer want satisfaction" with "maximization of wealth").

[147] *See* Bork, *Legislative Intent*, *supra* note 2, at 14–26 (discussing statements by legislators describing policy behind Act as well as proposed rules of law); Bork, *Rule of Reason I*, *supra* note 56, at 830 n.177 ("It seems difficult to imagine another value which would suggest greater toleration for mergers than for cartels since, aside from their efficiency-enhancing potential, mergers might seem less socially desirable.").

[148] *See* Bork, *Legislative Intent*, *supra* note 2, at 7 (defending total welfare standard); *see also* BORK, ANTITRUST PARADOX, *supra* note 2, at 107–15 (arguing that mergers that create efficiencies are good for society at large).

[149] *See, e.g.*, Hovenkamp, *supra* note 31, at 22 (treating Bork as single representative of total welfare view); Kirkwood & Lande, *supra* note 31, at 192–96 (attributing this view to Bork and other Chicagoans); Salop, *supra* note 3, at 329 n.68 (treating Bork as single representative of total welfare standard); *cf.* 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, 42–43, 71 (noting that proponents of interventionist enforcement often attribute contrary view to purportedly extreme Chicago School while ignoring similar positions advanced by Harvard School).

[150] *See* BORK, ANTITRUST PARADOX, *supra* note 2, at 90–115 (arguing for total welfare approach); Bork, *Goals of Antitrust*, *supra* note 146, at 245 (same); Bork, *Legislative Intent*, *supra* note 2, at 7 (same); Bork, *Rule of Reason I*, *supra* note 56, at 829–31 (same).

[151] *See* Posner, *supra* note 145, 928 n.8 (stating that position of Harvard School "is well conveyed in the writings of Edward S. Mason"). There was, at the time Mason started writing, no "Chicago School" of antitrust policy.

ning in 1937, Mason authored a number of articles that developed a workable competition approach to industrial organization and antitrust theory.[152] Adherents to "workable competition" rejected perfect competition—the foundation of neoclassical price theory—as a reliable benchmark for evaluating trade practices, recognizing that certain departures from perfect competition could actually generate more benefits than harms, despite resulting market power.[153] The classic example was economies of scale: In some industries technology was such that only relatively large firms could realize available efficiencies, thereby inevitably producing a concentrated market structure conducive to market power and inconsistent with perfect competition.[154] In language like that which Bork would employ nearly two decades later, Mason opined that competition was not an end in itself, but was instead desirable "for the results that are expected to follow from it," namely the "efficient use of resources."[155] Working with a grant from the Merrill Foundation, Mason created an interdisciplinary working group in 1950 charged with "formulat[ing] a standard of workable competition."[156] The group included participants from the Harvard Economics Department, Harvard Law School, and MIT.[157] Two of the participants would co-author a leading monograph

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[152] *See* Edward S. Mason, *Monopoly in Law and Economics*, 47 YALE L.J. 34, 46 (1937) [hereinafter Mason, *Monopoly in Law and Economics*] ("[Some degree of] control is perfectly compatible with the existence of some degree of competition."); Edward S. Mason, *The Current Status of the Monopoly Problem in the United States*, 62 HARV. L. REV. 1265, 1266–71 & n.6 (1949) [hereinafter Mason, *Current Status*] (examining implications of workable competition model for various antitrust problems).

[153] *See* Mason, *Current Status*, *supra* note 152, at 1266–67 ("From the point of view of economic policy, competition is supposedly desirable, not as an end in itself, but for the results that are expected to follow from it."). In addition to Mason's work, see, for example, John M. Clark, *Toward a Concept of Workable Competition*, 30 AM. ECON. REV. 241 (1940), which explains the shortcomings of perfect competition as a benchmark for antitrust policy, and JOHN PERRY MILLER, UNFAIR COMPETITION 404–22 (1940), which calls for policies that further workable competition. *See also* Alan J. Meese, *Monopolization, Exclusion and the Theory of the Firm*, 89 MINN. L. REV. 743, 772–93 (2005) (describing development of workable competition school, including role of Harvard scholars).

[154] *See* EDWARD S. MASON, *Workable Competition Versus Workable Monopoly*, *in* ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM 382, 387–88 (1957) (arguing that when deciding what constitutes permissible versus impermissible monopolistic behavior, courts should take into account how that behavior affects "the organization and administration of economic resources"); *see also* JOE S. BAIN, PRICING, DISTRIBUTION, AND EMPLOYMENT 112 (rev. ed. 1953) (arguing that "[i]n most industries a very small firm is quite inefficient" in light of unrealized economies of scale).

[155] *See* Mason, *Current Status*, *supra* note 152, at 1266–67.

[156] *See Nine Professors Named for Study of Monopoly Problems*, CHRISTIAN SCI. MONITOR, July 10, 1950, at 13 (describing Mason's launch of five-year study).

[157] *See* Edward S. Mason, *Preface* to CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY, at xi, xix n.11 (1959) (describing group and its membership).

on the economics of antitrust policy, with a preface by Mason describing the book as a manifestation of the working group's views.[158] Another authored leading texts in price theory and industrial organization.[159]

Like Bork would do more than fifteen years later, Mason argued in 1949 that *Alcoa*'s holding swept too far. The decision, Mason said, threatened to ban ordinary competitive tactics like the expansion of productive capacity to meet demand and the concomitant realization of economies of scale.[160] Other scholars would echo Mason's concerns.[161] None of these scholars invoked or endorsed a purchaser welfare standard.

Nonetheless, buoyed by its success in *Alcoa*, the United States had challenged another monopolist, the United Shoe Machinery Corporation, in the District of Massachusetts. In so doing, the government focused on conduct that post-dated its unsuccessful attack on the company three decades earlier.[162] Invoking *Alcoa*, the United States sought to condemn United Shoe on the grounds that its consistent embrace of new opportunities was indicative of an intent to monopolize.[163] In addition, the government challenged a wide variety of the company's practices, including purely internal activities such as the introduction of new machines in response to competitive challenges, as well as aggressive research, development, and patenting.[164]

Perplexed by what he termed the government's "scattershot case,"[165] Judge Wyzanski sought help from, literally, the Harvard School of antitrust analysis. He contacted Mason, then the Dean of

[158] *Id.* at xix (describing influence of working group discussions on authors' conclusions and contending that monograph was result of joint effort by members of study group).

[159] *See* Joe S. Bain, INDUSTRIAL ORGANIZATION (1959) [hereinafter BAIN, INDUSTRIAL ORGANIZATION]; JOE S. BAIN, PRICE THEORY (1952).

[160] *See* Mason, *Current Status*, *supra* note 152, at 1273 ("Although [the *Alcoa*] decision probably broke new legal ground, it is from an economist's point of view, marred by what is at best some very dubious economics. . . . [T]he evidence concerning intent to exclude others is difficult to distinguish from ordinary, intelligent competitive action."); *id.* at 1275 ("[I]t would appear extremely difficult to distinguish between a progressive embracing 'of each new opportunity' and what would ordinarily be considered desirable competitive performance.").

[161] *See, e.g.*, KAYSEN & TURNER, *supra* note 157, at 107 (criticizing *Alcoa*'s general rule).

[162] *See supra* notes 66–68 and accompanying text (describing facts of prior case).

[163] *See* United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 329 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954) (per curiam) ("United has continuously sought to anticipate all demands of the shoe industry for improved or new machinery, and, where such demand seems to invite competition, to forestall such competition by manufacturing and distributing such machinery.").

[164] *See id.* at 329–31 (recounting government's allegations).

[165] *Id.* at 314 (chiding government for "unforgivably unselective tactics").

Harvard's Public Policy School, in search of a special law clerk to assist in the court's analysis of the parties' contentions.[166] Mason suggested that Judge Wyzanski appoint Carl Kaysen, then a graduate student in the Harvard Economics Department and a participant in Mason's working group.[167] Judge Wyzanski obliged and hired Kaysen, whom he tasked with analyzing the voluminous record that had been amassed in the case.[168] Kaysen prepared a lengthy report, which he subsequently published, with few changes, as his doctoral thesis.[169] While he did not discuss the case in the working group, he reported that the general principles animating the group influenced his recommendations.[170]

Relying heavily on Kaysen's report, Judge Wyzanski first found that United Shoe possessed a monopoly share (75%) of the shoe machinery market.[171] He then found that various barriers to entry made it unlikely that rivals would undermine that share anytime soon. These barriers included the excellent quality of United's machines, its reputation, and the high quality of its aftermarket service.[172] The barriers also included United's policy of leasing its machines and refusing to sell them outright, as well as the adoption of so-called "full capacity clause[s]."[173] These clauses required lessees to use machines they had leased from United at full capacity before turning to machines manufactured by rivals. Finally, Judge Wyzanski invoked United's policy of requiring lessees to use its repair service as a condition of the lease, a service United would not provide to other shoe machinery manufacturers.[174] This policy, he said, deprived the marketplace of "large scale independent repair companies," thereby creating a "stumbling block"

[166] *See* Carl Kaysen, *In Memoriam: Charles E. Wyzanksi*, 100 HARV. L. REV. 713, 713 (1987) (recounting events that led to Kaysen's appointment as special law clerk).

[167] *See* CARL KAYSEN, *UNITED STATES V. UNITED SHOE MACHINERY CORPORATION: AN ECONOMIC ANALYSIS OF AN ANTI-TRUST CASE* viii (1956) (describing Kaysen's participation in Mason's working group).

[168] Kaysen, *supra* note 166, at 713–14.

[169] KAYSEN, *supra* note 167, at vii.

[170] *Id.* at viii.

[171] United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 343 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954) (per curiam).

[172] *Id.* at 344 ("To combat United's market control, a competitor must be prepared with knowledge of shoemaking, engineering skill, capacity to invent around patents, and financial resources sufficient to bear the expense of long developmental and experimental processes."); *see also supra* notes 88–90 and accompanying text (explaining that production of high-quality products at low prices will exclude less efficient rivals).

[173] *United Shoe*, 110 F. Supp. at 320, 324–25 (describing such clauses and their entry-deterring effects).

[174] *See id.* at 344 ("The three principal sources of United's power have been the original constitution of the company, the superiority of United's products and services, and the leasing system. *The first two of these are plainly beyond reproach.*" (emphasis added)).

for those firms that wished to compete with United, because they could not participate in the market without entering at two levels.[175]

Under a purchaser welfare approach, Judge Wyzanski would then have asked whether United Shoe's various tactics, alone or in tandem, reduced the welfare of purchasers in the relevant market. If a tactic excluded rivals but produced no benefits, the answer would be simple: The court would ban the arrangement. If, on the other hand, a tactic both excluded rivals and produced benefits, the court would ask whether those benefits counteracted the impact of any market power effects on purchasers and thus enhanced, or at least did not reduce, the welfare of purchasers.

Judge Wyzanski did nothing of the sort. Instead, after a careful analysis of existing precedent, he announced and applied a standard identical to that suggested by Kaysen's report.[176] In particular, Judge Wyzanski announced a safe harbor for what he called "competition based on pure merit."[177] Such conduct included "the use of accessible resources, the process of invention and innovation, and the employment of those techniques of employment, financing, production, and distribution, which a competitive society must foster."[178] Judge Wyzanski went on to include activities such as: "efficient design and improvement of machines," "prompt and knowledgeable service," "research," refusal to share the fruits of that research, and "economies of scale."[179] Each of these was an example of unilateral conduct and thus could not implicate section 1 of the Sherman Act, which only reaches concerted action.[180] As for liability under section 2, Judge Wyzanski recognized that the tactics that he accepted as "competition on pure merit" could make entry by competitors difficult and thus could create or fortify a monopoly; indeed, he found that they had done so in the case at hand.[181] Nonetheless, he said, these practices were "beyond reproach" and constituted the "superior skill, foresight, and industry" that were "the inevitable consequences of ability, nat-

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175 *Id.* at 325.

176 *See* Meese, *supra* note 153, at 801 nn.247–48 (collecting various authorities demonstrating influence of Kaysen's report on Judge Wyzanski's opinion).

177 *United Shoe*, 110 F. Supp. at 345.

178 *Id.* at 344–45.

179 *Id.*; *see id.* at 333 (finding that United had "never offered to license all, or its principal, shoe machinery patents").

180 *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 759, 763, 767–78 (1984) (holding unilateral conduct to be beyond reach of section 1).

181 *See United Shoe*, 110 F. Supp. at 344 ("United's control does not rest *solely* on its original constitution, its ability, its research, or its economies of scale." (emphasis added)); *see also* HOVENKAMP, *supra* note 88, at 553 ("Nothing is a more effective barrier to entry than a firm's capacity to produce a high quality product at a low price, or to provide improved service to its customers.").

ural forces, or law."[182] In short, the court declined to condemn conduct that helped create and fortify a monopoly without making any effort to ascertain the net impact of such conduct on purchasers.

United Shoe, of course, had done more than just engage in the sort of unilateral competition on the merits that Judge Wyzanski declined to condemn. It had also entered various contracts with customers that, as Judge Wyzanski found, made entry by rivals more difficult.[183] Moreover, extant economic theory had no benign explanation for such practices; economists interpreted them as the use of monopoly power to foreclose rivals from competitive opportunities.[184] As such, these agreements were incompatible with workable competition and thus the very antithesis of competition on the merits as Judge Wyzanski defined it.[185] Even though such conduct might be "honestly industrial," in the sense that non-monopolists might employ such tactics, Judge Wyzanski nonetheless declared it to be unlawful because it excluded rivals without creating any offsetting benefits.[186]

Judge Wyzanski, it should be noted, did not expressly depart from *Alcoa*, but instead purported to follow that decision, which was, after all, binding on him.[187] He read the decision as banning the achievement or maintenance of monopoly by "manoeuvres" that, while "honestly industrial," were "not economically inevitable, but were rather the result of the firm's free choice of business policies."[188] At the same time, he claimed to find within *Alcoa* a safe harbor for firms that had achieved a monopoly solely as the result of "superior skill, superior products, natural advantages, (including accessibility to raw materials or markets), economic or technological efficiency, (including scientific research), low margins of profit maintained permanently and without discrimination, or licenses conferred by, and used within, the limits of law, (including patents on one's own inventions, or franchises granted

182 *See United Shoe*, 110 F. Supp. at 344 (quoting United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945)); *see also* KAYSEN, *supra* note 167, at 16–19 (arguing that monopoly maintained by means of economies of scale is unobjectionable).

183 *See United Shoe*, 110 F. Supp. at 344 ("But United's control does not rest solely on its original constitution, its ability, its research, or its economies of scale. There are other barriers to competition, and these barriers were erected by United's own business policies.").

184 *See* Meese, *supra* note 153, at 771–93 (explaining how economic theory of period treated various nonstandard agreements as coercive efforts to protect or extend monopoly power); *see also* BAIN, INDUSTRIAL ORGANIZATION, *supra* note 159, 330–31 (concluding that nonstandard contracts such as tying and exclusive dealing agreements are coercive efforts by manufacturers to maintain or extend their power).

185 *See* Meese, *supra* note 153, at 793–812 (describing workable competition paradigm's influence on section 2 doctrine).

186 *United Shoe*, 110 F. Supp. at 341–43.

187 *See id.* at 341–43 (invoking and purporting to follow *Alcoa*).

188 *Id.* at 341.

directly to the enterprise by a public authority)."[189] He did not cite any particular portion of *Alcoa* to support this claim or explain the difference between expanding output—the conscious business policy that doomed Alcoa—and enforcing a patent or realizing economies of scale—both of which he claimed to be perfectly lawful under the *Alcoa* formulation. In so doing, Judge Wyzanski took a page from a then-recent Supreme Court decision, which had endorsed *Alcoa* while at the same time claiming that the decision rested on a finding that Alcoa had engaged in "unlawful" tactics.[190] Despite this creative effort at reconciliation, Judge Wyzanski had plainly departed from Hand's rationale.[191]

C. *Harvard Touts* United Shoe *(and Total Welfare)*

Antitrust scholars from the Harvard School, who had criticized *Alcoa*, endorsed Judge Wyzanski's opinion and approach in *United Shoe*, including the result that monopoly obtained or maintained by "competitive merit" was beyond reproach.[192] Indeed, one might say that the decision was a paradigmatic exemplar of the Harvard School approach to antitrust regulation generally. Just five years after the decision, Carl Kaysen and Donald Turner, the former an MIT economist and the latter an economist at Harvard Law School, published their definitive text *Antitrust Policy: An Economic and Legal Analysis*.[193] A preface to the book by Edward Mason described the tome as the fruit of the Harvard-centered study group that he had formed less than a decade earlier.[194] The first and third chapters outlined the

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[189] *Id.* at 342.

[190] *See* Am. Tobacco Co. v. United States, 328 U.S. 781, 786 (1946) (characterizing *Alcoa* as resting upon finding that "there was a use of various unlawful means to establish or maintain the monopoly"). In fact, Judge Hand found no such independently "unlawful means" but instead held that the otherwise lawful and normal conduct nonetheless violated section 2. United States v. Aluminum Co. of Am., 148 F.2d 416, 432 (2d Cir. 1945).

[191] *See* Lawrence A. Sullivan, Handbook of the Law of Antitrust 95–99 (1977) (concluding that holding of *United Shoe* revised *Alcoa* and correctly stated law of monopolization); Stanley D. Robinson, *Recent Antitrust Developments*, 80 Colum. L. Rev. 1, 3–4 (1980) (pointing out that *United Shoe* opinion departed from *Alcoa* in manner favorable to monopolists).

[192] Kaysen & Turner, *supra* note 157, at 22, 44, 268 (approving approach in *United Shoe* and stating that "the Sherman Act has been interpreted—and properly, we think—to leave room for legal monopolies, that is, for monopolies acquired solely by *competitive merit*" (emphasis added)).

[193] Kaysen & Turner, *supra* note 157.

[194] *See* Mason, *supra* note 157, at xix ("[T]he study is, in an important sense, the product of the discussion of a group of lawyers and economists extending over several years. The authors would be the first to admit that the contribution of the group to the formulation of the ideas here presented has been large.").

overarching framework the authors would employ to evaluate various business practices and the appropriate antitrust policy toward each.[195]

According to the authors, antitrust law should interdict what they called an "unreasonable degree of market power."[196] Under a purchaser welfare balancing test, antitrust law might determine "reasonableness" by asking whether the restraint or other challenged practice resulted in higher prices than would obtain without the practice.[197] However, Kaysen and Turner did not mention the welfare of purchasers; they instead chose a different approach to determining reasonableness, one derived from neoclassical price theory's workable competition model, which had informed Mason's own work for two decades.[198] That is, following earlier work by Mason, the authors admonished courts and the enforcement agencies to treat as "reasonable" any market power that was necessary to "maintain[ ] desirable levels of economic performance."[199] Desirable performance, in turn, was defined as an efficient allocation of productive resources.[200] Thus, the authors proposed a standard whereby the law would interdict significant amounts of market power *unless* possession of such power was necessary to realize nontrivial efficiencies.[201] For instance, these

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[195] *See* KAYSEN & TURNER, *supra* note 157, at 3–23.

[196] *Id.* at 44–45 (describing primary goal of antitrust policy as eliminating "undue market power to the extent consistent with maintaining desirable levels of economic performance"); *see also id.* at 77–79 (describing elimination of "unreasonable market power" as authors' primary goal).

[197] *See, e.g.*, Salop, *supra* note 3, at 313–14, 330–32.

[198] *See* Clark, *supra* note 153 (discussing workable competition model). I do not mean to suggest that Professors Kaysen and Turner endorsed each policy prescription that could be attributed to some version of workable competition. On the contrary, the authors expressly distanced themselves from particular versions of workable competition theory. KAYSEN & TURNER, *supra* note 157, at 81–82. However, they expressly embraced that version of workable competition which "identifies markets as workably competitive when they cannot be made more so, consistent with the requirements of efficiency and the recognition of the realities of consumer preference and geography." *See id.* at 81; *see also* BAIN, INDUSTRIAL ORGANIZATION, *supra* note 159, at 13–18 (describing and endorsing workable competition as guide to public policy).

[199] *See* KAYSEN & TURNER, *supra* note 157, at 44–45 ("[W]e are suggesting that the primary goal of antitrust policy be the limitation of undue market power to the extent consistent with maintaining desirable levels of economic performance."); *see also* MASON, *supra* note 154, at 387 (articulating similar standard for "permissible power").

[200] KAYSEN & TURNER, *supra* note 157, at 11–12. The authors identified four attributes of economic performance: efficiency, progressiveness, stability in output and employment, and an equitable distribution of income. They concluded, however, that antitrust policy was not an appropriate vehicle for stabilizing the economy or assuring an equitable distribution of income. *See id.* at 11–12. Nineteen years later, Bork would agree without citing Kaysen and Turner. *See* BORK, ANTITRUST PARADOX, *supra* note 2, at 110–12 (opining that courts should not use antitrust to affect distribution of income).

[201] *See* KAYSEN & TURNER, *supra* note 157, at 78 ("Market power resting on certain bases we consider 'reasonable,' because we think it either undesirable or impossible to eliminate them. . . . [Market power resulting from economies of scale] could be reduced

scholars concluded that a merger that conferred market power on the merging parties (and thus raised prices) should nonetheless survive antitrust scrutiny so long as it produced significant efficiencies that could not be achieved by other means.[202] They also concluded that antitrust law should not condemn product differentiation, even though such conduct would naturally lead to market power and higher prices.[203] Moreover, these scholars and others advocated breaking up firms that possessed significant market power, *unless* such action would prevent the realization of significant efficiencies.[204] Finally, these authors argued that courts should not condemn monopolies achieved solely as a result of economies of scale and similar competition on the merits.[205] Attacking such market power would result in "producing at higher costs in inefficiently small units"—a price the authors "d[id] not desire to pay."[206] Not surprisingly, then, they and other members of the Harvard School endorsed the standard announced in *United Shoe* as an appropriate implementation of section 2 of the Sherman Act.[207]

This approach was emphatically *not* a purchaser welfare balancing test or otherwise an effort to maximize the welfare of purchasers. Indeed, when defining the content of "desirable economic results," the authors rejected "an equitable distribution of income" as a variable antitrust law could or should influence.[208] Thus, like the test

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only at the cost of producing at higher costs in inefficiently small units; this price we do not desire to pay.").

202 *Id.* at 133–34. This result, of course, followed the more general principle that society should tolerate market power that is necessary to realize efficiencies. *See, e.g.*, MASON, *supra* note 154, at 387.

203 KAYSEN & TURNER, *supra* note 157, at 77–78; *see also* Mason, *Monopoly in Law and Economics*, *supra* note 152, at 48 (noting that law does not condemn successful differentiation of product even though it may entrench monopoly power); BAIN, *supra* note 154, at 373–74 (noting that product differentiation in oligopolistic markets may lead to less than optimum production).

204 See, e.g., KAYSEN & TURNER, *supra* note 157, at 113; MILLER, *supra* note 153, at 411–12 (advocating breaking up firms "to [the] extent . . . feasible without interfering with the attainment of the optimum scale of plant and rate of operation"); MASON, *supra* note 154, at 387 ("There is no reason, however, to tolerate positions of market power that can be lessened by appropriate antitrust action *unless* it can be shown that this lessening substantially interferes with the job to be done [by the firm]." (emphasis added)).

205 KAYSEN & TURNER, *supra* note 157, at 78.

206 *Id.*

207 *See, e.g.*, *id.* at 268 (suggesting "justifications" for market power that "closely resemble those suggested by Judge Wyzanski in *United Shoe*"); MASON, *supra* note 154, at 387–88 (arguing that courts should tolerate market power where concentration resulting in such power is dictated by economies of scale); JOEL B. DIRLAM & ALFRED E. KAHN, FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY 62–63 (1954) (same); MILLER, *supra* note 153, at 411 (same).

208 KAYSEN & TURNER, *supra* note 157, at 11–12.

articulated by Judge Wyzanski, the standard endorsed by these scholars did not incorporate any examination of the actual or predicted impact of a monopolist's conduct upon purchasers in the relevant market.[209] Instead, (perhaps) unlike formative-era judges, the Harvard School plainly contemplated that, in some cases, firms would achieve or maintain market power or even a monopoly by realizing economies of scale or other efficiencies. They did not assert that monopolists would pass such savings on to purchasers in the relevant market, but instead endorsed such conduct because it would enhance society's overall welfare by ensuring the best possible arrangement of productive resources.[210] They even anticipated a "second best" objection to their approach, arguing that antitrust policy should adopt a "Pigovian assumption" that "it is desirable to make as close an approach to the conditions of economic efficiency in as many sectors of economy as possible."[211] The authors' invocation of Pigou only made sense within a total welfare framework.[212] Kaysen and Turner thus implicitly applied the Kaldor-Hicks efficiency criterion so often

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209 *See id.* at 11–12, 44–45 (suggesting that "primary goal of antitrust policy" should be "limitation of undue market power to the extent consistent with maintaining desirable levels of economic performance"); *id.* at 77–79 (asserting that antitrust policy should eliminate only unreasonable market power); *id.* at 45 (arguing that antitrust policy should tolerate market power that is necessary to achieve "efficiency and progressiveness").

210 *See id.* at 12 ("Efficiency is ideally a distributive or relational concept, which embraces the whole economy. Essentially [efficiency] is a state in which no rearrangement of outputs among products and no redistribution of inputs among firms could increase consumer satisfaction."). The term "consumer satisfaction," read in light of the authors' reference to efficiency in "the whole economy" plainly refers to what Robert Bork called "consumer want satisfaction," that is, the aggregate welfare of all consumers, whether or not they purchased the monopolist's product. *See supra* notes 144–46 and accompanying text; *see also* BAIN, INDUSTRIAL ORGANIZATION *supra* note 159, at 24 (stating that general equilibrium theory, "is our primary source of standards as to what constitutes desirable performance by firms and industries"); MILLER, *supra* note 153, at 360 (employing similar definition of efficiency relevant to competition policy).

211 *See* KAYSEN & TURNER, *supra* note 157, at 12 & n.11. Pigou pioneered the theory of regulating externalities to prevent market failure, thereby maximizing the "national dividend," or total welfare. *See* A.C. PIGOU, THE ECONOMICS OF WELFARE 31–42 (1932) (equating "national dividend" with "economic welfare"); *id.* at 127–30 (describing plan of book as determining extent to which "free play of self interest" will maximize "national dividend"); *id.* at 172–203 (examining role of externalities in creating market failure and possible remedies).

212 *See* Guido Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J.L. & ECON. 67, 69–71 (1968) (arguing that antitrust regulation can be explained as effort to replicate allocation of resources that would occur in absence of bargaining costs, thereby maximizing total welfare).

employed by economists as a guide to public policy.[213] Turner would use the same normative benchmark in subsequent work.[214]

The Supreme Court affirmed Judge Wyzanski's decision unanimously.[215] Moreover, the distinction between competition on the merits and unnatural exclusion has served as the backbone for much section 2 doctrine ever since. In *United States v. Grinnell Corp.*, for instance, the Supreme Court affirmed a decision by Judge Wyzanski that condemned the Grinnell Corporation for maintenance of its monopoly.[216] In so doing, the Court announced that section 2 did not forbid a monopoly obtained or maintained by means of "superior product, business acumen, or historic accident."[217] Instead, the Court—without mentioning purchaser welfare or any synonym thereof—condemned the firm because it had achieved and maintained its monopoly position by means of mergers with rivals and long-term leases that the Court characterized as "coercive."[218]

Proponents of a purchaser welfare approach to section 2 regularly assert that support for the total welfare standard originated with the Chicago School and is still confined to that subset of antitrust scholars and jurists.[219] By framing support for the total welfare standard in this way, proponents of purchaser welfare minimize the apparent support for the total welfare standard while at the same time offering their own approach as the mainstream view long-embraced by the Supreme Court. This Part has offered an entirely different account of the origins of the total welfare school, an approach that undermines the story told by proponents of the purchaser welfare standard. As it turns out, before there was a recognized Chicago School of antitrust analysis, the so-called Harvard School was generating doctrinal prescriptions premised upon a normative total welfare account of section 2 of the Sherman Act. These prescriptions influenced the seminal *United Shoe* decision and, ironically, presaged the Chicago School's own commitment to a total welfare standard. Support for the total welfare standard is more widespread and deeply rooted than generally supposed.

213 *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 12–15 (1986) (defining Kaldor-Hicks efficiency criterion and discussing relationship between Kaldor-Hicks and Pareto superiority criteria).

214 *See* Donald F. Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1208–09 (1969) (assuming that appropriate goal of economic policy is to "maximize aggregate economic wealth" and endorsing view that economies of scale should justify high concentration).

215 United Shoe Mach. Corp. v. United States, 347 U.S. 521 (1954) (per curiam).

216 384 U.S. 563 (1966).

217 *Id.* at 571.

218 *Id.* at 578.

219 *See supra* note 149 (collecting authorities attributing this view primarily to Bork).

V
Total Welfare Comes of Age: The Modern Era

By 1965, the Chicago and Harvard Schools had embraced the total welfare normative framework to govern section 2's regulation of monopolists' conduct. For instance, both schools agreed that a so-called efficient monopolist did not offend section 2, without regard to whether the monopoly reduced the welfare of purchasers in the relevant market. Moreover, *United Shoe* and its progeny embraced this approach, which it implemented in light of the economic theory of the time. Accordingly, competition on the merits was lawful per se, while agreements that tended to exclude rivals were deemed coercive exercises of monopoly power without offsetting benefits and thus, if entered into by a monopolist, were unlawful per se.

This apparent agreement on normative premises may seem surprising to some. After all, scholars have often portrayed Harvard and Chicago as competing schools of thought offering radically different prescriptions for antitrust doctrine.[220] Indeed, there is no doubt that the two schools have often advocated vastly different legal rules governing various types of conduct.[221] Nonetheless, the evidence adduced thus far suggests that these differences do not reflect any *normative* disagreement about what effects matter for antitrust purposes, at least under section 2 of the Sherman Act. On the contrary, as suggested elsewhere, these differences would seem to be purely descriptive; they result from different economic appraisals of the impact of the practices in question.[222] In any event, as explained below, Harvard continued to embrace the total welfare account of section 2 doctrine—so often associated with the Chicago School—well into the 1980s and 1990s.

A. *Harvard Reiterates Its Support for Total Welfare*

This collective embrace of the total welfare standard was no passing fad or anomaly. During the 1970s, the Harvard School reiterated and systematized the approach to section 2 litigation that Judge Wyzanski articulated in the *United Shoe* decision and that Kaysen and Turner endorsed in their 1959 treatise. For instance, in 1975, Professors Turner and Areeda published their blockbuster article on

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220 Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. Rev. 219, 226–28 (1995) (characterizing Harvard and Chicago as competing schools of antitrust thought); Posner, *supra* note 145, at 925–33 (arguing that "there was a time" when Harvard and Chicago were distinct but that those distinctions have "greatly diminished").

221 *See* Posner, *supra* note 145, at 925–33 (describing these differences).

222 *See id.*

predatory pricing, which embraced the safe harbor for competition on the merits.[223] Areeda had been a student at Harvard Law School while Mason's working group was active, and Kingman Brewster, Harvard's antitrust authority at the time, was a member of the group.[224] The Areeda-Turner article sought to articulate the standards courts should employ to examine predatory pricing by monopolists and firms allegedly seeking monopoly power. The authors began with the assumption that competition on the merits was lawful, even if it injured or dispatched rival firms and led to higher purchaser prices.[225] They also concluded that above-cost pricing was always competition on the merits and thus lawful per se.[226] The authors recognized that such a safe harbor could in some cases reduce the welfare of purchasers, by allowing monopolists to deter or defeat entry by less-efficient rivals and thus maintain monopoly prices.[227] Nonetheless, they adhered to their safe harbor proposal, in part because such high prices were the natural reward that drove firms to obtain a monopoly by innovating and realizing productive efficiencies in the first place:

> Moreover, a monopolist whose power was legitimately acquired by patents cannot be denied monopoly profits without subverting the purpose of the patent laws. Similarly, denying monopoly profits to those whose power was obtained by superior skill, foresight, and industry could eliminate the primary incentive to develop such competitive skill. Finally, price restrictions would have perverse effects on the efficiency and innovation aspects of a monopolist's on-going performance by eliminating the reward.[228]

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[223] *See* Philip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). William Kovacic has argued that this article "has a strong claim to be the most influential law review article ever written on an antitrust topic." Kovacic, *supra* note 149, at 46. I do not disagree with this assessment. At the same time, it should be noted that the safe harbor for above-cost pricing and competition on the merits endorsed by this 1975 article can trace its origins to Judge Wyzanski's *United Shoe* decision more than two decades earlier and the Harvard School that influenced him.

[224] Mason, *supra* note 157, at xix.

[225] *See* Areeda & Turner, *supra* note 223, at 697 ("A firm which drives out or excludes rivals by selling at unremunerative prices is not competing on the merits, but engaging in behavior that may properly be called predatory.").

[226] *Id.* at 706 ("Exclusion by charging prices equal to average cost is also competition on the merits—only those potential entrants who cannot survive at the efficiency-related price are kept out. . . . [M]ore-or-less permanently 'low' prices are . . . not an abuse of power or exclusionary behavior for the purposes of Section two . . . ." (footnotes omitted)); *id.* at 709 ("[W]e conclude that a price at or above average cost should be demed [sic] non-predatory, and not in law exclusionary, whether permanent or not.").

[227] *See id.* at 705–06 (recognizing that so-called above-cost "limit pric[ing]" by incumbent monopolist can deter entry and thereby help incumbent sustain monopoly prices).

[228] *Id.* at 707.

Here again, the authors concluded that the welfare of purchasers in a particular market should yield to the overall welfare of society. As one scholar has explained, this approach to predatory pricing was indistinguishable from that taken by the Chicago School.[229]

Three years later, Turner and Areeda would publish the early volumes of their extremely influential treatise on antitrust law. There they repeated their assertion that section 2 should not reach competition on the merits, and they offered the most comprehensive definition to date of that term, a definition consistent with that offered by Carl Kaysen and Judge Wyzanski more than two decades earlier.[230] After opining that section 2 should forbid "exclusionary" conduct by a monopolist, they went on to try and define it:

> [T]he first step in defining "exclusionary" conduct is to state what it clearly is not. Our concern about monopoly and *the opportunities of rivals* must not be allowed to obscure the objective of antitrust law which seeks to protect the process of *competition on the merits* and the economic results associated with *workable competition*. Accordingly, non-exploitative pricing, higher output, improved product quality, energetic market penetration, successful research and development, cost-reducing innovations, and the like are welcomed by the Sherman Act and are not therefore to be considered "exclusionary" for § 2 purposes *even if monopoly results*. We attempt no further catalogue of desirable behavior at this point, but rest for the moment on the desirability of behavior constituting *competition on the merits*—the superior skill, foresight, and industry of which Judge Hand spoke. Antitrust law should not base the imposition of sanctions on the very conduct it would encourage. Behavior that is no more restrictive of rivals' opportunities than is reasonably necessary to effect *competition on the merits* is and should be approved by Sherman Act § 2. Such behavior is, after all, indispensable if the antitrust laws are to achieve their objective. Thus, "exclusionary" comprehends at the most the behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.[231]

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[229] *See* Kovacic, *supra* note 149, at 43–71 (showing that Harvard approach to predatory pricing law, private actions, and refusals to deal mirrored that advocated by Chicago School and vice versa). It should be noted that, despite its title, Professor Kovacic's article deals only with *unilateral* conduct by monopolists and not all dominant firm conduct. Moreover, the article does not examine section 2's normative premise, the underlying normative agreement between Harvard and Chicago, the Harvard School origin of the total welfare standard, nor the *United Shoe* decision or the origins of the term "competition on the merits."

[230] *See supra* notes 177–82 and accompanying text.

[231] AREEDA & TURNER, *supra* note 124, ¶ 626b (emphasis added). Despite this passage's reference to "non-exploitative pricing," the authors subsequently took the position

Areeda and Turner also expressly endorsed the rationale and result of the *United Shoe* decision.[232] The authors endorsed the economic results associated with workable competition and recognized that competition on the merits could lead to and help maintain a monopoly, to the detriment of purchasers, but nonetheless adhered to such a safe harbor because of the welfare consequences over the long term. To this end, they expressly opined that "exploitative" monopolistic pricing should not violate section 2 of the Sherman Act.[233] Other Harvard School scholars reached the same result.[234]

Moreover, buried in this paragraph and subsequent pages is a subtle expansion of the sort of conduct the Harvard School thought beyond the reach of section 2. Recall that *United Shoe* had drawn a distinction between "competition based on pure merit," on the one hand, and so-called "conscious business policies," on the other.[235] Agreements made by monopolists that disadvantaged rivals were, of course, "conscious policies" and thus unlawful under this standard.[236] Areeda and Turner employed a different taxonomy, however, distinguishing between conduct deemed "exclusionary" from that which was lawful. There is no reference to "conscious business policies." Moreover, while the authors treated competition on the merits as lawful per se, this does not exhaust the category of conduct that the authors treat as "non-exclusionary" and thus lawful. This category included not only (unilateral) competition on the merits, but also conduct that "is reasonably necessary *to effect* competition on the merits," or to "*further*" competition on the merits, even if such conduct impaired the opportunities of rivals.[237] Conduct necessary to "effect" competition on the merits could include exclusive dealing agreements and other nonstandard contracts—what Judge Wyzanski would have called unlawful "conscious business policies"—so long as the conduct

that even "exploitative" monopolistic pricing should not violate section 2 of the Sherman Act. *Id.* ¶ 710.

232 *Id.* ¶ 626b n.14.

233 *Id.* ¶ 710.

234 *See* SULLIVAN, *supra* note 191, at 95–99 (concluding that *United Shoe* revised *Alcoa* and correctly stated law of monopolization). Sullivan graduated from Harvard Law School in 1951, one year after Mason founded his working group and the same year that Phillip Areeda entered Harvard. Sullivan's monograph lists several Harvard School industrial organization texts as suggested reading. *Id.* at 15–17.

235 *See supra* notes 177–90 and accompanying text (outlining Judge Wyzanski's reasoning in *United Shoe*).

236 *See supra* notes 183–86 and accompanying text (noting that agreements with customers, for example, that erect barriers to entry without benign explanation fail "competition on the merits" standard).

237 AREEDA & TURNER, *supra* note 124, ¶ 626b (emphasis added).

produced benefits and was no broader than necessary to achieve those benefits.[238]

Despite their praise of *United Shoe*, Professors Areeda and Turner endorsed a somewhat less intrusive scope for section 2 than Judge Wyzanski had announced. This change did not reflect an adjustment of the normative standard that governed section 2 analysis, but instead accommodated changes in positive economic theory that undermined the Harvard School's previous hostility toward nonstandard contracts.[239] Whereas the old Harvard School believed that such contracts could never produce benefits, recent developments in economic theory—particularly those hailing from the Chicago School—had caused Harvard to reconsider its previous position. The most famous examples, of course, were the arguments by Lester Telser and Robert Bork that minimum resale price maintenance (Telser)[240] and exclusive territories (Bork)[241] could overcome the sort of market failure that reliance upon an unbridled market could produce. In fact, these arguments led Professor Turner, just before publication of the 1978 treatise, to reverse his earlier position that exclusive territories should be unlawful per se.[242] Moreover, as early as 1974, Professor Areeda had opined that exclusive dealing contracts could produce cognizable benefits by, for instance, promoting special selling efforts by individual dealers.[243] Given these developments, Professors

238 *See id.* (defining exclusionary conduct as more restrictive than necessary to "effect competition on the merits").

239 *See supra* notes 160–61 and accompanying text (documenting early Harvard School's desire to protect "ordinary" competitive actions); Meese, *supra* note 153, at 812–41 (describing rise of transaction cost economics and its influence on monopolization doctrine).

240 *See, e.g.*, Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & Econ. 86 (1960) (discussing resale price maintenance agreements and benefits of such nonstandard contracts).

241 *See* Bork, *Rule of Reason II*, *supra* note 73, at 430–38 (demonstrating how exclusive territories can induce dealers to make optimal investments in promotion by preventing free riding).

242 *Compare* Brief for Motor Vehicle Mfrs. Ass'n as Amicus Curiae at 34–38, Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (No. 76-15), 1977 WL 189274 (arguing that courts should analyze nonprice vertical restraints under rule of reason), *with* Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals To Deal*, 75 Harv. L. Rev. 655, 699 (1962) (arguing that vertically-adopted exclusive territories should be unlawful per se).

243 Phillip Areeda, Antitrust Analysis: Problems, Texts, Cases ¶ 561 (2d ed. 1974). Scholars have subsequently questioned this assertion, while at the same time identifying other benefits of exclusive dealing contracts. *See* Howard P. Marvel, *Exclusive Dealing*, 25 J.L. & Econ. 1, 6 (1982) (arguing that exclusive dealing contracts create contractual property rights that ensure that manufacturers capture benefits of promotional expenditures). Moreover, even before Professor Areeda's casebook, other scholars had identified cognizable benefits that such agreements might produce. *See* Bork, *Rule of Reason II*, *supra* note 73, at 398–402 (explaining how railroad could induce necessary

Areeda and Turner naturally recognized the possibility that conduct once deemed unlawful per se—exclusive dealing by monopolists, for instance—should now be analyzed under a more forgiving standard.[244] There were parallel developments in the courts and the enforcement agencies.[245]

B. *The Supreme Court Follows Harvard (and Chicago!)*

The Harvard School's pronouncements did not fall on deaf ears. Indeed, as some have noted, the Harvard School has exercised particular influence over the Supreme Court's antitrust doctrine, as evidenced by the Court's numerous favorable citations of Professor Areeda's work.[246] As Justice Breyer once put it, Supreme Court advocates would rather cite two paragraphs of Professor Areeda's treatise than the holdings of four courts of appeals and the opinions of three Supreme Court justices.[247]

Section 2 doctrine is no exception. Just over a decade after Professors Turner and Areeda published the early volumes of their treatise, the Supreme Court took up *Aspen Skiing Co. v. Aspen Highlands Skiing Co.*[248] There the Court reviewed a jury's conclusion that an admitted monopolist had employed unlawful tactics—notably a refusal to continue in a joint venture—to maintain its monopoly position. The Court examined the lower court's jury instructions that distinguished between a monopoly that was "legitimately gained" and that obtained or maintained by means of exclusionary conduct.[249] This distinction was consistent with that endorsed by the Areeda-Turner

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investments by granting sleeping car company exclusive right to serve its line); Milton Handler, *Statement Before the Small Business Administration*, 11 ANTITRUST BULL. 417, 424–25 (1966) (contending that exclusive dealing arrangement can avoid putting seller at buyer's mercy and thereby help induce relationship-specific investment by seller).

[244] *See* Meese, *supra* note 153, at 832–41 (explaining how developments in economic theory led courts to adjust standards governing nonstandard contracts by monopolists).

[245] *See* Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49–51, 57–59 (1977) (rejecting application of per se ban on nonprice vertical restraints given propensity of such restraints to overcome free riding and thus encourage optimal promotion expenditures); Koppers Co., 77 F.T.C. 1675, 1684 (1970) (holding that requirements contracts "are particularly suspect when used by a monopolist" and that such agreements were unlawful absent "very strong justification"); *see also infra* notes 272–79 and accompanying text (discussing lower courts' application of relaxed standard to various forms of conduct).

[246] A Lexis search reveals at least fifty citations of Professor Areeda's work in the U.S. Reports (last searched Apr. 1, 2010). *See also* Kovacic, *supra* note 149, at 43–71 (documenting influence of Harvard School on various antitrust doctrines generated by Supreme Court).

[247] Stephen Breyer, *In Memoriam: Phillip E. Areeda*, 109 HARV. L. REV. 889, 890 (1996).

[248] 472 U.S. 585 (1985).

[249] *Id.* at 596.

treatise.[250] The instructions, which the Court quoted with approval, elaborated on this distinction, noting that it was "legitimate" (and thus lawful per se) for a monopolist to "tak[e] advantage of scale economies by constructing a large and efficient factory."[251] The instructions contained no caveat for instances in which the resulting market power due to this construction injured purchasers in a relevant market. More generally, the instructions stated that a monopoly gained or maintained by means of a "superior product, well-run business, or luck" was beyond reproach, again without any caveat for practices that injured purchasers in the relevant market.[252]

In approving these instructions, the Court noted that the "central message" of the Sherman Act was that firms could obtain new customers lawfully through "internal expansion" and "competing successfully."[253] The Court cited with approval the passage authored by Professors Areeda and Turner which narrowed the definition of unlawful exclusionary conduct and approved of conduct necessary to "effect" or "further" competition on the merits. In doing so, the Court also adopted the Areeda-Turner standard for "exclusionary" conduct, repeating that it "comprehends *at the most* behavior that not only (1) tends *to impair the opportunities of rivals*, but also (2) either does not further *competition on the merits* or does so in an unnecessarily restrictive way."[254]

In the same paragraph, the Court quoted with approval Judge Bork's definition of exclusionary conduct as conduct that excludes rivalry on some basis other than efficiency, apparently treating that definition as co-extensive with that offered by Professors Areeda and Turner.[255] By contrast, a proponent of the purchaser welfare standard has expressly rejected Bork's test as inconsistent with a purchaser welfare approach to section 2, further indicating that the Court implicitly accepted a total welfare approach.[256]

Aspen Skiing establishes the following two-part test for evaluating claims of exclusion. First, so-called competition on the merits,

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250 *See supra* note 231 and accompanying text (providing Areeda-Turner definition of exclusionary conduct).

251 *Aspen Skiing*, 472 U.S. at 597.

252 *See id.* at 596.

253 *Id.* at 600 (quoting United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 116 (1975)).

254 *Aspen Skiing*, 472 U.S. at 605 n.32 (quoting AREEDA & TURNER, *supra* note 124, ¶ 626b) (emphasis added).

255 *See id.* at 605.

256 *See* Salop, *supra* note 3, at 328–29 (providing example of exclusionary conduct that would offend purchaser welfare standard but would not offend standard articulated by Bork).

such as realizing economies of scale (by internal expansion) is "legitimate" and thus lawful per se. Second, conduct that is not itself competition on the merits is nonetheless lawful, even if it disadvantages rivals, if it "furthers" competition on the merits and is not overly restrictive. Neither portion of this test requires the court to assess the impact of the conduct on purchasers in the relevant market or somehow balance the benefits of the conduct against its harms, however the latter are conceived.[257] In other words, the Court announced that competition on the merits, even when conducted by an adjudicated monopolist, is lawful per se, *without regard to the impact of such conduct on purchasers in the relevant market*.[258] Conduct that furthers such competition is lawful, unless there is a less restrictive means of achieving the same benefits. This less restrictive alternative test follows naturally from a total welfare standard, in that it minimizes the misallocation of resources and, consequently, reduces externalities produced by the restraint.[259]

The Court went on to affirm the jury's verdict that the defendant had maintained its monopoly through conduct that did not constitute or further competition on the merits.[260] In so doing, the Court emphasized the defendant's inability to articulate any beneficial rationale for its conduct.[261] Conversely, if the defendant had been able to articulate

[257] *See Aspen Skiing*, 472 U.S. at 596–97 (citing with approval trial court's instructions that monopoly power derived from superior business ability or efficiency does not violate section 2).

[258] While the Court examined the impact of defendant's conduct on purchasers, it plainly assumed that a negative impact was a *necessary* condition for liability but not a *sufficient* one; immediately after stating that it was "relevant" to consider the impact of the defendant's conduct on purchasers, the Court quoted with approval the Areeda-Turner formulation as well as Judge Bork's definition of exclusionary conduct. *Id.* at 605 & nn. 32–33.

[259] Meese, *supra* note 63, at 112 (explaining how proper application of less restrictive alternative test can be characterized as externality regulation).

[260] *See Aspen Skiing*, 472 U.S. at 605–11 (outlining Court's characterization of defendant's actions).

[261] *See id.* at 608–11 ("Thus, the evidence supports an inference that Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long run impact on smaller rivals.").

Professor Robert Pitofsky claims that *Aspen Skiing* "require[s] a balancing approach that compares the adverse impact of the refusal to deal on the competitive process with any efficiency effects that may simultaneously arise, taking into account the possibility of less restrictive alternatives that might produce comparable efficiencies." Pitofsky, Testimony, *supra* note 3, at 5; *see also* Pitofsky, *Antitrust Enforcement*, *supra* note 3, at 217 & n.24 (to same effect); Gavil, *supra* note 8, at 21–23 (claiming that law is ambiguous on this question); Varney, *supra* note 5, at 11–14 (reading *Aspen Skiing* and *Microsoft* as establishing requirement that courts "weigh" procompetitive and anticompetitive effects and determine whether "on balance the net effect of [a monopolist's] conduct harms competition and consumers"). I respectfully disagree with Professor Pitofsky's characterization of *Aspen Skiing*, which in my view finds no support in the language or rationale of the decision. The (and prove) such a benefit, the defendant's conduct would have survived unscathed, so long as it was not broader than necessary to achieve the benefit in question.

Six years later, the Court reiterated this approach in a case involving a challenge to a monopolist's tying agreements and refusals to deal. In *Eastman Kodak Co. v. Image Technical Services*, the Court held that section 2 forbids only the "willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[262] Thus, the Court continued, mere possession of a monopoly does not offend section 2, unless the defendant uses that power to foreclose rivals' opportunities.[263] Applying this test to the facts before it, the Court held that a plaintiff could establish a prima facie case of unlawful monopolization by showing that the monopolist's conduct excluded its rivals from a significant portion of the marketplace and thereby strengthened its monopoly position.[264] The Court also held that, if the plaintiffs should succeed in making out their prima facie case, the defendant could nonetheless prevail by establishing that the challenged conduct was supported by "valid business reasons."[265] The only caveat was that the conduct must be no

word "balance" does not appear in the opinion; nor does any synonym thereof. Moreover, neither the language in the opinion nor the jury instructions the Court implicitly approved implies that the finder of fact should "balance," "weigh," or "compare" the benefits of a restraint or other practice against any harms that the restraint produces. Instead, the Court made it absolutely plain that conduct that constitutes "competition on the merits" or furthers such competition cannot violate section 2, absent a less restrictive method of furthering said competition.

To be sure, application of a less restrictive alternative test depends on the assumption that the benefits of a practice coexist with harms. Absent such coexistence, there would be no rationale for encouraging a different method of achieving the same benefits. Meese, *supra* note 153, at 761. Still, *Aspen Skiing*'s invocation of this test does not suggest the Court was employing a purchaser welfare standard for two reasons. First, the Court did not equate restrictiveness with impact upon prices paid by purchasers in the relevant market. Second, under the Court's approach, proof that a practice is the least restrictive means of producing particular benefits would shield the defendant from liability, without regard to whether the benefits in question outweighed the harms or whether the restraint resulted in higher or lower prices. Thus, while the less restrictive alternative test requires monopolists to produce as much possible, it does not require them immediately to share those benefits with purchasers.

[262] Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 481 (1992) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966)).

[263] *Eastman Kodak*, 504 U.S. at 482–83 (citing United States v. Griffith, 334 U.S. 100, 107 (1948)).

[264] *See Eastman Kodak*, 504 U.S. at 482–83 (stating that, absent valid business reasons, adopting exclusionary policy to maintain or strengthen monopoly violates section 2).

[265] *See id.* at 483 ("[R]espondents have presented evidence that Kodak took exclusionary action to maintain its parts monopoly . . . .").

broader than necessary to achieve the benefits it claimed.[266] Applying this standard, the Court affirmed the denial of the defendant's motion for summary judgment on the monopolization claims because the plaintiff had adduced evidence that the defendant could achieve its legitimate purposes via less restrictive means.[267]

Here again the Court announced and applied the Areeda-Turner definition of unlawful exclusion, a definition that did not contemplate balancing or otherwise turn on the impact of the challenged conduct on purchasers in the relevant market. Instead, even if the conduct in question excluded rivals from the marketplace, the defendant would nonetheless prevail if it could show that such exclusion was necessary to achieve significant benefits, without regard to whether the practice on balance harmed purchasers.

The Court gave greater content to competition on the merits in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*[268] There, the Court reiterated the conclusion of Judge Wyzanski, the Harvard School, and others that above-cost pricing was lawful per se, expressly relying upon the work of Professors Areeda and Turner to support its conclusions.[269] It would not matter, the Court said, if such competition fortified a monopoly or otherwise facilitated the exercise of market power.[270] Regardless of the ultimate impact on purchaser welfare, proof that the defendant had priced below some measure of cost was a necessary (but not sufficient) condition for a showing of monopolization through predatory pricing.[271]

The message of these decisions and academic commentary was not lost on the lower courts. Even before *Aspen Skiing*, for instance, in the watershed case of *Berkey Photo, Inc. v. Eastman Kodak Co.*, the Second Circuit expressly repudiated the more extreme manifestations of Judge Hand's *Alcoa* opinion.[272] The court quoted *United Shoe* with approval for the proposition that section 2 does not condemn one "who merely by superior skill and intelligence got the whole business

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[266] *See id.* at 483–86 (denying defendant's motion for summary judgment after finding that plaintiff had adduced sufficient evidence to suggest that Kodak's business practices may have been unnecessary to achieve purported benefits).

[267] *See id.* (outlining defendant's justifications and plaintiff's responses).

[268] 509 U.S. 209, 223 (1993) (holding that section 2 does not forbid aggressive pricing that preserves monopolist's dominant position).

[269] *See id.* at 224 (citing Areeda & Turner, *supra* note 223, at 708–09).

[270] *See id.* (stating that its standard applied "[e]ven if the ultimate effect of the [lawful price] cut is to induce or reestablish supracompetitive pricing").

[271] *See id.* at 223 (holding that proof of below-cost pricing is necessary to predatory pricing case against monopolist).

[272] *See* 603 F.2d 263, 273–75 (2d Cir. 1979) (overruling *Alcoa* in part); *see also* Robinson, *supra* note 191, at 6–12 (discussing *Berkey Photo*'s rejection of *Alcoa*).

because nobody could do it as well."[273] Evaluating the plaintiff's claim that Kodak had maintained its monopoly by means of unlawful conduct, the court carefully distinguished between two different sorts of conduct capable of maintaining a monopoly: the use of power to disadvantage rivals, on the one hand, and superior skill or industry, such as the realization of economies of scale, on the other.[274] The former category was the basis for liability, while the latter was competition on the merits and thus lawful per se.[275] Moreover, the court treated the development of a new product, and the refusal to share such innovation with rivals, as competition on the merits.[276]

To be clear, the court's test for distinguishing between these two categories of conduct did not entail any examination of the impact of the defendant's practices on purchasers in the relevant market or any effort to balance harms against benefits. Instead, the court simply asked whether conduct that disadvantaged rivals was supported by a "valid business policy."[277] Finally, as if to eliminate any trace of doubt, the court explained that simply charging a high price could not itself violate section 2 if the monopoly in question was obtained or maintained via legitimate conduct.[278] Several other lower courts have adhered to the same standard.[279]

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[273] *Berkey Photo*, 603 F.2d at 274 (quoting United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 341 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954) (per curiam)). As the *Berkey* court noted, Judge Wyzanski was himself quoting the legislative history of the Act; *see also Berkey Photo*, 603 F.2d at 281 ("[A]s we have already indicated, a monopolist is permitted, and indeed encouraged, by § 2 to compete aggressively on the merits . . . ." (citing *United Shoe*, 110 F. Supp. at 344)); Bork, *Legislative Intent*, *supra* note 2, at 29–30 (invoking this passage of legislative history among other evidence in support of argument that Congress did not intend for Sherman Act to ban monopoly obtained by means of superior efficiency).

[274] *See Berkey Photo*, 603 F.2d at 274–75.

[275] *See id.* at 274 ("A firm that has lawfully acquired a monopoly position is not barred from taking advantage of scale economies by constructing, for example, a large and efficient factory. These benefits are a consequence of size and not an exercise of power over the market." (quoting Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 597 (1985))).

[276] *Id.* at 282–85.

[277] *Id.* at 284.

[278] *See id.* at 274 & n.12 ("Nor is a lawful monopolist ordinarily precluded from charging as high a price for its product as the market will accept."). The qualification "ordinarily" was explained as allowing condemnation of "an illegal 'price squeeze' in another market." *Id.* at 274 n.12.

[279] *See, e.g.*, United States v. Dentsply Int'l, Inc., 399 F.3d 181, 186–87 (3d Cir. 2005) (applying standard to practice of exclusive dealing); *see also* United States v. AMR Corp., 335 F.3d 1109, 1113 (10th Cir. 2003) (distinguishing between behavior that abuses monopoly power and that which simply "build[s] a better mousetrap"); Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 189–90 (2d Cir. 1992) (Marshall, J.) (collecting authorities arguing that business-purpose defense can defeat section 2 claim); Cal. Computer Prods. v. IBM Corp., 613 F.2d 727, 742 (9th Cir. 1979) (monopolist may main-

Section 2's Harvard-inspired safe harbor for competition on the merits (e.g., the realization of economies of scale and the development of a superior product) cannot be squared with a purchaser-welfare approach to antitrust law.[280] As courts and scholars have repeatedly recognized, legitimate and lawful competition can, by excluding less efficient rivals, result in a monopoly.[281] Or, such competition can fortify and protect a monopoly achieved by accident. In either case, the exclusion of rivals who are less efficient, even if only slightly less efficient, can ultimately result in a monopoly and prices that are higher than those that would obtain if section 2 doctrine instead prohibited such conduct and preserved a deconcentrated market structure at the expense of productive efficiency.[282] In either case, the safe harbor for competition on the merits may result in prices that are higher—and purchaser welfare that is lower—than they were before such (per-

tain its "dominant position in the market it created through 'business acumen' which [includes] shrewdness in profitable price competition"); Hayes v. Solomon, 597 F.2d 958, 985 (5th Cir. 1979) ("[A]n entrepreneur is not protected from competition on the merits—'the *summum bonum* of the Sherman Act.'" (quoting Sulmeyer v. Coca Cola Co., 515 F.2d 835, 851 (5th Cir. 1975))); Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701, 709 (7th Cir. 1977) (holding proof of monopolists' "misuse" of its power necessary for section 2 liability); Telex Corp. v. IBM Corp., 510 F.2d 894, 927 (10th Cir. 1975) (arguing that section 2 leaves room for companies to protect market share through innovation); Cole v. Hughes Tool Co., 215 F.2d 924, 932–33, 938 (10th Cir. 1954) (en banc) (distinguishing leases from those involved in *United Shoe* on ground that only latter deterred lessees from using competitors' products and holding that "[o]ne who gains a large portion of a market by manufacturing a better product and by furnishing better service to his customers, which constitutes legitimate competition, is not denounced by the Sherman Act"); E.I. DuPont de Nemours & Co., 96 F.T.C. 653, 745–48 (1980) (invoking *United Shoe*'s hostility toward "contracts, arrangements, and policies" which, instead of encouraging competition on pure merit, further dominance of particular firm and finding that defendant's continued expansion and refusal to license technology to competitors did not offend section 2).

280 Two scholars draw a different conclusion about the normative content of section 2 doctrine, albeit without mentioning *Aspen Skiing*, *Eastman Kodak*, *United Shoe*, appellate decisions like *Berkey Photo* and *Dentsply*, "competition on the merits," or the Areeda-Turner definition of exclusionary conduct quoted in *Aspen Skiing* and other decisions. *See* Kirkwood & Lande, *supra* note 31, at 192 ("[T]he fundamental goal of antitrust law is to protect consumers.").

281 *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223–24 (1993) (arguing that there is no congnizable claim against businesses engaging in above-cost price competition); *Berkey Photo*, 603 F.2d at 274 (stating that Sherman Act does not condemn monopoly gained by "superior skill and intelligence" (quoting United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 341 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954) (per curiam))); *supra* note 181 and accompanying text (explaining how competition on merits can create or fortify monopoly); *see also* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596–97 (1985) (approving jury instruction that distinguished between abuse of monopoly power and competitive market behavior).

282 *See* Areeda & Turner, *supra* note 223, at 706–07 (explaining that monopolists may set low prices to prevent market entry and then allow prices eventually to return to higher, monopolistic level); *cf.* Williamson, *supra* note 30, at 22–23 (demonstrating that modest efficiency gains can coincide with price increases).

fectly lawful) competition took place.[283] Indeed, lower courts have often dismissed monopolization claims once the defendant adduces convincing proof of benefits, without purporting to balance those benefits against harms or otherwise determine the overall impact of the conduct on purchaser welfare.[284]

This is not to say that current section 2 law reflects a perfectly honed total welfare approach to monopolists' conduct. In a world where judges and juries are omniscient, courts could read section 2 to empower factfinders to make a case-by-case determination of whether any particular practice increases or reduces overall welfare. But such central planning is beyond the skill and ability of real world judges and juries. As then-Judge Breyer reminded us, antitrust rules are necessarily imperfect, given the prohibitive administrative costs of perfection.[285] For instance, competition on the merits, as courts have defined it, can in some circumstances theoretically reduce total welfare. Economies of scale that enable a firm to drive rivals from the market may provide the monopolist with only a slight cost advantage, with the result that the deadweight loss resulting from such conduct may outweigh any efficiency gains.[286] Moreover, a test that allows monopolists to abuse their power by charging whatever the market will bear will encourage firms to engage in rent-seeking and thus to make investments that only make sense on the assumption that they will acquire or maintain monopoly power.[287] The safe harbors for such conduct under current law presumably reflect a judgment that more finely tuned examinations, while nominally designed to maximize total welfare, will in fact destroy more wealth than they create by consuming scarce administrative resources and deterring beneficial conduct.[288]

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283 *See* Areeda & Turner, *supra* note 223, at 706–07 (arguing that availability of monopoly profits increases incentives for monopolies to realize efficiencies).

284 *See, e.g.*, *Trans Sport, Inc.*, 964 F.2d at 189–90 ("[V]alid business rationales are sufficient to establish a *prima facie* case of lawful conduct.").

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

286 *Cf.* Williamson, *supra* note 30 (modeling tradeoff between efficiencies resulting from economies of scale and market power simultaneously produced by merger to monopoly).

287 *See* Richard A. Posner, Antitrust Law 13–14 (2d ed. 2001) ("[A]n opportunity to obtain a lucrative transfer payment in the form of monopoly profits will attract real resources into efforts by sellers to monopolize and by consumers to avoid being charged monopoly prices . . . .").

288 *See* Easterbrook, *supra* note 9, at 15 (resting argument for relatively permissive antitrust rules on assumption that misallocation of resources is only harm from monopoly

C. *The Demands of Stare Decisis*

Of course, the mere fact that courts repeatedly adopt a total welfare standard—and have never adopted a purchaser welfare standard—does not itself establish the original meaning of the Sherman Act. Courts may have misunderstood the meaning of the statute (and thwarted the will of Congress) by declining to ban conduct that, for instance, creates wealth but also reduces the welfare of purchasers in the relevant market.[289] Even longstanding constructions of a statute can be entirely incorrect.

Even so, courts do not lightly repudiate a deeply rooted construction of a statute.[290] When courts misconstrue a statute, the remedy can usually be found in the legislature and not the courts. Indeed, courts often distinguish and justify the weaker claims of stare decisis in the constitutional context on the ground that it is significantly easier for a legislature to amend a statute in response to judicial construction than it is for the body politic to amend the Constitution in response to a perceived judicial misconstruction of that fundamental charter.[291] If in fact the purchaser welfare standard reflects the appropriate construction of section 2 of the Sherman Act, despite repeated judicial decisions embracing a total welfare standard, then it would seem that proponents of such a standard should take their case to Congress and not to the courts or enforcement agencies.[292]

Still, when it comes to antitrust, the normal principles of stare decisis do not apply with full force. Over the past few decades in particular, the Supreme Court has not hesitated to overrule its own antitrust decisions, particularly those that had articulated per se rules

pricing and that false positives deter cost-reducing conduct and increase cost of producing market's entire output).

[289] *See* Lande, *supra* note 3, at 93–96 (marshalling evidence from Sherman Act's legislative history that Congress was concerned with distribution of welfare gains and not just gains themselves).

[290] *See, e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 732–33 (1975) (declining to disturb longstanding interpretation by lower courts that Congress had declined to overturn).

[291] *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 828 & n.1 (1991) (collecting thirty-three constitutional decisions that Supreme Court had overruled in previous twenty years and noting that stare decisis has stronger claim in statutory context than in constitutional context); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–10 (1932) (Brandeis, J., dissenting), *overruled by* Helvering v. Montain Producers Corp., 303 U.S. 376 (1938) *and* Helvering v. Bankline Oil Co., 303 U.S. 362 (1938) (arguing that demands of stare decisis are less pressing in constitutional context); *see also* Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation . . . .").

[292] *Cf.* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 32 (1985) (Brennan, J., concurring) (contending that any change to Court's longstanding per se rule against certain tying contracts should come from Congress, not courts).

against particular restraints.[293] The Court has justified this relaxed stare decisis approach by asserting that the Sherman Act is really a "common-law statute," that is, a delegation from Congress to the courts to fashion a common law governing trade restraints and other business practices.[294] Before there was a Sherman Act, courts articulating the common law of trade restraints repeatedly held that changed economic circumstances could justify the reformulation of case law so as to better implement the policies animating the doctrine.[295] As the Court put it more than two decades ago, the Congress that passed the Sherman Act adopted the common law of trade restraints "along with its dynamic potential" as reflected in these early common law decisions.[296]

Thus the total welfare normative premise may be more vulnerable than it might first seem, at least if proponents of a different approach can convince the Supreme Court that Congress had something else in mind when it passed the Sherman Act. Surely, the common law delegation to antitrust courts is sufficiently capacious to empower judges to, for instance, abandon a total welfare premise in favor of one focused on the welfare of purchasers in the relevant market.

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[293] *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 881–82 (2007) (overruling nearly century-old ban on minimum resale pricing agreements); State Oil Co. v. Khan, 522 U.S. 3, 7–8 (1997) (overruling twenty-nine-year ban on maximum resale price maintenance); Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 57–59 (1977) (overruling ban on nonprice territorial restraints).

[294] *See Leegin*, 551 U.S. at 899 ("*Stare decisis* is not as significant in this case, however, because the issue before us is the scope of the Sherman Act."); *Khan*, 522 U.S. at 20–21 ("[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress 'expected the courts to give shape to the statute's broad mandate by drawing on common law tradition.'" (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978))); *see also* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 732 (1988) (arguing that term "restraint of trade" in Sherman Act "invokes the common law itself, and not merely the static content that the common law assigned to the term").

[295] *See, e.g.*, Gibbs v. Consol. Gas Co., 130 U.S. 396, 409 (1889) (noting that definition of restraint of trade is "not . . . inflexible and has been considerably modified" in light of changed economic circumstances); Skrainka v. Scharringhausen, 8 Mo. App. 522, 525–26 (Mo. Ct. App. 1880) ("It is not that contracts in restraint of trade are any more legal or enforceable now than they were at any former period, but that the courts look differently at the question as to what is a restraint of trade."); Diamond Match Co. v. Roeber, 13 N.E. 419, 421–23 (N.Y. 1887) (endorsing modification of common law of trade restraints in light of changed economic circumstances); Kellogg v. Larkin, 3 Pin. 123, 139 (Wis. 1851) (analyzing law in light of changing economic situation).

[296] *See Bus. Elecs. Corp.*, 485 U.S. at 732 (arguing Sherman Act adopted common law approach to antitrust law).

Not so fast. The Court's invocation of the common law does not necessarily imply carte blanche power over normative approaches.[297] In fact, one can explain the various departures from precedent mentioned above without imputing to the Court the power to alter normative standards at its pleasure. Indeed, in each of the decisions referenced above, the Court claimed at least to be applying an unchanging normative standard in light of changed understandings of the positive economic impact of the practice in question.[298] More metaphorically, each of these departures from precedent can be explained as the "translation" of a previous application of an unchanging normative premise in light of new information about the economic impact of a challenged practice in the real world.[299] This conclusion follows naturally from the very nature of the rule of reason, which requires courts to employ reason to determine whether a challenged practice violates the "public policy which the act embodies."[300] There is, by contrast, no similar rationale for revising the *normative* premise that informs monopolization doctrine, since changes in economic theory cannot by themselves undermine the value judgment inherent in the choice between total welfare and purchaser welfare.[301]

Indeed, there is good reason to conclude the opposite, namely, that the claims of stare decisis in this context are particularly strong, given the widespread reliance on this normative premise throughout the antitrust community and the resulting intellectual infrastructure. For decades, legal scholars, economists, and judges have been engaged in a multilevel dialogue about the appropriate standards governing conduct by monopolists. The result has been an impressive body of case law and overarching principles that serve as reference points and accepted paradigms which inform continuing discussion and empirical and theoretical refinements of possible solutions to antitrust

[297] *See* Bork, *Legislative Intent*, *supra* note 2, at 47–48 ("Sherman and others clearly believed that they were legislating a policy and delegating to the courts the elaboration of subsidiary rules.").

[298] *See Khan*, 522 U.S. at 15–18 (reconsidering precedent banning maximum resale price maintenance based on changed understanding of restraints' economic effects); *Sylvania*, 433 U.S. at 50–59 (reconsidering ban on nonprice vertical restraints in light of new learning about impact of restraints).

[299] *See* Meese, *supra* note 63, at 89–92 (discussing rule of reason in context of evolving economic theory); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1247–51 (1993) (describing such an approach to interpretation and application of Sherman Act).

[300] Standard Oil Co. v. United States, 221 U.S. 1, 66 (1911).

[301] *See* Bork, *Legislative Intent*, *supra* note 2, at 48 (arguing that courts interpreting Sherman Act must look to economic theory to determine how to implement congressional purpose).

problems, both old and new.[302] A sudden bolt out of the blue, presumably announced in a single decision, declaring or implying that so much antitrust doctrine rested on a fundamental misunderstanding of the statute's basic purpose would call into question—and perhaps render useless—each major section 2 decision even arguably based upon a total welfare standard, including the innumerable decisions holding that competition on the merits is lawful per se.[303] Private parties could no longer rely upon such decisions as accurate accounts of their legal obligations, thereby undermining important economic reliance interests.[304] Firms hoping for certainty would instead have to await the slow and uncertain creation of a new body of (hopefully) coherent doctrine.[305] Moreover, scholars and practitioners would lack accepted paradigms they could apply to analogous problems or from which they could derive more general principles.[306] New decisions premised on a purchaser welfare standard would be incommensurable with those premised on a different approach.[307] These would be very high costs to pay for fidelity to a purchaser welfare standard, particularly in light of congressional acquiescence to a complex body of law premised on a desire to maximize total welfare.

VI
COUNTERARGUMENTS

Proponents of a purchaser welfare balancing test have offered two basic arguments in support of their position that merit addressing. First, some have suggested that the safe harbor for unilateral competition on the merits is a sort of anomaly, an exception to a more general

[302] *Cf.* Kovacic, *supra* note 149, at 72 ("Both the Harvard and Chicago Schools abide by the view that antitrust doctrine should reflect the rigorous application of microeconomic theory and should respond to insights from empirical work about the implementation of antitrust rules and about the impact of specific business practices.").

[303] *See supra* notes 278–79 (collecting authorities holding that competition on merits is lawful per se).

[304] *Cf.* Payne v. Tennessee, 501 U.S. 808, 828 (1991) ("Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved . . . .").

[305] *Cf.* Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 47–54 (1977) (criticizing and overruling previous decision that had departed from well-settled case law and thus created confusion and disparate treatment of economically similar conduct).

[306] *Cf.* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 23 (1962) ("In science, . . . a paradigm is rarely an object for replication. Instead, like an accepted judicial decision in the common law, it is an object for further articulation and specification under new or more stringent conditions."); WOLFGANG STEGMULLER, THE STRUCTURE AND DYNAMICS OF THEORIES 170–80 (1976) (discussing concept of paradigm).

[307] *See* KUHN, *supra* note 306, at 103 (explaining how competing scientific frameworks are often incommensurable, thereby preventing meaningful dialogue between frameworks' respective practitioners).

purchaser welfare principle approach that can and does animate the rest of section 2 law. Second, some have invoked the D.C. Circuit's fairly recent decision in the *Microsoft* case, which articulated and purported to apply a rule-of-reason balancing test similar to that applied under section 1—where courts focus on purchaser welfare—to a monopolist's conduct. This Part finds both arguments wanting.

A. *A Bifurcated Standard?*

Some have recognized that current law's safe harbor for competition on the merits reflects a social welfare approach to section 2 to the exclusion of a purchaser welfare approach.[308] Nonetheless, these scholars contend that conduct not historically deemed competition on the merits—such as exclusive dealing contracts, refusals to deal, and the like—is currently and properly judged under a purchaser welfare standard, even if courts judge unilateral conduct such as pricing decisions by something akin to a total welfare standard.[309] Indeed, some have even asserted that the safe harbor for competition on the merits in the form of above-cost pricing and similar conduct is entirely consistent with a purchaser welfare balancing test and that the defendant-friendly nature of this safe harbor simply reflects judicial concern about the negative impact *on purchaser welfare* of more aggressive scrutiny of such conduct.[310] Thus, these scholars argue, once a plaintiff demonstrates that conduct falling outside the safe harbor produces anticompetitive harm, courts can and should balance any benefits that the conduct produces against the simultaneously-produced harms and ban that conduct which injures purchasers.[311] Under this approach,

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[308] *See* Jacobson & Sher, *supra* note 5, at 780–84 (conceding that Areeda-Turner test is current test for pricing behavior); Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435, 464–65 (2006) (asserting that current rules governing pricing and product improvement rest on rejection of purchaser welfare approach).

[309] *See* Jacobson & Sher, *supra* note 5, at 781–83, 785–800 (contending that so-called "no economic sense" test is rooted in Areeda-Turner test for predatory pricing and arguing that courts should apply purchaser welfare balancing test to exclusive dealing contracts); Lao, *supra* note 7, at 452–62 (advocating lenient analysis of predatory pricing and product development claims and arguing in favor of purchaser welfare balancing test for analysis of monopolist's distribution restraints); Popofsky, *supra* note 308, at 441–48 (contending that section 2 doctrine reflects spectrum whereby certain forms of conduct should receive more intrusive scrutiny than others); *id.* at 465 (opining that purchaser welfare balancing test is not always improper).

[310] *See* Popofsky, *supra* note 308, at 465 (arguing that case-specific analysis of such conduct is difficult, error-prone, and thus likely to undermine incentives to compete and lead to harm to consumers over long term).

[311] *See* Jacobson & Sher, *supra* note 5, at 799–801 (arguing that section 2 should ban exclusive dealing contracts by monopolists whenever harm to purchasers outweighs benefits and leads to higher prices); Lao, *supra* note 7, at 456–62 (advocating purchaser welfare

section 2 doctrine would effectively reflect one welfare standard for some conduct and another welfare standard for other conduct.

These scholars do not assert that Congress actually contemplated such a bifurcated welfare standard within section 2.[312] Instead, they apparently assert that the safe harbor for competition on the merits is a narrowly tailored departure from the presumptive purchaser welfare standard that otherwise governs section 2 of the Sherman Act. This safe harbor, some say, is justified by the unambiguous and tangible benefits of the sort of conduct that courts define as competition on the merits, including low prices, product improvements, advertising, promotion, and the like.[313] Rigorous application of a purchaser welfare standard to such conduct, it is said, would unduly chill procompetitive conduct and actually reduce the welfare of purchasers as well as the welfare of society as a whole.[314] Thus, it is said, the application of relaxed standards to generally beneficial conduct does not reflect an overall embrace of a total welfare principle.

This claim ignores the intellectual roots of the safe harbor, which the Harvard School developed and endorsed as a means of furthering *total* welfare and *not* the welfare of purchasers.[315] In any event, there are several more fundamental reasons to reject the claim that the safe harbor for competition on the merits is merely an exception to a larger purchaser welfare principle embraced by section 2 doctrine. For one thing, this claim appears inconsistent with actual section 2 doctrine, which provides a safe harbor for some conduct not deemed competition on the merits. Moreover, such a bifurcated standard would offend the basic antitrust principle that doctrinal distinctions should rest upon economic substance, and not formalistic line drawing, by subjecting economically indistinguishable practices to varying section 2 standards. Finally, this approach contravenes the most recent Supreme Court decision examining exclusionary contracts

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balancing test for analysis of monopolist's distribution restraints such as tying and exclusive dealing contracts).

312 Indeed, Professor Salop would apply the consumer welfare effect standard to all practices governed by section 2. *See* Salop, *supra* note 3, at 336–43 (arguing for broad applicability by addressing common concerns about consumer welfare effect standard).

313 *See* Jacobson & Sher, *supra* note 5, at 781–83 (arguing that Areeda-Turner test for predatory pricing was premised on fear that more intrusive test would unduly deter procompetitive price cuts); Popofsky, *supra* note 308, at 465 (contending that safe harbor treatment is limited to situations in which case-specific search for net economic effects would be difficult and error-prone).

314 *See, e.g.*, Popofsky, *supra* note 308, at 465 (explaining that risk of error leads to false positives that chill innovation).

315 *See supra* notes 165–77 and accompanying text (describing Harvard School origins of safe harbor for competition on merits and its focus on total welfare).

entered by a monopolist, a decision that can only be explained as an effort to implement a total welfare standard.

1. The Scope of Section 2's Safe Harbor

The "bifurcated standards" explanation for the lax treatment of competition on the merits would predict relatively searching scrutiny for refusals to deal by monopolists, since such conduct is not competition on the merits as defined by courts. And in fact, some proponents of a purchaser welfare balancing test have advocated such an intrusive approach to refusals to deal.[316]

The actual state of the law, however, is quite different. One need look no further than *Aspen Skiing*: That case did not involve traditional competition on the merits, but rather the sort of refusal to deal that some scholars would analyze under a more intrusive purchaser welfare standard. In *Aspen Skiing*, however, the Supreme Court approved a jury instruction that distinguished between monopoly gained or fortified by conduct motivated by "legitimate business reasons," on the one hand, and that gained or maintained by conduct that "unnecessarily excludes or handicaps competitors, on the other."[317] The instruction did not distinguish between competition on the merits and refusals to deal, instead providing that a monopolist would avoid liability if it could adduce a "valid business reason[ ]" for its refusal.[318] And the Court affirmed the verdict for the plaintiff precisely because the defendant could not adduce such a justification.[319] Later in the opinion, the Court quoted from the Areeda-Turner treatise, which advocated a safe harbor for competition on the merits *as well as* conduct that "further[ed]" such competition.[320] The Court applied the same test in *Eastman Kodak v. Image Technical Services*, which also involved refusals to deal, relying upon *Aspen Skiing* for the proposition that proof of benefits would avoid liability under section 2, sub-

316 *See supra* notes 308–09 and accompanying text; *see also* Steven C. Salop, Testimony Before the Antitrust Modernization Commission, Avoiding Error in the Antitrust Analysis of Unilateral Refusals To Deal 6–7 (Sept. 21, 2005), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Salop_Statement_Revised%209-21.pdf (advocating application of purchaser welfare balancing test to refusals to deal). *But see* Lao, *supra* note 7, at 454–55 (advocating lenient analysis of refusals to deal despite support for purchaser welfare test in other contexts).

317 *See* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 597 (1985).

318 *Id.* at 597.

319 *Id.* at 608–11.

320 *Id.* at 605 n.32.

ject only to a no-less-restrictive-alternative limitation.[321] Lower courts have applied the same test.[322]

Perhaps, though, proponents of the purchaser welfare standard have simply drawn the line in the wrong place. That is, perhaps the law (properly) treats *all* unilateral conduct, including refusals to deal, with relative laxity, while subjecting concerted action, such as exclusive dealing and tying contracts, to greater scrutiny of the sort more consistent with a purchaser welfare balancing test.[323] Indeed, the line between competition on the merits, on the one hand, and refusals to deal, on the other, is not particularly precise. After all, a firm cannot realize economies of scale or create a superior product unless it can decline to sell its output at cost, or even at a monopoly price, to rivals.[324]

Any effort to explain away the lax treatment of unilateral conduct as some sort of anomaly is still destined to fail, however. For one thing, the line between refusals to deal and concerted action is by no means bright. In *Aspen* itself, the defendant's refusal to deal was simply a bargaining technique designed to convince the plaintiff to accept a smaller share of the fruits of their joint venture.[325] The plaintiff balked at accepting this proposal and sued instead.[326] What looked like a simple refusal to deal was in fact an effort to reach an agreement allocating the fruits of joint investments, perhaps in a manner that would have prevented free riding by the plaintiff.[327]

In any event, any exception for unilateral conduct would seem to dwarf the supposed general rule. If Ronald Coase and Phillip Areeda are correct, most economic activity is unilateral; that is, it takes place within the boundaries of individual firms.[328] Indeed, this assumption

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321 *See* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 482–83 (1992).

322 *See* Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 189–91 (2d Cir. 1992) (stating that plaintiff's inability to show proferred business justifications were pretextual doomed its case); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 284 (2d Cir. 1979) (holding that business justification will save otherwise anticompetitive behavior).

323 *See* Lao, *supra* note 7, at 451–56 (suggesting this approach).

324 Alan J. Meese, *Property,* Aspen, *and Refusals To Deal*, 73 ANTITRUST L.J. 81, 96 (2006); *see also Berkey Photo*, 603 F.2d at 281 (noting that competition on merits includes refusals to deal); Areeda & Turner, *supra* note 223, at 707 (contending that monopoly profits can provide incentives that encourage beneficial conduct).

325 *See* Meese, *supra* note 324, at 102–05 (suggesting that it was Highlands, not Ski Co., that refused to deal).

326 *See id.* (describing breakdown of negotiations).

327 *See id.* at 105–11 (pointing out that Ski Co. may have insisted upon changed revenue allocation formula in order to deter free riding by Highlands).

328 *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1462a (2d ed. 2003) ("In most cases the relevant economic actor is the firm . . . ."); *see also id.* ¶ 1464c, at 206 ("Conspiracies among unrelated units are *relatively* infrequent . . . ."); R.H. Coase, *The Institutional Structure of Production*, 82 AM. ECON. REV. 713, 714 (1992) ("[M]ost

led Professor Areeda to support the Supreme Court's conclusion that purely unilateral conduct falls outside of section 1 of the Sherman Act. Areeda believed that subjecting all such conduct to section 1 scrutiny would overburden the antitrust enforcement machinery and subject myriad business decisions to judicial scrutiny, without regard to the market share of the defendant.[329] Thus, any doctrinal distinction between unilateral conduct (including refusals to deal), on the one hand, and concerted action, on the other, would leave most conduct by monopolists beyond the scope of the supposedly presumptive purchaser welfare standard.[330] If there is a difference in the normative standard applied to unilateral conduct, on the one hand, and concerted action on the other, then the purchaser welfare standard would be the exception and not the rule—not the other way around—and an exception that would require additional justification.

2. *The Illusory Economic Distinction Between Unilateral Conduct and Concerted Action*

One should not lightly attribute such a bifurcated welfare standard to antitrust courts. After all, the Supreme Court has repeatedly stated that doctrinal distinctions under the Sherman Act should rest upon economic realities and not formalistic line drawing.[331] At times the Court has gone even further, holding that disparate treatment of economically similar conduct requires courts to overrule the decision

resources in a modern economic system are employed within firms . . . ."); *cf.* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771–77 (1984) (holding that conduct undertaken by single firm is "unilateral" and thus not "concerted" action subject to section 1 of Sherman Act).

[329] *See* AREEDA & HOVENKAMP, *supra* note 328, ¶ 1462a ("[S]ubjecting virtually every decision made within a firm to Sherman Act § 1 scrutiny would not only overtax the limits of our antitrust enforcement institutions, it would also involve judges and commissioners with the daily business decisions of every firm.").

[330] To be sure, the relative scarcity of concerted action by monopolists could in part reflect relatively lax treatment of unilateral conduct under section 2, which could induce monopolists to perform tasks internally they might otherwise have left to the market. *See* Alan J. Meese, *Intrabrand Restraints and the Theory of the Firm*, 83 N.C. L. REV. 5, 30–31 (2004) (explaining how relatively lax scrutiny of otherwise identical conduct can induce firms to integrate forward, thereby transforming activity that was once "concerted action" into "unilateral conduct").

[331] *See, e.g.*, Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 466–67 (1992) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law."); Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723–24 (1988) (stating that economic realities should define boundaries of per se rule, even if those realities require departure from long-established precedents); Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 47–58 (1977) (rejecting distinction between consignment and other agreements made by prior case law as formalistic and inconsistent with economic reality).

creating the anomaly.[332] Finally, the Court has perceptively noted that disparate treatment of similar forms of concerted and unilateral action may cause firms to integrate forward, foregoing more efficient concerted action simply to avoid more intrusive antitrust scrutiny.[333]

It is certainly possible to draw a *formal* line between unilateral conduct, such as refusals to deal and other conduct that hampers rivals. Yet there does not appear to be any economic substance supporting enhanced and more hostile scrutiny of the latter than of the former. Such a distinction may well have made sense fifty years ago, when neoclassical price theory and its workable competition model supplied the sole method for interpreting the causes and consequences of nonstandard agreements like exclusive dealing and tying contracts entered by monopolists. According to price theory and workable competition, individual firms made the economy's allocational decisions after observing relevant prices in input and output markets. A firm also realized technological efficiencies within its own boundaries, purchasing inputs in the spot market and transforming them into outputs.[334] At the same time, the workable competition model could not identify any beneficial purposes for concerted action between two or more firms, at least none that parties could not achieve via less restrictive means.[335] This intellectual milieu supported a judicial hostility toward exclusionary agreements that manifested itself in decisions such as *Grinnell* and *United Shoe*, both of which condemned nonstandard agreements entered by monopolists, without regard to any justifications the defendants might offer.[336]

The workable competition model's hostility toward nonstandard agreements could readily support a bifurcated approach to different forms of conduct alleged to be exclusionary. After all, if conduct not deemed competition on the merits *both* threatens purchaser welfare *and* only rarely produces benefits, then more searching scrutiny of

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[332] *See Sylvania*, 433 U.S. at 56–57 (holding that disparate treatment of consignment and other agreements resulting in territorial exclusivity required reconsideration of precedent creating such distinction).

[333] *See* State Oil Co. v. Khan, 522 U.S. 3, 16–17 (1997) (explaining that per se rule against concerted maximum price fixing had induced firms to integrate forward to avoid such scrutiny).

[334] *See* Oliver E. Williamson, The Economic Institutions of Capitalism 371 (1985) (explaining that, during this era, economists believed that "true economies take a technological form, [and] hence are fully realized within firms" and so, according to price-theoretic paradigm, "there is nothing to be gained by introducing nonstandard terms into market-mediated exchange").

[335] *See* Meese, *supra* note 63, at 115–19 (documenting and explaining applied price theory's hostility toward nonstandard contracts).

[336] *See supra* notes 198–218 and accompanying text (discussing workable competition theory and its impact on *Grinnell* and *United Shoe*).

such conduct can protect purchasers from harm without at the same time condemning conduct that might enhance purchaser welfare. If this is the case, then the cost of falsely condemning such conduct is very small indeed.[337]

A bifurcated approach makes far less sense, if any at all, given the advent of transaction cost economics (TCE) and its derivative theory of the firm.[338] TCE teaches that unilateral conduct—including competition on the merits—is itself the product of concerted action between potentially independent and fully autonomous individuals.[339] For instance, what antitrust treats as a single firm's decision to price above its costs but below those of its rivals is, according to TCE, an agreement between the firm's owners, who control the firm's property, and its employees, whom the owners contractually empower to sell the firm's property at a given price.[340] Such an agreement is, in economic substance, indistinguishable from an agreement between two vertically-related independent firms to reduce prices.[341] The same is true for a firm's decision to increase or decrease output.[342] Further, a firm's decision to advertise and promote its own products, but not those of its rivals, is also the result of such an agreement. Finally, a franchisor that integrates forward and then directs its outlets to purchase particular inputs does so pursuant to contracts between the

337 *See* Meese, *supra* note 63, at 124–34 (describing inhospitable case law during period). Put more technically, in these circumstances, the cost of false positives is low.

338 *See generally* WILLIAMSON, *supra* note 334 (describing TCE and its explanation of firm organization as means of reducing transaction costs); R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937) (same).

339 *See* Steven N.S. Cheung, *The Contractual Nature of the Firm*, 26 J.L. & ECON. 1, 1–5 (1983) (explaining that firm is simply nexus of contracts among individual factors of production); Coase, *supra* note 338, at 388 (same).

340 *See* Ill. Corporate Travel v. Am. Airlines, Inc., 806 F.2d 722, 727 (7th Cir. 1986) (analogizing minimum resale price maintenance agreements to managers of Sears telling employees what price to charge for goods); *see also* Coase, *supra* note 338, at 391 (explaining that firm is merely contract whereby employees agree to follow owner's instructions, within certain limits).

341 *Cf.* Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) (evaluating maximum resale price agreement between gasoline manufacturer and retailers); *see also* Frank H. Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886 (1981) (arguing for abandonment of per se invalidity of maximum price-fixing agreements).

342 *See* Chi. Prof'l Sports Ltd. P'ship v. NBA, 95 F.3d 593, 598 (7th Cir. 1996) (explaining that, under current law, "the producers of *Star Trek* may decide to release two episodes a week and grant exclusive licenses to show them, even though this reduces the number of times episodes appear on TV"); Ill. Corporate Travel v. Am. Airlines, Inc., 889 F.2d 751, 753–54 (7th Cir. 1989) (finding airline's ban on advertisement of discounted prices lawful per se because "travel service operators are the air carriers' agents"); *Ill. Corporate Travel*, 806 F.2d at 727 (explaining how contractual ban on price cutting by travel agents was analogous to "Sears . . . tell[ing] the managers of its stores what prices to charge").

firm's owners and those that operate its outlets.[343] Indeed, any time a firm other than a sole proprietorship without employees "acts" (or declines to act), it does so pursuant to agreements between participants in the venture—agreements that are always closely analogous to other arrangements that courts treat as concerted action.[344] What antitrust law treats as unilateral conduct is in fact the result of nonstandard agreements that devotees of purchaser welfare would subject to enhanced scrutiny.[345]

At the same time, TCE also explained that concerted action in the form of partial contractual integration could overcome "market failures" that unbridled rivalry would otherwise produce.[346] For instance, some have argued that exclusive territories ancillary to otherwise lawful ventures could prevent venture members from free riding on promotional expenditures by fellow venturers.[347] Thus, such restraints would ensure that independent dealers would replicate the amount and type of promotion that completely integrated firms would produce.[348]

Not all such agreements produce significant benefits. Nonetheless, there is very good reason to believe that, in fact, most nonstandard agreements are properly deemed beneficial or benign. As noted earlier, the firm itself is a sort of nonstandard contract, indeed, a nexus of nonstandard contracts.[349] Since most industries are unconcentrated or have low barriers to entry, it stands to reason that economic agents have adopted these arrangements for the purpose of

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343 *See* Paul H. Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, 21 J.L. & ECON. 223, 231–32 (1978) (criticizing antitrust intervention in franchising contracts because there is no economic distinction between franchisor-franchisee relationship and employer-employee relationship).

344 *See* Meese, *supra* note 330, at 57–64 (criticizing disparate treatment of "internal" firm conduct and agreements between firms); *cf.* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984) (conceding that activity within firm can be characterized as agreement between firm's various participants).

345 *See* Meese, *supra* note 330, at 59 ("As a result, what economists and antitrust scholars deem 'a firm,' capable of 'unilateral action,' is in fact a 'nexus of contracts' between various individuals that supply labor, capital, and other inputs in pursuit of an economic objective.").

346 *See* Meese, *supra* note 63, at 134–41 (explaining how partial contractual integration can overcome costs of relying upon atomistic competition to conduct economic activity).

347 *See* Bork, *Rule of Reason II*, *supra* note 73, at 430–38 (explaining how exclusive territories can encourage promotional expenditures by dealers by overcoming free rider problem).

348 *See* Bork, *Rule of Reason I*, *supra* note 56, at 434–35.

349 *See supra* notes 338–45 and accompanying text; *see also* Cheung, *supra* note 339, at 5–6 (explaining employment contract as organizational form that minimizes transaction costs).

minimizing costs—not to exercise market power.[350] To be sure, numerous nonstandard agreements bind two or more independent firms. Here again, however, there appears to be no evidence establishing or even suggesting that most such agreements arise in markets structured in a manner conducive to the acquisition or maintenance of market power. In fact, the vast majority of rule-of-reason claims fail for lack of proof that the restraint produces harm.[351]

Of course, where section 2 is involved, courts will not inquire into the effects—pro or con—of a monopolist's conduct unless the plaintiff first proves that, in fact, the defendant possesses monopoly power.[352] However, the mere fact that a defendant is a monopolist is no reason to assume that all or most of its practices reflect anything other than efforts to minimize costs. Even proponents of a purchaser welfare standard have conceded that firms may obtain and maintain a monopoly through benign conduct.[353] Indeed, as Herbert Hovenkamp has explained, even firms that become dominant by means of exclusionary conduct usually also engage in conduct that is procompetitive in some respects.[354] It is easier to maintain a monopoly if you are also selling an attractive product.[355] Thus, the mere fact that a monopolist

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[350] *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 22 (1979) (finding that fact that challenged restraint had also been adopted by firms without market power militated in favor of rule-of-reason scrutiny); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 221 (D.C. Cir. 1986) (Bork, J.) (holding that absence of market power by parties to challenged agreement requires inference that restraint produces benefits); *see also* Coase, *supra* note 338, at 394–95 (arguing that competition between market actors will result in optimal degree of contractual integration).

[351] *See* Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. Rev. 1265, 1268 (reporting that eighty-four percent of rule-of-reason cases studied in exhaustive survey failed at initial stage because of lack of proof of anticompetitive harm).

[352] *See* United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 380 (1956) (stating that proof of monopoly power is necessary to establish unlawful monopolization).

[353] *See supra* notes 101–04 and accompanying text (noting formative era assumption that efficient conduct could lead to at least temporary monopoly).

[354] Hovenkamp, *supra* note 88, at 197 ("It is usually very difficult for a nondominant firm to become dominant *simply* by doing anticompetitive things. In most cases such firms also have superior products or lower costs than their rivals, at least during the period when their monopoly is developing."). Indeed, in the *Microsoft* case, both the government and the courts had trouble distinguishing between the impact of plainly procompetitive conduct, such as product improvements and low prices, on the one hand, and exclusive dealing and tying contracts, on the other. Both categories of conduct tended to increase Microsoft's market share at the expense of Netscape's share. It has been suggested that Microsoft's efforts to thwart Netscape's so-called middleware strategy might have succeeded even absent any of the conduct that the courts found to be unlawful. *See* Meese, *supra* note 153, at 769–70.

[355] *Microsoft* may well provide an example of this phenomenon. While the firm may have engaged in anticompetitive conduct properly condemned under section 2, there is no dispute that the firm had also engaged in a significant amount of beneficial conduct. Indeed, when reviewing a consent decree proposed by the United States, the D.C. Circuit

has entered an exclusive dealing contract, for instance, is no reason to presume that the arrangement is anything other than a "normal" or "ordinary" practice that reduces costs.[356] Indeed, one proponent of a purchaser welfare approach to unilateral conduct has, in other contexts, explained that the existence of a concentrated market is simply one of several conditions necessary for a successful effort to raise the costs of one's rivals and thus acquire or protect market power.[357]

The insights offered by TCE would seem to undermine the case for the application of a more forgiving standard to competition on the merits and other unilateral conduct challenged under section 2. Like partial contractual integration, for instance, a unilateral refusal to deal can deprive a monopolist's rivals of key inputs. Both also presumptively produce significant benefits, and mistaken condemnation will injure purchasers in the relevant market as well as the rest of society. Moreover, there is no reason to believe that courts have any special competence in distinguishing harmful concerted action from that which produces benefits. Indeed, history is replete with instances in which courts—and even expert enforcement agencies—condemned agreements that likely produced benefits, often *in spite of* defendants' explanations of the restraints' beneficial consequences.[358] Thus, any disparate treatment of unilateral exclusionary conduct, on the one

emphasized that it did not disagree with the assertion by the United States that Microsoft had obtained its monopoly by means of lawful, procompetitive conduct. United States v. Microsoft Corp., 56 F.3d 1448, 1452 (D.C. Cir. 1995); *see also* Brief for Appellant United States at 4, *Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995) (Nos. 95-5037, 95-5039) ("[T]here was no basis for an antitrust challenge to Microsoft's acquisition of monopoly power in the market for operating system software for IBM-compatible personal computers . . . ."). Moreover, the government supported its assertion with an affidavit from Nobel Laureate Kenneth Arrow. *See* Declaration of Kenneth Arrow at 11, *Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995) (No. 95-5037), *available at* www.justice.gov/atr/cases/exhibits/2517.pdf ("Clearly, the six-fold growth in the installed base [of consumers using the Windows Operating System] is primarily the result of the extraordinary commercial success of the IBM-compatible PC platform, in which Microsoft's product development and marketing played a part.").

[356] *See supra* notes 340–50 and accompanying text.

[357] *See* Krattenmaker & Salop, *supra* note 34, at 253–66 (discussing numerous necessary conditions for sucessful strategy of raising rivals' costs).

[358] *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 602–08 (1972) (declaring horizontal division of territories ancillary to legitimate joint venture unlawful per se); *cf.* Brief for Topco Assocs., Inc. at 21–23, United States v. Topco Assocs., Inc., 405 U.S. 596 (1972) (No. 70-82) (explaining in intricate detail how restraints in question counteracted free riding (citing Bork, *Rule of Reason I*, *supra* note 56)); *see also* FTC v. Brown Shoe Co., 384 U.S. 316, 320–21 (1966) (finding that exclusive dealing contract involving only one percent of nation's shoe retailers offended "the central policy of . . . the Sherman Act" that all market segments be open to all competitors). Moreover, in some cases, defendants themselves may not be able to explain the rationale for the challenged conduct. *See* Easterbrook, *supra* note 9, at 5–6 (stating that defendants often do not know *why* given practice is successful, only that it is).

hand, and that which flows from concerted action, on the other, would seem to rest on "formalistic line drawing" and not on the respective economic consequences of such conduct.[359] Therefore, one would not expect well-considered section 2 doctrine to reflect disparate treatment of some forms of purported exclusion.

3. *The Supreme Court's Rejection of a Bifurcated Standard*

One need not rely upon these more theoretical arguments, however, to reject the "bifurcation" account of current law. It seems absolutely plain that courts, including the Supreme Court, have rejected the proffered distinction between unilateral conduct and concerted action. Put another way, the standards that courts apply to both sets of conduct entail a rejection of a purchaser welfare standard. If there were any doubt on this question, the Supreme Court resolved it in *Eastman Kodak Co. v. Image Technical Services, Inc.*[360] There, the defendant, with a market share of over ninety percent, allegedly employed tying contracts (concerted action) and refusals to deal (unilateral conduct) to maintain its monopoly share of the market.[361] The Supreme Court articulated the uniform standard governing the defendant's conduct as entailing two elements: "(1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[362] After finding that the plaintiffs had satisfied the first element by proving monopoly power, the Court fleshed out the second element of the offense, defining it as "the use of monopoly power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor.'"[363]

The Court then applied this standard in light of the evidence of tying and refusals to deal that the plaintiff had adduced in response to the summary judgment motion. The Court opined that the plaintiff's evidence would support a finding that "Kodak took exclusionary action to maintain its parts monopoly and used its control over parts to strengthen its monopoly share of the Kodak service market."[364] Given this conclusion, the Court said: "Liability turns, then, on

[359] *See supra* note 331 and accompanying text (collecting authorities for proposition that distinctions drawn by antitrust doctrine should not rest on formalistic line drawing).

[360] 504 U.S. 451 (1992).

[361] *Id.* at 456–58.

[362] *Id.* at 481 (quoting United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966)).

[363] *Id.* at 482–83 (quoting United States v. Griffith, 334 U.S. 100, 107 (1948)).

[364] *Id.* at 483.

whether 'valid business reasons' can explain Kodak's actions."[365] The Court reiterated this point in a footnote, citing *Aspen Skiing* for the proposition that a monopolist could refuse to deal with its rivals whenever "there are legitimate competitive reasons for the refusal."[366] *Aspen Skiing*, of course, had derived its test from the Areeda-Turner treatise.[367]

According to this Harvard-inspired valid business reasons test, undisputed proof that the refusals to deal and tying contracts produced significant benefits would have entitled Kodak to summary judgment.[368] This was so even though the plaintiff's evidence showed (and Kodak did not dispute) that the refusals and tying excluded the plaintiffs from the market and strengthened Kodak's monopoly "share of the Kodak service market."[369] The Court did not suggest that the finder of fact should balance any benefits of Kodak's conduct against the harms produced by such exclusion or the strengthening of its monopoly power. Nor did the Court suggest or imply that the analysis should turn on the conduct's impact on price.[370] Instead, the question was simply whether the restraint produced benefits.

The Court did add one caveat to the valid business reasons test, a caveat that actually confirms its implicit rejection of the purchaser welfare standard: In applying the test to the evidence that Kodak adduced, the Court employed a less restrictive alternative standard. Thus, even though Kodak brought forth evidence that its conduct produced some benefits, the Court nonetheless rejected Kodak's bid for summary judgment, because there was evidence that Kodak could have achieved the very same objectives by means of a less restrictive alternative.[371] Of course, the invocation of such an alternative depends upon an assumption that the benefits of the restraint necessarily coexist with its harms; otherwise there would be no reason to assume the restraint is "restrictive" and require the defendant to achieve these benefits via other means.[372]

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[365] *Id.* Ironically, the Court cited *Alcoa* for this proposition.

[366] *Id.* at 483 n.32.

[367] *See supra* notes 248–54 and accompanying text.

[368] *See Eastman Kodak*, 504 U.S. at 483–85 (discussing benefits that Kodak attributed to its conduct).

[369] *Id.* at 483.

[370] *Cf.* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 114 (1984) (holding that benefits purportedly produced by restraint did not counterbalance harms for purposes of section 1 rule-of-reason analysis given factual finding that restraint resulted in prices higher than they otherwise would have been).

[371] *See Eastman Kodak*, 504 U.S. at 484–86.

[372] Meese, *supra* note 153, at 761; *see also* Meese, *supra* note 63, at 168 ("An assertion that alternatives are more competitive depends upon the assumption that the restraints in question actually injure competition in the first place.").

Still, despite this assumption that any benefits coexist with harms, the Court nonetheless eschewed balancing, making it plain that proof of benefits that could *not* be achieved in some other way would entitle Kodak to judgment in its favor. Such an approach stands in stark contrast to that employed in the section 1 context, where courts often at least say that they will "balance" or "weigh" any of a restraint's benefits against its harms.[373] Thus, *Eastman Kodak* cannot be squared with a purchaser welfare balancing test.

Lower courts have repeatedly employed a *Kodak*-like standard when evaluating alleged exclusionary agreements. Consider the Third Circuit's recent decision in *United States v. Dentsply International, Inc.*[374] There the United States challenged a series of exclusive dealing contracts under section 2 of the Sherman Act. The Third Circuit found that the defendant possessed a monopoly and that the challenged agreements had "a significant effect in preserving [the defendant's] monopoly."[375] The court repeated its earlier assertion that the defendant could nonetheless prevail if it established a "business justification."[376] The court did not mention any requirement that the benefits of the justified behavior outweigh the harms produced by the restraint or that the restraint result in any particular price level.[377]

B. Microsoft

What, though, about the *Microsoft* decision,[378] which some cite as evidence for a purchaser welfare balancing test?[379] There the United States challenged numerous tactics that Microsoft employed to disadvantage Netscape, then the leading seller of Internet browsers. Such tactics included tying agreements, primary dealing contracts, and a policy of giving Microsoft's browser away for free.[380] After affirming the trial court's finding that Microsoft possessed monopoly power, the D.C. Circuit went on to articulate "a general rule for distinguishing

[373] *See, e.g.*, Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998) ("[T]he harms and benefits must be weighed against each other in order to judge whether the challenged behavior is, on balance, reasonable." (citing Phillip E. Areeda, Antitrust Law ¶ 1502 (1986))). *But see infra* note 404 (noting that more than ninety percent of rule-of-reason cases involve no balancing whatsoever).

[374] 399 F.3d 181 (3d Cir. 2005).

[375] *Id.* at 191.

[376] *Id.* at 196.

[377] *Id.* at 196–97; *see also* Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 786–88 (6th Cir. 2002) (articulating defense for legitimate business justification); Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 189–91 (2d Cir. 1992) (same).

[378] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

[379] *See, e.g.*, Salop, *supra* note 3, at 333–34.

[380] *See Microsoft*, 253 F.3d at 58–78 (describing and evaluating various challenged practices).

between exclusionary acts, which reduce social welfare, and competitive acts, which increase it."[381] According to the court, sections 1 and 2 of the Sherman Act each implement "similar" standards of liability.[382] The court then articulated a test similar in form to that employed under section 1 of the Sherman Act.[383] That is, once a plaintiff makes out a prima facie case that the challenged conduct is exclusionary, the burden shifts to the defendant to "proffer a 'procompetitive justification' for its conduct."[384] Such a justification, the court said, would require a "nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal . . . ."[385] If the defendant does assert such a benefit, the court said, the burden shifts back to the plaintiff to rebut that claim.[386] If the plaintiff cannot rebut that claim (that is, if the defendant's conduct in fact produces some benefits), then the plaintiff bears the burden of showing that "the anticompetitive harm of the conduct outweighs the procompetitive benefit."[387] The balancing test that courts employ under section 1 of the Act at least purports to condemn restraints that reduce purchaser welfare, leading some to claim that *Microsoft* meant to employ a similar normative premise under section 2.[388]

As an initial matter, the D.C. Circuit has no authority to reject the standard announced in *Eastman Kodak* and *Aspen Skiing*, even if it believes that standard to be incorrect and that the Supreme Court itself would abandon that standard upon further examination.[389] In any event, nothing in the *Microsoft* decision implies the embrace of a purchaser welfare standard to the exclusion of a total welfare standard. To be sure, the opinion speaks of balancing anticompetitive harms against procompetitive benefits. In this sense, the opinion departs from *Eastman Kodak*, *Aspen Skiing*, and other decisions that eschew such weighing of costs and benefits.[390] However, the language in question may technically be dicta, since the court did not actually engage in such balancing even though it evaluated numerous allegedly

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381 *Id.* at 58.

382 *Id.* at 59.

383 *Id.*

384 *Id.* (citing Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 483 (1992)).

385 *See Microsoft*, 253 F.3d at 59.

386 *Id.*

387 *Id.*

388 *See* Salop, *supra* note 3, at 333–34 (arguing that D.C. Circuit adopted purchaser welfare balancing test in *Microsoft*).

389 *See* State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (stating that lower courts should adhere to Supreme Court precedents even if they believe Court will reverse itself).

390 *See supra* notes 248–67 and accompanying text.

exclusionary practices.[391] Moreover, a standard requiring the weighing of costs against benefits simply raises the question of how exactly to define and measure these competing effects. Under a total welfare approach, for instance, the finder of fact would balance the benefits produced by the conduct against the harm in the form of any dead-weight allocative loss produced by enhanced market power.[392] A purchaser welfare approach, by contrast, would entail balancing the efficiency effects of the restraint against any reduction in purchaser welfare caused by market power, focusing on the price resulting from the challenged activities.[393]

While the *Microsoft* court was not entirely clear on this question, the opinion seemed to take a total welfare approach.[394] For one thing, the court began its discussion of the definition of "anticompetitive conduct" by endorsing the safe harbor for the creation of a "superior product, business acumen, or historical accident," without balancing the benefits of such conduct against harms or otherwise seeking to determine the impact of such conduct on the welfare of purchasers.[395] The Court also quoted, with approval, the dicta from *Alcoa* to the effect that "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."[396] Moreover, the court described its task—and that of any antitrust court—as "distinguishing between exclusionary acts, which reduce *social* welfare, and competitive acts, which increase it."[397] To be sure, the court held that proof of an anticompetitive effect requires proof that a practice "harm[s] the competitive process and thereby harm[s] consumers."[398] Such proof, however, was merely a *necessary* condition for liability, sufficient only to establish a prima facie case.[399] Defendants could rebut such a case, the court said, by proving that the conduct was in fact "a form of competition on the merits because it involves, for example, greater efficiency *or* enhanced consumer appeal . . . ."[400] Even if the defendant

391 *See* Gavil, *supra* note 8, at 22–23 (arguing that *Microsoft* court did not engage in balancing when analyzing Microsoft's conduct).

392 *See supra* notes 25–30 and accompanying text.

393 *See supra* notes 31–34 and accompanying text.

394 *See* Hovenkamp, *supra* note 3, at 153 (opining that *Microsoft* formulation, while "elaborate . . . is also fairly unfocused, in that it does not specify criteria for harm to competition or the competitive process"); Gavil, *supra* note 8, at 23 ("*Microsoft* offers little specific guidance on how [the] balance should be struck.").

395 *See* United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001).

396 *Id.* at 58 (quoting United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945)).

397 *Id.* (emphasis added).

398 *Id.* (emphasis omitted).

399 *See id.* at 58–59.

400 *Id.* at 59 (emphasis added).

proves such benefits, the plaintiff could still prevail by proving that the restraint's harms outweigh its benefits.[401] Nowhere does the court define "harm" for this purpose as harm to purchasers in the relevant market, nor does it equate the "social" welfare expressly embraced by the opinion with the welfare of purchasers in the relevant market—a mere subset of society. Indeed, the court's reference to a rebuttal based upon enhanced efficiency without regard to whether such efficiencies were passed on to consumers would seem to reflect a total welfare standard. In short, there is little evidence to support the claim that the *Microsoft* court somehow departed from the Supreme Court's focus on total welfare.

Finally, section 1's seeming reliance on a purchaser welfare standard does not compel a different result. *Microsoft* itself merely opined that its test was "similar" to that employed under section 1.[402] And even under section 1, actual balancing is rare indeed. Data suggest that most rule-of-reason cases fail because plaintiffs cannot prove that the challenged restraint produces harm in the first place.[403] Even when plaintiffs succeed in making out a prima facie case of harm, balancing is still exceedingly rare; proof that a restraint produces benefits that could not be achieved in a different manner nearly always entitles the defendant to judgment.[404]

In any event, recognition that courts have embraced different normative standards under sections 1 and 2 respectively does not thereby establish that the standard currently articulated (but almost never applied) under section 1 should prevail. One might just as well assert that section 2's standard, including its safe harbor for "normal" conduct, should control. This was, after all, the test originally announced under the rule of reason.[405] Further, if, as suggested earlier, most economic activity is in fact unilateral in nature, and therefore not subject to section 1, the total welfare standard currently governs most business behavior. Perhaps this Article's conclusions

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[401] *Id.*; *see also id.* at 67 ("The plaintiff bears the burden not only of rebutting a proffered justification but also of demonstrating that the anticompetitive effect of the challenged action outweighs [the procompetitive benefits].").

[402] *See id.* at 59.

[403] *See* Carrier, *supra* note 351, at 1268 (reporting after exhaustive survey that eighty-four percent of rule-of-reason cases fail for lack of proof of anticompetitive harm); *see also* Krattenmaker & Salop, *supra* note 34, at 278 (asserting that consideration of efficiencies under rule of reason generally entails "subjecting assertions of anticompetitive effects to close scrutiny," not balancing).

[404] Carrier, *supra* note 351, at 1267–68, 1272–73, 1349–57 (reporting that only four percent of rule-of-reason cases, in sample of nearly five hundred cases, entailed actual balancing of harms against benefits and reporting that only one rule-of-reason case in previous four years entailed actual balancing of harms and benefits).

[405] *See supra* notes 59–75 and accompanying text.

about the source and durability of section 2's total welfare standard should cause courts to reassess their apparent commitment to protecting purchasers instead of society in that small subset of cases governed by section 1.

Conclusion

Before offering to reform the law, one first needs to know what the law *is*. Several antitrust scholars and lawyers have recently argued that the case law under section 2 of the Sherman Act reflects a purchaser welfare approach to antitrust—that is, an effort to maximize the welfare of those individuals who happen to purchase in the market purportedly monopolized by the defendant. Some of these same scholars claim that support for the alternative total welfare account originated with the Chicago School of antitrust analysis and that only Chicagoans support such a standard.

The choice between these two competing normative premises is of significant practical import. Selection of a total welfare standard implies a safe harbor for competition on the merits and any other conduct that makes economic sense separate and apart from any expectation of acquiring or maintaining monopoly power. Conversely, embrace of a purchaser welfare standard would entail application of a consumer welfare balancing test. Under this test, courts would balance any benefits produced by a challenged practice against its harms, judged by the impact of the challenged practice upon the welfare of purchasers in the relevant market. Thus, a practice that enhanced the overall welfare of society would nonetheless be unlawful if it reduced the welfare of purchasers in the relevant market.

This Article has sought to demonstrate that section 2 doctrine as it currently stands reflects a total welfare approach to antitrust law. Indeed, no decision of which the author is aware has embraced a purchaser welfare approach to section 2. As a result, embrace of a purchaser welfare standard would call into question numerous decisions and resulting legal rules designed to maximize society's welfare—decisions on which myriad firms and individuals have relied.

This commitment to maximizing total social wealth is not a recent phenomenon associated with the Chicago School. Instead, the total welfare standard is deeply rooted in section 2 law, tracing its origin to the formative era of antitrust law. Furthermore, some scholars have overstated the role of Robert Bork and the Chicago School in developing the total welfare approach. Instead of Chicago, it was the Harvard School of antitrust analysis, steeped in neoclassical price theory, that led the charge for a total welfare approach to antitrust generally and under section 2 in particular, beginning in the 1950s. Since that time, courts have relied upon the work of Harvard scholars to justify the application of section 2 tests that reflect a total welfare standard to various forms of conduct. Such an approach is not limited to competition on the merits or unilateral conduct more generally, but instead applies across the board to nonstandard contracts such as exclusive dealing and tying as well. Finally, even if a purchaser welfare standard were to supply a better account of the original meaning of the Sherman Act, considerations of stare decisis counsel strongly against jettisoning the total welfare standard. Those who would undo this modern consensus bear the heavy burden of explaining why so many have been so wrong for so long.