THE VALUES AND CONSEQUENCES OF ANTITRUST DAMAGES*

I. INTRODUCTION

Justice Scalia was right. Five years ago, in *Comcast Corp. v. Behrend*,[1] the Supreme Court held that the trial court improperly certified a class of cable subscribers. The opinion, authored by Justice Scalia, found that the economic model used to measure damages resulting from alleged antitrust violations could not accurately compute damages on a class-wide basis.[2] "For all we know," Justice Scalia concluded for the five-justice majority,[3] subscribers to Comcast cable services could have been injured by any number of antitrust violations.[4] "[C]able subscribers in Gloucester County," Justice Scalia supposed, "may have been overcharged because of petitioners' alleged elimination of satellite competition."[5] He continued, "subscribers in Camden County may have paid elevated prices because of petitioners' increased bargaining power vis-à-vis content providers,"[6] while subscribers in Montgomery County "may have paid rates produced by the combined effects of multiple forms of alleged antitrust harm."[7] According to Justice Scalia, and the four Justices who joined him, "[t]he permutations involving four theories of liability and 2 million subscribers located in 16 counties are nearly endless."[8]

Justice Scalia was right not because the academy has failed to develop and the judiciary to adopt sound theoretical models to identify antitrust injury and the resulting damages—they have.[9] As it stands, antitrust plaintiffs "must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended

* Kevin Trainer, J.D. Candidate, Temple University Beasley School of Law, 2018. I would like to thank my wonderful colleagues on the *Temple Law Review* editorial staff for their work on this piece, especially Sonya Bishop, Liam Thomas, and Cody Wolpert. I thank Professor Salil Mehra for supervising this project, and Howard Langer, John Grogan, Ned Diver, Irv Ackelsberg, and Peter Leckman for introducing me to antitrust and the many ways in which it can and should be about the collective good. And, finally, I thank Emma McClafferty, my enduring coconspirator.

1. 133 S. Ct. 1426 (2013).

2. *Comcast*, 133 S. Ct. at 1432–33.

3. In *Comcast*, the Justices split five to four, with Chief Justice Roberts and Justices Kennedy, Thomas, and Alito joining Justice Scalia. *Id.* at 1429. Justices Ginsburg and Breyer dissented, joined by Justices Sotomayor and Kagan. *Id.* at 1435 (Ginsburg & Breyer, JJ., dissenting).

4. *Id.* at 1434–35 (majority opinion).

5. *Id.* at 1434.

6. *Id.*

7. *Id.*

8. *Id.* at 1434–35.

9. *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 17.1–17.4 (4th ed. 2011) [hereinafter HOVENKAMP, FEDERAL ANTITRUST POLICY] (summarizing scholarship for identifying antitrust injury and calculating antitrust harm).

to prevent and that flows from that which makes defendants' acts unlawful."[10] Moreover, it is now well accepted, at least as a theoretical matter, that the optimal damage award in an antitrust action should equal the net harm to persons other than the offender.[11] Thus, if an antitrust violation allows the violator to overcharge customers by $100, and the violation itself causes net social losses of $50, then the optimal damage award is $150.[12]

The difficulty, of course, lies not in the conceptualization of the antitrust injury and damages rules, but in accessing the information the rules demand[13] or, more radically, questioning whether the rules are any good in the first place.[14] It is here where Justice Scalia was right. He observed that under the current antitrust regime, the judiciary's ability to address substantive antitrust claims is curtailed by rules that may permit harms caused by monopolistic or cartel behavior to endure.[15]

Indeed, Justice Scalia's language seems to concede that the two million cable subscribers may have actually suffered real harm, even if that harm may not have been deemed cognizable or measurable under the antitrust laws.[16] The subscribers from Gloucester County "may have been overcharged because of petitioners' alleged elimination of satellite competition."[17] Should an "overcharge" resulting from an "elimination" be illegal? The subscribers from Camden County "may have paid elevated prices because of petitioners' increased bargaining power vis-à-vis content providers."[18] Is an "elevated price" the legal equivalent of an "overcharge" and, if so, are "elevated prices" illegal if they result from "increased bargaining power"? And the subscribers in Montgomery County "may have paid rates produced by the combined effects of multiple forms of alleged antitrust harm."[19] But are not these "rates" "overcharges" or "elevated" and, if so, is such a rate, "produced by . . . antitrust

10. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (quoting Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125 (1969)).

11. *See, e.g.*, *id.*; *see also* William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 656 (1983).

12. *See, e.g.*, Landes, *supra* note 11, at 656. See also *infra* Part II.A for a detailed explanation of the optimal damages model.

13. *See, e.g.*, *Comcast*, 133 S. Ct. at 1430–31 (describing the theories of liability and the damages model developed to capture those damages).

14. *See, e.g.*, Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1075 (1979) (concluding "that the trend toward use of an exclusively economic approach to antitrust analysis excludes important political considerations that have in the past been seen as relevant by Congress and the courts"); Joseph Gregory Sidak, Note, *Rethinking Antitrust Damages*, 33 STAN. L. REV. 329, 329 (1981) (noting, in 1981, that "[a]ntitrust law currently lacks a unified theory of liability and damages").

15. *See Comcast*, 133 S. Ct. at 1434–35.

16. *Id.* at 1434–35. Justice Scalia would no doubt respond that it was the district court that eliminated three out of the four theories of liability, thus holding as a matter of law that those three were not antitrust injuries.

17. *Id.* at 1434.

18. *Id.*

19. *Id.*

harm," paradigmatically illegal? Unfortunately, Justice Scalia did nothing to cure the constraint—he shrugged his shoulders. Justice Scalia's epistemic observation that *we just don't know* was treated as an escape hatch, not as a bug in the antitrust enforcement system that the Supreme Court might have wanted to fix.

Justice Scalia's rhetorical incredulity seems to stem from the fact that the antitrust laws continue to lack a unified theory of liability and resulting damages.[20] This Comment suggests that Justice Scalia's formalistic approach to resolving an allegation of antitrust harm was a manifestation of a deeper problem in the antitrust laws, and one that portends more significant problems to come. The evolution of antitrust doctrines has strayed far from their original intent. Specifically, the current antitrust damages regime, in which the price paid by a putative consumer is treated as the sole measure of harm, dangerously neglects other sociopolitical values, like a free and healthy democracy, that may be equally jeopardized by antitrust violations.

After the introduction, this Comment proceeds in three Sections. Section II begins by exploring the optimal damages model in antitrust law, what it is and where it comes from. It then turns to demonstrate that the optimal damages model runs immediately into doctrinal and structural complications. In Section III, the Comment first argues that the history of the antitrust laws is a history of choosing and ignoring sociopolitical values. Even the optimal damages model and the modern antitrust edifice built around it are based upon a particular sociopolitical value—consumer welfare. Section III then argues that the consumer welfare hypothesis was not preordained but the byproduct of normative choices made by scholars and courts. Section III closes by exploring other sociopolitical values, how to incorporate them into an antitrust analysis, and the results such an incorporation might produce. Section IV concludes.

II. OVERVIEW

The antitrust laws[21] forbid any contract, combination, or conspiracy that restrains trade;[22] any monopolization, attempted monopolization, or conspiracy or combination to monopolize;[23] certain mergers and acquisitions where the

20. *See, e.g.*, Pitofsky, *supra* note 14, at 1075; Sidak, *supra* note 14, at 329.

21. Throughout this Comment, "the antitrust laws" refer to the Sherman Act and the Clayton Act, passed in 1890 and 1914, respectively. *See* Sherman Act, ch. 647, 26 Stat. 209 (1890), *superseded by* Clayton Antitrust Act of 1914, Pub. L. No. 63–212, 38 Stat. 730 (codified at 15 U.S.C. §§ 1–38). Because those laws were both passed over a century ago, and because they are for all practical purposes the only statutory prohibitions, most antitrust law is crafted by judges.

22. *Id.* § 1.

23. *Id.* § 2. For well over one hundred years, the courts have understood the antitrust laws to prohibit only "unreasonable" restraints on trade. *See, e.g.*, Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 342–43 (1982). That qualification first appeared soon after the Sherman Act was passed. The Supreme Court, in a troika of cases penned by Justice Peckham, concluded that the Sherman Act does not prohibit every restraint of trade, only those that are unreasonable. *See* United States v. Joint Traffic Ass'n, 171 U.S. 505, 567–68 (1898) ("We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or

effect "may be substantially to lessen competition, or to tend to create a monopoly";[24] interlocking directorates;[25] and certain discriminatory prices, services, and allowances in dealings between merchants.[26] Any person injured by a violation of the antitrust laws may recover treble damages in addition to "the cost of suit, including a reasonable attorney's fee."[27] Part II.A first introduces the antitrust law's optimal damages model, as well as the theory that supports it. Part II.B demonstrates that the economic rationalism at the heart of current damages orthodoxy was by no means predestined but was a normative choice made by scholars and courts to place that value atop all others.

A. *Optimal Damages for Antitrust Violations*

The following Parts introduce and refine modern antitrust damages orthodoxy. Part II.A.1 introduces optimal damages theory. Part II.A.2 takes the general theory of optimal damages and applies it to antitrust harms. Part II.A.3 discusses the historic origins of the optimal damages regime in the antitrust laws.

1. Designing an Optimal Damages Regime

Antitrust enforcement is designed maximize the wealth of society.[28] The enforcement regime does so by permitting or approving practices when they produce competitive output and price efficiencies and condemning practices

trade within any legal definition of that term . . . ."); Hopkins v. United States, 171 U.S. 578, 587–88 (1898) (upholding an arrangement in which "defendants have entered into a voluntary association for the purpose of thereby the better conducting their business, and that after they entered into such association they still continued their individual business in full competition with each other, and that the association itself, as an association, does no business whatever, but is simply a means by and through which the individual members who have become thus associated are the better enabled to transact their business; to maintain and uphold a proper way of doing it; and to create the means for preserving business integrity in the transaction of the business itself"); Anderson v. United States, 171 U.S. 604, 615–16 (1898) ("[T]he purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object."). Interestingly, Justice Peckham also wrote *Lochner v. New York*, 198 U.S. 45 (1905), which held that limits to working time violated the Fourteenth Amendment. *Id.* at 58. In *Lochner*, Justice Peckham concluded that "the real object and purpose" of the provisions limiting the hours a baker may work were not to protect the bakers' health but "were simply to regulate the hours of labor between the master and his employés (all being men, *sui juris*), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employés." *Id.* at 64. Justice Peckham continued that, "[u]nder such circumstances the freedom of master and employé to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution." *Id.*

24. 15 U.S.C. § 18 (2012).

25. *Id.* § 19.

26. *Id.* § 13.

27. *Id.* § 15(a).

28. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.1a.

when they do not.[29] With respect to what damages to assess on some antitrust violation, the picture is more complex. Taken generally, classical economic theory teaches that the optimal deterrence model for any penalty regime is the point at which marginal social benefits of enforcement equal the marginal social costs of enforcement.[30] In the antitrust context, marginal social benefits of enforcement include the benefits to a private plaintiff in an antitrust suit (like damages received for having been forced to pay monopolistic prices) and the benefits to society (like fewer trusts and, perhaps, less corporate control of political processes).[31] Marginal benefits decline as markets become more competitive because, like the law of diminishing marginal utility,[32] benefits to consumers are harder to deliver as a market approaches perfect competition.[33] On the other hand, marginal social costs tend to rise because each additional unit of enforcement is relatively more expensive than the last.[34] In a perfectly competitive market, an additional unit of antitrust enforcement would produce near-zero benefits at exorbitant (perhaps infinite) costs.[35]

But locating the point at which marginal social costs and benefits intersect is, for all practical purposes, impossible.[36] Indeed, scholars cannot agree even in broad strokes whether there is too much or too little antitrust enforcement.[37]

29. *Id.*

30. *Id.* § 17.1b & n.6; Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 207 (1968).

31. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.1b n.6.

32. N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 425 (6th ed. 2011).

33. Intuitively, this makes sense. In a perfectly competitive market, a consumer cannot, by definition, obtain any additional benefits. *See* HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.2b. By contrast, in a market controlled by one firm, in which that firm charges supracompetitive prices, nearly any bit of antitrust enforcement or natural competition will benefit the consumer. MANKIW, *supra* note 32, at 447 ("The *marginal utility* of any good is the increase in utility that the consumer gets from an additional unit of that good. Most goods are assumed to exhibit *diminishing marginal utility:* The more of the good the consumer already has, the lower the marginal utility provided by an extra unit of that good.").

34. This too makes intuitive sense. Imagine if the Department of Justice, for example, were to engage in no antitrust enforcement but employed at least some lawyers and retained a few offices. At that point, to engage in even minimal enforcement, the Department could easily put to work these idle resources. The marginal product of the initial set of lawyers would be large, and the marginal cost of additional enforcement would be small. They would likely prosecute the most blatant antitrust violations. However, when enforcement is extensive, and the Department is teeming with lawyers, it could increase the amount of antitrust enforcement, but at that point the options for prosecution would be the more difficult cases to prove. Thus, when the quantity of enforcement is already high, the marginal product of each extra lawyer is low, and the marginal cost of additional antitrust enforcement is high. *See* MANKIW, *supra* note 32, at 268–69.

35. *See id.*

36. *See* HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.1b.

37. At one extreme, at least one scholar has argued that the cost of even minimal antitrust enforcement exceeds its benefits. *See* William F. Shughart II, *Private Antitrust Enforcement: Compensation, Deterrence, or Extortion?*, REGULATION, Winter 1990, at 53, 61. This seems to be false as a matter of logic—such a position could be true only if (1) purported antitrust violations were never inefficient or (2) if the cost of prosecuting even conspicuous price-fixing conspiracies exceeded the benefits to the public. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.1b–c.

More importantly, even if enforcement officials could identify with absolute precision every antitrust violation that produced cognizable anticompetitive harms, maximum enforcement would be suboptimal, as the costs of prosecuting some violations would exceed benefits.

Economist Gary Becker, in an influential article on optimal sanctions for socially harmful behavior,[38] assisted antitrust scholars in identifying the conceptual foundations for an optimal damages model for antitrust violations.[39] Becker argued that three costs should be considered when computing optimum sanctions: (1) the costs imposed on society by the conduct itself; (2) the costs of the system seeking to detect, apprehend, and determine the guilt of alleged violators; and (3) the costs of imposing punishments on violators found guilty.[40] An optimum sanctions policy should minimize the sum of these three costs.[41]

However, in antitrust, as in other socially harmful activities, the three costs are interdependent. For example, the entirety of antitrust policy is designed to minimize the first set of costs—monopolies and cartels are disfavored precisely because they are thought to impose costs on society.[42] Any acceptable damages model, then, should seek to measure the costs a purported antitrust violation has on society.[43] The second cost is often in the hands of enforcement officials who have crafted rules to minimize the costs associated with detecting and prosecuting antitrust harms. Courts, for example, have deemed certain offenses (like horizontal price fixing) per se violations of the antitrust laws.[44] Prosecuting such offenses, then, is significantly cheaper than prosecuting offenses that require examining in detail the reasonableness of a certain activity deemed to be in violation of the antitrust laws.[45]

But classifying too many offenses as per se illegal could lead to an increase in costs of the first type. If the antitrust authorities were to deem vertical integration of firms categorically illegal—thus shrinking the costs needed to detect anticompetitive vertical integrations—the costs imposed on society might well increase, because the social benefits of some vertical integrations exceed

Approaching the other extreme, scholars suggest that the current level of enforcement is too low. *See, e.g.*, Robert H. Lande, *Why Antitrust Damage Levels Should Be Raised*, 16 LOY. CONSUMER L. REV. 329, 344–45 (2004); Pitofsky, *supra* note 14, at 1075 (concluding "that the trend toward use of an exclusively economic approach to antitrust analysis excludes important political considerations that have in the past been seen as relevant by Congress and the courts").

38. Becker, *supra* note 30.

39. For an application of Becker's argument to antitrust damages actions, see Warren F. Schwartz, *An Overview of the Economics of Antitrust Enforcement*, 68 GEO. L.J. 1075 (1980).

40. Becker, *supra* note 30, at 181.

41. *Id.*

42. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.1c.

43. *Id.*

44. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007) ("Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices.").

45. *See id.* (noting that the "*per se* rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work" and that "the *per se* rule can give clear guidance for certain conduct").

their social costs.[46] Similar tradeoffs exist with respect to the third cost, the cost of imposing punishments: too lax a law of damages and too many firms will engage in anticompetitive conduct;[47] too strict a damages regime might root out most anticompetitive behavior, but it might chill competitive behavior, as well.[48]

Extending Becker's work, scholars subscribed to the current antitrust economic ideology have come to agree that the optimal damages for an antitrust violation should be constructed so as to make the offense unprofitable if it is inefficient, but profitable if it is.[49] Many business practices alleged to be antitrust violations are efficient, leading to lower costs to both the participants and the consumer.[50] Other practices, like price fixing, are both inefficient and have few (if any) redeeming social values.[51] In between those endpoints exists a large swath of business practices that might simultaneously increase the market power of the participants while also producing efficiencies for consumers. As Professor Herbert Hovenkamp has noted, a

> perfectly designed antitrust policy would exonerate the first set of practices, condemn the second set, and condemn the third set only when the social cost of the restraint exceeds its social value. A theory of damages based on the same principle would make them unprofitable when they are inefficient but leave them alone when they are not.[52]

Despite easy conceptualization in the abstract, detecting and thereafter measuring alleged antitrust violations of each stripe is difficult.

2. Optimal Damages for Overcharge Injuries[53]

The next Parts take the general theory of optimal damages and apply it to antitrust harms. Part II.A.2.a begin with the "easy case"—a perfectly competitive market disrupted by a monopolist, whose disruption causes consumers to pay higher prices. Part II.A.2.b then complicates the easy case by observing that the effects of monopolistic behavior may be more nuanced—inflated prices, yes, but

46. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, at § 9.1–9.2. The reverse is also true. If too few practices are deemed per se illegal without assessment of the practice's procompetitive and anticompetitive effects, then socially harmful practices would be encouraged. *Id.* § 17.1c.

47. *Id.* § 17.1b; *see also* Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 2 (1989) [hereinafter Hovenkamp, *Antitrust's Protected Classes*].

48. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.1c.

49. *See, e.g.*, Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & ECON. 445, 447 (1985); Landes, *supra* note 11, at 656; William H. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467, 468 (1980); Schwartz, *supra* note 39, at 1093–94.

50. *See, e.g.*, Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 20–24 (1979) (finding no violation under the antitrust laws for a blanket license arrangement that gave licensees the right to perform all compositions owned by the members or affiliates as often as the licensees desired for a stated term).

51. *See, e.g.*, Hovenkamp, *Antitrust's Protected Classes*, *supra* note 47, at 4–7; Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807, 809–12 (1975).

52. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.1a.

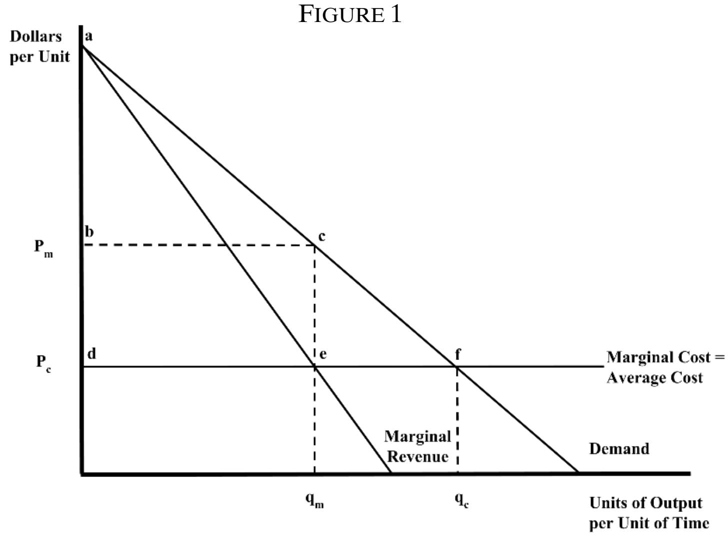
53. The standard model is largely adopted from HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.1–17.4.

also perhaps downstream price reductions arising from business efficiencies.

a. The Easy Case

A perfectly designed antitrust policy would permit socially efficient practices, condemn socially inefficient ones, and allow practices that increase the efficiency and market power of participants if their social values exceed their social costs.[54] To see how to measure damages under this model, consider a single-firm monopolist that, being a monopolist, exploits its market position to raise the price of its product.[55] Assume, as in Figure 1, an industry in which the marginal cost is constant and equal to the supply curve under competitive market conditions. In a competitive market, the price of a good would be P_c and its rate of output q_c. Assume next that a monopolist achieves market dominance and, seeking to exploit its monopoly position, reduces its output rate to q_m to raise price to P_m.[56]

FIGURE 1



54. *Id.* § 17.1a.

55. MANKIW, *supra* note 32, at 303. Because it lacks market power—that is, the ability to raise and maintain price above competitive levels—a firm operating in a competitive market must sell its goods at its marginal cost. *Id.* at 282–85. For purposes of the discussion, a firm is a monopolist if it is the sole seller of its product and if its product does not have close substitutes. *Id.* at 300.

56. Why the monopolist produces at output q_m can be demonstrated by example. Suppose, first, that the monopolist is producing at a level above q_m (that is, to the right of q_m in Figure 1). At that output, the monopolist's marginal cost is greater than its marginal revenue. If the monopolist reduced output, the costs saved would exceed revenue lost. Thus, the monopolist will reduce output. Similarly, if the monopolist is producing at a level below q_m, then the marginal cost is less than marginal revenue. If the monopolist increased output, the additional revenue would exceed the additional costs, and profits would rise. Thus, when the monopolist's output is at an output and price at which the marginal revenue is greater than marginal cost, the monopolist can increase profit by expanding output. MANKIW, *supra* note 32, at 307.

A monopolist that restricts output and raises price injures consumers in two ways. First, the higher price causes consumers to pay supracompetitive prices, represented by Rectangle b–c–e–d.[57] Second, a firm charging monopoly prices causes some consumers to forgo the monopolist's product for a (by definition) less efficient alternative.[58] The number of goods produced at the monopoly price is thus less than what would be produced in a competitive market—the "socially efficient level."[59] Triangle c–f–e represents that "deadweight" or "social" loss caused by the monopolist's output reduction. The social loss, unlike the wealth transfer from the consumer to the monopolist as a result of monopoly pricing, affects overall social wealth.[60] According to textbook economics, however, monopoly profits are simply wealth transfers from the consumer to the monopolist and do not cause overall societal wealth to decrease.[61]

Consider the following example. Assume a monopoly charges supracompetitive prices causing monopoly profits of $1,000. Because the demand curve is linear, the social loss is half the monopoly overcharge, or $500.[62] One possibility is to fashion antitrust punishment equal to the social loss caused by the monopoly's output reduction.[63] But setting damages equal to the social loss would not discourage the violator from violating because the expected cost of a violation (a fine of $500) is less than the expected gain ($1,000). The violator would continue to engage in the activity even though it produces socially harmful effects.[64] Moreover, the social loss imposed on society would not be cured because the violator's fine would go to the victims of the overcharge. So a damages rule that sets the fine equal to the amount of social loss cannot work.

Another possibility is to set the punishment equal to the amount overcharged to the consumer, or $1,000. This rule would, at least at first approximation, reduce the expected value of monopolization formation to zero. If the fine imposed on the monopoly were even a trivial amount greater than the amount gained by the monopoly (say, $1,001), then no profit-maximizing monopolist would engage in illegal activity.[65] Such a rule seems more promising.

b. Complicating the Easy Case

However, in certain cases, behavior allegedly in violation of the antitrust laws may both cause anticompetitive harms *and* increase efficiencies. A merger

57. For a derivation, see MANKIW, *supra* note 32, at 308–09. "Supracompetitive prices" are prices above the prices that would exist in a perfectly competitive market. *Id.* at 303–13.

58. *See id.* at 312. The replacement product is thought to be less efficient because if it were more or as efficient than the original product, the consumer would have already switched to the replacement product. *Id.*

59. *Id.*

60. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.2b.

61. *Id.*

62. *Id.*

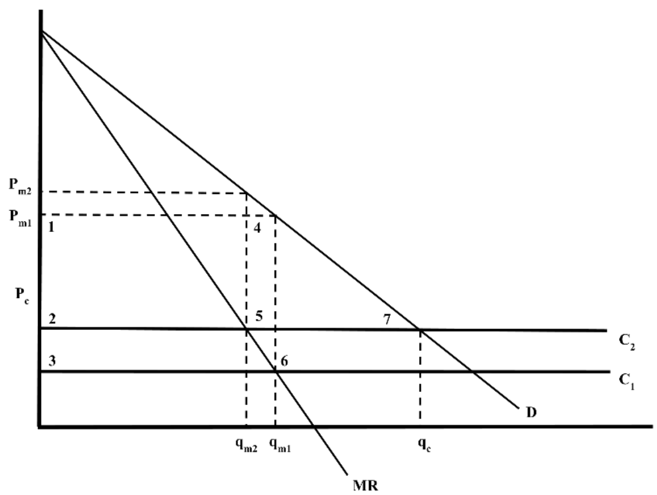
63. *Id.*

64. *Id.*

65. *Id.*

of two firms—say AT&T and Time Warner[66]—could grant market power to the merged, newly created firm, which would allow the merged firm to price at monopoly levels.[67] The merger may also cause the newly created firm to experience business efficiencies, allowing it to lower its costs.[68] If so, an optimal damages rule should reduce the size of the damage award by the amount of cost reductions stemming from the merged firm's increased efficiencies. Figure 2 considers this scenario.

FIGURE 2



Before the merger, the firms faced costs of C_2 and, thus, output q_c and price P_c. But after the merger, the merged firm may experience certain efficiencies, like downsizing redundant HR or IT departments, allowing its costs to drop to C_1. And because the merged firm now has market power, it can reduce output to q_{m1} and increase price to P_{m1}.[69]

Here, like in Figure 1, rectangle 1–2–5–4 represents the monopoly overcharge.[70] And triangle 4–5–7 represents the social loss caused by the output reduction of the merged firm. However, rectangle 2–3–6–5 represents the cost reductions caused by the merged firm's subsequent efficiency gains. If the area of rectangle 2–3–6–5 is greater than the area of triangle 4–5–7, then the merger will be deemed efficient.[71]

66. *See* Cecilia Kang & Michael J. de la Merced, *Justice Department Sues to Block AT&T-Time Warner Merger*, N.Y. TIMES: DEALBOOK (Nov. 20, 2017), http://www.nytimes.com/2017/11/20/business/dealbook/att-time-warner-merger.html?_r=0 [perma: http://perma.cc/86B4-66PL].

67. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.2b.

68. *See id.* § 12.2.

69. *See* Landes, *supra* note 11, at 658–61.

70. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.2b.

71. *Id.*; Oliver E. Williamson, *Economies as an Antitrust Defense Revisited*, 125 U. PA. L. REV. 699, 706–08 (1977). In this case, the merger is deemed "efficient" even though the price consumers pay

Assume again that the monopoly profits are $1,000 and the social loss is $500.[72] But now also assume that cost savings from the merger are $600.[73] In that case, the gain accrued by the merged firm is $1,600 (sum of monopoly profits and cost savings). Consumers who continue to purchase at the monopoly price lose $1,000 (through a wealth transfer to the monopolist) and society loses $500 (through consumers refusing to pay monopoly prices and substituting other goods). Total losses are thus $1,500. Because the gain accrued by the merged firm is greater than the loss to consumers, the merger is deemed "efficient."[74]

A damages rule that sets the damages equal to the amount of the monopoly overcharge or marginally greater[75] would now no longer deter anticompetitive behavior. Assuming expected damages for an antitrust violation were equal to a marginal amount greater than the monopoly overcharge (say, $1,001), then any cost reduction by the merged firm over $1 would make the merger and concurrent pricing strategy profitable.[76]

Now suppose that the expected damages were not the overcharge, but the sum of the overcharge and the social loss.[77] In that case, the merged firm's allegedly anticompetitive behavior would be profitable only if the cost savings exceeded the social loss.[78] Assuming, as above, that the monopoly profits were $1,000, the social loss $500, and the cost savings $600, then the expected damages would be $1,500 but the expected gain would be $1,600. Accordingly, "the best measure of damages for overcharge injuries caused by monopoly pricing should equal the amount of the overcharge plus the deadweight loss."[79] Returning to Figure 2, the measure of damages for overcharge injuries would be equal to rectangle 1–2–5–4, which represents the monopoly overcharge, plus triangle 4–5–7, which represents the social loss caused by the output reduction of the merged firm. Setting a damages rule in this way "would permit efficient conduct, even if the conduct is an antitrust violation, but would effectively deter inefficient antitrust violations."[80] With such a rule, firms with monopoly positions would be incentivized to engage in efficient behavior.

3. The Origins of the Optimal Model

No scholar did more to establish the theoretical foundations for the optimal

is higher than the competitive cost and the output of the producer is lower than the competitive output. *Id.* at 708–09. The monopoly profits caused by the higher price and lower profits are merely a wealth transfer from consumer to monopolist and do not affect overall social wealth. *Id.* at 707–09.

72. *See supra* notes 62–64 and accompanying text.

73. Recall that this is the rectangle 2–3–6–5. *See supra* Figure 2.

74. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.2b.

75. *See supra* note 57–65 and accompanying text.

76. This is because, in such a case, the merged firm would expect to lose only $1,000 in a damage action, which, by definition, is less than $1,000 (monopoly pricing) plus any cost savings.

77. This expected damages calculation is the sum of rectangle 1–2–5–4 (monopoly profits) and triangle 4–5–7 (social loss).

78. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.2c.

79. Id. § 17.2b.

80. *Id.*

damages model, and to advance it as a normative project, than Robert Bork. In 1966, Bork, then a law school professor, published a highly influential account of the framing of the Sherman Act—the primary antitrust law enacted in the late 1800s—that sought to place what he deemed economic rationalism at the foundation of the Act.[81] Bork's project led him to conclude that the "legislative history . . . contains no colorable support for application by courts of any value premise or policy other than the maximization of consumer welfare."[82] By "consumer welfare," Bork meant "the maximization of wealth"[83] or, as Bork later characterized it, "merely another term for the wealth of the nation."[84] Bork argued that only maximization of consumer welfare could unite the central prohibitions of the Sherman Act.[85]

Bork's thesis began to make inroads at the Supreme Court just a decade after its publication. In *Continental T.V., Inc. v. GTE Sylvania Inc.*,[86] a retailer of televisions, relying on recent Supreme Court precedent,[87] argued that a manufacturer's limitation on the locations at which the retailer could sell Sylvania brand televisions was a per se violation of the Sherman Act.[88] The Court of Appeals for the Ninth Circuit, rehearing the case en banc, struggled to reconcile its view that no violation had occurred with Supreme Court precedent suggesting that such behavior was a per se violation of the antitrust laws.[89] As the Supreme Court later put it, the practices condemned in its previous cases were "clearly broad enough to apply" to the facts of the case.[90] Notwithstanding seemingly controlling Supreme Court precedent, the Ninth Circuit concluded that the arrangements did not violate the antitrust laws because they "may in some instances *promote*, rather than impede, competition" and, in turn, efficiency.[91]

81. *See* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7 (1966) [hereinafter Bork, *Legislative Intent*].

82. *Id.* at 10.

83. *Id.* at 7.

84. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 90 (1978) [hereinafter BORK, THE ANTITRUST PARADOX]. Scholars today prefer "total surplus," "total welfare," or something similar. *See, e.g.*, MANKIW, *supra* note 32, at 145 ("[T]he economic well-being of a society . . . [can be] measure[d] [as] the sum of consumer and producer surplus, which we call *total surplus*.").

85. *See* Bork, *Legislative Intent*, *supra* note 81, at 11–12, 21–26. According to Bork, "[o]nly a consumer-welfare value which, in cases of conflict, sweeps all other values before it can account for Congress' willingness to permit efficiency-based monopoly." *Id.* at 12. Bork also pointed out that the legislators used the term "monopolize," a verb that implies firm action, as opposed to "monopoly," a noun, which a firm might achieve from superior efficiency. *Id.* at 26–31.

86. 433 U.S. 36 (1977).

87. *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), *overruled by* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1997).

88. *Cont'l T.V.*, 433 U.S. at 40–41.

89. GTE Sylvania Inc. v. Cont'l T.V., Inc. 537 F.2d 980, 988–97 (9th Cir. 1976)(en banc), *aff'd*, 433 U.S. 36 (1977).

90. *Cont'l T.V.*, 433 U.S. at 46.

91. *GTE Sylvania Inc.*, 537 F.2d at 1000.

Importantly, in reaching its conclusion, the Ninth Circuit wholesale adopted Bork's consumer welfare thesis:

> Since the legislative intent underlying the Sherman Act had as its goal the promotion of consumer welfare, we decline blindly to condemn a business practice as illegal *per se* because it imposes a partial, though perhaps reasonable, limitation on intrabrand competition, when there is a significant possibility that its overall effect is to promote competition between brands. . . . It is altogether possible that foreclosing the competitive benefits of vertical agreements like the one here involved by means of a *per se* rule, without any inquiry into the possibility of an overall procompetitive effect in the relevant industry, might well signal the death of similarly situated manufacturers with small market shares in other industries. If a *per se* rule of illegality is permitted to replace a genuine inquiry into the reasonableness and economic effect of business arrangements which, in reality, strengthen competition and promote the Nation's economic welfare, the purpose of the Sherman Act is undermined. This would promote monopoly, hamstring free enterprise, and victimize our country's consumers. Hopefully, our conclusion in this case bars such subversion of the national welfare.[92]

The Supreme Court affirmed the Ninth Circuit.[93] In doing so, the Court noted that the use of per se rules should be applied to only "manifestly anticompetitive" conduct.[94] Certain vertical restrictions did not pass muster—to the Court, "[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products."[95] Thus, in emphasizing economic efficiency at the expense of other sociopolitical values, the Supreme Court seemingly endorsed Bork's view. Justice White, concurring, was more explicit. He believed that the Sherman Act was "directed solely to economic efficiency,"[96] and cited Bork's article as the source of that position.[97]

Whatever ambiguity remained vanished two years later when the Court, in *Reiter v. Sonotone Corp.*,[98] firmly concluded that the legislative history "suggest[s] that Congress designed the Sherman Act as a 'consumer welfare prescription.'"[99] Over the next several years, Bork's thesis, while not always commanding a majority as to the cases' particular facts, continued to make

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92. *Id.* at 1003–04.

93. *Cont'l T.V.*, 433 U.S. at 59.

94. *Id.* at 49–50.

95. *Id.* at 54.

96. *Id.* at 69 (White, J., concurring).

97. *Id.* at 69 n.9. Justice White cited to Bork's ultimate conclusion. *Id.*; *see also* Bork, *Legislative Intent*, *supra* note 81, at 7 ("My conclusion, drawn from the evidence in the Congressional Record, is that Congress intended the courts to implement (that is, to take into account in the decision of cases) only that value we would today call consumer welfare.").

98. 442 U.S. 330 (1979).

99. *Reiter*, 442 U.S. at 343 (citing BORK, THE ANTITRUST PARADOX, *supra* note 84, at 66).

inroads at the Supreme Court, and in federal courts across the country.[100]

B. *Confusing the Optimal Model*

Reality quickly disrupts the optimal damages model and the theoretical support for it. This Part surveys the most conspicuous divergences. Part II.B.1 begins by describing the panoply of sociopolitical values other than economic rationalism that have influenced antitrust decisions. This Part also analyzes the accounts of various scholars questioning the validity of the consumer welfare hypothesis and shows that courts, in an attempt to massage the optimal model to fit the fresh world of facts, have enacted a series of complex doctrinal rules that seem to deoptimize the optimal model. Part II.B.2 then demonstrates that, despite the optimal model seemingly reducing the antitrust laws to an elegant formulation ready to be applied with scientific rigor, no consensus has emerged on the precise values underpinning the antitrust laws.

1. The Panoply of Sociopolitical Values Motivating Antitrust Decisions

a. *The Unstable Foundation of the Consumer-Welfare Hypothesis*

Before Bork's consumer-welfare hypothesis gained widespread acceptance, the Supreme Court seemed to deemphasize economic rationalism in favor of other sociopolitical goals. For example, in *United States v. Trans-Missouri Freight Ass'n*,[101] one of the first Sherman Act cases to reach the Supreme Court, the Court regretted "transferring an independent business man . . . into a mere

100. *See, e.g.*, NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 107 (1984) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting *Reiter*, 442 U.S. at 343)); Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 367 (1982) (Powell, J., dissenting) ("I believe the Court's action today loses sight of the basic purposes of the Sherman Act. As we have noted, the antitrust laws are a 'consumer welfare prescription.'" (quoting *Reiter*, 442 U.S. at 343)). Nearly all circuits have followed the Supreme Court's lead. *See, e.g.*, Energy Conversion Devices Liquidation Tr. v. Trina Solar Ltd., 833 F.3d 680, 685 (6th Cir. 2016) ("At their core, the antitrust laws are a 'consumer welfare prescription.'" (quoting BORK, THE ANTITRUST PARADOX, *supra* note 84, at 66)), *cert. denied mem.*, 137 S. Ct. 1582 (2017); United States v. Am. Express Co., 838 F.3d 179, 195 (2d Cir. 2016) ("The overarching standard [in monopolization claims] is whether defendants' actions diminish *overall* competition, and hence consumer welfare." (quoting K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123, 128 (2d Cir. 1995))), *cert. granted mem. sub nom.*, Ohio v. Am. Express Co., 138 S. Ct. 355 (2017); Marucci Sports, LLC v. NCAA, 751 F.3d 368, 377 (5th Cir. 2014) ("[R]eduction of competition does not invoke the Sherman Act until it harms consumer welfare." (quoting Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995))); Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1339 (11th Cir. 2010) ("[C]onsumer welfare, understood in the sense of allocative efficiency, is the animating concern of the Sherman Act."); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308 (3d Cir. 2007) ("The primary goal of antitrust law is to maximize consumer welfare . . . ."); *Rebel Oil Co.*, 51 F.3d at 1433 ("But reduction of competition does not invoke the Sherman Act until it harms consumer welfare."); Fishman v. Estate of Wirtz, 807 F.2d 520, 535 (7th Cir. 1986) ("We agree that the enhancement of consumer welfare is an important policy—probably the paramount policy—informing the antitrust laws."); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 218 (D.C. Cir. 1986) ("That view of submarket analysis is also mandated by the purpose of the antitrust laws: the promotion of consumer welfare.").

101. 166 U.S. 290 (1897).

servant or agent of a corporation."[102] Some years later, Judge Learned Hand, in the famous *United States v. Aluminum Co. of America* case (*Alcoa*),[103] asserted that Congress passed the Sherman Act "to put an end to great aggregations of capital because of the helplessness of the individual before them."[104]

That same year, in *Associated Press v. United States*,[105] the Supreme Court faced an antitrust challenge to the structure of the Associated Press (AP).[106] At the time, the AP was a cooperative news organization of approximately 1,200 newspapers.[107] The AP's structure was efficient—if an AP reporter filed a story in, say, Washington, D.C., all member newspapers would have access to the story.[108] However, per the AP's bylaws, no member could sell a news story to a nonmember,[109] and each member had the power to block nonmembers from entry into the organization.[110] The government challenged the bylaws adopted as in violation of the antitrust laws because they impermissibly restrained trade.[111] In the end, the Supreme Court held that the provisions violated the antitrust laws.[112]

But at the heart of the Court's decision was not an assessment of the economic efficiencies attendant to the AP's structure but a theory of democratic governance.[113] Justice Black, writing for the majority, argued that "the widest

102. *Trans-Mo. Freight Ass'n*, 166 U.S. at 324.

103. 148 F.2d 416 (2d Cir. 1945) [hereinafter *Alcoa*], *superseded by statutue*, Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97–290, § 402, 96 Stat. 1233, 1246.

104. *Alcoa*, 148 F.2d at 428. Judge Learned Hand continued by noting that "[t]hroughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." *Id.* at 429. Judge Hand, of course, was no slouch—he is "considered by many the third-greatest judge in the history of the United States, after Holmes and John Marshall." Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L.J. 511 (1994) (reviewing GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1994)). Bork's divergence from Judge Hand could not be more conspicuous.

105. 326 U.S. 1 (1945).

106. *Associated Press*, 326 U.S. at 3–5.

107. *Id.* at 3.

108. *See id.* at 4.

109. *Id.*

110. *Id.*

111. *Id.* at 4–5. For example, the members were prohibited from selling news to nonmembers and nonmembers could not access a news story until after it went to press. *Id.*

112. *See id.* at 21–23.

113. *See id.* at 20 ("Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. . . . The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity."); *see also id.* at 29 (Frankfurter, J., concurring) ("The short of the matter is that the by-laws which the District Court has struck down clearly restrict the commerce which is conducted by the Associated Press, and the restrictions are unreasonable because they offend the basic functions which a constitutionally guaranteed free press serves in our nation."). Justice Black, who wrote the majority opinion, was a First Amendment absolutist. *See, e.g.*, Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960) ("It is my belief that there *are* 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be 'absolutes.' . . . For example, there is a question as to whether the First Amendment

possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[114] Center stage in *Associated Press* was not economic rationalism but the First Amendment—a countervailing force pushing against the strictures of the antitrust laws.

Moreover, as previously mentioned, Bork's thesis took about one decade to be adopted by the Supreme Court.[115] But it took a change in the Chief Justice (from Earl Warren to Warren Burger) before the Court took Bork's work seriously.[116] For example, in 1967, the year after Bork published his original piece, the Supreme Court, in *United States v. Arnold, Schwinn & Co.*,[117] held that under "the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it."[118] *Schwinn* was eventually overruled by *Continental T.V.*[119] But when the Ninth Circuit decided *Continental T.V.* in 1982 it struggled to reconcile the holding of *Schwinn* with what it seemed to think was the right result in the case.[120] Even the Supreme Court admitted that the condemnation of *Schwinn* was "clearly broad enough to apply" to the facts of *Continental T.V.*[121] The Court firmly solidified Bork's theory two years later in *Reiter v. Sonotone Corp.*[122]

b. Scholars Casting Doubt on the Values Underpinning the Optimal Model

Bork's proclamation that the antitrust laws contain "no colorable support for application by courts of any value premise or policy other than the maximization of consumer welfare"[123] has not gained widespread acceptance by other scholars.[124] Soon after the Supreme Court endorsed Bork's consumer-

was intended to protect speech that courts find 'obscene.' . . . I am primarily discussing here whether liberties *admittedly* covered by the Bill of Rights can nevertheless be abridged on the ground that a superior public interest justifies the abridgment. I think the Bill of Rights made its safeguards superior.").

114. *Associated Press*, 326 U.S. at 20.

115. *See supra* notes 86–100 and accompanying text.

116. *See supra* notes 94–100 and accompanying text.

117. 388 U.S. 365 (1967), *overruled by* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1997).

118. *Arnold, Schwinn & Co.*, 388 U.S. at 379.

119. *Cont'l T.V.*, 433 U.S. at 47–59.

120. *See* Cont'l T.V., Inc. v. GTE Sylvania Inc., 694 F.2d 1132, 1138–39 (9th Cir. 1982).

121. *Continental T.V.*, 433 U.S. at 46.

122. See *supra* notes 98–100 for a discussion of *Reiter* and the Supreme Court's use of Bork's consumer-welfare thesis.

123. Bork, *Legislative Intent*, *supra* note 81, at 10.

124. For a survey of the scholarship calling into question Bork's central conclusions, see, for example, Hovenkamp, *Antitrust's Protected Classes*, *supra* note 47, at 24 ("Although the drafters of the Sherman Act were concerned about injury to consumers, they were at least as concerned with various kinds of injury to competitors."); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L. J. 65, 86–87 (1982) [hereinafter Lande, *Wealth Transfers*] ("The efficiency-oriented view of the Sherman Act, as propounded by Judge Bork and others, has initial appeal. No basis exists, however, for their contention that Congress was concerned only with allocative efficiency." (footnoted omitted)).

welfare hypothesis in *Reiter*, scholars immediately began challenging Bork's premises, methods, and conclusions.[125] Four accounts are representative.

The first was advanced by Professor Pitofsky in his seminal essay *The Political Content of Antitrust*.[126] In that essay, Pitofsky argues that the antitrust laws should be concerned with more than just economic questions.[127] Pitofsky contended that the antitrust laws should incorporate political values.[128] By political values, Pitofsky meant, "first, a fear that excessive concentration of economic power will breed antidemocratic political pressures, and second, a desire to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all."[129] Pitofsky added that a "third and overriding political concern is that if the free-market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants."[130]

In an important sense, Pitofsky's project was modest. The notion that economic power begets political power not only existed at the enactment of the Sherman Act;[131] it has existed since the founding of the United States.[132] Thomas

Claiming that Bork's proclamation that the antitrust laws contain "no colorable support for application by courts of any value premise or policy other than the maximization of consumer welfare," Bork, *Legislative Intent*, *supra* note 81, at 10, has not gained widespread acceptance by other scholars is not the same as claiming that courts have not adopted Bork's prescription. They certainly have. See *supra* note 100 for a list of circuits that have adopted "consumer welfare" as the purpose of the antitrust laws. The claim is more precise. The claim is that Bork's supposed discovery that the initial intent of the framers of the antitrust laws was to promote consumer welfare and consumer welfare alone is incorrect or, more modestly, incomplete.

125. *See* Hovenkamp, *Antitrust's Protected Classes*, *supra* note 47, at 24; Lande, *Wealth Transfers*, *supra* note 124, at 83.

126. Pitofsky, *supra* note 14, at 1051.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *See, e.g.*, United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 324 (1897) (regretting "transferring an independent business man . . . into a mere servant or agent of a corporation"); *see also supra* Part II.B.1.a.

132. For example, approximately one hundred years before the Sherman Act, Thomas Jefferson supported the inclusion of a "restriction against monopolies" in the Bill of Rights. *See* Letter from Thomas Jefferson to James Madison 3 (Dec. 20, 1787), http://hdl.loc.gov/loc.mss/mtj.mtjbib003193 [perma: http://perma.cc/CV2F-8343]. Jefferson was receiving updates from Madison on the progress being made at the Constitutional Convention. In one reply, Jefferson wrote:

> I will now add what I do not like. First the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land . . . . Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference.

Id. at 3–4.

Jefferson wished to include a rule against monopolies in the Bill of Rights.[133] A century-and-a-half later, Henry Simons, a fierce free-market polemic, wrote in the 1930s and 1940s a series of scathing attacks concluding that monopoly was the great enemy of democracy.[134]

The second account, advanced by Professor Robert H. Lande soon after *Reiter* was decided, argues that "the legislative history of the Sherman Act reveals a total lack of concern for allocative inefficiency."[135] Instead, Lande contends that the principal purpose of the Sherman Act was to prevent wealth transfers from individuals to trusts.[136] Lande also contends that Congress passed the Sherman Act for sociopolitical reasons, stating that "the legislative history shows that Congress passed the Sherman Act because it believed that trusts and monopolies possess excessive social and political power, and reduce entrepreneurial liberty and opportunity."[137]

This second account also includes Professor Herbert Hovenkamp, who like Lande, believes that Bork missed the mark.[138] Hovenkamp contends that the original purpose of the Sherman Act was to protect small businesses, not necessarily consumers.[139] Hovenkamp believes that all the circumstances surrounding the enactment of the Sherman Act in 1896 suggest that of those pushing for the enactment, small producers influenced Congress most effectively.[140] Hovenkamp also contends, in contrast to Bork, that Congress intended to act broadly in condemning various types of anticompetitive conduct, not just those that were economically inefficient.[141]

Finally, and most recently, Lina Khan forcefully argues that the "current framework in antitrust fails to register certain forms of anticompetitive harm and therefore is unequipped to promote real competition—a shortcoming that is

133. *Id.*

134. *See* Henry C. Simons, *For a Free-Market Liberalism*, 8 U. CHI. L. REV. 202, 205–06 (1941) ("[E]nterprise monopoly is largely and basically a problem of excessive corporate size, of corporate imperialism run mad, of the fantastic, monstrous aggregations of businesses which, like our cancerous metropolises, we mistakenly regard as monuments to our economic efficiency."); J. Bradford De Long, *In Defense of Henry Simons' Standing as a Classical Liberal*, 9 CATO J. 601, 604–05 (1990). However, Simons's tirades against monopolies were not restricted to corporate giants: "Simons hated and feared labor unions the most." *Id.* at 605 n.5.

135. Lande, *Wealth Transfers*, *supra* note 124, at 83.

136. *Id.* (arguing that trusts and monopolies "were condemned principally because they 'unfairly' extracted wealth from consumers").

137. *Id.*

138. Hovenkamp, *Antitrust's Protected Classes*, *supra* note 47, at 24.

139. *Id.* at 30 ("Sherman was not speaking for consumers of refined petroleum products, but rather for the small producers and refiners whom [the monopolist] had driven to ruin.").

140. *Id.* at 29–30.

141. *Id.* at 21, 34 ("The relevant question for antitrust policy is . . . whether it is anticompetitive and calculated to create or maintain a monopoly. . . . Efficient as well as inefficient conduct can force rivals from a market."). At least one scholar has gone further, suggesting (likely incorrectly) that Bork's thesis "has been almost universally rejected by antitrust scholars." Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs*, 98 MICH. L. REV. 849, 905 n.150 (2000).

illuminated and amplified in the context of online platforms and data-driven markets."[142] In particular, Khan trains her analytic spotlight on Amazon.[143] Khan argues that those who wish to combat the rise of monopolies or oligopolies like Amazon should either "reform antitrust law to prevent this dominance from emerging" or "adopt regulations to take advantage of these economies of scale while neutering the firm's ability to exploit its dominance."[144]

c. *Narrowing the Scope of Antitrust Injury*

The optimization of the antitrust regime also has been affected by courts' decisions to redefine what counts as an injury for the purposes of the antitrust laws.[145] Many individuals or entities lack the ability to bring an antitrust action under the antitrust laws, even if they were harmed (in the common law sense) by an antitrust violation.[146] Such a limitation is sensible: most market behavior—whether in violation of the antitrust laws or not—will ripple through the economy, affecting persons and entities at all stages of the distribution chain.[147] Moreover, the provision of treble damages and mandatory attorney's fees to prevailing plaintiffs contained in the Clayton Act (the successor to the Sherman Act) incentivizes litigation by parties for whom the chance of recovery is minimal.[148]

Like the Supreme Court's adoption of Bork's consumer-welfare thesis, the concept of antitrust injury was developed on the heels of the Warren Court's[149] expansion of substantive antitrust liability and concurrent relaxation of

142. Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 737 (2017); *see also id.* at 746–83.

143. *See id.* at 746–55.

144. *Id.* at 790.

145. *See generally* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 484–89 (1977) (introducing the concept of antitrust injury).

146. *See, e.g.*, Ill. Brick Co. v. Illinois, 431 U.S. 720, 736–37 (1977).

147. Consider the OPEC cartel, a real-world case of a legal monopoly. At times, OPEC's control over the market for petroleum results in higher prices for not only petroleum but of everything that requires petroleum for its manufacture and production. *See* Int'l Ass'n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354, 1355–56 (9th Cir. 1981) ("The members of the International Association of Machinists and Aerospace Workers (IAM) were disturbed by the high price of oil and petroleum-derived products in the United States. They believe the actions of the Organization of the Petroleum Exporting Countries, popularly known as OPEC, were the cause of this burden on the American public.").

148. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 16.2. To illustrate with a simple example, imagine a common law breach of contract claim providing single damages and no attorney's fees. A party will not bring a case unless the amount of recovery discounted by the probability of success is greater than the cost of prosecuting the case. The same logic applies to the decision whether to bring an antitrust case. However, if the breach of contract case can be transformed into an antitrust case, the amount of recovery discounted by the probability of success is greater because of treble damages and mandatory attorney's fees.

149. Earl Warren was Chief Justice of the United States from 1953–1969. *Justices 1789 to Present*, SUPREME COURT OF THE U.S., http://www.supremecourt.gov/about/members_text.aspx [perma: http://perma.cc/6BHS-BQF2] (last visited May 22, 2018).

procedural constraints.[150] That trend was reversed, however, under the direction of the Burger Court.[151] During Burger's tenure, the Court recognized that the predominant goal of the antitrust laws was to protect competition, not competitors.[152] In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[153] the U.S. Supreme Court read the language of Section 4 of the Clayton Act, which permits recovery for "anything forbidden in the antitrust laws," to refer only to the *anticompetitive* aspect of the antitrust violation and not the violation itself.[154] Pueblo owned several bowling alleys, and Brunswick was a major national manufacturer of bowling equipment.[155] Over an extended period of time, Brunswick acquired several bowling centers owned by its defaulting customers that were in competition with Pueblo.[156] Brunswick then continued to operate the bowling centers in competition with Pueblo.[157] Pueblo challenged Brunswick's acquisitions under Section 7 of the Clayton Act, claiming that its market share (and attendant profits) would have increased had the defaulting bowling alleys gone out of business.[158] Pueblo claimed as damages the profits they would have gained had the defaulting bowling alleys gone out of business.[159] The Third Circuit Court of Appeals ruled that if Brunswick's acquisitions were found to be illegal under the antitrust laws, then any injury proximately caused by the violation would be recoverable as damages.[160]

The Supreme Court, in an opinion written by Justice Marshall, unanimously vacated the order of the lower court, and entered for Brunswick a judgment notwithstanding the verdict.[161] In denying recovery to Pueblo, the Court concluded that many antitrust violations would cause "losses which are of no

150. Kenneth W. Dam, Fortner Enterprises v. United States Steel*: "Neither a Borrower, nor a Lender Be"*, 1969 SUP. CT. REV. 1, 36–40. The Warren Court issued a series of procedural decisions placing the private plaintiff at the center of the antitrust enforcement regime and, more importantly, removing procedural blocks that had prevented plaintiffs from prevailing in their antitrust suits. *See, e.g.*, Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134 (1968) (eliminating *in pari delicto* as a complete defense), *overruled by* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984); Poller v. CBS, Inc., 368 U.S. 464 (1962) (raising standards for summary judgment), *abrogated by* Ne. Educ. Television of Ohio, Inc. v. Educ. Television Assoc. of Metro. Cleveland, 758 F.Supp. 1560 (N.D.Ohio 1990); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) (per curiam) (eliminating the requirement that the plaintiff prove public injury in per se cases).

151. Page, *supra* note 49, at 468. Warren E. Burger was Chief Justice of the United States from 1969–1986. *Justices 1789 to Present*, *supra* note 149.

152. *See* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53 n.21 (1977).

153. 429 U.S. 477 (1977).

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

155. *Id.* at 479.

156. *Id.* at 479–80.

157. *Id.* Most of the acquired bowling alleys would likely have gone out of business had Brunswick not intervened. *See id.*

158. *Id.* at 480.

159. *Id.* at 480–81.

160. NBO Indus. Treadway Cos. v. Brunswick Corp., 523 F.2d 262, 273 (3d Cir. 1975), *vacated sub nom. Brunswick*, 429 U.S. 477.

161. *Brunswick*, 429 U.S. at 490–91.

concern to the antitrust laws."[162] Justice Marshall reasoned that because liability was based on Brunswick's "deep pocket," any recoverable damages would have had to be caused by that alleged antitrust violation—that is, by Brunswick's predatory conduct.[163] But because the measure of damages was based solely on Pueblo's lost profits after Brunswick began operating competing bowling alleys, it was inconsistent with the fundamental purpose of the antitrust laws.[164] The Court therefore held that for the

> plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."[165]

Despite the Supreme Court's clear pronouncement of antitrust injury in *Brunswick*, lower courts did not uniformly adopt the doctrine.[166] Nevertheless, scholarship published concurrently with *Brunswick* recognized certain parallels between the Court's explicit adoption of the doctrine of antitrust injury and other antitrust doctrines.[167] Much like the Court's adoption of the "rule of reason"[168] narrowed the class of cognizable antitrust violations from all those that violate the antitrust laws to those that violate the antitrust laws and produce

162. *Id.* at 487.

163. *Id.* at 487–89.

164. *Id.* at 488.

165. *Id.* at 489 (omission in original) (quoting Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 125 (1969)). Section 7 of the Clayton Act, codified as amended at 15 U.S.C. § 18, provides:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
>
> No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18 (2012).

166. *See* Page, *supra* note 49, at 471 n.22 (citing cases).

167. *See id*. at 471.

168. The "rule of reason," first announced by then-Sixth Circuit Court of Appeals Judge William Howard Taft in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (1898), *aff'd*, 175 U.S. 211 (1899), and most famously applied in *Board of Trade of Chicago v. United States*, 246 U.S. 231 (1918), holds that even if a plaintiff can demonstrate an antitrust violation, the defendant can offer procompetitive justifications for the alleged antitrust violation and, if the procompetitive justifications outweigh the alleged restraint, prevail. *Bd. of Trade of Chi.*, 246 U.S. at 238 ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").

market inefficiencies,[169] so too did the adoption of "antitrust injury" narrow the class of potential plaintiffs who could bring an antitrust suit from those that were injured *in fact* to those whose injuries flowed directly from the aspects of the antitrust violation that caused the market inefficiency.[170] This realization was in line with the Supreme Court's early interpretations of the antitrust laws, in which it held that the Sherman Act was

> enacted to prevent not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence *not only the prohibitions of the statute but the remedies which it provided were co-extensive with such conceptions*.[171]

The early interpretation of the language of the antitrust laws, which seems to emphasize that not every injured person may have an injury redressable by the antitrust laws, and which became doctrine in *Brunswick*, therefore guides the interpretation of modern-day antitrust injury jurisprudence.

d. Narrowing the Scope of Antitrust Standing

Courts also have limited the class of plaintiffs that can bring suit for antitrust harms. The *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[172] and *Illinois Brick Co. v. Illinois*[173] decisions stand for the proposition that courts are often ill suited to precisely calculate damages owed to victims and that, at least in the antitrust context, imposing a penalty on some antitrust violator is more important than fairly allocating that penalty among responsible parties.[174]

The so-called *Illinois Brick* rule, which grew out of the decision in *Hanover Shoe*, decided a decade before, states that indirect purchasers may not bring private antitrust actions against antitrust violators in federal courts.[175] *Hanover Shoe* involved an antitrust suit brought against a manufacturer of shoe machinery by one of its customers, a shoe manufacturer.[176] United Shoe was found to have illegally monopolized the market for shoe manufacturing equipment by, among other practices, forcing shoe manufacturers to lease—rather than buy—its best equipment.[177] Hanover Shoe, a shoe manufacturer and direct lessee of United Shoe's equipment, sued under Section 4 of the Clayton Act, which provides a private cause of action and trebled damages to parties "injured" by antitrust violations.[178]

169. *See Bd. of Trade of Chi.*, 246 U.S. at 238.

170. Page, *supra* note 49, at 471.

171. D.R. Wilder Mfg. Co. v. Corn Prods. Ref. Co., 236 U.S. 165, 174 (1915) (emphasis added).

172. 392 U.S. 481 (1968).

173. 431 U.S. 720 (1977).

174. *See, e.g.*, *Ill. Brick*, 431 U.S. at 748–49 (Brennan, J., dissenting) (arguing that antitrust laws have both compensation and deterrence objectives).

175. *Id.* at 728–29 (majority opinion).

176. *Hanover Shoe*, 392 U.S. at 483.

177. *Id.*

178. *Id.* at 481. Relevant here, Section 4 of the Clayton Act, codified as amended at 15 U.S.C.

The main issue that the Supreme Court confronted concerned United Shoe's use of a so-called pass-on defense.[179] United Shoe (the manufacturer of the shoe machinery) argued that Hanover Shoe (the customer of United Shoe and shoe manufacturer) did not pay any monopoly overcharge because Hanover Shoe would have passed on the amount of the overcharge to its customers in the form of higher prices.[180]

The Supreme Court rejected the use of the pass-on defense.[181] In an opinion by Justice White, the Court rested its decision on two premises: deterring anticompetitive behavior and avoiding complex damage-apportionment calculations.[182] The Court first concluded that while not impossible to establish, the pass-on defense would be established rarely, and only when the defendant meets the "normally . . . insurmountable" task of proving that (1) the direct buyer "raised his price in response to, and in the amount of, the overcharge"; (2) "his margin of profit and total sales had not thereafter declined"; and (3) the company "could not or would not have raised [its] prices absent the overcharge or maintained the higher price had the overcharge been discontinued."[183] Second, the Court reasoned that permitting the defendants to assert a pass-on defense would decrease the incentive of direct purchasers to bring suit for antitrust violations, which would substantially undermine the deterrent value of the private right of action.[184]

The Court recognized "that there might be situations" in which the pass-on defense would be permitted, "for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract."[185] The Court acknowledged that, in these cases, it will be "easy to prove that [the buyer] has not been damaged."[186]

Nine years later in *Illinois Brick*, the Court considered the flip side of the *Hanover Shoe* coin: the limit the pass-on theory placed on injured downstream buyers.[187] The plaintiffs in *Illinois Brick* alleged that a concrete manufacturer had fixed prices of blocks sold to masonry contractors, who then sold the blocks

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§ 15(a), provides:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a) (2012).

179. *See Hanover Shoe*, 392 U.S. at 487–88.

180. *Id.* United Shoe argued that if Hanover Shoe "had bought machines at lower prices, [it] would have charged less and made no more profit than it made by leasing." *Id.* at 488.

181. *Id.* at 488.

182. *See id.* at 493–94.

183. *Id.*

184. *Id.* at 494. Moreover, the Court stated that permitting a pass-on defense would allow offenders to retain the "fruits of their illegality," since few direct purchasers would sue them. *Id.*

185. *Id.*

186. *Id.*

187. Ill. Brick Co. v. Illinois, 431 U.S. 720, 724 (1977).

to general contractors who used the blocks in buildings sold to plaintiffs.[188] As the Court explained, the "only way in which the antitrust violation alleged could have injured respondents is if all or part of the overcharge was passed on by the masonry and general contractors to respondents, rather than being absorbed at the first two levels of distribution."[189]

The defendants argued that the principles of the pass-on theory announced in *Hanover Shoe* applied with equal force to plaintiffs alleging antitrust injury, precluding the indirect purchaser from maintaining a cognizable claim.[190] Writing for a six-justice majority, Justice White—author of *Hanover Shoe* nine years earlier—denied standing to the indirect purchasers.[191]

Justice White's *Illinois Brick* opinion followed his opinion in *Hanover Shoe*.[192] Justice White's analysis established a rule of symmetry: "whatever rule is to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants."[193] If a manufacturer is unable to press a pass-on defense to combat a suit from a direct purchaser, a pass-on justification may not be available to a downstream plaintiff.[194] According to the Court, denying the pass-on defense while permitting the indirect purchaser's suit threatened "a serious risk of multiple liability for defendants."[195]

The Court was thus limited to two options: "either we must overrule *Hanover Shoe* . . . or we must preclude [indirect purchasers] from seeking to recover on their pass-on theory."[196] The Court chose to uphold *Hanover Shoe* under principles of stare decisis.[197] Mirroring its analysis from *Hanover Shoe*, the Court again emphasized the complexities attendant to calculating passed-on damages.[198] The Court reasoned that however "appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness."[199] The Court continued, identifying certain other values embedded in the antitrust enforcement mechanism:

> [T]he legislative purpose in creating a group of "private attorneys general" to enforce the antitrust laws under § 4 . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the

188. *Id.* at 726–27.
189. *Id.* at 727.
190. *Id.*
191. *See id.* at 736.
192. *See id.* at 735–36.
193. *Id.* at 728.
194. *Id.* at 728–30.
195. *Id.* at 730.
196. *Id.* at 736.
197. *Id.*
198. *Id.* at 737.
199. *Id.*; *see also id.* at 740–41 (presenting a series of hypothetical indirect purchaser suits that would have no obvious resolution).

overcharge among all that may have absorbed a part of it.[200]

In dissent, Justice Brennan, joined by Justices Marshall and Blackmun, argued that the majority's result abandoned a central tenet of the antitrust laws, which was to compensate injured parties.[201] The dissent protested that barring suits from indirect purchasers would cause consumers to ultimately bear the harm from antitrust injuries with no available avenue for relief.[202] The *Illinois Brick* approach, Justice Brennan argued, forced a tradeoff between ensuring compensation and enhancing deterrence,[203] since "from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as someone redresses the violation."[204] Indeed, Justice White agreed that compensation was a functional objective of the Clayton Act, but the majority was "unwilling to carry the compensation principle to its logical extreme."[205]

At first blush, the notion that the primary purpose of treble damage awards is to deter wrongful conduct is at odds with the *Brunswick* Court's interpretation of Section 4:

> Section 4, in contrast, is in essence a remedial provision. It provides treble damages to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." Of course, treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing, as we also have frequently observed. . . . It nevertheless is true that the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, *is designed primarily as a remedy*.[206]

But reading the case closely reveals that the *Brunswick* Court was not suggesting that deterrence was not a primary rationale of the antitrust laws. The Court, in characterizing the purpose of Section 4 as remedial, emphasized that any damages must be for actual injury.[207] Indeed, the Court's very next paragraph introduces the concept of antitrust injury in rejecting both decisions of the court of appeals.[208] The Third Circuit had held the only additional element that a plaintiff must demonstrate was that it was in a worse position than it would

200. *Id.* at 746 (quoting Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 262 (1972), *superseded by statute*, Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94–435, § 301, 90 Stat. 1383, 1394).

201. *Id.* at 748–49 (Brennan, J., dissenting) (noting both the compensation and deterrence objectives of Congress).

202. *Id.* at 749, 764 ("[I]n many instances, consumers, although indirect purchasers, bear the brunt of antitrust violations. To deny them an opportunity for recovery is particularly indefensible when direct purchasers . . . pass on the bulk of their increased costs to consumers farther along the chain of distribution.").

203. *See id.* at 751–53.

204. *Id.* at 760.

205. *Id.* at 746–47 (majority opinion).

206. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485–86 (1977) (alteration in original) (emphasis added).

207. *Id.*

208. *Id.* at 486–87.

have been but for the defendant's antitrust violation.[209] The Supreme Court reversed in part because the Third Circuit's "holding divorces antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so."[210] The remainder of the Court's opinion made clear that the remedial function of the antitrust laws is primarily a vehicle for deterring inefficient antitrust violations.[211]

2. Antitrust Damages Can Compensate or Deter

The dispute between Justices White and Brennan in *Illinois Brick* reveals a fundamental problem in the antitrust laws. Indeed, scholars and courts continue to debate whether deterrence or compensation has priority in the antitrust damages regime. They have long noted that together deterrence and compensation serve as the twin goals of the antitrust enforcement system—a prophylactic to deter anticompetitive behavior and a remedy to compensate victims of unlawful conduct.[212] The statutory text of the antitrust laws is compensatory.[213] Both the Sherman and the Clayton Acts allow for any person

209. *Id.* at 486. The court of appeals held compensable any loss "causally linked" to "the mere presence of the violator in the market." NBO Indus. Treadway Cos., Inc. v. Brunswick Corp., 523 F.2d 262, 272–73 (3d Cir. 1975), *vacated sub nom. Brunswick*, 429 U.S. 477.

210. *Brunswick*, 429 U.S. at 487.

211. *Id.* at 486–89.

212. *See, e.g.*, Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 314 (1978) (stating that "§ 4 of the Clayton Act "has two purposes: to deter violators and deprive them of 'the fruits of their illegality,'" and '"to compensate victims of antitrust violations for their injuries'" (first quoting Ill. Brick Co. v. Illinois, 431 U.S. 720, 746 (1977); then quoting *Brunswick*, 429 U.S. at 485–86)), *superseded by statute*, Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97–290, § 402, 96 Stat. 1233, 1246; *Ill. Brick Co.*, 431 U.S. at 746 (asserting that compensation and deterrence are the twin goals of Section 4 of the Clayton Act). *Compare* Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 572 n.10 (1982) ("Congress created the treble-damages remedy . . . precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." (omission in original) (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979))), *and* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 636 (1981) (noting that deterrence is an "important purpose[] of the treble-damages action under § 4 of the Clayton Act"), *with Brunswick*, 429 U.S. at 485–86 ("Section 4, in contrast, is in essence a remedial provision. It provides treble damages to '[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . .' Of course, treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing, as we also have frequently observed. It nevertheless is true that the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy." (alterations in original) (citations omitted) (quoting Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 139 (1968)), *and Reiter*, 442 U.S. at 343 ("[T]he treble damages remedy . . . [was enacted] as a means of protecting consumers from overcharges resulting from price fixing."). Professor Herbert Hovenkamp similarly concludes that the purpose of the antitrust laws is twofold. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.2a–b.

213. Sherman Act, ch. 647, § 7, 26 Stat. 209, 210 (1890), *superseded by* Clayton Antitrust Act of 1914, Pub. L. No. 63–212, § 4, 38 Stat. 730, 731 (codified at 15 U.S.C. § 15); *see also* HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.2a–b.

injured by a violation of the antitrust laws to recover treble damages.[214] As stated by the Court in *Brunswick*, the remedial provision of the statute, "which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved,"[215] suggests that compensation is at least one principal purpose of the antitrust laws. The goal of an enforcement system based on compensating injured parties is local, in the sense that it aims to return those particular parties to the same position they would have been in had the antitrust violation not taken place.

But significant evidence and scholarship suggests that the "goal of antitrust is to perfect the operation of competitive markets"[216]—to weed out certain anticompetitive conduct by making it unprofitable to do so.[217] The legislative history of the Sherman Act seems to support the conclusion that the original, primary goal of the antitrust laws was not to compensate victims but to deter anticompetitive behavior.[218] The compensation mechanism at the heart of the antitrust laws, then, was merely "intended to make the antitrust law self-enforcing,"[219] thereby allowing injured citizens *qua* private attorneys general to promote the commonweal by establishing incentives through the enforcement of the antitrust laws.[220]

Moreover, the framers of the Sherman Act likely never considered compensation as the primary goal of the antitrust laws. During the floor debate, for example, the Senate rejected a proposed amendment to the bill that became the Sherman Act that would have permitted injured plaintiffs to join together in one suit.[221] Thus, because the number of injured parties in an antitrust suit would

214. Clayton Act § 15; Sherman Act § 7.

215. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485 (1977).

216. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 1 (1984).

217. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.2b.

218. Page, *supra* note 49, at 473 ("The legislative history of the Sherman Act is notoriously malleable, assuming virtually any shape the advocate desires. Nonetheless, there is evidence in the early congressional debates to support the primacy of the deterrent function.").

219. *Id.*

220. *See* HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 225, 229, 588 (1955).

221. 21 CONG. REC. 3,147–51 (1890) (statements of Sens. George & Morgan). On the floor, Senator Morgan expressed his view that "there was a little too much temptation of that kind presented in it, for when a plaintiff is allowed reasonable attorney's fees, if he has but 75 cents interest, he will always be very likely to find an attorney who will prosecute his case." *Id.* at 3,149 (Morgan). Views like that prompted the sponsor of the amendment, Senator George, to respond:

> [W]hen you pass a bill by which you throw the poor unlettered and unskilled American farmer and American mechanic and American laborer, who are the great sufferers by these trusts and combinations, unaided, single-handed, against these large corporations, you just simply pass a bill that will amount to nothing, and I predict—and I put it on the record now as my deliberate judgment—that not one suit will ever be brought under this seventh section by any person who is simply damaged in his character as consumer. I repeat it. I do not propose silently to sit here and be a silent partner, an assenting partner, to the enactment of what I know to be, so far as a remedy to the real parties injured by these trusts is [sic] concerned, a sham, a snare, and a delusion.

Id. at 3,150 (George). The ability of plaintiffs to join together is codified now in Rule 20 of the Federal normally have been significant, courts were thought to be unable to fully and fairly compensate each injured party.[222] The legislative history of the Clayton Act, passed twenty-four years after the Sherman Act, similarly supports the conclusion that deterrence is the primary goal of the antitrust laws.[223]

The legislative history of the antitrust laws, however, is "notoriously malleable, assuming virtually any shape the advocate desires."[224] The Supreme Court has done little to help, repeatedly declining to decide whether the primary goal of the antitrust laws is to compensate or to deter.[225] Nevertheless, in most cases decided today, courts compute damages consistent with a compensation model.[226] Thus, if we follow Justice Holmes and understand the law from the perspective of the "bad man, who cares only for the material consequences which such knowledge enables him to predict,"[227] then it is the compensation scheme that creates the deterrence incentives, not the other way round.

But therein lies the problem. Most commentators think there is little correlation between the compensation scheme at the heart of the antitrust laws and the laws' supposed deterrent function.[228] Take, for example, the case of predatory pricing, in which a firm seeks a long-run monopolist position through short-term price cuts.[229] According to the optimal model,[230] the profitability of a predatory pricing strategy depends on the number of sales the predatory pricer can make at the monopoly price.[231] But that amount is not a function of a competitor's losses, even if that competitor is driven from the market due to the predation.[232] And the amount of monopoly profits the predatory pricer gains does not fully reflect the amount of total damages because the predatory pricer incurred losses during the predation period.[233]

Rules of Civil Procedure. FED. R. CIV. P. 20.

222. Page, *supra* note 49, at 473.

223. *See* 51 CONG. REC. 16,274–75 (1914) (statement of Rep. Webb) (noting that treble damages "will have a more deterrent effect on the men who practice those things than a mere criminal penalty").

224. *See* Page, *supra* note 49, at 468.

225. See *supra* notes 212–20 an accompanying text for an introduction to these twin goals.

226. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.2a.

227. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

228. *See* HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.2a–b.

229. Amazon is the paradigmatic example of a predatory pricer. *See* Khan, *supra* note 142, at 746–783. Indeed, for the "vast majority of its twenty years in business, losses—not profits—were the norm." *Id.* at 747. Nevertheless, while Amazon's profit margins were, at best, razor thin, its revenue (and stock price) has continued to soar. *Id.* at 713, 747–48. It is now one of the most expensive stocks in the S&P 500. Alex Rosenberg, *Out of the 5 Most Expensive Stocks in the S&P 500, One Could Be a Buy*, CNBC (Sept. 11, 2017, 1:46 PM), http://www.cnbc.com/2017/09/11/out-of-the-5-most-expensive-stocks-in-the-sp-500-one-could-be-a-buy.html [perma: http://perma.cc/4Q2X-WGJZ].

230. *See supra* Parts II.A.2–3.

231. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.2c.

232. *Id.*

233. *Id.* § 8.4. Imagine, for example, that a firm selling a widget engages in predatory pricing to drive its competitors from the market. To do so, for twenty-four months it lowers the price of its widget by fifteen percent. By the end of the predation period, the firm succeeds in driving its competitors from the market and begins charging monopolistic prices. Here, however, the amount of

Like the uncertainty over which values motivate the antitrust laws, the ongoing debate over whether compensation or deterrence drives the assessment of antitrust damages model sows confusion into the optimal model. Central to the confused history of the antitrust damages regime is the provision in the Clayton Act that awards any person injured by the antitrust laws "three fold the damages by him sustained."[234] While the Sherman Act and, later, the Clayton Act both provide for a treble damage award, the multiplier was not designed by the Congress; instead it was likely was adopted from the English Statute of Monopolies,[235] passed in 1623.[236] Despite that heritage, Congress seems to have spent little time debating the value of treble damages as opposed to some other damages multiplier.[237] Senator Sherman originally proposed double damages but after some debate and subsequent amendments, adopted treble damages.[238]

In any event, the original justification for treble damages seems to have been pragmatic—as argued by Senator Sherman, under even a double damages regime, [v]ery few actions will probably be brought, but the cases that will be brought will be by men of spirit, who will contest against these combinations."[239] But over time the pragmatic ceded ground to an argument based on deterrence.[240] Such a rationale is problematic, however: a fixed multiplier may

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the monopoly profits should be reduced by the losses incurred by the firm during the predation period even if the consumers paying monopolistic prices experience no discount. *Id.* § 17.2.

234. Sherman Act, ch. 647, § 7, 26 Stat. 209, 210 (1890), *superseded by* Clayton Antitrust Act of 1914, Pub. L. No. 63–212, § 4, 38 Stat. 730, 731 (codified at 15 U.S.C. § 15) (allowing "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful in this act . . . [to] recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee").

235. THORELLI, *supra* note 220, at 213.

236. English Statute of Monopolies of 1623, 21 Jac. 1 c. 3, § 4 (providing that a person injured by monopolistic behavior "shall recover three times so much as the damages which he or they sustained by means or occasion of being so hindered").

237. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.3.

238. 21 CONG. REC. 2,569 (1890) (statement of Sen. Sherman); *see also* HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.3 n.3.

239. *See* Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI.-KENT L. REV. 207, 215 (2003) ("While by no means considered the kind of activity normally condemned as malum in se under the criminal law, there is a lengthy and venerable tradition of recognizing at least certain hardcore antitrust violations as morally offensive and worthy of punishment."); Daniel A. Crane, *Antitrust Modesty*, 105 MICH. L. REV. 1193, 1196 n.20 (2007) (reviewing HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION (2005)) (noting and citing early antitrust cases in which moral reasoning was explicitly used to come to decision, including one noting that "dealings between man and man must be on terms of justice" (quoting United States v. Patterson, 201 F. 697, 716 (S.D. Ohio 1912), *rev'd*, 222 F. 599 (6th Cir. 1919))).

240. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.3. Awarding only single damages could make violating the antitrust laws profitable. *Id.* For example, assume that an alleged anticompetitive practice produced (1) monopoly overcharges of $100, (2) efficiency gains of $60, and (3) a social loss of $50. The optimal damages model indicates damages equal to $150 (overcharge plus social loss). *See supra* Parts II.A.2–3. However, setting damages equal to $150 would make the practice profitable, since it produces profits of $160 (overcharge plus efficiency gain). *See* HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.2b–c.

overdeter some practices while underdeterring others.[241] Naked price fixing, for example, is not only illegal per se under the civil antitrust laws.[242] Under the criminal laws, it is also a felony.[243] Moreover, naked price fixing is thought to confer no benefit other than on those parties to the price-fixing agreement.[244] In such a case, a treble-damage award to those injured seems appropriate. However, many other alleged antitrust violations may have beneficial consequences for consumers, such as mergers[245] or vertical integrations of complementary firms.[246] A treble-damage multiplier awarded in those cases may be unfair or deter efficiency-creating business arrangements.[247] The antitrust laws, however, make no distinction between different kinds of alleged anticompetitive behavior.[248]

241. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.2d.

242. *See id.* § 17.3. However, the question of what is price fixing is not always so easy to answer. *See, e.g.*, Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238–41 (1918) (applying the rule of reason to analyze alleged price-fixing violations). In *Board of Trade*, the Chicago Board of Trade, a member-based commodity market in grains, was accused by the Department of Justice of fixing the price of grains in violation of the antitrust laws. *Id.* at 237. The basis of the suit was the Board's introduction of a "call rule," by which members of the Board "were prohibited from purchasing or offering to purchase, during the period between the close of the Call and the opening of the session on the next business day, any wheat, corn, oats or rye 'to arrive' at a price other than the closing bid at the Call." *Id.* Before the implementation of the call rule, members of the Board could set prices as they saw fit. *Id.* After the implementation of the rule, however, the price of the bids for each grain was fixed from the end of the day's session—which was typically 2 p.m.—to the opening of the next day's session. *Id.* At trial, the Board argued that the purpose of the rule was not to prevent competition through a price-fixing arrangement but to promote convenience among its members and to disrupt an after-hours trading market in which certain grains dealers were undercutting prices to certain buyers. *Id.* The district court did not issue an opinion, but the Justice Department and Board entered a consent decree that enjoined the Board from acting under the call rule or adopting and acting upon any similar rule in the future. *Id.* The Supreme Court reversed the consent decree of the district court with instructions to dismiss. *Id.* at 241. In an opinion by Justice Brandeis, the Court held that the call rule, while sounding in price fixing, should instead be analyzed under the rule of reason, by which anticompetitive harms and procompetitive benefits are balanced. *Id.* at 238–41.

243. 15 U.S.C. § 2 (2012) ("Monopolizing trade a felony; penalty").

244. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.2b.

245. *Id.* § 12.1.

246. *See, e.g.*, R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 395 (1937) ("[A] firm will tend to expand until the costs of organising an extra transaction within the firm become equal to the costs of carrying out the same transaction by means of an exchange on the open market or the costs of organising in another firm."). The Coasian theory of the firm and the potential benefits of vertical integration continue to be explored. *See* R. H. Coase, *The Nature of the Firm: Influence*, 4 J.L. ECON. & ORG. 33, 35–36 (1988) (assessing contributions made by other scholars to understand and expand his original work). The view of vertical aggregation was not always so sanguine. *See* United States v. Am. Tobacco Co. 221 U.S. 106, 182–83 (1911) (finding that "the conclusion of wrongful purpose and illegal combination is overwhelmingly established" by the defendant's intent to "gradual[ly] absor[b] . . . control over all the elements essential to the successful manufacture of tobacco products, and placing such control in the hands of seemingly independent corporations serving as perpetual barriers to the entry of others into the tobacco trade").

247. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 17.3.

248. 15 U.S.C. § 2 (stating that any "person" found to violate the antitrust laws "shall be deemed guilty of a felony"); *id.* § 15(a) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold

III. DISCUSSION

The instability of the optimal damages model allows courts to broaden their understanding of the harms wrought by antitrust violations by reinfusing sociopolitical considerations into antitrust analysis. For the purposes of this Comment, it is not necessary to define precisely "sociopolitical considerations." It means at least that courts should consider noneconomic factors in resolving antitrust cases, like free speech in *Associated Press* or individual autonomy in *Trans-Missouri Freight*, in addition to the price paid by a consumer. A definition of "sociopolitical considerations" also could follow Pitofsky, who contended that the antitrust laws should incorporate political values, by which he meant "first, a fear that excessive concentration of economic power will breed antidemocratic political pressures, and second, a desire to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all."[249]

The simplest way for courts to include sociopolitical considerations in their analyses is to evolve the optimal damages model to account for all pernicious effects of monopolistic behavior, which would of course include but not be limited to a reduction in consumer welfare. Quick observation suggests that increased market concentration in a number of industries has negatively affected wages,[250] suppliers,[251] quality of service,[252] regional inequality,[253] economic dynamism,[254] and democracy itself.[255] Part III.A first demonstrates what should be clear by this point—that sociopolitical considerations (including but not limited to economic efficiency) have long been part of antitrust enforcement analysis and that Bork's consumer-welfare thesis was, despite his protestations to the contrary, a normative project. Part III.B then argues that the optimal damages model can accommodate sociopolitical as well as economic costs. Part III.B closes with two examples in which antitrust allegations have been raised and in which sociopolitical values could be analyzed.

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the damages by him sustained . . . .").

249. Pitofsky, *supra* note 14, at 1051.

250. *See A Lapse in Concentration*, ECONOMIST (Sept. 29, 2016), http://www.economist.com/news/special-report/21707838-dearth-competition-among-firms-helps-explain-wage-inequality-and-host-other [perma: http://perma.cc/BT87-BAH5].

251. *See* Marshall Steinbaum, *Monopsony Takes Center Stage*, PRO-MARKET (Jan. 8, 2017), http://promarket.org/monopsony-takes-center-stage/ [perma: http://perma.cc/BAY7-ZKHE].

252. *See* Alex Pareene, *Airlines Can Treat You Like Garbage Because They Are an Oligopoly*, SPLINTER (Apr. 11, 2017, 9:33 AM), http://splinternews.com/airlines-can-treat-you-like-garbage-because-they-are-an-1794192270 [perma: http://perma.cc/99E8-9L3V].

253. *See* Phillip Longman, *Bloom and Bust*, WASH. MONTHLY (Nov./Dec. 2015), http://washingtonmonthly.com/magazine/novdec-2015/bloom-and-bust/ [perma: http://perma.cc/NH4A-EGBX].

254. *See* ECON. INNOVATION GRP., DYNAMISM IN RETREAT 24 (2017), http://eig.org/wp-content/uploads/2017/07/Dynamism-in-Retreat-A.pdf [perma: http://perma.cc/8QCQ-7QKK].

255. Asher Schechter, *Is There a Case to Be Made for Political Antitrust?*, PRO-MARKET (Apr. 28, 2017), http://promarket.org/case-made-political-antitrust/ [perma: http://perma.cc/97PW-8VYV].

A. *Antitrust's History of Sociopolitical Values*

The copious examples of courts straying from the principles underlying the optimal damages model demonstrates that sociopolitical values have long played a prominent role in adjudicating antitrust claims. The Supreme Court's decisions in *Trans-Missouri Freight*, *Alcoa*, *Associated Press*, and even *Reiter* illustrate the disparate sociopolitical values that have motivated the antitrust laws.[256] In *Trans-Missouri Freight*, decided in 1897, the Court was concerned not just that contracts among railroad conglomerates to set collective rates, rules, and regulations would force "an independent business man . . . into a mere servant or agent of a corporation."[257] The *Trans-Missouri Freight* Court's concern was more general. It was concerned that anytime "combinations of capital" form and come "to control the production or manufacture of any particular article in the market," that trust will be able to "dictate the price at which the article shall be sold," with "the effect being to drive out of business all the small dealers in the commodity, and to render the public subject to the decision of the combination as to what price shall be paid for the article."[258] Initially, the *Trans-Missouri Freight* Court's justification for condemnation under the antitrust laws sounds in Bork's consumer-welfare theory: the Court was concerned that trusts could, because of their monopoly position, dictate price at which items could be sold.[259] But the Court's rationale was much broader. Indeed, it explained that whether or not a monopoly *did* raise the price on a certain commodity was irrelevant.[260] The main danger in the Court's view was removing from certain communities the vibrancy and stability brought by small businesses in which workers had a stake.[261]

Likewise, in *Alcoa*, Judge Hand stated clearly that there are not just "economic reasons which forbid monopoly," but that "there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results."[262] Judge Hand made clear what those other reasons were. He first cited to legislative statements made by Senator Sherman contemporaneous to the passage of the Act that condemned trusts because of

256. *See supra* Part II.B.1.

257. United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 324 (1897). See also *supra* Part II.B.1.a for a discussion of *Trans-Missouri Freight*.

258. *Trans-Mo. Freight*, 166 U.S. at 323–24.

259. *Id.*

260. *Id.*

261. *Id.* at 324. One passage prominently displays the multiple values being balanced by the Court. On the one hand, the Court's concern was strictly economic—"[n]or is it for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital." *Id.* On the other hand, the Court was concerned with forces far broader than economic power or efficiency. The Court noted that "it is not for the real prosperity of any country that such changes"—trust formation—"should occur which result in . . . an independent business man . . . having no voice in shaping the business policy of the company, and bound to obey orders issued by others." *Id.*

262. *Alcoa*, 148 F.2d 416, 428 (2d Cir. 1945), *superseded by statutue*, Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97–290, § 402, 96 Stat. 1233, 1246.

their tendency to "disturb social order."[263] Judge Hand then cited *Trans-Missouri Freight* for another "aspect of the same notion."[264] Judge Hand read *Trans-Missouri Freight* to stand for the proposition that the Sherman Act was most concerned with preserving the competitive standing of small businesses and the values they impart in American communities.[265]

Associated Press is different in character to *Trans-Missouri Freight* and *Alcoa* but no less demonstrates that any assessment of antitrust harm must remain committed to broader public policy concerns. There, even though the restrictions enacted by members of the AP were no doubt economically efficient,[266] they were found to violate the sociopolitical values undergirding the principles of free speech.[267] The AP asked the Court to rule that applying the Sherman Act to its organization would constitute an abridgement of the freedom of speech.[268] The Court accepted the AP's contention that free speech principles were at play but concluded that the "First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary."[269] The Court observed that because a "free press is a condition of a free society," any government mandate that would "impede the free flow of ideas," including a ruling by the Supreme Court holding that the First Amendment permitted the AP to restrict access to newsworthy information, must not stand.[270] In an important sense, the methodology of the *Associated Press* Court was like the methodologies in *Trans-Missouri Freight* and *Alcoa*. Each court conceived of the antitrust laws not in a strictly economic sense; instead, each believed that the antitrust laws were flexible enough to tackle threats to core tenets of democracy.

Even *Reiter* and the post-*Reiter* decisions show the Court grappling with issues of public import.[271] *Reiter*, following Bork, concluded that Congress

263. *Id.* at 428–29, 429 n.1 ("If the concerted powers of this combination are intrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the State and national authorities." (quoting 21 CONG. REC. 2,457 (1890) (statement of Sen. Sherman))); *see also id.* ("The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition. These combinations already defy or control powerful transportation corporations and reach State authorities. They reach out their Briarean arms to every part of our country. They are imported from abroad. Congress alone can deal with them, and if we are unwilling or unable there will soon be a trust for every production and a master to fix the price for every necessity of life." (quoting 21 CONG. REC. 2,460 (1890) (statement of Sen. Sherman))).

264. *Id.* at 429 (citing *Trans-Mo. Freight*, 166 U.S. at 323).

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

266. Associated Press v. United States, 326 U.S. 1, 4 (1945).

267. *Id.* at 19–20.

268. *Id.*

269. *Id.* at 20.

270. *Id.*

271. See *supra* Part II.A.3 for a discussion of *Reiter*'s adoption of Bork's consumer-welfare

designed the Sherman Act as a consumer-welfare prescription.[272] That reformulation of the original purpose of the Sherman Act was largely adopted by subsequent Supreme Court decisions and by decisions of the nearly all courts of appeals.[273] The consumer-welfare thesis could have been dead wrong; nevertheless, the Supreme Court's adoption of economic efficiency as the core value of the antitrust laws was no different than the Court's adoptions of different values in *Trans-Missouri Freight*, *Alcoa*, and *Associated Press*.

B. Incorporating Sociopolitical Values into Antitrust Decisions

1. Adjusting the Damages Model to Account for Sociopolitical Costs

A holistic approach to antitrust harm that incorporates all sociopolitical values attendant to the Supreme Court's historical antitrust decisions will best account for the pernicious methods modern monopolists employ to exploit their market position. The conceptual framework of the optimal damages model is the best vehicle through which to incorporate these values. For one, the optimal damages model is no doubt normative and, accordingly, can be evolved to fit modern needs.[274] As is clear from the fierce criticism the consumer-welfare hypothesis has continued to generate, Bork did not succeed in "discovering" the fundamental values of antitrust but, instead, in changing the policies underlying the antitrust laws.[275] Past courts have selected certain other values (sometimes broadly political, sometimes specifically communitarian, sometimes other), that took precedence over economic efficiency.[276]

In addition, the optimal damages model is conceptually simple and easy to understand.[277] The optimal damages model already includes, at least theoretically, an account of the "social cost" and "efficiency gains" of behavior in violation of the antitrust laws.[278] Take the case of a firm abusing its monopoly position by restricting output and raising price. One component of the social cost

hypothesis, and see *supra* Parts II.B.1.c–d for a discussion of the post-*Reiter* decisions that reformulated who may seek redress for antitrust violations, and for what injuries.

272. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (citing BORK, THE ANTITRUST PARADOX, *supra* note 84, at 66).

273. *See supra* note 100 and accompanying text.

274. "Normative" in this sense simply means a legal theory concerned with how the law *ought* to be, not (as in the "positive" law sense) how the law *is*. *See* Lawrence B. Solum, *Legal Theory Lexicon 016: Positive and Normative Legal Theory*, LEGAL THEORY LEXICON, http://lsolum.typepad.com/legal_theory_lexicon/2003/12/legal_theory_le.html [perma: http://perma.cc/HX4K-9A6Q] (last revised Oct. 2017).

275. *See supra* Part II.A.3; *see also* Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 835 (2014).

276. *See supra* Part II.B.1.a.

277. As even a critic of the optimal damages model attests, the model "provides a clear and cogent set of rules that courts can apply in antitrust cases, and no other view of antitrust accomplishes that task." Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-Examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359, 373 (1993).

278. See *supra* Part II.A.2 for a discussion on how the optimal model for antitrust damages seeks to account for the "social" or "deadweight" loss attendant to monopolistic or similar behavior.

in that case is the cost incurred by consumers who switch to less efficient products.[279] But the monopoly position of the firm may also create efficiencies, and the monopolist will be able, in effect, to discount the social cost attendant to his monopoly behavior on that basis.[280] Indeed, the current antitrust enforcement regime would allow the firm to pursue its monopoly pricing and output strategy if the efficiency gains exceeded the social costs.[281]

The conception of social costs embedded in the optimal damages model need not be so parochial and can include other political or social costs.[282] Judges in various courts have issued rulings across many areas of the antitrust laws that take into account sociopolitical and other, noneconomic considerations.[283] Think back to *Associated Press*. There, the Court held that economically efficient restrictions enacted by member organizations of the AP violated the sociopolitical value of freedom of speech.[284] The Court observed that because a "free press is a condition of a free society," any government mandate that would "impede the free flow of ideas."[285] That idea could easily be reformulated in optimal damages terms—the *social cost* of the AP's curtailment of free speech significantly outweighs the *economic benefits* of the AP's restrictive news practices.[286] Same for the Court's decision in *Trans-Missouri Freight*: the social cost of forcing an independent businessman to become a corporate servant and lose his stake in his work exceeds certain economic benefits of rate regulation among competing rail companies.[287]

2. Problems with Valuing Sociopolitical Costs

A defense of the pure version of the optimal damages model might be that considering only economic costs ensures an orderly, reliable, and predicable antitrust enforcement process. Indeed, how should courts compare a *social* cost with an *economic* benefit? Is that any different than comparing apples and oranges?

Difficulties attendant to valuing sociopolitical costs overstate the precision of the current system.[288] The concept of antitrust injury, for example, is already one step removed from an actuarial system in which purely economic costs are tallied. An injury under the antitrust laws, recall, includes only those that the

279. *See supra* notes 58–61 and accompanying text.

280. *See supra* Part II.A.2.b.

281. *See supra* Part II.A.2.b.

282. *See infra* Parts III.C.1–2; *see also, e.g.*, Pitofsky, *supra* note 14, at 1075 ("[T]he trend toward use of an exclusively economic approach to antitrust analysis excludes important political considerations that have in the past been seen as relevant by Congress and the courts."); Williamson, *supra* note 71, at 707–09.

283. See *supra* Part II.B for a discussion of the various doctrines created by courts that diverge from the optimal damages model and its singular emphasis on economic efficiency.

284. Associated Press v. United States, 326 U.S. 1, 4, 19–20 (1945).

285. *Id.* at 20.

286. *Id.*

287. *See supra* Part II.B.1.a.

288. *See supra* Part II.B.

antitrust laws were meant to prevent, not all injuries that might flow from the business conduct at issue.[289] Similarly, in the domain of antitrust standing, the doctrine of *Illinois Brick* states that the efficient enforcement of the Sherman Act necessitates a rule that bars claims by indirect purchasers for the payment of alleged "overcharges" passed on through a distribution chain.[290] The Court's reasoning was not that prohibiting recovery for indirect purchasers would produce more accurate damage apportionments. Rather, it was that the complexities of apportioning damages attributable to a passed-on overcharge (from a manufacturer to a distributor to a consumer) warranted a bright-line rule: only the direct purchaser has standing to recover damages, *even if* the purchaser was a distributor who passed on the overcharge to the consumer and was thus not injured at all.[291]

Moreover, any argument that the optimal damages model should consider only economic costs because of reliability and predictability neglects the reality that so many antitrust questions are factually indeterminate. Antitrust claims are answered within the judicial process, a process constrained by institutional capacities and access to information. Justice Scalia's lamentations in *Comcast* illustrate the point that antitrust questions are often indeterminate because of a constrained process.[292] "For all we know," Justice Scalia concluded, the subscribers to Comcast's services alleging antitrust harm could have been injured by any number of antitrust violations—the "permutations involving four theories of liability and 2 million subscribers located in 16 counties are nearly endless."[293] It is perhaps because of institutional constraints that courts have adopted bright-line rules. Incorporating a valuation of sociopolitical harms will not disturb an optimal damages system, for an optimal system does not exist.

C. Two Examples

A workable enforcement regime is, of course, desirable. All else being equal, courts should adopt rules that are predictable and easily enforced. The following are two examples of antitrust cases that could give rise to considerations of sociopolitical values.

1. Amazon and Political Influence

a. The Antitrust Case

In June 2017, Amazon agreed to buy Whole Foods for $13.4 billion.[294]

289. See *supra* Part II.B.1.c for a discussion of antitrust injury and how it differs in important ways from conceptions of injury in common law contexts.

290. *See supra* Part II.B.1.d.

291. *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 730–37 (1977).

292. *See supra* Part I.

293. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1434–35 (2013).

294. Nick Wingfield & Michael J. de la Merced, *Amazon to Buy Whole Foods for $13.4 Billion*, N.Y. TIMES: DEALBOOK (June 16, 2017), http://www.nytimes.com/2017/06/16/business/dealbook/amazon-whole-foods.html [perma: http://perma.cc/MQ66-YYYR].

Almost immediately, prices for groceries at Whole Foods stores began to drop.[295] Such a reduction in price mimics what Amazon has been doing in other markets for its entire existence—offering products for sale by more innovative means and at prices lower than its competitors.[296] Such a reduction in price also has largely insulated Amazon from challenges under the antitrust laws.

Two months after Amazon announced its acquisition of Whole Foods, the Federal Trade Commission (FTC) declined to further investigate the merger,[297] giving it the go-ahead.[298] The FTC investigation was brought under Section 7 of the Clayton Act.[299] Section 7 prohibits mergers if "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[300] However, under traditional antitrust principles, the acquisition of Whole Foods by Amazon is unobjectionable because Amazon and Whole Foods are not horizontal competitors.[301] The two firms overlap only in the market for online groceries, but that market remains a small share of the market for groceries overall.[302]

b. The New Political Context

Amazon announced in September 2017 that it would accept from any "metropolitan statistical area (MSA), state/province, county, city and the

295. Jennifer Kaplan & Matthew Boyle, *Amazon Cuts Whole Foods Prices as Much as 43% on First Day*, BLOOMBERG TECH. (Aug. 28, 2017, 8:15 AM, updated Aug. 28, 2017, 4:16 PM), http://www.bloomberg.com/news/articles/2017-08-28/amazon-cuts-prices-at-whole-foods-as-much-as-50-on-first-day [perma: http://perma.cc/Y279-8W9T] (noting that "[a]t the [Whole Foods] store on East 57th Street in Manhattan, organic fuji apples were marked down to $1.99 a pound from $3.49 a pound; organic avocados went to $1.99 each from $2.79; organic rotisserie chicken fell to $9.99 each from $13.99, and the price of some bananas was slashed to 49 cents per pound from 79 cents," and also noting that the "marked-down items had orange signs reading 'Whole Foods + Amazon'" with the "signs list[ing] the old price, the new price and 'More to come'").

296. Khan, *supra* note 142, at 746–54.

297. Press Release, Fed. Trade Comm'n, Statement of Federal Trade Commission's Acting Director of the Bureau of Competition on the Agency's Review of Amazon.com, Inc.'s Acquisition of Whole Foods Market Inc. (Aug. 23, 2017), http://www.ftc.gov/news-events/press-releases/2017/08/statement-federal-trade-commissions-acting-director-bureau [perma: http://perma.cc/3E3T-EZA7].

298. *See* David McLaughlin & Spencer Soper, *Amazon's Whole Foods Deal Wins Swift U.S. Antitrust Approval*, BLOOMBERG TECH. (Aug. 23, 2017, 4:35 PM, updated Aug. 23, 2017, 6:25 PM), http://www.bloomberg.com/news/articles/2017-08-23/amazon-s-whole-foods-deal-wins-fast-track-u-s-antitrust-nod [perma: http://perma.cc/HVS5-HCWU].

299. *See* Press Release, Fed. Trade Comm'n, *supra* note 297 (noting that the "FTC conducted an investigation of this proposed acquisition to determine whether it substantially lessened competition under Section 7 of the Clayton Act, or constituted an unfair method of competition under Section 5 of the FTC Act").

300. 15 U.S.C. § 18 (2012).

301. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 9, § 3.8.

302. Tiffany Hsu & Nick Wingfield, *Walmart Expands Online Grocery Delivery to 100 Cities*, N.Y. TIMES (Mar. 14, 2018), http://www.nytimes.com/2018/03/14/business/dealbook/walmart-online-delivery-groceries.html [perma: http://perma.cc/6AFH-57G5] (noting that "[s]pending on online groceries is currently just $27 billion a year, or 3 percent of the total" amount spent on groceries).

relevant localities therein" applications to be the location of its second headquarters.[303] Amazon was eventually deluged with 238 applications from municipalities and state governments in the United States, Canada, and Mexico.[304] In January 2018, Amazon released a significantly pared down list of twenty finalists.[305]

According to Amazon, the winner of the second headquarters would receive substantial economic benefits, including up to 50,000 high-paying jobs and $5 billion in investment.[306] Amazon also asked cities and states to describe the tax incentives they could offer to, as Amazon claimed, "offset initial capital outlay and ongoing operational costs."[307] In response, political leaders from many of the twenty selected municipalities and states are attempting to convince Amazon to select them. As of the publication of this Comment, New Jersey, for example, has offered Amazon $7 billion in state and city tax incentives.[308] Chicago has offered free land worth up to $100 million.[309] Amazon as a company is worth more than $500 billion.[310]

c. *Incorporating Sociopolitical Values*

In adjudicating an antitrust action concerning Amazon's growing economic influence, courts should focus also on Amazon's growing *political* influence. The antitrust claim could find footing under Section 2 of the Sherman Act for illegal monopolization,[311] and be calculable under the damages methodology described

303. AMAZON, AMAZON HQ2 RFP (2017), http://images-na.ssl-images-amazon.com/images/G/01/Anything/test/images/usa/RFP_3._V516043504_.pdf [perma: http://perma.cc/Z8M7-9666] (providing instructions at unnumbered initial page); *see also* Nick Wingfield & Patricia Cohen, *Amazon Plans Second Headquarters, Opening a Bidding War Among Cities*, N.Y. TIMES (Sept. 7, 2017), http://www.nytimes.com/2017/09/07/technology/amazon-headquarters-north-america.html [perma: http://perma.cc/R6BQ-P9RX].

304. Alison Griswold, *A Nearly Complete List of the 238 Places that Bid for Amazon's Next Headquarters*, QUARTZ (Nov. 4, 2017), http://qz.com/1119945/a-nearly-complete-list-of-the-238-places-that-bid-for-amazons-next-headquarters/ [perma: http://perma.cc/33YR-BFXU].

305. Nick Wingfield, *Amazon Chooses 20 Finalists for Second Headquarters*, N.Y. TIMES (Jan. 18, 2018), http://www.nytimes.com/2018/01/18/technology/amazon-finalists-headquarters.html [perma: http://perma.cc/H3XP-ZNS3]. As of the publication of this Comment, the finalists are Atlanta; Austin, Texas; Boston; Chicago; Columbus, Ohio; Dallas; Denver; Indianapolis; Los Angeles; Miami; Montgomery County, Maryland; Nashville; Newark; New York; Northern Virginia; Philadelphia; Pittsburgh; Raleigh, North Carolina; Toronto; and Washington, D.C. *Id.*

306. *See* AMAZON HQ2 RFP, *supra* note 303, at 5.

307. *Id.*

308. Keiko Morris & Mike Vilensky, *New Jersey Offers $7 Billion in Incentives to Lure Amazon to Newark*, WALL ST. J. (Oct. 16, 2017, 8:30 PM), http://www.wsj.com/articles/newark-offers-7-billion-in-incentives-to-lure-amazon-1508191648 [perma: http://perma.cc/7CP5-DM6J].

309. Fran Spielman, *Chicago's Amazon Bid Includes $2.25 Billion Incentive Package*, CHI. SUN TIMES (Oct. 23, 2017, 8:02 PM), http://chicago.suntimes.com/news/chicagos-amazon-bid-includes-2-25-billion-incentive-package/ [perma: http://perma.cc/4K9C-9Q3K].

310. Matt Egan, *Facebook and Amazon Hit $500 Billion Milestone*, CNN MONEY (July 27, 2017, 10:29 AM), http://money.cnn.com/2017/07/27/investing/facebook-amazon-500-billion-bezos-zuckerberg/index.html [perma: http://perma.cc/6L6K-F8FP].

311. See *supra* Part II.A for a discussion of the antitrust laws and how claims are brought under

above.[312] A Section 2 action would claim that Amazon's corpus of business activity accounts for illegal monopolization. Like in *Trans-Missouri Freight*, Amazon's business activity has forced many small business people to become "mere servant[s] or agent[s] of a corporation."[313] Amazon Marketplace, for instance, has allowed Amazon to gather analytics on its business partners, including small retailers selling through Amazon, and then to enter those retailers' markets while using its data advantage and exploitive terms to overtake that market.[314] In addition, any damage calculation should include as a social cost the risk that Amazon's growing power poses to democratic norms. In *Alcoa*, Judge Hand concluded that the framers of the Sherman Act were concerned with the tendency of monopolies to "disturb social order"[315] and with preserving the competitive standing of small businesses.[316] Amazon's business behavior evinces both.

2. Ownership and Distribution of Information: AT&T and Time Warner

a. The (Erstwhile Potential) Antitrust Case

In October 2016, AT&T (the telecommunications giant) agreed to buy Time Warner (an entertainment and content company) for $84.5 billion.[317] Because AT&T and Time Warner are not direct competitors, their merger was initially thought to be subject to the well-trodden antitrust principles governing the vertical integration of firms.[318] In part based on Bork's pioneering work,[319] antitrust enforcement officials largely permit the vertical integration of firms, which previously had been thought to pose significant antitrust concerns.[320] Bork

the various substantive sections.

312. *See supra* Part III.B.1.

313. United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 324 (1897); *see also supra* notes 101–02 and accompanying text.

314. *See, e.g.*, Jamie Merrill, *Amazon Under Fire for 'bullying and exploiting small retailers'*, INDEPENDENT (Sept. 5, 2014, 4:52 PM), http://www.independent.co.uk/news/business/news/amazon-under-fire-for-bullying-and-exploiting-small-retailers-9715502.html [perma: https://perma.cc/Q72A-5DGL].

315. *See supra* note 261.

316. *See supra* note 263.

317. Michael J. de la Merced, *AT&T Agrees to Buy Time Warner for $85.4 Billion*, N.Y. TIMES: DEALBOOK (Oct. 22, 2016), http://www.nytimes.com/2016/10/23/business/dealbook/att-agrees-to-buy-time-warner-for-more-than-80-billion.html?action=click&contentCollection=DealBook&module=RelatedCoverage&region=EndOfArticle&pgtype=article [perma: http://perma.cc/Z65M-UTQV] ("In the world of media, bigger remains better.").

318. *See, e.g.*, Peter Coy et al., *AT&T Wants to Get Vertical with Time Warner. Is That a Problem?*, BLOOMBERG BUSINESSWEEK (Nov. 16, 2017, 2:23 PM), http://www.bloomberg.com/news/articles/2017-11-16/at-t-wants-to-get-vertical-with-time-warner-is-that-a-problem [perma: http://perma.cc/55AS-TTU6].

319. BORK, THE ANTITRUST PARADOX, *supra* note 84, at 225–33.

320. *See, e.g.*, Port Dock & Stone Corp. v. Oldcastle Northeast, Inc., 507 F.3d 117, 124 (2d Cir. 2007) ("Vertical expansion by a monopolist, without more, does not violate section 2 of the Sherman Act."); Paschall v. Kan. City Star Co., 695 F.2d 322, 327 (8th Cir. 1982) ("[V]ertical integration,

argued that antitrust's "concern with vertical mergers is mistaken."[321] But Bork's main criticism with the then-prevailing antitrust enforcement regime's proscription of vertical mergers was limited to the "faint theoretical case, hardly worth mentioning, that vertical mergers can be used by very large firms for purposes of predation under exceptional circumstances."[322] Bork's theory on the legality of vertical integration did not account for sociopolitical considerations.[323] Under the prevailing antitrust doctrines governing whether the vertical integration of firms is permissible, the merger between AT&T and Time Warner should have been approved easily.[324]

b. The New (and Actual) Political Context

But ownership over media has radically changed in the past forty years. In the early 1980s, some fifty companies accounted for ninety percent of the media consumed domestically.[325] By 2012, just six companies controlled the same amount.[326] In November 2017, the Department of Justice (DOJ) filed suit to block the merger.[327] The DOJ claimed that the union of the two companies would harm consumers and weaken competition.[328]

c. Incorporating Sociopolitical Values

However, nowhere in the DOJ's complaint is an allegation that the merger between AT&T and Time Warner would compromise sociopolitical values.[329] Like in *Associated Press*,–in which the Supreme Court decided that the AP's structure (which was admittedly efficient) violated the antitrust laws because it

without more, does not violate the Sherman Act."); Byars v. Bluff City News Co., Inc., 609 F.2d 843, 861 (6th Cir. 1979) ("[V]ertical integration, without more, should not be a basis for imposing liability.").

321. BORK, THE ANTITRUST PARADOX, *supra* note 84, at 226.

322. *Id.*

323. *See id.* at 225–33 (focusing exclusively on the economic considerations of vertical integration).

324. James B. Stewart, *With AT&T and Time Warner, Battle Lines Form for an Epic Antitrust Case*, N.Y. TIMES (Nov. 16, 2017), http://www.nytimes.com/2017/11/16/business/att-time-warner.html [perma: http://perma.cc/A2EE-HVW3] (quoting Professor Larry Downes of Georgetown Law Center saying "[i]f the government goes to court, it will lose. There's no case law to support them").

325. James B. Stewart, *When Media Mergers Limit More Than Competition*, N.Y. TIMES (July 25, 2014), http://www.nytimes.com/2014/07/26/business/a-21st-century-fox-time-warner-merger-would-narrow-already-dwindling-competition.html [perma: http://perma.cc/TZF6-KKFZ].

326. *Id. But see The Comcast/NBC Universal Merger: What Does the Future Hold for Competition and Consumers?: Hearing Before the Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Comm. on the Judiciary*, 111th Cong. 11 (2010) (statement of Jeff Zucker, President and Chief Executive Officer, NBC Universal) ("Less than 40 years ago, three companies enjoyed 90 percent of all television viewing. . . . Each of the five largest media companies in America now only account for between 5 and 10 percent of all viewing, and a multitude of smaller competitors actually account for half of all television viewing.").

327. Complaint at 1, United States v. AT&T, No. 1:17-cv-02511 (D.D.C. Nov. 20, 2017).

328. *Id.* at 5–7 (discussing the anticompetitive effects of the proposed merger in exclusively price-related terms); *see also* Kang & de la Merced, *supra* note 66 (same).

329. *See* Complaint, *supra* note 327.

reduced the flow of newsworthy information (a First Amendment concern),[330] a court adjudicating an antitrust claim concerning mergers of media giant should likewise look beyond mere efficiency. Justice Black, a First Amendment absolutist,[331] in writing for the *Associated Press* majority, argued that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[332] Justice Black's argument is apt in this context. AT&T and Time Warner are not direct competitors, but they disseminate significant information and opinions—like "Real Time With Bill Maher" and "Last Week Tonight With John Oliver"[333]—that provide astute and sometimes highly critical political commentary. Increasing consolidation could threaten that vital and diverse political discourse.

IV. CONCLUSION

Courts should reinfuse a broad spectrum of sociopolitical considerations into antitrust analysis. The optimal damages model, itself built upon the sociopolitical value of economic efficiency, has failed to meet current challenges posed by monopolistic behavior. This Comment, even if failing to put forth a fully-formed antitrust analysis framework that incorporates sociopolitical values, demonstrates that the selection of economic efficiency, in the guise of Bork's consumer-welfare hypothesis, was by no means predestined. To the contrary, courts, both before and after *Reiter*'s adoption of Bork's thesis, have infused antitrust decisions with sociopolitical, noneconomic considerations, causing the optimal damages model to be anything but optimal. The instability of the optimal damages model should permit courts to broaden their understanding of the harms wrought by antitrust violations and to reinfuse sociopolitical considerations into antitrust analysis. The simplest way to execute the reinfusion is to expand the conceptual understanding of "social loss" in the optimal damages model to include sociopolitical costs or, more generally, costs to the commonweal. Doing so will not be easy but could pave the way to returning the American economy to the free and open place dreamed of by Senator Sherman.

330. *See* Associated Press v. United States, 326 U.S. 1, 20 (1945) ("Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. . . . The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity."); *see also id.* at 29 (Frankfurter, J., concurring) ("The short of the matter is that the by-laws which the District Court has struck down clearly restrict the commerce which is conducted by the Associated Press, and the restrictions are unreasonable because they offend the basic functions which a constitutionally guaranteed free press serves in our nation.").

331. *See, e.g.*, Black, *supra* note 113, at 867.

332. *Associated Press*, 326 U.S. at 20.

333. *See* HBO, http://www.hbo.com/ [perma: http://perma.cc/BWV7-EYAC] (last visited May 22, 2018).