

# THE YALE LAW JOURNAL

CHARLES S. DAMERON

## Present at Antitrust's Creation: Consumer Welfare in the Sherman Act's State Statutory Forerunners

**ABSTRACT.** For the last four decades, federal courts have construed the Sherman Act as a consumer-welfare statute. But considerable disagreement persists within the legal academy regarding the true legislative aims of American antitrust law. This Note argues that interpreters of the Sherman Act ought to look more closely at an understudied branch of antitrust—state antitrust statutes enacted contemporaneously with the Sherman Act—to better understand the roots of federal antitrust law. The Sherman Act's legislative history indicates that Congress intended to prohibit the same combinations in restraint of trade that were already prohibited by state statutory and common law. The plain language of the Sherman Act's state predecessors shows that most were designed to promote what we now call consumer welfare. These statutes prohibited only those business combinations that harmed consumers by artificially constraining the supply of consumer goods. Read in this context, the Sherman Act is properly understood as the federal component of a national program on behalf of consumer welfare.

**AUTHOR.** Yale Law School, J.D. 2015. I am especially grateful for the direction and advice I received on this project from Professor George Priest. Professors Herbert Hovenkamp and Dale Collins provided valuable feedback on the first drafts. Jennifer Yun, Rebecca Lee, Michael Clemente, and the editors of the *Yale Law Journal* strengthened this Note through their thoughtful questions and suggestions. Any errors are mine.



## NOTE CONTENTS

INTRODUCTION	1074
I. STATE ANTITRUST LEGISLATION AND THE SHERMAN ACT, <i>IN PARI MATERIA</i>	1078
A. The Legislative Conversation Between the Senate and the States	1081
B. Federal-State Jurisdiction and the Sherman Act	1089
II. THE STATES' CONSUMER-WELFARE POLICY	1093
A. Prohibition of Restraints on Output and Prices	1099
B. Reference to Particular Commodities and Articles of Commerce	1104
C. Mens Rea Requirement	1106
III. APPLYING THE ORIGINAL CONSUMER-WELFARE POLICY	1108
A. Rejection of Dueling Efficiencies and Williamson's "Naïve Tradeoff"	1108
B. Protecting Competition on Behalf of Consumers Alone	1111
C. Narrowing the Applicability of Per Se Rules Under Section 1	1113
CONCLUSION	1114

## INTRODUCTION

In an age of ever more complex congressional enactments, the Sherman Act stands out as an unusual piece of legislation. The 125-year-old core of American antitrust law remains powerful and ubiquitous: between 2012 and 2014, it gave rise to prosecutions generating \$3.4 billion in criminal fines across a range of industries.<sup>1</sup> Yet it was drafted with semantic economy, rendering its meaning elusive. In just ninety-six words, section 1 of the Act prohibits all agreements “in restraint of trade or commerce among the several States.”<sup>2</sup> Section 2 of the Act, in eighty-two words, imposes criminal penalties on “[e]very person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States.”<sup>3</sup> The law’s Delphic language, together with Congress’s infrequent modification of the federal antitrust regime, has led some to conclude that “[t]he Sherman Act set up a common law system in antitrust.”<sup>4</sup>

Notwithstanding occasional invocations of the judiciary’s “common law” authority over the Sherman Act, federal courts have, since the Act’s earliest days, expended great energy attempting to divine the legislative purpose behind it.<sup>5</sup> If the Sherman Act were truly a blanket grant of common law-making authority to federal courts, they would hardly need to undertake such searching inquiries. The Supreme Court’s and lower courts’ close attention to the Sherman Act’s language and legislative history indicates that they have sought to abide by their constitutional role as interpreters of federal statutes.<sup>6</sup>

1. See Antitrust Div., *Criminal Enforcement Fine and Jail Charts Through Fiscal Year 2014*, U.S. DEP’T JUST. (June 25, 2015), <http://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts> [<http://perma.cc/HFA5-J9TT>]; Antitrust Div., *Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More*, U.S. DEP’T JUST. (Apr. 22, 2015), <http://www.justice.gov/sites/default/files/atr/legacy/2015/04/23/sherman10.pdf> [<http://perma.cc/VB5P-59AY>].
2. 15 U.S.C. § 1 (2012).
3. *Id.* § 2.
4. Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1705 (1986); cf. Andrew S. Oldham, *Sherman’s March (in)to the Sea*, 74 TENN. L. REV. 319, 325 (2007) (arguing that common-law judicial interpretation has “unmoored the Sherman Act from its statutory foundations and set it adrift in a stormy sea of illegitimacy”).
5. See *infra* notes 7-17 and accompanying text.
6. See, e.g., *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 328 n.7 (1991); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 531 (1983); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 50 (1911); *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59, 63-64 (2d Cir. 1997); *McGahee v. N. Propane Gas Co.*, 858 F.2d 1487, 1497-98 (11th Cir. 1988); *GTE Sylvania Inc. v. Cont’l T.V., Inc.*, 537 F.2d 980, 1019 & n.2 (9th Cir. 1976), *aff’d*, 433 U.S. 36 (1977); cf. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 644 (1981) (“It is very true that we use common-law terms here and common-law definitions in order

It is therefore more precise to say that the judiciary enjoys an especially wide authority to fill statutory gaps when interpreting the Sherman Act due to the Act's ambiguous language, its constancy over time, and the fact—peculiar in light of many modern regulatory regimes—that Congress did not assign rulemaking authority to an administrative agency. These traits do not imply that federal courts may pursue whatever antitrust policy they find most desirable or wise; courts are obliged to follow the statute's contours to the extent that they can perceive those contours.<sup>7</sup>

The judiciary's evolving understanding of the Sherman Act has dramatically affected the scope of antitrust law in the United States. The Supreme Court first purported to strictly construe the Act's prohibition of "every contract . . . in restraint of trade," noting that "no exception or limitation can be added without placing in the act that which has been omitted by Congress."<sup>8</sup> The Court later set aside the statute's plain meaning<sup>9</sup> and seized upon the statute's use of common-law language to derive a common-law "rule of reason" prohibiting only those agreements that "unreasonably" restrained trade.<sup>10</sup>

In the middle of the twentieth century, the dominant reading shifted. In the legislative history of the Sherman Act courts found a congressional intent to preserve competition for the benefit of other producers. In his famous *Alcoa* opinion, Judge Hand wrote that "Congress . . . was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character."<sup>11</sup> He cited the Congressional Record for the proposition that the Sherman Act was designed "to put an end to great aggregations of capital because of the helplessness of the individual before

---

to define an offense which is in itself comparatively new, *but it is not a common-law jurisdiction that we are conferring upon the circuit courts of the United States.*" (quoting 21 CONG. REC. 3149 (1890) (statement of Sen. Morgan)).

7. See U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . ."); *id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").
8. *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 328 (1897) (emphasis added).
9. See *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) ("[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.").
10. See, e.g., *Standard Oil*, 221 U.S. at 51 ("It is certain that [the Act's] terms, at least in their rudimentary meaning, took their origin in the common law."); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 278-79 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).
11. *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 427 (2d Cir. 1945).

them.”<sup>12</sup> In cases like *United States v. Von’s Grocery Co.*, the Supreme Court invoked Congress’s general fear of “concentration,” and adopted the view that the purpose of the Sherman Act was “to prevent economic concentration in the American economy by keeping a large number of small competitors in business.”<sup>13</sup>

Change came yet again in 1966. Robert Bork, then an antitrust professor at Yale, delved into the Senate debates over the Sherman Act and concluded that Congress’s legislative intent in enacting the Sherman Act was to “maximiz[e] . . . consumer welfare,” without regard to the interests of competitors.<sup>14</sup> Within a decade, lower federal courts began signing on to this proposition.<sup>15</sup> In 1979 the Supreme Court unanimously concluded, “Congress designed the Sherman Act as a ‘consumer welfare prescription.’”<sup>16</sup> The Court has since repeatedly affirmed that interpretation.<sup>17</sup>

Putting aside the modern judicial consensus, the statutory underpinnings of the consumer-welfare theory remain shaky. The text of the Sherman Act, of course, says nothing about “consumer welfare,”<sup>18</sup> and there is a general sense within the legal academy that Bork reached his conclusions by cherry-picking from a complex and contradictory legislative history.<sup>19</sup> Subsequent studies of the Sherman Act’s legislative history revealed other policies, including

---

12. *Id.* at 428 & n.1 (citing 21 CONG. REC. 2457, 2460 (1890) (statement of Sen. Sherman)).

13. 384 U.S. 270, 274-75 (1966).

14. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 48 (1966).

15. See, e.g., *GTE Sylvania Inc. v. Cont’l T.V., Inc.*, 537 F.2d 980, 1003 & n.39 (9th Cir. 1976), *aff’d*, 433 U.S. 36 (1977).

16. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting ROBERT BORK, *THE ANTITRUST PARADOX* 66 (1978)).

17. See *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1363 (2013); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221 (1993); *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984).

18. The definition of “consumer welfare” is itself the subject of considerable debate. This Note follows the most common understanding of the phrase, as a byword for allocative efficiency. See *infra* Part II.

19. See, e.g., Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-Examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359 (1993); Thomas W. Hazlett, *The Legislative History of the Sherman Act Re-Examined*, 30 ECON. INQUIRY 263 (1992); Robert H. Lande, *The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust*, 33 ANTITRUST BULL. 429, 451 n.81 (1988) (“Bork selectively interprets Congressional will to suit his own agenda; he does not defer to a Congress that had different goals.”). *But see* Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 840-44 (2014).

producer welfare,<sup>20</sup> protection of consumers and small suppliers,<sup>21</sup> and prevention of an accumulation of “excessive social and political power” in the hands of monopolists.<sup>22</sup> Barak Orbach summarizes a widespread view: “The legislative history of the Sherman Act has been studied thoroughly during the past century. There is broad agreement today, if not consensus, that the record does *not* support the historical claims that led to the adoption of the consumer welfare standard.”<sup>23</sup> Reflecting on the scholarly debate, one introductory antitrust casebook advises students, “[Y]ou . . . may be tempted to try to ascertain the congressional intent underlying [the Sherman Act]. No matter how much you research the history of the Act . . . you are unlikely to find convincing answers.”<sup>24</sup>

This Note proposes that convincing answers can be found outside the immediate legislative history of the Sherman Act, in a body of pre-Sherman Act state law. In particular, thirteen state antitrust statutes and five state constitutional antitrust provisions—adopted while Congress debated the Sherman Act between 1888 and 1890—shed light on the policy underlying the Sherman Act.

Consulting state legislation may seem like an odd way to derive the meaning of a federal statute as foundational as the Sherman Act. But, as Part I argues, it follows an old canon of statutory interpretation, *in pari materia*, which advises courts to read related statutes in harmony where the statutes are part of an “integrated scheme” of regulation.<sup>25</sup> Though the legislative history of the Sherman Act contains few sure answers, there is wide agreement that Congress intended the Act to work in concert with state antitrust law, providing a federal forum for targeting the anticompetitive combinations that were already illegal in the states.<sup>26</sup>

Part II explores the text of the state statutes and constitutional amendments and finds a clear pattern among them. Far more detailed than the Sherman Act, these statutes and constitutional amendments articulated the states’ original

---

20. See Grandy, *supra* note 19, at 359.

21. See John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 FORDHAM L. REV. 2425, 2433-39 (2013).

22. Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 83 (1982).

23. Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253, 2256 (2013).

24. THOMAS D. MORGAN, CASES AND MATERIALS ON MODERN ANTITRUST LAW AND ITS ORIGINS 24-25 (4th ed. 2009).

25. CALEB NELSON, STATUTORY INTERPRETATION 487 (2011).

26. See, e.g., *California v. ARC Am. Corp.*, 490 U.S. 93, 102 (1989) (“Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies.”); Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L.J. 375, 375 (1983).

consumer-welfare policy. This policy had three major features. First, it emphasized the principle of allocative efficiency. In other words, most state statutes prohibited only arrangements that had the effect of raising prices for consumers by restricting productive output. Second, this policy protected consumers not by reference to overall social output, but by reference to industrial output in discrete product markets. Third, it incorporated a mens rea requirement, making antitrust liability contingent on an actual intent to harm consumers through restrictions on output.

Part III brings the original consumer-welfare policy into the present day, briefly explaining how the approach embodied in the early state antitrust statutes would address some of the unresolved questions in modern antitrust law. It first explores how the original consumer-welfare policy differs from competing standards advanced by scholars, such as “total welfare” and “competition” standards. It then explains why the original consumer-welfare policy is consistent with the Supreme Court’s present consumer-welfare approach, which has generally moved antitrust law away from per se liability standards and toward individualized assessments of consumer harm. The federal courts’ current focus on consumer welfare should be understood not as a modern contrivance, but as a faithful application of the Sherman Act as it was written.

#### **I. STATE ANTITRUST LEGISLATION AND THE SHERMAN ACT, *IN PARI MATERIA***

A long-established principle of statutory construction holds that “if divers[e] statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law.”<sup>27</sup> Although “the rule’s application certainly makes the most sense when the statutes were enacted by the same legislative body at the same time,”<sup>28</sup> the Supreme Court and other federal and state courts have treated related federal

---

27. *United States v. Freeman*, 44 U.S. (3 How.) 556, 564 (1845); see *United States v. Stewart*, 311 U.S. 60, 64-65 (1940); WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION* 1066-81 (4th ed. 2007); William N. Eskridge, Jr., *The New Textualism*, 37 *UCLA L. REV.* 621, 663 n.169 (1990); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 *STAN. L. REV.* 901, 927 fig.1 (2013); Quintin Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, 3 *U. KAN. L. REV.* 1, 4 (1954) (“All courts make great use of statutes *in pari materia* . . .”).

28. *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972).

and state statutes *in pari materia* where it is clear that one statute is intended to work in concert with the provisions of another.<sup>29</sup>

Statutes that work *in pari materia* might not say so on their face, and courts—including those favoring textualist interpretive approaches—make use of legislative history to determine whether one statute is intended to incorporate the provisions of another.<sup>30</sup> As Caleb Nelson explains,

At a minimum, when courts conclude that two statutes are part of an integrated scheme, courts will resist reading those statutes to work at cross-purposes. More broadly, courts often try to resolve indeterminacies in one statute in a way that keeps the statute in tune with the policies behind other statutes that are *in pari materia*.<sup>31</sup>

In accord with the *in pari materia* canon, federal and state courts have frequently treated judicial constructions of the Sherman Act as binding or persuasive authority in construing analogous state statutes passed after the Sherman Act's adoption in order to avoid conflicts between state and federal antitrust policies.<sup>32</sup>

---

29. See, e.g., *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 214 (1934) (reading the Federal Safety Appliance Act *in pari materia* with an analogous Kentucky statute); *Fed. Deposit Ins. Corp. v. Am. Bank Tr. Shares, Inc.*, 460 F. Supp. 549, 559-60 (D.S.C. 1978); *Underwater Constr. v. Shirley*, 884 P.2d 150, 155 (Alaska 1994); *Wilson v. Freedom of Info. Comm'n*, 435 A.2d 353, 359 (Conn. 1980); *Bethlehem Steel v. Comm'r of Labor & Indus.*, 662 A.2d 256, 258 (Md. 1995); *Powder River Basin Res. Council v. Wyo. Dep't of Env'tl. Quality*, 2010 WY 25, ¶ 7, 226 P.3d 809, 813 (Wyo. 2010).

30. See *FAIC Sec. Inc. v. United States*, 768 F.2d 352, 363 (D.C. Cir. 1985) (citing statements entered in the Congressional Record to determine that the National Housing Act should be read *in pari materia* with the Federal Deposit Insurance Act).

31. NELSON, *supra* note 25, at 487.

32. See, e.g., *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1014 (3d Cir. 1994) (noting that the plaintiffs' Pennsylvania-law antitrust claim "rises or falls with plaintiffs' federal antitrust claims"); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 269 F. Supp. 2d 1213, 1223-24 (C.D. Cal. 2003) (finding that construction of federal antitrust law should guide construction of state antitrust law because the state law "has objectives identical to the federal antitrust acts" (quoting *Vinci v. Waste Mgmt., Inc.*, 36 Cal. App. 4th 1811, 1814 n.1 (Ct. App. 1995))); *Stolow v. Greg Manning Auctions Inc.*, 258 F. Supp. 2d 236, 244 n.8 (S.D.N.Y. 2003); *Verizon N.J., Inc. v. Ntegrity Telecontent Servs., Inc.*, 219 F. Supp. 2d 616, 632 (D.N.J. 2002); *La. Power & Light Co. v. United Gas Pipe Line Co.*, 493 So. 2d 1149, 1158 (La. 1986) ("Because La. Rev. Stat. Ann. § 51:122 is a counterpart to § 1 of the Sherman Antitrust Act, the United States Supreme Court's interpretation of the Sherman Act should be a persuasive influence on the interpretation of our own state enactment."); *Beville v. Curry*, 2001 OK 1, ¶ 11, 39 P.3d 754, 759; *H.J. Baker & Bros., Inc. v. Orgonics, Inc.*, 554 A.2d 196, 204 (R.I. 1989); *Hovenkamp, supra* note 26, at 377 n.10 ("[S]tate antitrust laws are substantively similar to federal antitrust law, and many state courts have held that case law interpreting the federal statutes is fully applicable to corresponding state statutes.").

The same principle of statutory interpretation should extend to America's first codified antitrust laws: the antitrust statutes and constitutional provisions passed by state legislators while Congress debated the Sherman Act. These statutes were part of a legislative conversation between Congress and the states, and the Sherman Act's legislative history shows that Congress intended the federal and state antitrust laws to work together as part of a cohesive national regulatory scheme. Courts and scholars should therefore examine the Sherman Act's legislative purpose in light of these state-law antecedents.

Admittedly, reading a federal statute—particularly one as foundational as the Sherman Act—in light of state law might strike some as unconventional. It should not. Federal courts regularly read federal statutes in light of preexisting state common-law decisions when Congress incorporates terms from the common law in its statutes.<sup>33</sup> For many years, courts<sup>34</sup> and commentators<sup>35</sup> have understood the Sherman Act's operative terms as common-law terms that should be interpreted in light of preexisting state case law, such as the Michigan Supreme Court's decision in *Richardson v. Buhl*,<sup>36</sup> of which Senator John Sherman took particular notice on the floor of the Senate.<sup>37</sup> Federal courts read these state common-law precedents into the Sherman Act on the understanding that Congress intended to prohibit interstate trusts to the same extent as they had been prohibited at the intrastate level by state law.<sup>38</sup> But

- 
33. See, e.g., *Field v. Mans*, 516 U.S. 59, 72 n.10, 73-74, 73 nn.11-12 (1995) (consulting state-court definitions to determine the level of reliance required to constitute "actual fraud" under a provision of the federal Bankruptcy Code); *Evans v. United States*, 504 U.S. 255, 269 (1992) (consulting state-court definitions of "extortion" to clarify the meaning of "extortion" in the Hobbs Act).
  34. See, e.g., *Associated Gen. Contractors of Cal. Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 531 (1983); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 & n.11 (1978).
  35. See, e.g., Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 *FORDHAM L. REV.* 2279, 2340 (2013) (noting that "backers of the Sherman Act assured the floor of the Senate that they were merely seeking to enable federal courts to apply the common law to anticompetitive business activities and early federal cases are full of citations to English and state common law"); William L. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 *U. CHI. L. REV.* 221, 252-53 (1956) (noting Senator Sherman's argument that the Sherman Act was meant to prohibit "all those [combinations] which the common law had always condemned as unlawful" and recalling Sherman's reading of the *Richardson v. Buhl* decision on the floor of the Senate).
  36. 43 *N.W.* 1102 (Mich. 1889); see also *N. Sec. Co. v. United States*, 193 U.S. 197, 341 (1904) (citing *Richardson*, among other state-court decisions); *United States v. Addyston Pipe & Steel Co.*, 85 *F.* 271, 291 (6th Cir. 1898) (same), *aff'd*, 175 U.S. 211 (1899).
  37. 21 *CONG. REC.* 2456 (1890) (statement of Sen. Sherman).
  38. See, e.g., *N. Sec. Co.*, 193 U.S. at 339 ("[W]hen Congress declared contracts, combinations and conspiracies in restraint of trade or commerce to be illegal, it did nothing more than

those same courts have long relied solely on state judicial opinions to understand the state-law landscape at the time of the Sherman Act's adoption.<sup>39</sup> This focus on state judicial opinions has neglected the content of local legislation—state constitutional and statutory law—that took shape as Congress debated the Sherman Act. Congress intended for the Act to work in harmony with that legislation, just as it intended for federal antitrust law to follow the contours of common-law prohibitions on conspiracies in restraint of trade.<sup>40</sup> Taking notice of state statutes *in pari materia* provides another way of understanding the antitrust prohibitions that Congress sought to enforce at the interstate level when it passed the Act.

A. *The Legislative Conversation Between the Senate and the States*

Seventeen states drafted measures contemporaneously with the Sherman Act in a wave of public backlash against monopolistic trusts' growing control of various industries in the 1880s.<sup>41</sup> These trusts included famous aggregations like the Standard Oil petroleum refining monopoly and the mighty Sugar Trust, but also a host of trusts cornering more obscure markets such as the School Slate Trust, the Envelope Trust, and the Paper Bag Trust.<sup>42</sup> As William Letwin recognized in his canonical study of the Sherman Act's legislative history, news articles and editorials attacking the trusts were the daily fare of major newspapers like *The New York Times* and *The Chicago Tribune* in the late 1880s.<sup>43</sup> Opponents of the trusts, one commentator colorfully explained, saw the new class of monopolists as “merciless and cruel exploiters, completely selfish, living by no rules and guided by no ethics.”<sup>44</sup> Letwin summed up more

---

apply to interstate commerce a rule that had been long applied by the several States when dealing with combinations that were in restraint of their domestic commerce.”).

39. See, e.g., *id.* at 339-41.

40. See *infra* notes 113, 116, 120-125 and accompanying text.

41. See IDAHO CONST. art. XI, § 18 (1889); MONT. CONST. art. XV, § 20 (1889); N.D. CONST. art. VII, § 146 (1889); WASH. CONST. art. XII, § 22 (1889); WYO. CONST. art. X, § 8 (1889); Act of Apr. 16, 1888, ch. 84, 1888 Iowa Acts 124; Act of Mar. 2, 1889, ch. 257, 1889 Kan. Sess. Laws 389; Act of May 20, 1890, ch. 1621, 1889 Ky. Acts 143; Act of Mar. 7, 1889, ch. 266, 1889 Me. Laws 235; Act of July 1, 1889, No. 225, 1889 Mich. Pub. Acts 331; Act of Feb. 22, 1890, ch. 36, 1890 Miss. Laws 55; Act of May 18, 1889, 1889 Mo. Laws 96; Act of Mar. 29, 1889, ch. 69, 1889 Neb. Laws 516; Act of Mar. 11, 1889, ch. 374, 1889 N.C. Sess. Laws 372; Act of Mar. 3, 1890, ch. 174, 1890 N.D. Laws 503; Act of Mar. 7, 1890, ch. 154, 1890 S.D. Sess. Laws 323; Act of Apr. 4, 1889, ch. 250, 1889 Tenn. Pub. Acts 475; Act of Mar. 30, 1889, ch. 117, 1889 Tex. Gen. Laws 141.

42. See Letwin, *supra* note 35, at 234; see also Collins, *supra* note 35, at 2315-28.

43. Letwin, *supra* note 35, at 224.

44. Will Wilson, *The State Antitrust Laws*, 47 A.B.A. J. 160, 160 (1961).

modestly, “In the years immediately before the Sherman Act, between 1888 and 1890, there were few who doubted that the public hated the trusts fervently.”<sup>45</sup>

Elected state and federal officials channeled this popular anger into legislative action.<sup>46</sup> Iowa was first out of the gate. In April 1888, its legislature adopted an “Act for the Punishment of Pools, Trusts and Conspiracies.”<sup>47</sup> At their national conventions that summer, for the first time, both the Democratic and Republican platforms included antitrust policy planks.<sup>48</sup> The Republicans declared their

opposition to all combinations of capital, organized in trusts or otherwise, to control arbitrarily the condition of trade among our citizens; and . . . recommend[ed] to Congress and the state legislatures, in their respective jurisdictions, such legislation as will prevent the execution of all schemes to oppress the people by undue charges on their supplies, or by unjust rates for the transportation of their products to market.<sup>49</sup>

That year, the Republican Convention nominated for president a compromise candidate, Benjamin Harrison, over the early front-runner, Senator Sherman of Ohio.<sup>50</sup> One month after his defeat, Sherman successfully asked the Senate to give the Senate Finance Committee, of which Sherman was the former chairman and a leading member,<sup>51</sup> jurisdiction over all bills dealing with the regulation of the “arrangements, contracts, agreements, trusts, or combinations . . . which tend to prevent free and full competition.”<sup>52</sup>

Efforts to craft a federal antitrust law began in earnest, and two early bills set the initial framework of the debate. Senator John Reagan, a Democrat from

---

45. Letwin, *supra* note 35, at 222.

46. See David Millon, *The First Antitrust Statute*, 29 WASHBURN L.J. 141, 148 (1990) (“Most antitrust activity began not at the national level, but rather at the state and local level.” (quoting STEVEN L. PIOTT, *THE ANTI-MONOPOLY PERSUASION: POPULAR RESISTANCE TO THE RISE OF BIG BUSINESS IN THE MIDWEST* 4 (1985))).

47. Act of Apr. 16, 1888, ch. 84, 1888 Iowa Acts 124.

48. See HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGIN OF AN AMERICAN TRADITION* 150-51 (1955).

49. *Id.* at 151 (quoting THOMAS H. MCKEE, *THE NATIONAL CONVENTIONS AND PLATFORMS OF ALL POLITICAL PARTIES, 1789 TO 1905*, at 241 (1906)).

50. See WILLIAM T. HORNER, *OHIO’S KINGMAKER: MARK HANNA, MAN AND MYTH* 73 (2010); William Kolasky, *Senator John Sherman and the Origin of Antitrust*, *ANTITRUST*, Fall 2009, at 85, 86.

51. See S. DOC. NO. 97-5, at 43 (1981).

52. 19 CONG. REC. 6041 (1888).

Texas, introduced the first bill on August 14, 1888. Reagan's bill defined "trust" as

the combination of capital or skill by two more persons for the following purposes:

First. To create or carry out restrictions in trade.

Second. To limit, to reduce, or to increase the production or prices of merchandise or commodities.

Third. To prevent competition in the manufacture, making, sale, or purchase of merchandise or commodities.

Fourth. To create a monopoly.<sup>53</sup>

Reagan's bill made engaging in trust activities a "high misdemeanor" subject to a ten-thousand-dollar fine and five years of imprisonment. It also included a jurisdictional provision that implicitly invoked Congress's interstate and foreign Commerce Clause powers.<sup>54</sup>

Sherman prevailed in having Reagan's bill referred to the Finance Committee, and then introduced his own.<sup>55</sup> Sherman's bill prohibited

all arrangements, contracts, agreements, trusts, or combinations . . . made with a view, or which tend, to prevent full and free competition in the production, manufacture, or sale of articles . . . and all arrangements, contracts, agreements, trusts, or combinations . . . designed, or which tend, to advance the cost to the consumer of any of such articles . . .<sup>56</sup>

Sherman's bill did not criminalize these combinations; instead, it called for the forfeiture of the charter of any corporate participant in a trust.<sup>57</sup> But it was far from clear that Congress could strip a corporation of its state corporate charter. This defect, and the bill's failure to include any reference to a constitutional grant of power, Hans Thorelli notes, made Sherman's bill seem "a little amateurish" when compared with Reagan's.<sup>58</sup>

---

53. S. 3440, 50th Cong. § 1 (1888).

54. *See id.* §§ 2-3.

55. 19 CONG. REC. 7513 (1888).

56. S. 3445, 50th Cong. (as introduced by Senator Sherman, Aug. 14, 1888).

57. *Id.*

58. THORELLI, *supra* note 48, at 170.

In September, the Finance Committee reported out a version of Sherman's bill that incorporated the criminalization and jurisdictional provisions of Reagan's bill, but preserved Sherman's operational language referring to "arrangements, contracts, agreements, trusts, or combinations" designed or tending to restrict competition or raise costs for consumers.<sup>59</sup> The Fiftieth Congress then adjourned in March 1889.<sup>60</sup>

At the same time, state legislatures around the country convened for their 1889 legislative sessions and enacted a battery of state antitrust laws. Between March and July, eight states—Kansas, Maine, North Carolina, Nebraska, Texas, Tennessee, Missouri, and Michigan—approved antitrust statutes.<sup>61</sup> Close on the heels of those statutes, in the summer and fall of 1889, a set of territories in the far West—North Dakota, South Dakota, Wyoming, Montana, Idaho, and Washington—gathered delegates to draft constitutions in anticipation of impending statehood. All the constitutional conventions except South Dakota's chose to write antitrust provisions into their first state constitutions.<sup>62</sup> The language of these statutes and constitutional provisions tracked the development of a national conversation on how to define and prohibit "trusts," both within and among the states, and between the states and Congress.

Among the state statutes, two contained language similar to that used in Sherman's and Reagan's bills in Congress. Kansas's law, passed on March 2, 1889, borrowed much of the language of Sherman's operative provision prohibiting "arrangements, contracts, agreements, trusts or combination" tending to "prevent full and free competition" or tending to "advance, reduce or control the price or the cost to the producer or to the consumer."<sup>63</sup> At the end of March, Texas's legislature adopted a law that copied Reagan's operative definition of "trust"<sup>64</sup> with a few changes, including the removal of any reference to "monopoly," and the addition of a long and unwieldy catch-all

---

59. S. 3445 (as reported by S. Comm. on Fin., Sept. 11, 1888).

60. THORELLI, *supra* note 48, at 171-73.

61. Act of Mar. 2, 1889, ch. 257, 1889 Kan. Sess. Laws 389; Act of Mar. 7, 1889, ch. 266, 1889 Me. Laws 235; Act of July 1, 1889, No. 225, 1889 Mich. Pub. Acts 331; Act of May 18, 1889, 1889 Mo. Laws 96; Act of Mar. 29, 1889, ch. 69, 1889 Neb. Laws 516; Act of Mar. 11, 1889, ch. 374, 1889 N.C. Sess. Laws 372; Act of Apr. 4, 1889, ch. 250, 1889 Tenn. Pub. Acts 475; Act of Mar. 30, 1889, ch. 117, 1889 Tex. Gen. Laws 141.

62. See IDAHO CONST. art. XI, § 18 (1889); MONT. CONST. art. XV, § 20 (1889); N.D. CONST. art. VII, § 146 (1889); WASH. CONST. art. XII, § 22 (1889); WYO. CONST. art. X, § 8 (1889). South Dakota adopted a state constitutional antitrust provision in 1896. See S.D. CONST. art. XVII, § 20.

63. § 1, 1889 Kan. Sess. Laws at 389.

64. § 1, 1889 Tex. Gen. Laws at 141.

provision.<sup>65</sup> The Texas Legislature's deference to Reagan's conceptualization of the antitrust problem is unsurprising given that, in this pre-Seventeenth Amendment era, the legislature had elected Reagan to his Senate seat.<sup>66</sup> The relationship worked the other way, too: in the spring of 1890, Reagan returned to Washington with a new bill that reflected the revisions worked in Austin during the state legislature's 1889 session.<sup>67</sup> While Kansas and Texas recycled Congress's approaches, other states and territories experimented with new language.

This Part highlights four developments in the states that anticipated legislative developments in Congress. First, most states omitted any references to the impairment of "full and free competition," or any similarly broad "competition" language. Instead, they chose to define trusts by reference to particular effects on the price and supply of particular articles of commerce.<sup>68</sup> Second, most of the states wrote a mens rea requirement into their laws. It was not enough that a cartel or trust had the effect of raising prices; a "trust" was a combination formed with the *purpose* or *intent* of harming consumers.<sup>69</sup> Third, a bloc of Midwestern states – Missouri, Kansas, and Nebraska – broke up their operative antitrust provisions into two pieces. The first section essentially prohibited horizontal price-fixing arrangements.<sup>70</sup> The second section prohibited placement of "the management or control" of a combination "in the hands of any trustee or trustees" with a view to fixing prices or restricting output – a prototype of the prohibition on monopoly that would emerge in the final version of the Sherman Act.<sup>71</sup> Lastly, two states – Michigan and Texas – included exceptions for farmers or laborers.<sup>72</sup>

When the Fifty-First Congress returned to consider antitrust legislation in December 1889, three major antitrust bills were introduced. The first, Sherman's, took substantially the same form as it had at the end of the Fiftieth

---

65. *Id.* The Texas statute was principally drafted by then-Attorney General James Hogg, who used Reagan's bill as a model. ROBERT C. COTNER, JAMES STEPHEN HOGG: A BIOGRAPHY 163-64 (1959) (citing TOM FINTY, JR., ANTI-TRUST LEGISLATION IN TEXAS 16 (1916)).

66. See U.S. CONST. art. I, § 3, cl. 1, amended by U.S. CONST. amend. XVII.

67. See S. 62, 51st Cong. (as introduced by Senator Reagan, Dec. 4, 1889); COTNER, *supra* note 65, at 166.

68. See *infra* Parts II.A, II.B.

69. See *infra* Part II.C.

70. See Act of Mar. 2, 1889, ch. 257, § 1, 1889 Kan. Sess. Laws 389, 389; Act of May 18, 1889, § 1, 1889 Mo. Laws 96, 96; Act of Mar. 29, 1889, ch. 69, § 1, 1889 Neb. Laws 516, 516-17.

71. See § 2, 1889 Kan. Sess. Laws at 389; § 2, 1889 Mo. Laws at 96-97; § 2, 1889 Neb. Laws at 517-18.

72. See Act of July 1, 1889, No. 225, § 6, 1889 Mich. Pub. Acts 331, 333 (including an exception for laborers and agricultural producers); Act of Mar. 30, 1889, ch. 117, § 13, 1889 Tex. Gen. Laws 141, 142 (including an exception for agricultural producers).

Congress.<sup>73</sup> Reagan also reintroduced his own bill with changes to the operative “trust” definition that reflected alterations made by the Texas Legislature the previous spring.<sup>74</sup> A third bill, introduced by Senator James George, a Democrat from Mississippi, retained Sherman’s operative definition of “trust,” but followed the lead of the Michigan and Texas legislatures by adding a special proviso that excepted farmers and laborers from liability.<sup>75</sup>

In January 1890, the Finance Committee reported out an amended version of Sherman’s bill that criminalized only those arrangements made “with *the intention* to prevent full and free competition” or to raise prices, mirroring the movement in the states toward the inclusion of a statutory mens rea requirement.<sup>76</sup> Senator George blasted this change, alleging that under the proposed language, it would be “impossible . . . to produce a conviction” for violation of the law.<sup>77</sup> Sherman agreed with this critique, and two months later proposed an amendment to the bill that would eliminate the mens rea requirement and prohibit all combinations entered “with a view or *which tend* to prevent full and free competition” or “advance the cost to the consumer.”<sup>78</sup> In a brief exchange with George on the Senate floor in March, Sherman disavowed the Committee’s mens rea language and insisted that even a “tendency” to stifle competition would make a combination illegal, though not criminal: “The ‘*intention*’ can not be proved, though ‘*tendency*’ can. The tendency is the test of legality. The intention is the test of a crime.”<sup>79</sup> No more was heard of the law’s mens rea requirement in Senate debate.<sup>80</sup>

73. Compare S. 1, 51st Cong. (as introduced by Senator Sherman, Dec. 4, 1889), with S. 3445, 50th Cong. (as amended and printed, Jan. 25, 1889).

74. See S. 62, 51st Cong. § 2 (as introduced by Senator Reagan, Dec. 4, 1889). Reagan’s amended bill departed from the policy of the Texas statute in one crucial respect: unlike the state statute, it did not include an agricultural exception. *Id.*

75. S. 6, 51st Cong. § 1 (as introduced by Senator George, Dec. 4, 1889).

76. S. 1 § 1 (as reported by Senator Sherman, Jan. 14, 1890).

77. 21 CONG. REC. 1767 (1890).

78. S. 1 § 1 (as proposed by Senator Sherman, Mar. 18, 1890) (emphasis added).

79. 21 CONG. REC. 2461 (1890) (statement of Sen. Sherman). Note that under Sherman’s March amendment, illegal combinations were subject only to civil, and not criminal, liability; this seems to have been a factor in Sherman’s replacement of the mens rea provision with a strict-liability regime. See *id.*

80. Congress’s consideration of a mens rea requirement in Sherman’s amended bill does not indicate any particular legislative intent with respect to mens rea. As noted below, the final bill issued by the Judiciary Committee, and largely written by Senator George Edmunds, Republican of Vermont, bore only a rough resemblance to the earlier bills floated by Senator Reagan and Senator Sherman. Senator Edmunds’s bill, with its famously broad language, was intended mainly to give the federal government the power to prosecute interstate monopolies to the same extent that state governments prosecuted intrastate monopolies. See, e.g., H.R. REP. NO. 51-1707, at 1 (1890); see also *infra* Section I.B. The best reference

The other principal elements of the nationwide antitrust movement showed up in the compromise Senate bill that emerged in late March. Rather than selecting one of the Sherman, Reagan, or George bills, the Senate picked all three: it kept Sherman's provisions for civil liability, adopted Reagan's definition of "trust," taken from the Texas law, and his provisions for criminal antitrust liability,<sup>81</sup> and incorporated George's proviso shielding farmers and laborers from liability, taken from Texas and Michigan.<sup>82</sup>

Meanwhile, the legislative effort in the states continued. The winter and spring of 1890 saw the adoption of new antitrust statutes in three more states: Mississippi, South Dakota, and North Dakota. These three states split in their approaches to state antitrust regulation in ways that mirrored the debate in Congress. In late February, Mississippi's legislature—breaking from the approach favored by its own Senator George—adopted a state antitrust statute that copied Texas's statute and Reagan's proposal in Congress.<sup>83</sup> Just two weeks later, South Dakota's state legislature adopted an antitrust statute that bore a strong resemblance to the Sherman formulation, referring to combinations preventing "free, fair and full competition" and combinations that "ten[d] to advance the price" of certain commodities and consumer goods.<sup>84</sup> Meanwhile, the North Dakota Legislature chose a more laconic enactment that tracked Missouri's statute and the constitutional provisions of the new Western states.<sup>85</sup> Like several other Midwestern and Plains states, North Dakota also split its antitrust statute into two parts. The first section dealt with horizontal price-fixing agreements, and the second dealt with conspiracies to put the "management or control" of a combination in restraint of trade in a monopolistic entity.<sup>86</sup>

Back in Congress, the federal antitrust legislation took a sharp turn on March 27 when the provision-laden compromise bill that had taken shape two days earlier was, by a narrow thirty-one to twenty-eight vote, referred to the

---

point for whether or not the Sherman Act carried a mens rea requirement, therefore, may be the various items of state legislation, which constituted the broader antitrust scheme that the Sherman Act was meant to supplement.

81. See 21 CONG. REC. 2611 (1890) (adopting Reagan's amendment by a roll call vote of thirty-four to twelve).

82. See 21 CONG. REC. 2612 (1890) (adopting the agricultural and labor proviso by a voice vote).

83. See Act of Feb. 22, 1890, ch. 36, 1890 Miss. Laws 55.

84. Act of Mar. 7, 1890, ch. 154, § 1, 1890 S.D. Sess. Laws 323, 323.

85. See Act of Mar. 3, 1890, ch. 174, 1890 N.D. Laws 503 (prohibiting combinations with reference to certain price and supply effects without mentioning "competition" as such).

86. See *id.* §§ 1-2.

Judiciary Committee with instructions to return a polished bill within twenty days.<sup>87</sup>

The Judiciary Committee, led by Senator Edmunds, a Republican from Vermont, returned a bill that had been stripped down to its essentials.<sup>88</sup> This version removed a raft of futures regulations introduced by Senator John James Ingalls, a Republican from Kansas,<sup>89</sup> as well as the George proviso for farmers and laborers. It followed the Reagan bill by explicitly premising itself on Congress's Commerce Clause authority,<sup>90</sup> and drew from the Reagan and the Sherman bills in imposing both criminal and civil liability on antitrust violators.<sup>91</sup>

Yet the bill's operational provisions, which defined the scope of prohibited combinations, resembled more the emerging consensus among state legislatures than the bills previously advanced in Congress. The bill followed the lead of Kansas, Missouri, Nebraska, and North Dakota in splitting its major liability provisions into a horizontal-restraint-of-trade provision (the first section),<sup>92</sup> and a provision prohibiting any person from attempting to control a trade or industry (the second section).<sup>93</sup> The Edmunds bill removed all references to restraints on "free competition" and referred more simply to restraints on "commerce" and "trade or commerce."<sup>94</sup> The bill thus echoed state statutory and constitutional provisions that prohibited restraints on "any article of merchandise or commodity,"<sup>95</sup> or on "any article of manufacture or commerce."<sup>96</sup>

The Senate and House approved this simplified bill, which went to conference committee in mid-May.<sup>97</sup> In the meantime, Kentucky passed the last pre-Sherman Act state antitrust statute.<sup>98</sup> Its terms were copied from those contained in North Dakota's and Missouri's statutes, and it split the operative

---

87. See 21 CONG. REC. 2731 (1890).

88. See S. 1, 51st Cong. (as reported by S. Comm. on the Judiciary, Apr. 2, 1890).

89. See 21 CONG. REC. 2613 (1890).

90. See S. 1 § 1 (prohibiting contracts "in restraint of trade or commerce among the several States"); *id.* § 2 (prohibiting efforts to monopolize "any part of the trade or commerce among the several States").

91. See *id.* §§ 1, 2, 7.

92. *Id.* § 1.

93. *Id.* § 2.

94. See S. 1.

95. Act of May 18, 1889, §1, 1889 Mo. Laws 96, 96; Act of Mar. 3, 1890, ch. 174, § 1, 1890 N.D. Laws 503, 503-04.

96. N.D. CONST. art. VII, § 146 (1889).

97. THORELLI, *supra* note 48, at 207.

98. Act of May 20, 1890, ch. 1621, 1889 Ky. Acts 143.

provisions into two parts (horizontal price-fixing and monopolization), limiting their prohibitions to restraints on “any article of property, commodity, or merchandise.”<sup>99</sup>

In June 1890, both houses of Congress approved the bill, and President Harrison signed it into law on July 2.<sup>100</sup> Three days later, the Louisiana Legislature passed an antitrust statute of its own, whose operative provisions largely mirrored the language of the new federal law.<sup>101</sup> With the federal legislation complete, the conversation between Congress and the states subsided.<sup>102</sup>

*B. Federal-State Jurisdiction and the Sherman Act*

The legislative history of the Sherman Act shows not only that its drafters were influenced by the same trends prevailing in the states, but also that federal lawmakers used state law as their template. Congress intended for the federal antitrust statute to provide federal jurisdiction over interstate combinations that state laws could not reach. Debate in Congress did not focus closely on the question of how to define trusts. That matter appears to have been among the least contentious of the issues facing the Fiftieth Congress and Fifty-First Congress.<sup>103</sup> Senators of different ideological stripes and members of the House of Representatives saw that state and federal legislation would need to work hand in hand to defeat the trusts.<sup>104</sup> The Sherman Act was meant to federalize the prohibitions that had already been enacted at the state level.<sup>105</sup>

---

99. § 1, 1889 Ky. Acts at 143.

100. See THORELLI, *supra* note 48, at 210.

101. See Act of July 5, 1890, No. 86, § 1, 1890 La. Acts 90, 91 (“[E]very contract, combination in the form of trust, or conspiracy, in restraint of trade or commerce or to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this State is hereby declared illegal.”).

102. The states, however, continued to enact their own antitrust legislation. By 1932, only seven states were without their own antitrust laws. See *Legislation: A Collection and Survey of State Antitrust Laws*, 32 COLUM. L. REV. 347, 347 (1932).

103. See 21 CONG. REC. 3133, 3145-53 (1890); cf. THORELLI, *supra* note 48, at 170 (“Little intellectual effort is required to ascertain the fact that the philosophy underlying the substantive clauses of the Sherman and Reagan bills was virtually identical.”).

104. 21 CONG. REC. 3133, 3146-51 (1890).

105. Scholars have long taken note of this aspect of the Sherman Act. See Hovenkamp, *supra* note 26, at 375 (“The legislative history of the federal antitrust law indicates that Congress intended to leave state antitrust enforcement more or less intact but to provide an additional federal forum for dealing with restraints of trade which exceeded the jurisdiction of the courts of any particular state.”); James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L.

Most of the Senate debate therefore addressed (1) the source of constitutional authority for congressional action and (2) the proper remedy. On the former question, members of the Senate sought to ground the new antitrust legislation in Congress's Article I interstate commerce power,<sup>106</sup> its Article I taxing power,<sup>107</sup> or its Article III power to define and prescribe rules for federal courts' exercise of jurisdiction.<sup>108</sup> The question of Congress's constitutional authority was tightly connected to its remedial power. Senator Reagan's assertion of Commerce Clause authority, for instance, allowed him to propose criminal sanctions for trust violators.<sup>109</sup> For Democratic Senator George and Democratic Senator George Vest, who questioned Congress's power to prohibit trusts under the Commerce Clause,<sup>110</sup> the alternative invocation of Congress's power to lay and collect taxes and import duties provided an attractive remedy: opening up the trusts to foreign competition by stripping them of tariff protection (a major Democratic policy goal at the time).<sup>111</sup> The major policy implications of the constitutional and remedial questions ensured that these issues received the lion's share of contentious debate in the Senate.<sup>112</sup>

By contrast, on the question of how "trusts" would be defined—that is, what kinds of combinations or agreements would be unlawful—there was a strong consensus in the Senate that the federal antitrust law would render illegal those same combinations prohibited by state law. Senator Sherman described the complementary relationship between the federal law and state laws:

---

REV. 495, 503-04 (1987); Note, *The Commerce Clause and State Antitrust Regulation*, 61 COLUM. L. REV. 1469, 1473-74 (1961).

106. See U.S. CONST. art. I, § 8, cl. 3; S. 3440, 50th Cong. § 2 (as introduced by Senator Reagan, Aug. 14, 1888) (prohibiting the activities of any trust "in any trade or business carried on with foreign countries, or between the States").
107. See U.S. CONST. art. I, § 8, cl. 1; S. 6, 51st Cong. § 3 (as introduced by Senator George, Dec. 4, 1889) (permitting the suspension of "duties or import taxes" on articles of commerce controlled by trusts).
108. See U.S. CONST. art. III, § 2; 21 CONG. REC. 2460-61 (1890) (statement of Sen. Sherman); S. 6 § 2 (as introduced by Senator George, Dec. 4, 1889) (restricting federal jurisdiction with regard to suits brought to enforce illegal combinations in restraint of trade).
109. See S. 3440 § 2 (as introduced by Senator Reagan, Aug. 14, 1888).
110. See 21 CONG. REC. 2465 (1890) (statement of Sen. Vest); 21 CONG. REC. 1768-72 (1890) (statement of Sen. George).
111. See S. 6 § 3 (as introduced by Senator George, Dec. 4, 1889); Richard C. Edwards, *Economic Sophistication in Nineteenth Century Congressional Tariff Debates*, 30 J. ECON. HIST. 802, 821-22 (1970).
112. See, e.g., 21 CONG. REC. 2460-68, 2470-73 (1890); 20 CONG. REC. 1458-1462 (1889); see also THORELLI, *supra* note 48, at 170-99.

This bill, as I would have it, has for its single object to invoke the aid of the courts of the United States to . . . supplement the enforcement of the *established rules of the common and statute law* by the courts of the several States in dealing with combinations that affect injuriously the industrial liberty of the citizens of these States. It is to arm the Federal courts within the limits of their constitutional power that they may cooperate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States.<sup>113</sup>

The purpose of the law, then, was to take the law of the states and apply it federally, so that interstate combinations could not escape the regulation of state legislatures and courts, whose powers over out-of-state corporations were limited at that time by the dormant Commerce Clause<sup>114</sup> and the territorial restrictions of personal jurisdiction under the rule of *Pennoyer v. Neff*.<sup>115</sup>

Sherman characterized these limitations on state power as the spur for federal action:

Similar contracts in any State in the Union are now, by common or statute law, null and void. Each State can and does prevent and control combinations within the limit of the State. This we do not propose to interfere with. The power of the State courts has been repeatedly exercised to set aside such combinations as I shall hereafter show, but these courts are limited in their jurisdiction to the State, and, in our complex system of government, are admitted to be unable to deal with the great evil that now threatens us.<sup>116</sup>

According to Sherman, the new law would set up a state-federal jurisdictional division of labor: “If the combination is confined to a State the State should apply the remedy; if it is interstate and controls any production in many States, Congress must apply the remedy.”<sup>117</sup> For this dual jurisdiction, the same rules would apply. Sherman explained that the federal law “will enable the courts of the United States to restrain, limit, and control such combinations as interfere injuriously with our foreign and interstate commerce, to the same extent that

---

113. 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman) (emphasis added).

114. See Andrew I. Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism*, 61 GEO. WASH. L. REV. 657, 678-83 (1993).

115. 95 U.S. 714 (1878); see Hovenkamp, *supra* note 26, at 379-82.

116. 21 CONG. REC. 2456 (1890) (statement of Sen. Sherman).

117. *Id.* at 2457.

the State courts habitually control such combinations as interfere with the commerce of a State.”<sup>118</sup>

Senator Vest of Missouri, who objected to Sherman’s proposal on constitutional grounds, going so far as to question Sherman’s capacity as a lawyer,<sup>119</sup> nevertheless agreed with him about the basic structure of federal antitrust law. It would provide a remedy that would incorporate and fill in the gaps of state antitrust law:

I believe there is a remedy if you take the jurisdiction of the State and also the jurisdiction of Congress and put them together, but I do not believe there is any complete remedy in the action of either separately . . . .

. . . .

. . . I do not think there is any difficulty whatever as to that class of cases in which the products, or the transactions, to speak more accurately, take place entirely within the limits of a State; but we know that these trusts evade the State statutes even when they are made . . . .<sup>120</sup>

And Senator Reagan told his colleagues that whatever federal legislation they crafted would supplement a national antitrust regime established primarily in the states:

[I]f the people of this country expect salutary relief on this subject they must look to their State governments, for they have jurisdiction over the great mass of transactions out of which these troubles grow. If the Federal Government will act upon those things which relate to international and interstate commerce, and the States, responding to the necessity of the country and the complaints of the people, will act upon the branch of subjects of which the States have jurisdiction, we may, it seems to me, arrest the evil of trusts and combinations . . . .<sup>121</sup>

This understanding of the law’s purpose and meaning was also adopted and articulated by the House of Representatives. The House Judiciary

---

118. *Id.* at 2456.

119. See 21 CONG. REC. 2464–65 (1890) (statement of Sen. Vest).

120. *Id.* at 2465.

121. 21 CONG. REC. 2469 (1890) (statement of Sen. Reagan); see also 21 CONG. REC. 2601 (1890) (statement of Sen. Reagan) (explaining that when Congress had “exhausted [its] power under the commerce clause . . . then the people must rely upon the Legislatures of the several States for the rest of the legislation on [trusts and combinations]”).

Committee's report on the bill to the full House carefully explained that the bill was designed to complement, not supplant, state law:

No attempt is made to invade the legislative authority of the several States or even to occupy doubtful grounds. No system of laws can be devised by Congress alone which would effectually protect the people of the United States against the evils and oppression of trusts and monopolies. Congress has no authority to deal, generally, with the subject within the States, and the States have no authority to legislate in respect of commerce between the several States or with foreign nations. It follows, therefore, that the legislative authority of Congress and that of the several States must be exerted to secure the suppression of restraints upon trade and monopolies. Whatever legislation Congress may enact on this subject, within the limits of its authority, will prove of little value unless the States shall supplement it by such auxiliary and proper legislation as may be within their legislative authority.<sup>122</sup>

Such statements indicate that, in enacting the Sherman Act, Congress saw itself as establishing a federal antitrust jurisdiction that was only one part of a coherent national regulatory system, rooted in the "established rules of the common and statute law" of the states.<sup>123</sup> This "integrated scheme" of regulation presents a classic *in pari materia* case for intertextual statutory interpretation.<sup>124</sup> The states' statutory declarations of policy thus form the essential backdrop for understanding the federal law's broad prohibition on monopolies and arrangements "in restraint of trade or commerce."<sup>125</sup>

## II. THE STATES' CONSUMER-WELFARE POLICY

With the Sherman Act, Congress committed the federal government to a national program of trust regulation first initiated in the states. This Part identifies the states' antitrust policy by examining the text of the states' antitrust legislation.

Popular frustration with trusts was not evenly distributed across the United States. Figure 1 displays a map of states that adopted state antitrust statutes or constitutional provisions prior to the signing of the Sherman Act in July 1890.

---

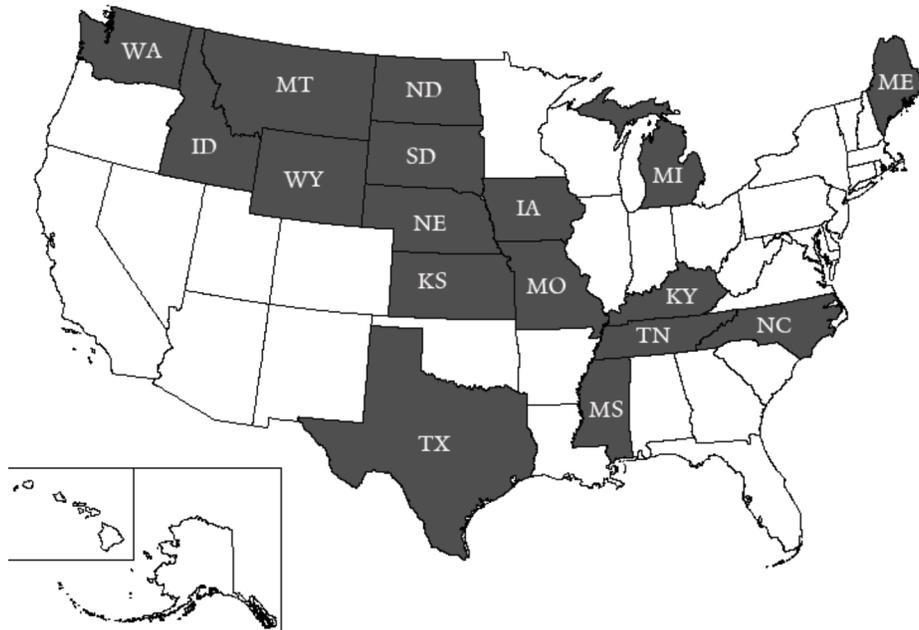
<sup>122</sup>. H.R. REP. NO. 51-1707, at 1 (1890).

<sup>123</sup>. 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman).

<sup>124</sup>. See NELSON, *supra* note 25, at 487 ("[W]hen courts conclude that two statutes are part of an integrated scheme, courts will resist reading those statutes to work at cross-purposes. . . . [C]ourts often try to resolve indeterminacies in one statute in a way that keeps the statute in tune with the policies behind other statutes that are *in pari materia*.").

<sup>125</sup>. 15 U.S.C. § 1 (2012).

**Figure 1.**  
STATE ANTITRUST LEGISLATION BEFORE THE SHERMAN ACT<sup>126</sup>



As Figure 1 illustrates, early state antitrust legislation was a regional phenomenon that occurred principally in the Midwest and Plains states and the newly created states of the Mountain West and Pacific Northwest. Several states of the old Confederacy also enacted early antitrust legislation. Maine was the sole New England state to pass antitrust legislation, and the Mid-Atlantic region was not represented.

This pattern of legislative adoption across predominantly agricultural states is consistent with most historical accounts, which typically credit populist farmers and their interest groups—among them, The Grange and the Farmers' Alliance—with sowing the seeds of antitrust policy in the late nineteenth

<sup>126</sup>. Note that, despite the fifty-state image displayed above, at the time of the Sherman Act's adoption on July 2, 1890, Alaska, Arizona, Hawaii, Idaho, New Mexico, Oklahoma, Utah, and Wyoming had not yet been admitted to the Union as states. Idaho and Wyoming, each of which was admitted shortly after the passage of the Sherman Act, approved antitrust provisions in their state constitutional conventions prior to their admission as states and prior to the adoption of the Sherman Act. See IDAHO CONST. art. XI, § 18 (1889); WYO. CONST. art. X, § 8 (1889).

century.<sup>127</sup> These same historical accounts sometimes suggest that the populists pushing the development of state antitrust legislation intended for such legislation to serve as a protectionist bulwark against out-of-state corporations. This view of state antitrust legislation, which draws upon broad readings of economic and social history, credits state laws as flexible tools for “restor[ing] the balance of economic power” writ large.<sup>128</sup> In other words, antitrust legislation was not so much a regime to protect consumers as an effort by small businessmen and farmers to wring profits out of powerful corporate competitors and suppliers.<sup>129</sup>

This Note departs from past approaches by examining the contents of the state antitrust statutes themselves. By and large, the statutory language does not support the view that the agricultural states of the South and West adopted antitrust legislation as protectionist or as “anti-bigness” weapons against the advances of powerful corporations. The prairie populists – or at least the pieces of legislation they enacted – were doing something else: they were prohibiting only those combinations and business practices that harmed consumers through restrictions on the production of a given commodity or article of commerce. In other words, they were working toward a policy of consumer welfare.

Before examining the language of the statutes, a brief explanation of “consumer welfare” – a term subject to some dispute<sup>130</sup> in the antitrust community today – is required. This Note adopts Herbert Hovenkamp’s definition of consumer welfare, which is based on his observation of the policy of American antitrust regulators and courts: “[A]ntitrust policy in the United States follows a consumer welfare approach in that it condemns restraints that

---

127. See, e.g., COTNER, *supra* note 65, at 160-61; THORELLI, *supra* note 48, at 58-62, 143-44; Frank H. Easterbrook, Commentary, *Antitrust 1889*, 29 WASHBURN L.J. 150, 153-54 (1990); Letwin, *supra* note 35, at 232-33; Millon, *supra* note 46, at 141.

128. Millon, *supra* note 46, at 149; see, e.g., Easterbrook, *supra* note 127, at 152 (noting that a “booming economy” at the time of the state statutes’ adoption leads Easterbrook to “doubt some of Professor Millon’s explanation” that aggregation of economic power “threatened American ideals” and led to the rise of state antitrust statutes); Millon, *supra* note 46, at 143 (appealing to a spirit of egalitarianism rooted in the tradition of “Thomas Jefferson’s idealistic vision of a nation of independent property owners of roughly equal economic stature”).

129. Millon, *supra* note 46, at 149; see also Easterbrook, *supra* note 127, at 153 (hypothesizing that state antitrust laws were designed to “allocate [railroad] gains to the farmers” and “tur[n] the screws on the railroads”). *But see* George J. Stigler, *The Origin of the Sherman Act*, 14 J. LEGAL STUD. 1, 1-3 (1985).

130. See generally Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133 (2011) (arguing that use of the term “consumer welfare” has obscured the distinctions between more nuanced antitrust enforcement goals, including consumer surplus and total welfare).

actually result in monopoly output reductions, whether or not there are offsetting efficiencies and regardless of their size.”<sup>131</sup> Under this definition, consumer welfare refers to the preservation of consumer surplus generated under conditions of allocative efficiency, in which the price of an article of commerce is determined by its marginal cost of production. Prices and output in a market characterized by allocative efficiency are Pareto optimal, which means that any contrary allocation of resources would end up harming one or more market participants.

What does allocative efficiency look like? The outline is a familiar one. Consider a retail automotive market for sedans. Under ideal conditions, carmakers like Ford or Volkswagen will seek to maximize profits by making and selling as many of these cars as possible. They will make sedans until they can no longer profit from sales—that is, until the price of the last vehicle sold equals the marginal cost of its production (marginal cost). Consumers will purchase the sedans so long as the value consumers derive from them (marginal benefit) is greater than or equal to the purchase price. The price is set where marginal benefit equals marginal cost, so that the maximum number of sedans is produced at the lowest possible price. This price and output level is allocatively efficient and Pareto optimal because, without a change in the supply or demand curves, neither the carmakers’ profits (“producer surplus”) nor the consumers’ value-for-money (“consumer surplus”) can be increased without decreasing the other.

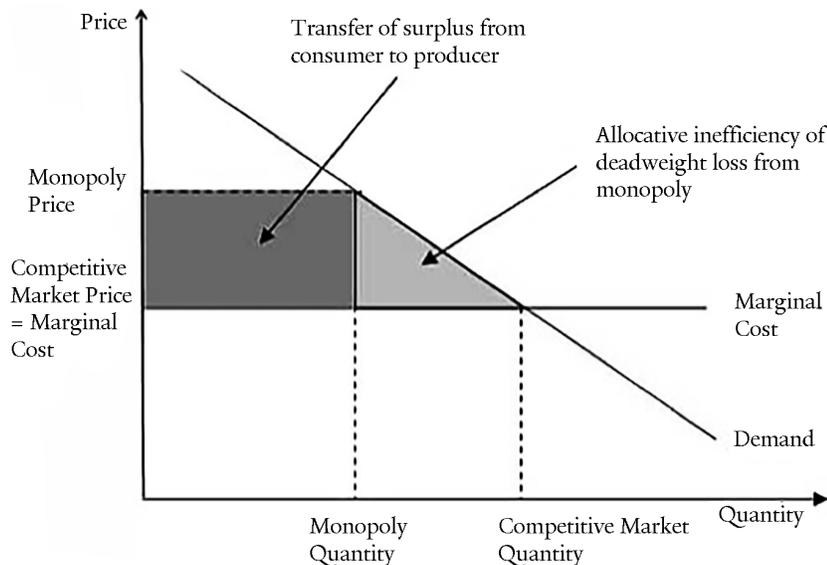
As Hovenkamp explains, antitrust policy in the United States follows a “consumer welfare” approach in that it condemns “monopoly output reductions”—that is, instances where a producer (or group of producers) with sufficient market power to set overall market output has decreased output to increase producer surplus.<sup>132</sup> This increase in producer surplus comes at the expense of consumer surplus, since consumers must pay above-market prices. It also creates “deadweight loss,” or the destruction of wealth that would have been created for consumers and producers if output remained at the Pareto-optimal level. The welfare consequences of allocative inefficiency in a monopoly market are illustrated in Figure 2.

---

<sup>131</sup>. Herbert Hovenkamp, *Implementing Antitrust’s Welfare Goals*, 81 *FORDHAM L. REV.* 2471, 2477 (2013); see also Phillip Areeda, *Introduction to Antitrust Economics*, 52 *ANTITRUST L.J.* 523, 535 (1983) (“Some argue that output volume is the exclusive measure of consumer welfare. As a first and generally decisive test, it is indeed often useful to ask whether a challenged arrangement reduces output.”).

<sup>132</sup>. Hovenkamp, *supra* note 131, at 2477.

**Figure 2.**  
**WELFARE CONSEQUENCES OF MONOPOLY OUTPUT REDUCTION**<sup>133</sup>



Simply put, a consumer-welfare policy aims to preserve consumer surplus by prohibiting these reductions of output. This is the policy of antitrust law in the United States today, and, as this Part argues, it was the antitrust policy adopted by state legislatures across the country from 1888 to 1890.

Consider Missouri's antitrust statute,<sup>134</sup> which bore a close resemblance to several of the pre-Sherman Act state antitrust measures.<sup>135</sup> A full reproduction of its operative provisions conveys the statute's purposes:

<sup>133</sup>. Nicolas Petit, *A Proposed Interpretation of the ECJ Ruling in GSK (C-468/06 to C-478/06) –and GCLC Slides*, ANTITRUST HOTCH POTCH (Dec. 21, 2008, 4:01 PM), [http://professorgeradin.blogs.com/professor\\_geradins\\_weblog/2008/12/ecj-sot-lelos-kai-sia-ee-et-al-v-glaxosmithkline-aeve-c46806-to-c47806-gsk-and-gclc-slides.html](http://professorgeradin.blogs.com/professor_geradins_weblog/2008/12/ecj-sot-lelos-kai-sia-ee-et-al-v-glaxosmithkline-aeve-c46806-to-c47806-gsk-and-gclc-slides.html) [<http://perma.cc/7THJ-59X6>].

<sup>134</sup>. Act of May 18, 1889, 1889 Mo. Laws 96.

<sup>135</sup>. The core language of Missouri's antitrust statute was also used in the statutes crafted by legislatures in Kentucky and North Dakota. See Act of May 20, 1890, ch. 1621, 1889 Ky. Acts 143; Act of Mar. 3, 1890, ch. 174, 1890 N.D. Laws 503. State constitutional conventions in Idaho, Montana, North Dakota, and Washington relied on similar language for their respective state constitutions. See IDAHO CONST. art. XI, § 18 (1889); MONT. CONST. art. XV, § 20 (1889); N.D. CONST. art. VII, § 146 (1889); WASH. CONST. art. 12, § 22 (1889). It was also closely echoed in nearly every other state enactment, as discussed below.

SECTION 1. If any corporation organized under the laws of this or any other state or country, for transacting or conducting any kind of business in this state, or any partnership or individual or other association of persons whosoever, shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of or a party to any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article, commodity or merchandise, to be manufactured, mined, produced or sold in this state, shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this act.

SEC. 2. It shall not be lawful for any corporation to issue or to own trust certificates, or for any corporation, agent, officer or employes [*sic*], or the directors or stockholders of any corporation, to enter into any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article.<sup>136</sup>

Reduced to its critical language, section 1 of the Missouri law prohibited any “agreement . . . to regulate or fix the price of any article of merchandise or commodity, or . . . to fix or limit the amount or quantity of any article, commodity or merchandise, to be manufactured, mined, produced or sold in this state.” Section 2 of the law prohibited monopolization, just like section 2 of the Sherman Act.<sup>137</sup> Though the statute does not use the word “monopoly,” the language of the statute unambiguously refers to activities that we would now call monopolistic.<sup>138</sup> It also uses the language of “trusts,” which then connoted

---

<sup>136.</sup> §§ 1-2, 1889 Mo. Laws at 96-97.

<sup>137.</sup> Compare § 2, 1889 Mo. Laws at 96-97, with 15 U.S.C. § 2 (2012).

<sup>138.</sup> See *Monopoly*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“A monopoly is created when, as the result of efforts to that end, previously competing businesses are so concentrated in the hands of a single person or corporation, or a few persons or corporations acting together, that they have power, for all practical purposes, to control the prices of a commodity . . . .”)

a meaning we would now understand as synonymous with monopolies.<sup>139</sup> A single business organization and its agents could be liable under section 2 where the organization was structured “*with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article.*”<sup>140</sup>

Three conclusions may be drawn from the face of this statute's definition of liability for conspiracies in restraint of trade. First, agreements and combinations that did not reduce output and raise prices did not run afoul of the law. Second, Missouri lawmakers cared about price and output effects on particular commodities and articles of merchandise, not overall social output or price effects. Third, under the antimonopoly provision of section 2, a business organization had to act with “the intent” to control output or prices. Monopolies achieved through productive efficiency, without any intention of controlling prices or output, did not violate the terms of the statute.

As explained below, each of these three basic features turned up in a majority of the states' antitrust statutes or constitutional provisions. Together, they formed the states' original consumer-welfare policy at the time of the Sherman Act's adoption.

#### *A. Prohibition of Restraints on Output and Prices*

At the heart of most of the states' antitrust enactments were concrete, specific definitions of antitrust liability. Table 1 shows the state-by-state breakdown of approaches on the first prong of the states' consumer-welfare policy: a textual focus on price and output controls.

---

(quoting 54A AM. JUR. 2D *Monopolies, Restraints of Trade, and Unfair Trade Practices* § 781 (1996)).

139. See WEBSTER'S INTERNATIONAL DICTIONARY 1547 (1891) (defining a “trust” as an “organization formed mainly for the purpose of regulating the supply and price of commodities, etc.; as, a sugar trust”).

140. § 2, 1889 Mo. Laws at 96, 97 (emphasis added).

**Table 1.**  
**REFERENCE TO PRICE AND OUTPUT RESTRAINTS<sup>141</sup>**

<i>Prohibits Only Combinations To Fix Prices and Output</i>	<i>Prohibits Combinations To Fix Prices and Output, and Includes Other Language</i>
Iowa statute	Kansas statute (section 1 cartel prohibition)
Kansas statute (Section 2 trust prohibition)	Michigan statute
Kentucky statute	Mississippi statute
Maine statute	South Dakota statute
Missouri statute	Tennessee statute
Nebraska statute	Texas statute
North Carolina statute	Wyoming constitutional provision
North Dakota statute	
Idaho constitutional provision	
Montana constitutional provision	
North Dakota constitutional provision	
Washington constitutional provision	

As Table 1 illustrates, a majority of the state enactments prohibiting trusts and other conspiracies in trade referred only to conspiracies to “fix or limit the amount or quantity” of production and to “regulate or fix the price” of consumer goods. These legislatures and constitutional conventions understood the connection between supply and demand, and the terms of the statutes reflect a policy of promoting allocative efficiency.

Consider North Carolina’s antitrust statute, which defined “trust” in these terms:

[A]n arrangement, understanding or agreement, either private or public . . . for the purpose of increasing or reducing the price of the shares of stock of any company or corporation, or of any class of products, materials or manufactured articles, *beyond the price that would be fixed by the natural demand for or the supply of such shares, products, materials or manufactured articles . . .*<sup>142</sup>

<sup>141.</sup> See sources cited *supra* note 41.

<sup>142.</sup> Act of Mar. 11, 1889, ch. 374, § 2, 1889 N.C. Sess. Laws 372, 372-73 (emphasis added). The North Carolina statute also prohibited arrangements “reducing” prices, but this was not a prohibition on productive efficiencies that reduced prices by changing the supply curve; it

This understanding of “trusts” and their harms was shared across the continent in the emerging states of the far West, whose entry into the Union realigned American politics by facilitating a rural coalition of Southern and Western states capable of sustaining a “rising tide of Populism.”<sup>143</sup> The depth of antitrust feeling in this region was such that the states chose to write antitrust provisions into their first state constitutions.<sup>144</sup> But they adopted an antitrust framework that reflected the same policy principle articulated in Missouri and North Carolina. Constitutional delegates in Washington, Idaho, Montana, and North Dakota condemned only those agreements that had the effect of raising consumer prices through restrictions on output.<sup>145</sup> Typical among these was the Montana Constitution, which provided:

No incorporation, stock company, person or association of persons in the state of Montana, shall directly, or indirectly, combine or form what is known as a trust, or make any contract with any person or persons, corporation, or stock company, foreign or domestic, through their stockholders, trustees, or in any manner whatever, for the purpose of fixing the price, or regulating the production of any article of commerce, or of the product of the soil, for consumption by the people.<sup>146</sup>

Even in states where antitrust legislation departed from the easily comprehensible formulations offered by the likes of Missouri, North Carolina, and Montana, antitrust laws targeted conspiracies to reduce output. Nebraska, for instance, adopted a two-part statute that resembled the final version of the

---

was a prohibition on anticompetitive product dumping, as the statute went on to explain: “[A]ny merchant, broker, manufacturer or dealers in raw materials of any kind, or the agent of such persons, who shall sell any particular class of goods, raw materials or manufactured articles for less than [the] actual cost for the purpose of breaking down competitors, shall be guilty of a misdemeanor . . .” § 5, 1889 N.C. Sess. Laws at 373 (emphasis added).

<sup>143</sup>. Scott C. James, *Prelude to Progressivism: Party Decay, Populism, and the Doctrine of “Free and Unrestricted Competition” in American Antitrust Policy, 1890-1897*, 13 *STUD. AM. POL. DEV.* 288, 303 (1999).

<sup>144</sup>. These explicitly anti-*trust* constitutional provisions should not be confused with older state constitutional provisions, preceding the advent of industrial trusts, that prohibited “monopolies” in the older sense, meaning publicly granted charters of exclusive dealing. See, e.g., MD. CONST. art. XXXIX (1776) (“[M]onopolies are odious, contrary to the spirit of a free government and the principles of commerce, and ought not to be suffered.”).

<sup>145</sup>. IDAHO CONST. art. XI, § 18 (1889); MONT. CONST. art. XV, § 20 (1889); N.D. CONST. art. VII, § 146 (1889); WASH. CONST. art. XII, § 22 (1889). Wyoming opted for a wider-scoped antitrust provision prohibiting combinations “to prevent competition, to control or influence productions or prices thereof, or in any manner to interfere with the public good and general welfare.” WYO. CONST. art. X, § 8 (1889).

<sup>146</sup>. MONT. CONST. art. XV, § 20 (1889).

Sherman Act: its first section prohibited cartel arrangements in which “a common price shall be fixed for any . . . article or product, or whereby the manufacture or sale thereof shall be limited”;<sup>147</sup> its second section prohibited “[p]ooling . . . in the nature of what are commonly called trusts, for any purpose whatever,” without defining the kind of behavior that constituted a trust.<sup>148</sup> But reference to contemporary sources makes clear that what was “commonly called” a trust in this era—an “organization formed mainly for the purpose of regulating the supply and price of commodities”<sup>149</sup>—was understood as the same kind of output-restricting combination condemned by Nebraska’s neighbors, Missouri<sup>150</sup> and Iowa.<sup>151</sup>

A sizeable minority of states adopted provisions with more general principles, in addition to price-fixing output restrictions. Michigan’s antitrust statute, for example, prohibited combinations

the purpose or object or intent of which shall be to limit, control, or in any manner to restrict or regulate the amount of production or the quantity of any article or commodity to be raised or produced by mining, manufacture, agriculture or any other branch of business or labor, or to enhance, control or regulate the market price thereof, or in any manner to prevent or restrict free competition in the production or sale of any such article or commodity.<sup>152</sup>

Though Michigan’s legislature did not hew narrowly to the language employed in other states, its only deviation from the formulaic recitation of market prices and output was a prohibition on combinations “prevent[ing] or restrict[ing] free competition in the production or sale” of a commodity.<sup>153</sup> But the legislature’s invocation of this broad policy goal on the heels of specific and narrowly tailored criteria for liability is a classic instance where courts would apply the *ejusdem generis* canon, which provides, “Where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects

---

147. Act of Mar. 29, 1889, ch. 69, § 1, 1889 Neb. Laws 516, 516-17.

148. § 2, 1889 Neb. Laws at 517-18; *see also* Act of Mar. 7, 1889, ch. 266, § 1, 1889 Me. Laws 235, 235 (prohibiting the organization of “any trust,” but leaving the term undefined).

149. WEBSTER’S INTERNATIONAL DICTIONARY, *supra* note 139, at 1547.

150. Act of May 18, 1889, 1889 Mo. Laws 96.

151. Act of Apr. 16, 1888, ch. 84, § 1, 1888 Iowa Acts 124, 124 (prohibiting any agreement “to regulate or fix the price of . . . [any] commodity or article . . . or limit the amount or quantity of any commodity or article to be manufactured, mined, produced, or sold in this State”).

152. Act of July 1, 1889, No. 225, § 1, 1889 Mich. Pub. Acts 331, 332.

153. *Id.*

enumerated by the preceding specific words.”<sup>154</sup> The same principle of construction would apply to the antitrust statutes of Tennessee<sup>155</sup> and South Dakota,<sup>156</sup> as well as the Wyoming Constitution’s antitrust provision,<sup>157</sup> all of which combined specific references to price-fixing and output restrictions with broad, almost nonjusticiable appeals to “legitimate trade” and the “public good.”

Only three states—Kansas, Texas, and Mississippi—attempted to define a broader antitrust policy. These three stood outside the consensus policy of the other states, which limited antitrust liability to combinations designed to depress output and raise prices for consumers. Kansas, which promulgated a standard monopolization provision in section 2 of its antitrust statute,<sup>158</sup> also crafted a broader prohibition in section 1 designed to protect consumers *and* producers from changes in price. It prohibited not only arrangements impairing “full and free competition,” but also all combinations “which tend to advance, reduce or control the price or the cost to *the producer* or to the consumer of any such products or articles.”<sup>159</sup> It thus reached business organizations that lowered prices for consumers while hurting other producers or suppliers in the process, either through productive efficiency or through monopsony power.

Texas’s law (and Mississippi’s,<sup>160</sup> which copied Texas’s operative definition nearly word for word) enacted similarly broad prohibitions. Its antitrust statute defined “trust” by way of five illegal purposes: first, to “create or carry out restrictions in trade”; second, to limit production or increase or reduce prices; third, to “prevent competition”; fourth, to fix prices “at any standard or figure”; and fifth, to enter into an “agreement of any kind . . . to pool, combine, or unite any interest . . . with the sale or transportation of any such

---

154. *Yates v. United States*, 135 S. Ct. 1074, 1086 (2015) (alteration in original) (quoting *Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003)).

155. See Act of Apr. 4, 1889, ch. 250, § 1, 1889 Tenn. Pub. Acts 475, 475 (prohibiting “any trust . . . to limit the supply or production of said articles . . . or to create a monopoly or corner in the same” while also broadly condemning the formation of a trust to produce articles “for the purpose of injuriously affecting . . . legitimate trade and commerce”).

156. See Act of Mar. 7, 1890, ch. 154, §§ 1-2, 1890 S.D. Sess. Laws 323, 323-24 (condemning any combination “that tends to advance the price to the user or consumer of any article or commodity . . . beyond the reasonable cost of production or manufacture” or any combination tending “to prevent a free, fair and full competition”).

157. WYO. CONST. art. X, § 8 (1889).

158. See Act of Mar. 2, 1889, ch. 257, § 2, 1889 Kan. Sess. Laws 389, 389.

159. § 1, 1889 Kan. Sess. Laws at 389 (emphasis added).

160. See Act of Feb. 22, 1890, ch. 36, § 1, 1890 Miss. Laws 55, 55-56.

article or commodity *that its price might in any manner be affected.*"<sup>161</sup> Like the Kansas statute, Texas's prohibition on combinations that had any effect on commodity prices could be used to punish businesses that succeeded in lowering consumer prices through new productive efficiencies. This was not a narrow consumer-protection statute; it was a legislative sledgehammer designed with what one scholar and one corporate lawyer called "an intent to terrify" big business.<sup>162</sup>

This "intent to terrify" is noteworthy because it was an outlier among the states' antitrust policies. Texas's unique approach is especially significant given that it was one of the early movers in state antitrust legislation. Ten of the eleven states<sup>163</sup> (all except Mississippi) that adopted antitrust legislation after Texas but before the Sherman Act eschewed Texas's wide-ranging prohibitions and followed the approach of Iowa and Missouri, proscribing only business arrangements that impaired allocative efficiency.

#### *B. Reference to Particular Commodities and Articles of Commerce*

The second prong of the states' consumer-welfare policy was its commitment to preserving allocative efficiency with respect to the production of particular commodities and articles of commerce. The state statutes sought to keep price and output in individual product markets at their natural, competitive level; they did not seek to maximize social welfare.<sup>164</sup> Table 2 tracks the state statutes' references to effects on particular commodities and articles of commerce. As Table 2 indicates, a majority of jurisdictions used legislative language focused on price and output effects for discrete classes of products.

---

161. Act of Mar. 30, 1889, ch. 117, § 1, 1889 Tex. Gen. Laws 141, 141 (emphasis added).

162. Joseph A. Pratt & Mark E. Steiner, "An Intent to Terrify": State Antitrust in the Formative Years of the Modern Oil Industry, 29 WASHBURN L.J. 270, 275 (1990) (quoting 2 CLARENCE WHARTON, TEXAS UNDER MANY FLAGS 418 (1930)).

163. IDAHO CONST. art. XI, § 18 (1889); MONT. CONST. art. XV, § 20 (1889); N.D. CONST. art. VII, § 146 (1889); WASH. CONST. art. XII, § 22 (1889); WYO. CONST. art. X, § 8 (1889); Act of May 20, 1890, ch. 1621, 1889 Ky. Acts 143; Act of July 1, 1889, No. 225, 1889 Mich. Pub. Acts 331; Act of May 18, 1889, 1889 Mo. Laws 96; Act of Mar. 3, 1890, ch. 174, 1890 N.D. Laws 503; Act of Mar. 7, 1890, ch. 154, 1890 S.D. Sess. Laws 323; Act of Apr. 4, 1889, ch. 250, 1889 Tenn. Pub. Acts 475.

164. For a more detailed discussion of the difference between achieving allocative efficiency within a single market and maximizing overall social output, see *infra* Part III.

---



---

PRESENT AT ANTITRUST'S CREATION

**Table 2.**  
**REFERENCE TO EFFECTS ON PARTICULAR ARTICLES OF COMMERCE<sup>165</sup>**

<i>Statute or Provision Only Prohibits Behavior Affecting the Trade of Particular Articles of Commerce</i>	<i>Language Sweeps Broadly To Prohibit "Restrictions in Trade" or Interference with "the Public Good"</i>
Iowa statute	Mississippi statute
Kansas statute	Texas statute
Kentucky statute	Wyoming constitutional provision
Maine statute	
North Carolina statute	
Nebraska statute	
Tennessee statute	
Missouri statute	
Michigan statute	
North Dakota statute	
South Dakota statute	
Idaho constitutional provision	
Montana constitutional provision	
Washington constitutional provision	
North Dakota constitutional provision	

Under this prong of the states' original consumer-welfare policy, violators of the antitrust laws must have actually raised the prevailing price or lowered the total output of some particular "product of the soil or . . . article of manufacture or commerce," as the North Dakota Constitution provided.<sup>166</sup> Two state statutes even went so far as to provide nonexhaustive lists of such products: Iowa enumerated "oil, lumber, coal, grain, flour, provisions or any other commodity or article whatever";<sup>167</sup> South Dakota reeled off "farm machinery, implements, tools, supplies, and lumber, wood and coal," and also referred specifically to product dumping in "wheat, corn, oats, barley, flax, cattle, sheep, hogs, or other farm or agricultural products."<sup>168</sup> Other states used more general terms, such as "the price of any merchandise,"<sup>169</sup> or "any article or commodity to be raised or produced by mining, manufacture, agriculture or

---

<sup>165.</sup> See sources cited *supra* note 41.

<sup>166.</sup> N.D. CONST. art. VII, § 146 (1889).

<sup>167.</sup> Act of Apr. 16, 1888, ch. 84, § 1, 1888 Iowa Acts 124, 124.

<sup>168.</sup> Act of Mar. 7, 1890, ch. 154, § 1, 1890 S.D. Sess. Laws 323, 323-24.

<sup>169.</sup> Act of May 20, 1890, ch. 1621, § 1, 1889 Ky. Acts 143, 143.

any other branch of business or labor,”<sup>170</sup> or “any article of commerce, use, or consumption.”<sup>171</sup> Even Michigan’s statute, which referred in broad terms to the impairment of “free competition,” referred to the restriction of such competition specifically “in the production or sale of any such article or commodity.”<sup>172</sup>

Here, too, Mississippi and Texas adopted statutes that diverged from the consensus policy: their definition of trust encompassed any “restrictions in trade,” without explicit textual regard to price effects on particular commodities or goods.<sup>173</sup> But this broader language represented a minority position: the text of nearly every state antitrust law adopted a clearer standard for liability that was focused on price and output effects with regard to particular markets.

### C. *Mens Rea Requirement*

Lastly, a majority of state statutes and constitutional provisions prohibited only business practices that exhibited a purpose or intent to restrict output and control prices. Although several states criminalized or prohibited arrangements that merely resulted in a restriction on output, the bulk of states took a narrower approach. Table 3 lists the states’ liability standards for cartel and trust prohibitions.

---

170. Act of July 1, 1889, No. 225, § 1, 1889 Mich. Pub. Acts 331, 332.

171. Act of Mar. 2, 1889, ch. 257, § 2, 1889 Kan. Sess. Laws 389, 389.

172. § 1, 1889 Mich. Pub. Acts at 332.

173. See Act of Feb. 22, 1890, ch. 36, § 1, 1890 Miss. Laws 55, 55-56; Act of Mar. 30, 1889, ch. 117, § 1, 1889 Tex. Gen. Laws 141, 141.

---



---

PRESENT AT ANTITRUST'S CREATION

**Table 3.**  
**MENS REA STANDARDS**<sup>174</sup>

<i>Statute or Provision Requires an Illegal Intent or Purpose</i>	<i>Negligence Liability Standard</i>
Iowa statute	Kansas statute (section 1 cartel ban)
Kansas statute (section 2 trust ban)	Kentucky statute (section 2 trust ban)
Kentucky statute (section 1 cartel ban)	Mississippi statute
Maine statute	Texas statute
Michigan statute	North Dakota constitutional provision
Missouri statute	Wyoming constitutional provision
Nebraska statute	
North Carolina statute	
North Dakota statute	
South Dakota statute	
Tennessee statute	
Idaho constitutional provision	
Montana constitutional provision	
Washington constitutional provision	

North Carolina, for example, prohibited only those arrangements “entered into . . . for the purpose” of fixing prices.<sup>175</sup> Michigan proscribed agreements with the “purpose or object or intent” to control output.<sup>176</sup> Tennessee banned combinations “for the purpose of injuriously affecting the legitimate trade and commerce . . . or to limit the supply or production . . . for the purpose of speculation.”<sup>177</sup> Three states—Kansas, Kentucky, and North Dakota—split their antitrust policies with regard to mens rea. Kansas’s prohibition on horizontal arrangements in restraint of trade covered all arrangements “made with a view or which tend to prevent . . . competition,”<sup>178</sup> but its antimonopolization provision required “intent to . . . lessen the production” of an article of commerce.<sup>179</sup> Kentucky did just the reverse, requiring proof of intent or purpose with respect to horizontal arrangements but imposing strict

---

174. See sources cited *supra* note 41.

175. Act of Mar. 11, 1889, ch. 374, § 2, 1889 N.C. Sess. Laws 372, 372-73.

176. § 1, 1889 Mich. Pub. Acts at 332.

177. Act of Apr. 4, 1889, ch. 250, § 1, 1889 Tenn. Pub. Acts 475, 475.

178. Act of Mar. 2, 1889, ch. 257, § 1, 1889 Kan. Sess. Laws 389, 389 (emphasis added).

179. *Id.*

liability for the antimonopolization provision of the statute.<sup>180</sup> The North Dakota Constitution prohibited any combination “having for its object or effect”<sup>181</sup> the fixing of prices or production but limited criminal penalties in its statutory antitrust enactment to “agreement[s] . . . to regulate or fix” prices or output.<sup>182</sup>

North Dakota’s example is instructive. Except for the constitutional provisions, the states’ legislative antitrust enactments were criminal statutes, so a consensus policy in favor of a mens rea requirement is unsurprising: the maxim that “[t]here can be no crime, large or small, without an evil mind”<sup>183</sup> is an enduring principle of English and American law.<sup>184</sup> Although several states chose to pursue the trusts more aggressively by making trust-like behavior a strict-liability crime, most states chose to follow a more traditional mens rea approach in the criminal law governing the trusts.

### III. APPLYING THE ORIGINAL CONSUMER-WELFARE POLICY

When Congress enacted the Sherman Act, it borrowed a consumer-welfare policy from the states. That policy is the prevention of deadweight loss resulting from monopoly output reductions in individual markets for goods and services. Antitrust law should concern itself with no more than this, and no less. More pointedly, this approach entails navigating a middle course between the Scylla of a “total-welfare” model on one side, and the Charybdis of an ambiguous “competition” theory of antitrust on the other.

#### A. *Rejection of Dueling Efficiencies and Williamson’s “Naïve Tradeoff”*

Scholars have debated how courts ought to weigh conflicts between two kinds of efficiency: allocative efficiency and productive efficiency. As we have seen, allocative efficiency is a Pareto optimal market state in which the price for a given product is equal to its marginal cost, and under which consumer and producer surplus is maximized. Productive efficiency simply refers to a reduced marginal cost of production, and is associated with the kind of cost savings we commonly think of as “efficiency,” including reduced labor or overhead costs. In a market characterized by allocative efficiency, productive efficiencies are

---

<sup>180</sup>. See Act of May 20, 1890, ch. 1621, 1889 Ky. Acts 143.

<sup>181</sup>. N.D. CONST. art. VII, § 146 (1889) (emphasis added).

<sup>182</sup>. Act of Mar. 3, 1890, ch. 174, § 1, 1890 N.D. Laws 503, 503.

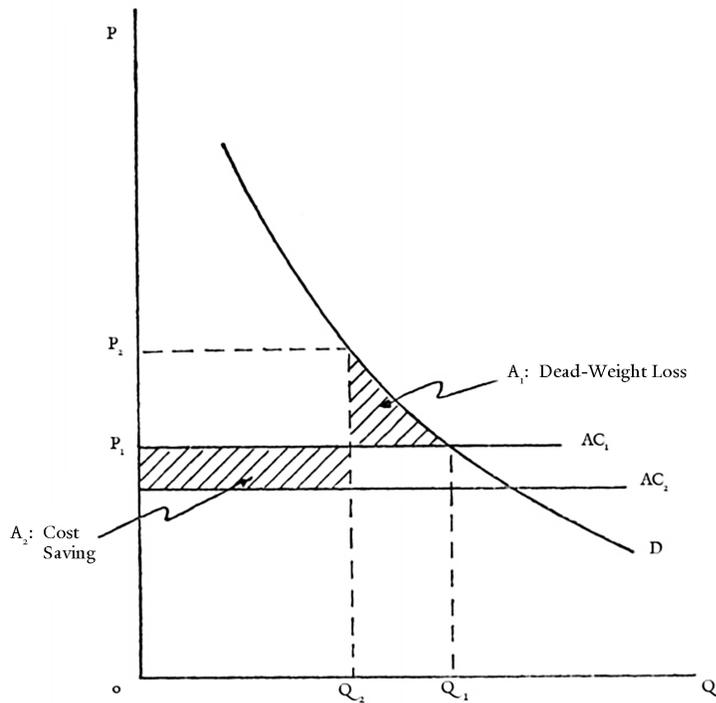
<sup>183</sup>. Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932) (quoting 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 287 (9th ed. 1930)).

<sup>184</sup>. See *Staples v. United States*, 511 U.S. 600, 605 (1994); *Morissette v. United States*, 342 U.S. 246, 250-56 (1952).

obviously good for consumers: when a producer realizes productive efficiency gains (as in Henry Ford's assembly line), and reduces the marginal cost of its product (as with the Model T), those savings are passed along to consumers in the form of lower prices.

The problem is that productive efficiency does not always coincide with allocative efficiency. Consider the classic "naïve tradeoff" hypothetical posed nearly fifty years ago by Oliver Williamson, in which a court or regulator evaluates the legality of a horizontal merger between firms that creates productive efficiencies (reducing the cost of production), but gives the newly enlarged firm a sufficient command of the market to reduce output and raise prices for consumers, creating allocative inefficiency.<sup>185</sup> This scenario is depicted in Figure 3.

**Figure 3.**  
THE NAÏVE TRADEOFF<sup>186</sup>



185. See Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 21-23 (1968).

186. This graph is taken from Williamson. *Id.* at 21 fig.1.

Williamson and other proponents of a “total-welfare” theory of antitrust law asked courts and federal regulators to weigh the relative size of  $A_1$  (deadweight loss) and  $A_2$  (productive efficiencies) to determine whether the merger is illegal. According to Williamson, if the productive efficiencies outweighed the deadweight loss, regulators and courts should allow the firm to make an efficiency defense and avoid antitrust liability.<sup>187</sup> Total-welfare theory reasons that this outcome maximizes social welfare: after all, those cost savings from productive efficiencies go somewhere (specifically, to firms and their shareholders) and free up resources for the production of other goods, enriching consumers overall.<sup>188</sup> Under the total-welfare approach, regulators prioritize the wealth of *all* consumers, rather than that of consumers in a particular market (“consumer welfare” or “purchaser welfare”).<sup>189</sup>

As a policy option, the total-welfare model has much to recommend it. But it is inconsistent with the consumer-welfare policy adopted by the states and Congress between 1888 and 1890. As we saw in Part II, most state antitrust statutes narrowly condemned output restrictions on *particular* commodities or articles of commerce; they were not written to maximize overall social output.<sup>190</sup> Under the original consumer-welfare standard, a court will not attempt to balance productive and allocative efficiencies: the demonstrated creation of an allocative inefficiency (deadweight loss) in a given market suffices to prohibit the combination.

The Supreme Court has not grappled with the total welfare theory since it explicitly adopted a consumer-welfare policy in *Reiter v. Sonotone Corp.*,<sup>191</sup> and federal courts have resisted the “naïve tradeoff” offered by Williamson and other advocates of the total-welfare approach. Instead, courts have maintained consumer welfare (allocative efficiency) as the ultimate criterion of the antitrust laws. As Robert Pitofsky notes, “There is no recorded instance in the United States where an otherwise illegal merger was found by a court not to violate the

---

187. *Id.* at 25, 34. Williamson’s proposal has attracted adherents outside the academy. Canadian antitrust law, for instance, recognizes a productive-efficiency defense. See Michael J. Trebilcock & Edward M. Iacobucci, *National Treatment and Extraterritoriality: Defining the Domains of Trade and Antitrust Policy*, in COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 152, 167 (Richard A. Epstein & Michael S. Greve eds., 2004).

188. See Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 N.Y.U. L. REV. 659, 668-69 (2010).

189. *Id.*

190. See *supra* Section II.B.

191. 442 U.S. 330, 343 (1979).

antitrust laws because of the presence of [productive] efficiencies.”<sup>192</sup> A representative example can be found in Judge Collyer’s opinion in *Federal Trade Commission v. CCC Holdings, Inc.*<sup>193</sup> In that case, the trial court held that it would allow the introduction of productive efficiencies as a defense to liability only if there was concrete evidence that the benefits of such efficiencies would be passed on to consumers in the relevant market—that is, only if consumer welfare remained unharmed.<sup>194</sup> The federal courts’ current approach to productive efficiencies presents a straightforward implementation of the original consumer-welfare policy.

*B. Protecting Competition on Behalf of Consumers Alone*

Notwithstanding federal courts’ steady application of a consumer-welfare policy, there remains a persistent call among antitrust scholars for its abandonment in favor of a broad procompetition policy said to be rooted in the original public understanding of the Sherman Act.<sup>195</sup> Orbach, for instance, argues that antitrust law should be “nuanced, dynamic, and imperfect” and urges that Judge Hand’s approach be “reheard” so as to “preserve some degree of flexibility” in condemning business arrangements that harm competition, broadly defined.<sup>196</sup> John Kirkwood advances a similar but narrower argument that antitrust ought to prohibit anticompetitive transfers of wealth, whether caused by buyers or sellers.<sup>197</sup>

---

192. Robert Pitofsky, *Efficiency Consideration and Merger Enforcement: Comparison of U.S. and EU Approaches*, 30 *FORDHAM INT’L L.J.* 1413, 1418 (2006). Although the consideration of productive efficiencies has gained increasing acceptance among antitrust regulators at the Justice Department and the Federal Trade Commission, see William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 *ANTITRUST L.J.* 207, 213-31 (2003), productive efficiencies weigh in favor of a merger only where the cost savings are likely to be passed on to consumers in the relevant market, see U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, *HORIZONTAL MERGER GUIDELINES* 31 (2010).

193. 605 F. Supp. 2d 26 (D.D.C. 2009).

194. *Id.* at 74; accord *Fed. Trade Comm’n v. H.J. Heinz Co.*, 246 F.3d 708, 720-21 (D.C. Cir. 2001); *Fed. Trade Comm’n v. Tenet Health Care Corp.*, 186 F.3d 1045, 1055 (8th Cir. 1999) (approving productive efficiencies where “evidence shows that the merged entity may well enhance competition”); *Fed. Trade Comm’n v. Univ. Health, Inc.*, 938 F.2d 1206, 1223 (11th Cir. 1991); *Fed. Trade Comm’n v. Swedish Match*, 131 F. Supp. 2d 151, 171-72 (D.D.C. 2000).

195. See, e.g., Orbach, *supra* note 23.

196. *Id.* at 2276.

197. John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 *FORDHAM L. REV.* 2425, 2429 (2013) (“In a buy-side case, when suppliers are the victims of anticompetitive conduct, the overarching goal is analogous: to

The conflict between the pro-“competition” standard and the consumer-welfare standard arises neatly in the current debate over antitrust’s treatment of monopsonies, in which a single purchaser (or a group of purchasers) uses its market power to reduce the price paid to suppliers of a particular good. Kirkwood and Robert Lande argue that the antitrust laws should prohibit such “anticompetitive behavior by buyers.”<sup>198</sup> The argument against monopsony was raised by some commentators in the lead-up to a failed merger attempt between Comcast and Time Warner Cable. Critics of the deal argued that even if the merger would not have disadvantaged consumers, it would have harmed the providers of television content (such as HBO or Disney) by giving an enlarged Comcast yet more leverage to negotiate low wholesale rates for programming. As one journalist wrote, “It would be hard to successfully make the case that their market power as sellers is pitted against consumers. Instead, the antitrust scrutiny at the Justice Department and Federal Trade Commission will likely center on . . . monopsony.”<sup>199</sup> The merger was eventually scuttled under pressure from the Federal Communications Commission, which appears to have been principally concerned with a monopsony problem: that the new entity’s command of the broadband internet service market would allow it to squeeze streaming content providers, like Netflix.<sup>200</sup>

Yet under the original consumer-welfare standard discussed above, monopsony does not violate the antitrust laws unless evidence shows that monopsony inevitably leads to reduced output and higher prices for consumers.<sup>201</sup> Just as productive efficiencies are ultimately irrelevant to antitrust liability unless they help to preserve consumer surplus, monopsonies are irrelevant to the enforcement of the antitrust laws unless they ultimately diminish consumer surplus. Put differently, the consumer-welfare standard is

---

stop conduct that creates market power on the buying side, transfers wealth from suppliers to buyers, and does not provide suppliers with offsetting benefits.”).

198. John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 209 (2008).

199. Jill Priluck, *The Antitrust Case Against Comcast-Time Warner*, REUTERS (Feb. 20 2014), <http://blogs.reuters.com/great-debate/2014/02/19/the-anti-trust-case-against-comcast-time-warner> [<http://perma.cc/KR8B-QPLM>].

200. See Shalini Ramachandran, *Comcast Kills Time Warner Cable Deal*, WALL ST. J. (Apr. 24, 2015), <http://www.wsj.com/articles/comcast-kills-time-warner-cable-deal-1429878881> [<http://perma.cc/4GPT-YFKQ>] (“The agencies’ biggest concerns came down to how they could protect the nascent streaming TV industry against the broadband colossus the deal would create, people familiar with the meetings between Comcast and the regulators said.”).

201. Antitrust scholars on different sides of the monopsony issue agree that monopsony *sometimes* affects output or consumer price but does not necessarily hurt consumers. See Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 339 (1991); Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669, 671 (2005).

indifferent to the balance of interests between the likes of Comcast and Netflix unless that balance somehow diminishes the wealth of consumers.<sup>202</sup>

*C. Narrowing the Applicability of Per Se Rules Under Section 1*

The original consumer-welfare policy prohibited only those arrangements entered into with the “purpose” or “intent” of raising consumer prices and restricting output.<sup>203</sup> This mens rea requirement is consistent with the Supreme Court’s conclusion in *United States Gypsum Co.* that intent to manipulate prices is an element that must be proved in every Sherman Act criminal prosecution.<sup>204</sup> It also lends support to the argument that section 1 of the Sherman Act should not impose civil liability for per se prohibitions on business practices that do not necessarily harm consumer welfare, consistent with the Supreme Court’s jurisprudence over the past four decades.<sup>205</sup> As the courts have recognized, some of these practices, formerly illegal per se, are entered into “not out of disinterested malice, but in . . . commercial self-interest” that is essentially procompetitive.<sup>206</sup> The states’ mens rea requirement suggests that per se illegality under section 1 should be reserved for cartel-like agreements that are explicitly designed to restrict output or raise market prices—those agreements that are actually “formed for the purpose and with the effect” of hurting consumers.<sup>207</sup> All other forms of agreement must be submitted to an analysis that takes intent into account, “not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.”<sup>208</sup>

---

202. Cf. MONT. CONST. art. XV, § 20 (1889) (“No incorporation . . . shall directly, or indirectly, combine or form what is known as a trust . . . for the purpose of fixing the price, or regulating the production of any article of commerce . . . for consumption by the people.”); Act of Mar. 7, 1889, ch. 266, § 1, 1889 Me. Laws 235, 235 (“It shall be unlawful for any firm . . . organized for the purpose of manufacturing . . . any article or product which enters into general use and consumption by the people, to form or organize any trust.”).

203. See *supra* Part II.C.

204. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 435-36 (1978).

205. See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (holding that vertical price restraints are subject to a rule-of-reason standard); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (applying the rule of reason to vertical maximum price fixing); *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (applying the rule of reason to location-of-sale restrictions).

206. *Khan*, 522 U.S. at 16 (quoting *Khan v. State Oil Co.*, 93 F.3d 1358, 1362 (7th Cir. 1996)).

207. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (emphasis added).

208. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918).

**CONCLUSION**

The Sherman Act's capacious language helps explain the pinball-like trajectory of American antitrust law over its long life, a life that has seen various governing principles come and go like so many changes in political fashion.<sup>209</sup> For close to forty years, however, federal courts have increasingly embraced a single principle—consumer welfare—as antitrust's guiding policy. This approach has brought coherence to the law, albeit dogged by lingering doubts about its pedigree: many continue to suspect that the consumer-welfare principle is just an expedient of the Chicago school of economics, a convenient way of rationalizing an otherwise opaque text.

Discerning the organizing policy of the Sherman Act would be much easier, of course, if Congress had laid out a more specific standard for liability in the text of the Sherman Act itself. But its failure to do so does not render the statute incomprehensible. If Congress meant anything by the Sherman Act, it meant to supplement the states' early antitrust efforts—through case law and through legislation—with a federal statute that would impose antitrust liability at the interstate level to the same extent as state law did at the intrastate level. Congress may have punted in defining antitrust liability, but the states did not. Courts and scholars need not apologize for grafting a consumer-welfare policy onto the Sherman Act. Consumer welfare has been there since the beginning.

---

209. See generally Sandeep Vaheesan, *The Evolving Populisms of Antitrust*, 93 NEB. L. REV. 370 (2014).