17

COMPETITION AND COMPETITION LAW IN THE CLASSICAL LIBERAL TRADITION

Geoffrey A. Manne and Lazar Radic

17.1 Introduction

It is often assumed that the creation and protection of competitive markets, whenever possible, is a central tenet of classical liberalism and that antitrust laws are an essential feature of a classical liberal political economy (West, 1976, pp. 23–24, 185).[1] The logic behind this proposition is that monopolization and cartelization produce private gains for their participants while resulting in deadweight loss: lower output, higher prices, and a general decline in overall wealth and productivity (Williamson, 1968). But that cannot be the end of the story. Remedies to guard against these risks are both costly and (often) erroneous, thus deterring beneficial conduct, as well. This unavoidable trade-off makes it unclear what concrete legal and policy prescriptions classical liberalism prescribes to maintain, protect, and promote competition—if any. As a result, classical liberal ideals have been invoked to justify deeply opposed policies: from antitrust abstentionism (Smith, 1983, pp. 23–33, 28) to aggressive trustbusting (Jones et al., 2019, p. 4; Mogin, 2008).

This chapter aims to elucidate this perennial but still elusive question. It is structured as follows.

Section 17.2 argues that there are different conceptions of competition in classical liberalism, leading to different policy proposals. It contends that competition is better viewed as a discovery process—which gradually but systematically pushes back the boundaries of ignorance—than a static state of equilibrium in which atomistic sellers offer a standard array of products to a determinate group of buyers. The unpredictable path of innovation better reflects the classical liberal insight about the limits of human omniscience and the use of decentralized market forces to coordinate human activities, whether by individuals or firms.

Section 17.3 argues, however, that the recognition that competition is valuable—either as leading to equilibrium or as a discovery process—does not automatically mean that a specific law protecting or abetting competition is necessary or justified. Instead, it is necessary to consider the government's ability to effectively realize its policy aims, given enforcers' limited knowledge and the legitimacy of doing so in light of the centrality of individual rights. Given knowledge constraints and the absence of any general duty to use private property wisely or efficiently, the direct enforcement of competition law should be considered a last

DOI: 10.4324/9781003276784-17

resort, not an initial move, to be applied only when lesser measures such as the removal of government-created barriers to trade and the nonenforcement by courts of illegal restraints are found wanting. Positive antitrust law should follow only from the insufficiency of these prescriptions.

After building a plausible classical liberal case for antitrust in the abstract, Section 17.4 explores how that law should be structured to distinguish procompetitive from anticompetitive conduct effectively. As a rule, classical liberal antitrust law should not be committed monolithically to identifying some purportedly optimal mix of goods and services of society but should instead make sure that commercial processes are correctly monitored so that this outcome can be produced (or at least furthered) by decentralized actions. We argue that consumer- or total-welfare furnishes the preferred standard so long as the law's enforcers are appropriately limited by the unavoidable limits of human knowledge and the costs of erroneous intervention. Ultimately, no matter how the different versions of the consumer/total-welfare standard play out, caution is the overarching norm because, in antitrust, "error costs are high, even for the best approach" (Epstein, 2003, p. 131). Against this background, we argue that a classical liberal antitrust law should naturally prefer type II (false negative) over type I (false positive) errors. Section 17.4 observes that, even with these utilitarian calculations, the value afforded to negative freedom in classical liberalism militates, ceteris paribus, in favor of nonintervention. In other words, the normative preference for negative freedom embedded in classical liberal political philosophy also reduces error costs and thus adds a qualitative argument in favor of nonintervention and the relative preference for type II errors.

Section 17.5 applies these lessons to a non-exhaustive selection of modern antitrust cases and laws. Modern antitrust law generally does a good job of structuring rules to minimize error costs through presumptions and standards that coalesce into two main analytical approaches: per se analysis and the rule of reason. Conversely, modern antitrust falls short of the classical liberal ideal where it insists on treating perfectly competitive markets as its model, applies the wrong presumptions and standards to the wrong conduct, and misconstrues antitrust law as a tool for achieving political goals rather than simply facilitating market processes. To the extent that these failures stem from naivete about (or indifference to) the possibility of government failure, they are also at loggerheads with fundamental classical liberal insights about the limits of knowledge, the importance of decentralized decision-making, and individual freedom.

17.2 Competition in Classical Liberalism—and Since

Adam Smith forcefully argued that free trade and free competition were beneficial to the public and that monopoly—which originally referred to the absence of market competition due to government-granted franchises—was antithetical to it (McCraw, 1989, p. 29). Smith's revolutionary insight ran counter to the mercantilist orthodoxy of the time.[2] Adam Smith saw competition as a natural process of independent rivalry between two or more individuals whereby they sought to gain advantages over each other (Hearn, 2018, p. 167; Stigler, 1957, pp. 1–2). This led him to condemn state measures that distorted natural processes by narrowing or precluding open competition in a way that benefited special interests but harmed the public (Smith, 1776, Book I, Chapter 11).

Despite their innovativeness, the influential ideas about competition presented by the classical liberals were also relatively unsophisticated and sparse.[3] Since then, two strands of thought have refined their basic approach: the model of perfect competition and the notion of competition as a discovery process. The former is essentially a variation of Adam Smith's initial understanding; the latter offers a profound shift that is, in fact, more consistent with the classical liberal vision. The conceptual differences between these two models are not purely academic, however, as our understanding of competition and the role it plays in society is central to the design of the competition laws and regulations that protect it (Jorde & Teece, 1992, pp. 3–5; Sidak & Teece, 2009).

17.2.1 Perfect Competition

Competition had not received explicit, systematic attention in mainstream economics before 1871 (Stigler, 1957, p. 1). It was instead "treated with the kindly casualness with which one treats the intuitively obvious" (Stigler, 1957, p. 1). This changed when economists like Alfred Marshall and Francis Edgeworth mathematically modeled competition as an aggregate of individual behaviors that tended toward perfection. In this view, competition was not so much a process as a market structure in perpetual equilibrium (McNulty, 1967).

According to George Stigler (1946), the model of perfect competition was a *quantitative* improvement over Adam Smith's references to rivalrous competition, which were seen as a "somewhat crude articulation which was to receive its refinement and precise formulation only in later generations" (Kirzner, 2000, p. 213). This increasing analytical formalization led neoclassical economists to focus more on the outcomes of economic processes and less on those processes themselves (Kirzner, 2000, p. 210).

The simplest and most tractable model of perfect competition posited homogenous products, perfect information, and no transaction costs.[4] All decisions to buy or sell take place because each seller (buyer) always correctly anticipates the highest (lowest) price at which he can sell (buy). There is, furthermore, no regret because there is no learning; nothing is gleaned from the transaction other than what was already known to all actors involved (Kirzner, 2000, pp. 223–224). In this conception, "'competition'. . . mean[s] a determinate outcome more than a process, an equilibrium more than a disequilibrium, a static condition more than dynamic behavior" (McCraw, 1989, p. 34). However, this static model was never meant to describe reality but to be a model of what market outcomes would look like if these unrealistic conditions were met. As such, it has limited use as a guide to policy.

17.2.2 Competition as a Process of Discovery

The static model of perfect competition is fundamentally at odds with the understanding of competition as an entrepreneurial process, as the Austrian theory of the entrepreneur posits (Kirzner, 1973), or as a process that improves knowledge by coordinating scattered information, as Hayek (1980, pp. 92–106) would have it. Seeing competition as a *process of discovery* necessarily assumes a dynamic market environment.[5] For the proponents of this view, such as the Austrian economists, "the advantages of competition are to be found in the dynamics of the *process* of competition" more than in the imagined structural state of affairs identified by the models of perfect competition (Kirzner, 2000, pp. 14, 205). Competition is the name given to the series of discovery steps taken in a highly uncertain and changing environment (see also Hayek, 1945). Accordingly:

> The function of competition, in this open-ended world of sheer ignorance, is to achieve those discoveries which change the position of the frontiers separating knowledge from ignorance. It is dynamic competition which expands the domain of what is known, continually shifting the location of profitable opportunities and thus continually inspiring yet further discoveries expanding the domain of what is known.
>
> *(Kirzner, 2000, p. 92)*

The dynamic view of competition does not deny the tendency of competition to optimize prices. But it is more concerned with the process by which parties not only satisfy preexisting preferences but also establish new ones based on new information, rather than a (hypothetical) structural end state (Kirzner, 2000, p. 14). In this world in perpetual motion, there is no perfect end state because there *is* no end state: Every transaction undercuts old preferences and generates new ones, and the causality between knowledge and competition is reversed. Efficiency occurs in the long run, not the short term (Giocoli, 2024, p. 838). Alternatively, as Hayek eloquently put it, "[The] knowledge which is assumed to be given to begin with is one of the main points where it is only through the process of competition that the facts will be discovered" (Hayek, 1945, pp. 362–363).

17.2.3 Implications

If the social benefits of competition derive primarily from a state of static equilibrium, then the preservation of competition—the role of antitrust law—means treating any deviation from the competitive ideal as a function of market power and a potential target of regulation. By contrast, competition as a discovery process views many deviations from perfect competition as entrepreneurial, institutional solutions that facilitate long-term competition under conditions of ignorance. At any point in time, in other words, many intensely competitive markets are nevertheless not in equilibrium. So long as firms can plausibly compete against each other, however, the dynamic benefits of competition—understood as ongoing rivalry—accrue. As Kirzner (2000) has written, even monopolists are not "insulate[d]. . . from the cold winds of potential competition; they are subject to the threat of the process of competitive entry" (p. 230; see also Jorde & Teece, 1992, p. 5; Sidak & Teece, 2009; and, in general, Schumpeter, 1942). Today, the perfect-competition model has become firmly ensconced in textbooks and the logic of antitrust law worldwide (McCraw, 1989), with dynamic notions of competition enjoying limited success in influencing competition policy (Sidak & Teece, 2009)—even if, as some have persuasively argued, the dynamic view of competition is more appropriate for today's high-tech markets than one undergirded by a short-term, static view of welfare (Giocoli, 2024, pp. 827, 836, 838).

The recognition that competition is valuable—either as leading to equilibrium or as a discovery process—does not automatically mean that any specific law protecting or abetting competition is necessary or justified, however. Establishing that entails a comparative institutional analysis and a determination of whether the benefits of passing and enforcing such a law outweigh its costs. We turn to this question next.

17.3 Competition vs. Competition Law

According to some authors, the proliferation of antitrust laws "provides yet another powerful sign of re-acknowledgment of Adam Smith's principles" (West, 1976, pp. 23–24), which calls for the aggressive enforcement of such laws (Mogin, 2008; Jones et al., 2019, p. 4). While it may be, as Richard Posner (2001, p. 2) has it, that the importance of economic efficiency "establishes a prima facie case for having an antitrust policy," a preference for competition over monopoly does not automatically support that conclusion when the cost and risk of erroneous enforcement are taken into account.[6] Even Adam Smith's (1776) oft-invoked quote about persons of the same trade rarely meeting if not to conspire against the public interest must be tempered by his equally overlooked caveat that a ban on such agreements would be both ineffective and tyrannical: "It is impossible, indeed, to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice" (Book I, Chapter 10; see also Smith, 1983, p. 23).

Once the government is involved, public choice concerns about the costs of government failure are introduced. If these costs exceed their benefits, antitrust laws may be unjustified. Indeed, while markets are imperfect, so is the government (Winston, 2006), and it is well understood that its intervention comes with costs and risks, such as the potential for mistakes born of ignorance or capture by self-interested parties (Pigou, 1912, pp. 247–248).

All these concerns are exacerbated in the context of antitrust law, where ignorance is endemic (Manne, 2020a) and where "it is quite certain that, whatever may be the characteristics of the ideal world, we have not yet discovered how to get to it from where we are" (Coase, 1964, p. 195). By their very nature, the effects of most business conduct on competition are not readily known, meaning there is always the looming threat of error (Easterbrook, 1984, pp. 4–5). Moreover, precisely because the line between procompetitive and anticompetitive is often so blurry (Auer & Radic, 2022, p. 15; see also Section 17.4), antitrust law is a particularly attractive target for rent-seeking and capture by competitors looking to co-opt the law to protect themselves from superior rivals.[7]

It is here, again, that the concept of perfect competition presents practical challenges. Indeed, the effort to intervene in markets in order to move them closer to a model of perfect competition obscures the defects of government intervention that must be compared to the costs of imperfect markets before intervention is justified:

> Contemplation of an optimal system may provide techniques of analysis that would otherwise have been missed and, in certain special cases, it may go far to providing a solution. But in general its influence has been pernicious. It has directed economists' attention away from the main question, which is how alternative arrangements will actually work in practice. It has led economists to derive conclusions for economic policy from a study of an abstract of a market situation. It is no accident that in the literature. . . we find a category "market failure" but no category "government failure." Until we realize that we are choosing between social arrangements which are all more or less failures, we are not likely to make much headway.
>
> *(Coase, 1964, p. 195)*

Reflecting precisely the concern raised by Coase (and centuries after Adam Smith), Hayek equivocated over whether a sound competition policy implied the use of antitrust law (Hayek, 2007, p. 103; 1979, pp. 72, 85, 87). It seems clear that Hayek's "first best [competition] policy was to remove all government barriers to entry" (Veljanovski, 2023, p. 39). And, while there does seem to be an endorsement of legal prohibitions in the relatively narrow case of exclusionary price discrimination practiced by monopolists (Hayek, 1979, p. 85), one can scour the classical liberal literature in vain for an explicit, unequivocal endorsement of a generally applicable antitrust law, much less one administered by public enforcers. Some authors have even contended not only that antitrust law is *not* inspired by classical liberal postulates but that its ideological foundations are protectionist or even progressive.[8] Thus, because the connection is far from self-evident, the classical liberal case for antitrust law must be built from the ground up by first assessing the two primary, less restrictive alternatives.

17.3.1 Negative Over Positive Measures and the Marginal Importance of Purely Private Restraints of Competition Under Classical Liberalism

Before 1900, the prevalent idea of monopoly, and the one to which classical liberalism has traditionally subscribed, was that of a government-granted legal privilege, not dominance achieved through purely private means (Smith, 1983, p. 24).[9] For instance, in *Darcy vs. Allen*, the famous playing-card-monopoly case reported on by Sir Edward Coke in 1603, monopoly was defined as "an institution or allowance by the King."[10] The harm from such governmental interventions was not only economic but also, as Coke put it, a threat to liberty:

> All Trades. . . which avoid idleness. . . and exercise men and youths in labor for the maintenance of them and their Families, and for the increase of their livings. . ., were profitable for the Commonwealth; and therefore the grant to the Plaintiff to have the sole making of them is against the Common Law, and the benefit and liberty of the subject.[11]

Similarly, in *The Wealth of Nations*, Adam Smith (1776, Book V) criticized the trading privileges bestowed by public authorities on such firms as the East India Company.

Later, classical liberal and libertarian authors like Ludwig von Mises and Bruno Leoni contended that it was absurd to expect government intervention to curb monopoly through antitrust laws, "for the governments whom they ask to fight monopoly are the same governments who are devoted to the principle of monopoly" (see also Mises, 2002, p. 91; 1961, p. 11; Leoni, 1991, pp. 83, 88; Leoni, 2017).

Sure enough, Adam Smith strongly criticized the cozy relationship between business and government in which those in authority would grant monopolies to favored courtiers and manufacturers (Smith, 1776, Book V; Butler, 2012, p. 30)—an insight that was later developed by public choice theory to demonstrate that "political decisions, far from being made efficiently and dispassionately in pursuit of the 'public interest,' could well be less efficient, less rational and more vulnerable to manipulation by vested interests than the supposedly flawed market process" (Butler, 2012, p. 25). As Tullock (1967) showed, the enormous potential value of government-granted monopolies rendered them a particularly attractive target for rent-seeking interest groups. In consequence, the classical liberal position tends to be that "monopolies not imposed by the sovereign [are] exceptional and not very important cases in the market as a whole" (Leoni, 2017, p. 88). On this view, the state best protects competition by recognizing robust private property rights, enforcing contracts, and, above all, abstaining from granting monopolistic privileges. As Hayek (1979) put it, the best "antitrust policy was to ensure that there are no government-created privileges and barriers to entry" (p. 79). As discussed earlier, Hayek's antitrust proposals were modest (see also Veljanovski, 2023, p. 37).

This classical liberal position contrasts starkly with other, younger, liberally oriented schools of thought, such as Ordoliberalism and neo-Brandeisianism, which assume that markets have an inherent tendency toward monopolization and anticompetitive conduct unless constantly policed by a watchful state.[12] Thus, while classical liberals, Ordoliberals, and neo-Brandeisians all agree with the overarching sentiment that competition is good and monopoly bad, their policy prescriptions diverge. For the Ordoliberals and neo-Brandeisians, antitrust law (and thus the state) must take center stage if a market is to become or remain competitive (Biebricher & Vogelmann, 2017, pp. 93, 112; Wu, 2018; Khan, 2018a, 2018b). As Rüstow argued at the Walter Lippmann Colloquium in 1938:

> It is not competition that kills competition [but] rather the intellectual and moral weakness of the state that, at first ignorant of and negligent in its duties as *policeman of the market*, lets competition degenerate. Then lets its rights be abused by robber knights [*chevaliers pillards*] to deal the fatal blow to this degenerate competition.
>
> *(Reinhoudt & Audier, 2017, p. 32; emphasis added)*

For the Ordoliberals, this explicit (and deliberate) deviation from classical liberal doctrine is warranted by that doctrine's overestimation of the market's natural ability to correct monopoly and market failure and underestimation of the viability of private restraints on trade.[13] Analogous views are espoused today by the neo-Brandeisians, who see high levels of concentration (from which they infer a lack of competition) as an inevitable consequence of weak antitrust enforcement and the law's narrow focus on prices rather than private constraints on economic liberty: "The Madisonian concept of 'self-government' hinges on the ability of citizens to control and check private concentrations of economic power" (Khan, 2018b, p. 131).

For all their concern about market failure, however, neo-Brandeisians and Ordoliberals do not give enough consideration to the possibility of government failing, despite copious "empirical evidence. . . that the welfare cost of government failure may be considerably greater than that of market failure" (Winston, 2006, p. 3; see also Coglianese, 2012, p. vii; Wilson & Clovers, 2020).[14] Thus, their concerns about the outsized influence of big business do not translate into reservations about sprawling government power (Lambert & Cooper, 2023; Crane, 2019). But the neo-Brandeisian and Ordoliberal optimism about the government's ability and incentive to correct market failure jars with fundamental classical liberal postulates such as the bounds of knowledge, decentralized decision-making, limited government, and individual freedom. Ultimately, however, these deviations from the original position, which discount the possibility of government failure and rest on an unrealistic vision of perfect competition, reaffirm the merits of the primarily negative policy approach to monopoly endorsed by classical liberalism.

17.3.2 The Common Law Way: Repeal of Monopoly Privileges and Nonenforcement of Anticompetitive Agreements

For the classical liberal, then, the first step to ensure competition is to repeal anticompetitive regulations. But classical liberals acknowledge that competitive restraints can also be achieved and maintained through purely private means, such as contracts and voluntary associations (Smith, 1776, Book I, Chapter 10, part 2).[15] These restraints may be comparatively rare relative to the threat of government meddling, but that does not mean that classical liberalism should effectively ignore them. Assuming that public choice considerations and the possibility of government failure are adequately accounted for, the question becomes what kind of intervention is appropriate from a classical liberal perspective.[16]

In hindsight, we might consider that criminal suits for (treble) damages and private injunctions—that is, the basis of modern antitrust law—are the obvious choice. But less restrictive means have been and still are available. The first alternative is the elimination of state monopoly privileges, which we have already addressed (Section 17.3.1). The second, which we discuss now, is the nonenforcement of private agreements in restraint of trade, for which the common law already showed disdain—a position endorsed by Hayek (1979, p. 86) and Adam Smith (1776, Book I, Chapter 10), among others.[17]

Although the common law was generally concerned with private conduct, "expressing little or no concern about the sovereign's economic policy" (Hovenkamp, 1989, p. 1023), it has a long tradition of nevertheless dealing in a policy-oriented fashion with contracts in restraint of trade "to protect the public from the evil consequences of an agreement under which it would be deprived of the benefits of competition in skilled labor" (Beach, 1898, p. 107).[18] Over time, the common law approach became more nuanced, condemning only, in essence, "unreasonable" agreements in restraint of trade.[19]

Some have contended that the common law approach to restraints of trade was insufficient to curb anticompetitive practices and monopolistic combinations in the wake of the Industrial Revolution (Letwin, 1954, pp. 373, 379; Kleit, 1992, pp. 9–11; Hovenkamp, 1989, p. 1025). On this view, the historical weakness of the common law vis-à-vis restraints of trade prompted the adoption of the antitrust laws in the United States (Letwin, 1954, p. 384). Indeed, others have suggested that the enactment of the Sherman Act in the United States in 1890 is best viewed as a modest statutory extension of the common law (Kleit, 1992, pp. 6–22). The fact that *Michel v. Reynolds* established a principle that would become central to U.S. antitrust law—namely, that only *unreasonable* restraints of trade are prohibited—lends support to this theory.[20] It also helps explain why an exception to the classical liberal rule of freedom of contract—whether through judicial nonenforcement or prosecution under antitrust law—might be justified in the case of certain monopolistic practices.[21]

Although on its face the Sherman Act is a rather draconian law, prohibiting all contracts in restraint of trade—a position that would prohibit *all* contracts, as, by definition, all contracts restrain someone's scope of permissible economic activity (Meese, 1999, p. 7)—the law's vague, terse language, and implicit standards-based approach quickly lent themselves to a common law–like process of interpretation (Auer et al., 2022, pp. 1640, 1645). This resulted in a reading of the act rooted not in "liberty *from* contract," as Alan Meese (1999, p. 7) puts it, but "liberty *of* contract" guided by a concern for allocative efficiency.[22]

The Sixth Circuit's *Addyston Pipe* decision, authored by Supreme Court Justice (and future President) William Howard Taft, cited *Michel v. Reynolds* extensively to support its finding that a contract is reasonable when it is ancillary to and necessary for achieving a larger, legitimate purpose such as facilitating a transfer of property. It was thus "in the interest of trade that certain covenants in restraint of trade be enforced."[23] Even if such restraints reduced competition in the short term, "this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community."[24] By contrast, a contract was unreasonable where the sole object of both parties was merely to restrain competition and "enhance and maintain prices."[25]

Notably, the Sixth Circuit also held in *Addyston Pipe* that the unreasonableness of restraints of trade lay in the discouragement of industry and enterprise and the exclusion of rivalry, monopolization of business, and engrossing of the market.[26] This concern for overarching efficiency, which could justify abridging the freedom of contract, was a hallmark of early U.S. antitrust cases tasked with giving coherence to the Sherman Act's declaration that "every contract. . ., in restraint of trade. . ., is hereby declared to be illegal."[27] Later, in formally adopting the "rule of reason" approach to assessing restrictive contracts in the *Standard Oil* case, the Supreme Court explained that the purpose of the prohibition of unreasonable restraints of trade under the common law was primarily to protect the interest of the commonweal.[28] *Standard Oil* adopted a standard that "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" (Meese, 2014a, p. 135).

Indeed, Giocoli (2024, pp. 835–837) has argued that the 19th-century U.S. common law approach to interpreting the Sherman Act is best viewed as one guided by "distributive effects, that is, by its being favorable to the 'just' distribution envisaged by the classical system" (p. 835). In this conception,

> economic variables such as prices and quantities were at most a useful, yet not wholly reliable, signal of the effective working of competition and, therefore, of the conformity to justice and liberty of the underlying legal relations. The true goal was a just and free polity.
>
> *(pp. 835–836)*

Thus, although generally protective of freedom of contract, the evolved common law justification for not enforcing some restraints of trade rested in their harm to the public, and, by the same token, the justification for enforcing others lay in their benefit to the public.[29] This public policy rationale for an exception to the general rule of freedom of contract in antitrust law carried forward into courts' interpretations of the common law–like Sherman Act. But the question of who or what counts as the public here is far from straightforward. It has been, and remains to this day, a hotly debated topic in antitrust scholarship. The outlines of a classically liberal answer are given below.

17.4 Separating Anticompetitive from Procompetitive Conduct: What Counts as a Public Benefit?

Thinking in terms of classically liberal antitrust goals is something of an oxymoron. Classical liberal systems are uneasy about the articulation of collective visions to which all parties must adhere. As James Buchanan has observed, "To lay down any 'social' purpose, even as a target, is to contradict the principle of liberalism. . . that leaves each participant free to pursue whatever it is that remains feasible within the limits of the legal-institutional parameters" (Buchanan, 2000, p. 15).[30]

Accordingly, a classical liberal order should avoid pursuing any overarching goal (except in exceptional circumstances such as wars and natural disasters). Instead, it should lay down a framework of impersonal rules of the road within which individuals are left to pursue their own objectives (Epstein, 1995). Liberalism distrusts grand unifying theories and emphasizes process over ends (Pyle, 1999, p. 814).[31] This process, and not some predetermined end state, *is* the classical liberal notion of the "common good" (Kukathas & Petit, 1991, p. 93). Although this program ordinarily improves social outcomes, the permissibility of individual action in classical liberalism is, in principle, not tightly tethered to the maximization of social utility, however defined.

Limits on individual liberty, however, are constrained to instances where they can persuasively be deemed to promote social welfare. Properly construed, there is no inherent conflict between protecting individual liberty and promoting the social good. As Richard Epstein puts it:

> Individual liberty, private property, and free contract remain centerpieces of the basic system—but not as absolutes unthinkingly defended come hell or high water. On this point at least, the basic theory joins forces with its insistent critics by consciously identifying the principled limitations on private property and freedom of contract that advance the common good.
>
> *(Epstein, 1998, p. 3)*

What is essential is the identification of appropriate standards to determine when deviations from the basic system are truly necessary: "[Laissez-faire's] object is to maximize the cooperative social gain from human behavior, and to use state force when (but only when) necessary to achieve that end" (Epstein, 1998, p. 321).

17.4.1 In Search of a Standard

In principle, there would be no antitrust *goal* determining the correct mix of goods and services congenial to classical liberalism. However, there might be *standards* to deal with restraints of trade that harm competition. The difference is that a goal relates to the accomplishment of a preestablished outcome, whereas a standard is concerned primarily with the observance of process. Goals are thus ends in themselves, whereas standards serve as proxies that provide information about something else—in this case, the competitive process.

For example, properly understood, the consumer-welfare standard of U.S. antitrust law does not seek to effect the goal of maximizing consumer welfare through increased output or lower prices. Instead, it holds that the legality of challenged conduct should be judged by its effect on consumers (who are, as we discuss below, the primary beneficiaries of production).[32] Only when consumers are harmed by conduct (i.e., when output is restricted or prices increased) may it be inferred that it interferes with the competitive process.

Antitrust law thus differs from price regulation in that it does not mandate or prohibit certain price levels. Instead, it provides a general framework that facilitates market processes and uses outcomes such as prices and output as relevant yardsticks to glean information about the validity of such processes. Without standards tethered to measurable outcomes, however, process becomes self-referential and ultimately arbitrary (Petit & Radic, 2023). Conversely, the imposition of overarching goals—particularly the goal of moving markets toward the model of perfect competition—obviates processes and diminishes individual freedom. Neither is satisfactory from a classical liberal perspective. What, then, is an appropriate antitrust standard? U.S. antitrust history provides a helpful lesson and a potential answer.

As antitrust law developed throughout the 20th century through judicial interpretation, it became increasingly unmoored from liberal principles and, as public choice theory would predict, aimed at effecting the policy preferences of narrow, relatively powerful interests. At various points, antitrust was used to protect "small dealers and worthy men" from stronger competitors and to curb firm size (Brandeis, 1934; Auer & Radic, 2024). In the name of protecting "helpless individuals," the courts routinely condemned conduct that lowered prices, which could be considered the very essence of competition (Dorsey et al., 2020, p. 873). The Robinson-Patman Act, which was passed in 1936 and which some have called "the most protectionist piece of antitrust legislation" (Hovenkamp, 2019, p. 85), prohibited wholesalers, suppliers, and manufacturers from selling goods to preferred customers at a discounted price under the guise of preventing price discrimination.[33] In reality, the law was designed to protect small food and drug retailers against competition from chain stores that could buy and resell products at reduced prices due to their higher purchase volumes (Schwartz, 1986, p. 733).

This unprincipled and erratic approach to antitrust adjudication eventually gave rise to severe criticism (Dorsey et al., 2020, p. 874).[34] "The rudderless analysis on the distinction between permissible and impermissible left no meaningful way to distinguish procompetitive from anticompetitive conduct" (Dorsey et al., 2020, p. 873), and it often even actively *abated* competition in the name of fighting "bigness" (Dorsey et al., 2020, p. 873). This led to the paradox in which a law purportedly designed to protect competition punished economic efficiency (Bork, 1978). A straightforward test was necessary to distinguish between competition on the merits and illicit activities that undermined the competitive process (Page, 1989, pp. 1229–1230; Dorsey et al., 2020, p. 874). As reformers recognized, however, "antitrust efficacy was not an end in itself, but instead served as a proxy for the revealed preferences of society" (Dorsey et al., 2020, p. 875). At its core, it allowed courts to separate the conduct that aimed to satisfy societal needs and wants through competition (thus benefiting the public) from that which circumvented them by abridging the competitive process (thus harming the public).

By and large, these valuable debates forced legal scholars to reexamine the first principles of antitrust law and grapple with the question of why competition was valuable in the first place (Dorsey et al., 2020, p. 875; Bork, 1978). "The answer that emerged was that competition leads to lower prices, expanded output, higher quality, and more innovation" (Dorsey et al., 861). It was these elements, then, that should serve as a shorthand for determining whether conduct is anticompetitive; and, sure enough, it is precisely these elements that are cognizable under the consumer-welfare standard (Melamed & Petit, 2019). Put differently, in this view, consumer welfare is implicit in the notion of competition itself (Vickers, 2024, p. 11).

There are many reasons for the classical liberal to favor a consumer-welfare antitrust standard, especially when considering the alternatives that were put forward in the past (and which are being put forward today).[35] On the whole, the consumer-welfare standard offers a workable, coherent, and objective framework that elegantly translates the core antitrust inquiry of whether there has been harm to competition into a straightforward question: "Does the conduct make consumers better or worse off?" (Wright & Ginsburg, 2013, pp. 2406–2407). More generally, narrow standards dovetail nicely with the rule of law by limiting harmful tendencies like rent-seeking, regulatory capture, and politically motivated enforcement (DeBow, 1991, pp. 205–206; Manne, 2021b) while also interfering less with economic liberty by circumscribing the scope of public intervention to particular, demonstrable instances of public harm.[36]

However, there are also aspects of the consumer-welfare story that should give classical liberals some pause. Surely, antitrust law for the classical liberal should not countenance redistributing wealth from producers or other parties to consumers (Meese, 1999).[37] And does consumer welfare not, in the end, subordinate competition to one overarching goal: the well-being of consumers? As Bruno Leoni observed, "'Anti-restrictive' laws on competition are in reality inspired by the principle—more or less declared—that the producer is somehow the subject of the consumer, and that therefore he must subject himself to the sovereign imposition" (Leoni, 2017, pp. 84–85).

While interesting, this (in our view) overly skeptical position can be surmounted from a classical liberal perspective in two ways.

The first is by following Adam Smith (1776, Book IV, Chapter VIII) in considering that the purpose of all production is consumption.[38] This would, in principle, justify some redistribution of wealth from the producer to the consumer. If the purpose of all productive activity is to satisfy consumers' wants and needs, and if competition best satisfies these needs through more and better products and lower prices, then, in judging whether an agreement or conduct is pro- or anticompetitive, what should be measured is the surplus that goes to consumers, while that which goes to producers (profits) should be ignored.[39] Contrary to Leoni's assertion, the consumer-welfare standard here does not serve to subordinate the producer to the interests of the consumer or to effect some broader redistributive social policy. The consumer is favored not because they are worse off or more deserving than the producer but because it is consumer surplus, not producers' profits, that are the measure of a healthy, natural competitive process (and vice versa). This proposition, in turn, gives sense to laws prohibiting restraints on trade, which would, if taken literally, ban almost all agreements (Meese, 1999, p. 7).[40]

The second way of bridging Leoni's skeptical-libertarian position is through a *total*-welfare standard, which adds producer surplus to the equation.[41] The total-welfare standard measures the effect of a practice on the economic welfare of all participants in a market, including consumers and producers. It refers to aggregated value created without regard to how gains and losses are distributed, and accordingly, it is concerned with economic efficiency—that is, maximizing the total gains from trade (Bork, 1978; Wilson, 2019; Kleit, 1992; Blair & Sokol, 2013). There are strong arguments to be made that this position more closely approximates the classical liberal ideal. Despite Adam Smith's assertion, classical liberal laws—including antitrust laws—should not, in principle, distribute wealth from one group to another (even assuming such groups are stable and readily identifiable (Wilson, 2020, p. 14). If, as follows from the Lockean equation (Epstein, 2011), the state has no greater powers than those of the individuals it represents, then antitrust law should not serve to take from some to give to others but to prevent conduct that diminishes the total wealth of the individuals who make up the state.

According to Epstein (2014), the classical liberal would permit state intervention to overcome collective action problems but not to engage in the redistribution of wealth.[42] In antitrust, the collective action problem occurs when aggregate welfare clashes with the concurrent but opposed desire of some of the members of society for private gain. For example, when monopolists exercise market power to reduce output and increase prices, the resulting reduction in overall transactions imposes a deadweight loss on society (i.e., goods are allocated inefficiently). While price increases also transfer surplus from inframarginal consumers to producers, this should, in principle, not matter from a total-welfare perspective so long as those losses are offset by the gains accrued by the producers (Williamson, 1968).

Ultimately, the total-welfare standard in antitrust law distinguishes competitive from anti-competitive conduct more objectively because it values the welfare of specific consumers no more than the welfare of producers or other affected parties.[43] If we agree with Epstein that in a classical liberal world, state coercion should be limited to measures that enhance aggregate welfare but should avoid purely redistributive ends (Merrill, 2021, p. 10), then it seems that the total-welfare standard furnishes more adequate guidance for a classically liberal antitrust law than does consumer welfare. And, indeed, it is arguably the case that U.S. courts have generally implemented a total-welfare standard in antitrust adjudication, even when it is referred to as a *consumer*-welfare standard (Meese, 2010, p. 665).[44]

Nevertheless, neither the total- nor the consumer-welfare standard is automatically operable. The question of harm is inherently complicated because the observable outcomes of conduct do not neatly sort themselves into conduct that meets competition on its merits and conduct that restrains competition by driving otherwise-viable firms from the marketplace (Veljanovski, 2021, p. 25). In addition, the common reference point for both consumer and total welfare is generally the model of perfect competition, which, as discussed in Section 17.2, is deeply unsatisfying from a classical liberal perspective, as it may wrongly condemn nonstandard market arrangements that facilitate the dynamic process of competition. Thus, while the choice between the consumer- and total-welfare standards is perhaps necessary to sustain a principled approach to classical liberal antitrust law, it is not sufficient. The relevant standard must also be combined with a recognition of the errors of enforcement policy in light of the limitations of public agents in evaluating private actions. This will likely be a more important piece of the classical liberal antitrust puzzle than the choice between consumer and total welfare.[45]

17.4.2 Knowledge and the Error-Cost Framework

As noted in Section 17.2, the limits of human knowledge appear in classical liberal thought as early as Adam Smith (1776, Book IV, Chapter IX, p. 687):

> The sovereign is completely discharged from a duty [for which] *no human wisdom or knowledge could ever be sufficient*; the duty of superintending the industry of private people, and of directing it towards the employments most suitable to the interest of the society.
>
> *(emphasis added)*

Private people, who have more detailed and localized knowledge about the most advantageous uses of capital, should therefore be allowed to decide how that capital should be used. As Turgot argued, "These committed, on-the-spot participants in the market process know far more about their situations than do the intellectuals aloof from the fray" (Gordon, 2011, p. ix).[46]

Smith's and Turgot's conclusion that government should limit itself to performing certain well-defined tasks—such as the administration of justice, the providing of national defense, and the provision of public works—is built on a solid sense of the looming cost of errors stemming from epistemological limitations. This basic idea was later developed by authors like Hayek (1980, p. 77), who pointed out that the dispersed data about the whole society are never given to a single mind that could work out the implications (Hayek, 1945, p. 519). Hayek later characterized the inability to grapple with this reality as the "fatal conceit" of the socialist economic planner (Hayek, 1988).[47]

The thought is powerfully evocative of classical liberal philosophy. In Sowell (1995), the conceit is embodied in the "anointed" thinkers and activists whose utopian vision of progress is impervious to facts. In Bastiat (2007, pp. 23–25, 33–35, 39), it is the "manipulators of society" who seek to make man "virtuous" through force. And, of course, in Adam Smith (1776, Part IV, Section II, Chapter II, pp. 233–234), it is the "man of system," the social regimenter enamored by the beauty of his ideal plan of government but naive about its fallibility.[48]

This does not imply that public authorities are always incapable of making sound policy decisions, of course. What it means is that from a classical liberal perspective, the government's willingness to intervene in markets should be commensurate with its (limited) knowledge of the shifting needs and wants of society and authorized only when the inevitable costs of erroneous or discretionary enforcement would not outweigh the harm from nonenforcement. One way to account for policymakers' limited knowledge and foresight in modern antitrust law and policy is through the error-cost framework (Easterbrook, 1984).

Legal decision-making and enforcement under uncertainty are always difficult and potentially costly (Ehrlich & Posner, 1974; Manne, 2020a; Manne & Wright, 2009). "The risk of error, always present given the limits of knowledge, is magnified by the precedential nature of judicial decisions" (Manne, 2020a, p. 33), where precedent casts the shadow of the law (Mnookin & Kornhauser, 1979, p. 968). Whether an enforcer or judge is trying to ascertain the likely effects of a business practice or to establish causality between a type of conduct and its effects (or both), this forward-looking analysis will be tasked with inferring anticompetitive conduct from limited information (Joskow & Klevorick, 1979, p. 213). However,

> the decision maker's model of the world encompasses only a minute fraction of all the relevant characteristics of the real environment, and his inferences extract only a minute fraction of all the information that is present even in his model.
>
> *(Simon, 1959, p. 272)*

To mitigate risks, a liberally oriented system of antitrust law will rely on certain heuristics to help mitigate both the direct and the indirect costs of the error-cost framework (Manne, 2020a, pp. 34, 41), where the objective of the error-cost framework is to ensure that regulatory rules, enforcement decisions, and judicial outcomes minimize (1) the expected cost of erroneous condemnation and deterrence of beneficial conduct (type I errors); (2) the expected cost of erroneous allowance and underdeterrence of harmful conduct (type II errors); and (3) the costs of administering the system (Easterbrook, 1986; Manne, 2020a).

Thus, per se rules can work well where courts know that the type of conduct presented is always or almost always harmful (Easterbrook, 1984, p. 15),[49] as with certain horizontal restraints. In most cases, however, the error-cost framework naturally leads to rule-of-reason analysis (Easterbrook, 1984, p. 10), especially with novel behavior or behavior in nascent industries (Manne, 2020a).[50] It also leads naturally to a preference for tolerating type II over type I errors (Easterbrook, 1984, p. 15; Manne, 2020a, pp. 61–76). For one, "mistaken inferences and the resulting false condemnations are especially costly, because they often chill the very conduct the antitrust laws are designed to protect."[51] Second, false positives may be more challenging to correct, especially in light of the weight of judicial precedent (Easterbrook, 1984, pp. 2–3, 15–16) and the institutional constraints of the legal system (Manne, 2020a, pp. 64–65). Third, most (though not all) forms of cooperation are beneficial (Easterbrook, 1986, pp. 15–16). Fourth, "evidence of Type I errors is hard to come by, but for a wide swath of conduct. . ., the evidence of systematic *problems* is virtually nonexistent" (Manne, 2020a, p. 72). Finally, the costs of monopoly wrongly permitted are small compared to the costs of competition wrongly condemned (Manne, 2020a, p. 72). As Lionel Robbins (1937, p. 116) quipped, monopoly tends to break, and tariffs tend to stick.

But even if one disagrees with the utilitarian arguments in favor of a general normative preference for type II over type I errors because, say, some anticompetitive practices are seen as more pervasive or costly or because some assumptions such as the extent to which markets are self-correcting are brought into question (Baker, 2015; Hovenkamp & Scott Morton, 2020), there remains for classical liberalism a "general preference for freedom" (Bork, 1978, p. 133) that militates in favor of nonintervention at the margin. The following passage by Jacob Viner deserves to be quoted at length:

> It is not clear that Adam Smith believed that laissez faire would carry the wealth of a nation to some kind of theoretically-conceivable maximum. What is clear is that. . . he believed that economic society left to its autonomous operation would produce a higher level of economic welfare than would accrue if government, inefficient, ignorant, and profligate as in practice it was, should try to direct or regulate or operate it. *It is clear, moreover, that for Adam Smith laissez faire, beyond its material benefits, had ethical or moral value in that it left to the individual unimpaired that "natural system of liberty" to which he had a natural right. It is quite probable, therefore, that Adam Smith would have rejected an extensive program of state regulation of economic enterprise even if he had believed that the wealth of nations could thereby be augmented.*
>
> *(1960, p. 60; emphasis added)*

The case for classical liberalism has always been a double helix of moral and consequentialist arguments. For instance, when pushed by Robert McKenzie in the final episode of the television series *Free to Choose* on whether he would choose prosperity over freedom, Milton Friedman chose the latter.[52] Hayek's normative justification for economic policies rested on their ability to promote individual freedom and general welfare (Feld & Nientiedt, 2022, p. 458). But in *The Road to Serfdom*, he recognized that his preference for liberalism was based on certain ultimate values, such as individualism and personal liberty (Hayek, 2007, p. xlv). Accordingly, competition was superior "not only because it is in most circumstances the most efficient method known but *even more* because it is the only method by which our activities can be adjusted to each other without coercive or arbitrary intervention of authority" (Hayek, 2007, pp. 40–41; emphasis added). Perhaps the appeal of liberalism lies in the fact that, in most cases, adhering to a natural system of liberty also yields the best outcomes. According to Giocoli (2024, p. 838), for example, the natural system leads to the best distribution of wealth—"where 'best' meant the distribution guaranteeing the maximization of the 'Wealth of the Nation'. . . albeit in a long run, dynamic sense."

Put differently: deferring to natural liberty passes muster under the error-cost framework because, in the rare cases where upholding natural liberty does not maximize prosperity, it does so often enough that the occasional sacrifice in prosperity is justified to uphold liberty. And, while the social gains from antitrust intervention are always uncertain, losses in personal liberty resulting from intervention—even in cases rightly decided—never are.

17.5 Is Modern Antitrust Law Classical Liberal?

17.5.1 What Modern Antitrust Gets (Mostly) Right

Antitrust is costly. Thus, reflecting the error-cost framework, a classically liberal antitrust law would ensure that as confidence in social gains goes down, skepticism of enforcement must rise, and vice versa. Modern antitrust law generally does a good job of operationalizing this principle by incorporating rules and standards that reflect different degrees of certainty about social harm. Most obviously, for example, the choice between a full-blown rule-of-reason analysis and a per se review is a manifestation of the error-cost framework (Manne, 2020a, pp. 45–46).[53]

Ultimately, whether conduct is subjected to one or the other analysis turns on information and probabilities or the extent to which courts have knowledge that the type of case is always or almost always harmful (Manne, 2020a, p. 46).[54] Thus, at one end of the spectrum, per se prohibitions condemn conduct that experience shows is most likely anticompetitive, such as cartels and price-fixing agreements. These practices are so rarely beneficial that the costs of the occasional unfortunate condemnation are less than the costs of making case-by-case decisions about their competitive benefit, which justifies general presumptions against them (Easterbrook, 1984, pp. 3, 9–10; OECD, 1998, p. 2).[55] In such cases, accurate, generalizable per se rules are justified because of the high returns to intervention and the low rates of error.

> Of course, precisely because certainty about the competitive effects of *most* conduct is not available, condemnation under the per se standard is rarely appropriate. As a result, the error cost framework leads naturally to a preference for the 'leftover realm' of rule of reason analysis for most types of conduct.
>
> *(Manne, 2020a, p. 46; see also Easterbrook, 1984, p. 10)*

Most horizontal mergers, for example, are benign: They do not create market power or realize scale economies (Williamson, 1968, pp. 18, 33). But because many mergers result in efficiencies *and* decreased competition, the scale-economy/market-power trade-off must be assessed on a case-by-case basis, as the one does not self-evidently dominate the other. For instance, Williamson's so-called naive trade-off model, which studies the effects on resource allocation of a merger that yields economies but extends market power in a partial equilibrium context, shows how a horizontal merger that yields nontrivial economies must produce substantial market power and result in relatively large price increases for the net allocative effects to be adverse (Williamson, 1968, pp. 21–23). Without a rule-of-reason analysis, mixed mergers involving both scale-economy and market-power effects can only be handled arbitrarily (Williamson, 1964, p. 24).

At the other extreme are cases that should be treated as nearly per se legal given the low likelihood that these practices harm competition. This is the case, for example, with maximum resale price maintenance, nonprice vertical restraints, and Robinson-Patman Act violations (see, in general, Sokol, 2014). Maximum resale price maintenance sets a price ceiling, which, as the Supreme Court noted in *State Oil Co. v. Khan*, can have no anticonsumer effect.[56] Nonprice restrictions enhance interbrand competition through manufacturer efficiencies created by vertical restraints.[57] Primary-line injury cases under the Robinson-Patman Act—that is, those in which injury is caused to sellers by other sellers that give out discriminatory discounts—are virtually per se legal because, as Robert Bork noted, price discrimination can be good for competition (Bork, 1978, pp. 394–398; Sokol, 2014, pp. 1012–1014).[58]

As noted above, these categories are not set in stone. As economists come to understand their procompetitive justifications, specific categories of conduct have been moved from the per se box to the rule-of-reason box (Sokol, 2014). Thus, in the past, tie-ins, resale price maintenance, and vertical territorial and customer restrictions were often dispatched under the per se rule. Over the years, however, economists have developed procompetitive explanations for all or most of these practices (Easterbrook, 1984, p. 6). Cases like *State Oil Co. v. Khan* and *Sylvania*, for instance, overturned long-standing assumptions about the competitive harm of the impugned conduct (maximum resale price maintenance and vertical nonprice restrictions, respectively), thus demonstrating antitrust's ability to modernize by incorporating lessons from industrial organization economics (albeit often slowly; see Sokol, 2014, pp. 1003–1004). The reverse is also true: As certain types of conduct reveal themselves to be generally noxious or benign, they should be moved to the category of per se legality or illegality, as the case may be. Modern antitrust law has mostly learned this lesson and has shown itself to be sensitive to changing economic insights in informing legal rulemaking.

17.5.2 What Modern Antitrust Gets Wrong

Modern antitrust law falls short of the classical liberal ideal in at least four ways, however.

17.5.2.1 When It Applies the Wrong Presumptions and Standards to the Wrong Types of Conduct

First, and despite the arguments adduced in the previous section (or precisely because of those arguments), modern antitrust law fails when it applies the wrong presumptions and standards to categories of conduct. Lately, this has meant erring on the side of enforcer-friendly presumptions and overinclusiveness under a revival of the inhospitality tradition in antitrust (Williamson, 1985, p. 19; Easterbrook, 1986, p. 4; Dorsey, 2019). This is arguably a function of two interrelated phenomena that have percolated into antitrust from broader forums of public opinion: the increasingly pervasive notion that government is infallible (or at least less fallible than markets) and the view that false negatives are more costly than false positives. Neither of these fits particularly well within a classical liberal framework: the latter because false positives are more costly than false negatives (see Section 17.4.2), and the former because, as Frank Easterbrook has written, "The common belief that if markets are imperfect then something else must be better is a logical fallacy. One need not pretend that markets work perfectly to see that they are better than judges at penalizing inappropriate conduct" (1984, p. 24).

Recent developments in vertical mergers illustrate how skewed inhospitality presumptions can wrongly determine antitrust outcomes. A horizontal merger "combines firms that compete in the same relevant market, which necessarily reduces the number of firms engaged in head-to-head competition and may eliminate substitutes. That reduction inherently tends to increase prices, but the price effect may be trivial" (ICLE, 2023, p. 3). A vertical merger, by contrast, combines firms operating at different stages of the supply chain—that is, firms with a complementary, "upstream-downstream" relationship (ICLE, 2023, p. 3). The economic consequences of combining complements rather than substitutes are fundamentally different, however. "Whereas the first-order effect of a horizontal merger is upward pricing pressure, the first-order effect of a vertical merger is downward pricing pressure" (ICLE, 2023, p. 4). Vertical mergers "typically entail the elimination of double marginalization, which is akin to downward pricing pressure" (ICLE, 2023); internalize externalities in research and development; and (like horizontal mergers) confer other benefits such as operational and transactional efficiencies (ICLE, 2023; Williamson, 1985, p. 86). Both types of mergers can ultimately prove beneficial or harmful, but vertical mergers have long (and properly) enjoyed a (rebuttable) presumption *against* harm—a straightforward application of the error-cost principle.

In the Federal Trade Commission (FTC) and Department of Justice's newly issued 2023 Merger Guidelines, however, the agencies treat vertical mergers the same as—or perhaps even slightly less hospitably than—horizontal mergers (Salinger, 2024, pp. 6–8),[59] demonstrating an explicit effort to reverse the error-cost presumption favoring vertical mergers (Khan et al., 2021, pp. 1–2). Moreover, in recent vertical-merger cases, the FTC has all but reversed that presumption for vertical mergers.

In its challenge to the 2023 Illumina/GRAIL vertical merger, for example, the FTC required Illumina to divest GRAIL because it argued that it would have the incentive and ability to foreclose GRAIL's competitors from necessary inputs, thus diminishing innovation and raising prices in the market for certain early-detection cancer tests.[60] The FTC concluded that the same scrutiny should apply to horizontal and vertical mergers and that efficiencies in vertical mergers are about as likely as in the horizontal context—that is to say, not very likely (ICLE, 2023, p. 5).[61] In its brief before [delete] the Fifth Circuit reviewing the decision, the FTC argued that "the Clayton Act applies equally to horizontal and vertical mergers."[62] But this view conflicts with long-standing precedent and economic research (ICLE, 2023). "Courts and economists alike recognize that vertical integration is typically procompetitive, and it is widely accepted that vertical mergers and horizontal mergers should be evaluated under different presumptions" (ICLE, 2023, p. 5). As Areeda and Hovenkamp have written, "In the great majority of cases no anticompetitive consequences can be attached to [vertical integration], and injury to competition should never be inferred from the mere fact of vertical integration" (Areeda & Hovenkamp, 2017, p. 755a).

This knowledge informs the existing standards for vertical-merger scrutiny, and so, "unlike horizontal mergers, the government cannot use a shortcut to establish a presumption of anticompetitive effect."[63] In other words, this was a case that had to be analyzed from the ground up, as befits conduct that is known to be generally benign or procompetitive. Instead, the FTC adopted a standard that elided this requirement and showed simply that Illumina had *some* incentive to foreclose competitors but did not account for all the reasons why Illumina *did not* have such an incentive, such as its interest in revenue from a broader array of clients, the relatively low risk of entry by close substitutes, the procompetitive benefits likely arising from integration with GRAIL, and the constraints of Illumina's long-term supply agreement offered to all existing and future companies using its technology (ICLE, 2023, p. 12). This was a decision, in other words, based entirely on a presumption of harm.

Similarly, the FTC's move to challenge the Microsoft/Activision deal—another vertical merger—was based on a speculative theory of harm, positing that Microsoft would have the incentive and ability to make Activision's games exclusive to its Xbox gaming consoles and cloud-gaming platform.[64] But, again, the FTC downplayed the many procompetitive benefits of the merger, such as that the acquisition would make Activision games available to cloud-gaming users for the first time, the existing competitive pressure from console-gaming companies like Sony (with its 70% of the global gaming-console market), the probability of efficiencies of integration such as the promotion of cross-team collaboration (Abbott, 2023), and the fact that Microsoft would rationally have little incentive to reduce sales across platforms of popular games (Portuese, 2023).

In discounting the weight and likelihood of efficiencies and treating highly speculative future harm as virtually inevitable, the FTC once again erred in applying a presumption of harm that was not justified in light of past experience with vertical mergers.

Cases like Illumina/GRAIL and Microsoft/Activision show how unjustified presumptions can wrongly push certain types of benign or procompetitive conduct toward per se illegality, driving a wedge in market processes and inhibiting their ability to deliver the sort of dynamic public benefits that classical liberals might be persuaded to justify the existence of antitrust laws in the first place (Section 17.4). A particularly dangerous version of this inhospitality tradition seems to revitalize the perfect-competition model, as it is rooted in "an instinctive hostility to business conduct other than moment-by-moment rivalry in the spot market" (Meese, 2014b, p. 954; Section 17.5.2.2). Cases like Illumina/GRAIL evince a misguided preference for short-term, arms-length contracting over integration by improperly ignoring the costs of market transactions and discounting the benefits of integrated research and development (Coase, 1937, pp. 390, 394–395).

Similarly, the rule of per se illegality is also being stretched beyond its natural limits. As discussed earlier, the imposition of a per se rule is appropriate only after repeated determinations under the rule of reason (Manne, 2021a, pp. 424, 427).[65] When that process yields answers that are clear enough to push the boundaries of enforcers' knowledge, those answers are encapsulated in per se rules. Anything operating outside of the boundaries of enforcers' and judges' knowledge, however, is essentially operating outside of the limits of antitrust. There is arguably no better example of an antitrust policy operating beyond those limits today than the EU's Digital Markets Act (DMA).[66]

The DMA applies per se rules to broad swathes of conduct in so-called digital markets. Under the DMA, conduct such as self-preferencing, lack of interoperability, or the use of third-party data is proscribed, with no scope for effects analysis or procompetitive justifications. This broad-brush approach is anathema to the principles espoused above in that it ignores the basic implications of error-cost-based policy. Indeed, most of the conduct covered by the DMA has one, if not several, plausible procompetitive explanations. For example, companies may favor their products or services because they can better guarantee quality or quick delivery. Amazon, for instance, may be better placed to ensure that products provided by the Fulfilled by Amazon logistics service are delivered promptly compared to other services (Auer et al., 2023, p. 16). Consumers may benefit from self-preferencing in other ways, too. If, for instance, Google were prevented from prioritizing Google Maps or YouTube videos in its search queries, it could be more challenging for users to find optimal and relevant results (Auer et al., 2023, p. 16). Users have complained about this issue since the DMA entered into force (Hancock, 2024). Obligatory choice screens meant to preclude self-preferencing create clutter and upend the clean simplicity of products like Apple's iPhone, which many consumers value tremendously. The DMA also de facto standardizes open platforms by imposing interoperability obligations. However, "open" and "closed" are not synonymous with "good" and "bad." Rather, they represent alternative business models, each with its potential advantages and disadvantages (Manne, 2020b, p. 2; Hagiu, 2006, pp. 2–3).[67] The DMA destroys interbrand competition between those two models, thereby inhibiting market processes rather than enabling them.

This was always going to be a problem with hard-and-fast, per se, rules in so-called digital markets. Because of the heterogeneity of the conduct and defendants involved, "evolving economic understandings, and the inherent competitive ambiguity of novel conduct or novel circumstances, the optimal rule in these cases is likely not a single rule, but a dynamic one that continually evolves over time" (Manne, 2021a, p. 436). Per se rules are "especially inappropriate in fast-moving digital markets, as one of the key strengths of the rule of reason is that it is more susceptible to change" (Manne, 2021a, p. 435). And yet, the DMA subjects a range of conduct involving a hodgepodge of "core platform services" and vastly different companies to the same blanket regime of preemptive per se rules, with no opportunity for an efficiency defense.

Another frequent rationalization for the DMA's about-face on per se rules is that cases in digital markets are too hard to prove. But "categorically proscribing categories of ambiguous and poorly understood conduct because plaintiffs currently struggle to prove they are harmful is the height of faith-based policymaking" (Manne, 2021a, p. 424). Indeed:

> It is plausible that rule of reason cases are difficult to prove because the most egregious practices are either being deterred or policed under the per se rule. The marginal cases that face prosecution under the rule of reason might thus be those that are least likely to cause harm (and thus harder to prove). . . . [Difficulty in proving cases could stem from the fact that] none of the conduct was actually anticompetitive, rather than that it is too difficult to prove that anticompetitive conduct is, in fact, anticompetitive. Indeed, with a mature legal system and relatively clear rules, one should expect relatively few instances of marginal conduct giving rise to cases that present truly novel problems.
>
> *(Manne, 2021a, pp. 438, 441)*

In 1984, Frank Easterbrook (1984) observed that "we cannot condemn so quickly anymore, and that what we do not condemn we must study under the rule of reason" (p. 10). His point was that changes in the structure of antitrust analysis should follow changes in our understanding of the consequences of the practices involved. The DMA turns the aphorism on its head by making certain types of conduct per se illegal, not, as Easterbrook remarked, because of the insights derived from lengthy study but precisely to avoid the burden of having to conduct *any* study at all. This starkly contrasts with the cautious approach to policymaking counseled by classical liberalism and operationalized through the error-cost framework.

17.5.2.2 When It Views Markets as Perfectly Competitive

Second, modern antitrust law errs in its tendency to view markets as defective when they deviate from the perfectly competitive model (see Section 17.2). Perfect competition is an imperfect guide for policy because it is a theoretical construct. "Where the antitrust law or the courts try to move the economy in the direction of the textbook model of atomistic auctions, they are bound to be wrong a great deal of the time" (Easterbrook, 1984, pp. 1–2). This is because adherence to the rigid model of perfect competition "as the normative and interpretative bedrock of modern antitrust necessarily blocks conduct that is viewed as a deviation from the blackboard model" (Meese, 2005, p. 23). But deviations from those assumptions are not necessarily expressions of market power; rather, they are often corrections of underlying market failures (Auer & Manne, 2021, p. 1320). As Alan Meese has written:

> Modern antitrust's embrace of perfect competition and its core vision of atomistic rivalry apparently blocks the recognition that non-standard contracts altering collective prices and outputs or thwarting rivals' access to markets can in fact internalize externalities, change a firm's cost structure, and thus alter price or output without creating or exercising market power. As a result, modern scholars still treat agreements that expressly or effectively alter prices or exclude rivals as manifestations of market power, the antithesis of the unbridled rivalry and the resulting prices implied by the perfect competition model and its more realistic variants. So long as scholars cling to perfect competition as a normative and descriptive ideal, antitrust policy will likely misinterpret some contracts that overcome market failure.
>
> *(2005, p. 23)*

Today, the "ghost of perfect competition" (Meese, 2005) haunts digital markets, in particular where change often takes the form of technological or business-process innovation (Auer & Manne, 2021; Manne & Wright, 2009). Particularly in oligopoly markets (like those predominated by digital platforms), "a stable outcome [requires] restrictions on the freedom of some market participants: that is, it requires some sort of coordination and control" (Bittlingmayer, 1989, p. 740). These restrictions look like a deviation from perfect competition because they are.[68] But that does not mean they are anticompetitive:

> Large, complex systems like digital platforms are incongruous with perfect competition-informed antitrust doctrine and the traditional, linear supply-chain relationship upon which it is built. The Supreme Court's recent *Ohio v. American Express Co.* decision. . . is a nod in this direction: a realization that something more than the "local" efficiency notions endemic to traditional antitrust is required if adjudication of competition disputes relating to these businesses is to avoid systematic error. What the literature and the *Amex* Court make clear is that the systemic efficiency associated with platform ecosystems entails elements of coordination and control in various places in order to optimize the whole.
>
> *(Auer & Manne, 2021, p. 1313)*

Rather, these are the apotheosis of nonstandard market corrections to market failure, where "transaction costs [] can be attenuated [but not eliminated] by substituting internal organization for market exchange" (Meese, 2014b, p. 979).

In this vein, consider the Second Circuit Court of Appeals' *United States v. Apple, Inc.* decision regarding the creation of Apple's e-book store and its entry into that market, which Amazon then dominated.[69] In that case, which concerned most-favored-nation clauses agreed upon by Apple and several book publishers, the court found:

> Even if there were such evidence, the fact that a competitor's entry into the market is contingent on a horizontal conspiracy to raise prices only means (absent monopolistic conduct by the market's dominant firm, which cannot lawfully be challenged by collusion) that the competitor is inefficient, i.e., that its entry will not enhance consumer welfare.[70]

While the court's analysis might arguably be correct from a limited, static point of view, it misses critical questions regarding dynamic competition:

> Though Apple's agency model may have led to higher short-run e-book prices, and though bringing it about may have entailed control over and effective collusion of otherwise independent competitors, it also had the potential to shake up the e-book industry and enable firms with differentiated business models to gain traction (notably Apple and its then-brand-new iPad).
>
> *(Auer & Manne, 2021, p. 1315)*

Arguably, the court's attachment to the perfect-competition model prevented it from realizing that only deviation from that model (in the form of coordination by Apple to enable its return on a risky investment) would enable new entry into an imperfect market. It is undeniable that Apple's entry into the e-book market increased competition in the long run, and it is plausible that Apple's entry would not have occurred but for its ability to coordinate publishers to facilitate it.

17.5.2.3 When It Imposes Goals, Especially the Wrong Goals

Finally, modern antitrust fails where it misconstrues the law's essential purpose. As we discussed in Section 17.4, standards in competition policy serve to elucidate the question of whether market processes are working correctly. Today, however, there is much discussion about what goals antitrust law pursues or should pursue (see Stylianou & Iacovides, 2022). This is a conceptual mistake. A classically liberal antitrust law does not contort market processes to achieve the government's preferred policy outcomes. It sets out a general framework and employs standards to gauge market processes but does not impose goals. Some of the resulting outcomes may align with competitive preferences—such as low prices—but because antitrust law is not a tool for regulating prices, these are relevant only insofar as they can be connected to a valid correction of a restriction of competition. In other words, antitrust law is not a discretionary policy tool to bludgeon market participants into lowering their prices in any given context; instead, it is a structured inquiry about the competitive process conducted under uncertainty. Attaching any end goal to this inquiry vitiates its outcome and misconstrues the law's purpose.

Even on their own terms, however, some of the goals postulated today are antithetical to the competitive process and reveal a more profound misunderstanding of the role of competition and competition law in society. For example, where antitrust law protects competitors from better, more efficient rivals, it fundamentally subverts the system's logic. The rationale of antitrust law is not to penalize efficient companies but to ensure that the public benefits of efficiency are not thwarted by foreclosure or other anticompetitive practices that limit, eliminate, or distort competition. Efficient market exit is a natural and necessary part of that process.[71] Today, however, some argue that antitrust law should curb company size and protect small competitors as a matter of principle (Wu, 2018; Vaheesan, 2020, p. 39), resuscitating the nostalgia for the (bygone?) era of antitrust's anti-efficiency strain.[72]

Neo-Brandeisians and other, generally left-leaning, scholars have also called for incorporating various policy objectives and values into antitrust, ranging from promoting democracy (Millington & Willis, 2022) to mitigating inequality (Khan & Vaheesan, 2017; Posner & Sunstein, 2022), combating racism (Davis et al., 2021), addressing climate change (Holmes, 2020, p. 364), and even promoting a general-welfare standard that would seemingly incorporate all of the above, and possibly more (Glick, 2022). Assessing the individual merits of each of these proposals is beyond the scope of this chapter, and we have already discussed why the consumer- and total-welfare standards provide an adequate yardstick for measuring competition processes (see Section 17.3.1). However, the more general point can be made that an ill-defined, value-pluralistic antitrust law inevitably bestows enormous discretion on enforcers, who, in weighing incommensurate goals and values, are ultimately required to act as regimenters and social planners (see also Lambert & Cooper, 2023). Endowing governments with vast, top-down powers to redraw market boundaries, override market transactions freely agreed upon by consenting adults, and substitute grassroots consumer preferences for their own goals could not be further from the classical liberal ideal. Apart from eviscerating individual freedom, the rule of law, and individual autonomy, such an arrangement would make error-cost assessment nigh impossible—for how does one assess the welfare effects of conduct adjusting for all the possible facets of human well-being across different groups, all of which are presumably deserving of (varying degrees of) special protection? Classical liberalism advises against such heroic assumptions about concentrated human knowledge and the folly of public policies that rely on philosopher kings who presume to possess it (Section 17.3.2).

17.5.2.4 When It Abdicates Reasoned Skepticism of Government Action

Finally, antitrust law today seems to be premised on the notion that markets can be made competitive only through active government policing and litigation. But the classical liberal position is that the vast majority of restrictive practices are enabled by government action itself (see Section 17.3.1). For every headline-grabbing case like the Department of Justice's lawsuit against Microsoft, there are multiple laws that raise tariffs and deploy other protectionist measures that restrict competition, such as the Inflation Reduction Act of 2022.[73] Among many other examples, occupational licensing laws raise barriers to entry into the trades (McLaughlin et al., 2017, pp. 3–4), acting as modern-day mercantilist guilds; zoning laws limit construction, prevent competitive market processes from solving housing shortages, and inflate prices (Bunting, 2021);[74] and certificate-of-need laws allow incumbent health care providers to restrict entry and expansion by competitors (Ohlhausen, 2015). In industries like schooling, higher education, health care, transportation, construction, and research and development, markets are shot through with government-backed restrictions on competition, big and small.[75] And, while antitrust authorities do sometimes conduct valuable advocacy work to combat restrictive government measures (Cooper et al., 2005), the lion's share of their activity—and of the scholarly and antitrust discussion—revolves around the minority of fleeting private restraints, which constitute a drop in the figurative ocean of anticompetitive hurdles.[76]

Economic liberty is rarely, if ever, considered a serious justification for cabining the *government's* ability to interfere in markets under the aegis of antitrust. For instance, in the EU parliamentary discussions preceding the adoption of the DMA, the economic freedom of gatekeepers was never seriously weighed against the European Commission's desire to impose the public policy goals of fairness and contestability. Regulation was a foregone conclusion, arguably because the impetus behind the DMA was always to punish and discipline certain predetermined firms that were looked upon unfavorably for a range of loosely connected social, political, and economic reasons.[77] Thus, with the DMA, the EU did not intend to protect competition in the modest, classical liberal sense but to infuse markets with its own sense of order, including, but not limited to, by leveling down gatekeepers, redistributing rents toward the regulators' preferred groups, and protecting less efficient competitors (Auer et al., 2024). In classical liberalism, however, the state is not the ultimate ordering power of the economy; market participants are. Accordingly, the state's goals, no matter how noble (or noble-sounding), must be subordinated to those of the individuals acting freely and spontaneously in the market—not the other way around. The DMA flouts this principle by blatantly substituting the government's specific preferences for market ordering in lieu of those that emerge through the conduct and preferences of companies and consumers (Auer et al., 2024, pp. 47–50).[78]

17.6 Conclusion: What Should Classical Liberalism Do (About Antitrust)?

In this chapter, we have attempted to understand what a classical liberal competition law might look like and whether there is even a case for any such law from a classical liberal perspective in the first place. What does this analysis contribute, and why does it matter? First, there is substantive foundational value in illuminating what remains an oddly understudied area at the intersection of classical liberalism and antitrust law. Second, the ideas discussed here might serve as an overarching set of principles that can guide classical liberal policymakers toward an antitrust policy more aligned with their Weltanschauung. While the discussion offered here will not dispel all the uncertainties in either the theoretical or practical sense, it will—we hope—at least contribute to bridging the existing gap in the literature, even if only modestly. Perhaps the most significant contribution of this chapter, and the greatest measure of its success, will be the extent to which it galvanizes further research into the underdeveloped yet enormously intriguing connection between what is still the dominant paradigm of political philosophy in most Western societies—liberalism—and an increasingly prevalent area of public policy today: antitrust.

Notes

1 See also Mogin, 2008. "Smith's words are the backbone of our antitrust laws."

2 To understand what Adam Smith was up against see, for example, Steuart (1767): "That in a country entirely taken up with the object of foreign trade, no competition should be allowed to come from abroad for articles of the first necessity, and principally for food, so as to raise prices beyond a certain standard. That no domestic competition should be encouraged upon articles of superfluity, so as to raise prices beyond a certain standard."

3 Some authors have even argued that competition is not as central an idea in *The Wealth of Nations* as scholars typically assume. See Hearn (2018).

4 Some of these assumptions have been subsequently revised. For instance, we now know that perfect information is not necessary for perfect competition. See Makowski and Ostroy (2001); Albrecht and Guthmann (2022); Albrecht (2022).

5 For the contention that Smith essentially supported a notion of competition spurred by dynamic efficiency, see Giocoli (2024, p. 836).

6 Indeed, Posner (2001, p. 2) himself is attuned to this reality, noting in the next sentence that antitrust enforcement can be inefficient when "the economies of centralizing production" outweigh the costs of monopoly.

7 This led Easterbrook to argue that one of the filters that should be used to determine whether an antitrust case is accepted by judges is whether it was brought by a competitor (Easterbrook, 1984, pp. 33–39).

8 For examples of the former, see Boudreaux and DiLorenzo (1993); DiLorenzo (1985); Smith (1983); Armetano (1982); and Armentano (1972).

9 For the distinction between the two, see Leoni (2017, pp. 84–85).

10 *Darcy v. Allen* (The Case of Monopolies), 11 Co. Rep. 84b, 77 Eng. Rep. 1260 (K. B. 1603).

11 *Darcy v. Allen*, 11 Co. Rep. 84b, 86a, 77 Eng. Rep. 1260 (K. B. 1603).

12 "There are no such things as market 'forces.' . . . The New Brandeisians [] believe the political economy is structured only through law and policy. This is of vital importance, as it means that . . . Brandeisians do not recognize any form of organization or any type of power as inevitable. Technological advances may upend existing balances in ways that facilitate consolidation, but just as government can structure the political economy to encourage innovation, it can also ensure that the fruits of innovation are not used to capture private control over markets" (Khan, 2018b, p. 132).

13 See, for example, Roepke (2014, p. 184) and Reinhoudt and Audier (2017, pp. 42–43), in which Roepke and Rüstow mockingly refer to 19th-century advocates of laissez-faire as "paleo-liberals." Rüstow and other Ordoliberals believed that Adam Smith's faith in the invisible hand was rooted in a hidden deism (Biebricher & Vogelmann, 2017, p. 139).

14 Ordoliberals were notoriously sanguine about the need for a strong state to enable and subsequently lord over the free market, even in the face of actual European authoritarianism: "In another speech, entitled 'Free Economy, Strong State,' a title strongly evocative of a lecture previously delivered by the prominent Nazi Carl Schmitt, entitled 'Strong State, Sound Economy,' Rustow argues that the best way to overcome the ills of a pluralist democracy is through a semi-authoritarian state . . . , entrusted with the ultimate control over economic policy" (Biebricher & Vogelmann, 2017, p. 139).

15 "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."

16 The question can also be framed in the reverse: What kind of intervention is appropriate to ensure that public choice considerations and government failure are properly accounted for?

17 As Hayek (1973, p. 94) shows, liberalism and the common law are deeply intertwined, not least because both rely on the notion of the spontaneous order (see also Ogus, 1989, p. 393).

18 See, for example, *Dyer's Case* of 1414, in which the court found that a contract in which John Dyer promised not to practice his trade in the same town as the plaintiff was void for being an unreasonable restraint of trade. *Dyer's Case* (1414) 2 Hen. V, fol. 5, pl. 26.

19 Thus, for example, in 1711, the Court of the Queen's Bench held in *Mitchel v. Reynolds* that although general restraints of trade were unlawful, the restraint at issue was ancillary to a legitimate transaction (the rental of a bakeshop) and necessary to accomplish its primary (beneficial) purpose. 24 Eng. Rep. 347 (Q. B. 1711). See also Hovenkamp (1989, p. 1035): "The law gradually accommodated a new, more neoclassical concept of 'competition,' within which few contracts in restraint of trade were perceived as anticompetitive. Most of them were nothing more than noncompetition agreements attending the sale of businesses in competitively structured industries. These simply did not create the opportunity to monopolize a market."

20 We are referring, of course, to the rule of reason. See 85 F. 271 (6th Cir. 1989), later affirmed by the U.S. Supreme Court in *Addyston Pipe and Steel Co. v. United States*, 175 U.S. 211 (1899). Interestingly, the defendants on appeal argued primarily that the Commerce Clause of the Constitution empowered Congress to remove barriers to interstate commerce erected by states, and not to regulate private agreements. This reasoning is also aligned with the arguments discussed in Section 3.1. *See also Standard Oil Company of New Jersey v. United States* 221 U.S. 1 (1911); *National Soc'y of Prof. Engineers v. United States*, 435 U.S. 679 (1978). On unreasonable restraints of trade, see generally Eaton (1890, p. 128).

21 See also Epstein (1995, pp. 116–118), finding exceptions to the rule of free contract in a monopoly. See also Section 4.

22 "The mere fact that a contract led to higher prices did not, ipso facto, place it outside the protection of liberty of contract. Instead, only those contracts that could only be explained as designed to achieve this effect, i.e., those contracts that had an 'immediate' and 'direct' effect on prices, were beyond the shelter of liberty of contract. Contracts that could be explained as 'legitimate' methods of competition were consistent with the natural workings of the competitive process and thus found shelter within liberty of contract. . . . Such an approach, which countenanced various forms of integration that might 'indirectly' lead to higher prices, was consistent with an approach to antitrust that emphasized the creation of wealth, and not its distribution" (Meese, 1999, pp. 91–92).

23 85 F. 271, 280 (6th Cir. 1898) (explaining the common law against unreasonable restraints of trade, and citing Justice Hull, Year Book, 2 Hen. V., folio 5, pl. 26).
24 85 F. 271, 280 (6th Cir. 1898) (explaining the common law against unreasonable restraints of trade, and citing Justice Hull, Year Book, 2 Hen. V., folio 5, pl. 26).
25 85 F. 271, 280 (6th Cir. 1898) (explaining the common law against unreasonable restraints of trade, and citing Justice Hull, Year Book, 2 Hen. V., folio 5, pl. 26). at 272.
26 85 F. 271, 280 (6th Cir. 1898) (explaining the common law against unreasonable restraints of trade, and citing Justice Hull, Year Book, 2 Hen. V., folio 5, pl. 26). at 280 (citing *Mitchel v. Reynolds*, 1 P. Wms. 181, 190 and *Alger v. Thacher*, 19 Pick. 51, 54).
27 Sherman Act, 15 U.S. Code § 1 (Jul. 2, 1890).
28 *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 54 (1911).
29 See, for example, *Mallan v. May*, 11 Mees. & W. 652 (1843): "Contracts for the partial restraint on trade are upheld . . . because it is for the benefit of the public at large that they should be enforced."
30 See also Nozick, 1974, pp. 32–33; Hayek 1980; Hayek, 2007, pp. 18–20, 24, 41; Popper, 2011, pp. 9–10, 42–43, 101; Bastiat, 2007, pp. 23–35.
31 "Liberalism is never utopian, by anyone's definition, but always procedural, because it presupposes a society of people who profoundly disagree with each other and whose interests, goals, stakes and stands, cannot easily, if ever, be fully reconciled."
32 See, in a similar vein, Salinger (2024, p. 9): "To date, the one underlying principle of modern U.S. antitrust enforcement has been to protect competition (and, therefore, the beneficiaries of competition)."
33 Robinson-Patman Act of 1936 (Pub. L. No. 74–692), 49 Stat. 1526 (Jun. 19, 1936) (codified at 15 U.S.C. § 13).
34 See, for example, *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart dissenting) ("The sole consistency that I can find is that in litigation under [the merger laws], the Government always wins.").
35 See Wilson (2019) for a discussion and critique of other goals and standards.
36 *"If antitrust becomes more political, the outcome will be less democratic, more politically determined results*—precisely the opposite of what proponents claim to want" (Manne, 2021b, p. 14). See also Wilson and Cela (2022).
37 "The conclusion that high prices justified interference with contractual freedom because of their distributional consequences does not fit neatly within the structure of liberty of contract jurisprudence. . . . If the state could not act to redistribute wealth from employer to employee, why could it redistribute wealth from businesses to consumers?" (Meese, 1999, p. 12).
38 "Consumption is the sole end and purpose of all production; and *the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer*" (emphasis added).
39 See also Lyons (2023), who argues that Adam Smith advocated something similar to a modern consumer-welfare standard. "This is a very modern consumer welfare standard—[Smith's] concern with collusion was that it raises profits at the expense of consumers."
40 See also *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), stating that while Section 1 of the Sherman Act could be interpreted to proscribe all contracts, the U.S. Supreme Court has never taken a literal approach to its language but has rather interpreted it as outlawing only unreasonable restraints on trade.
41 And, indeed, for some, including Bork (1978, pp. 107–115), the so-called consumer-welfare standard really operates as a total-welfare standard.
42 Opening the door to explicitly redistributive measures, Epstein argues, causes class conflict, partisan gridlock, and bitter animosity (Epstein, 2008, pp. 28–34; Merrill, 2021, p. 18).
43 It also has the added advantage of reconciling potentially conflicting effects across a supply chain, which may arise when input suppliers or workers are affected by conduct that simultaneously affects consumers (Albrecht et al., 2024).
44 "The author is aware of no decision in which a court implementing Section 2 [of the Sherman Act] 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."
45 Some authors have pointed out that the distinction between total and consumer welfare is of little practical importance (Blair & Sokol, 2013, p. 2498; Wilson, 2019, p. 16; Hovenkamp, 2013, p. 2474).

46 This is, of course, reminiscent of Hayek's theory of the use of knowledge in society (Hayek, 1945).
47 The insight builds on Hayek's so-called knowledge problem. Two aspects of the problem can be distinguished. First, individuals have limited knowledge and foresight. Second, knowledge is dispersed across the many members of society (Feld & Nientiedt, 2022, pp. 461–462). Obviously, the government is not immune to the knowledge problem. See, for example, Scheall (2020).
48 "The man of system . . . seems to imagine that he can arrange the different members of a great society with as much ease as the hand arranges the different pieces upon a chess-board. He does not consider that in the great chess-board of human society, every single piece has a principle of motion of its own, altogether different from that which the legislature might choose to impress upon it."
49 *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607–608 (1972).
50 For a judicial decision implementing this approach, see *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9 (1979).
51 *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004).
52 Free to Choose, Episode 10: "How to Stay Free." Minute 48:25. See also Friedman (2009, pp. 8, 39).
53 Though it must be said that the distinction between per se rules and the rule of reason is overstated, as all legal regimes exist on a spectrum somewhere between perfect rules and looser standards (Manne, 2021a, p. 425).
54 See *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886–887 (2007), finding that the per se rule should be applied (1) "only after courts have had considerable experience with the type of restraint at issue" and (2) "only if courts can predict with confidence that [the restraint] would be invalidated in all or almost all instances under the rule of reason" because it "'lack[s] . . . any redeeming virtue.'" In other words, per se rules summarize what has been learned in prior adjudications. See also Ehrlich and Posner (2008, p. 266).
55 See also OECD, Recommendation concerning effective action against hard core cartels [C(98)35/FINAL], available at https://one.oecd.org/document/C(98)35/FINAL/en/pdf.
56 *State Oil Co. v. Khan*, 522 U.S. 3, 16 (1997).
57 *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 56 (1977).
58 See also *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).
59 As Salinger (2024, p. 7) writes, "Making the elimination of double marginalization a mere footnote to be treated with the same sort of skepticism that is typical of how the Agencies view efficiency claims ignores the basic economics of vertical mergers."
60 Complaint, *In the Matter of Illumina, Inc., and GRAIL, Inc.*, FTC Docket No. 9401 (Apr. 3, 2023).
61 Complaint, *In the Matter of Illumina, Inc., and GRAIL, Inc.*, FTC Docket No. 9401 (Apr. 3, 2023). at 75.
62 Brief of the Federal Trade Commission, *Illumina, Inc. & GRAIL, LLC v. FTC*, Case No. 23–60167 (5th Cir., Aug. 4, 2023) at 20.
63 *United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D. C. Cir. 2019).
64 Complaint, *Microsoft Corp., and Activision Blizzard Inc.*, FTC Docket No. 9412 (Dec. 22, 2022).
65 See also *United States v. Topco Assocs., Inc*, 405 U.S. 596, 607–608 (1972). "It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act."
66 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).
67 Andrei Hagiu (2006) explains that there is a "fundamental welfare tradeoff between two-sided proprietary . . . platforms and two-sided open platforms, which allow 'free entry' on both sides of the market," and thus "it is by no means obvious which type of platform will create higher product variety, consumer adoption and total social welfare." See also Barnett (2011, p. 1927) and ICLE (2022, pp. 20–21).
68 See Bittlingmayer (1989, p. 751): "Clearly, when no competitive equilibrium is possible, something else has to take its place. Since the problems arise from too much competition and too little cooperation, the institutions that solve these problems necessarily imply a variety of arrangements that look 'anticompetitive.'"
69 791 F.3d 290 (2d Cir. 2015).
70 791 F.3d 290 (2d Cir. 2015). at 334.

71 See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Cargill v. Monfort*, 479 U.S. 104 (1986).
72 See Easterbrook (1984, p. 3, footnote 5).
73 Inflation Reduction Act of 2022 (Pub. L. 117–169), 136 Stat. 1818 (Aug. 16, 2022). The EU, for instance, clearly views the Inflation Reduction Act (IRA) as a protectionist act that distorts competition. Ursula Von der Leyen, president of the European Commission, remarked that "there is a risk that the IRA can lead to unfair competition, could close markets," and that the EU "must take action to rebalance the playing field where the IRA and other measures create distortions" (Von der Leyen, 2022).
74 Bunting also finds that antitrust law is generally not the appropriate doctrinal vehicle for addressing the anticompetitive impact of commercial zoning restrictions.
75 For further examples of how governments distort competition through their interventions, see, for example, Sokol (2009).
76 In the past, antitrust authorities such as the FTC explicitly recognized that the most egregious harms to competition came from distortive government measures. See, for instance, Ohlhausen (2017, p. 8): "Arguably the most destructive restrictions on competition flow from the government. Put simply, government regulation is the barrier to entry that may never fall." See also Federal Trade Commission (2017, p. 10). Such statements by FTC officials are increasingly rare, however.
77 On the DMA being punitive see, for instance, Andriychuk (2023, pp. 127–131): "The means for allowing the second-tier ersatz-Big Tech to scale up is punitive: to slow down the current gatekeepers by imposing upon them a catalogue of exceptionally demanding obligations. . . . [T]his punitive nature of the DMA also means that the obligations can be blatantly arduous and interventionist."
78 On how uninterested the DMA seems to be in the effects its provisions may have on consumers (let alone gatekeepers), see Auer (2024).

Bibliography

Abbott, A. (2023). UK blocking the Microsoft-Activision merger is anticompetitive and anti-innovation. *Truth on the Market*. https://truthonthemarket.com/2023/05/04/uk-blocking-of-microsoft-activision-merger-is-anticompetitive-and-anti-innovation/

Albrecht, B. (2022). Common chicanery about competition. *Economic Forces*. https://pricetheory.substack.com/p/common-chicanery-about-competition

Albrecht, B., Auer, D., & Manne, G. A. (2024). *Labor monopsony and antitrust enforcement: A cautionary tale* (ICLE White Paper No. 2024–05–01). https://laweconcenter.org/resources/labor-monopsony-and-antitrust-enforcement-a-cautionary-tale/

Albrecht, B., & Guthmann, R. R. (2022). *Market microstructure and informational efficiency: The role of intermediation* [Working paper]. Available at SSRN https://ssrn.com/abstract=3493194

Andriychuk, O. (2023). Do DMA obligations for gatekeepers create entitlements for business users? *Journal of Antitrust Enforcement, 11*, 123–132.

Areeda, P., & Hovenkamp, H. (2017). *Antitrust law* (4th ed.). Wolters Kluwer.

Armentano, D. (1972). *The myths of antitrust: Economic theory and legal cases*. Arlington House.

Armetano, D. (1982). *Antitrust and monopoly: Anatomy of a policy failure*. Wiley.

Auer, D. (2024). The broken promises of Europe's digital regulation. *Truth on the Market*. https://truthonthemarket.com/2024/03/12/the-broken-promises-of-europes-digital-regulation

Auer, D., & Radic, L. (2022). The growing legacy of Intel. *Journal of Competition Law & Practice, 14*(1), 15–23.

Auer, D., & Radic, L. (2024, July 9). The legacy of neo-Brandeisianism: History or footnote? In *Network Law Review*. Retrieved from https://www.networklawreview.org/auer-radic-brandeisianism/

Auer, D., Bowman, S., & Manne, G. A. (2022). Should Asean antitrust laws emulate European competition policy? *Singapore Economic Review, 67*(5), 1637–1697.

Auer, D., Lesh, M., & Radic, L. (2023). Digital overload: How the Digital Markets, Competition and Consumers Bill's sweeping new powers threaten Britain's economy. *Institute of Economic Affairs*. https://iea.org.uk/publications/digital-overload-how-the-digital-markets-competition-and-consumers-bills-sweeping-new-powers-threaten-britains-economy/#Self-preferencing

Auer, D., & Manne, G. A. (2021). Antitrust dystopia and antitrust nostalgia: Alarmist theories of harm in digital markets and their origins. *George Mason Law Review, 28*(4), 1281–1398.

Auer, D., Manne, G.A., & Radic, L. (2024). Regulate for what? A closer look at the rationale and goals of digital competition regulations (ICLE White Paper No. 2024–05-01). https://laweconcenter.org/wp-content/uploads/2024/05/ICLE-Digital-Competition-Regulation-05-15-2024.pdf
Baker, J. B. (2015). Taking the error out of "error cost" analysis: What's wrong with antitrust's right. *Antitrust Law Journal, 80*(1), 1–38.
Barnett, J. M. (2011). The host's dilemma: Strategic forfeiture in platform markets for informational goods. *Harvard Law Review, 124*(8), 1861–1938.
Bastiat, F. (2007). *The law*. Ludwig von Mises Institute.
Beach, C. F. (1898). *A treatise on the law of monopolies and industrial trusts, as administered in England and the United States of America*. Central Law Journal Company.
Biebricher, T., & Vogelmann, F. (Eds.). (2017). *The birth of austerity: German Ordoliberalism and contemporary neoliberalism*. Rowman & Littlefield.
Bittlingmayer, G. (1989). The economic problem of fixed costs and what legal research can contribute. *Law & Social Inquiry, 14*(4), 739–762.
Boudreaux, D. J., & DiLorenzo, T. J. (1993). The protectionist roots of antitrust. *The Review of Austrian Economics, 6*(2), 81–96.
Bork, R. H. (1978). *The antitrust paradox: A policy at war with itself*. The Free Press.
Blair, R. D., & Sokol, D. (2013). Welfare standards in U.S. and EU. Antitrust enforcement. *Fordham Law Review, 81*(5), 2497–2541.
Brandeis, L. D. (1934). The curse of bigness. In O. K. Fraenkel (Ed.), *The curse of bigness: The miscellaneous papers of Louis D. Brandeis* (pp. 109–111). Viking Press.
Buchanan, J. M. (2000). The soul of classical liberalism. *The Independent Review, 5*(1), 111–119.
Bunting, W. C. (2021). Curbing the anticompetitive impact of commercial land use regulation: An administrative approach. *Villanova Law Review, 66*(4), 681–729.
Butler, E. (2012). *Public choice—a primer*. Institute of Economics Affairs.
Coase, R. H. (1937). The nature of the firm. *Economica, 4*(16), 386–405.
Coase, R. H. (1964). The regulated industries: Discussion. *American Economic Review, 54*(2), 194–197.
Crane, D. (2019). How much Brandeis do the neo-Brandeisians want? *The Antitrust Bulletin, 64*(4), 531–539.
Coglianese, C. (2012). *Regulatory breakdown: The crisis of confidence in U.S. regulation*. University of Pennsylvania Press.
Cooper, J. C., Pautler, P. A., & Zywicki, T. J. (2005). Theory and practice of competition advocacy at the FTC. *Antitrust Law Journal, 72*(3), 1091–122.
Davis, J. P., Cramer, E. L., Streater, R. L., & Rubin, M. R. (2021). Antitrust as antiracism: Antitrust as a partial cure for systemic racism (and other systemic "isms"). *The Antitrust Bulletin, 66*(3), 359–383.
DeBow, M. E. (1991). The social costs of populist antitrust: A public choice perspective. *Harvard Journal of Law & Public Policy, 14*, 202–223.
DiLorenzo, T. J. (1985). The origins of antitrust: An interest-group perspective. *International Review of Law and Economics, 5*(1), 73–90.
Dorsey, E. (2019). Anything you can do, I can do better—except in big tech? Antitrust's new inhospitality tradition. *Kansas Law Review, 68*(5), 975–1015.
Dorsey, E., Manne, G. A., Rybnicek, J., Stout, K., & Wright, J. D. (2020). Consumer welfare and the rule of law: The case against the new populist antitrust movement. *Pepperdine Law Review, 47*(4), 861–916.
Easterbrook, F. H. (1984). The limits of antitrust. *Texas Law Review, 63*(1), 1–40.
Easterbrook, F. H. (1986). Workable antitrust policy. *Michigan Law Review, 84*, 1696–1713.
Eaton, A. M. (1890). On contracts in restraint of trade. *Harvard Law Review, 4*(3), 128–137.
Ehrlich, I., & Posner, E. (1974). An economic analysis of legal rulemaking. *Journal of Legal Studies, 3*(1), 257–286.
Epstein, R. A. (1995). *Simple rules for a complex world*. Harvard University Press.
Epstein, R. A. (1998). *Principles for a free society: Reconciling individual liberty with the common good*. Basic Books.
Epstein, R. A. (2003). *Skepticism and freedom: A modern case for classical liberalism*. University of Chicago Press.
Epstein, R. A. (2011). *Design for liberty*. Harvard University Press.
Epstein, R. A. (2014). *The classical liberal constitution*. Harvard University Press.

Feld, L. P., & Nientiedt, D. (2022). Hayekian economic policy. *Journal of Economic Behavior and Organization, 204*, 457–465.
Friedman, M. (2009). *Capitalism and freedom* (40th anniversary ed.). University of Chicago Press.
Federal Trade Commission. (2017). *Prepared statement of the Federal Trade Commission on competition and occupational licensure before the Judiciary Committee Subcommittee on Regulatory Reform, Commercial and Antitrust Law*. U.S. House of Representativeshttps://www.ftc.gov/system/files/documents/public_statements/1253073/house_testimony_licensing_and_rbi_act_sept_2017_vote.pdf
Giocoli, N. (2024). Neither populist nor neoclassical: The classical roots of the competition principle in American antitrust law. *History of Political Economy, 56*(5), 805–841.
Glick, M. (2022). An economic defense of multiple antitrust goals: Reversing income inequality and promoting political democracy. *Institute for New Economic Thinking Working Paper Series* No. 181.
Goodin, R. (1995). *Utilitarianism as a public philosophy*. Cambridge University Press.
Gordon, D. (Ed). (2011). *The Turgot collection*. Ludwig von Mises Institute.
Hagiu, A. (2006). *Proprietary vs. open two-sided platforms and social efficiency* (AEI-Brookings Joint Center for Regulatory Studies Working Paper No. 06–12). AEI-Brookings Joint Center for Regulatory Studies.
Hancock, E. (2024). "Severe pain in the butt": EU's digital competition rules make new enemies on the internet. Politico. https://www.politico.eu/article/european-union-digital-markets-act-google-search-malicious-compliance
Hayek, F. A. (1945). The use of knowledge in society. *The American Economic Review, 35*(4), 519–530.
Hayek, F. A. (1979). *Law, legislation, and liberty: Vol. 3. The political order of a free people*. Routledge & Kegan Paul.
Hayek, F. A. (1980). *Individualism and economic order*. University of Chicago Press.
Hayek, F. A. (1988). *The fatal conceit: The errors of socialism*. Routledge.
Hayek, F. A. (2007). *The road to serfdom*. University of Chicago Press.
Hearn, J. (2018). How to read the Wealth of Nations (or why the division of labor is more important than competition in Adam Smith). *Sociological Theory, 36*(2), 162–184.
Holmes, S. (2020). Climate change, sustainability, and competition law. *Journal of Antitrust Enforcement, 8*, 354–405.
Hovenkamp, H. (1989). The Sherman Act and the classical theory of competition. *Iowa Law Review, 74*, 1019–1065.
Hovenkamp, H. (2013). Implementing antitrust's welfare goals. *Fordham Law Review, 81*(5), 2471–2496.
Hovenkamp, H. (2019). Is antitrust's consumer welfare standard imperiled? *Journal of Corporation Law, 45*, 101–130.
Hovenkamp, H., & Scott Morton, F. (2020). Framing the Chicago school of antitrust analysis. *University of Pennsylvania Law Review, 168*(7), 1843–1878.
International Center for Law and Economics (ICLE). (2023). Brief for *amici curiae* International Center of Law and Economics Scholars on behalf of petitioners. Illumina, Inc. and Grail, Inc. v. Federal Trade Commission, Docket No. 23–60167 (5th Circuit). https://laweconcenter.org/wp-content/uploads/2023/06/ICLE-amicus-brief-as-filed.pdf
Jones, A., Surfin, B., & Dunne, N. (2019). *EU competition law: Texts, cases and materials* (7th ed.). Oxford University Press.
Jorde, T. M., & Teece, D. (Eds.) (1992). *Antitrust, innovation, and competitiveness*. Oxford University Press.
Joskow, P. L., & Klevorick, A. K. (1979). A framework for analyzing predatory pricing policy. *Yale Law Journal, 89*(2), 213–270.
Khan, L. M. (2017). Amazon's antitrust paradox. *Yale Law Journal, 126*(3), 710–805.
Khan, L. M. (2018a). The ideological roots of America's market power problem. *Yale Law Journal Forum, 127*, 960–979.
Khan, L. M. (2018b). The new Brandeis movement: America's antimonopoly debate. *Journal of European Competition Law & Practice, 9*(3), 131–132.
Khan, L. M., Chopra, R., & Slaughter, R. K. (2021). Statement on the withdrawal of the vertical merger guidelines. FTC Commission File No. P810034 (September 15, 2021). https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-commissioner-rohit-chopra-commissioner-rebecca-kelly-slaughter

Khan, L. M., & Vaheesan, S. (2017). Market power and inequality: The antitrust counterrevolution and its discontents. *Harvard Law & Public Policy Review, 11*(235), 235–294.

Kirzner, I. M. (2000). *The driving force of the market: Essays in Austrian economics*. Routledge.

Kleit, A. N. (1992). Beyond the rhetoric: An inquiry into the goal of the Sherman Act (Federal Trade Commission Working Paper No. 195). Federal Trade Commission. https://www.ftc.gov/sites/default/files/documents/reports/advertising-restrictions-rent-increasing-costs/wp195.pdf

Kukathas, C., & Petit, P. (1991). *Rawls: A Theory of Justice and its critics*. Stanford University Press.

Lambert, T., & Cooper, T. (2023). Neo-Brandeisianism's democracy paradox. *Journal of Competition Law, 49*, 347–378.

Leoni, B. (2017). *Law, liberty and the competitive market*. Routledge.

Leoni, B. (1991). *Freedom and the law*. Liberty Fund.

Letwin, W. L. (1954). The English common law concerning monopolies. *The University of Chicago Law Review, 21*(3), 355–386.

Lyons, B. (2023). What would Adam Smith have thought about modern cartel policy, 300 years after his birth? *Competition Policy Blog*. https://competitionpolicy.wordpress.com/2023/06/27/what-would-adam-smith-have-thought-about-modern-cartel-policy-300-years-after-his-birth

Makowski, L., & Ostroy, J. M. (2001). Perfect competition and the creativity of the market. *Journal of Economic Literature, 39*(2), 479–535.

Manne, G. A. (2020a). Error costs in digital markets. In J. D. Wright & D. H. Ginsburg (Eds.), *The Global Antitrust Institute report on the digital economy*, George Mason University Antonin Scalia Law School (pp. 33–108).

Manne, G. A. (2020b). Foreword: Against the vertical discrimination presumption. *Concurrences Revue Des Droits De La Concurrence* No. 2–2020, 1–4.

Manne, G. A. (2021a). The rule of reason as a discovery procedure: A response to Ramsi Woodcock's Hidden Rules of a Modest Antitrust. *Minnesota Law Review, 105*, 422–453.

Manne, G. A. (2021b). *Should antitrust enforcement account for socially desirable, but otherwise anticompetitive, objectives?* [Working paper]. https://laweconcenter.org/wp-content/uploads/2023/03/Manne-Should-Antitrust-Enforcement-Account-for-Socially-Desirable-Objectives_-2021-1.pdf

Manne, G. A., & Radic, L. (2023). The FTC's gambit against Amazon: Navigating a multiverse of blowback and consumer harm. *Truth on the market*. https://truthonthemarket.com/2023/08/03/the-ftcs-gambit-against-amazon-navigating-a-multiverse-of-blowback-and-consumer-harm

Manne, G. A., & Wright, J. D. (2009). Introduction. In G. A. Manne & J. D. Wright (Eds.), *Competition policy and patent law under uncertainty: Regulating innovation* (pp. 1–24). Cambridge University Press.

McCraw, T. K. (1989). What economists have thought about competition, and what difference it makes. *Proceedings of the Massachusetts Historical Society, 101*, 24–55.

Meese, A. J. (1999). Liberty and antitrust in the formative era. *Boston University Law Review, 79*, 1–92.

Meese, A. J. (2005). Market failure and non-standard contracting: How the ghost of perfect competition still haunts antitrust. *Journal of Competition Law and Economics, 1*, 21–95.

Meese, A. J. (2010). 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. *New York University Law Review, 85*(3), 659–737.

Meese, A. J. (2014a). Antitrust, regulatory harm, and economic liberty. *Iowa Law Review Bulletin, 99*, 115–135.

Meese, A. J. (2014b). Robert Bork's forgotten role in the transaction cost revolution. *Antitrust Law Journal, 79*, 953–982.

Melamed, D., & Petit, N. (2019). The misguided assault on the consumer welfare standard in the age of platform markets. *Review of Industrial Organization, 54*(4), 741–774.

Merrill, T. W. (2021). Classical liberal property and the question of institutional choice. *Journal of Legal Studies, 50*(S2), 9–25.

McLaughlin, P., Mitchell, M. D., & Philpot, A. (2017). The effects of occupational licensure on competition, consumers and the workforce. *Mercatus on Policy*. https://www.mercatus.org/research/public-interest-comments/effects-occupational-licensure-competition-consumers-and

McNulty, P. J. (1967). A note on the history of perfect competition. *Journal of Political Economy, 75*(4), 395–399.

Millington, L., & Willis, E. (2022). Competition law and non-economic considerations: The particular case of democracy. *Journal of International and Comparative Law, 9*(51), 51–74.

Mises, L. v. (1961). *Planned chaos*. Ludwig von Mises Institute.

Mises, L. v. (2002). *Liberalism in the classical tradition*. Ludwig von Mises Institute.

Mnookin, R. H., & Kornhauser, L. (1979). Bargaining in the shadow of the law: The case of divorce. *Yale Law Journal, 88*(5), 950–997.

Mogin, D. (2008, June 15). Antitrust and democracy: Adam Smith was right. *Mogin Rubin*. https://moginrubin.com/antitrust-democracy-adam-smith-right

Nozick, R. (1974). *Anarchy, state, and utopia*. Basic Books.

Ohlhausen, M. K. (2015). Certificate of need laws: A prescription for higher costs. *Antitrust, 30*(1), 50–54.

Ohlhausen, M. K. (2017). *The FTC's path ahead*. GCR Live 6th Annual Antitrust Law Leaders Forum, Miami, Florida. https://www.ftc.gov/system/files/documents/public_statements/1070123/gcr_the-ftc_path_ahead.pdf

Ogus, A. I. (1989). Law and spontaneous order: Hayek's contribution to legal theory. *Journal of Law and Society, 16*(4), 393–409.

Page, W. H. (1989). The Chicago school and the evolution of antitrust: Characterization, antitrust injury, and evidentiary sufficiency. *Virginia Law Review, 75*(7), 1221–1308.

Petit, N., & Radic, L. (2023). The necessity of a consumer welfare standard in antitrust analysis. *ProMarket*. https://www.promarket.org/2023/12/18/the-necessity-of-a-consumer-welfare-standard-in-antitrust-analysis

Pigou, A. C. (1912). *Wealth and welfare*. Macmillan and Co., Limited.

Popper, K. (2011). *The open society and its enemies*. Routledge.

Posner, E. A., & Sunstein, C. (2022). Antitrust and inequality. *American Journal of Law and Equality, 2*, 190–207.

Posner, R. A. (2001). *Antitrust law* (2nd ed.). University of Chicago Press.

Portuese, A. (2023). Microsoft-Activision merger: Will antitrust undermine the future of online gaming? *Capitalism Magazine*. https://www.capitalismmagazine.com/2023/01/microsoft-activision-meger-will-antitrust-undermine-the-future-of-online-gaming

Pyle, J. J. (1999). Race, equality and the rule of law: Critical race theory's attack on the promises of liberalism. *Boston College Law Review, 40*(6), 787–827.

Reinhoudt, J., & Audier, S. (2017). *The Walter Lippmann Colloquium: The birth of neoliberalism*. Palgrave Macmillan.

Robbins, L. (1937). *Economic planning and international order*. Macmillan.

Roepke, W. (2014). *A humane economy: The social framework of the free market*. ISI Books.

Salinger, M. A. (2024). The 2023 Merger Guidelines and the role of economics. *Review of Industrial Organization*. https://doi.org/10.1007/s11151-024-09957-x

Scheall, S. (2020). *F. A. Hayek and the epistemology of politics*. Routledge.

Schwartz, M. (1986). The perverse effects of the Robinson-Patman Act. *The Antitrust Bulletin, 31*(3), 733–760.

Schumpeter, J. A. (1942). *Capitalism, socialism, and democracy*. Harper & Row.

Sidak, G., & Teece, D. (2009). Dynamic competition in antitrust law. *Journal of Competition Law and Economics, 5*(4), 581–631.

Simon, H. A. (1959). Theories of decision making in economics. *American Economic Review, 49*(3), 253–283.

Smith, A. (1776). *An inquiry into the nature and causes of the wealth of nations*. W. Strahan and T. Cadell, London.

Smith, F. L. (1983, January/February). Why not abolish antitrust? *Regulation January/February*, 23–33. https://www.aei.org/articles/why-not-abolish-antitrust/

Sokol, D. (2014). The transformation of vertical restraints: Per se illegality, the rule of reason, and per se legality. *Antitrust Law Journal, 79*, 1003–1016.

Sokol, D. (2009). Limiting anticompetitive government interventions that benefit special interests. *George Mason Law Review, 17*, 119–189.

Sowell, T. (1995). *The vision of the anointed*. Basic Books.

Steuart, J. (1767). *The principles of political economy*. A. Millar and T. Cadell.

Stigler, G. J. (1957). Perfect competition, historically contemplated. *Journal of Political Economy, 65*(1), 1–17.
Stigler, G. J. (1946). *The theory of price*. Macmillan.
Stylianou, K., & Iacovides, M. (2022). The goals of EU competition law: A comprehensive empirical investigation. *Legal Studies, 42*, 620–648.
Tullock, G. (1967). The welfare costs of tariffs, monopolies, and theft. *Economic Inquiry, 5*(3), 224–232.
Vaheesan, S. (2020). Privileging consolidation and proscribing cooperation: The perversity of contemporary antitrust law. *Journal of Law and Political Economy, 1*(1), 28–45.
Veljanovski, C. (2021). Hayek on competition and antitrust in the digital age. In V. Hewson (Ed.), *The meaning of competition in the digital age* (pp. 16–27). Institute of Economic Affairs.
Veljanovski, C. (2023). *Hayek on competition: A liberal antitrust for a digital age?* Institute of Economic Affairs, the New Hobart Papers No.1.
Vickers, J. (2024). Competition policy and the consumer welfare standard. *Journal of Antitrust Enforcement, 12*(2), 1–11.
Viner, J. (1960). The intellectual history of laissez-faire. *The Journal of Law & Economics, 3*, 45–69.
Von der Leyen, U. (2022). *Speech by President Von der Leyen at the College of Europe in Bruges*. European Commission. https://ec.europa.eu/commission/presscorner/detail/en/speech_22_7487
West, E. G. (1976). *Adam Smith: The man and his works*. Arlington House.
Williamson, O. E. (1968). Economies as an antitrust defense. *The American Economic Review, 58*(1), 18–36.
Williamson, O. E. (1985). *The economic institutions of capitalism: Firms, markets, relational contracting*. Free Press.
Wilson, C. S. (2019). *Welfare standards underlying antitrust enforcement: What you measure is what you get*. Luncheon keynote address at George Mason Law Review 22nd Annual Antitrust Symposium.
Wilson, C. S., & Clovers, K. (2020). The growing nostalgia for past regulatory misadventures and the risk of repeating these mistakes with big tech. *Journal of Antitrust Enforcement, 8*(10), 10–19.
Wilson, C. S., & Cela, A. S. (2022). Deconstructing the worldview of the neo-Brandeisians through Marxism and critical legal studies. *George Mason Law Review, 29*(4), 961.
Winston, C. (2006). *Government failure versus market failure: Microeconomics policy research and government performance*. AEI-Brookings Joint Center for Regulatory Studies.
Wright, J. D., & Ginsburg, D. H. (2013). The goals of antitrust: Welfare trumps choice. *Fordham Law Review, 81*(5), 2405–2423.
Wu, T. (2018). *The curse of bigness: Antitrust in the new gilded age*. Columbia Global Reports.