STANDARD OIL AS *LOCHNER*'S TROJAN HORSE

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I. INTRODUCTION

Few decisions are as maligned as *Lochner v. New York*, which struck down a law setting maximum hours for bakers.[1] Innumerable critics assert that *Lochner* was a paradigmatic example of judicial activism, whereby laissez-faire judges imposed their personal policy preferences under the guise of judicial review. According to this widely shared view, both *Lochner* and its progeny improperly read the "liberty" of the Fourteenth and Fifth Amendments to include "liberty of contract," which the Court then protected against substantive abridgment by laws that fell outside of the police power. The police power, in turn, was defined narrowly, so as to preclude, for instance, laws designed to transfer income from one class to another. Thankfully, this school of thought concludes, the Supreme Court abandoned *Lochner* and its progeny in 1937, thus allowing state legislatures and Congress to have their way and impose redistributive legislation, unfettered by private liberty, throughout the land.

Within antitrust circles, *Standard Oil*[2] is every bit as beloved as *Lochner* is maligned. Despite its age, major decisions continue to endorse *Standard Oil* and its Rule of Reason[3] as an appropriate exposition of the Sherman Act. Indeed, no Supreme Court Justice has (in recent memory) questioned the correctness of *Standard Oil* or its holding that Section 1

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1. Lochner v. New York, 198 U.S. 45 (1905), *abrogated by* Ferguson v. Skrupa, 372 U.S. 726 (1963).
2. Standard Oil Co. v. United States, 221 U.S. 1 (1911).
3. *Id.* at 62. For a discussion of the modern rule of reason, see generally Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733 (2012).

only forbids "unreasonable" restraints.[4] On the contrary, the most "progressive" Justices, while expressly criticizing *Lochner*, have invoked and relied upon *Standard Oil* and its Rule of Reason when resolving antitrust controversies.

The universal high regard for *Standard Oil* is ironic in light of the opprobrium regularly heaped on *Lochner*. After all, as others have noted, and as reiterated in this Essay, *Standard Oil* was simply an application of *Lochner* to antitrust policy. Section 1 of the Sherman Act banned contracts in restraint of trade, and Section 2 banned contracts and other conduct, including the utilization of property, that monopolized. An unduly broad reading of the statute, then, would infringe the liberty of contract that *Lochner* and its progeny so jealously protected. That is to say, the now-longstanding Rule of Reason served as a device to define the statute's coverage so as not to ban contracts and other conduct protected by the due process clause, but instead to reach only those contracts and conduct susceptible to regulation under *Lochner*'s regulatory paradigm. Thus, one of constitutional law's most maligned decisions and its progeny live on, at least nominally, with no sign of mortality.

Part II of this essay briefly recounts the vastly different treatments of *Lochner* and *Standard Oil* by modern jurists and scholars. Part III documents *Standard Oil*'s reliance on *Lochner*-style concern for liberty of contract to inspire and give content to the decision's Rule of Reason. This part also rebuts the claim that *Standard Oil*'s concern for contractual liberty was somehow a novel departure from prior decisions such as *Addyston Pipe & Steel Co. v. United States*[5] and *United States v. Joint Traffic Ass'n*,[6] which had banned "direct restraints" of trade, leaving "indirect restraints" unscathed. Part IV explores how a Lochnerized Rule of Reason would address two current antitrust controversies: first, the appropriate definition of "consumer welfare," and second, whether courts should balance the benefits that a "normal" restraint produces against resulting harms and condemn the restraint when the harms outweigh the benefits. Part V concludes.

4. *Standard Oil*, 22 U.S. at 56.
5. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).
6. United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898).

II. A BRIEF TALE OF TWO CENTURY-OLD DECISIONS

For over four decades, Supreme Court Justices have been distinctly split about the existence and content of substantive due process. Some have argued that "process means process," that is, that the due process clauses in the Fourteenth and Fifth Amendments place no limits on the content of legislation, so long as the government provides sufficient procedural protections before depriving citizens of life, liberty, or property.[7] Most Justices, however, have concluded that the due process clauses place substantive limitations on the content of legislation, while at the same time disagreeing about the nature of such limitations.[8]

Despite these various points of discord, such Justices unanimously agree on one thing—namely that the due process clauses provide no meaningful protection for liberty of contract, with the result that *Lochner* was wrongly decided. Indeed, no Justice who has served on the Supreme Court during the last seven decades has endorsed *Lochner* or otherwise embraced meaningful protection for liberty of contract.[9] Many have expressly repudiated the decision, albeit for different reasons.[10] Some, as already noted, have simply concluded that the due process clauses contain no substantive component.[11] Others, however, have embraced substantive

7. *See, e.g.*, McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010) (Scalia, J., concurring) (noting "misgivings about Substantive Due Process as an original matter"); *id.* at 3059 (Thomas, J., concurring) (concluding that the right to bear arms cannot be found "through a clause that speaks only to 'process'").

8. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 752–65 (1997) (Souter, J., concurring) (offering a robust defense of substantive due process based on doctrine's historical pedigree); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75 (1996) (holding that the due process clause places substantive limits on the magnitude and rationale for punitive damages); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846–51 (1992) (O'Connor, Kennedy & Souter, JJ., joint opinion) (holding that, despite its plain language, the due process clause places substantive limitations on the content of state legislation).

9. *See, e.g.*, *Glucksberg*, 521 U.S. at 760–62 (Souter, J., concurring) (approving of precedents holding that laws abridging liberty of contract require the lowest level of scrutiny); *Planned Parenthood*, 505 U.S. at 861–62 (O'Connor, Kennedy & Souter, JJ., joint opinion) (contending that circumstances required the Court to overrule *Adkins v. Children's Hospital of D.C.*, 261 U.S. 525 (1923), and thus *Lochner* by implication); Roe v. Wade, 410 U.S. 113, 173–74 (1973) (Rehnquist, J., dissenting) (criticizing the majority's opinion as "closely attuned to the majority opinion of Mr. Justice Peckham in [*Lochner*]" and endorsing *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955), and its very deferential rational basis test, as the appropriate standard for reviewing economic legislation); *Lee Optical*, 348 U.S. at 488 ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.").

10. *See* cases cited *supra* note 9.

11. *See supra* note 7.

due process but concluded that liberty of contract and liberty of occupation are unimportant rights.[12] Thus, courts have upheld laws that burden or eliminate the right to enter into particular contracts if the laws have a rational basis.[13] This decision to employ a rational basis test generally is outcome determinative. Over the past seven decades courts have repeatedly sustained legislation that abridges significant economic rights with little or no plausible regulatory benefits.[14] Indeed, the *Lochner* decision is so maligned that "to Lochnerize" became a nonflattering verb more than three decades ago.[15] Dissenting Justices and legal scholars often think they score points by comparing allegedly activist majority opinions to *Lochner*.[16] In fact, the Court has cited the decision seventy-four times since 1937, when the Court abandoned meaningful protection for economic liberty, and not once with approval.[17] Jurists have employed this *Lochner*-bashing technique in decisions involving abortion, the nondelegation doctrine, commercial speech, sovereign immunity, and the dormant commerce clause, among others.[18]

Yet, when it comes to interpreting the Sherman Act, the very same Justices have embraced *Standard Oil* and thus implicitly endorsed *Lochner*

12. *See, e.g.*, *Glucksberg*, 521 U.S. at 760–62 (Souter, J., concurring in judgment).

13. *See* cases cited *infra* note 14.

14. *E.g.*, Ferguson v. Skrupa, 372 U.S. 726, 731–32 (1963) (unanimously sustaining a ban on "debt-adjusting" by nonlawyers without determining the wisdom of it); *Lee Optical*, 348 U.S. at 487–88; United States v. Carolene Prods. Co., 304 U.S. 144, 153–54 (1938) (upholding the federal Filled Milk Act, which prohibited the shipment in interstate commerce of milk whose fat had been removed and replaced with oil from coconuts or other source). *See also* New Orleans v. Dukes, 427 U.S. 297, 304–05 (1976) (finding that the right to pursue harmless occupation is not "fundamental" for purposes of equal protection analysis).

15. BRIAN A. GARDNER, A DICTIONARY OF MODERN LEGAL USAGE 536–37 (2d ed. 1995) (defining the term "Lochnerize" and stating that "[t]he term carries no small degree of opproprium"). Gardner invokes a 1978 treatise as an early example of such usage. *Id.* at 536 (quoting LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 435 (1978)).

16. *See, e.g.*, Michael Kent Curtis, Citizens United *and* Davis v. FEC*:* Lochner *on Steroids and Democracy on Life Support* 51–54 (2010) (Wake Forest Univ. Legal Studies Paper No. 1685459, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1685459 (claiming that decisions protecting political speech from abridgment shared same ideological premises as *Lochner*).

17. A LexisNexis search in May 2011 of Supreme Court decisions between 1938 and the present located seventy-four citations of *Lochner*. A LexisNexis search of Supreme Court decisions between 1904 and 1937 inclusive located seventy-six citations, including one in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1957), which of course overruled *Adkins* and thus disapproved *Lochner*.

18. *See, e.g*., Seminole Tribe v. Florida, 517 U.S. 44, 166–67 (1996) (Souter, J., dissenting) (arguing that the majority's opinion supporting sovereign immunity is in line with the kind of judicial standards in *Lochner*); Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting) (arguing that the majority's trimester framework was a kind of judicial legislation similar to that exemplified by *Lochner*).

and liberty of contract.[19] To be sure, no Justice has expressly invoked *Lochner* in the Sherman Act context. At the same time, the Court and numerous individual Justices have embraced *Standard Oil* as well as the Rule of Reason it announced.[20] Moreover, since Justice Harlan issued a lone dissent from the original decision,[21] no Justice has suggested that *Standard Oil* was incorrect or argued that Section 1 bans reasonable restraints. Finally, courts have continued to rely on *Standard Oil* for certain subsidiary principles of the Rule of Reason, including the power of courts to adjust antitrust doctrine in light of changed economic circumstances and understandings.[22] As a result, one of the most notorious decisions in constitutional law is alive and well, repackaged in the Sherman Act's most important decision.

III. *STANDARD OIL*'S LOCHNERIZED RULE OF REASON

Some scholars have previously noted *Standard Oil*'s reliance on *Lochner*-like reasoning, and with good cause.[23] The decision is brimming with favorable references to freedom of contract and its influence on various sources of law governing trade restraints. For instance, to ascertain the meaning of the term "restraint of trade" employed in Section 1, the Court embarked on a lengthy exegesis of English authorities.[24] Thus, the Court explained that all trade restraints had been unenforceable during the fifteenth century, but that English courts reversed course in the eighteenth century "[i]n the interest of the freedom of individuals to contract" and thus required enforcement of restraints that were "partial in its operation" and

19. *See infra* Part III.

20. *See infra* notes 98–101 and accompanying text.

21. Standard Oil Co. v. United States, 221 U.S. 1, 82–106 (1911) (Harlan, J., concurring and dissenting).

22. Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 732 (1988) ("The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890" (citing *Standard Oil*, 221 U.S. at 51–60)). *See also* State Oil Co. v. Khan, 522 U.S. 3, 21 (1997) (citing *Business Electronics* for this proposition).

23. *See* RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA: 1888–1992, at 56–58 (1996) ("The *Standard Oil* (1911) opinion's Rule of Reason can be understood as closing *Lochner*'s circle of individual liberty . . . ."); MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890–1916: THE MARKET, THE LAW, AND POLITICS 146–48 (1988) (concluding that *Standard Oil* read the term "restraint of trade" in light of the common law and so as not to infringe liberty of contract); Edward S. Corwin, *The Anti-Trust Acts and the Constitution*, 18 VA. L. REV. 355, 368–70 (1932) (criticizing *Standard Oil* for its reliance on liberty of contract when announcing the Rule of Reason); Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77, 83–86 (tracing the role of liberty of contract in early Sherman Act case law, particularly *Standard Oil*).

24. *Standard Oil*, 221 U.S. at 51.

"otherwise reasonable."[25] Moreover, England had deprived the Crown of the ability to grant state-enforced monopolies "because of their restriction upon individual freedom of contract and their injury to the public."[26] That injury took three possible forms: (1) the power to fix prices, (2) the power to limit "production," and (3) the "deterioration in quality of the monopolized article."[27] The Court also recounted how Parliament had at one time banned "forestalling, regrating and engrossing," that is, private efforts to corner a market, because such abuses of the right to contract might purportedly produce a monopoly or its consequences.[28] The Court noted, however, with approval that "more accurate economic conceptions" caused a repeal of such statutes because they had come to ban exercises of the right to contract that, instead of causing harm, had "fructif[ied] and develop[ed] trade."[29] By the late nineteenth century, when Congress passed the Sherman Act, "freedom to contract and to abstain from contracting, and to exercise every reasonable right incident thereto, became the rule in the English law."[30] This freedom was not unlimited, as it did not include the freedom to restrain trade unreasonably or to "restrain the free course of trade" with contracts motivated by a "wrongful purpose."[31] A restraint was "unreasonable" if it produced monopoly or the consequences of monopoly.[32]

American law, the Court said, reflected the same commitments to liberty of contract, qualified in the same manner, as English law.[33] Section 1 of the Sherman Act embraced and incorporated this definition of restraint

25. *Id.*

26. *Id*. at 54. The Court buttressed its historical understanding of monopolies by reproducing Lord Coke's statement that a monopoly restrains the "freedom or liberty" of subjects "in their lawful trade," *id.* at 51, and by quoting William Hawkins's statement that where monopoly is present the subject is "restrained from any freedom of manufacturing or trading which he had before," *id.* at 51–52 (punctuation omitted).

27. *Id*. at 52.

28. *Id*.

29. *Id*. at 55–56. The Court went on to explain that the repeal of statutes against forestalling, regrating, and engrossing rested on the "truisms" that "the course of trade could not be made free by obstructing it, and that an individual's right to trade could not be protected by destroying such right." *Id.* at 56. The views of one contemporary commentator reflected these more accurate conceptions. *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 238 (4th ed. 1827) ("The popular fear of engrossing and forestalling may be compared to the popular terrors and suspicions of witchcraft.").

30. *Standard Oil*, 221 U.S. at 56.

31. *Id*.

32. *Id*. at 52–58.

33. *Id*. at 56–58.

of trade, and thus did not limit the "right to make and enforce contracts, whether resulting from combination or otherwise" unless those contracts "unduly restrain[ed] interstate or foreign commerce."[34] Instead, the statute empowered federal courts to employ "reason" to determine whether a given restraint (Section 1) or practice (Section 2) contravened the public policy embodied in the Act, that is, whether the restraint or conduct produced a monopoly or its consequences.[35] Indeed, the Court concluded, enforcement of liberty of contract, combined with a ban on agreements that abused that right, would prevent the emergence of monopoly.

> [T]he omission [from the Sherman Act] of any direct prohibition against monopoly in the concrete . . . indicates a consciousness that the freedom of the individual right to contract when not unduly or improperly exercised was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words, that freedom to contract was the essence of freedom from undue restraint on the right to contract.[36]

Any broader application of the Act would be "destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce."[37]

Finally, as if to remove any possible doubt, just two weeks later the Court, in *United States v. American Tobacco Co.*, reaffirmed *Standard Oil*'s rationale, and reiterated that the Rule of Reason applies to Section 2 as well.[38] In so doing, the Court explained *Standard Oil*'s rationale in the following terms:

> [The *Standard Oil* Court exercised] the duty to interpret which inevitably arose from the general character of the term "restraint of trade" [that] required that the words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce . . . .[39]

34. *Id*. at 60.

35. *Id*. at 60–61.

36. *Id.* at 62.

37. *Id*. at 63.

38. United States v. Am. Tobacco Co., 221 U.S. 106 (1911).

39. *Id*. at 180. *See also id.* at 181 ("[G]iving to the statute a reasonable construction, [*Standard Oil* held that] the words 'restraint of trade' did not embrace all those normal and usual contracts

The Court also explained that adherence to "the standard of the rule of reason" was:

> [S]o plainly required in order to give effect to the remedial purposes which the act under consideration contemplates, and to prevent that act from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade . . . .[40]

Thus, like the states, Congress was, as the Court held in other contexts,[41] bound to respect liberty of contract, and the Court read the Sherman Act as though Congress had done exactly that.[42]

Over a decade later, in *United States v. American Linseed Oil Co.*, the Court reiterated *Standard Oil*'s conclusion that the Act did not outlaw "normal and useful contracts" because doing so would abridge liberty of contract.[43] Justice McReynolds, an ardent proponent of liberty of contract, wrote for a unanimous Court:

> [The Sherman Act] did not forbid or restrain the power to make normal and useful contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose . . . . The words "restraint of trade" should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect.[44]

The Court also read the Clayton Act and the Federal Trade Commission ("FTC") Act, both passed in response to *Standard Oil*, in the same manner, as not to ban "ordinary" or "usual" contracts or business

essential to individual freedom and the right to make which were necessary in order that the course of trade might be free . . . .").

40. *Id.* at 180.

41. *See, e.g.*, Adair v. United States, 208 U.S. 161, 179–80 (1908) (voiding a Congressional ban on contracts binding railroad employees not to join unions despite Congress's authority to regulate interstate transportation).

42. *Cf.* United States v. E.C. Knight Co., 156 U.S. 1 (1895) (reading Sherman Act so as not to reach manufacturing given Court's previous holding that states had exclusive authority over such activity).

43. United States v. Am. Linseed Oil Co., 262 U.S. 371, 388–89 (1923).

44. *Id.* (quoting *American Tobacco Co.*, 221 U.S. at 179–80) (discussing and reaffirming *Standard Oil*). Moreover, just three years after *Standard Oil*, the Court reiterated the decision's conclusion that the Sherman Act did not "reach normal and usual contracts incident to lawful purposes and intended to further legitimate trade." E. States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 609–10 (1914).

practices.[45] In *Federal Trade Commission v. Gratz*, for instance, Justice McReynolds rejected the Commission's argument that tying was an "unfair method of competition," concluding instead that "[i]f real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved."[46]

Some have claimed that *Standard Oil*'s reliance on liberty of contract was a shift from prior, more interventionist case law.[47] Echoing Justice Harlan's *Standard Oil* dissent, these scholars claim or imply that early decisions such as *United States v. Trans-Missouri Freight Ass'n*,[48] *United States v. Joint Traffic Ass'n*,[49] and *Addyston Pipe & Steel Co. v. United States*,[50] ignored liberty of contract and simply banned all restraints of trade.[51] Others have made a related suggestion that these decisions subordinated liberty of contract to Congress's commerce power, holding that the latter somehow trumped the former.[52]

45. *See* FTC v. Sinclair Ref. Co., 261 U.S. 463, 475–76 (1923) ("[The FTC] has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition. The great purpose of both statutes [the Sherman Act and the Clayton Act] was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill, and capital should have large freedom of action in the conduct of their own affairs."); WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 270–78 (1965) (describing the passage of the Clayton and FTC Acts as reactions to *Standard Oil* and its Rule of Reason).

46. FTC v. Gratz, 253 U.S. 421, 428–29 (1920), *abrogated by* FTC v. Brown Shoe Co., 384 U.S. 316 (1966).

47. *See, e.g.*, PERITZ, *supra* note 23, at 50–58 (treating *Standard Oil* as a departure from previous decisions); SKLAR, *supra* note 23, at 127–46 (contending that pre-1911 Sherman Act case law minimized the importance of liberty of contract by rejecting the common law's enforcement of reasonable restraints of trade and characterizing *Standard Oil*'s Rule of Reason as a departure from this case law); Corwin, *supra* note 23, at 366–67 (discussing *Standard Oil* as a "clash" with prior decisions); James May, *Antitrust in the Formative Era*: *Political and Economic Theory in Constitutional and Antitrust Analysis: 1880–1918*, 50 OHIO ST. L.J. 257, 306–09 (1989) (describing Justice White's departure from a "rigid" line between "direct restraint" and "indirect restraint" to a more ambiguous standard as a substantial analytic shift); David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1288 n.314 (1988) (arguing that prior decisions potentially limited all contracts, contrary to the Rule of Reason in *Standard Oil*).

48. United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290 (1897).

49. United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898).

50. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

51. *See supra* note 47 and accompanying text.

52. HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836–1937, at 293–95 (1991) ("[*Addyston Pipe*] completely disassociated the classical concern with liberty of contract from the Sherman Act's concern about elimination of competition. If a restraint was within the power of Congress to regulate interstate commerce, and thus within the jurisdiction of the Sherman Act, then liberty of contract did not apply."); May, *supra* note 47, at 305 (contending that the only question before the Court in *Joint Traffic* was the scope of the commerce power).

Both arguments have some superficial plausibility. The opinions in *Trans-Missouri Freight* and *Joint Traffic* held that a ban on agreements setting reasonable prices did not abridge liberty of contract,[53] thus rejecting arguments to the contrary in Justice White's dissent in *Trans-Missouri Freight* and by attorneys for Joint Traffic Association.[54] Moreover, all three decisions preceded *Lochner*, raising the possibility that the Court discerned the meaning of the Sherman Act without regard to liberty of contract. Finally, some language in the Court's *Addyston Pipe* opinion seems to suggest that the commerce power provides Congress with greater leeway over private contracts than the ordinary police power, and that liberty of contract must thereby yield to the Sherman Act.[55]

Closer analysis, however, reveals that these decisions did not reach as far as others have claimed and were in fact entirely consistent with *Standard Oil*'s subsequent invocation of liberty of contract as the principle controlling interpretation and implementation of the Sherman Act. Eight years before *Lochner*, and during the same month as *Trans-Missouri Freight*, Justice Peckham declared, for a unanimous Court in *Allgeyer v. Lousiana*, that the due process clause protects liberty of contract against abridgments outside the police power, confirming what the Court had previously suggested.[56] Indeed, on the New York Court of Appeals, Justice Peckham had authored an opinion voiding a statute prohibiting firms from providing free products to induce the purchase of others, holding that such regulation infringed the liberty of traders and exceeded the police power.[57] He also dissented from the court's holding that New York could regulate collusive prices charged by floating grain elevators, criticizing *Munn v. Illinois*,[58] and referring to such regulation as "vicious in its nature, [and] communistic in its tendency."[59]

53. *See Trans-Mo. Freight*, 166 U.S. at 340; *Joint Traffic Ass'n*, 171 U.S. at 572–73.

54. *Trans-Mo. Freight*, 166 U.S. at 344–55 (White, J., dissenting); *Joint Traffic Ass'n*, 171 U.S. at 565–67 (recounting the defendants' liberty of contract argument).

55. *See Addyston Pipe*, 175 U.S. at 229–30 ("[T]he provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution . . . . The power of Congress over this subject seems to us much more important and necessary than the liberty of the citizen to enter into contracts *of the nature above mentioned* . . . ." (emphasis added)).

56. Allgeyer v. Louisiana, 165 U.S. 578, 591 (1897); Mugler v. Kansas, 123 U.S. 623, 660–61 (1887) (discussing the right to manufacture and sell as an aspect of liberty protected by the due process clause). *See also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (tracing the origin of post–Civil War substantive due process to *Mugler*).

57. People v. Gillson, 17 N.E. 343, 345–46 (N.Y. 1888).

58. Munn v. Illinois, 94 U.S. 113 (1876).

59. People *ex rel.* Annan v. Walsh, 22 N.E. 682, 688, 695 (N.Y. 1889) (Peckham, J., dissenting).

Justice Peckham, who of course would also author *Lochner* in 1905, authored the Court's five major antitrust decisions between 1897 and 1899.[60] Any claim that these decisions ignored liberty of contract would imply that Justice Peckham abandoned deeply held views so as to validate an expansive Sherman Act, only to re-embrace such liberty in *Lochner*. On the contrary, Justice Peckham repeatedly crafted decisions consistent with the contractual liberty he embraced in *Allgeyer*, *Lochner*, and his New York opinions. In *Trans-Missouri Freight*, for instance, the defendants did not raise a liberty of contract argument, instead arguing that a ban on all price fixing by railroads would create such absurd consequences that Congress could not have intended such a result.[61] Rejecting this argument, Justice Peckham emphasized that the defendants had received special benefits and privileges from the state, including the power of eminent domain and grants of land, and thus were subject to more extensive regulation than ordinary businesses.[62] Thus, he said, "the impolicy" of banning such price fixing was not so clear as to justify reading an exception into the Act.[63] This rationale also blunted the force of Justice White's dissent, which did invoke liberty of contract.[64] After all, even strong proponents of liberty of contract conceded that states had greater latitude to regulate prices of firms that received special privileges, including the power of eminent domain, which enhanced their market power.[65]

60. These five decisions were: *Addyston Pipe*, 175 U.S. 211; Anderson v. United States, 171 U.S. 604 (1898); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); Hopkins v. United States, 171 U.S. 578 (1898); and United States v. Trans-Mo. Freight, 166 U.S. 290 (1897).

61. *See Trans-Mo. Freight*, 166 U.S. at 340 ("[W]e are asked to read into the act by way of judicial legislation an exception that is not placed there by the lawmaking branch of the Government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language that it used."). *Cf*. Church of the Holy Trinity v. United States, 143 U.S. 457, 458–59 (1892) (rejecting the statute's plain language in light of allegedly absurd consequences).

62. *See Trans-Mo. Freight*, 166 U.S. at 335–36.

63. *Id*. at 340 ("That impolicy is not so clear, nor are the reasons for the exception so potent as to permit us to interpolate an exception into the language of the act, and thus to materially alter its meaning and effect.").

64. *Id*. at 354 (White, J., dissenting) (asserting that the majority's interpretation would "work an enormous injustice and operate to the undue restraint of the liberties of the citizen"). Justice White also argued that the majority's interpretation would, "if it does not destroy, at least gravely impair[], both the liberty of the individual to contract and the freedom to trade." *Id.* at 355.

65. *See, e.g.*, Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1, 55–56 (1999) (noting that the grant of eminent domain power conferred additional power to regulate the prices of recipients under the dominant political economy of the time); T.M. Cooley, *State Regulation of Corporate Profits*, 322 N. AM. REV. 205, 209–11 (1883) (concluding that privileges accorded to railroads rendered them subject to price regulation that would not be appropriate in other industries); Thomas M. Cooley, *Limits to State Control of Private Business*, I PRINCETON R. 233, 249–55 (1878) ("[I]t would be strange indeed if the law in giving could not limit its gift."). *See also* Smyth v. Ames,

The defendants in *Joint Traffic* argued strenuously that *Trans-Missouri*'s reading of the statute would infringe *Allgeyer*'s liberty of contract by banning "ordinary contracts and combinations."[66] Instead of rejecting any role for contractual liberty in determining the scope of antitrust regulation, as some have suggested, Justice Peckham instead conceded that the commerce power did not include "the right to destroy or impair" liberty of contract.[67] Moreover, he concluded that the statute did not purport to reach the "ordinary contracts and combinations" protected by liberty of contract.[68] Echoing his opinion in *Hopkins v. United States*, released the same day, Justice Peckham opined that the Act only banned "direct restraints" of interstate commerce, leaving so-called indirect restraints, that is, ordinary contracts and combinations, unscathed.[69]

The defendants themselves, however, had not entered into indirect restraints, but had restrained interstate commerce directly. To back this conclusion, Justice Peckham emphasized that the defendants had received public franchises from various states—franchises that included the eminent domain power.[70] Interstate transportation pursuant to such franchises fell within the jurisdiction of Congress, he said, which could attach certain conditions to such grants, even though individual states were the grantors.[71] "Ordinary freedom of contract" did not empower the defendant railroads

169 U.S. 466, 545–46 (1897) ("A corporation maintaining a public highway, although it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, privileges, and franchises subject to the condition that the government creating it, or the government within whose limits it conducts its business, may, by legislation, protect the people against unreasonable charges for the services rendered by it.").

66. United States v. Joint Traffic Ass'n, 171 U.S. 505, 566 (1898).

67. *Id.* at 571–72 ("The [commerce] power, however, does not carry with it the right to destroy or impair those limitations and guarantees which are also placed in the Constitution, [including liberty of contract] . . . ." (citing Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893); Interstate Commerce Comm'n v. Brimson, 154 U.S. 447 (1894))).

68. *Id.* at 567–68.

69. *Id.* at 566–68 (responding to defendants' assertion that, as construed in *Trans-Missouri Freight*, the Sherman Act banned "ordinary contracts and combinations" protected by liberty of contract). Justice Peckham continued

> An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, . . . is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. . . . "[T]he act of congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and, possibly, to restrain it."

Id. at 568 (quoting Hopkins v. United States, 171 U.S. 578, 600 (1898)).

70. *Id.* at 569–71.

71. *Id.* at 570.

"to combine as one consolidated and powerful association for the purpose of stifling competition among themselves, and of thus keeping their rates and charges higher than they might otherwise be under the laws of competition."[72]

Moreover, in *Addyston Pipe*, joined by the *Joint Traffic* dissenters, including Justice White, the Court reiterated that the Sherman Act banned only "direct restraints" and unanimously held that a cartel arrangement creating prices well above cost, including a reasonable rate of return, "directly restrain[ed]" interstate commerce.[73] In so doing, the Court rejected the defendants' claim that the commerce power did not extend to private restraints but instead only reached those direct restraints imposed by states.[74] Adoption of the defendants' position, the Court said, would mean that regulation of such restraints would fall to individual states, who would regulate or not regulate such restraints according to their "own particular interest."[75] Addressing the defendants' liberty of contract claim, Justice Peckham concluded that private liberty of contract did not include the right to enter "contracts of the nature above mentioned" and thus to impose direct restraints on interstate commerce that are analogous to public regulations of such commerce.[76] The restraints before the Court were direct, he said, because they raised prices above the competitive level.[77]

In both *Addyston Pipe* and *Joint Traffic*, the reach of the commerce clause defined the proper reach of the Sherman Act and thus the limits of liberty of contract.[78] The converse was equally true, however, as liberty of contract principles informed, and limited, the definition of "direct restraint."[79] More precisely, doctrines defining the domain of "liberty of

72. *Id.* at 570–71.

73. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 235–41 (1899) (reproducing and relying upon findings from Judge Taft's Sixth Circuit opinion that market structure and transportation costs facilitated above-cost cartel pricing), *aff'g* 85 F. 271 (6th Cir. 1899).

74. *Id.* at 228–35.

75. *Id*. at 231.

76. *Id*. at 229–30 ("If certain kinds of private contracts do directly, as already stated, limit or restrain, and hence regulate interstate commerce, why should not the power of Congress reach those contracts just the same as if the legislation of some State had enacted the provisions contained in them? The private contracts may in truth be as far reaching in their effect upon interstate commerce as would the legislation of a single State of the same character.").

77. *Id.* at 235–38 ("The facts thus set forth show conclusively that the effect of the combination was to enhance prices beyond a sum which was reasonable.")

78. HOVENKAMP, *supra* note 52, at 294–95.

79. *See* United States v. Joint Traffic Ass'n, 171 U.S. 505, 566–68 (1898) (concluding that "ordinary contracts and combinations" protected by liberty of contract are "indirect restraints" and thus beyond the scope of the Sherman Act)*; Addyston Pipe*, 175 U.S. at 230 ("The power of Congress over this subject seems to us much more important and necessary than the liberty of the citizen to enter into

contract" and the "commerce power" were symbiotic, with neither dominating the other.[80] Instead, common precepts about the appropriate scope of regulatory power simultaneously informed each doctrinal category. In other words, a restraint was "direct" if it impacted interstate commerce in a way that produced the sort of harm that justified regulatory intervention under the classical economic paradigm that informed liberty of contract jurisprudence.[81] As a result, liberty of contract still retained independent force vis-à-vis the commerce power, a fact confirmed by decisions outside the antitrust context.[82] Far from ignoring liberty of contract, Justice Peckham sketched a Sherman Act framework designed to safeguard agreements otherwise protected by ordinary freedom of contract by leaving so-called "indirect" restraints unscathed.[83] Indeed, if anything, Justice Peckham's account of the scope of the Sherman Act was less

contracts *of the nature above mentioned* . . . ." (emphasis added)). The negative implication of the italicized and qualifying language is that Congress does not have authority to ban any contract simply because the contract falls within the commerce power.

80. *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 143–44 (1998) (contending that late nineteenth-century commerce clause jurisprudence was strongly influenced by conceptual categories developed in the liberty of contract context).

81. *See* HOVENKAMP, *supra* note 52, at 200–01 (explaining how the principle of externality regulation informed liberty of contract jurisprudence).

82. *See, e.g.*, Adair v. United States, 208 U.S. 161, 180 (1908) (voiding a Congressional ban on contracts binding railroad employees not to join unions despite Congress's authority to regulate interstate transportation).

83. *See* Meese, *supra* note 65, at 55 (discussing authorities supporting the proposition that the grant of eminent domain power conferred additional power to regulate prices charged by recipients); William H. Page, *Ideological Conflict and the Origins of Antitrust Policy*, 66 TUL. L. REV. 1, 46–47 (1991) (explaining that franchises granted the defendants an advantage by precluding market entry by potential new competitors). Professor Hovenkamp has offered a somewhat different account of *Joint Traffic*, contending that the Court relied upon implied limitations in the franchises the railroads had received from various states. *See* HOVENKAMP, *supra* note 52, at 294 ("One could not presume that the franchises entitled [the railroads] to behave anticompetitively."). He does not, however, identify any legal text granting such franchises or any portion of such text limiting the pricing discretion of the recipients. Nor did the *Joint Traffic* opinion itself claim that the states that had granted the franchises meant to limit the pricing discretion of the railroads with respect to interstate commerce. Indeed, states likely did not possess the authority to regulate rates for the interstate shipment of goods. *See* Ill. Cent. Ry. v. Illinois, 163 U.S. 142, 153 (1896) (invalidating a law prescribing the location of stops for interstate trains); Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557, 576–77 (1886) (voiding state regulation of interstate rail rates). Finally, even if states did possess the authority to regulate the rates for interstate rail transportation, it seems unlikely that they would exercise that authority to protect out-of-state shippers from unreasonably high rates imposed by in-state carriers. *See* N. Sec. Co. v. United States, 193 U.S. 197, 352 (1904) (banning a merger that would have created a monopoly between two interstate railroads despite the approval by the state where the merging firms were incorporated); *Addyston Pipe*, 175 U.S. at 231 (recognizing that states would regulate or not trade restraints according to their "own particular interest").

interventionist than that sketched by *Standard Oil*. For example, Justice Peckham placed so-called indirect restraints—including mergers, the formation of partnerships, and covenants not to compete—beyond the scope of the Sherman Act altogether, even if such restraints would have been unreasonable under the *Standard Oil* formulation.[84]

It is also noteworthy that Judge Taft, whose Sixth Circuit *Addyston Pipe* opinion was an important pillar of pre–*Standard Oil* law, expressly opined in a 5000-word letter to Congress that *Standard Oil*'s Rule of Reason did not alter the standards articulated by *Joint Traffic* or his own *Addyston Pipe* opinion.[85] Indeed, in his post-presidency book on the Sherman Act, Taft announced that he had challenged *Standard Oil*'s detractors to identify a single scenario in which the Rule of Reason would fail to condemn a restraint properly condemned by pre–*Standard Oil* case law.[86] No one, Taft said, had taken up the challenge.[87] More than fifteen years later, Chief Justice Taft repeated this message, declaring in a unanimous opinion that *Standard Oil* merely "confirmed" the best reading of *Addyston Pipe*, *Joint Traffic*, and *Trans-Missouri Freight*.[88]

Still, Justice Peckham had declined to embrace the Rule of Reason that Justice White had so vigorously endorsed in his *Trans-Missouri Freight* dissent. That task fell to Justice Brewer, concurring in the famous

84. *Cf. N. Sec. Co.*, 193 U.S. at 400–11 (Holmes, J., joined by Fuller, C.J., White & Peckham, JJ., dissenting) (contending that merger to monopoly was not a restraint of trade). By contrast, Judge Taft's Sixth Circuit *Addyston Pipe* opinion concluded that partial, ancillary restraints of interstate commerce—indirect and thus lawful restraints according to Justice Peckham—would violate the Sherman Act if unreasonable. United States v. Addyston Pipe & Steel Co., 85 F. 271, 283 (6th Cir. 1899), *aff'd*, 175 U.S. 211 (1899).

85. *See* President William Howard Taft, Third Annual Message to Congress (Dec. 5, 1911) ("These cases of restraint of trade that the court excepted from the operation of the statute [in *Trans-Missouri Freight* and *Joint Traffic*] were instances which, at common law, would have been called reasonable. In the *Standard Oil* and *Tobacco* cases, therefore, the court merely adopted the tests of the common law, and in defining exceptions to the literal application of the statute, only substituted for the test of being incidental or indirect, that of being reasonable, and this, without varying in the slightest the actual scope and effect of the statute. In other words, all the cases under the statute which have now been decided would have been decided the same way if the court had originally accepted in its construction the rule at common law."); WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ACT 266–67 (1956) (describing Taft's reaction to the *Standard Oil* decision and its critics).

86. WILLIAM HOWARD TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 94–95 (1914).

87. *Id.*; Taft, *supra* note 85 ("The most extreme critics cannot instance a case that ought to be condemned under the statute which is not brought within its terms as thus construed [in *Standard Oil* and *American Tobacco*].").

88. *See* Cline v. Frink Dairy Co., 274 U.S. 445, 460–61 (1927) (Taft, C.J.) (concluding that *Standard Oil's* Rule of Reason was consistent with earlier decisions such as *Joint Traffic*, *Trans-Missouri Freight*, and Taft's own *Addyston Pipe* decision); Taft, *supra* note 85.

Northern Securities Co. decision. Conceding that he had joined Justice Peckham's previous majorities, Justice Brewer reiterated his view that these cases were correctly decided.[89] He opined, however, that "in some respects the reasons given for the judgments cannot be sustained."[90] In particular, he said, "the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act," and that the Act only proscribed those "contracts which were in direct restraint of trade, unreasonable, and against public policy."[91] Such a construction was necessary in part because "the general language of the act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen."[92] *Standard Oil* simply elaborated and rearticulated Justice Brewer's conclusion.[93]

The Supreme Court overruled *Lochner* sub silentio in 1937, holding that minimum wages for women do not violate the due process clause.[94] Since that time the Supreme Court has repeatedly gone out of its way to repudiate the vision of contractual liberty and limits on state regulatory authority that animated *Lochner*.[95] Indeed, since the retirement of Justice McReynolds in 1941, no member of the Court has endorsed meaningful

89. *N. Sec. Co.*, 193 U.S. at 360 (Brewer, J., concurring).

90. *Id*. at 361.

91. *Id*.

92. *Id.*

93. Although Justice Brewer supplied the fifth vote for the result in the case, no other Justice expressly endorsed his Rule of Reason. For instance, in dissent, Justice White, joined by Justice Peckham, Justice Holmes, and Chief Justice Fuller, contended that the Court's application of the Act exceeded the scope of Congress's commerce power. *See id.* at 364–400 (White, J., dissenting) ("Congress was without power to regulate the acquisition and ownership of the stock in question . . . ."). Moreover, Justice Holmes, joined by Justice Peckham, Justice White, and Chief Justice Fuller, argued that the Act did not reach mere mergers that combined the assets of two previously competing firms, a result consistent with *Joint Traffic*'s conclusion that such a transaction was an indirect restraint of trade and thus beyond the scope of the Sherman Act. *See id.* at 403 (Holmes, J., dissenting) (viewing the effect of the purchase of shares as "such a remote result").

94. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 397–400 (1937) (overruling Adkins v. Children's Hosp. of D.C., 261 U.S. 525 (1923)). Perhaps ironically, this pillar of post-*Lochner* jurisprudence sustained a statute that contravened the equal protection clause by discriminating against women and thus pricing some women out of the labor market.

95. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (sustaining a ban on "debt-adjusting" by nonlawyers without determining whether the ban furthered any rational public purpose); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 490–91 (1955) (upholding a state law that banned advertising for the sale of eyeglasses and lenses against a due process challenge); United States v. Carolene Prods. Co., 304 U.S. 144, 153–54 (1938) (upholding the federal Filled Milk Act, which prohibited the shipment of purportedly adulterated milk in interstate commerce).

protection for liberty of contract.[96] During the same period, numerous justices have authored or joined opinions criticizing liberty of contract in general and *Lochner* in particular.[97]

At the same time, the Court has repeatedly endorsed *Standard Oil* and its Rule of Reason numerous times in the ten decades since the decision. Over the past three decades, for instance, the Supreme Court has cited *Standard Oil*'s Rule of Reason several times, often in unanimous or near unanimous decisions.[98] Additional decisions invoked the Rule of Reason and its antiliteral consequences without expressly mentioning *Standard Oil*.[99] Major lower court decisions have invoked the Rule of Reason as well.[100] No Justice, aside from the elder Justice Harlan, has questioned the correctness of *Standard Oil* or its Rule of Reason.

There is a similar disconnect within the community of antitrust scholars. Here again, most scholars endorse *Standard Oil* and the Rule of Reason as the appropriate approach to the Sherman Act.[101] Very few,

96. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 481–82 (1965) (Douglas, J.) (rejecting *Lochner* and its progeny as an appropriate guide to substantive due process analysis).

97. *See* Washington v. Glucksberg, 521 U.S. 702, 760–61 (1997) (endorsing the enterprise of substantive due process while at the same time rejecting *Lochne*r and meaningful protection for liberty of contract); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (same).

98. Nynex Corp. v. Discon, Inc., 525 U.S. 128, 132–33 (1998); California v. Am. Stores Co., 495 U.S. 271, 286 (1990); Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723, 732 (1988); Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 288 (1985); Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 103 (1984); Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332 (1982); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978). Several decisions from a more interventionist era also invoked *Standard Oil* and its Rule of Reason. *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 211 (1959) (referring to *Standard Oil* as a "landmark case" and relying on the decision for the proposition that some restraints, because of their "nature or character," were "unduly restrictive, and hence forbidden by both the common law and the statute"); N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4–5 (1958) (invoking *Standard Oil* for the proposition that the Sherman Act bans only unreasonable restraints).

99. *See, e.g.*, Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 885 (2007) ("While § 1 could be interpreted to proscribe all contracts, the Court has never 'taken a literal approach to [its] language.' Rather, the Court has repeated time and again that § 1 'outlaw[s] only unreasonable restraints.'" (citations omitted)); State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) ("Although the Sherman Act, by its terms, prohibits every agreement 'in restraint of trade,' this Court has long recognized that Congress intended to outlaw only unreasonable restraints. As a consequence, most antitrust claims are analyzed under a 'rule of reason.'"(citations omitted)).

100. *E.g.*, United States v. Microsoft, Inc., 253 F.3d 34, 59 (D.C. Cir. 2001) (en banc).

101. *See, e.g*., ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 33–41 (1978) [hereinafter BORK, ANTITRUST PARADOX] (endorsing *Standard Oil*'s overarching principle while critiquing the Court's application of it in the particular case); LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 217–18 (2d ed. 2006) (praising *Standard Oil* as an "antitrust classic"); Robert H. Bork, *The Rule of Reason and the Per Se*

however, recognize the connection between *Standard Oil* and *Lochner*'s version of substantive due process.[102] Robert Bork's nontreatment of the connection is illustrative. On the one hand, Bork carefully dissects the formative-era case law and concludes, as do other scholars including myself, that *Standard Oil*'s Rule of Reason was consistent with the tests announced by then-Judge Taft in *Addyston Pipe* and Justice Peckham in *Joint Traffic* and *Addyston Pipe*.[103] He also endorses all such decisions as exemplifying the appropriate approach to antitrust questions.[104] At the same time, his discussion completely ignores the role that *Lochner*, liberty of contract, and substantive due process played in these early decisions.[105] Bork took this approach despite the fact that both *Joint Traffic* and *Addyston Pipe*, for instance, entertained liberty of contract challenges to the Act.[106] Moreover, while he discusses the Harlan plurality opinion and the Holmes dissent in *Northern Securities*, he does not mention Justice Brewer's controlling concurrence, which, as explained earlier, expressly invoked the constitution's protection for "[f]reedom of action" over one's property as militating in favor of a narrower Rule of Reason approach to the statute.[107] While one can only speculate regarding the cause of this oversight, it should be noted that Bork has always been a vociferous opponent of the enterprise of substantive due process; perhaps this hostility, combined with the general opprobrium heaped on *Lochner*, led Bork to

Concept: Price Fixing and Market Division, 74 YALE L.J. 775, 801–05 (1965) [hereinafter Bork, *The Rule of Reason*] (noting the "major virtues" of *Standard Oil*, despite the existence of some flaws).

102. Rudolph Peritz, of course, is one exception. *See* PERITZ, *supra* note 23, at 56–58 (1996) ("The *Standard Oil* (1911) opinion's Rule of Reason can be understood as closing *Lochner*'s circle of individual liberty . . . .").

103. *See* Bork, *The Rule of Reason*, *supra* note 101, at 785 ("Despite the near universal opinion that Chief Justice White fathered the modern rule of reason in his 1911 *Standard Oil* and *American Tobacco* opinions, a careful reading of Justice Peckham's opinions indicates that the honor of paternity belongs instead to him."). Bork continued by arguing that "White's acceptance of *Trans-Missouri* and *Joint Traffic* and his own three-part test result in a rule of reason largely, if not completely, convertible either to Peckham's test of direct and indirect restraints or Taft's test of ancillary and non-ancillary restraints." *Id*. at 805. *See also* SULLIVAN & GRIMES, *supra* note 101, at 217–18 (concluding that *Standard Oil* did not depart significantly from previous decisions).

104. Bork, *The Rule of Reason*, *supra* note 101. at 785–805.

105. *See* SULLIVAN & GRIMES, *supra* note 101, at 217–19 (discussing *Standard Oil* without mentioning *Lochner* or liberty of contract).

106. *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 232 (1899); United States v. Joint Traffic Ass'n, 171 U.S. 505, 573 (1898).

107. Bork, *The Rule of Reason*, *supra* note 101, at 806–14; *see also* N. Sec. Co. v. United States, 193 U.S. 197, 361 (1904) (Brewer, J., concurring).

minimize the role that liberty of contract played in inspiring the approach he himself embraced.[108]

IV. MODERN CONTROVERSIES

Although *Standard Oil* and its Rule of Reason are a century old, there is not universal agreement about the Rule's content. This section examines two sources of controversy, namely, how to define "consumer welfare" and whether courts should balance the beneficial impact of a restraint against its harms or, instead, simply decline to condemn a restraint that is necessary to produce benefits.

A. THE MEANING OF "CONSUMER WELFARE"

Quoting Robert Bork, the Supreme Court has said that Congress passed the Sherman Act as a "consumer welfare prescription."[109] Unfortunately, the term "consumer welfare" does not define itself, and antitrust scholars have advocated two different definitions of this term.[110] Bork has argued that courts should equate "consumer welfare" with total economic welfare, that is, the welfare of all individuals in society, regardless of whether they purchase products governed by a challenged restraint or other practice.[111] Though often associated with the so-called Chicago school of antitrust, Bork's approach actually replicated the approach previously endorsed by the Harvard school, headed by Edward

108. It should be noted that other contemporary work examining *Standard Oil* and earlier decisions also fastidiously avoided any mention of *Lochner*. *See* LETWIN, *supra* note 85, at 293–96 (listing a table of over 100 cases discussed in the work with no mention of *Lochner*).

109. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("[Debates in Congress] suggest that Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting BORK, ANTITRUST PARADOX, *supra* note 101, at 66)).

110. *See* Ken Heyer, *Welfare Standards and Merger Analysis: Why Not the Best?*, 2 COMP. POL'Y INT'L 29, 31 (2006) (explaining these two different welfare approaches).

111. BORK, ANTITRUST PARADOX, *supra* note 101, at 50–89 (arguing on various grounds that courts should treat maximizing total economic welfare as the exclusive goal of the Sherman Act). *See also* RICHARD A. POSNER, ANTITRUST LAW 2, 9–32 (2d ed. 2001) (stating that the economic theory of monopoly and the resulting misallocation of resources provides the only sound basis for antitrust policy, and that courts should prefer monopoly over competition when the former results in greater efficiency in a Kaldor-Hicksian sense); Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 11–13 (1966) (examining legislative history and concluding that, in passing the Sherman Act, Congress favored a "consumer welfare" framework, which Bork equated with total economic welfare); 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) (discussing various authorities advancing the "total welfare" approach).

Mason, Donald Turner, Carl Kaysen, and Phillip Areeda.[112] Others, however, take issue with the Harvard/Chicago account regarding the meaning of the statute and instead would equate "consumer welfare" with the welfare of purchasers in the relevant market occupied by the proponent of the challenged conduct.[113] Under this approach, a restraint, a merger, or any other transaction that increases overall economic welfare nonetheless contravenes the Act if it raises prices in the relevant market.

Although they have had over a century to do so, courts have not settled on a particular definition of "consumer welfare" relevant to Sherman Act adjudication. Thus, under Section 2 of the Act, courts have embraced the Harvard/Chicago approach, holding that "competition on the merits" such as the realization of economies of scale and associated above-cost pricing is lawful per se, without regard to whether such conduct results in higher prices for purchasers in the relevant market.[114] Moreover, this

112. *See* Meese, *supra* note 111, at 690–708. In particular, the Harvard school argued that so-called competition on the merits should be lawful per se, regardless of whether such conduct raised or lowered prices in the relevant market. *See id.* at 704. These scholars also argued that the Sherman Act should not ban restraints that produced a "reasonable" degree of market power, that is, market power necessary to achieve significant efficiencies, again without regard to whether the restraint in question increased or decreased prices paid by purchasers in the relevant market. *Id.* at 698–702.

113. *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 93–96 (1982) (arguing that the legislative history of the Sherman Act demonstrates concern with harm to purchasers, not allocative efficiency); Robert Pitofsky, *Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission*, 72 U. CHI. L. REV. 209, 217 (2005) (endorsing a comparison of efficiency effects with adverse impacts on purchasers in the relevant market); Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 329–36 (2006) (endorsing the so-called consumer welfare effect standard under Section 2, whereby courts determine whether a restraint, on balance, injures purchasers in the relevant market).

114. *See, e.g.*, Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993); United States v. AMR Corp., 335 F.3d 1109, 1113 (10th Cir. 2003) (distinguishing between behavior that abuses monopoly power and that which simply "build[s] a better mousetrap"); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274 (2d Cir. 1979) ("A firm that has lawfully acquired a monopoly position is not barred from taking advantage of scale economies by constructing, for example, a large and efficient factory. These benefits are a consequence of size and not an exercise of power over the market." (quoting Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 597 (1985))); United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 343 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954) (per curiam); PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 626b, at 77–78 (1978) (arguing that Section 2 should not forbid conduct that "furthers competition on the merits" in the least restrictive manner, even if such conduct excludes rivals and obtains or maintains monopoly power); LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 73 (1st ed. 2000) (assuming that firms can achieve dominance by merit and concluding that current law does not interdict such monopolies). It should be noted that the referenced passage of the Areeda and Turner treatise addresses itself to all conduct that might monopolize a

"total welfare" approach applies even to agreements or refusals to deal that exclude rivals from the market and thus maintain a firm's monopoly position, so long as the challenged practice produces significant benefits.[115] That is, contrary to the suggestion of some, courts applying Section 2 do not balance the benefits of such restraints against harms, or otherwise seek to ascertain whether the conduct results in higher prices than those that existed before the practice.[116]

Courts treat Section 1 differently, however. That is, courts have apparently structured Section 1's Rule of Reason analysis in a manner that equates "consumer welfare" with the welfare of purchasers in the relevant market. Indeed, the Supreme Court has held that benefits attributed to a restraint are not even cognizable in the first place if the benefits rest on the assumption that the restraint will increase prices.[117] Moreover, when conducting Rule of Reason analysis, the Court has rejected a claim that efficiencies justified an otherwise anticompetitive restraint simply because the restraint purportedly resulted in prices that were higher than the status quo ante.[118] Under this approach, then, Section 1 condemns any restraint that results in higher prices than the status quo ante, even if the efficiencies produced by the restraint outweigh any social loss that the restraint produces. That is to say, this definition of "consumer welfare" requires

market, including concerted action such as exclusive dealing and tying contracts. *See also* Barak Y. Orbach & D. Daniel Sokol, *Antitrust Energy*, 85 S. CAL. L. REV. 429, 433–35 (2012).

115. *See, e.g.*, Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 482–84 (1992); United States v. Dentsply, 399 F.3d 181, 191 (3d Cir. 2005) (applying the *Eastman Kodak* test to evaluate an exclusive dealing contract that purportedly contravened Section 2); Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 786–88 (6th Cir. 2002) (articulating a legitimate business justification defense in a case involving alleged business torts and exclusionary contracts); Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 189–90 (2d Cir. 1992) (Marshall, J.) (determining that the practice of excluding rivals from the market is lawful if supported by a legitimate business justification); *Berkey Photo*, 603 F.2d at 284 (same).

116. *See* Pitofsky, *supra* note 113, at 217 (endorsing a comparison of efficiency effects with adverse impacts on purchasers in the relevant market); Salop, *supra* note 113, at 329–36 (endorsing the so-called consumer welfare effect standard under Section 2, whereby courts determine whether a restraint, on balance, injures purchasers in the relevant market).

117. *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 693–95 (1978) (holding that defendants' argument that restraint was necessary to prevent low prices from undermining the quality of engineering services simply confirmed that the agreement had an "anticompetitive purpose and effect" because it was premised upon an assertion that the agreement would maintain or increase the price level).

118. *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 113–14 (1985) ("If the NCAA's television plan produced procompetitive efficiencies, the plan would increase output and reduce the price level of televised games."); FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.37 (2000).

courts to implement Section 1 of the Sherman Act in a manner that reduces economic welfare and ultimately injures society's consumers as a class.[119]

Of course, these two definitions of "consumer welfare" produce the same result in numerous antitrust cases.[120] Both camps would ban naked horizontal price fixing and both would condone a merger to monopoly or other agreement that resulted in efficiencies large enough to reduce prices or prevent their increase. Still, the two standards do require different treatment of some restraints. For instance, the "purchaser welfare" school would ban above-cost pricing by an efficient monopolist if such prices deterred entry by less efficient rivals, thus resulting in higher prices than entry by such inefficient rivals would produce.[121] By contrast, the "total welfare" school reasons that the social gains from the monopolist's superior efficiency would likely outweigh the harm from any misallocation of resources resulting from an exercise of monopoly power and thus would leave such conduct unscathed.[122]

As between these two approaches, only the first, the total welfare approach, is consistent with a Lochnerian Rule of Reason. Recall that during the *Lochner* era, regulation that infringed contractual liberty or limited the use of property only survived constitutional review if it fell

119. *Cf.* Alan J. Meese, *Section 2 and the Great Recession: Why Less (Enforcement) Might Mean More (GDP)*, 80 FORDHAM L. REV. 1633, 1674– 75 & n.261 (2012) (contending that realization of efficiencies in one market will free up resources that can flow to other markets and thus reduce prices paid by consumers in those markets).

120. Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1703 (1986) ("[T]he dominant theme [of the Sherman Act's legislative history] is the protection of consumers from overcharges. This turns out to be the same program as one based on 'efficiency.' There are differences at the margins, such as what if anything to do about price discrimination . . . but the differences are not very important.").

121. *See* Meese, *supra* note 111, at 668 (describing the position of the "purchaser welfare" school); Aaron S. Edlin, *Predatory Pricing*, *in* RESEARCH HANDBOOK ON ECONOMICS OF ANTITRUST (Einer Elhauge, ed., forthcoming Nov. 2011), *available at* http://works.bepress.com/cgi/view content.cgi?article=1078&context=aaron_edlin (endorsing this position). *See also* Christopher R. Leslie, *Revisiting the Revisionist History of* Standard Oil, 85 S. CAL. L. REV. 573 (2012) (discussing the debates over predatory pricing).

122. Meese, *supra* note 111, at 671–72 (explaining how safe harbor for "competition on the merits" is best understood as reflecting this assumption). *See also* Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 21–23 (1968) (explaining that modest efficiencies will generally exceed the deadweight allocative losses resulting from a transaction that also enhances market power); BORK, ANTITRUST PARADOX, *supra* note 101, at 107–10 (invoking Williamson's partial equilibrium trade-off model to illustrate the inherent tradeoff between productive efficiencies and the "deadweight loss" caused by monopolistic output reduction).

within the police power.[123] As Herbert Hovenkamp has explained, this authority consisted solely of the power to regulate market conduct that produced welfare-reducing negative externalities as defined by the Pigouvian regulatory paradigm.[124] Such externalities reflect a market failure that occurs because high transaction costs prevent parties from bargaining resources to their highest-valued uses, thereby resulting in a misallocation of resources.[125] Thus, while *Lochner*'s conception of the police power as authorizing the correction of market failures would authorize an antitrust policy focused on maximizing total economic welfare—the Harvard/Chicago definition of consumer welfare—it would not authorize a ban on restraints that enhance the overall allocation of productive resources and increase total economic welfare merely because such restraints would also create market power and increase prices paid by purchasers in the relevant market. Such restraints would not produce a market failure subject to antitrust regulation under the Lochnerian paradigm because parties operating in a world with zero transaction costs would adopt the restraint in question instead of the status quo ante.[126]

123. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 53–54 (1905); Allgeyer v. Louisiana, 165 U.S. 578, 585–86 (1897); Mugler v. Kansas, 123 U.S. 623, 658–59 (1887).

124. *See* HOVENKAMP, *supra* note 52, at 201 ("Both [Thomas] Cooley and the Supreme Court read into substantive due process doctrine a theory of externalities much like [A.C.] Pigou's. The Court approved regulatory legislation if it was convinced that market exchanges produced negative externalities for which the bargaining parties would not account."); A.C. PIGOU, WEALTH AND WELFARE (1912). An instructive example of such an externality-based approach can be found in *In re Jacobs*, 98 N.Y. 98 (1885), where the New York Court of Appeals struck down a state ban on the manufacture of cigars in tenement houses. Among other things, the court relied on the fact that tobacco odor "did not extend to any of the other rooms of the tenement-house." *Id*. at 113. By contrast, the Supreme Court sustained a local ban on nighttime laundry operations requiring continuous fires in neighborhoods subject "to high winds" and consisting of "wooden buildings" because "regulations of a strict character should be adopted to prevent the possibility of fires." Soon Hing v. Crowley, 113 U.S. 703, 708 (1885) (upholding a ban on a laundry operation for this reason).

125. *See* A.C. PIGOU, THE ECONOMICS OF WELFARE 172–203 (4th ed. 1932) (examining the role of externalities in creating market failure and possible remedies necessary to correct that failure and "make the national dividend a maximum"). Pigou also equated "national dividend" with "economic welfare." *Id*. at 31–42. *See also* Guido Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J.L. & ECON. 67, 69–71 (1968) (explaining the connection between transaction costs, market failure, and economic welfare, and arguing that antitrust regulation can be explained as an effort to replicate allocation of resources that would occur in absence of bargaining costs, thereby maximizing total welfare). *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (explaining that, in the absence of transaction costs, parties will bargain resources to their highest valued use regardless of the initial allocation of entitlements).

126. For instance, purchasers injured by a wealth-creating merger would not be willing to pay the merging parties to forgo the transaction. Though of course, in a world with no transaction costs, bargaining parties would have their cake and eat it too, that is, parties would bargain both for the restraint that creates the efficiencies and for increased output, perhaps as a result of price

Simply put, the vision of contractual liberty articulated and enforced during the *Lochner* era did not view redistribution of income between market participants as a valid justification for abridging liberty of contract or the right of property. As Hovenkamp put it over two decades ago:

> This doctrine of externalities led the Supreme Court to its decisions that struck down regulatory legislation as well as those that upheld statutes where qualifying externalities were found. It also explains why the Court generally refused to tolerate inequality of bargaining power as a qualifying public interest [that justified abridgement of contractual liberty or property]. Inequality of bargaining power between capitalists and laborers affected the distribution of wealth *between* the bargaining parties, but the Court saw no effect on anyone else. For example, Justice Peckham held that the bakers' hours statute in *Lochner* (1905) must fall unless the plaintiffs could show a relationship between the number of hours a baker works and the "healthful quality" of the bread he produces. The mere fact that long hours of work were bad for bakers, who were adults capable protecting themselves, was insufficient to justify the regulation . . . .[127]

Perhaps the best exemplar of such reasoning can be found in *Coppage v. Kansas*.[128] In *Coppage*, the Court entertained a challenge to a ban on so-called yellow dog contracts, namely, agreements whereby employees agreed not to join a union.[129] The state justified the ban in part by claiming that employer and employee did not bargain as equals, with the result that employers purportedly employed their unequal bargaining power to coerce such agreements upon unwilling employees.[130] The Court replied in a manner consistent with a market failure account of the police power.[131] The Court did not claim that employers and employees bargained as equals but

discrimination. Antitrust regulation is not price regulation, however, and thus cannot replicate this bargain.

127. HOVENKAMP, *supra* note 52, at 201–02 (quoting *Lochner*, 198 U.S. at 62). *See also* Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 WM. & MARY L. REV. 3, 19–20 (1999) (recounting other nineteenth-century authorities equating the police power with market failure regulation).

128. Coppage v. Kansas, 236 U.S. 1, 12–15 (1915). *See also* Adair v. United States, 208 U.S. 161, 172–74 (1908) (voiding a Congressional ban on contracts binding railroad employees not to join unions despite Congress's authority to regulate interstate transportation).

129. *See generally* Daniel Ernst, *The Yellow-Dog Contract and Liberal Reform, 1917–1932*, 30 LABOR HIST. 251 (1989) (discussing the history and eventual abolition of yellow dog contracts).

130. *Coppage*, 236 U.S. at 16–18.

131. *Id.* at 14 ("[S]o far as its title or enacting clause expresses a purpose to deal with coercion, compulsion, duress, or other undue influence, we have no present concern with it, because nothing of that sort is involved in this case.").

instead conceded the assumption by the Supreme Court of Kansas that employers possessed a bargaining advantage over employees because of the former's ownership of greater property.[132] Still, the Court said, an unequal distribution of property was a predictable and defensible result of the recognition of private property and freedom of contract.

> No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employee. Indeed a little reflection will show that wherever the right of private property and the right of free contract coexist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the Fourteenth Amendment, in declaring that a state shall not "deprive any person of life, liberty, or property without due process of law," gives to each of these an equal sanction; it recognizes "liberty" and "property" as coexistent human rights, and debars the states from any unwarranted interference with either.[133]

Thus, legislation that abridged liberty of contract or regulated for example the prices charged by private businesses solely for the purpose of redistributing income from one party to another, exceeded the scope of the police power and thus contravened the due process clause.[134] If states or the federal government wished to redistribute income, they had to do so the old-fashioned way, that is, by raising taxes and spending the proceeds.[135]

132. *Id*. at 17.

133. *Id.*

134. *See* Allgeyer v. Louisiana, 165 U.S. 578, 591 (1897); Mugler v. Kansas, 123 U.S. 623, 660–61 (1887) (discussing the right to manufacture "for general use or for the personal use of the maker" as an aspect of liberty protected by the due process clause); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (O'Connor, Kennedy & Souter, JJ., joint opinion) (tracing the origin of post–Civil War substantive due process to *Mugler*). *See also* Barak Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605, 632, 637–38 (2012) (discussing no-fault monopolization theories associated with level of prices).

135. *See* David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1, 19–20 (2003) (explaining that the *Lochner*-era Court did not oppose redistribution via taxation but only redistribution

While some might have attributed this view to Social Darwinists like Herbert Spencer,[136] others might have found the rationale in the works of James Madison.

To be sure, the actual record is a bit more nuanced. After all, the Court did, in some cases, sustain price regulation, even though such regulation abridged liberty of contract. In particular, the Court held that, despite generalized protection for liberty of contract and private property, states could regulate the prices of firms in industries "affected with a public interest."[137] This small category included firms that had received special benefits from the state conferring competitive advantages,[138] as well as industries with characteristics, including high concentration and barriers to entry, which facilitated collusion and thus the collective exercise of market power.[139] Even here, however, courts policed state-imposed prices to ensure that they were reasonable, thereby preventing the state from reducing welfare in attempts to achieve a politically popular distribution of

via abridgments of liberty or property that fell outside the police power); Meese, *supra* note 127, at 51 ("[F]ull and vigorous enforcement of liberty of contract still leaves the state perfectly free to assure minimal levels of human welfare through taxing and spending."); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 878 n.27 (1987) (noting *Lochner*'s "preference for redistribution through taxation rather than regulation"). This distinction—between abridgments that serve redistributive purposes and redistribution via taxation and spending—seems at least implicit in *Adkins v. Children's Hospital of the District of Columbia*, 261 U.S. 525, 550–55 (1923). There, the Court rejected Congress's imposition of a minimum wage in the District of Columbia. *Id.* at 566. In so doing, the Court expressly rejected the government's claim that such regulation was justified to ensure that employees received wages sufficient to ensure their healthy subsistence. *Id.* According to the Court, employers had no greater duty to pay above-market wages to their needful employees than grocers had to charge below-market prices to hungry customers. *See id*. at 558–59. Instead, the Court said, the welfare of such needful employees and customers was the responsibility of society at large, and thus could not justify abridging the contractual liberty of individuals and firms. *See id.*

136. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("The [Constitution] does not enact Mr. Herbert Spencer's Social Statics.").

137. *See, e.g.*, Budd v. New York, 143 U.S. 517, 541–43 (1892); Munn v. Illinois, 94 U.S. 113, 126 (1876) (holding that price regulation of firms in industry "affected with a public interest" did not offend the due process clause of the Fourteenth Amendment).

138. *See* Charles Wolff Packing Co. v. Court of Indus. Relations of Kansas, 262 U.S. 522, 535–42 (1923) (Taft, C.J.) (elaborating the principles for determining whether industries are affected with a public interest, including the presence of state-conferred privileges and conditions conducive to cartelization).

139. *See Wolff Packing*, 262 U.S. at 535–42; *Munn*, 94 U.S. at 131–33 (sustaining price regulation because there were only seven independent firms in the industry and the firms in question were actively colluding on price thereby resulting in a "virtual monopoly"); Barry Cushman, *Continuity and Change in Commerce Clause Jurisprudence*, 55 ARK. L. REV. 1009, 1017–18 (2003) (concluding that the Court deemed fewer than half a dozen businesses to be "affected with a public interest" and thus subject to price regulation during this period).

the fruits of economic activity.[140] Moreover, early antitrust decisions reached results consistent with these principles. In *Joint Traffic*[141] and *Trans-Missouri Freight*,[142] for instance, the Court sustained application of the Sherman Act because the defendants had received special privileges from the state in the form of eminent domain and land grants; privileges that conferred competitive advantages on the defendants and thus facilitated the exercise of market power.[143] Just one year later, the *Addyston Pipe* Court upheld application of the Sherman Act to a private cartel, relying upon findings that the defendants' share of the market, combined with barriers to entry, facilitated effective cartelization resulting in unreasonable prices.[144]

Proponents of a "purchaser welfare" approach to Section 1 could invoke these early decisions, which *Standard Oil* did not purport to overrule, in an effort to contradict a total welfare interpretation of *Standard Oil*'s Rule of Reason. However, formative-era antitrust decisions such as *Joint Traffic*, *Trans-Missouri Freight*, and *Addyston Pipe* are entirely consistent with a total welfare approach and thus with *Lochner*'s anti-redistributionist philosophy. Simply put, each such case involved cartel price fixing that presumably resulted in a misallocation of resources and deadweight loss, analogous to an externality, without any countervailing efficiency benefits; this ultimately justified condemnation as a market failure and reduction in total welfare under the Pigouvian paradigm.[145] To be sure, such condemnation would be consistent with a purchaser welfare approach, because the challenged restraints also, apparently, produced prices above the competitive level.[146] Such coincidental consistency, however, does not contradict or falsify the total welfare account of the

140. Smyth v. Ames, 171 U.S. 361, 362–63 (1898) (holding that a legislatively imposed railroad tariff that did not allow a fair return to regulated firms thereby deprived railroads of property without due process of law).

141. United States v. Joint Traffic Ass'n, 171 U.S. 505, 574–77 (1898).

142. United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 338–41 (1897).

143. *See* Meese, *supra* note 65, at 54–55 (explaining that state grant of special privileges, such as the power of eminent domain, thereby justified more intrusive regulation); *supra* notes 61–72 and accompanying text.

144. *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 235–38 (1899) (reproducing findings from Judge Taft's Sixth Circuit opinion that the cartel charged prices well above cost plus a reasonable rate of return and thus above the competitive level); Meese, *supra* note 65, at 62–67 (explaining how Justice Peckham sustained antitrust regulation of a purely private cartel given factual record establishing that such conduct would produce unreasonable prices); Page, *supra* note 83, at 47–49 (explaining that franchises granted defendants an advantage by precluding market entry by potential new competitors).

145. *See supra* notes 122–25 and accompanying text.

146. *See supra* notes 111–14 and accompanying text (explaining "purchaser welfare" approach).

Lochnerian Rule of Reason, particularly when one considers that era's related constitutional barrier against redistributionist price regulation.[147] Total welfare, not purchaser welfare, is the *Standard Oil* way.[148]

B. TO BALANCE OR NOT TO BALANCE

The case law of Section 1 and Section 2 differs in another important respect as well, namely, whether courts balance conduct's harms against its benefits. Under Section 2, courts do not balance a practice's harms against its benefits and determine which predominates. Instead, once a plaintiff makes out a prima facie case of monopolization, the burden shifts to the defendant to adduce evidence that the challenged practice produces significant benefits or, in the words of two scholars, that the practice "further[s] competition on the merits."[149] If a defendant can prove to the trier of fact that such benefits exist, the defendant prevails, unless the plaintiff can show that the defendant could achieve the same benefits by less restrictive means.[150] While the application of a less restrictive alternative test rests on the assumption that a restraint's benefits coexist

147. *See* Smyth v. Ames, 169 U.S. 466, 545–50 (1897) (holding that state regulation of a railroad company deprived it of its property in violation of the Fourteenth Amendment by setting firm's prices below a reasonable level); People *ex rel.* Annan v. Walsh, 22 N.E. 670, 695 (N.Y. 1889) (Peckham, J., dissenting) (characterizing redistributionist price regulation as "communistic in its tendency").

148. Proponents of the purchaser welfare approach might also invoke *Standard Oil*'s own account of the three "consequences of monopoly," the presence of which would justify condemnation under the Rule of Reason. *See supra* notes 111–14 and accompanying text (explaining the "purchaser welfare" approach). Suffice it to say that this account of the "public policy embodied in the act" did not confront the situation in which a practice both created market power *and* productive efficiencies, thereby "fructify[ing]" and "develop[ing]" trade, thus raising the possibility that overall wealth creation would require purchasers in a particular market to pay higher prices. Standard Oil v. United States, 221 U.S. 1, 55–56 (1911). For what it might be worth, William Howard Taft, who endorsed *Standard Oil*'s Rule of Reason, answered the question in a way more congenial to a "total welfare" approach. *See* TAFT, *supra* note 86, at 124 ("[The Sherman Act's aim was not] to destroy the larger businesses whose capital and large plants enable them to produce goods cheaply, in order that small plants that cannot produce them as cheaply may live.").

149. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32 (1985) (quoting AREEDA & TURNER, *supra* note 114, at ¶ 626b, at 77–78). *See also* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 482–83 (1992) (citing *Aspen Skiing* for the proposition that conduct supported by a "valid business justification" cannot violate Section 2); Meese, *supra* note 111, at 710 n.261 (arguing that Robert Pitofsky's contention that *Aspen Skiing* requires a "balancing approach" is incorrect).

150. *See Eastman Kodak*, 504 U.S. at 483–86 (rejecting Kodak's motion for summary judgment because the plaintiff adduced evidence that Kodak could have achieved the same benefits by less restrictive means). *See also* D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. CAL. L. REV. 689, 694–95 (2012) (discussing strategic private litigation utilizing Section 2 claims).

with harms, application of such a test does not entail actual balancing of harms versus benefits.[151]

Section 1 is a different story, however. Here the consensus among courts and the enforcement agencies is quite clear: courts must balance any benefits produced by a restraint against its harms, determining which impact predominates.[152] At the same time, such balancing rarely occurs in practice. For instance, one exhaustive, but somewhat dated, survey finds that 84 percent of Rule of Reason cases fail because a plaintiff cannot establish any significant anticompetitive effect in the first place and that courts actually purported to "balance" harms against benefits in only 4 percent of cases surveyed.[153] This same survey found that, in half of the cases that "balanced," courts found that there was no harm after all, and that courts reached incorrect results in some of the remaining cases.[154] Finally, such balancing is, at least as a rhetorical matter, a post-1970 development.[155]

A Lochnerized Rule of Reason would reject balancing, just as courts of that era rejected balancing in other contexts.[156] During the *Lochner* era, courts simply asked whether regulation was within the police power, an inquiry that entailed a purely categorical judgment. They did not ask whether the benefits of an abridgment outweighed the detriment to the regulated entity. While such analysis may have involved balancing sub silentio, there is no confirmation of such balancing in judicial opinions.

151. *See* Meese, *supra* note 23, at 169–70 (arguing that the existence of a less restrictive alternative does not exclude the possibility that the restraint merely combats market failure and thus produces no competitive harm to begin with). As I have explained elsewhere, application of a less restrictive alternative test is consistent with a total welfare approach. *See* Meese, *supra* note 111, at 710 ("This less restrictive alternative test follows naturally from a 'total welfare' standard, in that it minimizes the misallocation of resources . . . .").

152. *See* Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998) ("[T]he harms and benefits must be weighed against each other in order to judge whether the challenged behavior is, on balance, reasonable." (citation omitted)); FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, *supra* note 118, § 3.37; Meese, *supra* note 23, at 108 n.157 (collecting numerous judicial and academic authorities calling for such balancing in the Section 1 context). *Cf.* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 260 (1994) (appearing to argue that, if benefits and harms really do coexist, the court's only conclusion must be to condemn the agreement).

153. Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1267–68, 1272–73, 1348–57.

154. *Id*. at 1347–57 (detailing the results in those cases where courts balanced harms against benefits).

155. A LexisNexis search of pre-1970 cases finds no reference to Rule of Reason "balancing."

156. *See generally* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (describing balancing in constitutional law as a relatively recent development).

In the antitrust context, this categorical approach manifested itself as a safe harbor for "normal" or "ordinary" restraints.[157] Restraints fell into this category if defendants would have adopted them without regard to their exclusionary impact. If restraints fell into this category, courts did not balance harms against benefits. *United States v. United Shoe Machinery Co.* is a classic example.[158] In that case, no one doubted that the challenged agreements helped preserve the defendant's monopoly.[159] The Court, however, rejected the government's case because the challenged practices had been adopted in a workably competitive market and were motivated by ordinary commercial objectives; that is, in modern parlance, they would have been adopted without regard to their exclusionary impact.[160] The Court did not purport to balance the benefits of the practices against the harms, even though the practices obviously fortified the defendant's monopoly. It was enough for the Court that the challenged practices, as *Standard Oil* put it, "tended to fructify and develop trade."[161] While banning such practices could enhance competition in the short run, nothing prevented other firms from exercising their own liberty to engage in similar

157. *See* United States v. Am. Tobacco Co., 221 U.S. 106, 181 (1911) (holding that the Sherman Act does not ban "normal and usual contracts essential to individual freedom"). The *American Tobacco* Court also emphasized *Standard Oil*'s holding that the Sherman Act "did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose." *Id.* at 179. *See also* FTC v. Sinclair Ref. Co., 261 U.S. 463, 475–76 (1923) (holding that the antitrust laws do not ban "ordinary business methods").

158. United States v. United Shoe Mach. Co. of N.J., 247 U.S. 32 (1918).

159. *Id*. at 56 (noting that the company had "magnitude," which was both "result and cause of efficiency").

160. *Id.* at 65 (finding that the defendant adopted the challenged practices for reasons that "move[] and may move the transactions of men"). For instance, the Court explained that the practice of leasing machines helped finance the entry of small shoe manufacturers and ensured that machines were used in proper relation to other machines. *Id.* at 63–64. *See also* William H. Page, *Legal Realism and the Shaping of Modern Antitrust*, 44 EMORY L.J. 1, 16–17 (1995) (explaining how the *United Shoe* decision rested on a determination that challenged voluntary arrangements benefited both parties). As I have suggested before, the test applied in *United Shoe* was akin to the modern "no economic sense" test. Meese, s*upra* note 111, at 677 n.70. *See also* Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 ANTITRUST L.J. 413, 413–17 (2006) (articulating the "no economic sense" test).

161. Standard Oil Co. v. United States, 221 U.S. 1, 55 (1911). *Cf. Am. Tobacco*, 221 U.S. at 181 (describing condemnation of American Tobacco as resting on determination that the firm obtained its monopoly "not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade by driving competitors out of business").

practices. Protection for such liberty, and not regulatory intervention, was the best guarantor of useful competition in the long run.[162]

V. CONCLUSION

In 1937, the Supreme Court abandoned meaningful protection for economic liberty. *Lochner* has since become one of the most reviled decisions in constitutional law—a quintessential exemplar of unbridled judicial activism, at least according to its numerous critics. Nonetheless, *Lochner* lives on in *Standard Oil* and its Rule of Reason, which modern courts embrace as a definitive exposition of the Sherman Act. That is to say, *Standard Oil* read the Sherman Act so as not to abridge liberty of contract, employing the Rule of Reason to implement *Lochner*'s vision of the appropriate scope of economic regulation. Contrary to assertions by some, this result was consistent with prior decisions such as *Addyston Pipe* and *Joint Traffic*.

Recognition of *Standard Oil*'s Lochnerian origins can help facilitate the faithful application of the Rule of Reason and thus shed light on modern controversies. For instance, a Lochnerian Rule of Reason would ban only those arrangements that reduce total economic welfare, leaving wealth-creating agreements that incidentally injure purchasers in the relevant market unscathed. Moreover, such a Rule of Reason would not entail "balancing" a restraint's benefits against any harms it might create, but instead would validate any practice necessary to create significant benefits, that is, so-called normal or ordinary conduct. Perhaps recognition of *Standard Oil*'s Lochnerian origins will help provide solutions to other antitrust controversies as well.

162. *See Standard Oil*, 221 U.S. at 61–62 ("[T]he freedom of the individual right to contract when not unduly or improperly exercised was the most efficient means for the prevention of monopoly . . . .").