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A RESTRAINT OF SPEECH AS A RESTRAINT OF TRADE: HOW REDISCOVERING ANTITRUST'S EQUITABLE ORIGINS AND EVOLUTION CAN HELP PROTECT AMERICA'S DEMOCRACY AND ECONOMY

Collin Schaffhauser

INTRODUCTION

Contemporary American antitrust law finds itself constrained to a narrow conception of economics. Where the digital, data-driven, and service-oriented economy grows increasingly ever-present in the American economy and our everyday lives, courts continue to utilize a purely economic theory of antitrust that is unable to deal with the dilemmas of our digital, information-age economy: economic concentration in the hands of a few "Big Tech" companies and manipulation—both economic and political—of the vast quantities of data and opportunities said companies lord over. This information, and the control over its dissemination and use, has led to the undermining of the democratic process[1] and small entrepreneurial enterprise[2] in the United States.

This is not to say that technology companies are the exclusive issue to our present issues with democratic government and civil society. Other sectors of the economy are now marshalled to use economic means for political ends.[3] Environmental, Social, and Governance (ESG) initiatives are utilized to pick winners and losers in the market.[4] Universities are also implicated in these endeavors.[5] So too are major media institutions.[6] The American economy is exemplified by "fissured" entities which effectively sequester capital and intellectual property from labor, with no broader benefit conferred upon the American public.[7] The problems posed by Big Tech are part and parcel of a larger issue concerning both economic and political liberty.

This present dilemma tragically mirrors our nation's prior struggle to overcome the infamous 19th Century trusts that left enduring impacts upon

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[1] Viktoria Robertson, Antitrust, Big Tech, & Democracy: A Research Agenda. 67(2) The Antitrust Bulletin 259, 266 (2022).

[2] *See* Clayton Masterman, The Customer is Not Always Right: Balancing Worker & Customer Welfare in Antitrust Law. 69 Vanderbilt L. Rev. 1387, 1397 (2016).

[3] *See* Executive Order on Promoting Competition in the American Economy, July 9, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

[4] Mark Brnovich, *ESG May Be an Antitrust Violation*, WALL ST. J., https://www.wsj.com/articles/esg-may-be-an-antitrust-violation-climate-activism-energy-prices-401k-retirement-investment-political-agenda-coordinated-influence-11646594807 (Mar. 6, 2022); Virginia Furness, *BlackRock fast-tracks eviction of ESG violators from MSCI-linked ETFs*, Reuters https://www.reuters.com/business/finance/blackrock-fast-tracks-eviction-esg-violators-msci-linked-etfs-2023-03-09/ (Mar. 9, 2023, 4:57 PM).

[5] Mason Goad, *UT Austin Sued Over First Amendment Violations*, Minding the Campus, https://www.mindingthecampus.org/2023/02/13/ut-austin-sued-over-first-amendment-violations/ (Feb. 13, 2023).

[6] Ethan Yang, *The Insidious Political Ends of Cancel Culture*, Am. Inst. for Academic Research, https://www.aier.org/article/the-insidious-political-ends-of-cancel-culture/ (Aug. 18, 2020).

[7] Erik Peinert, Intellectual Property and the Fissured Economy, Am. Affs. (May 20, 2023).

American society and politics. Moreover, this repetition owes itself to similar mistakes and presumptions that allowed for the rise of those former monopolies: the separation and neglect of the political underpinnings that preclude restraints of trade; the new conflict between freedom of contract and enterprise on the one hand and other cherished constitutional freedoms such as freedom of speech; and the institutional biases towards greater efficiency, passive consumption, and power. Where 19th Century common-law courts raised economic freedom on an alter at the expense of political liberty,[8] today, antitrust jurisprudence is mired in a myopia of economics that permits a similar curtailment of liberties; economics is being utilized as a political weapon.[9] This economic focus is then further limited to the concerns of Americans as consumers, rather than as potential entrepreneurs or producers.[10]

The limitations of present antitrust enforcement over service-oriented industries are most apparent in the 2020 Supreme Court case of *National Collegiate Athletic Association v. Alston*,[11] which, although is not a perfect example, does highlight the contemporary limits of antitrust jurisprudence. While the Supreme Court ultimately found the NCAA violated antitrust laws with respect to education-related benefits,[12] under the surface there were clear issues as to what, exactly, is the NCAA's "product." Over the NCAA's existence, the organization repeatedly altered its conception of "amateurism" independent of any consideration given to the consumer.[13] While the Court restated that one cannot claim a restraint is a product feature to avoid antitrust scrutiny,[14] the exact nature of the NCAA's product remained unresolved. All that could be said is that it is a "product distinct from professional sports."[15]

Justice Kavanaugh in his concurrence addressed the other aspects of the NCAA's business model under the rule of reason. Put simply, Kavanaugh noted the NCAA's entire business model should be illegal under the rule of reason.[16] If the NCAA's "product" is, in essence, unpaid labor, how is it allowed to persist? No other field of business could circumvent entire sectors of law, let alone antitrust law, through the mere incorporation of price-fixing into the

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[8] *E.g.*, *Diamond Match Co. v. Roeber*, 13 N.E. 419, 481-82 (N.Y. 1887).
[9] Harry First & Spencer Waller, Antitrust's Democracy Deficit, 81 Fordham L. Rev. 2543, 2559 (2013); Viktoria Robertson, Antitrust, Big Tech, & Democracy. 67(2) The Antitrust Bulletin 259, 260, 266 (2022).
[10] *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).
[11] 141 S. Ct. 2141 (2021).
[12] *Id.* at 2147, 2166.
[13] *Id.* at 2163.
[14] *Id.* (citing *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 199, n. 7 (2010)).
[15] *In re Nat'l Collegiate Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1246 (9th Cir. 2020).
[16] *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2167 (2021) (Kavanaugh, J. concur.).

definition of the product.[17] Underlying Justice Kavanaugh's observations and criticism are issues as to the NCAA's relevant market—both before and after any hypothetical payment for labor in the ensuing years. Although not a perfect example of the issues antitrust jurisprudence faces in a largely post-industrial economy, its limitations are clear.

With the Big Tech companies, the same issues mentioned and implied by Justice Kavanaugh concerning relevant market and product are equally applicable. In fact, these same issues are why the Federal Trade Commission's case against Facebook was dismissed in its entirety.[18] However, Big Tech's influence extends beyond the reach of college athletes and fans of college sports and impacts almost all our lives. The democratic process itself and American civil liberties are directly impacted by the behaviors of companies such as Google, Twitter,[19] and Facebook[20].[21] Further, as more information is gleaned about these companies' respective internal operations, it is equally apparent the traditional, democratic means of reigning in such power is not only divided, but to some extent coopted.

The Twitter Files also demonstrate that the allure of economic power as a tool to further political power is persuasive to Americans of all stripes. Both the Trump and Biden administrations used media concentration to suit their respective desires.[22] These efforts extended to Amazon to suppress material contrary to the government's preferred message.[23] Large businesses have also taken advantage of the concentration to further their ends.[24] Outside of the realm of government, both liberals and conservatives have accused one another of attempting to influence the direction of the nation through collusion with private enterprises.[25] This has led to a "democracy deficit" and

[17] *Id.*
[18] Chris Rodrigo, Court dismisses FTC, state antitrust cases against Facebook, The Hill. https://thehill.com/policy/technology/560578-court-dismisses-facebook-antitrust-challenges/ (June 28, 2021 3:09 PM) (last viewed Jan. 14, 2023).
[19] Although Twitter has rebranded itself as "X," I retain its more commonly recognized name.
[20] As with Twitter, I will use the more commonly known name of Facebook instead of "Meta."
[21] Robertson, *supra* note at 260-61.
[22] J.D. Tuccille, *Twitter Files Reveal Politicians, Officials Evading the Constitutions Restrictions*, REASON, https://reason.com/2023/01/02/twitter-files-reveal-politicians-officials-evading-the-constitutions-restrictions/ (Jan. 2, 2023 7:00 AM).
[23] Was Amazon 'Free to Ignore' White House Demands That It Suppress Anti-Vaccine Books?, Reason https://reason.com/2024/02/07/was-amazon-free-to-ignore-white-house-demands-that-it-suppress-anti-vaccine-books/ (Feb. 7, 2024 3:55PM).
[24] *E.g.*, Alex Berenson, *From the Twitter Files: Pfizer board member Scott Gottlieb secretly pressed Twitter to hide posts challenging his company's massively profitable Covid jabs*, https://alexberenson.substack.com/p/from-the-twitter-files-pfizer-board (Jan. 9, 2023).
[25] Tuccille *supra* note 19.

hence "democracy-related harm" to the American public.[26] Political power is not diffused amongst the populace at large and executed through established democratic institutions, but through technocratic experts and away from the influences of the citizenry.[27]

As we have learned from *Missouri v. Biden*,[28] these efforts involved the White House, the FBI, the CBC, and several other government agencies.[29] Those businesses, not only complied, but joined wholesale in the endeavor.[30] "When there was doubt, they met with . . . officials, tried to 'partner' with them, and assured them that they were actively trying to 'remove the most harmful COVID-19 misleading information.' At times, their responses bordered on capitulation."[31] Policies were changed,[32] content "demoted" or "promoted" based on the government's preferred message.[33] Officials acknowledged this cooperation "continues to this day."[34] Perhaps most worrying, the Fifth Circuit noted public officials were also subject to these censorship efforts.[35] While the Fifth Circuit affirmed in part the District Court judgment,[36] it must be stressed that the relief sought is against the government, not the private entities continuing to cooperate in the suppression of First Amendment rights.[37] Those entities face zero consequences for their willing violation of constitutional rights and have no disincentive cooperate in the future.

This was not always the case. In fact, the invocation of "political" antitrust enforcement as a complement to economic antitrust enforcement has swung, pendulum-like, from one extreme to the other. Rather than providing a consistent foundation for the enforcement of antitrust law, public policy's mercurial application has led to the present issues the United States now faces. The search for a justiciable middle ground has been fleeting.

This Note will argue that, with the present hesitancy to adopt a more "Brandeisian"[38] antitrust approach, the best method of expanding antitrust

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[26] Viktoria Robertson, Antitrust, Big Tech, & Democracy. 67(2) The Antitrust Bulletin 259, 260, 266 (2022); Harry First & Spencer Waller, Antitrust's Democracy Deficit. 81 Fordham L. Rev. 2543, 2544-45 (2013).
[27] First *supra* note 7, at 2544-45, 2552-53.
[28] 83 F.4th 350 (5th Cir. 2023), *cert. granted sub. nom. Murthy v. Missouri*, 601 U.S. — (2023) (No. 23-411).
[29] *Id.* at 359.
[30] *Id.* at 360-61.
[31] *Id.* at 361.
[32] *Id.*
[33] *Id.* at 362.
[34] *Biden*, 83 F.4th at 364.
[35] *Id.* at 366.
[36] *Id.* at 399.
[37] *Id.* at 369-70.
[38] Jonathan Sallet, *Brandeis' Framework for Antitrust and Competition*, BENTON INST. FOR BROADBAND & SOC., https://www.benton.org/blog/brandeis%E2%80%99s-framework-antitrust-and-competition (Oct. 30, 2018).

enforcement is to tie greater enforcement to enshrined First Amendment freedoms via traditional equity principles. The use of traditional equity principles would supply steady and consistent antitrust principles to those overlapping First Amendment freedoms of speech and press that occupy both the political and economic realms in American society. Equitable principles would supplement the use of antitrust's typical reliance upon public policy, which is more strictly limited than equity jurisprudence. In Part One, it will address the similarities between traditional equitable jurisprudence and common-law public policy. In Part Two it will then delve into the history of the legal concept of a "restraint of trade," how both common law and equitable courts possessed jurisdiction over such restraints, and how statutory antitrust enforcement has utilized remedies identical or similar to existing equitable remedies, further warranting consideration of time-honored and proven equity principles. In Part Three, this Note will discuss the history of "political" antitrust, its similarities to the late labor movement's push for freedom of association, the connections between antitrust and First Amendment values, and the subsequent decline of "political" antitrust in the post-World War Two era. Finally, in Part Four, this Note will combine the application of equitable principles to create a new "political" antitrust to compliment and supplement the contemporary economics-only approach based on the already accepted practice of enforcing First Amendment rights in the economic realm.

Using equity principles, which are more developed and less susceptible to the vagaries of public opinion than public policy, courts could rein in some of the excesses of the Big Tech companies as they presently exist and bring in the concerns of small businesses, independent entrepreneurs, and workers into the protection of more robust and well-rounded antitrust enforcement. Just as the late 19th and early 20th Centuries' expansion of the First Amendment freedom of association helped mitigate the excesses of big business in the past, so too would the inclusion of freedom of speech and expression. Under a framework that utilizes equity and public policy, contemporary antitrust enforcement can be freed of its present calcified application and allow for the steady protection of both liberty and economic interests.

I. EQUITY AND PUBLIC POLICY COMPARED

Although not strictly a product of equity, the prohibition of restraints of trade always possessed the hallmarks of an equitable remedy despite its apparent origins in the English courts of common law. As a result, both courts of equity and the common law adjudicated matters that involved alleged

restraints of trade.[39] According to Justice Story, such contracts were classified as a form of constructive fraud, which brought them within the ambit of courts of equity.[40] Accordingly, although public policy is considered the fount of restraint of trade doctrine in Anglo-American law,[41] equity also invalidated such contracts on its own grounds.[42] This is understandable when one realizes public policy and equity have many similarities in their respective *raison d'etre* and application. Prior to the Sherman Act, there was nothing that prevented a court of equity from presiding over an alleged restraint of trade and applying its own principles to the matter. At heart, this is because the doctrines serve substantially the same interests.

The major difference between the two concepts is the courts to which they owe their origin: equity to the courts of chancery and public policy to the courts of common law. As a result, the characteristics of both equity and public policy are tinged with the political origins from which they respectively derive. Despite these distinct origins, however, both principles of equity and common law public policy were utilized to serve a common purpose: ameliorate the harshness of the common law and, of relevance to this note, prevent the vagaries and potential abuses made possible by the open-ended nature of the ability to contract.[43]

To start, the application of both equity and public policy is not inherently contradictory.[44] Both derive from a long and storied tradition in the Western legal framework.[45] Equity and public policy generally act as

[39] *Compare Livingston v. Van Ingen*, 9 Johns. 507, 507 (N.Y. 1812) (suit filed in Court of Chancery), *with Palmer v. Stebbins*, 20 Mass. 188, 188 (1825) (plaintiff filed suit for liquidated damages in common-law court). The Supreme Judicial Court of Massachusetts in *Palmer* ended its opinion by stating whether the contract in dispute was "useless and unnecessary[,] . . . and therefore not to be enforced by law . . . may be the subject of further consideration on a hearing in chancery . . . ." 20 Mass. at 193.

[40] Justice Story's Commentaries §§ 258, 292-93, 437.

[41] *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 279 (6th Cir. 1898).

[42] *E.g.*, *Keeler v. Taylor*, 3 P.F. Smith 467, 469 (Pa. 1866) (noting that, while "partial restraints [] make the bond good *at law*. Equity is loth, even then, to enforce them, and will not do so if the terms be at all hard or even complex . . . .") (emphasis in original). The Pennsylvania Supreme Court in *Keeler* also noted that, even if the contract were not void, "a chancellor would regard the hardship of the bargain, and the prejudice to the public, and withhold his hand from enforcing it." *Id.* at 470.

[43] 30A C.J.S. §§ 3 & 63; Farshad Ghodoosi, *The Concept of Public Policy in Law: Revisiting the Role of Public Policy Doctrine in the Enforcement of Private Legal Arrangements*, 94 Neb. L. Rev. 685, 687 (2015).

[44] 30A C.J.S. Equity § 101.

[45] *See* Adrian Vermule, Common Good Constitutionalism, 3-4, 77-80 (Polity Press 2022); Michelle Johnson & James Oldham, Law versus Equity--As Reflected in Lord Eldon's Manuscripts, 58 Am. J. Legal Hist. 208, 221-22 (2018).

complimentary forces to moderate the harsh rigidity of both the common law and statutory law.[46]

Equity's first maxim—that equity follows the law—shows equitable principles are readymade to supplement antitrust law and the public policy surrounding it.[47] Just as equity must follow the law, so too must equity abide by public policy.[48] These complimentary aspects lend themselves to the extensive similarities between the two doctrines and led to the eventual merger of courts of common law and equity in most Anglo-American jurisdictions.[49] The similarities are further apparent in the history, historical criticisms, and role of both courts of equity and the common law invocation of the doctrine of public policy in Anglo-American jurisprudence. Even where the two doctrines differ in origin, they converge in rather unified goals of producing better judicial outcomes consonant with prevailing norms and values.[50]

The doctrine of public policy is a civic paragon of public virtue, first designed to protect the values of the community and then later the political community against "general mischief."[51] Equity, on the other hand, started as a "moral virtue, which "qualifies, moderates, and reforms" the common law to avoid the intrigues of clever persons,[52] and was located not in a common-law court but the King of England's administrative departments to affect the will of the crown and church.[53] The common law's doctrine of public policy is

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[46] Stephanie Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 Notre Dame L. Rev. 55, 60-61 (2020) (noting that courts of law moderated the application of general statutes through the use of the doctrine called "equity in the statute" in both 18th Century England and the early United States); Hon. H. Brent McKnight, *How Shall We Then Reason? The Historical Setting of Equity*, 45 Mercer L. Rev. 919, 945 (1994); *see* Russell Fowler, *A History of Chancery and Its Equity*, 48 Tenn. Bar J. 20, 25-26 (2012) (discussing how Justice Story argued equity and the common law were "mutually dependent" and acted as "checks and balances to each other").

[47] *See* 30A C.J.S. Equity § 130.

[48] *Mosley v. Triangle Townhouses, LLC*, 170 So. 3d 1251, 1254 (Miss. 2015); *Hemingway v. Ball*, 179 A. 374, 381 (N.J. Ch. 1935).

[49] Thomas Main, Traditional Equity and Contemporary Procedure, 78 Wash. L. Rev.429, 464-65, 496 n.409 (2003).

[50] *See Leslie v. Lorillard*, 18 N.E. 363, 363 (N.Y. 1888) ("[C]ourts should refrain from the exercise of their equitable powers in . . . restraining the conduct of . . . individuals and corporations, unless their conduct, in some tangible form, threatens the welfare of the public.").

[51] Ghodoosi, *The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements*, 94 NEBRASKA L. REV. 685, 692 (2016).

[52] *Dudley v. Dudley*, Prec. Ch. 241, 244 (1705); *Simonds v. Simonds*, 380 N.E.2d 189, 189 (N.Y. 1978).

[53] Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 537 (2016); A. H. MARSH, HISTORY OF THE COURT OF CHANCERY AND OF THE RISE AND DEVELOPMENT OF THE DOCTRINES OF EQUITY, 14-15 (Fred B. Rothman & Co. 1985) (1890); *In re Est. of Flowers*, 264 So.3d 775, 779 (Miss.

invoked in the name of the legislature, society-at-large, and the overall economy.[54] While, equitable jurisprudence moved away from its religious beginnings, it is still concerned with contemporary social needs and issues.[55] Crucially, equity is not limited by the absence or presence of existing legislation; it is intended to fill in those existing gaps.[56]

Flexibility and adaptability to enforce higher ideals are thus the hallmarks of both equity and public policy. It may, in fact, be apt to say that the doctrine of public policy is merely the fount of what could be called a "middle-class" equity that tracks the growth of the middle class and the movement away from more authoritarian forms of government to those more democratic.[57] Where equity traditionally grounded itself in the dispositions of the monarchy and religion (and has since moved towards more generic social needs), public policy grounds itself in the more democratic domains of legislation, regulation, and popular sentiment. When one looks past the distinct origins, more universal themes undergird the application of both equity and the common law. The concepts of justice and fairness lie at the heart of each.[58]

Further, the courts of chancery and the doctrine of public policy have faced similar criticisms from the stalwarts of the common law. Both are notorious for their relative independence from the strict binds of precedent. Equity is infamous for its "roguish" ways.[59] Although the application of equity has changed considerably since John Selden's criticisms in the 16th century, courts of chancery and the application of equity have retained a considerable degree of independence from the common law. Discretion and the application of moral principles still typify equitable jurisprudence.[60]

Likewise, public policy has been characterized as an unpredictable "unruly horse."[61] This unpredictability is in large part due to the vague nature

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2019) ("A court of equity is a court of conscience.") (internal quotations omitted); *Lyn-Anna Props., Ltd. v. Harborview Dev. Corp.*, 678 A.2d 683, 686 (N.J. 1996).

[54] Ghodoosi, *supra* note 19, at 696, 700-01, 724-25; *e.g.*, *Vasquez v. Glassboro Serv. Ass'n, Inc.*, 83 N.J. 86, 98 (1980) (stating that federal and state legislation as well as judicial sources are among the sources of public policy).

[55] *Severn v. Wilmington Med. Ctr., Inc.*, 421 A.2d 1334, 1348 (Del. 1980).

[56] *Id.* at 1349.

[57] Seymore Martin Lipset, The Expansion of Democracy, 60 Temp. L. Q. 985, 986 (1987); Carl Schramm, Law Outside the Market: The Social Utility of the Private Foundation, 30 Harv. J. L. & Pub. Pol. 355, 362-64 (2006); William T. Quillen & Michael Hanrahan, A Short History of the Delaware Court of Chancery—1792-1992, 18 Del. J. Corp. L. 819, 825 (1993).

[58] Darien Shanske, Four Theses: Preliminary to an Appeal to Equity, 57 Stanford L. Rev. 2053, 2073 (2005); McKnight *supra* note 21, at 930; Ghodoosi *supra* note 19, at 709.

[59] Powell, *"Cardozo's Foot": The Chancellor's Conscience and Constructive Trusts*, 56 L. & CONTEMP. PROBS. 7, 7-8 (1993) (quoting English Legal Scholar John Selden).

[60] H. Jefferson Powell, *supra* note 11, at 9; *Allstate New Jersey Ins. Co. v. Lajara*, 117 A.3d 1221, 1230 (N.J. 2015) (quoting *Sears, Roebuck & Co. v. Camp*, 1 A.2d 425, 429 (N.J. 1938)).

[61] Ghodoosi, *supra* note 19, at 693.

of the concept.[62] This, in turn, has led to competing theories as to what concerns fit within the ambit of public policy and changing societal norms.[63] While public policy's invocation is more restrained, it's potential is abundantly clear. Litigants make public policy arguments every day not only in the United States but across the globe.[64] Where precedent provides no assurances or may perhaps even dissuade a litigant, public policy can prove the difference maker.

Even further, since courts of equity have shed their religious origins, equitable principles and public policy have dovetailed. Such mutuality of purpose is most apparent in the Supreme Court's cases involving the then-burgeoning railroad industry at the end of the 19th Century. In *Joy v. City of St. Louis*, 138 U.S. 1 (1891), the Court was faced with an action to compel specific performance of a contract.[65] Although courts of equity generally will not compel specific contractual performance,[66] and the appellants argued such,[67] the Court ruled otherwise.[68] According to the Court, considerations of public interest were controlling upon a court of equity.[69] Indeed, the powers and procedures of a court of equity were "capable of being made such as to accommodate themselves to the development of interests to the public, in the progress of trade and traffic, by new methods of intercourse and transportation."[70]

Five years later, when another party asserted equity would not compel specific performance when the contracts "requiring continuous acts involving skill, judgment, and technical knowledge,"[71] the Court again ruled otherwise.[72] It noted that, "in the increasing complexities of modern business relations, equitable remedies have necessarily and steadily expanded, and no inflexible rule has been permitted to circumscribe them."[73] Once again, the Court observed equitable remedies and their flexible principles were the best vehicle to effectuate public policy.[74]

As a result, the similarities between equity and public policy also extend to available remedies; common-law public policy has borrowed from equity and equity, in kind, has borrowed from the common law. This is despite

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[62] *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 678 (2008) (Hect, J. concur.).
[63] *See* Ghodoosi, *supra* note 19, at 703-08, 728 (detailing the competing theories of public policy).
[64] Ghodoosi, *supra* note 19, at 687.
[65] *Id.* at 3.
[66] 30A C.J.S. Equity §§ 90, 128.
[67] *Joy*, 138 U.S. at 46, 49.
[68] *Id.* at 51.
[69] *Id.* at 47.
[70] *Id.* at 50.
[71] *U. Pac. Ry. Co. v. Chi., R.I. & P. Ry. Co.*, 163 U.S. 564, 600 (1896).
[72] *Id.* at 600, 603-04.
[73] *Id.* at 600-01.
[74] *Id.* at 603.

the fact the distinct classification of equitable and legal remedies has remained while the traditional distinction between courts of law and equity has subsided.[75] Equity is renowned for its bevy of unique remedies: injunctions, constructive trusts, equitable rescission, cancellation, among others.[76] Yet it is also no stranger to monetary or penal relief.[77] Similarly, concerns of public policy—as evidenced typically by the federal or state legislature—have been invoked to create implied causes of action for parties where none previously existed.[78] While not strictly a remedy, the creation of an implied (or private) right of action permits the recovery of a remedy where one ordinarily would not exist at all.[79] These implied causes of action have provided both traditionally legal and equitable relief.[80]

Due to these similarities and the complimentary aspects between the doctrines of equity and public policy, the lines between law and equity became blurred.[81] Courts of law would invoke equitable principles to void statutes,[82] and courts of equity were not averse to voiding contracts on public policy grounds.[83] For these reasons, many jurisdictions did away with the old distinctions between courts of law and equity and merged them together.[84] The complimentary coexistence is particularly important for antitrust, an

[75] Bray, *supra* note 35, at 544.
[76] Bray, *supra* note 35, at 541, 541 n.51.
[77] Bray *supra* note 35, at 545, 565-66; *Porter v. Warner Holding Co.*, 328 U.S. 395, 398-99 (1946); *F.T.C. v. Bronson Partners, LLC*, 654 F.3d 359, 367 (2d Cir. 2011); *Walensky v. Jonathan Royce Int'l, Inc.*, 624 A.2d 613, 615 (N.J. App. Div. 1993).
[78] *Wisniewski v. Rodale, Inc.*, 510 F.3d 294, 301 (3d Cir. 2007); *see Warren Cnty. Bar Ass'n v. Bd. of Chosen Freeholders of Cnty. of Warren*, 899 A.2d 1028, 1031 (N.J. App. Div. 2006) (describing how an implied private right of action may be found); *see also Nat'l Trust for Historic Pres. v. City of Albuquerque*, 874 P.2d 798, 802 (N.M. 1994) ("A state's public policy. . . may be determinative in deciding whether to recognize a cause of action.").
[79] Caroline Newcombe, Implied Private Rights of Action: Definition, and Factors to Determine Whether a Private Action Will Be Implied From a Federal Statute, 49 Loy. U. Chi. L.J. 117, 120 (2017).
[80] *E.g.*, *J.I. Case Co. v. Borak*, 377 U.S. 426, 432-33 (1964) *abrogated by Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855-56 (2017); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 397 (1971).
[81] Main *supra* note 31, at 464.
[82] Barclay, *supra* note 28, at 80-90 (documenting equitable exemptions created by common law courts in the early American Republic); Owen W. Gallogly, Equity's Constitutional Source, 132 Yale L.J. 1213, 1250-54 (2023) (describing the transition from "conscience-based equity" to "precedent-based equity").
[83] *E.g.*, *Hartman v. Butterfield Lumber Co.*, 199 U.S. 335, 340 (1905) (White, J. dissenting); *see also* Story Commentaries on Equity at § 292.
[84] Const. Art. III § 2 cl. 1; *cf.* Fowler *supra* note 21, at 20 (stating that only Tennessee, Delaware and Mississippi retain distinctly separate courts of equity); *but see* N.J. R. 4:3-1 (dividing New Jersey civil practice between, *inter alia*, the Law Division and the Chancery Division–General Equity).

outgrowth of contract law,[85] which was the subject of parallel developments under courts of law and equity that subsequently coalesced.[86] As will be shown, however, courts have failed to utilize principles of equity in the application of antitrust despite the remarkable similarities between equity and public policy and the overlap that existed before any legislation. Thus, we begin a review of American antitrust law.

II. THE ORIGINS OF AN ILLEGAL RESTRAINT OF TRADE

Constrained by common law and fundamentally altered by statute, antitrust jurisprudence has a long and complicated history. Before delving into the history, it is crucial to note that the concept of a restraint of trade was commonly used—if not exclusively—as a defense against a plaintiff's attempt to enforce a contract.[87] One did not assert a claim of restraint of trade against another with the aim of obtaining relief at law. Rather, when a plaintiff sought to enforce a contract against another party, the defendant would counter that the contract in question was a restraint of trade and should be declared void. "Positive" legal relief, i.e., money damages, was not a remedy for an alleged restraint of trade.[88] Courts looked to the totality of the circumstances and effects of the restraint rather than a series of pre-set elements to satisfy the claim.[89] Even further, where the distinction between the courts remained, courts of both law and equity heard cases involving alleged restraints of trade.[90] There appeared to be no barrier between the two courts in this regard; jurisdiction hinged solely on whether the plaintiff sought injunctive relief or liquidated damages that arose from the particular contract at issue.[91] Yet no firm or coherent basis for the doctrine of restraint of trade was ever established.[92]

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[85] *See* 15 U.S.C.A. § 1 (outlawing all contracts, combinations and conspiracies in restraint of trade or commerce); *see also infra* Part II.
[86] Bray, *supra* note 35, at 538.
[87] First *supra* note 7, at 2546; s*ee*, *e.g.*, *Mitchel v. Reynolds*, 1 PWms 181 (1711); *Pierce v. Fuller*, 8 Mass. 223, 223-24 (Mass. 1811); *Ross v. Sadgbeer*, 21 Wend. 166, 166-67 (N.Y. 1839) (presuming such a contract void until there is proof of adequate consideration); *Mandeville v. Harman*, 7 A. 37, 38 (N.J. Ch. 1886); *Diamond Match Co. v. Roeber*, 13 N.E. 419, 420-21 (1887); *see Or. Steam Nav. Co. v. Winsor*, 87 U.S. 64, 71 (1873).
[88] *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 279 (6th Cir. 1898) (citing cases).
[89] *See* Winsor, 87 U.S. at 67-69.
[90] *E.g.*, Craft v. McConoughy, 79 Ill. 346, 346-48 (1887); Mandeville v. Harman, 7 A. 37, 37-38 (N.J. Ch. 1886); Keeler v. Taylor, 3 P.F. Smith 467, 467-469 (Pa. 1866); Livingston v. Van Ingen, 9 Johns. 507, 507 (N.Y. 1812).
[91] *Compare* Pierce v. Fuller, 8 Mass. 223, 227-228 (1811), *with* Angier v. Webber, 96 Mass. 211, 216 (1867), *and* Mandeville, 7 A. at 38.
[92] ROBERT H. BORK, THE ANTITRUST PARADOX 16, 20 (1st ed. 1978).

The concept of a judicially curable "restraint of trade" stretches back through the ages to that of ancient Rome.[93] While many associate American antitrust law with well-known statutes such as the Sherman Act[94] and subsequent Clayton Act,[95] not to mention the several other statutes that further the Sherman Act's ends,[96] the doctrine is still a creature of American common law.[97] The federal government and the individual states each have their own antitrust laws [98] and prior common law jurisprudence of varying degrees.[99]

A. Restraints of Trade Prior to the Sherman Act: Economic and Political Considerations

For contemporary purposes, the antitrust law finds its fount in the twilight of Elizabethan England with the seminal case of *Darcy v. Allen*,[100] a case that, 400 hundred years later, still finds relevance in contemporary antitrust law.[101] In the 1500s the line was blurred between equity and common-law public policy as to which principles would govern restraints of trade. When the Queen's Bench ruled that the royal monopoly granted to *Darcy* was void it noted that, on this decision, law and equity were in agreement.[102] The court cited, among other materials, the Book Deuteronomy, the Magna Carta, and the Acts of Parliament for the basis of its judgment, much as how either equity or public policy would be enforced.[103] Tellingly, each of these varied sources provided independent support for the early concerns about monopolization's effects on society and the broader issue of impediments on an individual's labor or commerce.

Preeminently, for early English courts was the awful power monopolies possessed that precluded citizens from productive economic activity.[104] In the

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[93] Main *supra* note 31, at 445 n.99.
[94] 15 U.S.C. §§ 1-7.
[95] 15 U.S.C. §§ 12-27. The Clayton Act is particularly important because it allows private parties to bring suit under the Sherman Act. 15 U.S.C.A. §§ 15 & 26.
[96] *E.g.*, Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a.
[97] Nat'l Soc. of Pro. Eng'rs v. United States, 435 U.S. 679, 688 (1978); Thomas Piraino Jr., *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*, 82 IND. L. J. 345, 346 (2007).
[98] *E.g.*, New Jersey Antitrust Act, N.J. Stat. Ann. §§ 56:9-1 to 9-19.
[99] *E.g.*, Mandeville v. Harman, 7 A. 37 (N.J. Ch. 1886).
[100] Darcy v. Allen (1601) 77 Eng. Rep. 1260 (K.B.) (also known as the "Case of the Monopolies").
[101] City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 386 (1991) (Stevens, J. dissenting).
[102] *Darcy*, 77 Eng. Rep. at 1263.
[103] *Id.*, at 1263, 1265.
[104] Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 51 (1911); *See* Jim Powell, *Edward Coke: Common Law Protection for Liberty*, FOUND. ECON. EDUC., (Nov. 1, 1997) https://fee.org/articles/edward-coke-common-law-protection-for-liberty/.

words of Lord Coke, a pioneer of early antitrust law, "it appeareth that a man's trade is accounted his life, because it maintaineth his life; and therefore the Monopolist that taketh a man's trade, taketh away his life."[105] Yet "producers" – typified then by small manufacturers and traders – were not the only class of citizen early common law antitrust sought to protect. The concerns of consumers were equally considered. Issues of price, quality and the amount of production were also factors weighing in favor of finding a restraint of trade and, hence, a monopoly.[106] This nascent approach to restraints of trade thus acted in accordance with a classical political theory that placed liberty and economics, together when there was a claim of restraint of trade.[107]

Yet this variety of source material—biblical, legislative, and philosophical—failed to produce an overarching theory that justified the invalidation of restraints of trade. To wit, it was perhaps because of this broad agreement across diverse viewpoints that made it impossible for a singular basis to gain primacy as the groundwork for an overarching theory. As a result, antitrust experienced haphazard development both in England and later in the United States. This was due in part to the association of restraints of trade with royal monopolies. The almost inseparable association of monopolies and restraints of trade became engrained on both sides of the Atlantic. Crucial terms such as "monopoly" and "restraint of trade" became coterminous.[108] A monopoly, according to Lord Coke was "an institution or allowance. . . whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade."[109] While the close association between the two concepts was perhaps advantageous in the pre-industrial economy and royal prerogative, such a close association eventually became ruinous.

In the United States, the ambiguity and dual concern for producers and consumers as well as economic and political liberty initially found rich soil in the newly formed republic. States incorporated anti-monopoly provisions into their early constitutions.[110]

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[105] Powell, *supra* note 104.
[106] *Standard Oil*, 221 U.S. at 52.
[107] *See* James May, *Antitrust in the Formative Era: Political & Economic Theory in Constitutional & Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 270 (1989); *see also* James Schall, Acton Inst., *Natural Law and Economics*, 3 Religion & Liberty 3 https://www.acton.org/pub/religion-liberty/volume-3-number-3/natural-law-and-economics#:~:text=Natural%20law%20guarantees%20that%20something%20is%20good%20and,to%20achieve%20its%20own%20proper%20end%20and%20purpose (July 20, 2010).
[108] *See Standard Oil*, 221 U.S. at 54.
[109] *Id.* at 51 (quoting 3 Inst. 181, c 85.).
[110] *E.g.*, TEX. CONST. of 1836 Declaration of Rights, § 17; *see also* J.D. Forest, Anti-Monopoly Legislation in the United States, AM. J. OF SOCIO., 412-13 (1896), https://www.journals.uchicago.edu/doi/pdfplus/10.1086/210536.

Statutes were passed to prohibit the formation of monopolies and business actions such as "forestalling."[111] Contracts or acts which were considered to reduce competition "came also in a generic sense to be spoken of and treated as they had been in England, as restricting the due course of trade, and therefore as being in restraint of trade."[112] It was these same "evil consequences" – *inter alia*, restraining the livelihoods of individuals *and* unduly increasing prices – that were the feared results of monopoly in the early United States.[113]

Yet the fear of monopolies, restraints on trade and their pernicious effects in the early American republic failed to produce any more coherence in the United States than it did in England. Rather, the doctrine fell prey to the almost blind faith in progress and industrial development that permeated the 19th Century both in England and the early United States. Throughout the intervening years between the advent of the Industrial Revolution and the passage of the Sherman Act, public policy proved to be a hindrance rather than a steady hand for common law antitrust enforcement. Where parties and courts sought to utilize equitable principles to reel in the unrelented expansion of large corporations, public policy proved detrimental to the plight of smaller businesses and entrepreneurs.[114] The fundaments of public policy, statutes, economics, and society-at-large, were used to restrain the very remedies fashioned to protect smaller enterprises.

With the onset of the Industrial Revolution, the fears of economic concentration and a broad focus on the protection of economic and political liberty withered.[115] Courts increasingly limited their concern to economics for justifications to invalidate contracts and almost unbridled understanding of the freedom of contract all but eliminated the doctrine's application to producers.[116] Courts across the nation repeatedly allowed their personal

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[111] *See Standard Oil*, 221 U.S. at 56 (referencing Massachusetts), *and*, *Forestalling the Market*, Black's L. Dictionary (11th ed. 2019) (Forestalling is the practice "of inhibiting normal trading by persuading sellers to raise their prices on goods or dissuading them from offering the goods in a particular market, or by purchasing as much as possible of certain goods before they reach the market to drive up prices").

[112] *Standard Oil Co.*, 221 U.S. at 56.

[113] *Id.*

[114] *E.g.*, Leslie v. Lorillard, 18 N.E. 363, 363 (N.Y. 1888) (stating that competition is [not] invariably a public benefaction; for it may be carried on to such a degree as to become a general evil).

[115] *See*, *e.g.*, Palmer v. Stebbins, 3 Pick. 188, 192-193 (Mass. 1825) (stating that the court is "inclined to believe, that in this country at least, more evil than good is to be apprehended from encouraging competition" and that it "would be extravagant to suppose that any one, by multiplying contracts of this kind, could obtain a monopoly of any particular trade."); *cf.* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 348 (1897) (White, J. dissenting).

[116] *See Standard Oil Co.*, 221 U.S. at 54-55.

prejudices towards the concepts of economic progress and the benefits of competition to deleteriously impact the doctrine of restraints of trade.[117]

Perhaps most indicative of this rapid change from early efforts to prevent the consolidation of business is the New York case of *Livingston v. Van Ingen*.[118] There, the plaintiffs sought to enjoin a monopoly granted by the New York Legislature over steamboat operations in New York waters against a nascent competitor.[119] Even further, the plaintiffs sought to enforce the New York statute's additional remedy which called for the forfeiture of any competing steamboat to the plaintiff, his heirs or assigns.[120] In an extensively researched opinion reproduced by the New York Court of Chancery, Chancellor John Lansing Jr. denied the injunction and held the statutorily-granted monopoly constituted an impermissible restraint of trade.[121] Citing sources as varied as the common law, the Privileges and Immunities Clause of the United States Constitution, and the Code of Justinian, Chancellor Lansing found the legislatively created monopoly unenforceable.[122] On appeal, the Court for the Correction of Errors of New York reversed.[123] Noting, inter alia, that a monopoly is "in hostility to the public good,"[124] and that the plaintiff-appellants were merely the possessors and not the inventors of such technology,[125] the court nevertheless upheld the legislative conferral of monopoly-status over the entirety of New York.

In a twist, it was the state legislature and the common law courts that eroded the common law understanding of restraints of trade. Where the traditional or classical political theory conceived of economic and political principles as complementary and reciprocal to one another,[126] as typified by the Chancellor's opinion reproduced in *Livingston*, common law courts moved towards a bifurcated approach that segregated economic and political rights. Under this bifurcation, courts were apt to prioritize economics over the political, i.e., liberty interests.[127] Even further, common law antitrust briefly

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[117] *E.g.*, *Lorillard*, 18 N.E. at 363; Diamond Match Co. v. Roeber, 106 N.Y. 473, 482-83 (1887); *Palmer*, 3 Pick. at 192.

[118] Livingston v. Van Ingen, 9 Johns. 507, 514-15 (N.Y. 1812). (The cited opinion is from New York's then-highest court: the Court of Errors and Appeals, which reproduced the Chancellor's opinion in full before reversing the decision.)

[119] *Id.* at 507.

[120] *Id.* at 508 (quoting the statute).

[121] *See id.* at 522.

[122] *Id.* at 515-17, 522.

[123] *Id.* at 562.

[124] *Livingston*, 9 Johns. at 547.

[125] *Id.* at 531.

[126] *See* May, *supra* note 107, at 264, 275.

[127] *See, e.g.*, Palmer v. Stebbins, 20 Mass. 188, 192-93 (1825) (stating that the court is "inclined to believe, that. . . more evil than good is to be apprehended from encouraging competition" and that it would be "extravagant" to assume that anyone could achieve a monopoly through such contracts).

bifurcated under two theories guiding its application: (1) a "general" versus "partial" restraint distinction,[128] and (2) the rule of reason approach.[129] This would only lend further confusion, and dilution, to the doctrine's application.

Under the former, erroneous approach,[130] common law antitrust enforcement reached a nadir that infected the application of the latter rule of reason approach. A restraint of trade was only void if it was "general" in nature.[131] A "general" restraint was one that either precluded a person from performing their trade for the remainder of the person's natural or artificial existence or precluded the person from engaging in a particular economic activity anywhere in the United States.[132] Anything less than a total preclusion was a "partial" restraint and not void.[133]

A case that exemplifies this approach and how drastic its application could be is *Diamond Match Co. v. Roeber*.[134] There, the defendant sold the plaintiff his company with the added condition that the defendant would not engage in the manufacture or sale of matches "at any time or times within 99 years . . . within any of the several states of the United States of America, or in the territories thereof, or within the District of Columbia" except for Nevada and the then-territory of Montana.[135] While the Court of Appeals of New York noted that older common law doctrine may have looked down upon such a broad prohibition, such was no longer the case.[136] "Steam and electricity have for the purposes of trade and commerce have almost annihilated distance" and the rapid expansion of the industrial economy created plenty of other outlets for labor and capital.[137] "The tendency of recent adjudications is marked in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade are void, irrespective of special circumstances."[138] Because the defendant was not precluded from starting up a similar business in the territory of Montana or the state of Nevada, the court found the contract to be a "partial" restraint of trade and hence not void as a matter of law.[139] Tellingly, the only public policies the court relied upon were the "utmost freedom of contract" and the removal of all "unnecessary restrictions" to business.[140] The

[128] *See* Diamond Match Co. v. Roeber, 106 N.Y. 473, 481-82 (1887).
[129] *See* Ellerman v. Chi. Junction Rys. & U.S. Stock-Yards Co., 23 A. 287, 300-01 (N.J. Ch. 1891).
[130] *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 347 (1897) (White, J. dissenting).
[131] *Roeber*, 106 N.Y. at 480.
[132] *See Id.* at 482-83; *see also,* Or. Steam Navigation Co. v. Windsor, 87 U.S. 64, 66-67 (1873).
[133] *Roeber*, 106 N.Y. at 482.
[134] *Roeber,* 13 N.E. 419 (N.Y. 1887).
[135] *Id.* at 419.
[136] *Id.* at 421.
[137] *Id.*
[138] *Id.*
[139] *Id.* at 423.
[140] Diamond Match Co. v. Roeber, 13 N.E. 419, 422 (N.Y. 1887).

Court of Appeals would later further expand *Diamond* to validate all *per se* contractual self-protection in the next year.[141]

Under the latter rule of reason approach, the blind faith in progress and industrial development also biased courts against the doctrine's application.[142] This occurred, in part, because of the sublimation of the "general" versus "partial" distinction into the rule of reason approach.[143] In *Ellerman v. Chicago Junction Railways & Union Stock-Yards Co.*,[144] the Court of Chancery of New Jersey addressed a collateral attack on the legality of a contract.[145] There, the contract prevented defendants from carrying out their trade in Chicago so long as the plaintiff's company was operational.[146] With the rule of reason as its foundation, the chancery court looked to the contract's reasonableness at the time it was made; to wit, whether the restraint was only that necessary to afford a fair protection to the interest of the party in whose favor it was given, and not so large so as to interfere with the public interest.[147] In practice, the court looked at the duration and extent of the restraint and directly relied upon *Diamond Match Co. v. Roeber*, among other New York cases.[148] Because there were opportunities far beyond the confines of Chicago and because, theoretically, plaintiff's company would, at some point, come to an end, the restraint was "eminently reasonable."[149]

Without the strong commitment of a pre-industrial, common law antitrust that combined concerns for both economic and political liberty, the rise of big businesses and monopolies reached a crescendo in the waning years of the 19th century. "The nation had been rid of human slavery. . . but the conviction was universal that that the country was in real danger from another kind of slavery sought to be fastened on the American people[.]"[150] The accumulation of vast sums of capital in possession of a select few of individuals and corporations who would control the production and sale of all commerce was at the forefront of the American mind.[151] With this economic concentration came political influence and social destabilization.[152] Concerns

[141] Leslie v. Lorillard, 110 N.Y. 519, 534 (1888).
[142] *Roeber*, 13 N.E. at 421; Palmer v. Stebbins, 3 Pick. 188, 192 (Mass. 1825).
[143] *See* Ellerman v. Chi. Junction Rys. & U. Stock-Yards Co., 23 A. 287, 299 (N.J. Ch. 1891).
[144] *Id.*
[145] *Id.* at 300.
[146] *Id.*
[147] *Id.*
[148] *Id.* at 301.
[149] *Id.*
[150] Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 83 (1911) (Harlan, J. dissenting).
[151] *See Id.* at 83-84.
[152] May, *supra* note 107, at 297-98.

with these developments produced the fateful legislation intended control the deleterious practices of restraints of trade and monopolization.[153]

B. Reemergence of Political Antitrust and Limitations on Freedom of Contract

In 1890, Congress passed the Sherman Antitrust Act[154] which declared "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States" to be illegal.[155] Further, any person or entity who "shall monopolize, attempt to monopolize, or combine or conspire with any other person or persons" would be guilty of a felony.[156] Every corporation and association, whether it owed its existence to the laws of the United States, it's territories, or a foreign country was subject to these provisions.[157] The Act was to be coextensive with the United States Supreme Court's jurisdiction over interstate commerce.[158] States followed the Federal Government's example and enacted legislation themselves to compliment the federal legislation.[159] By its very language, the Sherman Act limits the ability of both individuals and businesses to contract with one another to preserve political freedom.[160]

What was once a shield to protect the interest of liberty and economics transformed into a sword, an affirmative cause of action. With the passage of the Sherman Antitrust Act, a claimant could receive monetary damages,[161] and companies could be precluded from merging, coordinating, or monopolizing, or even "broken up" after the fact.[162] Individuals found guilty even face potential imprisonment.[163] Overall, however, the remedies available for both federal and state[164] antitrust legislation sound more in equity than the

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[153] *See* Kenneth Lipartito, *The Antimonopoly Tradition*, 10 U. ST. THOMAS L.J. 991, 997, 1000 (2013).
[154] 15 U.S.C. §§ 1-7.
[155] 15 U.S.C. § 1.
[156] 15 U.S.C. § 2.
[157] 15 U.S.C. § 7.
[158] Bork, *supra* note 92, at 20.
[159] *E.g.*, N.J. STAT. ANN. §§ 56:9-1 to -19 (2022).
[160] *See* Barak Richman, *Religious Freedom Through Market Freedom: The Sherman Act and The Marketplace for Religion*, 60 WM. & MARY L. REV. 1523, 1525 (2019) ("The chief legal weapon available to combat the abuse of concentrated private authority is the Sherman Act. It is explicitly designed to counteract powerful economic or professional entities from restraining the preferences and dynamism of individual creativity.").
[161] 15 U.S.C. § 1.
[162] *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 78-81 (1911).
[163] 15 U.S.C. §§ 1 & 2.
[164] Most state antitrust legislation borrows extensively from the Federal Acts and Federal decisions. *E.g.*, N.J. STAT. ANN. § 56:9-19 (mandating that the New Jersey Antitrust Act be construed in harmony with analogous Federal judicial interpretations); *see also* Takeda

common law.[165] To this end, courts presiding over antitrust cases tend to approve remedies more akin to the "particularized justice" characteristic of courts of equity than the standardized remedies of the common law.[166] As a result, antitrust cases are not limited to those remedies specifically provided for in the statutes. Courts have retained jurisdiction over antitrust cases for decades, reminiscent of cases involving trusts, and have also considered pleas for judicial dissolution,[167] divestiture,[168] and disgorgement.[169] In fact, antitrust is also the source of the modern right to repair movement, born out of the necessity to check the economic might of IBM and protect smaller businesses.[170] This nascent movement has sought to limit the power of large corporations by providing consumers greater freedom of choice and information.[171]

Where the doctrine of restraints of trade once straddled the divide between equity and common law, now it almost unequivocally resembles those traditional claims adjudicated by chancery courts. Equitable remedies and the focus on particularized, fact-sensitive judicial remediation meant that combined law and equity courts would behave more like that latter than the former.[172] The newly-forged antitrust sword was, in Senator Sherman's own words, designed to protect the "industrial liberty" which made part of the foundation of all American rights and privileges.[173] The economic, social, and political ills of restraints of trade and monopolization that threatened the American republic were to be fervently combatted with this newfound legal power.[174]

Simultaneous and persisting alongside the "political" branch of antitrust, was the concerted expansion of the labor movement and pro-worker

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Pharm. Co. v. Zydus Pharms. (USA) Inc., 358 F. Supp. 3d 389, 393 n.2 (D.N.J. 2018) (noting that the language of the New Jersey Antitrust Act and the Sherman Act are "virtually identical") (internal quotations omitted).

[165] *See* Boardwalk Props., Inc. v. BPHC Acquisition, Inc., 602 A.2d 733, 741 (N.J. App. Div. 1991).

[166] *See* Shanske, *supra* note 58, at 2059, 2073.

[167] Brady v. Van Vlaanderen, 819 S.E.2d 561, 564 (N.C. 2018); United States v. Aluminum Co. of Am., 148 F.2d 416, 446 (2d Cir. 1945).

[168] California v. Am. Stores Co., 495 U.S. 271, 295 (1990).

[169] United States v. Keyspan Corp., 763 F. Supp. 2d 633, 640 (S.D.N.Y. 2011); *but see* AMG Cap. Mgmt., LLC v. F.T.C., 141 S. Ct. 1341, 1344 (2021) (holding that the FTC does not possess the authority to award equitable remedy of disgorgement under the FTC Act).

[170] Jared Mark, *Realizing a New Right: The Right to Repair at the Federal Stage*, 23 N.C. J. L. & TECH. 382, 388-89 (2021).

[171] *See* Thorin Klosowski, *What You Should Know About Right to Repair*, N.Y. TIMES, (July 15, 2021) https://www.nytimes.com/wirecutter/blog/what-is-right-to-repair/.

[172] *See* United States v. Microsoft Corp., 253 F.3d 34, 49, 105 (D.C. Cir. 2001) (dividing antitrust remedies into "conduct" and "structural" categories and noting that district courts have broad discretion to grant equitable relief).

[173] May, *supra* note 107, at 290.

[174] *Id.*

legislation.[175] Much like the early antitrust advocates, the labor movement and its advocates possessed a similar commitment to the classical connection between economic and political liberties.[176] Just as antitrust law dealt with the necessary limitations to the freedom of contract, the labor movement was centered around the conflict between the freedom of contract, freedom of association and the right to one's labor.[177] Labor activists looked to natural law as well as established constitutional rights to protect the rights of individual workers against predations by big business.[178] The question thus was about control over an individual's labor as an issue of constitutionally protected liberty.[179] Alongside the Clayton Act, which exempted unions from most Sherman Act claims, Congress would eventually pass the Norris-LaGuardia Act.[180] This legislation was intended to protect individual workers' "freedom of labor"[181] and, among other things, precluded "yellow-dog" contracts that prohibited workers' freedom of to unionize.[182] In effect, Congress linked a constitutional protection — the First Amendment's freedom of association — with what would ordinarily be seen as a purely private, economic matter that involved the freedom of contract.[183]

Likewise, the interplay of the First Amendment freedom of association applied in the economic realm and freedom of contract was also employed against unions that sought to enforce "closed shops"[184] (i.e., those businesses that agree to only employee union members in good standing).[185] Just as an employer could not preclude a worker from joining a union, a union could not preclude a worker from joining a rival union or no union at all. Freedom of economic association could not be unreasonably restricted for the purpose of securing domination of the given labor space.[186] One can also find a similar reasoning behind various state "right to work" laws[187] and the invalidation of

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[175] *See* Sanjukta Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 997-99 (2016).
[176] *See Id.*; *and* Lipset, *supra* note 57, at 986.
[177] *See* Barry Cushman, *Doctrinal Synergies and Liberal Dilemmas: The Case of the Yellow Dog Contract*, 1992 SUP. CT. REV. 235, 236-37 (1992).
[178] James Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor & the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1, 15-16, n. 51 (2002).
[179] *Id.* at 23-24.
[180] 29 U.S.C. §§ 101-15.
[181] 29 U.S.C. § 102.
[182] 29 U.S.C. § 103.
[183] Seth Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 VA. L. REV. 685, 714-16 (1985).
[184] Cushman, *supra* note 177, at 246 (1992). Closed shops were later statutorily outlawed under the Taft-Hartley Act. 29 U.S.C. § 158(b).
[185] *Closed shop*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[186] Cushman, *supra* note 177, at 247.
[187] Lunsford v. City of Bryan, 297 S.W.2d 115, 117 (Tex. 1957) (stating that the purpose of Texas' right to work law is to "protect employees in the exercise of the right of free choice of

certain New Deal legislation.[188] The key theme underlying each of these positions is the recognition that coercion exercised via overwhelming economic might should not permit liberty of contract to trump other recognized liberty interests.[189]

Yet these influences and the impact of coercion upon the sacrifice of political liberties due to extreme economic pressure went largely unnoticed by the courts in the field of antitrust. There appeared to be no consensus as to how the Sherman Act should be enforced as the common law itself was not unified on the matter at the time of its passage.[190] Whether, and to what extent, there should be a political branch to antitrust enforcement was unclear.

Initially, the United States Supreme Court provided for a literal, textual interpretation of this broad prohibition against restraints of trade. In 1897, the United States Supreme Court, in a 5-4 decision, held that there was no limiting language as to which restraints on trade were illegal.[191] Looking at the common law, the majority found that, regardless of whether a contract was deemed void or valid, a restraint of trade was nonetheless a restraint of trade.[192] Congress, thus, declared that all agreements in restraint of trade were illegal and there was no permissible – i.e., reasonable or valid – restraints on trade or commerce.[193] Justice Peckham's majority opinion relied, in part, upon the realization that vast accumulations of capital would turn the independent small business man into a mere corporate servant forced to follow orders and do little more.[194] Despite this initial victory and enunciation that courts should consider the inherent value of independent small entrepreneurs, the Supreme Court would be unable to build upon Justice Peckham's foundation.

Justice White, in dissent, noted that such a broad and total prohibition was not only demonstrably false under the common law,[195] but that such a stark reading of the statute turned the courts against the nascent labor movement, rather than big business.[196] By 1897, several such suits had

joining or not joining a union."); *but see* J.D. Tuccille, *When Right-To-Work Is Wrong and Un-Libertarian*, REASON (Dec. 12, 2021, 1:58 PM), https://reason.com/2012/12/12/when-right-to-work-is-wrong-and-un-liber/ (last viewed Apr. 4, 2024)).

[188] Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (invalidating the NIRA for violating minority workers' interests and interference with personal liberty and private property under the Fifth Amendment).

[189] *Id.* at 289; Cushman, *supra* note 177, at 249-50, 254, 266.

[190] First & Waller, *supra* note 9, at 2547.

[191] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 328 (1897).

[192] *Id.*

[193] *Id.* at 341.

[194] *Id.* at 323-24.

[195] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 352 (1897) (White, J., dissenting).

[196] *Id*. at 355-56.

already occurred throughout the country and would proceed for some time more.[197] In fact, Congress had to respond to the application of the Act against labor organizations by repeated legislative enactments.[198] According to Justice White, a proper reading of the Sherman Act was thus the codification of the rule of reason.[199]

Less than a year later, Justice White found vindication in the decision written by future Chief Justice William Taft in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898).[200] There, then-Judge Taft exhaustively elaborated upon the history of common-law restraint on trade jurisprudence and laid the foundation for the rule of reason.[201] With the decision of *Standard Oil Co. of New Jersey v. United States* in 1911, the strict textual approach was officially abandoned for the common law rule of reason.[202] Under the re-born rule of reason a three-part analysis was developed: (1) the *per se* concept; (2) market power; and (3) specific intent.[203] As such, Justice White's rule of reason was simply a system of analysis for directing investigation and decision; there were still no substantive rules for antitrust enforcement.[204]

In so doing, however, the United States Supreme Court re-adopted the common-law rule of reason at its lowest point, in particular to its protection of Americans as citizens and producers. Equally fortuitous was the failure to modify the rule of reason to comport with a claim of restraint of trade now as an affirmative claim instead of a quasi-equitable defense. Perhaps purposefully, the rule of reason was "Lochnerized" to comport with the freedom of contract prevalent with the then-sitting Supreme Court.[205] The Sherman Act's ability to prohibit restraints of trade was curtailed to allow for an extensive freedom of contract.[206]

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[197] *E.g.*, Duplex Printing Press Co. v. Deering, 254 U.S. 443, 467-68 (1921).
[198] United States v. Hutcheson, 312 U.S. 219, 229-31 (1941).
[199] *See Trans-Missouri*, 166 U.S. at 344 (White, J., dissenting).
[200] Although not a Supreme Court case, then-Judge Taft's decision is "universally accepted as authoritative," is repeatedly cited by the United States Supreme Court and lauded by antitrust scholars. Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 738-39 (1988) (Stevens, J., dissenting).
[201] *See* United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898).
[202] *See* Standard Oil Co. v. United States, 221 U.S. 1, 66 (1911).
[203] BORK, *supra* note 92, at 37.
[204] BORK, *supra* note 92, at 37. This fact-specific characteristic, while unusual in courts of law, is typical for courts of chancery. *Earl of Oxford's Case in Chancery*, 21 Eng. Rep. 465, 466 (1615) ("The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances.").
[205] Alan Meese, *Standard Oil as Lochner's Trojan Horse*, 85 S. CAL. L. REV. 783, 787-89 (2012).
[206] *Id.* at 790.

An unbridled, unfocused review of the entire circumstances consequently proceeded to govern federal antitrust enforcement.[207] Although the antitrust statutes were adorned in glowing language,[208] enforcement was predicated less upon the facts of the case and more upon the status of the American economy and the sentiment of the Justices.[209] Likewise, the states themselves struggled to draft and enforce their own antitrust regulations in light of the often uncertain and conflicting political concerns and necessary constitutional requirements.[210] A strict application of public policy hindered, rather than aided the enforcement of antitrust.

It was not until the mid-20th century that some direction and focus was brought to the field of antitrust law. This "Harvard" or "structural" approach was premised upon the idea that market concentration was conducive to anticompetitive conduct.[211] Market concentration was to be opposed at all costs, regardless of any benefit to consumers.[212] Political antitrust would center around a vague aversion to "bigness."[213] This meant that the rule of reason was sidelined for greater and greater use of a *per se* approach.[214] While easy to apply,[215] this further atrophied the abilities of the court to utilize anything more than a scatter-shot approach to adjudicating antitrust cases.

By the 1970s, the "structural" approach began to falter, and the Supreme Court slowly moved back towards the rule of reason.[216] Again, however, there was no focus to the overall inquiry as to how one could foretell what would constitute an impermissible restraint of trade.[217] Into this void step the Chicago School of antitrust, perhaps best exemplified by Robert Bork's magnum opus "The Antitrust Paradox."[218] Where antitrust law once stood to

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[207] Bd. of Trade. of Chi. v. United States, 246 U.S. 231, 238 (1918) (holding that to determine whether a restraint is reasonable, a court must consider "the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable" with relevant facts being "[t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained.").

[208] *See* Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933) (calling the Sherman Antitrust Act a "charter of freedom" comparable to constitutional provisions).

[209] Sheldon Kimmel, *How and Why the Per Se Rule Against Price-Fixing Went Wrong*, DEP'T OF JUST. (Mar. 2006), https://www.justice.gov/atr/how-and-why-se-rule-against-price-fixing-went-wrong.

[210] *E.g.*, Int'l Harvester Co. v. Kentucky, 234 U.S. 216, 220, 223 (1914) (holding Kentucky's antitrust law void for vagueness).

[211] Piraino, Jr., *supra* note 97, at 348-49.

[212] Piraino, Jr., *supra* note 97, at 349.

[213] *See* BORK, *supra* note 92, at 41-49.

[214] Piraino Jr., *supra* note 97, at 349.

[215] Piraino Jr., *supra* note 97, at 349-50.

[216] Cont'l T.V. v. GTE Sylvania, 433 U.S. 36, 59 (1977); Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006).

[217] *See GTE Sylvania*, 433 U.S. at 59.

[218] BORK, *supra* note 92.

reign in the dangers of "bigness," now it concern itself with economic efficiency.[219]

Per the Chicago School, the problems of competition and monopolization should be analyzed through a purely economic lens.[220] The rule of reason was just a set of general categories given content by the court's ideas about the proper goals of the law, economics, and the requirements of the judicial process.[221] The use of public policy was hopelessly incoherent.[222] Only a focus on economics could produce a logical and coherent antitrust policy.[223]

The consumer, and the consumer alone, was to be the focal point of antitrust under this economic approach.[224] The emphasis would shift from protection of competition as a process of rivalry to the protection of competition as a means of promoting economic efficiency for the sake of consumers.[225] This was the only logical purpose of economic activity and hence the only logical and consistent policy for antitrust.[226]

Thus, "it became recognized that the lawful monopolist should be free to compete like everyone else . . . ."[227]

To solidify and give legitimacy to this position, the Chicago School asserts consumer welfare was at the heart of antitrust law from the beginning, a beginning that was curated down to the passage of the Sherman Act in 1890 and no older.[228] Not only could this be allegedly evinced in the legislative debates of the Sherman Antitrust Act,[229] but it could be found in Justice Peckham's textualist holding in *Trans-Missouri* as well as subsequent cases.[230] The consumer welfare standard could also be found at the heart of Justice White's opinion in *Standard Oil*.[231] It was only a series of unfortunate errors – in the opinions of both Chief Justice Peckham and Justice White – that led the courts away from this ever-present consumer welfare standard.[232]

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[219] Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 375 (7th Cir. 1986).
[220] BORK, *supra* note 92, at 90.
[221] BORK, *supra* note 92, at 21.
[222] BORK, *supra* note 92, at 46.
[223] BORK, *supra* note 92, at 81-90.
[224] Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308 (3d Cir. 2007).
[225] F.T.C. v. Actavis, Inc., 570 U.S. 136, 161 (2013) (Roberts, C.J. dissenting); In re EpiPen Mktg., Sales Pracs. & Antitrust Litig., 44 F.4th 959, 959 (10th Cir. 2022).
[226] *See* BORK, *supra* note 92, at 50-51, 61.
[227] Olympia Equip. Leasing Co. v. W. Union Telegraph Co., 797 F.2d 370, 375 (7th Cir. 1986) (Posner, J.).
[228] BORK, *supra* note 92, at 15.
[229] BORK, *supra* note 92, at 20.
[230] BORK, *supra* note 92, at 22, 24 (stating that Justice Peckham "necessarily implies an *exclusive* concern with consumer well-being") (emphasis added).
[231] BORK, *supra* note 92, at 35.
[232] BORK, *supra* note 92, at 25, 37.

The Chicago School's approach became so dominant that today, the approach is all but undisputed. Robert Bork's work has been cited favorably by the United States Supreme Court as well as every Circuit Court of Appeals in the country.[233] The broad, unfocused approach that previously plagued antitrust remained, but now economics, pure and complicated, dictates the analysis.[234]

III. THE CONSUMER WELFARE STANDARD, ITS DISCONTENTS, AND ITS CONSEQUENCES

A. The Consumer Welfare Standard in Practice

Before delving into the consumer welfare standard, it is important to note that, like all else with antitrust jurisprudence, standing under antitrust law is utterly distinct. Under any other claim, standing requires (1) an injury in fact (i.e., concrete and particularized as well as actual or imminent), (2) fairly traceable to the challenged conduct of the defendant, that is (3) likely to be redressed by a favorable decision.[235] In contrast, an antitrust plaintiff must survive a five-factor balancing test.[236] This test considers: (1) the causal connection between the alleged violation and the harm to the plaintiff, and defendant's intent to cause that harm, with no one factor dispositive; (2) whether the plaintiff's injury is that which the antitrust statutes were intended to redress; (3) the directness of the injury; (4) the existence of more direct victims of the alleged violation; and (5) the potential for duplicative recovery or complex apportionment of damages.[237] The onerous nature of such a test is all the more so when one considers the heightened pleading standards required from, among other cases, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 444 (2007).[238]

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[233] *E.g.*, Nat'l Collegiate Athletics Ass'n v. Alston, 141 S. Ct. 2141, 2156 (2021); St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 790 (9th Cir. 2015); Geneva Pharms. Tech. Corp. v. Barr Lab'ys, Inc., 386 F.3d 485, 508 n.4 (2d Cir. 2004); Advo, Inc. v. Phila. Newspapers, Inc., 51 F.3d 1191, 1203 n.12 (3d Cir. 1995)

[234] *Alston*, 141 S. Ct. at 2161.

[235] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

[236] Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 320 (3d Cir. 2007).

[237] *Id.*

[238] JAMES KEYTE ET AL., *United States,* PRIVATE ANTITRUST LITIGATION 2018 141 (Samantha Mobley ed., 2017), https://www.skadden.com/-/media/files/publications/2017/09/private_antitrust_litigation.pdf; *see* Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 88 (2007) (noting that, in the aftermath of *Twombly*, antitrust complaints often run over 100 pages in length to assure plaintiffs possess enough factual material to survive dismissal).

It is only after this rigorous standing test[239] is met that a plaintiff can then proceed to the merits of the claim. If the alleged violation does not constitute a *per se* violation, and the court decides to forgo a "quick look" analysis, then the claim proceeds under the rule of reason.[240] Only in this last scenario must a plaintiff surmount the consumer welfare standard, with all its theoretical and practical limitations.

On the theoretical level,[241] the consumer welfare standard views all alleged antitrust violations with an eye towards the action's effects on consumers. Courts are to protect the process of competition only as a means of promoting economic efficiency.[242] Economic efficiency, in turn, is to be viewed from the lens of consumers.[243] Towards competitors, i.e., producers, antitrust is indifferent.[244] This is because, as a consumer, there is no attachment to any producer, only the product and the price thereof; whether the number of producers withers is immaterial to the generic consumer.[245] The court's goal, therefore, is to determine whether the restraint is harmful to the consumer, and thus anticompetitive, or in the consumer's best interest.[246]

It is with that foundation that a court determines whether there is a restraint of trade. The rule of reason requires a court conduct a fact-sensitive assessment of market-power and market structure to assess the restraint's "actual effect" on competition.[247] This includes a determination of the relevant market, i.e., those commodities reasonably interchangeable by consumers for the same purposes based on factors such as price, use and the product's qualities.[248] The existence of a relevant market is not a given; a plaintiff must

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[239] This does not say anything about the other burdensome requirements and doctrines of antitrust law that stem from the consumer-welfare standard. *See* William Markham, *The Consumer-Welfare Standard Should Cease to Be the North Star of Antitrust*, CAL. LAW. ASS'N (2021), https://calawyers.org/publications/antitrust-unfair-competition-law/competition-fall-2021-vol-31-no-2-the-consumer-welfare-standard-should-cease-to-be-the-north-star-of-antitrust/.

[240] Ohio v. Am. Express Co., 138 S. Ct. 2274, 2283-84 (2018).

[241] It is important to note at this point that the "consumer welfare standard" is a misnomer. Kenneth Heyer, *Consumer Welfare and the Legacy of Robert Bork*, 57 J. L. & ECON. S19, S20 (2014); Kati Cseres, *The Controversies of the Consumer Welfare Standard*, 3(2) COMP. L. REV., 121, 124 n.5 (2007). In the present legal context, "consumer welfare" is better understood to mean "total welfare." Kenneth Heyer, *Consumer Welfare and the Legacy of Robert Bork*, 57 J. L. & ECON. S19, S20 (2014); Kati Cseres, *The Controversies of the Consumer Welfare Standard*, 3(2) COMP. L. REV., 121, 124 n.5 (2007).

[242] Sanofi-Aventis U.S., LLC v. Mylan, Inc., 44 F.4th at 959, 984-5 (10th Cir. 2022).

[243] *Id.* at 985.

[244] *Id.*

[245] *Sanofi-Aventis*, 44 F.4th at 985; Marrese v. Am. Acad. of Orthopaedic Surgeons, 706 F.2d 1488, 1497 (7th Cir. 1983).

[246] Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018).

[247] *Id.*

[248] Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir. 1991) (citing United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377, 395 (1956)).

establish the relevant product market and the relevant geographical market.[249] Yet there is little, if any, structure to a restraint of trade claim beyond this.

After the relevant market is established, the plaintiff shoulders the initial burden to establish a substantial anticompetitive—i.e., anti-consumer—effect through either direct evidence (such as proof of decreased output or increased prices) or indirect evidence ("proof of market power plus some evidence that the challenged restraint harms competition").[250] Once shown, the burden shifts to the defendant(s) to provide a procompetitive rationale for the restraint.[251] If such a rationale is provided, the burden then shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.[252]

B. Criticism of an Economic-Centered Antitrust and the Consumer Welfare Standard

While the consumer welfare standard approach appears simple on its face, in effect, the burdens prove to be more mountain than molehill. Even worse, the mountain is no better defined than it was before the courts adopted the consumer welfare standard. Instead of creating a clear, theoretical framework upon which to assess potential violations – as was Bork's intention – current antitrust enforcement is equally, if not more, opaque with courts simply erring on the side of the challenged business activity for one reason or another.[253]

One of the biggest theoretical issues is the distortion of the total welfare and consumer welfare standards. While courts speak as though economic efficiency, pure and simple, is the standard, the clear focus is on consumers. To wit, by all accounts, the concerns of producers/competitors are nonissues. Courts are thus tasked with assessing economic activity in the abstract and aggregate while simultaneously considering factors that are at odds with the aggregate economic activity in question.[254]

In the same vein, there is also the patent issue of the term "consumer." While the term may conjure up images of an individual buyer interacting with

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[249] MODEL JURY INSTRUCTION 3B (2016) (AM. BAR ASS'N).
[250] *Am. Express*, 138 S. Ct. at 2284.
[251] *Id.*
[252] *Id.* It is important to note, however, that this back-and-forth approach is not intended to be a fixed approach; a court can vary its assessment based on the particular circumstances of the case at hand. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2160 (2021).
[253] *See* Markham, *supra* note 239.
[254] Cseres, *supra* note 241, at 124 n.5, 137 (stating that, if the goal is to maximize consumer welfare, then antitrust is not focused on economic efficiency, or total surplus but solely on consumer surplus); Hovenkamp, *supra* note 238, at 84.

a seller, whether online or in person, this is but half of the picture. In our complex economy, producers/competitors are also consumers.[255] Nevertheless, the concerns of these intermediary economic actors go unaddressed despite the abuse proliferated by certain corporations.[256] Contemporary antitrust jurisprudence under the consumer welfare standard is thus caged into a myopic understanding of who and what are affected by various anticompetitive activities. It does not concern itself with Americans as producers, nor as citizens in a democratic Republic.[257]

Likewise, there are numerous legislative and judicial critiques of the economics-only approach and the consumer welfare standard. The most glaring criticism is that the courts are not staffed by expert economists.[258] Nor does the language of the Sherman Act or any sister legislation limit its ambit to the plight of consumers.[259] The men who worked to pass the Sherman Act spoke open and often about the need for legislation that would the bundle of economic and political rights that are interwoven and indispensable to the American experiment.[260] This understanding was echoed in similar legislation passed by the States.[261] Only under this combined framework could the Sherman Act become the "charter of freedom" and "Magna Carta of free enterprise" comparable to constitutional provisions.[262] When viewed in this light, the Sherman Act and similar legislation are intended to decentralize vast accumulations of economic authority that often evolve into political authority.[263] Just as it is foreseeable that the concentration of political power can lead to a subsequent concentration of economic power, it is equally foreseeable that the consolidation of economic power can lead to the consolidation of political power.[264]

As a result, the Supreme Court has noted that the overlap between antitrust principles and explicit constitutional protections is more than a mere academic exercise. The application of the antitrust laws is both consistent and

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[255] Cseres, *supra* note 241, at 131; Heyer, *supra* note 241, at S28; *see* Clayton Masterman, *The Customer is Not Always Right: Balancing Worker and Customer Welfare in Antitrust Law* (Vanderbilt Univ. L. Sch., Working Paper No. 17-4, 14-15).
[256] Peinert, *supra* note 7; Erik Peinert & Katherine Van Dyck, *The Needless Desertion of Robinson-Patman*, PROMARKET (Oct. 10, 2022), https://www.promarket.org/2022/10/10/the-needless-desertion-of-robinson-patman/.
[257] *See* David Barnes, *Nonefficiency Goals in the Antitrust Law of Mergers*, 30 WM. & MARY L. REV. 787, 852-53 (2016).
[258] *See* United States v. Topco, Assocs., Inc., 405 U.S. 596, 610 (1972).
[259] Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219, 236 (1948).
[260] *See* May, *supra* note 107, at 289-90.
[261] May, *supra* note 107, at 291.
[262] Appalachian Coals v. United States, 288 U.S. 344, 359-60 (1933); *Topco*, 405 U.S. at 610.
[263] United States. v. Columbia Steel Co., 334 U.S. 495, 536 (1948) (Douglas, J., dissenting).
[264] *See id.*; Louis B. Schwartz, *The Schwartz Dissent*, 1 ANTITRUST BULL. 37, 39 (1955).

supportive of First Amendment values.[265] Since the First Amendment's speech protection is concerned with the "marketplace of ideas"[266] and the supply of diverse and competing information that will produce a more informed and prepared citizenry, monopolization of such marketplaces is unequivocally found odious.[267] The First Amendment provides "powerful reasons" for the application of antitrust laws when those rights are implicated.[268] The entire purpose of the First Amendment is to provide for "the widest possible dissemination of information from diverse and antagonistic sources . . . ."[269] This is echoed by the Federal Communications Commission's own position that "the public interest is best preserved by permitting [the] free expression of views."[270]

The logic of the marketplace of ideas thus mirrors the logic of the free market economy: for either freedom to mean anything, the competitive process must be protected.[271] Governments seek to protect competition so that, in general, consumers have access to the best available goods and individuals are free to try their hand at the occupation of their choosing.[272] Likewise, the states and the federal government have sought to keep markets free from "anticompetitive practices,"[273] so they have done with the marketplace of ideas.[274] Without the requisite protections, either marketplace would wither and impede the function of our democratic society.

In the absence of the complimentary political branch to antitrust, these impediments have in fact impacted our state and federal government.[275] The

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[265] Fed.Commc'n. Comm'n. v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 800, n. 18 (1978) (citing cases); United States v. AT&T, 552 F. Supp. 131, 184 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[266] Maurice Stucke & Allen Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L. J. 249, 252 (2001) (defining the marketplace of ideas as the "sphere in which intangible values compete for acceptance.").

[267] *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

[268] Associated Press v. United States, 326 U.S. 1, 20 (1945).

[269] *See id.*

[270] *The FCC and Speech*, FED. COMMC'NS COMM'N, https://www.fcc.gov/consumers/guides/fcc-and-speech (Aug. 31, 2022).

[271] *Compare* Texas v. Johnson, 491 U.S. 397, 408 (1989) ("[A] principal function of free speech under our system of government is to invite dispute.") (internal quotation marks omitted), *with* Spectrum Sports v. McQuillan, 506 U.S. 447, 458 (1993) ("The purpose of the [Sherman] Act is . . . to protect the public from the failure of the market. The law directs itself . . . against conduct which unfairly tends to destroy competition itself.").

[272] *See* FTC v. Qualcomm Inc., 969 F.3d 974, 987-88 (9th Cir. 2020).

[273] *See id.*

[274] *See* Stucke & Grunes, *supra* note 266, at 251-52; *see also Johnson*, 491 U.S. at 419 ("The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong.").

[275] *See generally* First & Waller, *supra* note 9, at 2546-63 (describing contemporary antitrust's effects on American courts, Congress, bureaucracy, and state enforcement); *see also* Robertson, *supra* note 1, at 266-67.

grave concerns of prior generations have largely come to pass and with little of the alleged benefits that the proponent of the consumer welfare standard promised.

C. The Consequences

Perhaps the greatest issue for private plaintiffs is the increased reliance upon abstract economic theory.[276] As Justice Kavanaugh noted in *National Collegiate Athletic Association v. Alston*, courts have disposed of nearly all rule of reason cases in the last 45 years on the ground that the plaintiff failed to carry its initial burden.[277] This is in spite of the fact that antitrust plaintiffs are apt to spend an inordinate amount of time – and money, if possible – on establishing a case.[278] Procedural barriers, human limitations, and barriers imposed by the consumer welfare standard's application are to largely to blame.

Due to the complete segregation of the political and economic spheres, antitrust has moved away from the layman and is firmly entrenched in the realm of technocratic expertise.[279] Parties to antitrust litigation are, in essence, thus required to retain an economic expert,[280] who are by no means inexpensive.[281] The models and projections produced by these experts are complex and, most importantly, speculative.[282] To wit, such models may even be reflective of a world that only exists in theory,[283] or fail to account for the rise of companies that behave in a manner inconsistent with prior industrial corporate models, such as Amazon.[284]

Worst of all, the expert models are eventually placed before judges and, if the plaintiff is lucky, jurors who have no economic training upon which to assess the expert evidence.[285] A plaintiff, or prospective plaintiff, hence must commit to gambling away vast sums of money only to, in all likelihood, find that the efforts required by the court produce unintelligible or inconclusive results that left his case no better position. Faced with this inconclusive result,

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[276] *See* Heyer, *supra* note 241, at 25.
[277] NCAA v. Alston, 141 S. Ct. 2141, 2160-61 (2021).
[278] *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 12-13 (1984); *see also* Hovenkamp, *supra* note 238, at 92-93.
[279] *See* First & Waller, *supra* note 9, at 2544.
[280] *See* Hovenkamp, *supra* note 238, at 98.
[281] *See* Stuart N. Senator & Gregory M. Sergi, *Noerr-Pennington: Safeguarding the First Amendment Right to Petition the Government*, 23 COMPETITION J. ANTITRUST & UNFAIR COMPETITION L. 83, 99 (2014); *see also* Markham, *supra* note 239, at 33.
[282] *See generally* Markham, *supra* note 239, at 33.
[283] *See generally id.*
[284] *See* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 747-54 (2017).
[285] *See* Hovenkamp, *supra* note 238, at 99; Heyer, *supra* note 241, at 25.

courts have used the economic muddle to excuse them from proactively adjudicating antitrust disputes.

Rather than streamlining and creating navigable, predictable rules for antitrust enforcement, the consumer welfare standard has left contemporary antitrust laws toothless and sclerotic. The only predictability that has resulted is that courts will rarely, if ever, find conduct to be anticompetitive within the meaning of applicable antitrust laws. While proponents of the consumer welfare standard find this lack of enforcement worthy of praise, data paints a much bleaker picture. Market concentration has increased considerably across economic sectors.[286] The number of new businesses started each year has also steadily decreased since 1979.[287] Corporations adapted to lax antitrust enforcement to further expand and exert their dominance over others.[288]

While profits have increased across the United States, big businesses have been the overwhelming beneficiaries of this development.[289] Yet big businesses have not benefitted from the increased profits due to greater economic efficiency or on the quality of their products and services. Instead, big, concentrated businesses have resorted to exerting pressure on suppliers and employees as well as raising prices on consumers.[290] These efforts by big business have generated a return-on-equity 40% higher in domestic markets than abroad in the past decade.[291]

As for the Big Tech companies, the economic and political effects of their concentration are equally staggering. This concentration is so titanic that a broad consensus has developed across the political spectrum that something must be done to limit their influence on both the public at large and the American political system.[292] The "Big Four," Alphabet (commonly known as Google), Amazon, Apple and Facebook, possess GDP's larger than some developing countries.[293] More concerning than the sheer volume of capital amassed by these companies is the influence they have exerted over American elections and the controversy around their actions taken (and failed to take). The free flow of information is filtered and curated based upon the whims of

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[286] *See* Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 921-23 (2007) (Breyer, J., dissenting); *see also* Markham, *supra* note 239, at 39.
[287] Markham, *supra* note 239, at 39.
[288] *See* Peinert, *supra* note 7; *see also* Peinert & Van Dyck, *supra* note 256; *see generally* Khan, *supra* note 284, at 756, 761, 774-77.
[289] *See* Markham, *supra* note 239, at 39.
[290] Markham, *supra* note 239, at 37-39.
[291] Markham, *supra* note 239, at 38.
[292] Roger P. Alford, *The Bipartisan Consensus on Big Tech*, 71 Emory L.J. 893, 901-02 (2022).
[293] Kyle Daly, *Big Tech's Power, in 4 Numbers*, AXIOS (July 27, 2020), https://www.axios.com/2020/07/27/big-techs-power-in-4-numbers.

companies or those with whom these companies seek to ingratiate themselves.[294]

In the same vein, there is growing concern around "cancel culture" and the stifling of free expression.[295] People of varying political persuasions have expressed a sense of existential threat posed by this modern sword of Damocles wielded by the vagaries of the mob.[296] This pernicious practice (a nod to the classical model which understands the overlap and complimentary nature of the economic and political) has also found acceptance inside and outside the halls of political power. Over the last several years, terms such as "fake news," "misinformation" and "disinformation" have entered the public lexicon; "fact checks" have become politicized; and vigorous debates over who can lay claim over "science" have permeated public discourse. Private parties have also taken it upon themselves to attempt to influence political developments by utilizing Big Tech companies and their vast resources.[297]

Yet there remains a perverse inertia in the halls of American government that has prevented any legislative or regulatory progress on the abuses fostered by Big Tech and other large entities. All the saber-rattling in Congress that has occurred over the last several years about expanded antitrust enforcement has come to naught.[298] The vast sums of capital available to entities, such as Google, proved instrumental in keeping Congress

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[294] *See generally* Robertson, *supra* note 1, at 266-67.

[295] *See generally* NAPA LEGAL STAFF, NAPA LEGAL INST., DE-PLATFORMING: THE THREAT FACING FAITH-BASED ORGANIZATIONS 1 (2022), https://www.napalegalinstitute.org/member-resources/de-platforming-the-threat-facing-faith-based-organizations; *see* Evan Gerstmann, *Cancel Culture is Only Getting Worse*, FORBES (Sept. 13, 2020, 8:54 PM), https://www.forbes.com/sites/evangerstmann/2020/09/13/cancel-culture-is-only-getting-worse/?sh=3d9fa03763f4; *see also* Nicole Etter, *Cancel Culture and the Future of Free Speech*, GARGOYLE: ALUMNI MAG. FOR THE UW L. SCH. (Apr. 20, 2021), https://gargoyle.law.wisc.edu/2021/04/cancel-culture-and-the-future-of-free-speech/; *see also* Julia Manchester, *Majority Says Cancel Culture Poses a 'Threat to Freedom'*, THE HILL (Mar. 1, 2021, 3:31 PM), https://thehill.com/homenews/campaign/541054-majority-says-cancel-culture-poses-a-threat-to-freedom/.

[296] *See* T.J. Roberts, *Cancel Culture: Its Causes and Its Consequences*, ADVOCS. FOR SELF-GOV'T (Feb. 24, 2020), https://www.theadvocates.org/cancel-culture-its-causes-and-its-consequences/; *also see* Steven Hassan, *Why Cancel Culture By Anyone Is Harmful and Wrong*, PSYCH. TODAY (Mar. 23, 2021), https://www.psychologytoday.com/us/blog/freedom-mind/202103/why-cancel-culture-anyone-is-harmful-and-wrong.

[297] *See* Berenson, *supra* note 24; *see also* Matthew Goldstein & Maureen Farrell, *BlackRock's Pitch for Socially Conscious Investing Antagonizes All Sides*, N.Y. TIMES (Dec. 23, 2022), https://www.nytimes.com/2022/12/23/business/blackrock-esg-investing.html.

[298] *See* Ryan Tracy, *Congress on the Sidelines as U.S. Takes on Google*, WALL ST. J. (Jan. 25, 2023, 5:30 AM), https://www.wsj.com/articles/congress-on-the-sidelines-as-u-s-takes-on-google-11674620070; *see also* Micah Meadowcroft, *An Antitrust Funeral Oration*, THE AM. CONSERVATIVE (Feb. 1, 2023, 12:00 PM), https://www.theamericanconservative.com/an-antitrust-funeral-oration/.

inactive on the issue.[299] As a result, the executive and judicial branches have stepped into the fray.[300] Both the Trump and Biden administrations have vowed to strengthen antitrust enforcement.[301] Nevertheless, results are fleeting. For the executive branch, this appears to be due to the allure Big Tech and other mass-concentrated businesses provide to the exercise of political power. Both the Trump and Biden administrations suppressed legitimate information that impacted lives and the political process with the bald desire retain political hegemony via "economic" methods.[302]

Perhaps the most glaring examples today involve the suppression of the legitimate news story involving the laptop of then-presidential candidate Joe Biden's son, Hunter Biden, and the suppression of legitimate medical information issued by medical professionals during the COVID-19 pandemic.[303] Each of these practices indicate that while courts may be content to bifurcate the economic from the political, and then further narrow the economic focus to consumers in antitrust jurisprudence, the American people are not.

Concerning Big Tech's effect on American workers and entrepreneurs, a pernicious influence is equally apparent. Some of this is coextensive with the silencing of voices on communications platforms. Other effects, however, take place in more traditional aspects of economic life. The proliferation of the "gig" economy has created business models in which negotiating power between allegedly independent contractors and customers is firmly placed with technology companies, such as Uber and Lyft. Likewise, companies like Amazon use their status as platforms to exploit and then undermine smaller third-party competitors.[304]

The need to prevent abuse of economic freedoms at the expense of recognized political liberties has never been more necessary since the late 19th and early 20th centuries. The response, then, just as now, is split between those who seek to reform existing legal doctrines, such as antitrust, to combat these contemporary issues, and those who seek greater regulation and governmental control over these big businesses.[305] Due to the monolithic size

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[299] *See* Tracy, *supra* note 298.
[300] *Id.*
[301] *See id.*; Tuccille, *supra* note 22.
[302] *See* Susan Shelley, *The Shameful Suppression of Pandemic Public Policy Dissidents*, L.A. DAILY NEWS (Dec. 31, 2022, 8:00 AM), https://www.dailynews.com/2022/12/31/the-shameful-suppression-of-pandemic-public-policy-dissidents/; *see also* Tuccille, *supra* note 22.
[303] Tuccille, *supra* note 22.
[304] Khan, *supra* note 284, at 781-82.
[305] *Compare* Daniel A. Crane, *All I Really Need to Know About Antitrust I Learned In 1912*, 100 IOWA L. REV. 2025, 2028-30 (2015), *with* Eric J. Savitz, *The Regulatory Threat to Tech Is Growing. What It Means for Stocks*., BARRON'S (Jan. 13, 2023, 2:15 AM), https://www.barrons.com/articles/tech-stocks-regulation-amazon-apple-facebook-google-51673563992, *and* Emily Birnbaum, *How Big Tech Defeated the Biggest Antitrust Push in*

and influence Big Tech companies – and other entities in different industries – possess, it is perhaps unsurprising that there is a desire to treat private enterprises as quasi-public institutions, like common carriers.[306] Yet, as the Twitter Files have shown, greater control and influence by states and the federal government may only exasperate the problems at hand, rather than resolve them. That is why the revival of political antitrust is so essential.

IV. APPLYING EQUITABLE PRINCIPLES IN ANTITRUST

The principal problem confronting antitrust's application to the democratic and constitutional harms caused by big businesses like Big Tech is the relatively free reign private enterprise has and the narrow focus to which antitrust is presently limited. Contemporary antitrust jurisprudence only views Americans as a consumer.[307] The simplest way to open the door to greater antitrust protections and enforcement is to rely upon those well-establish constitutional rights and protections that have routinely expanded in the face of cries of economic freedom. Specifically, the First Amendment to Big Tech companies provides this avenue with its shared interests with antitrust law. Application of equitable principles helps bridge that gap to that greater enforcement.

Presently, Big Tech's interference in our elections and their ability to stifle the free exchange of ideas and information continues because there is no common law or statutory duty understood to preclude companies from these actions. In the narrowed view of antitrust, a consumer has no direct concerns for the democratic process. The 1st Amendment only directly applies to the Federal Government,[308] applies to State governments via the 14th Amendment,[309] and traditionally only implicates private actors under very

Decades on Capitol Hill, L.A. TIMES (Dec. 20, 2022), https://www.latimes.com/business/technology/story/2022-12-20/how-big-tech-defeated-the-biggest-antitrust-push-in-decades-on-capitol-hill.

[306] *E.g.*, John Villasenor, *Social Media Companies and Common Carrier Status: A Primer*, BROOKINGS INST. (Oct. 27, 2022), https://www.brookings.edu/blog/techtank/2022/10/27/social-media-companies-and-common-carrier-status-a-primer/ (presenting arguments for and against common carrier status for social media companies); Matthew Freeney, *Are Social Media Companies Common Carriers?*, CATO INST.: CATO AT LIBERTY (May 24, 2021, 3:39 PM), https://www.cato.org/blog/are-social-media-companies-common-carriers.

[307] *See* Barnes, *supra* note 257, at 852-53.

[308] U.S. CONST. amend. I ("Congress shall make no law. . ."). This, of course, does not prevent governments from protecting those First Amendment freedoms. *See* Associated Press v. United States, 326 U.S. 1, 20 (1945).

[309] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

limited circumstances.[310] As for the Sherman Act, it is generally limited to concerted action,[311] or those actions undertaken by businesses with disproportionate economic power.[312] "The purpose of the Sherman Act is to prohibit. . . contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce . . . ."[313] The Act, as it is understood, does not interfere with the right of businessmen engaged in entirely private enterprise to exercise his or her discretion with whom he or she will do business.[314] The predictable call for legislation and further regulation, however, is not the answer. For one, Congress has proven unable to legislate on the matter.[315] Worse, politicians have proven unable to resist the power possessed by the Big Tech companies.[316] Even further, the elected branches of the United States government have shown that they too possess an appetite for the suppression of speech that runs contrary to their platforms.[317] The reimplementation of a "political" antitrust that is in line with the lengthy history of restraint of trade doctrine, legislative history, and the broad language of the Sherman Act is the best remaining avenue. In fact, equity and its principles are the only avenue available, for it, unlike public policy, can act without legislative direction.[318]

When any of the Big Tech companies decide to demonetize, de-platform, blacklist, or algorithmically diminish the reach of someone's content, there is no currently understood judicial remedy. The companies are free to unilaterally update, alter, and amend their terms of service at will.[319] Likewise, they are generally free to decide with whom and on what conditions they may

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[310] *See* Nat'l Broad. Co. v. Commc'ns. Workers of Am., 860 F.2d 1022, 1024 (11th Cir. 1988) (stating that constitutional rights do not apply to private parties unless the activity is deemed "state action"); *cf.* Wasatch Equal. v. Alta Ski Lifts Co., No. 14-4152, 2016 U.S. App. LEXIS 7033, at *8-9 (10th Cir. Apr. 19, 2016) (requiring at different times a "symbiotic-relationship," a "close nexus between the State and the challenged action of the regulated entity," "joint-action," or a "public-function" to apply constitutional rights to private parties).

[311] 15 U.S.C. § 1 (2024) (prohibiting every "contract, combination . . . or conspiracy, in restraint of trade . . . ."); 15 U.S.C. § 2 (2024) (prohibiting any combinations or conspiracies to monopolize).

[312] Image Tech. Serv., Inc. v. Eastman Kodak Co., 903 F.2d 612, 621 (9th Cir. 1990) (stating that § 1 of the Sherman Act only requires market power, while § 2 requires monopoly power), *aff'd*, 504 U.S. 451 (1992).

[313] United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

[314] *Id*.

[315] Tracy, *supra* note 298.

[316] Tuccille, *supra* note 22.

[317] *Id.*

[318] *See generally* Severns v. Wilmington Med. Ctr., Inc., 421 A.2d 1334, 1347-49 (Del. 1980).

[319] *See, e.g.*, *Terms of Service*, GOOGLE, https://policies.google.com/terms?hl=en-IN&fg=1#toc-about (last visited Apr. 28, 2024) (stating that Google "may update these terms and service-specific additional terms. . . to reflect changes in our services or how we do business," among other reasons).

do business.[320] How those rules, policies, and procedures are enforced is often left unexplained and applied haphazardly.[321] Information that an audience might seek or may be useful to a fully informed democratic populace is thus stifled for a variety of reasons.

Into this void, equity would bridge the gap between the need for a remedy and the gaps in the law and public policy that have allowed for the restriction of constitutional freedoms. As mentioned *infra* in Part 1, most state courts and the Federal courts combine the traditionally distinct common law and equitable jurisdictions. The available remedies for a private or public plaintiff after the passage of the Sherman Act now sound more in equity than in the common law.[322] Thus, when merged law and equity courts are faced with either a Federal or State antitrust claim, most often they are acting upon a claim for equitable relief in whole or in part.[323] Even if one were to consider the monetary and carceral remedies available to antitrust plaintiffs, those are not foreign to equitable jurisdiction and would not prevent the court from sitting in equity.[324]

On the matter of free speech in particular, a court would begin by taking notice of the recognized intersection between the traditional marketplace and the First Amendment.[325] In this arena, economic rights have historically ceded ground to constitutional rights.[326] Further, if the court is to accept that the Sherman Act codified the common law at the time of its enactment,[327] then it should note that the term contract should be applied rather liberally. As the pre-Sherman Act law demonstrates, the contracts at issue did not involve a multiplicity of offending parties, but rather one offending party. Specifically, the claim of a restraint of trade almost inevitably involved a dispute between the contractor and the contractee.[328] By almost any measure, this would be

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[320] Verizon Commc'ns., Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004).
[321] *See* Matt Taibbi (@mtaibbi), TWITTER (Dec. 2, 2022, 6:34 PM), https://twitter.com/mtaibbi/status/1598822959866683394?lang=en.
[322] *See* Boardwalk Props., Inc. v. BPHC Acquisition, Inc., 602 A.2d 733, 741 (N.J. Super. Ct. App. Div. 1991).
[323] *See id.*
[324] *See* Porter v. Warner Holding Co., 328 U.S. 395, 398-99 (1946).
[325] *See* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 800 n.18 (1978); *see also* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389-90 (1969).
[326] *See supra* Part II.
[327] State Oil Co. v. Khan, 522 U.S. 3, 21 (1997) ("[T]he term "restraint of trade," as used in § 1 . . . invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.").
[328] *See e.g.*, Mandeville v. Harman, 7 A. 37, 38 (N.J. Ch. 1886) (contract between a physician and his student-assistant); Keeler v. Taylor, 53 Pa. 467, 468 (Pa. 1866) (contract between a mechanic and his apprentice); Diamond Match Co. v. Roeber, 13 N.E. 419, 419 (N.Y. 1887) (contract between defendant and a corporate entity); *but see* Livingston v. Van Ingen, 9 Johns. 507, 558 (N.Y. 1812) (defendant alleged state legislation granting a monopoly over steamboat travel in New York waters was a restraint of trade).

classified as unilateral conduct unless one wanted to claim that the contractee was involved in his/her own restraint of trade. Thus, even activity implicating a singular Big Tech company could run afoul of antitrust laws if its terms of service are used in a manner that does not advance an economic interest.

Equity's primary focus is to achieve justice and fairness where legal rigidity would leave the injured party without a remedy.[329] Equity follows the law, but the law is not a straitjacket upon equitable jurisprudence.[330] Courts of equity may extend beyond their ordinary limitations and provide relief in furtherance of a public interest.[331] Similarly, the intended hallmark of equity is that it adapts to contemporary needs "to keep abreast of each succeeding generation and age."[332] Quite logically, this is the only means by which a court sitting in equity may afford parties complete justice in novel situations.[333]

While existing precedent hesitates to apply the Sherman Act to politically motivated boycotts,[334] there is no prohibition.[335] Nor would this proposed application be entirely novel.[336] All that is necessary is that there is a desire to exclude competition in some form.[337] While Big Tech companies may rely upon the fact that they are private entities who possess some discretion with regards to who they conduct business,[338] that discretion is not unfettered.[339] Courts in antitrust cases already look beyond proffered reasons

[329] *See* 30A C.J.S. EQUITY § 99 (2024).
[330] *See* John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1, 12-15 (2013).
[331] *See* Virginian Ry. Co. v. Sys. Fed'n, 300 U.S. 515, 552 (1937) (citing cases).
[332] Severns v. Wilmington Med. Ctr., Inc., 421 A.2d 1334, 1348 (Del. 1980) (quoting 1 Pomeroy's Equity Jurisprudence § 67 (5th ed.)).
[333] *See* 30A C.J.S. EQUITY § 131 (2024).
[334] *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 889, 907-08 (1982) (permitting a civil rights boycott against Mississippi businesses as protected under the First Amendment); *see also* Missouri v. Nat'l Org. for Women, Inc., 620 F.2d 1301, 1311-12 (8th Cir. 1980) (declining to apply the Sherman Act when a boycott is intended to influence a legislature's position on social legislation).
[335] *See* Allied Int'l v. Int'l Longshoremen's Ass'n, 640 F.2d 1368, 1379-80 (1st Cir. 1981) (finding that a "political dispute" is not related to the union's legitimate interest and thus was not immune from Sherman Act liability).
[336] *See* Bratcher v. Akron Area Bd. of Realtors, 381 F.2d 723, 724 (6th Cir. 1967) (applying the Sherman Act to realtors who conspired to preclude African Americans from purchasing and renting property in white neighborhoods). Regardless of this case, however, precedent is no bar to an award of equitable relief. *Severns,* 421 A.2d at 1348.
[337] *See Allied Int'l*, 640 F.2d at 1380.
[338] United States v. Colgate & Co., 250 U.S. 300, 307 (1919).
[339] *See id.*; *see also* Verizon Commc'ns, Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004).

for certain conduct and look to its affect.[340] Likewise, equity looks at the substance, rather than the form of the action(s) at issue.[341]

Under contemporary antitrust law, conduct is exclusionary if it tends to exclude opportunities from rivals and the exclusion is predicated on some grounds other than economic efficiency.[342] That the conduct may only directly target one individual is also no bar to the Sherman Act's application.[343] While it is true that businesses are generally free to contract with whomever they choose and however they please, this freedom of contract is not unqualified even in the context of antitrust.[344] If there is evidence that a business voluntarily terminated a course of dealing to achieve an anticompetitive end at the expense of profit, then courts may find a violation of antitrust laws.[345]

To that end, equity would take cognizance of the already accepted public policy favoring the dissemination of information[346] and expand upon those protections.[347] A court would then take note of the qualifications antitrust already places on a business' freedom of contract and assess those actions that cross the fluid boundary between economic and political actions. A company's ostensible business actions that were directed at stifling constitutionally protected actions and speech at the expense of the company's profits thus would not escape antitrust liability.

Under a rule of reason approach that takes cognizance of the value of First Amendment freedoms, a court would weigh the value of legitimate information against any alleged logic to the restraint.[348] This would involve an initial determination as to whether the challenged conduct will likely harm consumers.[349] At this stage, a court would be able to filter out those persons seeking to convey actual information from those who are attempting otherwise. The defendant would then be able to proffer some legitimate, competitive justification for the restraint.[350] If such justifications are put forward, the court could either find the restraint valid or find otherwise, based on the strength of the justification or additional evidence provided.[351] As

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[340] Nat'l Soc. of Pro. Eng'rs v. United States, 435 U.S. 679, 690 (1978); Bahn v. NME Hosps., Inc., 929 F.2d 1404, 1410 (9th Cir. 1991).
[341] Gatz v. Ponsoldt, 925 A.2d 1265, 1280 (Del. 2007).
[342] *See generally* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985).
[343] *See* Klor's v. Broadway-Hale Stores, 359 U.S. 207, 213 (1959).
[344] *Verizon Commc'ns*, 540 U.S. at 408 (quoting *Aspen Skiing Co.*, 472 U.S. at 601).
[345] *Id.* at 409.
[346] *See generally* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 784-85 (1978); *see also* Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 632-34 (1994) (noting Congress found that increasing horizontal and vertical concentration in the cable television industry threatened the vitality of smaller, more local broadcasters).
[347] *See* 30A C.J.S. EQUITY § 101 (2024).
[348] *See generally* Polygram Holding v. FTC, 416 F.3d 29, 33-36 (D.C. Cir. 2005).
[349] *Id.* at 35.
[350] *Id.* at 36.
[351] *Id.*

economic competition relies upon the relative freedom of the marketplace, truth and scientific discussion require a relatively free marketplace of ideas.[352] Thus, the practice of silencing certain voices and ideas would be an impermissible restraint of trade under either a rule of reason or *per se* approach.[353]

CONCLUSION

The application of more robust antitrust enforcement is increasingly necessary in contemporary American society. While courts may hesitate to return to any semblance of "Brandeisian" antitrust, the best avenue for doing so is to tie the matter to recognized constitutional rights. Just as the struggle between the then-recognized freedom of contract and freedom of association was resolved in favor of workers,[354] the equities weigh in favor of greater First Amendment protections with regards to Big Tech. Present practices are tied not to any legitimate economic end, but to the desire to suppress disfavored or disapproved political ideas. This has economic effects on those persons using their platforms and democratic affects on our Republic.

[352] *See* Maurice Stucke & Allen Grunes, *Antitrust and the Marketplace of Ideas*, 69 Antitrust L.J. 249, 251-52 (2001).
[353] *See, e.g.*, Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 886 (2007).
[354] *See supra* Part II.B.