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Antitrust, Regulatory Harm, and Economic Liberty

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Antitrust, Regulatory Harm, and Economic Liberty

Alan J. Meese

I. Nachbar’s “Constitutional” Approach: Banning Regulatory Restraints


III. The Contending Approaches and Current Law

CONCLUSION

I. Nachbar’s “Constitutional” Approach: Banning Regulatory Restraints

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

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3. Robert H. Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 54 HASTINGS L.J. 65, 93–96 (1982) (arguing that legislative history of the Sherman Act demonstrates concern with harm to purchasers, not allocative...
Thomas Nachbar articulates a fourth organizing principle for antitrust, what he calls a “Constitutional” approach to the subject.\footnote{Thomas B. Nachbar, The Antitrust Constitution, 99 IOWA L. REV. 57 (2013).} In particular, Nachbar contends that the Sherman Act mirrors the Constitution’s own prohibition on legislative delegation of regulatory authority to private parties.\footnote{See id. at 88–92.} Using the National Industrial Recovery Act as an example, Nachbar claims that delegating the state’s authority to private parties to determine the content of regulation deprives regulated individuals and firms of their liberty without due process of law, contrary to the Fifth Amendment.\footnote{See Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935) (rejecting argument by the United States that reliance on private industry to write Codes of Fair Competition thereby rendered delegation harmless). Nachbar also invokes the 1935 Bituminous Coal Act, which the Court also struck down, as exemplifying such an inappropriate delegation. Nachbar, supra note 4, at 82–88; see also Carter v. Carter Coal, 298 U.S. 238 (1936). Similar delegations, it should be noted, took place before the Depression. See Alan J. Meese, Competition Policy and the Great Depression: Lessons Learned and a New Way Forward, 23 CORNELL J.L. & PUB. POL’Y 255 (2013) (describing “codes of fair competition” imposed during the 1920s by the Federal Trade Commission after consulting with industry representatives at so-called “trade practice conferences”).} In the same way, he says, courts should read the Sherman Act to ban contracts (and other conduct) that restrain individual liberty and thus produce what he calls “regulatory harm.”\footnote{Nachbar, supra note 4, at 69.}

Of course, the Sherman Act does not implement the Due Process Clause, which, by its terms, applies only to “state action.”\footnote{See generally DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs., 489 U.S. 189 (1989); The Civil Rights Cases, 109 U.S. 3 (1882).} While state definition and enforcement of property and contract rights is necessary for markets to function, the Act is an exercise of the Commerce Power and not Section 5 of the Fourteenth Amendment.\footnote{See The Civil Rights Cases, 109 U.S. at 11 (explaining that Section 5 of the Fourteenth Amendment “does not authorize Congress to create a code of municipal law for the regulation of private rights but to provide modes of redress against the operation of State laws, and the action of State officers”); see also Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 (1940) (“The addition of the words ‘or commerce among the several States’ . . . was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes . . . .”).} Still, Nachbar contends that some private conduct can produce the same “regulatory harms” as official deprivations of liberty backed by public force and thus is an appropriate object for public intervention via legislation.\footnote{Nachbar, supra note 4, at 93–95.} More precisely, he draws a common sense distinction between economic conduct that is “proprietary,” on the one hand, and that which is “regulatory,” on the other. Proprietary conduct, he says, entails at its core a firm’s disposition of its own property
and includes setting the price for such disposition.\textsuperscript{11} By contrast, regulatory conduct entails contracts that by their terms restrict the manner in which one’s trading partners deal with their own property.\textsuperscript{12} A classic example of regulatory conduct is a tying contract, whereby the seller of one product (the tying product) obtains an agreement from the purchaser to purchase an additional, distinct item (the tied product) from the same seller.\textsuperscript{13} Such an agreement, it is said, “regulates” the purchaser’s use of his or her own property—including apparently, the money he or she would use to purchase the tied product—and thus restricts the purchaser’s freedom of choice with respect to property that the seller of the tying product never owned.\textsuperscript{14} Between these two polar opposites, conduct that is plainly proprietary and that which is plainly regulatory, stands conduct that shares attributes of both and is thus more ambiguous.\textsuperscript{15} To determine which position on the spectrum a restraint occupies, Nachbar says courts should measure the “distance” between the “ownership” of a defendant’s property, on the one hand, and the control exercised by the restraint.\textsuperscript{16}

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

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

\textsuperscript{12} Id.

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

\textsuperscript{14} Nachbar, supra note 4, at 100.

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

\textsuperscript{16} Id. at 71.

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

\textsuperscript{18} See id. at 73–74; see also BORK, supra note 1, at 263–79 (treating cartel price fixing as a quintessential example of conduct that an efficiency-based standard should condemn).
says, such restraints nonetheless restrict private choice and thus liberty in the same way as analogous public regulation written by private parties. By banning such contracts, then, the Sherman Act, properly interpreted, can further constitutional values and enhance individual liberty. Nachbar does not deny that, like some public regulation, such “private regulation” can enhance the allocation of resources and thus increase total welfare. Nonethe- 
ness, he contends that an antitrust regime based solely upon efficiency, while maximizing total economic welfare, will not maximize personal liberty, a value that competes with efficiency.

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

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

20. Nachbar, supra note 4, at 60.


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

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

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25. Nachbar, supra note 4, at 68–69 (explaining how even a commission-fixing agreement between two realtors in New York City is unlawful per se).

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

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

28. See Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 758–60 (“Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit.”); see also BORK, supra note 1, at 269 (explaining that once courts define price fixing as unlawful per se, “[v]ery few firms that lack power to affect market prices will be sufficiently foolish to enter into conspiracies to fix prices. Thus, the fact of agreement defines the market”).

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

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


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

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

33. See Nachbar, supra note 4, at 65–66 (quoting 21 CONG. REC. 2461 (remarks of Sen. Sherman)).
Section 1. One can find apparent references to similar concerns in the pre-Sherman Act common law.

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

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

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


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

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

Id. at 75 (footnotes omitted). Unlike Nachbar, I doubt that Topco is still good law after NCAA v. Bd. of Regents of the Univ. of Okla., 488 U.S. 85, 100–04 (1984) (explaining that horizontal restrictions in one portion of the market could enhance competition in other portions of the market and that such restrictions should be analyzed under the Rule of Reason); see also Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 226, 228–29 (D.C. Cir. 1986) (explaining that decisions such as NCAA overruled Topco sub silentio).

38. Rothery Storage, 792 F.2d at 225.
provided that members would not sell products made or distributed by the venture in other members’ territory.39

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

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

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

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

39. *Id.*
41. *See id.* at 610.
42. *See id.* It should be noted that the brief of the United States echoed similar themes. For instance, the government analogized the restraints before the Court to barriers to entry and contended that State-imposed barriers were more legitimate. See Brief for the United States of America at 26, *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972) (No. 70-82).
43. *Topco*, 405 U.S. at 611 (“If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions . . . .”); *see also* Parker v. *Brown*, 317 U.S. 341 (1943) (sustaining California’s imposition of cartel-like output restrictions as consistent with the Sherman Act and dormant commerce clause).
would restrict individual liberty, including liberty of contract, without the minimum accoutrement of legislative due process. The defendants in *Schechter Poultry* (and, for that matter, their employees and customers) learned this the hard way when the United States indicted them on 60 counts of violating the “Live Poultry Code.” Such violations included, for instance, failing to pay minimum wages, allowing employees to exceed maximum hours, failing to report prices to the code authority, and allowing customers to select individual chickens instead of forcing purchasers to take bad chickens with the good. A political society that enforced such legislation banning harmless cooperation between its citizens at the behest of other private parties would too closely resemble the State of Nature that man left to protect his liberty and property from arbitrary deprivations by brutish force. Purely private conduct that works the same deprivation of liberty, it would seem, should be just as unlawful.

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

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

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

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

47. See *supra* text accompanying notes 36–39.
deprivations by the State.48 There is no reason to expect that the Topco Court had any appreciation for whatever conception of liberty informed the Sherman Act.

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

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


50. Id. at 34–35.


52. Id. at 581–82.


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

55. See id. at 192, 180–84; see also id. at 190 (“It is the right and privilege of any man to engage in the commission business at the Kansas City stock yards, or, having so engaged in that business, it is his right to continue. A combination whose efforts are directed to prevent him from transacting such business is one which the law will not tolerate.”) (citing The Slaughterhouse Cases, 83 U.S. 56 (1873); Barr v. Essex Trades Council, 53 N.J. Eq. 101, 127 (1894); Temperton v. Russell, (1893) 1 Q.B. 715 (Eng.).
The Court rejected this argument in a unanimous opinion by Justice Peckham. Peckham conceded that statutes imposing similar restrictions on freedom of action may well infringe liberty of contract. He also conceded that such contracts might “greatly restrain[] and limit[]” the autonomy of the parties. However, he rejected any automatic parallel between the sort of public regulation hypothesized by the government, on the one hand, and contractual restraints, on the other. After all, he said, the “liberty” of a citizen to send as many solicitors as he might wish into another territory included the liberty “to curtail that right . . . for what he thinks good reason.” So long as such agreements were voluntary, he said, the agreements found shelter in liberty of contract. This shelter applied no matter how much they restrained the autonomy of the parties, unless they directly restrained interstate commerce and thus produced the sort of economic harm (not regulatory harm) that would justify regulation. Applying this standard to the restrictions before the Court, Peckham determined that that the restraints in question were merely indirect restraints. Thus, the agreements did not violate the Sherman Act, despite the extent to which they restrained the parties’ autonomy.

Other formative era decisions reached similar results. For instance, when challenging the Addyston Pipe cartel, the United States sought to rebut the defendants’ invocation of liberty of contract by analogizing the bid-rigging agreement before the Court to the worst form of private control over others, namely, human slavery and the sort of “liberty” advocated by Stephen Douglas before the Civil War. In another unanimous opinion by Peckham,
the Court rejected the defendants’ claim that direct restraints of interstate commerce found shelter in liberty of contract, noting that such restraints could have the same impact on interstate commerce as analogous (direct) restraints imposed by states.\(^{63}\) He also determined that the restraints were in fact direct. In so doing, he rejected the defendants’ claim that the prices set by the cartel were reasonable, invoking factual findings below by William Howard Taft, that the restraints had resulted in prices 25% above cost plus a reasonable rate of return, with the result that “the effect of the combination was to enhance prices beyond a sum which was reasonable.”\(^{64}\)

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

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

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

\(^{63}\) See Addyston Pipe, 175 U.S. at 229–30. 

\(^{64}\) Id. at 235–38. 

\(^{65}\) Id. at 244–45. 

\(^{66}\) Id. at 245. 

\(^{67}\) Id. 

\(^{68}\) Id. (emphasis added). 

\(^{69}\) See Meese, supra note 48, at 37–42, 73–74, and 76–77 (discussing state supreme court and lower federal court decisions evaluating “liberty from contract” arguments). 

\(^{70}\) Shortly before Hopkins, of course, the Court announced, again unanimously, that the Due Process Clause of the Fourteenth Amendment protects private liberty of contract against
Moreover, as a normative matter, the logic of both decisions on this point appears entirely sound and would require a different result and rationale in *Topco*. No one compelled any member of Topco to join the association or compelled the association to promulgate the licensing provisions that effectively granted members exclusive territories. On the contrary, the district court found, and the Supreme Court did not dispute, that members demanded such territorial exclusivity as a condition of entering the venture in the first place.\textsuperscript{71} The same district court found that there was good reason for such demands, namely, without such exclusivity, individual Topco members would not be able to capture the benefits of promotional investments.\textsuperscript{72} Absent such investments, the court found (again without contradiction by the Justices) that Topco's private label products would be at a competitive disadvantage vis-à-vis private label products sold by integrated chain stores like Safeway and A & P.\textsuperscript{73}

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

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


\textsuperscript{72} Id. at 1040–42.

\textsuperscript{73} Id. at 1045 (“[T]he relief which the government here seeks [, voiding the exclusive territories,] would not increase competition in Topco private label brands but would substantially diminish competition in the supermarket field. The antitrust laws are certainly not intended to accomplish such a result. Only the national chains and the other supermarkets who compete with Topco members would be benefitted. The consuming public obviously would not.”).

\textsuperscript{74} See F.A. Hayek, THE CONSTITUTION OF LIBERTY 11–21 (1960).
contract.\textsuperscript{75} Such limitations, if voluntarily entered, do not thereby reduce the sort of liberty that a free society values. Moreover, as the Hopkins Court recognized, true freedom, whether the freedom to speak, worship, work, or marry, includes the freedom to refrain from any of these activities.\textsuperscript{76} Indeed, in the term preceding the Court's decision in Hopkins, Peckham explained, again for a unanimous Court, that the “liberty” protected by the Due Process Clauses included the right of persons to enjoy all of his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.\textsuperscript{77}

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

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

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

\textsuperscript{77} Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

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

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

\textsuperscript{80} See R.H. Coase, The Nature of the Firm, 4 ECONOMICA 386, 391 (1937) (explaining that the business firm is in fact a special form of contract pursuant to which employers are authorized to dictate employees actions “within certain limits”); see also, e.g., Ill. Corporate Travel Inc. v. Am. Airlines, Inc., 806 F.2d 722, 724–25 (7th Cir. 1986) (“Employment relations do not violate the antitrust laws; Sears may tell the managers of its stores at what price to sell lawn mowers.”).
Other restraints that Nachbar identifies as producing “regulatory harm” are equally voluntary and thus further the liberty of the parties. Take cartel agreements, which Nachbar offers as another quintessential example of harmful private regulation, given the distance between the property owned by each member and the type of regulatory “control” exercised over the liberty and property of others. Certainly legislative imposition of prices and output would infringe upon the economic liberty of industry participants. Indeed, courts once denied states the power to “fix prices” via regulatory fiat, unless the industry in question was “affected with a public interest.”

However, while courts still call cartel agreements “price fixing,” such nomenclature cannot obscure the fact that such agreements are, without more, purely voluntary and presumably enhance the joint welfare of the parties to them. An antitrust policy concerned with these parties’ “liberty” then, would seem to require a “hands off” approach to such agreements. The same conclusion is true for many tying contracts, even those imposed by firms with market power. Nachbar concedes that most such agreements are efficient. If so, then presumably such agreements, which arise in low transaction cost settings, are the result of purely voluntary contractual integration, unlike, for example, the coerced block booking imposed by Schechter’s Live Poultry Code.

As a result, enforcement of such restraints, like enforcement of the restraints in Topco, will enhance the liberty of the parties, who have exercised that liberty in cooperation with others exercising their own. It is no surprise then that, during the Lochner era, the Supreme Court characterized tying agreements as resulting from “the right of the individual to exercise reasonable discretion in respect of his own business methods” and read the Federal Trade Commission Act so as not to ban such restraints, which it found necessary “[i]f real competition [was] to continue.”

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

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

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

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

III. THE CONTENDING APPROACHES AND CURRENT LAW

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

Take the distinction between unilateral pricing by a monopolist, on the one hand, and naked price fixing agreements, on the other. The former is, 86. See Meese, supra note 82, at 61–66 (describing three different types of market failures that voluntarily obtained tying contracts can overcome).
87. Namely, higher prices, reduced output or reduced quality. See Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 58 (1911); see also Alan J. Meese, Price Theory, Competition, and the Rule of Reason, 2003 U. ILL. L. REV. 77, 84–89.
88. See Alan J. Meese, Standard Oil as Lochner’s Trojan Horse, 85 S. CAL. L. REV. 783, 787 (2012).
without more, lawful per se, no matter how strong the monopoly, how high
the price, and how much allocative harm results. Moreover, the latter is
unlawful per se, even if the parties to the agreement have a miniscule
collective share of a market characterized by easy and free entry, and even if
the agreement produces no allocative harm (aside from the wasted
transaction costs of negotiating and enforcing the agreement). Strange as
this distinction may seem at first blush, there are very sound administrative
and efficiency reasons for it unrelated to any concerns about regulatory
harm or the lack thereof. To begin with, any efficiency-based ban on
monopoly prices would require a court to ascertain whether the challenged
price is above-cost and thus inefficient at a particular moment in time.
Moreover, any such determination would be subject to constant revision as
market conditions bearing upon the efficient price changed. By contrast, an
outright ban on any and all price fixing agreements requires no such
reasonable price determination and no continuing regulatory oversight.
That, as William Howard Taft explained, is one of the virtues of such a per
se rule, given that the alternative would force judges to “set sail on a sea of
doubt” and base their determinations of reasonableness upon shifting and
controversial views of political economy, e.g., whether some industries
(perhaps those characterized by innovation that produces positive
externalities) should be entitled to higher returns than others.89 Simply put,
where unilateral conduct is concerned, there is no apparent legal rule
analogous to a per se ban on price fixing agreements between two
independent entities accompanied by integration. Then-Judge Breyer was
absolutely correct when he explained that, despite its common law
flexibility, antitrust law simply cannot always force firms to replicate the
price and output that an omniscient social planner would require.90

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

89. See United States v. Addyston Pipe & Steel Co., 85 F. 271, 284 (6th Cir. 1898), aff’d,
175 U.S. 211 (1899).
90. See Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983)
(“[W]hile technical economic discussion helps to inform the antitrust laws, those laws cannot
precisely replicate the economists’ (sometimes conflicting) views . . . . Rules that seek to
embody every economic complexity and qualification may well, through the vagaries of
administration, prove counter-productive, undercutting the very economic ends they seek to
serve.”).
91. United States v. Aluminum Co. of Am., 148 F.2d 416, 432 (2d Cir. 1945).
mousetrap or realizing economies of scale and underpricing rivals without pricing below cost. Sometimes, of course, firms gain monopoly by means of unlawful exclusion. But firms rarely gain and maintain such power via unlawful exclusion alone. As Herbert Hovenkamp has explained, firms that obtain or maintain monopoly unlawfully have generally engaged in much welfare-enhancing conduct at the same time. The Microsoft case provides a perfect example of this phenomenon in two different ways. First, even the United States, which would later obtain a judgment against the firm for unlawful monopolization, admitted that Microsoft had acquired its monopoly by creating and producing a superior product. Second, while the courts found that Microsoft had maintained its monopoly unlawfully, none doubted that the firm had simultaneously engaged in various forms of procompetitive conduct, such as vastly improving the quality of its internet browser and vigorously encouraging distribution of the same through various lawful means, conduct that also tended to maintain the firm’s monopoly.

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

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

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

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


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

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

At the same time, important facets of antitrust law contradict Nachbar’s normative premise. For instance, according to Nachbar’s logic, all tying contracts should be unlawful per se, because of the great regulatory distance.
between the tying product, on the one hand, and the control that such contracts exercise over the purchaser’s decisions, on the other. However, that has never (quite) been the law. Even at the height of the inhospitality era, the Supreme Court declared that ties obtained by firms without market power escaped per se condemnation. To be sure, the Court defined “market power” quite liberally, equating any departure from perfect competition with such power for a few decades. However, the Court backtracked from this approach over three decades ago, holding that a plaintiff seeking to invoke the per se rule must establish what some call structural market power, that is, more than mere product differentiation. As the law currently stands, most ties survive per se condemnation, contrary to the predictions of Nachbar’s normative premise.

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

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


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

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

CONCLUSION

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

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

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

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

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