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THE CLAYTON ACT CIPHER: TEXT AS AN ANTITRUST STRATEGY

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Abstract

As federal antitrust enforcement has adopted its most aggressive stance in decades, the fate of billions of dollars' worth of economic activity rests on a few short statutory phrases enacted generations ago. The government officials who have proposed expanding antitrust enforcement have not justified their efforts through the difficult work of parsing the original meaning of these statutory texts. Nor have the targets of their scrutiny shielded themselves by asserting that statutory meaning. Instead, antitrust regulation and litigation have assumed that the text of these laws does not provide as clear or relevant a standard as do precedent, policy, and other concerns.

Rejecting that stance, this Article demonstrates the importance and practicality of antitrust textualism by engaging in the first dedicated interpretation of the Clayton Act of 1914, as amended by the Robinson-Patman Act of 1936 and Celler-Kefauver Act of 1950. These laws rest at the center of contemporary efforts to expand antitrust enforcement, especially merger policy. This Article shows that contemporaries of the Clayton Act would have originally recognized its terms as bearing a meaning similar to the foundational Sherman Act of 1890. This understanding becomes apparent when the language of the Clayton Act is juxtaposed with state statutes that employed the same or similar language. This Article then verifies that meaning by contextualizing the Clayton Act within its contemporary competition policy. Tracking the Act's amendment further shows that, contrary to the prevailing interpretation based upon legislative history, the Robinson-Patman and Celler-Kefauver Acts did not significantly transform that original meaning.

This Article then demonstrates how to apply this textual detective work in practice. Placing the historical meaning of these statutes at the center of modern practice would not generate drastic upheavals in policy. At the same time, textual

* Member, Ohio bar. The views and opinions set forth herein are the personal views or opinions of the author; they do not necessarily reflect the views or opinions of the law firm with which he is associated. My thanks to the editors of *Florida Law Review* for their insightful comments and meticulous scrutiny.

analysis remains critical to evaluating whether antitrust law permits the novel theories and initiatives of modern antitrust enforcers. This Article closes by illustrating how regulators and litigants can use the text to evaluate several core contemporary initiatives: replacing consumer welfare as the primary objective of antitrust law, resuming use of the Robinson-Patman Act to fight price discrimination, and expanding merger enforcement.

INTRODUCTION

As federal antitrust enforcement has adopted its most aggressive stance in decades, the fate of billions of dollars' worth of economic activity rests on a few short statutory phrases enacted generations ago.[1] When the Federal Trade Commission (FTC) today insists that the Clayton Antitrust Act of 1914[2] prohibits companies from engaging in a series of small acquisitions over time, it must demonstrate that acquiring the "assets of another person" can "lessen competition" substantially "or tend to create a monopoly."[3] When the nation's largest alcohol distributor grants price concessions to big box stores but not mom-and-pop retailers, its liability under the Robinson-Patman Act of 1936[4] depends on whether the discounts "injure, destroy, or prevent competition with" anyone receiving that benefit.[5] Before two technology companies merge, whether the potential loss of innovation constitutes reason to enjoin the combination under the Celler-Kefauver Act of 1950[6] hinges on what harms to competition "may" result.[7]

When these laws were still new a century ago, the Supreme Court informed parties that they should focus on the plain meaning of these phrases, not legislative history or economic policy, when litigating antitrust challenges.[8] Today, antitrust scholars and even the Supreme Court continue to hint at the potential fruits of parsing this textual meaning, especially in

1. *See generally* Promoting Competition in the American Economy, Exec. Order No. 14,036, 86 Fed. Reg. 36987–89 (July 14, 2021) (calling for invigorated antitrust efforts based on statutory sources of antitrust law); U.S. DEP'T OF JUST. & FTC, MERGER GUIDELINES 2–3 (Dec. 18, 2023) [hereinafter 2023 MERGER GUIDELINES], https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf [https://perma.cc/U4WW-TK99] (laying out eleven expanded principles of merger enforcement).

2. Pub. L. No. 63-212, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12 –15, 15a–15h, 16–18, 18a, 19, 21–26, 26a, 26b, 27 (2024)).

3. 15 U.S.C. § 18; *see* 2023 MERGER GUIDELINES, *supra* note 1, at 24, 40.

4. Pub. L. No 74-692, 49 Stat. 1526 (1936) (codified as amended at 15 U.S.C. §§ 13–13b).

5. 15 U.S.C. § 13(a); *see infra* notes 368–369 and accompanying text.

6. Pub. L. No. 81-899, 64 Stat. 1125 (1950) (codified as amended at 15 U.S.C. § 18).

7. 15 U.S.C. § 18; *see infra* notes 379–389.

8. Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356 (1922) ("Much is said in the briefs concerning the reports of committees concerned with the enactment of this legislation, but the words of the act are plain and their meaning is apparent, without the necessity of resorting to the extraneous statements and often unsatisfactory aid of such reports."); *see also* Breck P. McAllister, *Where the Effect May be to Substantially Lessen Competition or Tend to Create a Monopoly*, 3 A.B.A. ANTITRUST SECTION 124, 135 (1953) (evaluating the briefing in *Standard Fashion Co.*).

those novel situations that fall outside of binding precedent.[9] That modern textual approach identifies a law's original meaning by asking how average people at that time understood the statutory text, not by speculating what congressional drafters thought the text meant or what they intended it to mean.[10]

The FTC's complaints, private litigants' briefs, and judicial opinions today dutifully recite these statutory rules.[11] And regulators have defended their modern antitrust initiatives as a return to the plain meaning of statutory law.[12] Yet as antitrust law continues to stress congressional intent and economic purpose to the exclusion of modern methods of textual interpretation, their textual analyses rarely proceed past the surface.[13] Government officials proposing to expand antitrust

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9. *See Transcript of Conference Call with Robert Lande on Applying Textualism to Section 7 and Section 2*, THE CAP. F. (July 10, 2023), https://thecapitolforum.com/resources/transcript-of-conference-call-with-robert-lande-on-applying-textualism-to-section-7-and-section-2/ [https://perma.cc/66WK-RU54] (suggesting that enforcers should emphasize text to "nudge [judges] in the direction of going back to the statute"); Michael Murray, Deputy Assistant Att'y Gen., Recent Developments in the Jurisprudence of Direct and Indirect Purchaser (Sept. 25, 2019), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-michael-murray-delivers-remarks-united-states-council [https://perma.cc/Z885-WA6P] (expressing surprise that *Apple, Inc. v. Pepper*, 587 U.S. 273 (2019) emphasized statutory text because "in the antitrust world, it is unusual to ground the analysis in the text of the Sherman Act or the Clayton Act"); *see also* United States v. Rockford Mem. Corp., 898 F.2d 1278, 1280–81 (7th Cir. 1990) (chastising the government for overlooking textual arguments for the FTC's jurisdiction over nonprofit mergers).

10. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 78–92 (2012) (describing the fixed-meaning canon, under which words hold their meaning from the time of the text's adoption).

11. *See* Richard M. Steuer, *Incipiency*, 31 LOY. CONSUMER L. REV. 155, 156 (2019) (labeling the Clayton Act's central tests as "the most knocked-around phrases in antitrust").

12. *See* FTC ENFORCERS SUMMIT 51–52 (Apr. 4, 2022) [hereinafter Transcript Enforcers Summit], https://www.ftc.gov/system/files/ftc_gov/pdf/FTC%20Enforcers%20Summit_April%204.pdf [https://perma.cc/9LS5-XQGK] (providing views of FTC Commissioners and Department of Justice officials on the need to engage more closely with statutory text); Editorial, *Protecting Competition Is a Vital Goal*, N.Y. TIMES, Aug. 26, 2023, at SR11, https://www.nytimes.com/2023/ 08/26/opinion/biden-lina-khan-ftc.html [https://perma.cc/9YEZ-TT75] (summarizing interviews in which Jonathan Kanter, Assistant Attorney General for Antitrust, and Lina Khan, FTC Chair, explained that these changes "should be seen as a restoration of the plain meaning of the nation's antitrust laws").

13. *See* Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205, 1207–08, 1245–46 (2021); Alan J. Meese, *Justice Scalia and Sherman Act Textualism*, 92 NOTRE DAME L. REV. 2013, 2026–28, 2032–33 (2017); Daniel A. Farber

enforcement today have justified their new applications by stressing precedent, legislative history, and their own economic and administrative know-how, leaving the hard work of parsing the short but critical tests that Congress penned for another day.[14] Indeed, while the Department of Justice and FTC's press release on the updated merger guidelines released in late 2023 asserts that the guidelines "ensure fidelity to statutory text and precedent," only three of the final guidelines' ninety-two footnotes make any reference to antitrust statutes at all, and one of those misquotes the text![15]

One might expect that this lack of statutory engagement would light the way for the targets of regulatory scrutiny, or at least their amici curiae, to assert textual meaning as a shield. The Supreme Court's recent holding that courts have a constitutional obligation "to independently interpret the statute and effectuate the will of Congress" suggests that the merger guidelines and other agency actions can at most provide only an "informative" guide to determining the meaning of antitrust statutes.[16] But even as litigants increasingly claim

& Brett H. McDonnell, *"Is There a Text in This Class?" The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619, 621–22 (2005); William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1234–35 (2001).

14. *See, e.g.*, STATEMENT OF COMMISSIONER ALVARO M. BEDOYA JOINED BY CHAIR LINA M. KHAN AND COMMISSIONER REBECCA KELLY SLAUGHTER REGARDING THE PROPOSED MERGER GUIDELINES ISSUED BY THE FEDERAL TRADE COMMISSION & U.S. DEPARTMENT OF JUSTICE 4 (July 19, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p234000_merger_guidelines_statement_bedoya_final.pdf [https://perma.cc/ABV4-7FMH] (asserting that "any line of commerce" encompasses labor markets); STATEMENT OF CHAIR LINA M. KHAN JOINED BY COMMISSIONER REBECCA KELLY SLAUGHTER AND COMMISSIONER ALVARO M. BEDOYA REGARDING FTC-DOJ PROPOSED MERGER GUIDELINES COMMISSION FILE NO. P234000 at 1, 3, 4 (July 19, 2023) [hereinafter STATEMENT REGARDING MERGER GUIDELINES], https://www.ftc.gov/system/files/ftc_gov/pdf/p234000_chair_statement_re_draft_merger_guidelines.pdf [https://perma.cc/A3YQ-Z6RC] (discussing the role of the Clayton Act in defending potential competition); Transcript Enforcers Summit, *supra* note 12, at 52 (acknowledging that enforcers must do better at prioritizing statutory construction).

15. *Compare* Press Release, Off. of Pub. Affairs, U.S. Dept. of Just., Justice Department and Federal Trade Commission Release 2023 Merger Guidelines (Dec. 18, 2023), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-2023-merger-guidelines [https://perma.cc/VK8F-TXFA], *with* 2023 MERGER GUIDELINES, *supra* note 1, at 1 nn.1 & 6, 39 n.74. Note 74 quotes section 7 as "in any line of commerce in any section of the country," 2023 MERGER GUIDELINES, *supra* note 1, at 39 n.74, when the modern text actually reads "in any line of commerce *or in any activity affecting commerce* in any section of the country," 15 U.S.C. § 18 (emphasis added).

16. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263, 2267 (2024).

that the FTC's existence and operations violate the original meaning of the Constitution, few today challenge government or private suits as lacking a sound statutory basis.[17]

The limited adoption of these techniques corresponds with longstanding judicial and scholarly skepticism about the relevance of antitrust law's core texts to modern antitrust policy. Because the foundational Sherman Antitrust Act of 1890[18] employs terms familiar to the common law, many have concluded that Congress expected courts to develop antitrust law in a similar evolutionary fashion.[19] Textual analysis has cast doubt on that interpretation of the Sherman Act.[20] But even if correct, that rationale cannot extend to the Clayton Act and the other laws at the center of modern enforcement controversies, which use language unknown to the common

17. *See* Axon Enter., Inc. v. FTC, 598 U.S. 175, 195 (2023) (allowing litigants to bring constitutional challenges against the FTC during pendency of in-house proceedings); *cf.* Illumina, Inc. v. FTC, 88 F.4th 1036, 1046–47 (5th Cir. 2023) (dismissing constitutional challenges to the FTC and arguments that the FTC misapplied established section 7 case law). For examples of textual antitrust briefing, see Respondents' Brief in Opposition at 3–4, 10, 18–22, Confederación Hípica de P.R., Inc. v. Confederación de Jinetes Puertorriqueños, Inc., 143 S. Ct. 631(2022) (mem.) (No. 22-327), 2022 WL 17732809, at *3–4, *10, *18–22 (arguing that the original meaning of the Clayton Act's prohibition on injunctions in disputes involving "terms or conditions of employment" included a strike by independent-contractor jockeys against a racetrack and an owners association); Brief of Utah and 34 Other States as *Amici Curiae* in Support of Plaintiff-Counter-Defendant-Appellant and Reversal at 6–11, Epic Games, Inc. v. Apple, Inc., 67 F.4th 946 (9th Cir. 2023) (No. 21-16506), 2022 WL 314948, at *6–11 (explaining the Sherman Act's use of "contract" through historic understanding and canons of statutory construction); Brief for the United States as Amicus Curiae at 3–5, Reading Int'l, Inc. v. Oaktree Cap. Mgmt., 317 F. Supp. 2d. 301 (S.D.N.Y. 2003), https://www.justice.gov/atr/case-document/file/508196/download [https://perma.cc/5HZS-YJG5] (arguing that "person" in section 8 of the Clayton Act extends to business entities).

18. Pub. L. 51-647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7).

19. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 888 (2007) (equating Sherman Act "restraint of trade" to evolving common law); *see also* Crane, *supra* note 13, at 1232; Eskridge & Ferejohn, *supra* note 13, at 1249–50; Farber & McDonnell, *supra* note 13, at 657–58.

20. *See* Robert H. Lande & Richard O. Zerbe, *The Sherman Act is a No-Fault Monopolization Statute: A Textualist Demonstration*, 70 AM. U. L. REV. 497, 511–34 (2020) (applying textualist analysis to the Sherman Act); Alan J. Meese, *Antitrust Regulation and the Federal-State Balance: Restoring the Original Design*, 70 AM. U. L. REV. 75, 105–48 (2020) (emphasizing the historic meaning of commerce in interpreting the Sherman Act).

law.[21] When it comes to those laws, most have simply assumed, as today's leading antitrust treatise suggests, that Congress's laconic texts possess no meaning particular or practical enough to limit "the courts['] discretion to put them to proper use," whereas precedent and economic policy provide clearer standards.[22]

This Article challenges this reluctance by demonstrating the practicality of using statutory text to guide antitrust regulation and litigation. To do so, this Article constructs the first compressive cipher into what the Clayton Act's core language meant to those who consumed, worked, competed, and sued in the American economy over a century ago. Moving beyond dictionaries, this Article details the close connections between key phrases in these federal laws and the existing parallels in judicial decisions and, most importantly, state statutes.[23] The broader context of federal competition law, and judicial and popular interpretations of these laws shortly after their enactments, confirm those historic interpretations.[24] Those textual techniques further demonstrate that the subsequent amendments of the Robinson-Patman and Celler-Kefauver Acts

21. Crane, *supra* note 13, at 1251–52; Farber & McDonnell, *supra* note 13, at 643–44; *cf.* Frank H. Easterbrook, *Is There a Ratchet in Antitrust Law?*, 60 TEX. L. REV. 705, 706 (1982) (assuming that both the Sherman and Clayton Acts permit common-law antitrust development).

22. HERBERT HOVENKAMP & PHILLIP E. AREEDA, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 103d2 (5th ed. 2023); *see id.* at ¶ 1160b (describing section 7 of the Clayton Act as "open-ended" with "indefinite" terms); *see also* Crane, *supra* note 13, at 1205 & n.1 (noting scholarly consensus that antitrust law is "open-textured, vague, indeterminate, and textually unilluminating"); Rebecca Haw Allensworth, *The Influence of the Areeda-Hovenkamp Treatise in the Lower Courts and What it Means for Institutional Reform in Antitrust*, 100 IOWA L. REV. 1919, 1921–24 (2015).

23. Modern interpretations of the Clayton Act at best simply acknowledge these laws. *See* Herbert Hovenkamp, *The Antitrust Text*, 99 IND. L.J. 1063, 1093 & n.218 (2024). In other antitrust contexts, scholars have shown greater appreciation of the state-law context. *See* Samuel Evan Milner, *Defining Unfair Methods of Competition in the Federal Trade Commission Act*, 2023 WIS. L. REV. 109, 123–39, 142; Charles S. Dameron, *Present at Antitrust's Creation: Consumer Welfare in the Sherman Act's State Statutory Forerunners*, 125 YALE L.J. 1072, 1078–80, 1095 (2016); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 309–10, 341–43 (1989). On using judicial opinions to evaluate legally tinged statutory terms, see Wesco Ins. Co. v. Roderick Linton Belfance, LLP, 39 F.4th 326, 329, 337–38 (6th Cir. 2022).

24. *See* FCC v. AT&T, 562 U.S. 397, 406 (2011) (stressing the importance of context to the ordinary meaning of statutes).

did not fundamentally transform the meaning of the Clayton Act's underlying tests as their legislative histories suggest.[25]

This historical detective work demonstrates that the text of the Clayton Act as amended could in fact support much of contemporary antitrust practice.[26] That conclusion may come as a surprise. Many scholars believe antitrust practice has strayed from its statutory roots, and regulators have expressed concern that courts have improperly aligned the Clayton Act's standards with those of the Sherman Act.[27] Those who make such claims have by and large failed to perform the holistic textual analysis developed here.[28] Many have consulted modern-day dictionaries or have assumed that words today bear the same meaning as they did a century ago.[29] Some have

25. *See infra* Sections III.A–B, IV.A.

26. *See infra* Section IV.A.

27. *See, e.g.*, Crane, *supra* note 13, at 1229–33, 1238–46 (criticizing modern applications); Robert H. Lande, *Textualism as an Ally of Antitrust Enforcement: Examples from Merger and Monopolization Law*, 2023 UTAH L. REV. 813, 815, 823–26, 832–36 (arguing that courts erroneously allow efficiency defenses to mergers and misapply the statutory "may"); Farber & McDonnell, *supra* note 13, at 647–54 (criticizing differentiation of Robinson-Patman injuries); Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 ANTITRUST L.J. 125, 130–32 (2000) (arguing that courts apply sections 3 and 7 of the Clayton Act leniently, unlike Robinson-Patman); Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CALIF. L. REV. 1580, 1588–93 (1983) (asserting that Congress banned all mergers that raised prices). On regulators, see Transcript Enforcers Summit, *supra* note 12, at 53–54 (expressing the concern of FTC and Department of Justice officials that courts have overlooked distinctions in the Sherman and Clayton Acts' treatments of mergers and tying).

28. Exceptions to this methodological shortcoming appear in a working paper prepared by two attorneys affiliated with organizations advocating for aggressive antitrust enforcement, Basel J. Musharbash & Daniel A. Hanley, Toward a Merger Enforcement Policy That Enforces the Law: The Original Meaning and Purpose of Section 7 of the Clayton Act 1, 3–4, 9, 12, 15, 17–20, 31–32, 35, 44 (Aug. 1, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4745310 [https://perma.cc/59BH-CPB5], and in a comment on the 2023 merger guidelines, FARM ACTION, COMMENT ON DRAFT MERGER GUIDELINES 1, 3, 5, 15–16, 23–26, 52–53, 79 (Sept. 18, 2023) [hereinafter FARM ACTION], https://downloads.regulations.gov/FTC-2023-0043-1515/attachment_1.pdf [https://perma.cc/XPH7-7ULW]. Their heavy emphasis on grammar relative to concern about how contemporaries used these terms in the context of competition law cause them to overemphasize the transformative role of the Celler-Kefauver amendments while ignoring the importance of the original 1914 form. *See infra* Section III.B.

29. *See* Hovenkamp, *supra* note 27, at 134–35 (not interrogating the meaning of Robinson-Patman's words); Robert H. Lande, *A Traditional and Textual Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 FORDHAM L. REV. 2349, 2381–83 (2013) (assuming that the "plain meaning" of lessening competition and tendency to create a monopoly in section 7 is a "reasonable probability of higher prices to consumers").

made the opposite mistake, quoting dictionaries without contextualizing the terms in contemporary discussions of business and economics.[30] Even the most dedicated efforts have focused heavily on post-enactment interpretation, legislative history, and expert economic beliefs while glossing over the terms' everyday uses before, at, and immediately after the time of passage.[31]

Recognition of the ability to discern the original meaning of statutory antitrust law in turn carries significant implications for the scope of future antitrust litigation and regulation. The government and private plaintiffs may still be able to draw on these laws as a sword to promote a broader concept of competition than prevails at present.[32] But business defendants can also successfully wield the text of the Clayton Act as a shield against many modern regulatory priorities, such as invigorated Robinson-Patman enforcement and application of merger law to serial or roll-up acquisitions.[33]

This Article's historical analysis demonstrates the practicality and importance of restoring these statutes to the center of modern antitrust policy. Part I turns to contemporary sources to discern the meaning of the Clayton Act's key substantive terms in 1914: "to substantially lessen competition"; "tend to create a monopoly"; "where the effect . . . may be"; and "in any line of commerce." Part II confirms those meanings by contextualizing those passages within the text of the Clayton Act, in relation to other antitrust laws, and in their application following passage. Part III considers the effect of subsequent legislation, including the Robinson-Patman and Celler-Kefauver Acts, on the Clayton Act's meaning. Part IV challenges reluctance to engage with antitrust text by showing how this method can settle longstanding debates over the meaning of antitrust law and shield defendants from the novel targets of today's antitrust enforcers. This Article concludes by

30. Lande, *supra* note 27, at 826–32, 841–48 (defining section 7's "may" and "likely"); Robert H. Lande, John M. Newman & Rebecca Kelly Slaughter, *The Forgotten Anti-Monopoly Law: The Second Half of Clayton Act § 7*, 103 TEX. L. REV. (forthcoming 2024) (manuscript at 10–18), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4769563 [https://perma.cc/KK3T-TTFC] (examining the "plain, original meaning" of each individual word in section 7's test of "may be to . . . tend to create a monopoly"); s*ee* SCALIA & GARNER, *supra* note 10, at 418–19 (discussing perils of dictionary reliance).

31. Hovenkamp, *supra* note 23, at 1087–1113; Crane, *supra* note 13, at 1229–33, 1238–46.

32. *See infra* Section IV.B.

33. *See infra* Section IV.B.

emphasizing the role of legislated text in setting antitrust policy.

I. THE TEXTUAL MEANING OF THE CLAYTON ACT

Now and in 1914, statutory interpretation begins with the text: how would an ordinary person understand the words that Congress chose?[34] The Clayton Act repeats key phrases to determine when business conduct becomes illegal.[35] Section 2's ban on price discrimination and section 3's ban on exclusive dealing originally applied when the effects "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."[36] Section 7 as originally written addressed corporate stock acquisitions whose effect may be to "substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly in any line of commerce."[37] Congress has never modified section 3, and its amendments to the other sections have brought them into conformity with section 3's preserved tests.[38]

This Part explains the abstract concepts that these words signified when Congress enacted them. Prior discussions of antitrust law, including state legislation employing these exact phrases, reveal that the terms "to substantially lessen competition" and "to tend to create a monopoly" emphasized the power to manipulate market outcomes and functioned interchangeably with the key antitrust concepts of reasonableness and public injury.[39] That standard, which the Supreme Court incorporated into the Sherman Act only a few years before the Clayton Act, judges actions for their ultimate effect on competition across the market, no matter what happens to the businesses that have adopted that course.[40] The Clayton Act's other repeated phrases, "where the effect may be" and "in any line of commerce," refine this familiar analytical

34. Niz-Chavez v. Garland, 593 U.S. 155, 160–61, 163 (2021); United States v. First Nat'l Bank of Detroit, 234 U.S. 245, 258 (1914).

35. Clayton Antitrust Act, Pub. L. No. 63-212, §§ 2–3, 7, 38 Stat. 730, 730–32 (1914).

36. *Id.* §§ 2–3.

37. *Id.* § 7.

38. *See infra* Sections III.A–B.

39. *See infra* Sections I.A–B.

40. Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); United States v. Am. Tobacco Co., 221 U.S. 106, 179 (1911).

approach. The former focuses on the probability of market harm.[41] The latter moves beyond individual businesses to look at substitute or complementary products.[42]

A. *To Substantially Lessen Competition*

The meaning of the first substantive test of the Clayton Act, "to substantially lessen competition," starts with competition. Dictionaries in the early twentieth century defined competition as an "emulous contest" between "rival[s]," with "emulous" describing someone "[a]mbitiously desirous to equal or excel another."[43] Competition encompassed "[t]he act or proceeding of striving for something that is sought by another at the same time; a contention of two or more for the same object or for superiority; [or] rivalry, as between aspirants for honors or for advantage in business."[44] The Supreme Court echoed this rivalry-focused definition of competition in a case involving a transcontinental railway merger: "To compete is to strive for something which another is actively seeking and wishes to gain."[45] Joseph Davies, the first chairman of the FTC, similarly defined competition in his comprehensive survey of the legal and economic landscape in 1915 as a "natural rivalry between one manufacturer and another, between one dealer and another, each striving for business and profits," before adding other refinements based on the "classes of trader" and "point in the process of production and distribution" at which competition emerged.[46]

Statutory interpretation, both then and now, presumes that Congress used the term "competition" in its ordinary sense, not as specialists deploy it.[47] Even if Congress meant to use a technical term, economists had yet to coalesce around a particular textbook model of competition, although some did

41. *See infra* Section I.C.

42. *See infra* Section I.D.

43. WEBSTER'S ACADEMIC DICTIONARY: DICTIONARY OF THE ENGLISH LANGUAGE 120, 194 (1895) [hereinafter WEBSTER'S DICTIONARY]; *see also* NEW WEBSTERIAN 1912 DICTIONARY 191 (Harry Thurston Peck ed., 1912) [hereinafter NEW WEBSTERIAN DICTIONARY] (defining competition as "rivalry").

44. 1 STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 384 (1906) [hereinafter 1 STANDARD DICTIONARY].

45. United States v. Union Pac. R.R. Co., 226 U.S. 61, 87 (1912).

46. JOSEPH E. DAVIES, DEP'T OF COM., TRUST LAWS AND UNFAIR COMPETITION 302 (1915).

47. *See* SCALIA & GARNER, *supra* note 10, at 69–77; *cf.* Nix. v. Hedden, 149 U.S. 304, 307 (1893) (holding that tomatoes are vegetables, not fruits)*;* Robertson v. Salomon, 130 U.S. 412, 414 (1889) (holding that beans are vegetables, not seeds).

expect that free competition would expand output and reduce prices to marginal costs.[48] Everyday understandings of competition focused on lower prices and expanded output without any technical limitations.[49] The mere threat of "potential competition" from new entrants attracted by higher prices also sufficed to "hold[] prices within bounds."[50] But because competition implied a "struggle between rivals for the same trade at the same time," competition did not emerge from speculation about future entrants into the market.[51]

Contemporaries also distinguished competition from competitors. As Davies explained, the rivalry of competition occurs as competitors attempt to attract buyers (or sellers), and any effect on individual competitors is purely incidental to competition itself.[52] As one participant in the Clayton Act

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48. DAVIES, *supra* note 46, at 305–10 (noting that economists had not settled on a distinguishing definition of unfair competition despite many illustrations); John D. Park & Sons Co. v. Nat'l Wholesale Druggists' Ass'n, 67 N.E. 136, 148 (N.Y. 1903) (Martin, J., dissenting) (observing that economic theories of competition and pricing have "not been thus firmly and universally settled"); *see also* Benjamin J. Klebaner, *Potential Competition and the American Antitrust Legislation of 1914*, 38 BUS. HIST. REV. 163, 163 (1964) (noting lack of clear definitions); *cf.* FRED MANVILLE TAYLOR, PRINCIPLES OF ECONOMICS 162–64 (1914) (arguing that there are some operative principles of competition, including price determination processes); 2 FRANK WILLIAM TAUSSIG, PRINCIPLES OF ECONOMICS 55–56 (1911) (concluding that "price is determined by the cost of the marginal increment" in competitive economies); IRVING FISHER, INTRODUCTION TO ECONOMIC SCIENCE 286–87 (1910) (discussing the research-based concept of "'cutthroat competition'" within an economy built upon supply and demand).

49. *See, e.g.*, WILLIAM H.S. STEVENS, UNFAIR COMPETITION 5–6 (1917) (explaining that firms with lower costs should compete by reducing prices); JOSEPH A. JOYCE, A TREATISE ON MONOPOLIES AND UNLAWFUL COMBINATIONS OR RESTRAINTS 421 (1911) (explaining that courts determine if a combination could "control supply and prices" and reasoning that, when "competition is stifled[,] control and supply of prices [is] secured").

50. JOHN BATES CLARK & JOHN MAURICE CLARK, THE CONTROL OF TRUSTS vi–vii (rev. ed. 1912); *see* Over v. Byram Foundry Co., 77 N.E. 302, 304 (Ind. App. 1906) (noting that "quick communication and rapid transportation" prevented a company with control over a single town's production from obtaining a monopoly).

51. Ferd. Heim Brewing Co. v. Belinder, 71 S.W. 691, 695 (Mo. Ct. App. 1903); *see* State v. Chilhowee Woolen Mills, 89 S.W. 741, 744 (Tenn. 1905) (finding no lessening of full and free competition when stockholders in a woolen mill dissolved the corporation before beginning operations); CLARK & CLARK, *supra* note 50, at 185 (recognizing that potential competition can come from existing producers in other markets or companies not yet in operation but able to enter the field); DAVIES, *supra* note 46, at 305–06 (citing contemporary economists to explain that unfair competition prevents efficient potential competitors from becoming actual rivals); TAYLOR, *supra* note 48, at 242 (explaining that costs can determine price only where they are able to influence future supply).

52. DAVIES, *supra* note 46, at 304.

debates agreed, a new entrant who uses tactics such as below-cost sales "to get a foothold in a new locality" and challenge incumbents could thus "stimulate[]" competition even while harming competitors.[53] Competitors, others agreed, face harm only when "competition will be excluded" through unfair means unrelated to costs or similar advantages.[54]

Of the many terms then used to describe detrimental effects on competition, the Clayton Act selected a single standard: "lessen."[55] Dictionaries defined "lessen" as "to diminish or reduce."[56] As suggested by the statutory distinction from creating a monopoly, lessening competition indicated an outcome with a smaller effect than the destruction or elimination of all competition.[57] A firm that signed an exclusive dealing contract or that bought a single competitor lessened immediate competition by at least a de minimis amount.[58] The Clayton Act's drafters emphasized that this standard of lessening competition would thus apply more broadly than the Sherman Act's ban on restraint of trade, which evaluated individual restrictions under the rule of reason.[59]

No matter what Congress intended, however, contemporaries already employed the rule of reason to decide if

53. 51 CONG. REC. 9595 (1914) (statement of Rep. Green).

54. State *ex rel.* Att'y Gen. v. Standard Oil Co., 30 N.E. 279, 291 (Ohio 1892); *see also* DAVIES, *supra* note 46, at 304–06 (citing economists to describe the shift from universal approval of price competition to more nuanced views); 2 REPORT OF THE INDUSTRIAL COMMISSION ON TRUSTS AND INDUSTRIAL COMBINATIONS 89 (1901) (observing that a dominant incumbent can use predatory pricing "to prevent that incipient corporation from developing into a rival").

55. *See* Gilbert Holland Montague, *Business Enterprise and the Law*, 192 N. AM. REV. 694, 705 (1910) (listing various constructions of a participle and "competition").

56. 1 STANDARD DICTIONARY, *supra* note 44, at 1020; *see also* NEW WEBSTERIAN DICTIONARY, *supra* note 43, at 499 ("to make less; reduce").

57. *See* Judd v. Harrington, 19 N.Y.S. 406, 414 (Ct. Com. Pl. 1892) (noting that "lessen[ing] competition" occurs short of "total suppression").

58. W.W. THORNTON, A TREATISE ON THE SHERMAN ANTI-TRUST ACT 47 (1913) (explaining that buying a single competitor incidentally lessens competition without obtaining market "power" or restraining trade); *see* United States v. E. I. Du Pont De Nemours & Co., 188 F. 127, 150–51 (C.C.D. Del. 1911) ("Not every combination in restraint of competition was, in a legal sense, in restraint of trade."); John D. Park & Sons Co. v. Nat'l Wholesale Druggists' Ass'n, 67 N.E. 136, 138–39 (N.Y. 1903) (reasoning that retail price maintenance schemes reduce competition without restraining trade).

59. *See* 51 CONG. REC. 16324 (1914) (statement of Sen. Nelson) (complaining about use of the rule of reason); *id.* at 15935 (1914) (statement of Sen. Nelson) (complaining about reasonableness); *see also* Jonathan M. Jacobson, *Exclusive Dealing, Foreclosure, and Consumer Harm*, 70 ANTITRUST L.J. 311, 317 (2002) (noting that the Clayton Act drafters intended to avoid the rule of reason).

acts that might incidentally lessen competition between firms nevertheless could produce welcome gains for society as a whole, including lower prices and expanded output.[60] The best evidence of this equivalence between lessening competition and the rule of reason comes from the six states that expressly banned lessening competition prior to the Clayton Act and that in turn counted among the twenty-seven states that had enacted bans on restraining competition.[61] Congress was clearly aware of these state laws during the drafting of the Act, as both its official publications and floor debates indicate.[62]

Georgia's law most closely resembled the Clayton Act.[63] Article IV of the Georgia Constitution, adopted in 1877, forbade the state assembly from authorizing a corporation to buy stock in another corporation or to make any agreement with another corporation "which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly."[64] A statute covered the same conduct.[65]

The Georgia Supreme Court understood these statutory enactments to mean "the same thing" as common-law restraint of trade, with the operative inquiry being "whether or not the public interests have been injuriously affected."[66] It recognized that the law did not prohibit all combinations that may tend to lessen competition: a merger between two companies would destroy all competition between them but could create a stronger challenge to the dominant firm in the industry.[67] This

60. *See* Robert L. Raymond, *The Standard Oil and Tobacco Cases*, 25 HARV. L. REV. 31, 40–41 (1911) (equating "substantial lessening of competition" with "restraint of trade," which can be evaluated for unreasonable injury to the public).

61. For a summary of these laws, see DAVIES, *supra* note 46, at 159–64 (outlining state laws that banned the restraint of competition).

62. *See, e.g.*, 51 CONG. REC. 9894 (1914) (statement of Rep. Bartlett) (discussing Georgia law); *id.* at 9090 (1914) (statement of Rep. Mitchell) (discussing Massachusetts law). *See generally Trust Legislation: Hearings Before the H. Comm. on the Judiciary*, 63rd Cong. (1914) (compiling federal, state, and foreign antitrust law for congressional use).

63. *See* David Gelfand, Deputy Assistant Att'y Gen. for Litig., Antitrust Div., Dep't of Just., Reflections on the Past Year at the Antitrust Division 3 n.4 (Sept. 16, 2014) (transcript available at https://www.justice.gov/atr/file/517766/dl [https://perma.cc/ENH7-YBM9]) (noting this similarity).

64. GA. CONST. art. IV, § II, para. IV (1877).

65. GA. CIV. CODE § 5800 (1896).

66. State v. Central of Ga. Ry. Co., 35 S.E. 37, 40 (Ga. 1900).

67. *Id.* at 39. The presence of other incumbents also suggested that a merger would not result in higher prices. Dady v. Georgia & A. Ry., 112 F. 838, 844–45 (S.D. Ga. 1900).

balancing accounted for cost savings and other productive efficiencies.[68] When the general effect of a railroad merger was "to increase competition to a far greater extent than it has been diminished at particular points," the Georgia Supreme Court concluded that "it cannot, with reason, be said that competition has been defeated or lessened."[69]

The mergers Georgia forbade, by contrast, would impede price competition and harm the public interest, even if the acquiring firm noted potential benefits to its business.[70] The same distinction resulted when a city that could legitimately set quality or skill requirements for contracts instead demanded union labor, because "[t]he effect of the provision is to lessen competition by preventing contractors from employing any except certain persons, and by excluding therefrom all others engaged in the same work."[71] Likewise, when a significant number of independent producers used their heft to warn wholesalers against dealing with a single rival that had undercut their prices, they lessened competition by collusively pressuring others to boycott.[72]

South Carolina, Indiana, Missouri, Tennessee, and Texas also enacted laws banning contracts or combinations that lessened competition.[73] These laws, in practice, looked to public injury as with Georgia's law. The Tennessee Supreme Court, for instance, observed that, other than discussing tendencies, this law made no change to the understanding of "what was at

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68. *Central of Ga. Ry. Co.*, 35 S.E. at 43 (finding that cost savings and increased output outweighed localized reductions in competition).

69. *Id.*; *cf.* Tr. Co. of Ga. v. State, 35 S.E. 323, 331 (Ga. 1900) (permitting a railway consolidation when only eight percent of business was at competitive terminals because the law should provide for "the greatest good to the greatest number").

70. Cent. R.R Co. v. Collins, 40 Ga. 582, 612–13, 631 (Ga. 1869); *id.* at 640–41 (Brown, C.J., concurring).

71. City of Atlanta v. Stein, 36 S.E. 932, 934 (Ga. 1900) (quoting Adams v. Brenan, 52 N.E. 314, 316 (Ill. 1898)).

72. Brown v. Jacobs Pharmacy Co., 41 S.E. 553, 556–61 (Ga. 1902).

73. An Act to Prohibit Trusts, 1897 S.C. Acts 434, § 1 ("[M]ade with a view to lessen, or which tends to lessen, full and free competition"); MO. REV. STAT. § 8966 (1899) ("[D]esigned or made with a view to lessen, or which tend to lessen, full and free competition in the importation, manufacture or sale of any article, product or commodity in this state"); Tenn. Antitrust Law of 1903, TENN. CODE ANN. § 47-25-101 (1903) ("[M]ade with a view to lessen, or which tend to lessen full and free competition"); Antitrust Law of 1903, 1903 Tex. Gen. Laws 119, c. 94 ("To create or which may tend to create or carry out restrictions in trade or commerce . . . . To prevent or lessen competition . . . ."); HORNER'S IND. ANNO. STAT. 1901, § 7554 (Act of Apr. 15, 1897) ("[M]ade with a view to lessen, or which tend to lessen, full and free competition . . . .").

common law undue or unreasonable restraint of trade, or such restraint of the synonymous term, 'full and free competition.'"[74] As in Georgia, the court also read into Tennessee's law the requirement that competition must be lessened "to any material extent, to the injury of any part of the people of the State," by which it primarily meant acts that excluded competitors and raised prices in any locality or on any product.[75]

The other jurisdictions agreed. The South Carolina Supreme Court interpreted the tendency to lessen full and free competition as covering only contracts that "unreasonably affect[] competition and prices to the detriment of the public," analyzing its statute in parallel with the common law rule that contracts are not void "if reasonable" as a partial restraint of trade.[76] The Indiana Court of Appeals noted that a merger that would grant a monopoly of an essential product in a single town would not violate the law as long as the wider market remained open.[77] It also read reasonableness into this law, realizing that the statute surely did not prevent "the law of supply and demand" from changing prices whenever buyers and sellers entered into a contract.[78] The Texas Supreme Court explained that despite the "literal language" of its statute, some exclusive contracts would be "reasonable" and "could not justly be regarded as so injurious to the state or its citizens," but it did not look kindly to exclusive dealings that unreasonably imposed barriers to equally situated rivals or established monopolies in regional markets.[79] And the Missouri Supreme Court tempered

74. Baird v. Smith, 161 S.W. 492, 493 (Tenn. 1913). For summaries of other Tennessee cases, see JOYCE, *supra* note 49, at 384, 450, 520.

75. Standard Oil Co. v. State, 100 S.W. 705, 715 (Tenn. 1906) (collecting authorities from other states on public injury).

76. Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co., 55 S.E. 973, 975–76 (S.C. 1906) (explaining that an exclusive territorial agreement did not violate this law when other brands could still freely compete); *see also* State v. Va.-Carolina Chem. Co., 51 S.E. 455, 458, 463–64 (S.C. 1905) (holding that a combination of most fertilizer suppliers lessened competition, even if an individual acquisition might not have).

77. Over v. Bryam Foundry Co., 77 N.E. 302, 304 (Ind. 1906).

78. *Id.*

79. State v. Mo., Kan. & Tex. Ry. Co. of Tex., 91 S.W. 214, 218–20 (Tex. 1906) (disallowing the exclusive grant of an express shipment franchise that penalized other shippers). *Compare* Fort. Worth & D.C. Ry. Co. v. State, 87 S.W. 336, 342–43 (Tex. 1905) (allowing an exclusive deal between a railway and a sleeping car purveyor), *with* State v. Racine Sattley Co., 134 S.W. 400, 402–03 (Tex. 1911) (rejecting an exclusive dealing contract that created a regional monopoly over necessities).

a seemingly literal reading of a Missouri law by staying ouster of corporations with potentially procompetitive features until they abused their market power either "to force a competitor to sell or drive it out of the market by unfair methods" or to "raise the prices of the articles it sells beyond a fair profit on their cost and the expense of marketing."[80]

Even if the lessening of competition did not always equate to reasonableness, the Clayton Act's requirement of a substantial lessening conveyed that meaning. Dictionaries defined "substantial" to mean both "containing the essence of a thing" and "considerable and sure."[81] Contemporary discussion of substantial harms to competition referred to the unreasonable ability of a restraint on trade to restrict prices or output to the public detriment.[82] Substantiality in this sense followed a principle familiar from railway mergers: although two roads did not serve the exact same route, a merger between them could still harm the public if they ran substantially parallel over even minor distances.[83] The legislative debates on the Clayton Act show that at least some of the Act's drafters understood that a substantial lessening of competition would signal the

80. State *ex rel.* Major v. Int'l Harvester Co. of Am., 141 S.W. 672, 679 (Mo. 1911); *see also* State *ex rel.* Sager v. Polar Wave Ice & Fuel Co., 169 S.W 126, 134–35 (Mo. 1914) (imposing conditional ouster because the court "deemed it prudent to hold a whip hand upon corporations disposed to violate our anti-trust laws"); Pope-Turnbo v. Bedford, 127 S.W. 426, 428 (Mo. App. 1910) (borrowing from common law restraint of trade and non-compete law).

81. 2 STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 1793 (1897) [hereinafter 2 STANDARD DICTIONARY]; *see also* NEW WEBSTERIAN DICTIONARY, *supra* note 43, at 803 (having "substance" or "containing the essential parts").

82. *See* Prame v. Ferrell, 166 F. 702, 705 (6th Cir. 1909) (concluding that "active and substantial" competition prevented public injury from a non-compete agreement); United States v. Int'l Harvester Co., 214 F. 987, 994 (D. Minn. 1914) (noting that the merger of five companies with 80% market share "substantially suppressed all competition between" them and constituted illegal "restraint of competition" under the Sherman Act); Merch. Ice & Cold Storage Co. v. Rohrman, 128 S.W. 599, 599, 604 (Ky. 1910) (condemning a merger constituting 90–95% of market share that would "effectually destroy substantial competition").

83. *See* United States v. Union Pac. R.R. Co., 188 F. 102, 115–16 (C.C.D. Utah 1911) (declining to block a railway merger under the Sherman Act after finding the proportion of overlapping business between the railways to be single-digit percentages and reasoning that such overlap was insubstantial), *rev'd* 226 U.S. 61, 88–89 (1912) (holding that small levels of overlap proved substantial on those routes); *see also* St. Louis R.R. Co. v. Nw. St. Louis Ry. Co., 69 Mo. 65, 71 (1878); Commonwealth v. Beech Creek, 1 Pa. C.C. 223, 226–27 (Pa. C.P. Dauphin Cnty. 1886); State *ex rel.* Att'y Gen. v. Hocking Valley Ry., 31 Ohio C.C. (n.s.) 175, 190 (Ohio Cir. Ct. 1909).

continuation of this analytical focus on public injury.[84] As if to confirm that link, those drafters did not look kindly on the possibility that this meaning would persist.[85]

B. *Or Tend to Create a Monopoly*

The Clayton Act's second test, "or tend to create a monopoly," would have proven instantly recognizable in 1914.[86] Dictionaries, regular and legal, defined a "monopoly" as ownership or control of the supply of some product sufficient to block competitors and raise prices above the competitive level.[87] Antitrust law similarly defined "monopoly" as, in the words of one treatise, "exclusive control, a stifling of competition," with the implication that a single firm or group of individuals possesses "power to practically control prices . . . and thus suppress competition."[88] A monopoly did not need to have total control as long as the remaining competitors held purely

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84. Compare 51 CONG. REC. 14314 (1914) (statement of Sen. Thomas Walsh) (observing that stores in Chicago and St. Louis "do not substantially compete"), *with* 51 CONG. REC. 15857 (1914) (statement of Sen. James Reed) (suggesting that "substantial" could mean more than unreasonable), *and* 51 CONG. REC. 9078 (1914) (statement of Rep. Andrew Volstead) (suggesting that the ambiguous "substantial" standard requires near-total elimination of competition).

85. 51 CONG. REC. 16282 (1914) (statement of Sen. Volstead) (worrying that courts would view "less than 4 per cent; in fact, less than 1 per cent, of the commerce" as substantial as in *Union Pacific*).

86. *See, e.g.*, JOYCE, *supra* note 49, at 71 ("[C]ontracts and combinations which tend to create a monopoly are against public policy, and, therefore, illegal."); 2 ARTHUR J. EDDY, THE LAW OF COMBINATIONS EMBRACING MONOPOLIES, TRUSTS, AND COMBINATIONS OF LABOR AND CAPITAL; CONSPIRACY, AND CONTRACTS IN RESTRAINT OF TRADE 1464, 1507 (1901) (showing index entries for a legal combination "which does not tend to create a monopoly" and vice versa).

87. 2 STANDARD DICTIONARY, *supra* note 81, at 1146; *cf.* WEBSTER'S DICTIONARY, *supra* note 43, at 367 ("The exclusive power, right, or privilege of engaging in a particular traffic or business, or the resulting absolute possession or control; especially, in political economy, such control of a special thing, as a commodity, as enables the person or persons exercising it to raise the price of it above its real value, or above the price it would bring under competition."); *Monopoly*, BLACK'S LAW DICTIONARY (2d ed. 1910) ("[T]he ownership or control of so large a part of the market-supply or output of a given commodity as to stifle competition, restrict the freedom of commerce, and give the monopolist control over prices.").

88. JOYCE, *supra* note 49, at 7–8; *see* 1 EDDY, *supra* note 86, at 29 (explaining the test of monopoly based on whether a firm competes in or dominates the trade); THORNTON, *supra* note 58, at 335 (defining an illegal trust as a combination to control prices and "tend to create a monopoly").

marginal roles.[89] Economists had not yet settled on a single model of monopoly, but they too agreed that monopoly implied the absence of competition.[90]

Antitrust law prior to the Clayton Act also discussed the degree of inevitability that marked a tendency to create monopoly.[91] "Tendency" in this context described a necessary or natural outcome of some action.[92] It contrasted with acts evincing an intent to monopolize, which might not succeed but still could violate the Sherman Act.[93] Actions that naturally would centralize control in a single entity with the power to manipulate prices would be condemned even if complete control had not yet emerged.[94] Hence, Davies explained, state laws condemned exclusive dealing and price discrimination because of the belief that such acts "inevitably result in restraint of trade or tend to monopoly."[95] A horizontally merged corporation likewise might have initially lowered prices, but it may still have tended to monopolize if it lowered prices only to drive out rivals and thereby solidify its power to raise prices in the future.[96] By contrast, actions that permitted actual or potential

89. Over v. Byram Foundry Co., 77 N.E. 302, 304 (Ind. Ct. App. 1906); Fisher Flouring Mills Co. v. Swanson, 137 P. 144, 147 (Wash. 1913); 51 CONG. REC. 9090 (1914) (statement of Rep. Mitchell) (noting that "monopolistic" operations would leave independent challengers with a "very narrow and restricted field for operation").

90. *See* 2 TAUSSIG, *supra* note 48, at 107.

91. *See* sources cited *supra* note 88.

92. WEBSTER'S DICTIONARY, *supra* note 43, at 571 ("to be directed, as to any end or purpose"); NEW WEBSTERIAN DICTIONARY, *supra* note 43, at 828 ("inclination").

93. Swift & Co. v. United States, 196 U.S. 375, 396 (1905) ("Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly . . . an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen."); *see also* THORNTON, *supra* note 58, at 417–21 (explaining that "tendency to monopolize" meant an attempt with the necessary effect of creating harmful outcomes forbidden by law).

94. *See, e.g.*, United States v. E.C. Knight, 156 U.S. 1, 16 (1895) ("[I]t is not essential that its result should be a complete monopoly, it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition."); Distilling & Cattle Feeding Co. v. People *ex rel.* Moloney, 41 N.E. 188, 201 (Ill. 1895) (describing trusts able to dictate quantity and prices "and thus to create or tend to create a virtual monopoly"); *see also* Baird v. Smith, 161 S.W. 492, 493 (Tenn. 1913) (distinguishing common-law focus on actual effect from statutory tendency to produce that effect).

95. DAVIES, *supra* note 46, at 143.

96. *See* State *ex rel.* Att'y Gen. v. Standard Oil Co., 30 N.E. 279, 290 (Ohio 1892) (discussing Richardson v. Buhl, 43 N.W. 1102, 1111 (Mich. 1889) (Chamling, J., concurring)).

competition did not violate the law because their "tendency to create a monopoly is too remote."[97]

The Clayton Act finally requires a tendency to *create* a monopoly. By 1914, courts had interpreted the Sherman Act's ban on monopolization to include both new monopolies and the maintenance of monopolies through anticompetitive means.[98] Some state laws also expressly distinguished between the creation and maintenance of monopolies.[99] The Clayton Act instead limits liability to acts that have a tendency to create a monopoly where none existed previously, reflecting the emphasis of the Act's drafters on supplementing existing antitrust law with the ability to stop a monopoly in its incipience.[100]

C. *Where the Effect . . . May Be*

Consistent with this concern about stopping new harms, the Clayton Act requires only that the "effect" of the specified conduct "may be" to produce these effects.[101] Dictionaries defined "effect" as the "result or product of some efficient cause or agency; a consequence; [or] an outcome."[102] In the context of contemporary antitrust law, "effects" referred to whether business action would restrain trade or lessen competition due to attendant harms to the public in the form of control over

97. Barrows v. McMurtry Mfg. Co., 131 P. 430, 436 (Colo. 1913) (permitting a company sale with a reasonable non-compete clause); *see* DAVIES, *supra* note 46, at 25 (distinguishing non-competes on a sale of a business from horizontal agreements or consolidation between active competitors).

98. *See, e.g.*, Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 75 (1911) (noting "new means of [corporate] combination" used "to maintain the dominancy over the oil industry").

99. *See, e.g.*, 1897 N.Y. Laws 310, ch. 383 § 1 ("Every contract, agreement, arrangement or combination whereby a monopoly . . . is or may be created, established or maintained . . . is hereby declared to be against public policy."); 1908 Mass. Acts 409, ch. 454 ("Every contract, agreement, arrangement or combination in violation of the common law in that thereby a monopoly . . . is or may be created, established or maintained . . . ."); *see also* JOYCE, *supra* note 49, at 115 ("to create or maintain a monopoly").

100. *See* 51 CONG. REC. 15820 (1914) (statement of Sen. Walsh) (explaining that this law would "suppress those practices which, if persevered in and developed, would eventually result in the creation of a monopoly").

101. 15 U.S.C. §§ 13(a), 14, 18.

102. 1 STANDARD DICTIONARY, *supra* note 44, at 577; *see also* NEW WEBSTERIAN DICTIONARY, *supra* note 43, at 282 ("result").

pricing and output.[103] By contrast, "no injurious effect" could occur when competition remained in place.[104]

These effects did not have to be certain under the Clayton Act's "may" result language. Dictionaries of that time explained that "may" could mean something "possible" or "able" to occur.[105] But most states that used "may" in antitrust laws preferred a more stringent approach. As the Georgia Supreme Court reasoned about its law targeting conduct that "may have the effect . . . to defeat or lessen competition," condemning contracts that simply "might in same particulars have a tendency to lessen competition or to restrain trade," would risk condemning much conduct that is in fact socially beneficial, such as two weak competitors merging to challenge a stronger rival.[106] The Massachusetts Supreme Judicial Court likewise understood that the Commonwealth's law against mergers that "may" or do restrain or prevent price competition had to take into account the possibility of entry over the long-run and not merely any short-run potentialities.[107] And as the Missouri Supreme Court pointed out when the state Attorney General had investigated the American Tobacco Company for transferring its plants to a new corporation, the "strong suspicion-yes, even a strong probability-that a trust was being created" could coexist with a conclusion that the transfer was lawful.[108]

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103. *See, e.g.*, WILLIAM HOWARD TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 112 (1914) ("It is the purpose and necessary effect of controlling prices and putting the industry under the domination of one management that is within the [Sherman Act]."); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 245 (1899) (explaining that a collusive agreement could produce "the effect" of a restraint of trade under the Sherman Act); Boyle v. Adams, 52 N.W. 860, 861 (Minn. 1892) ("In either case, the natural and necessary effect of such an agreement is to remove competition . . . ."); State *ex rel.* Att'y Gen. v. Hocking Valley Ry., 31 Ohio C.C. 175, 188 (Ohio Cir. Ct. 1909) (describing the "restriction of trade or stifling of competition" as an "effect").

104. E. Tenn., Va. & Ga. Ry. Co. v. Interstate Com. Comm'n, 181 U.S. 1, 16–17 (1901); *see* Fisher Flouring Mills Co. v. Swanson, 137 P. 144, 148 (Wash. 1913) (reasoning that vertical price maintenance "cannot have an effect appreciably inimical to the public interest" absent monopoly).

105. WEBSTER'S DICTIONARY, *supra* note 43, at 352 ("To be possible or able; to have license."); NEW WEBSTERIAN DICTIONARY, *supra* note 43, at 529 ("[T]o be able; be allowed."); *see also* Lande, *supra* note 27, at 827–30 (collecting dictionary definitions and critiquing a permissive reading).

106. State v. Cent. of Ga. Ry. Co., 35 S.E. 37, 38 (Ga. 1900).

107. Commonwealth v. N. Shore Ice Delivery Co., 107 N.E. 402, 403–04 (Mass. 1914) (noting that combination with only temporary power to raise prices did not violate a statute against restraining competition).

108. Crow v. Cont'l Tobacco Co., 75 S.W. 737, 748 (Mo. 1903).

True, some contemporaries thought that "may" only required a possibility in the antitrust context. When Senator William Chilton presented the Senate with the conference committee's revisions to the Clayton Act, he explained that the Senate had prevailed in its preferred language of using "may be" in the place of the House's "is," a difference that he attributed to permitting liability "where it is possible for the effect to be."[109] New York had reached a similar conclusion when interpreting its law against contracts and combinations "whereby a monopoly . . . is or may be created . . . or whereby competition . . . is or may be restrained or prevented."[110] When the New York Court of Appeals applied this law to book publishers that blacklisted retailers who refused to follow resale price maintenance, it reasoned that it is "not only possible, but probable" that the publishers' association had created a monopoly in book sales.[111] But the court then explained that "whether such a result is probable or not" is the wrong test.[112] The correct test asks "what may be done under the agreement?"[113] This blacklist agreement "may be so worked out as to deprive a dealer from selling any books whatsoever, thus breaking up his business," so no matter the justification offered by the publishers, they could dictate prices to dealers.[114]

While some modern scholars have leaned heavily on dictionaries to agree that "may" signals possibility, the full context of the Clayton Act supports the historic majority position that it instead signals probability.[115] Equating "may" with possibility would impede the established background principle that antitrust law permits reasonable restrictions.[116] Had Congress intended to disturb this well settled body of law by adopting the possibility standard, it would have needed to

109. 51 CONG. REC. 16002 (1914) (statement of Sen. Chilton).

110. 1897 N.Y. Laws 310.

111. Straus v. Am. Publisher's Ass'n, 69 N.E. 1107, 1108 (N.Y. 1904).

112. *Id.*

113. *Id.*

114. *Id.* at 1109.

115. *See* Lande, *supra* note 27, at 830–31; Lande, Newman & Slaughter, *supra* note 30, at 13–15; FARM ACTION, *supra* note 28, at 17–18.

116. *See* THORNTON, *supra* note 58, at 155 ("But it does not follow that every combination in trade . . . is therefore illegal. Such a rule would produce greater public injury than that which it would seek to cure."); *see also* WALTER CHADWICK NOYES, A TREATISE ON THE LAW OF INTERCORPORATE RELATIONS 502 (1902) ("A distinction has been drawn between contracts of independent manufacturers, for the purpose of restricting competition, and the purchase by one corporation . . . of the properties and business of competing corporations, which may have the effect of suppressing competition.").

speak more clearly than "may."[117] Instead, as the Supreme Court observed a mere eight years after the law's enactment, just as the Clayton Act's use of "substantially" eliminates remote possibilities from its scope, so too does it make sense that "may" carries the heightened degree of certainty conveyed by "probably."[118]

Reading "may" as "probably" still represents an important change from prior antitrust law. The Sherman Act requires proof that some agreement has resulted in a restraint of trade, or at least an attempt to monopolize.[119] The Clayton Act echoes that heightened standard of inevitability or necessity when it discusses a tendency to monopoly.[120] Adding "may" to that formulation shows that enforcers need not be absolutely certain that harm will emerge.[121] Congress appreciated that this existing approach would reduce the certainty necessary to combat the proscribed activities.[122]

D. *In Any Line of Commerce*

Sections 2, 3, and 7 of the Clayton Act today require that the effect may be to substantially lessen competition or tend to create a monopoly "in any line of commerce."[123] Contemporaries read this "plain language" as extending the element of "in any line of commerce" to both the substantial lessening of

117. *See generally* SCALIA & GARNER, *supra* note 10, at 318–26 (discussing canons of construction that presume Congress preserves established common law and statutory meanings).

118. Standard Fashion Co. v. Magrane-Houst. Co., 258 U.S. 346, 356–57 (1922).

119. *See* 15 U.S.C. §§ 1–2.

120. *See supra* Section I.B.

121. *See* State v. Racine Sattley Co., 134 S.W. 400, 403 (Tex. 1911) (explaining that a law defining a trust as a combination that "may tend to create . . . restrictions in trade" does not require immediate effects of public harm as long as the tendency exists); Baird v. Smith, 161 S.W. 492, 493 (Tenn. 1913) (emphasizing that the statute introduced tendency to the common-law concern with "point of fact"). Supreme Court dicta that the Clayton Act requires "an actual tendency to monopoly," *Standard Fashion*, 258 U.S. at 357, and not simply a probability of that tendency should be ignored. The Court referred to the Act's original text, still preserved in section 3, which states that the "effect . . . may be to substantially lessen competition or tend to create a monopoly." 15 U.S.C. § 14. For the Court to have been correct that "may" modifies only the first part of that phrase, that text should have instead read that the "effect . . . may be substantially to lessen competition or *tends* to create a monopoly." "May" could modify "tend," but it could not modify "tends."

122. 51 CONG. REC. 15937 (1914) (statement of Sen. Chilton) (following the approach "adopted by most of the States . . . where the effect may be and where the tendency is to create monopoly"); *see also id.* at 14459–64 (offering and debating an amendment to replace "is" with "may be" in an earlier draft).

123. 15 U.S.C. §§ 13(a), 14, 18.

competition and the tendency to create a monopoly.[124] As originally written, this requirement appeared in sections 2 and 3, while section 7 used it only in conjunction with "tend to create a monopoly of any line of commerce."[125]

The Act defines "[c]ommerce" as interstate or international trade or commerce, which matters when satisfying federal jurisdiction.[126] But the full term "line of commerce" was, to the first court to grapple with the Clayton Act's text, a "vulgarism" that was "not a term of art" at that time.[127] In fact, searching for "line of commerce" in the case law of this period most commonly returns a literal line of commerce, such as a road or right of way,[128] or an actual road named Commerce Street.[129] The Supreme Court in 1929 explained that "line of commerce" is "comprehensive" and applies whenever "the forbidden effect or tendency is produced in one out of all the various lines of commerce," but the Court failed to explain what constitutes a separate line.[130]

Still, the meaning of this term is not difficult to discern from the competitive context. Other contemporary uses show that a line of commerce could encompass an entire industry or category of product larger than a single article or brand.[131] For instance, the Supreme Court observed that the pigment industry viewed chemicals as "staples of trade in that line of commerce."[132] Courts considering whether to interpret a contract in light of a purported industry practice asked if that

124. George Van Camp & Sons Co. v. Am. Can Co., 278 U.S. 245, 251–54 (1929).

125. Clayton Antitrust Act, Pub. L. 63-212, §§ 2, 3, 7, 38 Stat. 731–32 (1914).

126. 15 U.S.C. § 12(a); *see* United States v. Am. Bldg. Maint. Indus., 422 U.S. 271, 275–83 (1975) (explaining the use of interstate commerce to establish jurisdiction in section 7).

127. Great Atl. & Pac. Tea Co. v. Cream of Wheat Co., 224 F. 566, 572 n.7 (S.D.N.Y 1915).

128. *See, e.g.*, Kansas City S. Ry. Co. v. Kaw Valley Drainage Dist., 233 U.S. 75, 78 (1914).

129. *See, e.g.*, Turner v. City of Mobile, 33 So. 132, 133 (Ala. 1902); Bohny v. Petty, 17 S.W. 80, 80 (Tex. 1891).

130. George Van Camp & Sons Co. v. Am. Can Co., 278 U.S. 245, 253 (1929).

131. *See* G.P. Blackiston, *A Successful Bank Advertisement*, 81 BANKERS' MAG. 232 (Aug. 1910) ("The necessity for bank advertising is as great as in any other line of commerce . . . ."); W.F. ROCHELEAU, THE GEOGRAPHY OF COMMERCE AND INDUSTRY 95 (1913) ("[T]he use of fish has become so extensive, that this industry has established an important line of commerce, though scarcely any of the fish taken in the United States are exported."); *Fraud in Furs*, SCI. AM., Feb. 25, 1905, at 163 ("In no line of commerce are we more regularly fooled and defrauded than in the retail fur trade."); W.A. CARPENTER, RAMBLING THOUGHTS OR PURE GOLD 47 (1889) (describing alcohol as a "fatally dangerous line of commerce").

132. Meyer v. Arthur, 91 U.S. 570, 573 (1875).

custom was necessary to "the particular line of commerce."[133] The drafters of the Clayton Act likewise used the phrases "line of business" or "line of production" when giving illustrations of a "line of commerce."[134]

Contemporaries nevertheless would not have considered lines of commerce, which signified trade in some goods or commodities, to include labor markets.[135] After all, a year before the Clayton Act passed, Congress split off the relevant component of the former Department of Commerce and Labor into a separate Department of Labor, signaling a clear distinction between the two categories.[136] A guide to arbitrating "problems that arise daily in almost every active line of commerce"[137] during this era likewise treated labor only as a reason for productive disruptions, not a line in itself. Confirming this distinction, section 6 of the Clayton Act makes it plain that "the labor of a human being" does not constitute "a commodity or article of commerce."[138]

II. The Context of the Clayton Act

Readers of the Clayton Act in 1914 would have understood this law to have a familiar meaning. Contemporary discussions and legal application show that "lessening competition" required some unreasonable restraint, and a "tendency to create a monopoly" focused on inevitable or necessary control over prices.[139] Dictionary definitions, treatises, discussions of competition, and state laws all suggest that the Clayton Act differed from the Sherman Act primarily in its use of "may" to address probable effects.[140]

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133. Gilbert v. Citizens' Nat'l Bank of Chickasha, 160 P. 635, 641 (Okla. 1916); Mobile Fruit & Trading Co. v. J.H. Judy & Son, 91 Ill. App. 82, 90 (Ill. App. Ct. 1900).

134. 51 CONG. REC. 9083, 9163, 14420 (1914); *see also id.* at 15830 (statement of Sen. Reed) (paraphrasing section 3 as "some line of business or trade or manufacture").

135. *See* NEW WEBSTERIAN DICTIONARY, *supra* note 43, at 188 (defining commerce as the "interchange of merchandise on a large scale between nations or individuals."); 1 STANDARD DICTIONARY, *supra* note 44, at 379 (defining commerce as "[t]he exchange of goods, productions, or property of any kind").

136. An Act to Create a Department of Labor, Pub. L. No. 62-426, 37 Stat. 736 (1913).

137. HORACE ARTHUR DUNN & HENRY PROBASCO DIMOND, COMMERCIAL ARBITRATION i, 199 (1922).

138. 15 U.S.C. § 17.

139. *See supra* Sections I.A–B.

140. *See supra* Section I.C.

This Part confirms that meaning by contextualizing these words within federal competition law and by looking to their immediate reception, methods of interpretation as familiar in 1914 as they are today.[141] Sections 2, 3, and 7 form only part of the overall Clayton Act, and their incipient purpose stands out in the law's broader system of remedies, carveouts, and exclusions.[142] The Clayton Act's goal also stands out in comparison with the established approach of the Sherman Act and the unique enforcement mechanism and novel test of liability contained in the Federal Trade Commission Act[143] (FTC Act).[144] Treatises and early judicial application largely agreed that the Clayton Act added little to the Sherman Act's existing coverage other than its incipient applications.[145]

A. *Statutory Context*

The tests of liability contained within sections 2, 3, and 7 of the Clayton Act form only one part of that law's changes to antitrust law.[146] Reading these sections in the context of the Clayton Act as well as the Sherman Act and FTC Act reinforces that the new tests of liability differ primarily in their approach to incipience, not reasonableness.[147]

1. The Context of the Clayton Act

When Congress reused the same test of liability—where the effect may be to substantially lessen competition or tend to create a monopoly—in multiple sections of the Clayton Act, it presumably meant the same thing on each occasion.[148] Departures from that standard language confirm a reasonableness approach familiar to state and federal antitrust interpreters. For instance, after section 2 banned price discrimination "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly

141. *See* California v. Am. Stores Co., 495 U.S. 271, 279, 284 (1990) (moving from text to context in Clayton Act interpretation); Wyandotte Cnty. Gas Co. v. Kan. *ex rel.* Marshall, 231 U.S. 622, 629–30 (1914) (observing that statutory words must be read in context).

142. *See infra* Section II.A.1.

143. Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58).

144. *See infra* Section II.A.2.

145. *See infra* Section II.B.

146. *See infra* Section II.A.1.

147. *See infra* Section II.A.2.

148. *See* SCALIA & GARNER, *supra* note 10, at 170–73 (presumption of consistent usage canon).

in any line of commerce," it went on to provide safe harbors.[149] Among these, companies could use price discrimination "to meet competition" and select their own customers as long as they were "not in restraint of trade," evincing an expectation that courts and litigants would continue to emphasize those concepts and the Sherman Act's rule of reason.[150]

A variation in the original text of section 7 also emphasizes this connection with the rule of reason: no corporation could acquire stock if the effect of doing so would substantially lessen competition "between the corporation whose stock is so acquired and the corporation making the acquisition," as opposed to lessening competition in any line of commerce.[151] Congress designed this special section to apply its new incipience standard to horizontal mergers within the same industry while leaving open the possibility of vertical and conglomerate combinations.[152] A straight limitation on mergers between just these two competing companies would have foreclosed all horizontal consolidations. Adding the requirement of a substantial lessening of competition suggested that this standard applied reasonably and not as a per se ban, such as when the merger would enhance the promotion of preexisting brands.[153] Contemporaries echoed that understanding, noting that acquiring the stock of another minor participant in some market could create a stronger competitor overall.[154]

149. Clayton Antitrust Act, Pub. L. 63-212, § 2, 38 Stat. 730–31 (1914).

150. *Id.*

151. *Id.* § 7, 38 Stat. at 732.

152. 51 CONG. REC. 16002 (1914); *see* E.H., *Anti-Trust Act. Combinations in Restraint of Trade*, Note, 63 UNIV. PENN. L. REV. & AM. L. REG. 315, 320 (1915); EDDY, *supra* note 86, at 950 (describing the object of the railroad consolidation held illegal in *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897) as "to affect interstate commerce, and to lessen competition between the railways who were parties to the agreement"); *see also* United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 590–93 (1957) (concluding that the second and third prongs of the original section 7 covered non-horizontal stock acquisitions).

153. *See* Int'l Shoe Co. v. FTC, 280 U.S. 291, 298 (1930) (holding that there was no violation of section 7 when one firm previously concentrated on urban sales and the other on rural markets); *see also* V. Vivaudou, Inc. v. FTC, 54 F.2d 273, 275–76 (2d Cir. 1931) (rejecting an FTC challenge to a cosmetics merger in part because the combined company made greater efforts "to sell the articles as branded by each company" using salesmen exclusive to "their respective lines"). Section 7 separately authorized horizontal combinations for investment purposes. Clayton Antitrust Act, Pub. L. 63-212, § 7, 38 Stat. 732 (1914) (codified as amended at 15 U.S.C. § 18).

154. *See* E. Dana Durand, *The Trust Legislation of 1914*, 29 Q. J. OF ECON. 72, 83 (1915); William Howard Taft, *Address of the President*, 37 ANN. REP. A.B.A. 359, 365 (1914).

Section 8, the Clayton Act's fourth prohibition on conduct, was the only prohibition that did not adopt its standard test in any form. This section prohibits directors of one corporation from serving as directors of another if an agreement between the corporations "would" violate some other provision of antitrust law.[155] The hypothetical nature of any such agreement shows that Congress was again concerned about preventing antitrust violations in their incipiency, yet it declined to use the familiar language of "where the effect may be." Instead, it provided that any possible violation of antitrust law—including the Sherman Act—would constitute a per se violation, regardless of the actual chances of that violation occurring.[156]

The Clayton Act's express endorsement of injunctions further reinforced its incipient approach. The new section 16 established that private parties could obtain antitrust injunctions, overturning precedent that had construed the Sherman Act as limiting this relief to the government, and section 17 recognized preliminary injunctions.[157] Injunctions require a strong showing of success on the merits, aligning with the narrower reading of "may" as "probable" and not just "possible."[158]

2. The Context of Antitrust Law

The drafters of the Clayton Act denounced earlier interpretations of the Sherman Act as ineffective in curbing business power.[159] Yet, as many commentators quickly observed, the language that Congress chose for its new test could already be found in this disfavored Sherman Act case

155. Clayton Antitrust Act, Pub. L. 63-212, § 8, 38 Stat. 732 (1914) (codified at 15 U.S.C. § 19).

156. *See* Michael E. Blaisdell, *Interlocking Mindfulness,* FED. TRADE COMM'N (June 26, 2019), https://www.ftc.gov/enforcement/competition-matters/2019/06/interlocking-mindfulness [https://perma.cc/7X7R-KUDR] (describing section 8 as a per-se test).

157. Clayton Antitrust Act, Pub. L. 63-212, § 16–17, 38 Stat. 737–38 (1914) (codified as amended at 15 U.S.C. § 26); *see* Paine Lumber Co. v. Neal, 244 U.S. 459, 472–85 (1917) (Pitney, J., dissenting).

158. *See* Consol. Canal Co. v. Mesa Canal Co., 177 U.S. 296, 302 (1900).

159. *See, e.g.*, 51 CONG. REC. 9161 (1914) (denouncing the judicial treatment of exclusive dealing in *Whitwell v. Continental Tobacco Co.*, 125 F. 454 (8th Cir. 1903)); *see also* Motion Picture Pats. Co. v. Universal Film Mfg. Co., 243 U.S. 502, 517–18 (1917) (reasoning that the Clayton Act overturned earlier case law on tying).

law.[160] Just as section 1 of the Sherman Act banned those agreements and combinations in restraint of trade that flunked the rule of reason, so too had courts reasoned that combinations or other acts resulting in a substantial lessening of competition resulted in price manipulation without offsetting benefit.[161] And just as section 2 of the Sherman Act condemned monopolization, so too did the second half of the Clayton Act test apply to actions that would inevitably create a monopoly.[162]

Such continuity with the Sherman Act should not be a surprise given how much of it carried over into the Clayton Act. Section 4 of the Clayton Act, which authorized a private right of damages, restated section 7 of the Sherman Act with only minor changes about where to file actions.[163] Section 15, providing jurisdiction to federal district courts and calling on United States district attorneys to initiate suits for injunctions, likewise copied section 4 of the Sherman Act except that it shifted jurisdiction from federal circuit courts.[164]

These similarities with established antitrust law become even more apparent when contrasting the Clayton Act with the FTC Act, which Congress had passed two weeks earlier.[165] The

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160. *See* AMOS JENKINS PEASLEE, THE EFFECT OF THE FEDERAL ANTI-TRUST LAWS ON COMMERCE IN PATENTED AND COPYRIGHTED ARTICLES 402 (1915) (noting the similar language between section 3 of the Clayton Act and *Whitwell*); Durand, *supra* note 154 (suggesting that section 7 "seems to add nothing of real value to the Sherman [A]ct" other than targeting unproblematic behavior).

161. 15 U.S.C. § 1; *see supra* Section I.A.

162. 15 U.S.C. § 2; *see supra* Section I.B; *see also* 51 CONG. REC. 14319 (1914) (statement of Sen. Walsh) (reasoning that creating a monopoly in any line of commerce fell under the Sherman Act).

163. *Compare* Clayton Antitrust Act, Pub. L. 63-212, § 4, 38 Stat. 731 (1914) (codified as amended at 15 U.S.C. § 15) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in which the defendant resides or is found . . . ."), *with* Sherman Act, ch. 647, § 7, 26 Stat. 209, 210 (1890) ("Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found . . . .").

164. *Compare* Clayton Antitrust Act, Pub. L. 63-212, § 15, 38 Stat. 736–37 (1914) (codified as amended at 15 U.S.C. § 9) (transferring jurisdiction to federal district courts and empowering U.S. attorneys to seek injunctions in antitrust cases under the Clayton Act), *with* Sherman Act, ch. 647, § 4, 26 Stat. 209–10 (1809) (granting federal circuit courts jurisdiction and authorizing U.S. attorneys to bring antitrust suits under the Sherman Act).

165. *See* Neil W. Averitt, *The Meaning of Unfair Methods of Competition in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 262 (1980); Taft, *supra* note 154, at 364.

FTC Act created an independent federal trade commission empowered to identify and enjoin "unfair methods of competition."[166] Congress never defined "unfair methods of competition," but contemporary legal decisions and floor debates suggest that it encompassed existing standards that transcended violations of the letter of antitrust law.[167] Rather than provide proscriptions on specific behavior that businesses could circumvent, the FTC Act empowered an expert commission to determine when business ingenuity crossed the line from fair to unfair competition.[168] Unlike the Clayton Act's standards, the FTC Act does not apply to the probable effects of a method on competition itself; it only applies when someone has or is currently using a method of competition that the agency deems unfair.[169]

The drafters of the Clayton Act contemplated that the FTC would perform a similar role in enforcing that law as well. Section 11 of the Clayton Act grants the FTC "authority to enforce compliance with sections two, three, seven and eight" against most businesses when it believes that someone has or is currently violating those laws.[170] Like with adjudications against unfair methods of competition, the FTC can issue a cease-and-desist order, including requiring the divestiture of stock or removal of directors, subject to review by a court of appeals.[171] But while only the agency can file a complaint against unfair methods of competition, the FTC shares responsibility for enforcing the Clayton Act with the Department of Justice and private plaintiffs, who can obtain treble damages as well as injunctive relief.[172] Compared with the limited enforcement of the FTC Act, the heightened penalties for Clayton Act violations and the possibility of non-

166. 15 U.S.C. § 45(a)(1).

167. *See* Milner, *supra* note 23, at 123–46; Averitt, *supra* note 165, at 251–90.

168. *See* 15 U.S.C. § 45(b).

169. *Id.*

170. Clayton Antitrust Act, Pub. L. 63-212, § 11, 38 Stat. 734–36 (1914) (codified as amended at 15 U.S.C. § 21(b)).

171. *Compare id.* (empowering the FTC, with judicial review by the court of appeals, to issue cease-and-desist orders in antitrust cases, including ordering divestiture of stock or removal of directors), *with* 15 U.S.C. § 45(b), (c) (providing the FTC, with provisions for review by the court of appeals, authority to issue cease-and-desist orders for unfair methods of competition).

172. *Compare* 15 U.S.C. § 45(b) (granting the FTC exclusive authority to initiate complaints regarding unfair methods of competition), *with id.* §§ 15(a), 26 (allowing private plaintiffs and the Department of Justice, with provisions for treble damages and injunctive relief in antitrust violations, to enforce the Clayton Act).

expert factfinding by district courts and juries again relates its standards and application to those of the generally enforceable Sherman Act.[173]

B. *Contemporary Understanding and Application*

Early scholarly and judicial interpretations of the Clayton Act likewise concluded that the Clayton Act's tests of illegality largely continued the approach of the Sherman Act. Associating the Clayton Act's tests of "substantially to lessen competition" and "tend to create a monopoly" with the existing tests of the Sherman Act, those interpretations concluded that this new law would reach the same outcomes and apply the rule of reason.[174] That perceived continuity distinguished the Clayton Act from the FTC Act, which to at least some heralded a broader approach than earlier antitrust law.[175]

Contemporary judicial applications of the Clayton Act agreed that these new tests largely repeated familiar standards of the Sherman Act, eschewing a per se approach in favor of asking what effects might result in the future.[176] The first decision under the Act, which declined to force Cream of Wheat to sell its branded product to the A&P grocery chain when the grocer refused to abide by a recommended retail price, concluded that section 2 of the Clayton Act "plainly identifies

173. *See id.* § 15.

174. *See* DAVIES, *supra* note 46, at 134 (explaining that substantially lessening competition or tending to create a monopoly "connect[]" the Clayton Act to the Sherman Act); W.H.S. Stevens, *The Clayton Act*, 5 AM. ECON. REV. 38, 43 (1915) ("Would not the courts in any case coming before them have construed the Sherman act to embrace all these situations provided there was any substantial lessening of competition, restraint of trade, or tendency to create a monopoly?"); *see also* JOHN MAYNARD HARLAN & LEWIS W. MCCANDLESS, AN INTERPRETATION OF THE TRADE LAW AND RELATED STATUTES 13 n.37 (1916) (concluding that "substantially lessen competition" incorporates the rule of reason into the Clayton Act); *see also* Henry R. Seager, *The New Anti-Trust Acts*, 30 POL. SCI. Q. 448, 456 (1914) ("The legislation has, therefore, merely enumerated as unlawful certain lines of conduct which even before the act was passed had come to be viewed as possible evidences of a criminal combination."); Felix H. Levy, *The Clayton Law, An Imperfect Supplement to the Sherman Law*, 3 VA. L. REV. 411, 418 (1916) ("A study of the decisions of the Supreme Court under the Sherman Law show that neither [section 2 nor section 3] was needed[.]").

175. *Compare* Allyn A. Young, *The Sherman Act and the New Anti-Trust Legislation. III*, 23 J. POL. ECON. 417, 429–31 (1915), *and* STEVENS, *supra* note 49, at 235 n.I, *with* HARLAN & MCCANDLESS, *supra* note 174, at 23–29 (arguing that the FTC's unfair methods authority equals that of the Clayton Act).

176. *See infra* notes 177–178, 204–205 (section 2); 180–197 (section 3); 245–246 (section 7).

the lessening of competition with restraint of trade."[177] Even if Cream of Wheat engaged in price discrimination under that section, refusal to deal with a retailer who would cheapen the value of Cream of Wheat's trademark would not have the effect of producing a "substantial and unreasonable restraint of trade."[178]

Where early commentators did discern a difference was in the Clayton Act's rules for incipient violations and the procedure that accompanied them.[179] The judicial shift in the treatment of exclusive dealings and ties exemplifies that difference. Under the common law and the Sherman Act, courts had tended to uphold those arrangements as reasonable, at least if some independent source of supply remained.[180] Section 3's passage resulted in more skepticism of exclusive dealing and tying, with the FTC treating them as presumptively unlawful.[181] But even then, courts retained the familiar analysis about whether a partial restraint enhanced interbrand competition.[182]

This attitude guided the Supreme Court's first examination of the Clayton Act's test in *Standard Fashion Co. v. Magrane-Houston Co.*[183] This case involved a dress patternmaker that required stores to carry its patterns exclusively, capturing forty percent of the nation's 52,000 dress pattern retailers.[184] Courts

177. Great Atl. & Pac. Tea Co. v. Cream of Wheat Co., 224 F. 566, 574 (S.D.N.Y. 1915).

178. *Id.*

179. *See* Taft, *supra* note 154, at 366 ("These three sections, therefore, merely specify certain phases of violations of the Sherman law which can be prosecuted under separate indictments."); Stevens, *supra* note 174, at 43 n.12 (suggesting that the Clayton Act exceeded the Sherman Act's scope because the phrase "may be" permits targeting acts when "there is a possibility that competition will thereby be substantially lessened"); Young, *supra* note 175, at 429 ("In short, it adds nothing to the substantive law on the matter. It merely provides a new procedure[.]").

180. *See* DAVIES, *supra* note 46, at 409–10, 66–68; Jacobson, *supra* note 59, at 314–16; *see, e.g.*, Henry v. A.B. Dick Co., 224 U.S. 1, 30 (1912); Whitwell v. Cont'l Tobacco Co., 125 F. 454, 458–63 (8th Cir. 1903).

181. Ittai Paldor, *Antitrust Law's Harm to Competition: A New Understanding of Exclusivity*, 69 BUFF. L. REV. 1095, 1106–07 (2021); Jacobson, *supra* note 59.

182. *See* FTC v. Paramount Famous-Lasky Corp., 57 F.2d 152, 155–56 (2d Cir. 1932) (concluding that foreclosure by exclusive dealing was not substantial based on market shares and continued competition); B.S. Pearsall Butter Co. v. FTC, 292 F. 720, 722–23 (7th Cir. 1923) (noting that exclusive sales helped a new company become a stronger competitor); Standard Oil Co. v. FTC, 282 F. 81, 87–89 (3d Cir. 1922) (concluding that tying gas pumps to gas promoted interbrand wholesale competition).

183. 258 U.S. 346 (1922).

184. *Id.* at 357.

had previously disagreed about how to evaluate patternmaker contracts under state antitrust laws.[185] The Supreme Court now explained that the Clayton Act "sought to reach the agreements embraced within its sphere in their incipiency" by targeting conduct that "may 'substantially lessen competition or tend to create a monopoly.'"[186] Rejecting efforts to define those terms by legislative history, the Court reasoned from the use of the word "substantially" that the word "may" could not "prohibit the mere possibility of the consequences described" but only those that "would under the circumstances disclosed probably lessen competition."[187] Under that interpretation, the Court concluded that the contract violated section 3.[188] It rested this conclusion on more than the company's size. Even in regions that could support multiple retailers, each with their own pattern suppliers, consumers would demand fashions that were in "vogue."[189] It was probable that exclusive contracts would require retailers to buy from the companies most likely to meet consumer tastes, foreclosing style and price competition from smaller patternmakers unable to sell to major retail outlets.[190]

A similar emphasis on probability explains the Court's about-face on shoe machinery ties. United Shoe Machinery formed in 1899 to consolidate the production of patented shoemaking machines, including the production of the machines used to "bottom" shoes, that is, to unite the sole with the "upper."[191] United Shoe leased these machines to shoemakers with the requirement that if they used these machines to make part of a shoe, they could not use the machinery of any other manufacturer to complete the job.[192] Shoemakers protested these restrictions, but the Supreme

185. *See* Pictorial Rev. Co. v. Pate Bros., 185 S.W. 309, 311 (Tex. Civ. App. 1916) (concluding that a contract violated state antitrust law); Butterick Pub. Co. v. Rose, 124 N.W. 647, 649 (Wis. 1910) (reasoning that restraint of trade could not arise over patented goods); Standard Fashion Co. v. Siegel-Cooper Co., 51 N.E. 408, 409–10 (N.Y. 1898) (enforcing a contract).

186. *Standard Fashion*, 258 U.S. at 356.

187. *Id.* at 356–57.

188. *Id.* at 357.

189. *Id.*

190. *Id.* The Court may have overlooked evidence of less exclusionary effects given that these contracts were short-term and staggered, which allowed for competition between patternmakers across seasons. Howard P. Marvel, *Exclusive Dealing*, 25 J.L. & ECON. 1, 11–18 (1982).

191. United States v. United Shoe Mach. Co. of N.J., 247 U.S. 32, 38–40 (1918).

192. *Id.* at 35–36, 40, 62.

Court in 1918 held that the Sherman Act permitted this tie, because lessees could still choose to buy other machinery and the ease of buying all the machinery from United Shoe outweighed this restriction on their use.[193]

While that case was still percolating through the courts, Congress responded to the United Shoe controversy in section 3 of the Clayton Act by clarifying that illegal ties could involve patented goods too.[194] In 1922, the Supreme Court held that United Shoe had violated section 3.[195] In reaching this outcome, the Court focused not so much on whether the ties substantially lessened competition or tended to create a monopoly but rather on the certainty of the effects. In explaining that the previous Sherman Act litigation did not preclude this Clayton Act challenge, the Court stressed that, in addition to the latter's coverage of patents, section 3 also applied where the lease's effect "may" substantially lessen competition or tend to create a monopoly.[196] It elsewhere noted that the tying agreement "practically compel[led] the use of" United Shoe's machinery, allowing it to leverage its ninety-five percent share of the shoe machinery industry to block competitors.[197]

III. The Impact of Subsequent Legislation

The Clayton Act has received two major, and several minor, modifications. The Robinson-Patman Act of 1936 added a new set of rules dealing with price discrimination between buyers and sellers.[198] The Celler-Kefauver Act of 1950 amended section 7 during a period of intense congressional concern about merger policy's effectiveness.[199] And several other laws have since changed the procedural and jurisdictional scope of section 7.[200]

These legislative changes have historically received great weight in determining the meaning of the Clayton Act.[201] That emphasis is misplaced. When Congress amends or reenacts a statute, a significant change in language carries a significant change in meaning.[202] But when Congress repeats the same

193. *Id.* at 63–65.

194. *See* Int'l Bus. Machs. Corp. v. United States, 298 U.S. 131, 137 (1936) (explaining this history).

195. United Shoe Mach. Corp. v. United States, 258 U.S. 451, 460 (1922).

196. *Id.* at 460.

197. *Id.* at 455–58.

198. *See infra* Section III.A.

199. *See infra* Section III.B.

200. *See infra* Section III.C.

201. *See infra* Section IV.A.

202. SCALIA & GARNER, *supra* note 10, at 256–60 (reenactment canon).

language within the statute, it presumably intends an equivalence of meaning.[203] The net result of these legislative amendments to the Clayton Act has been to extend the original test preserved in section 3—"where the effect may be . . . substantially to lessen competition or tend to create a monopoly in any line of commerce"—to the other sections as well.

A. *The Robinson-Patman Act of 1936*

The first major change to the Clayton Act came from the Robinson-Patman Act of 1936, which amended section 2. That section addressed companies that used price discrimination or below-cost pricing to win customers from rivals unable to afford the competition.[204] As long as the market remained "open to all fair competitors," courts declined to find liability simply because a rival of that firm or that firm's customer could not obtain an equal discount.[205] Small retailers and their suppliers believed this law did not go far enough to address chain stores that leveraged their size to buy and sell at lower prices.[206] These small retailers received a sympathetic ear during the Great Depression, resulting in the Robinson-Patman Act of 1936, which expressly "amended" section 2 of the Clayton Act.[207]

The Robinson-Patman Act's only modification to the original test of the Clayton Act was to change the split infinitive of "to substantially lessen" to "substantially to lessen."[208] That change could have signified that the tendency to create a monopoly must also be substantial, as with the lessening of competition.[209] Because tendency already signified a heightened degree, substantially tending would prove redundant, so the better explanation is that congressional

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203. *Id.* at 170–73 (presumption of consistent usage); *see* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 229–30 (1993) (applying this interpretive canon to sections 2 and 7 of the Clayton Act).

204. *See* Porto Rican Am. Tobacco Co. of Porto Rico v. Am. Tobacco Co., 30 F.2d 234, 237 (2d Cir. 1929); Boss Mfg. Co. v. Payne Glove Co., 71 F.2d 768, 769–71 (8th Cir. 1934) (rejecting for insufficient evidence the conclusion that the defendant sold gloves at lower prices where in competition with the plaintiff).

205. S.S. Kresge Co. v. Champion Spark Plug Co., 3 F.2d 415, 420 (6th Cir. 1925); *see* Nat'l Biscuit Co. v. FTC, 299 F. 733, 738–39 (2d Cir. 1924) ("It is the exclusion of others from the opportunity of doing business that is regarded as monopolizing.").

206. *See* Frederick M. Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 COLUM. L. REV. 1059, 1064–68 (1957).

207. *Id.* at 1526.

208. *Id.*

209. *But see* Musharbash & Hanley, *supra* note 28, at 27 (arguing that the syntax of section 7 does not allow "substantially" to modify "lessen" and "tend"); FARM ACTION, *supra* note 28, at 20 (making a similar argument).

grammarians took this opportunity to correct an unprofessional split infinitive.[210] Contemporaries already used "to substantially lessen" and "substantially to lessen" interchangeably when discussing or paraphrasing the Clayton Act, so they would not have perceived any noteworthy change from this shift.[211]

More importantly, Robinson-Patman grafted a third test of liability onto section 2's existing standard of incipience: "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, *or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them*."[212] It also added new sections limiting the ability to obtain or provide payments for advertising, processing, and brokerage, as well as criminal prohibitions on making discounts, rebates, or similar payments "for the purpose of destroying competition."[213]

Despite these new additions, the meaning of the amended section 2—now section 2(a)—remained as it was at the time of the original Clayton Act. More rigorous economic theories of competition had emerged by the 1930s, including concepts of monopolistic and imperfect competition that rested between total monopoly and pure competition.[214] But in ordinary terms, competition still described the opposite of monopoly, namely an "effort of two or more parties, acting independently, to secure the custom of a third party by the offer of the most favorable terms."[215] And it was this plain meaning of competition to which courts of that era referred, not sophisticated economic

210. *See* WILFRED WHITTEN, IS IT GOOD ENGLISH? 9–12 (1925); Evelyn A. Carey, *The Grammatical Error Pirates*, *in* 4 ELEMENTARY ENG. REV. 201, 201–03 (1927); *see also* SCALIA & GARNER, *supra* note 10, at 256–60 (explaining that restyling or insignificantly changing amended text does not signal modified meaning).

211. *See* E. Wyndham White, *Competition and the Law – II: United States of America*, 20 J. COMP. LEGIS. & INT'L 3D SER. 29, 39 (1938); M.J. Fields, *Stabilizing the Anti-Trust Laws*, 6 J. BUS. UNIV. CHI. 191, 197 (1933); A.M. Tollefson, *Judicial Review of the Decisions of the Federal Trade Commission*, 4 WIS. L. REV. 257, 262 (1927); Herman Oliphant, *Trade Regulation*, 11 AM. BAR ASS'N J. 30, 31 (1925); John Leland Mechem, *Price Discrimination as Unfair Competition*, 21 MICH. L. REV. 852, 852, 853 n.2 (1923).

212. 15 U.S.C. § 13(a) (emphasis added).

213. *Id.* §§ 13(c)–(e), 13a.

214. *See* SAMUEL EVAN MILNER, ROBBING PETER TO PAY PAUL: POWER, PROFITS, AND PRODUCTIVITY IN MODERN AMERICA 16–17 (2021) (reviewing Depression-era theories of economic competition).

215. WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 545 (1934) [hereinafter WEBSTER'S].

modeling.[216] Competition, moreover, still presumed the existence of "present or potential" competitors while excluding purely speculative entrants.[217]

The new test's three types of harm—injure, destroy, or prevent competition—also each bore colloquial meanings in antitrust law and price discrimination specifically.[218] To "injure" meant "to do harm" or to "damage," especially by "lessen[ing] the value" of some business.[219] An injury to competition would "suppress competition" or tend to create a monopoly as understood under the antitrust laws, a theory of injury distinct from "weakening the competitive strength of any competitor by injuring him in his trade."[220] The Supreme Court accordingly observed that agreements that eliminated competition among the parties did not have "an injurious effect upon competitive conditions" when market entry remained easy and no firm could obtain pricing power.[221]

The other two standards possessed even more straightforward meanings. To "destroy" meant "to ruin completely," "to annihilate, to cause to vanish," or "to abolish."[222] Applied to price discrimination, contemporaries understood the destruction of competition as requiring predation sufficient to remove rivals from a market and thereby gain the ability to recoup losses at the expense of the public.[223] While the destruction of competition referred to competition already in place, the prevention of competition meant "to frustrate," to "hinder," or to "keep [it] from happening" or

216. *See* Lipson v. Socony Vacuum Corp., 87 F.2d 265, 270 (1st Cir. 1937) (quoting Webster's definition of competition in a case involving price discrimination).

217. FTC v. Raladam Co., 283 U.S. 643, 649 (1931).

218. *See* SCALIA & GARNER, *supra* note 10, at 174–79 (explaining that statutory interpreters should treat each word as carrying unique meaning if possible).

219. WEBSTER'S, *supra* note 215, at 1280.

220. Brief for Raladam Co. at 24–25, 31–32, FTC v. Raladam Co., 283 U.S. 643 (1931), 1931 WL 32238, at *24–25, *31–32; *see* 15 U.S.C. § 15(a) (providing right of action to "any person who shall be injured in his business or property").

221. Appalachian Coals, Inc. v. United States, 288 U.S. 344, 367–69 (1933) (upholding exclusive selling agency when entry into coal mining was easy and coal consumers exercised countervailing buying power); *see* Sugar Inst., Inc. v. United States, 297 U.S. 553, 599 (1936) (observing that some joint ventures lack "injurious effect upon competition" in markets with "abundant competitive opportunities").

222. WEBSTER'S, *supra* note 215, at 710.

223. *See* Fairmont Creamery Co. v. Minnesota, 274 U.S. 1, 7 (1927) (explaining contemporary theory of predation and recoupment); Nat'l Biscuit Co. v. FTC, 299 F. 733, 739 (2d Cir. 1924) (observing that section 2 cannot apply so broadly as "to destroy all competition except that which is easy").

"succeeding."[224] Preventing future competition generated the same effects as did destroying present competition.[225]

The Robinson-Patman Act specifies that the relevant competition be competition "with" anyone who grants or knowingly receives the discrimination, or "with" their customers.[226] The sponsors of this law believed the "with" preposition signaled an effect on specific competitors, not competition in general.[227] Courts heavily influenced by legislative history have adopted that reading, leading to the charge that this law is fundamentally anti-competitive.[228] As then-Judge Stephen Breyer noted, "[t]hat single word 'with' makes a considerable practical difference. It means that the Act protects *those who compete* with a favored seller, not just the overall competitive process."[229] Likewise, today's leading antitrust treatise describes Robinson-Patman's test as requiring injury or destruction of "the disfavored purchaser's *ability to compete* with the favored purchaser."[230]

That reading overlooks that Robinson-Patman's text—never known for its "precision of expression"[231]—does not refer to competitors. The Act requires that the harm occurs to the competition with the person who grants or knowingly receives the benefit discount, or a customer of either of them.[232] It is not directed at protecting bilateral competition with specific competitors. If Congress had meant to do that, it could have borrowed from the phrasing of the original section 7 to ban acts

224. WEBSTER'S, *supra* note 215, at 1960.

225. *See* State *ex rel.* Lee v. Cont'l Oil Co., 43 P.2d 686, 688 (Wyo. 1935); Ballard Oil Terminal Corp. v. Mexican Petroleum Corp., 28 F.2d 91, 94 (1st Cir. 1928); State v. Lewis & Leidersdorf Co., 230 N.W. 692, 696 (Wis. 1930).

226. 15 U.S.C. § 13(a).

227. 80 CONG. REC. 9417 (1936) (statement of Rep. Utterback) (reasoning that if a chain destroyed and replaced a local store, competition in that market "has not been lessened, . . . but competition with the grantor of the discrimination has been destroyed"); *To Amend the Clayton Act: Hearings Before the H. Judiciary Comm. on H.R. 8442, 4995, 5062*, 74th Cong. 251 (1935) (brief of H.B. Teegarden, General Counsel, United State Wholesale Grocers' Association) (explaining that the new language would "preclude the possibility of the courts requiring a showing of effect upon general competitive conditions in addition to obvious and admitted injury to particular competitors").

228. *See infra* notes 288–292.

229. Monahan's Marine, Inc. v. Bos. Whaler, Inc., 866 F.2d 525, 529 (1st Cir. 1989).

230. HOVENKAMP & AREEDA, *supra* note 22, ¶ 2331a.

231. Automatic Canteen Co. of Am. v. FTC, 346 U.S. 61, 65 (1953).

232. Henry D. Ostberg, *The Meaning of the "Injury to Competition" Provision of the Robinson-Patman Act*, 32 ST. JOHN'S L. REV. 26, 27 n.9 (1957) (equating the old and new section 2 tests "[o]n their face").

that may substantially lessen competition "between" the favored and unfavored parties.[233] Rather, Robinson-Patman prevents the party benefitting from this discrimination from harming competition, just as section 3 condemns the company imposing a tie and section 7 condemns the acquiring firm for lessening competition.[234] At the secondary level, moreover, the harm must befall competition "with customers" of the discriminating seller, not competition with a single customer—again requiring consideration of competition across an entire market.[235]

By contrast, when contemporaries wanted to indicate concern about competition's impact on specific rivals, including bilateral competition with chain stores, they would generally discuss one company "in competition with" another.[236] The two-letter preposition "in" made a significant difference when interpreting laws against chain stores.[237] Congress expressed that narrower meaning of competition between two or more discrete rivals in other contemporary economic laws as well.[238] The Robinson-Patman Act elsewhere uses a similar preposition–noun structure when criminalizing knowing discrimination "against competitors of the purchaser."[239] The Act's failure to use similar phrasing in section 2(a) shows that the provision aligns with the same competitive concerns as the original section 2.

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233. *See* sources cited *supra* notes 151–154.

234. *See* 15 U.S.C. §§ 14, 18.

235. *Id.* § 13(a).

236. Great Atl. & Pac. Tea Co. v. Grosjean, 301 U.S. 412, 426–27 (1937) (explaining that Louisiana enacted a chain-store tax "to neutralize disadvantages of small chains in their competition with larger ones"); Nat'l Biscuit Co. v. FTC, 299 F. 733, 736 (2d Cir. 1924) ("[I]n some instances the owner of but one store is in competition with a branch of a chain . . . ."); Great Atl. & Pac. Tea Co. v. Harvey, 177 A. 423, 424 (Vt. 1935) (describing A&P's fifty-eight retail stores in Vermont as "in direct competition with various other retail stores dealing in the same kind and class of goods and merchandise").

237. *See* Midwestern Petroleum Corp. v. State Bd. Of Tax Comm'rs, 187 N.E. 882, 888–89 (Ind. 1933) (expounding on the meaning of "in" in the phrase "in which goods, wares and merchandise are sold" to reject the contention that it applied only to establishments where business was conducted "under a roof").

238. *See* Act of May 27, 1930, Pub. L. 71–271, § 3, 46 Stat. 391, 391 (authorizing federal prisons to engage in manufacturing goods "not for sale to the public in competition with private enterprise"); *see also* Agricultural Adjustment Act, Pub. L 73-10, § 15(d), 48 Stat. 31, 39 (1933) (permitting the Secretary of Agriculture to alter processing taxes when they cause processors "disadvantages in competition from competing commodities").

239. 15 U.S.C. § 13(a).

Robinson-Patman still adds to the original section 2 test by shifting its focus from a product market—"in any line of commerce"—to competition involving actual and potential competitors to the beneficiary.[240] Given the drafters' focus on chain grocery stores that carry multiple products going head to head with smaller retailers that lack that variety, it makes sense that this law would look beyond individual product lines.[241] Hence, even in the presence of price discrimination as Robinson-Patman understands it, competition could still thrive when, to use the FTC's language contemporary with the act's passage, "chain companies within the various commodity groups actively compete with other chains in the same group."[242]

B. *The Celler-Kefauver Act of 1950*

The second major amendment, the Celler-Kefauver Act of 1950, modified section 7's rules on mergers and acquisitions. The original section 7 banned stock acquisitions between corporations "where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."[243] The first prong focused on the effects between the merging corporations, the second on geography, and the third on the traditional product market.[244] Despite the literal focus of the first prong on bilateral competition, the Supreme Court adopted a different approach in *International Shoe Co. v. FTC*.[245] It explained that substantiality in the Clayton Act

240. *Id.*

241. *See* Lamport v. 4175 Broadway, Inc., 6 F. Supp. 923, 923–24 (S.D.N.Y. 1934) (discussing a restrictive covenant preventing a lease to a greengrocer but excluding "any chain grocery store which may sell these articles"). *But see* George Van Camp & Sons v. Am. Can Co., 278 U.S. 245, 253–54 (1929) (explaining that "any line of commerce" in the original section 2 extended beyond what the targeted firm sold).

242. FED. TRADE COMM'N, FINAL REPORT ON CHAIN STORE INVESTIGATIONS, S. Doc. No. 74-4, at 23 (1st Sess. 1934) [hereinafter CHAIN STORE INVESTIGATIONS].

243. Clayton Antitrust Act, Pub. L. 63-212, § 7, 38 Stat. 731–32 (1914) (current version at 15 U.S.C. § 18).

244. "[I]n any section" meant that only part of a jurisdiction had to face an impact, as opposed to an all-or-nothing trigger. *See* Lane v. Watts, 234 U.S. 525, 527 (1914) ("No provision was made for indemnity lands in case mineral should be found in any section or quarter section. So that when the location was perfected the title passed to all the lands or to none."); Campbell v. City of Haverhill, 155 U.S. 610, 614 (1895).

245. 280 U.S. 291 (1930).

always signified "a degree as will injuriously affect the public," so an acquisition that eliminated only a minor part of the competition between two corporations without imposing barriers to entry by others did not present a probable risk of substantially lessening competition.[246]

Correct or not, this interpretation of section 7 appeared unable to arrest an ongoing trend of corporate consolidations.[247] The FTC assigned much of the blame to section 7's text, which forbade only stock acquisitions and thus prevented the Commission from seeking divestiture of transferred assets.[248] Efforts to use the Sherman Act to block mergers continued to run up against judicial evaluation of reasonableness.[249]

In 1950, Congress responded to these concerns by "amend[ing]" section 7 in the Celler-Kefauver Act:

> That no corporation . . . shall acquire . . . the whole or any part of the stock or . . .the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.[250]

This new law covered corporate asset transfers.[251] It also eliminated the restriction that looked only to competition between the corporations involved when evaluating the lessening of competition.[252] Either of the remaining tests could

246. *Id.* at 297–99.

247. *See* FED. TRADE COMM'N, REPORT OF THE FEDERAL TRADE COMMISSION ON THE MERGER MOVEMENT 18–21 (1948) (discussing the upward trend of merger activity through 1947).

248. *Id.* at 1–5; *see* Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587, 596–99 (1934) (finding that because the holding company had dissolved and divested itself of shares obtained in violation of section 7 before merger, the merger did not violate the Clayton Act); FTC v. Western Meat Co., 272 U.S. 554, 561 (1926) (holding that the Clayton Act has no application to "ownership of a competitor's property and business" acquired before the Commission took action, even if it was acquired through unlawfully held stock).

249. *See* United States v. Columbia Steel Co., 334 U.S. 495, 507, 519–34 (1948) (finding that "vertical integration" and acquisition without more, such as unreasonable restraint by control or intent to commit such restraint, do not violate the Sherman Act).

250. Act of December 29, 1950, Pub. L. 81-899, 64 Stat. 1125–26 (codified as amended at 15 U.S.C. § 18).

251. *Id.* at 1126.

252. *Id.*

now be satisfied when the effects befell any line of commerce in any section.[253]

The Celler-Kefauver Act otherwise resulted in a section 7 nearly identical to section 3, with two minor exceptions. Section 7 continued to include "in any section" alongside "in any line of commerce," a holdover from the original section 7's second prong against restraining commerce "in any section or community."[254] That standard had already applied to the tendency to monopoly test, and, while its new placement broadened the scope of the substantially lessening prong, it did not imply a major shift in statutory meaning.[255] Celler-Kefauver also changed the split infinitive of "to substantially lessen" to the grammatically correct "substantially to lessen," which, as with Robinson-Patman, constituted a cosmetic change.[256]

As an express amendment of the Clayton Act, the Celler-Kefauver Act presumably intended to carry the same meanings that Congress had previously used elsewhere in that statute.[257] The House Report on the bill acknowledged as much.[258] The

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253. *See id.*; S. REP. NO. 81-1775, at 5 (1950) (explaining that acquisitions that "substantially lessen competition" or produce monopolies are unlawful "in any line of commerce," regardless of whether that line of commerce is a sizeable part of the businesses involved).

254. *Compare* Clayton Antitrust Act, Pub. L. 63-212, § 7, 38 Stat. 730 (1914), *with* 15 U.S.C. § 14.

255. *See* United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 590–93 (1957) (concluding that the second and third prongs of the original section 7 already extended to non-horizontal mergers before the Celler-Kefauver Act).

256. *See* Earl W. Kintner, *The Revitalized Federal Trade Commission: A Two-Year Evaluation*, 30 N.Y.U. L. REV. 1143, 1184 (1955) ("Aside from the puristic correction of a split infinitive, the proscribed competitive effect exactly parallels that of Section 3."); *see also* McAllister, *supra* note 8, at 143, 145 (reproducing the new text without comment on this change); STAFF OF H.R. COMM. ON THE JUDICIARY, 96TH CONG., THE CELLER-KEFAUVER ACT: THE FIRST 27 YEARS 18 (Comm. Print 1979) ("It also corrected the split infinitive of the original language, 'to substantially lessen,' though this may have been a case where clarity was better served by violating grammarian purity."); *cf.* Maloney v. R.I. Ins. Co., 115 Cal. App. 2d 238, 249 (1953) (describing deletion of a split infinitive as part of a minor "series of language amendments"). On Robinson-Patman, see *supra* note 210.

257. SCALIA & GARNER, *supra* note 10, at 170–73 (Presumption of Consistent Use Canon); *id.* at 256–60 (Reenactment Canon); *see* C. Gibson Downing, *Monopolies: Interpreting the Qualifying Clause of Section 7, Clayton Act*, 46 KY. L.J. 87, 90 (1957) (reasoning that adoption of existing statutory terms aligns section 7 with the rest of this law).

258. H.R. REP. NO. 81-1191, at 8 (1949) ("These two tests of illegality are intended to be similar to those which the courts have applied in interpreting the same language as used as other sections of the Clayton Act.").

Senate Judiciary Committee's majority report agreed that the term "may be" had been present in the Act since 1914 and continued to apply to the "reasonable probability of the prescribed effect," not just to "the mere possibility."[259] True, the legislative history of Celler-Kefauver also evinces the expectation of extending merger enforcement beyond the Sherman Act and the rule of reason.[260] Those statements would have important consequences for mid-century judicial interpretation.[261] But as others observed at that time, section 7's familiar language perpetuated its role as an incipient aid to Sherman Act enforcement.[262] Given how *International Shoe* had already interpreted "substantially" in the merger context, the amendment suggested the continued requirement of public injury.[263] In any event, continued merger activity in the immediate aftermath of the law suggested that Wall Street did not interpret Celler-Kefauver as imposing stricter limits.[264]

C. *Other Legislation*

Congress has made several other amendments to section 7. The Antitrust Procedural Improvements Act of 1980,[265] in addition to provisions covering civil investigative demands and prejudgment interest, made two noteworthy changes. The first replaced "corporation" with "person," closing a loophole that had excluded other business organizations from the scope of

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259. S. REP. NO. 81-1775, at 6 (1950).

260. *Id.* at 5 (arguing these changes "reach[] far beyond the Sherman Act").

261. *See infra* Section IV.B. For contemporary agreement, see McAllister, *supra* note 8, at 143–44; S. Chesterfield Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139, 1197 (1952); Irston R. Barnes, *Economic Issues in the Regulation of Acquisitions and Mergers*, 14 OHIO ST. L.J. 279, 283–85 (1953).

262. Milton Handler, *Quantitative Substantiality and the Celler-Kefauver Act – A Look at the Record*, 7 MERCER L. REV. 279, 284, 287, 289 (1955).

263. Thomas K. McElroy, *Section 7 of the Clayton Act and the Oil Industry*, 5 BAYLOR L. REV. 121, 133–37 (1953); *see also* Sheldon Kimmel, *How Merger Regulation Became Unreasonable and How to Fix It*, 22 SUP. CT. ECON. REV. 181, 189–197 (2014) (arguing that Celler-Kefauver incorporates *International Shoe*); SCALIA & GARNER, *supra* note 10, at 322–26 (explaining that statutes retain the authoritative judicial construction of reused language).

264. Phil C. Neal, *The Clayton Act and the Transamerica Case*, 5 STAN. L. REV. 179, 179–80 (1953).

265. The Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, 94 Stat. 1154 (codified as amended at 15 U.S.C. § 18).

section 7.[266] The second changed the basis of federal jurisdiction from just "commerce" to "or in any activity affecting commerce," resolving a contemporary Supreme Court holding that had concluded that the former phrase did not extend section 7's coverage as broadly as the Commerce Clause allowed.[267] That change also broadened "any line of commerce" to include "any activity affecting commerce," which today plausibly means that labor market harms fall under section 7.[268] Subsequent laws have modified statutory carveouts for certain industries subject to regulatory oversight by other federal agencies, none of which change section 7's tests.[269]

The Hart-Scott-Rodino Antitrust Improvements Act of 1976[270] also enhanced the ability of the Clayton Act to target mergers in their incipiency without changing the text of section 7. This law requires companies about to acquire assets or voting shares above a statutory threshold to notify the FTC and Department of Justice, provide certain details on the deal, and wait thirty days before consummating the transaction.[271] That time permits the government to examine the transaction, determine if it would violate antitrust law if permitted to proceed, and seek a preliminary injunction.[272] The government must still determine if a merger will violate section 7 as written with the benefit of this additional data.[273] The thresholds for reporting—originally $200 million in most cases and since adjusted for inflation—might suggest an emphasis on

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266. *Id.* § 6(a)(1)–(2), 94 Stat. at 1157–58; *see* Matter of Beatrice Foods, 67 FTC 473, 725 (1965) ("Section 7 was not made applicable to noncorporate acquisitions only because corporate acquisitions were in the forefront of congressional concern and attention.").

267. The Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 6(a)(3), 94 Stat. 1154, 1157–58 (codified as amended at 15 U.S.C. § 18); *see* United States v. Am. Bldg. Maint. Indus., 422 U.S. 271, 275–79 (1975); U.S. CONST. art. I., § 8, cl. 3.

268. The Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 6(a)(3), 94 Stat. 1154, 1157–58 (codified as amended at 15 U.S.C. § 18); *see* 2023 MERGER GUIDELINES, *supra* note 1, at 26 (emphasizing merger law's application to labor markets).

269. Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, § 9(g)(4), 98 Stat. 1703, 1708 (1984); ICC Termination Act of 1995, Pub. L. No. 104-88, § 313(1), 109 Stat. 803, 948 (1995); Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(b)(3), 110 Stat. 56, 143 (1996).

270. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified as amended at 15 U.S.C. §§ 15c–15h, 18a, 66).

271. 15 U.S.C. § 18a(a)–(b), (e).

272. *See id.* § 18a(d), (f).

273. *See id.* § 18a(d).

substantiality that looks to dollars, but those limits serve to reduce bureaucratic costs, not the scope of economic policy.[274]

IV. TEXTUALISM AND THE CLAYTON ACT TODAY

The text of the Clayton Act intentionally departs from that of the Sherman Act. But text, context, and historic practice all suggest that the two apply very similar standards of liability. Contemporaries in 1914 would have understood a lessening of competition to mean a restraint of trade, at least when such lessening was substantial, and would have understood a tendency to monopoly as equivalent to monopolization under the Sherman Act.[275] They would have understood that by requiring that some action "may" have this forbidden effect, the Clayton Act reduced the standard of certainty that applied to prospective conduct under the Sherman Act.[276] And from the Clayton Act's language about "any line of commerce," they would have realized that the effects could occur in markets different from those in which the parties themselves engaged.[277]

Application of the Clayton Act today, converging with the Sherman Act's rule of reason as tempered by the incipiency clause, largely reaches that correct result but for all the wrong reasons.[278] Courts treat modern ideas about economic behavior as the purpose of these laws and substitute discussion of the text with the legislative history of past decades. That lack of textual engagement stands in stark contrast to how the Supreme Court has analyzed the procedural sections of the Clayton Act, using legislative history and other extrinsic evidence only to confirm unambiguous text.[279] When courts interpret and apply antitrust law broadly by focusing on legislative history and policy instead of text, they leave open the possibility that other congressional policies could become swords in the hands of aggressive enforcers and private

274. *Id.* § 18a(a)(2); *see id.* §§ 18a(c) (exempting certain transactions); *id.* §18(e)(1)(B)(i)–(ii) (requiring government procedures to expedite review and minimize discovery burdens).

275. *See supra* Sections I.A–B, II.B.

276. *See supra* Section I.C.

277. *See supra* Section I.D.

278. *See infra* Section IV.A.

279. *See* Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520, 1522 (2019) (discussing section 4); California v. Am. Stores Co., 495 U.S. 271, 278–95 (1990) (discussing section 16); Bankamerica Corp. v. United States, 462 U.S. 122, 128–40 (1983) (discussing section 8).

plaintiffs.[280] Recent statements by federal enforcers have challenged modern antitrust practice for conflating the Sherman Act with the Clayton Act, and they have argued that expanded enforcement would prove more faithful to both statutory text and purpose.[281] Until Congress modifies the legal standards for evaluating threats to competition, the antitrust text serves as the strongest, and most principled, way to determine which side is correct.

A. *Text and Purpose*

In the aftermath of the Clayton Act's passage, courts focused on the statutory text to the exclusion of other means of interpretation.[282] As the Supreme Court explained when it first interpreted section 3 in the case involving dressmaker patterns, "the words of the act are plain and their meaning is apparent."[283] This interpretative approach bore practical implications for litigants: the patternmaker's copious briefing on the legislative history and purpose of that law proved utterly ineffective at swaying the Court's views.[284] The first court to analyze the meaning of the Clayton Act likewise noted that despite the assistance of counsel, the Act's legislative history had provided no assistance in finding answers about the text of the law.[285]

By contrast, courts and litigants that resorted to atextual interpretive methods in the early decades of the Act were prone to go astray. For instance, did the phrase "any line of commerce" in section 2 prohibit a company from using price discrimination to injure competition among its customers or only to injure competition for its own business? Lower courts accepted arguments about legislative history and concluded that the

280. *See infra* Section IV.B.

281. *See, e.g.*, Transcript Enforcers Summit, *supra* note 12, at 53–54 (noting section 3 as a provision that courts might be tempted to collapse onto Sherman Act interpretation); Alvaro M. Bedoya, Comm'r, FTC, "Returning to Fairness:" Midwest Forum on Fair Markets: What the New Antimonopoly Vision Means for Main Street Hosted by the Institute for Local Self-Reliance & the Open Markets Institute 8 (Sep. 22, 2022) (describing Robinson-Patman as a "fairness" law"); Lina M. Khan, Chair, FTC, Address at the Fordham Annual Conference on International Antitrust Law & Policy 6–7 (Sept. 16, 2022) (criticizing reasonableness and other modern approaches as inconsistent with text of section 7).

282. *See supra* Section II.B.

283. Standard Fashion Co. v. Magrane-Hous. Co., 258 U.S. 346, 356 (1922).

284. *Id.*; *see also* McAllister, *supra* at note 8, at 133–36 (evaluating this briefing).

285. Great Atl. & Pac. Tea Co. v. Cream of Wheat Co., 224 F. 566, 575 (S.D.N.Y. 1915), *aff'd* 227 F. 46 (2d Cir. 1915).

Clayton Act's concern with retail discounting was limited in scope to direct rivals; the Supreme Court ignored legislative history to conclude that "any" plainly encompassed competition among customers.[286]

This approach faltered as the twentieth century progressed, as defenses to liability that were grounded in text failed to check assertions of broader congressional purpose.[287] To see how, start with section 2. The Robinson-Patman drafters had anticipated that, if courts deemed its language unclear, they would look to legislative history and the clear purpose expressed at that time of shielding independent retailers from chain competition.[288] The Supreme Court complied. In 1948, it concluded that the law possessed the purpose "to protect competition from all price differentials except those based in full on cost savings," so evidence of substantial price differentials established the reasonable probability of an impact on competition.[289] Two decades later, in the infamous *Utah Pie Co. v. Continental Baking Co.*,[290] the Court held that national bakeries had violated section 2 by lowering frozen pie prices in Salt Lake City to the detriment of a local firm.[291] The larger bakeries simultaneously showed predatory intent and used wrongful methods of competition, including industrial espionage, but the Court also explained that Robinson-Patman provided small business a sword against chain competition in an expanding regional market.[292]

Use of legislative histories and economic purpose also changed section 3. By the mid-1940s, the Supreme Court had begun to defer to the FTC's conclusions that any harm to small

286. *Compare* Mennen Co. v. FTC, 288 F. 744, 778–79 (2d Cir. 1923), *and* Nat'l Biscuit Co. v. FTC, 299 F.733, 739 (2d Cir. 1924), *with* George Van Camp & Sons Co. v. Am. Can Co., 278 U.S. 245, 253–54 (1929).

287. *See, e.g.*, Corn Prods. Refin. Co. v. FTC, 324 U.S. 726, 734–39 (1945) (disregarding the plausible argument that calculating freight charges from a standard location falls outside "the words of the statute" while concluding that legislative history and context showed that the practice violated section 2).

288. 80 CONG. REC. 9419 (1936) (statement of Rep. Celler) ("I simply want to get the record clear, because, of course, in endeavoring to interpret properly the language of statutes, the courts must, perforce, look to the statements that appear in the record on debate.").

289. FTC v. Morton Salt Co., 334 U.S. 37, 44, 46–47 (1948); *see also id.* at 55–58 (Jackson, J., dissenting in part) (arguing that the Court's reading allowed the tenuous standard of possibility to replace probability).

290. 386 U.S. 685 (1967), *abrogated by* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

291. *Id.* at 703.

292. *Id.* at 697, 702.

business displayed a "reasonable possibility" of harming competition, diluting "may" and "substantially" beyond their textual meanings.[293] In the 1949 case, *Standard Oil Co. of California v. United States* (*Standard Stations*),[294] the Court reasoned that the legislative history of section 3 showed that Congress did not intend to put exclusive dealing contracts to "the same tests of detriment to the public interest" as those in the Sherman Act.[295] The Court concluded that "proof that competition has been foreclosed in a substantial share of the line of commerce" suffices to prove a violation under section 3.[296] Never mind that the commerce foreclosed here when gas stations had to purchase all their products from a single supplier—16% of retail gas stations in the western United States, or 6.7% of total gallonage sold—appeared far from substantial in any sense of that word.[297] The Court's citation of legislative statements suggesting that "may" could mean "possible" goes far to explain this shift in attitude.[298]

Congressional purpose and economic scholarship likewise pulled section 7 in a very different direction than its text suggested. In *Brown Shoe Co. v. United States*,[299] the Supreme Court engaged in a lengthy analysis of legislative statements to explain that Congress had passed Celler-Kefauver in response to "fear" of "a rising tide of economic concentration."[300] In doing so, Congress had "rejected" the Sherman Act's methods "as inappropriate to the problem it sought to remedy" under section 7.[301] Drawing on contemporary economic scholarship about the dangers of excessive industrial concentration, the Court concluded that section 7 must incorporate not only concerns about barriers to entry but also the socio-political objective of "locking the barn door" and checking the spread of

293. *Morton Salt Co.*, 334 U.S. at 46–47 & n.14, 49–50 & n.18; *see also id.* at 56–58 (Jackson, J., dissenting in part) (advocating that the law as written requires that the record show a "reasonable probability" of harming competition); *see also* Note, *Unfair Competition – "Meeting Competition" Defense Allows Price Discrimination to Help Dealer Meet Retail Price of Seller's Vertically Integrated Competitor*, 110 U. PA. L. REV. 625, 626 n.8 (1962) (collecting cases where courts held that a "reasonable possibility" of injury was sufficient under section 2).

294. 337 U.S. 293 (1949).

295. *Id.* at 312–13 & n.16.

296. *Id.* at 314.

297. *Id.* at 295, 302, 314.

298. *Compare id.* at 300, *with id.* at 312 n.15.

299. 370 U.S. 294 (1962).

300. *Id.* at 315–23.

301. *Id.* at 318.

concentration before it grows out of hand.[302] Emphasizing congressional intent "to promote competition through the protection of viable, small, locally owned businesses," the Court concluded that this merger between a shoe manufacturer and a retailer would "substantially" lessen competition despite foreclosing at most 1.2% of national retail shoe sales to other shoemakers.[303] The Court also suggested that even in communities where the two companies held only a combined 5% market share of retail sales, the risk of oligopoly remained high enough to condemn the merger.[304]

The Court's subsequent section 7 cases tightened that standard. A year after *Brown Shoe*, the Court explained, in a case involving merging banks, that, for the sake of simplicity and consistency, it would henceforth deem mergers resulting in "undue concentration"—30% in that case but potentially less in others—as presumptively illegal.[305] The Court acknowledged that, while neither the text of section 7 nor its "legislative history suggests that any particular percentage share was deemed critical," contemporary economic scholarship and section 3's *Standard Stations* approach indicated that structure mattered for its own sake.[306] A few years after that, the Court barred a merger between two grocery stores in Los Angeles with a combined 7.5% market share simply because it occurred as part of a general trend toward retail grocery consolidation.[307] Rejecting the argument that the continued competitiveness of the grocery industry after the merger made any difference, the Court completed its transformation of incipiency from a standard of probability to a judicially overseen policy objective against concentration in itself.[308]

None of these mid-century interpretations of the Clayton Act find much, if any, support in the statutory text. The belief that Robison-Patman protects competitors ignores statutory defenses for cost differentials, market conditions, and good-faith price matching, to say nothing of its continued textual focus on competition.[309] The shorthand of *Standard Stations*'s

302. *Id.* at 321–22 & n.37. For economic citations, see *id.* at 332 nn.56–57, 334 n.61, 343 n.71.

303. *Id.* at 303, 334, 344.

304. *Id.* at 343–44.

305. United States v. Phila. Nat'l Bank, 374 U.S. 321, 363–64 & n.41 (1963).

306. *Id.* at 363 & nn.38–39, 365–66.

307. United States v. Von's Grocery Co., 384 U.S. 270, 272, 274, 277 (1966).

308. *Id.* at 278.

309. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 220 (1993).

"substantial foreclosure" diluted the textual test for the probable effect of substantially lessening competition or tending to create a monopoly.[310] And when Congress in 1914 wrote the standard that Celler-Kefauver would adopt for section 7, contemporaries believed that high levels of concentration did not always lead to a substantial lessening of competition, and the very idea of oligopolistic markets was still two decades away.[311] Even if everyday understanding of competition by the time of Celler-Kefauver incorporated notions of oligopoly, the incipient standard of "may" and the qualitative requirements of "substantially" and "tend" still should have prevented the conclusion that concentration itself violated this law.[312]

Antitrust law in the final decades of the twentieth century repudiated these approaches as economic and legal scholarship showed that practices once thought to be anticompetitive could actually enhance competition by lowering prices, increasing choice, or expanding output.[313] For section 2, the current view of Robinson-Patman holds that it must "be construed consistently with broader policies of the antitrust laws."[314] The Supreme Court has accordingly held that primary-line price injuries, which gauge the effect of a firm's price discrimination on its direct competitors, must also satisfy the requirements of a Sherman Act claim for predatory pricing: below-cost pricing with a possibility of recouping losses through higher prices once competitors have exited.[315] The incipient nature of the Clayton Act merely relaxes the certainty of recoupment from the

310. *See* Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 321–24 (1949) (Jackson, J., dissenting).

311. *See generally* State v. Cent. of Ga. Ry. Co., 35 S.E. 37 (Ga. 1900) (refusing to enjoin the consolidation of two railway companies because it did not lessen the competition and explaining that a reduction in the number of rival railways from three to two could sometimes enhance competition); *see also* MILNER, *supra* note 214 (reviewing the development of oligopoly theory).

312. *See* MILNER, *supra* note 214, at 81–90 (discussing the use of antitrust law to combat oligopoly in the 1940s and 1950s).

313. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889–90 (2007) (overruling precedent on vertical restrictions because resale price maintenance can be used to enhance efficiency); State Oil Co. v. Khan, 522 U.S. 3, 15 (1997) (overturning precedent on recognition that conclude vertically imposed maximum prices are unlikely to harm competition); *see also* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (endorsing the view that "Congress designed the Sherman Act as a 'consumer welfare prescription'").

314. *Brooke Grp.*, 509 U.S. at 220 (quoting Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69, 8, n.13 (1979)).

315. *Id.* at 221–26.

Sherman Act's "dangerous probability" standard to a "reasonable prospect" standard.[316] The Court has also explained that secondary-line discrimination, which occurs when favored customers receive advantages over competing customers, must "injure competition among the discriminating seller's customers."[317] These restrictions, combined with concern that Robinson-Patman privileges competitors over competition, have meant that public enforcement of this law has all but ceased since the 1970s, while private suits face uphill challenges.[318]

For claims against exclusive dealing and ties under section 3, courts today consider the probable effects of market power—and hence prices, output, and similar concerns—just as they would Sherman Act claims.[319] Cases involving exclusive dealing have increasingly distinguished the ability to raise rivals' costs and deter entry from the benefits to interbrand competition through increased effort, reduced free riding, and similar techniques.[320] Tying continues to constitute a nominally per se illegal activity, but courts have limited that bright-line approach to situations involving a clear abuse of market power, which forecloses a substantial volume of commerce between two separate products.[321]

As for section 7, the Supreme Court today recognizes that "[m]ergers among competitors eliminate competition, including price competition, but they are not *per se* illegal."[322] Despite differences in the "operative language" of section 7 and the

316. *Id.* at 224; *see also id.* at 251, 254 (Stevens, J., dissenting) (evaluating the Clayton Act and Sherman Act standards).

317. Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 176 (2006).

318. *See* D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 GEO. WASH. L. REV. 2064, 2074–75, 2077, 2099 (2015).

319. *See* HOVENKAMP & AREEDA, *supra* note 22, ¶ 1820; *see also* Jacobson, *supra* note 59, at 326, 328 (recognizing a focus by courts on the effects of exclusive dealing on pricing, output, and other concerns); Paldor, *supra* note 181, at 1112–18 (discussing the trend in market power analysis by courts).

320. *See* Jacobson, *supra* note 59, at 326–28, 357–65; HOVENKAMP & AREEDA, *supra* note 22, ¶ 1820a–b.

321. *See* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 33–38 (2006); Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14–17 (1984); *see also* HOVENKAMP & AREEDA, *supra* note 22, ¶ 1720(a) (suggesting that the per se rule is largely defunct).

322. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23 (1979).

Sherman Act, courts have read these approaches in harmony.[323] As discussed below, modern merger analysis requires careful definitions of product and geographic markets and indicia of probable effects on the exercise of market power over prices and barriers to entry, offset by potential efficiencies created by the merger.[324] This balancing act applies equally to horizontal mergers between competitors and vertical mergers at different levels of production.[325]

The modern attitude to the Clayton Act appears closer to that which followed the Act's passage. But rather than arriving at that approach through text, courts and litigants have, as the leading antitrust treatise recommends, focused on "statutory purpose" and modern precedent to avoid producing economically harmful outcomes.[326] Indeed, that treatise warns against wading into the "indefinite" and "open-ended" language of the Clayton Act, lest courts invalidate "low-order possibilities" of competitive harm such as those presented in *Utah Pie*, *Standard Stations*, and *Brown Shoe*.[327]

Antitrust's modern focus on competition rightly leaves it open to the charge of privileging a certain school of economic thought over Congress's policy intentions.[328] The Court has never overturned most of its mid-century precedent, and it remains good law—or at least persuasive dicta—that Congress passed the Clayton, Robinson-Patman, and Celler-Kefauver Acts to protect small business and prevent industrial concentration.[329] And there is no guarantee that modern economics will lead to textually correct results when it does not perfectly align with the understandings that prevailed generations ago.[330]

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323. United States v. Rockford Mem'l Corp., 898 F.2d 1278, 1281–82 (7th Cir. 1990); HOVENKAMP & AREEDA, *supra* note 22, ¶ 906 ("In the very few Sherman § 1 cases that remain, there are strong policy reasons for applying the same substantive test under the two statutes.").

324. *See infra* Section IV.B.3; *see also* HOVENKAMP & AREEDA, *supra* note 22, ¶ 908b.

325. *See* United States v. AT&T, Inc., 916 F.3d 1029, 1032 (D.C. Cir. 2019).

326. HOVENKAMP & AREEDA, *supra* note 22, ¶ 1160b.

327. *Id.*

328. *See* Crane, *supra* note 13, at 1238–41 (arguing that modern Robinson-Patman application privileges concern about economic ideas of competition over text); Transcript Enforcers Summit, *supra* note 12, at 53–54 (urging regulators to challenge judicial Clayton Act applications).

329. *See* Kimmel, *supra* note 263, at 200–02.

330. For instance, the leading treatise rejects *Brown Shoe* in part by reasoning that "competition" refers to driving prices to marginal cost, not protecting small

B. *Text as a Shield, Text as a Sword*

Antitrust today stands at an inflection point. After decades of narrow application, progressive thinkers and officials have charged that modern Clayton Act enforcement falls short of what Congress intended.[331] Appreciation for the text of the Clayton Act sidesteps those debates with clear answers about what Congress has and has not permitted under this law. This Section puts this textual analysis to work in evaluating three contentious debates in modern antitrust enforcement: whether courts have erred in viewing consumer welfare as the goal of antitrust law, whether the government should enforce Robinson-Patman more actively, and how far merger enforcement can extend.

1. Antitrust Law and Evidence of Consumer Welfare

The federal judiciary today views the purpose of antitrust law as enhancing competition, a concept that it links to "consumer welfare."[332] In practice, courts have used this term to refer to two different concepts: true consumer welfare, which measures the economic surplus that accrues to consumers when they purchase a good at a price lower than they were willing to pay, and total or societal welfare, which adds the surplus that producers capture for selling at a price over cost.[333] In a perfectly competitive economy, firms compete to sell additional output until the price has fallen to the marginal cost of production, maximizing both total welfare and true consumer welfare.[334] In less competitive economies, actions such as price discrimination, mergers, or exclusive dealing might still increase producer welfare, but if they reduce output while raising prices, or even cut output by more than prices fall, then true consumer welfare suffers a net loss.[335] Regardless of metric, the rationale for antitrust law's consumer welfare standard rests largely on legislative history, judicial

business, but the ordinary public meaning of "competition" in 1914 and 1950 did not signify that technical conception. *Compare* HOVENKAMP & AREEDA, *supra* note 22, ¶ 903b, *with supra* notes 43–46, 299–304 and accompanying text.

331. *See supra* notes 1, 281 and accompanying text.

332. *See, e.g.*, Ohio v. Am. Express Co., 138 S. Ct. 2274, 2289–90 (2018); Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 539 (2013); Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

333. HOVENKAMP & AREEDA, *supra* note 22, ¶ 114a.

334. *Id.*

335. *Id.*

administrability, and policy concerns.[336] Decades of historical research and real-world practice have cast doubt on at least some of those rationales, and more progressive antitrust scholars and regulators have argued that antitrust law should focus on the competitive process, concentration, domination, or similar concerns.[337]

Focusing on the text of the antitrust laws replaces debates about legislative purpose and policy with the concrete tests that Congress designed.[338] The test in sections 2, 3, and 7 of the Clayton Act, combines an incipience or probability standard—where there may be in any line of commerce—with an outcome—the effect of substantially lessening competition or tending to create a monopoly.[339] Satisfying that test does not necessarily require evidence that consumer welfare will decline. After all, Congress designed the FTC to use expert knowledge to evaluate when an act may have substantially lessened competition or tended to create a monopoly, but it did not necessarily expect private litigants or generalist courts to use such sophisticated means.[340]

At the same time, the Clayton Act's emphasis on probability also means that defendants in antitrust cases must be permitted to provide evidence of countervailing effects on competition.[341] Some courts and scholars have reasoned that the absence of an express provision for efficiencies in the

336. *See generally* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978) (arguing that antitrust law promotes consumer welfare and the protection of competition); *see also* HOVENKAMP & AREEDA, *supra* note 22, ¶ 114c (explaining why consumer welfare provides an administrable standard).

337. *See* Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 836 & n.3 (2014) (collecting critical sources); Lina M. Khan, Chair, FTC, Statement of on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act 5–6 (July 1, 2021) (summarizing the unwieldiness of reasonableness). For a concise summary of rival antitrust priorities, see Justin Lindeboom, *Two Challenges for Neo-Brandeisian Antitrust*, 68 ANTIRUST BULL. 392, 401–06 (2023).

338. *See* Lande, *supra* note 29, at 2354 (comparing legislative history and textualist methods); Hovenkamp, *supra* note 23, at 1068, 1086 (observing the late addition of "consumer welfare" to antitrust jurisprudence).

339. 15 U.S.C. §§ 13, 14, 18.

340. *Cf.* 15 U.S.C. § 21(c) (requiring judicial deference to FTC factfinding supported by "substantial evidence" but permitting parties to apply for leave to submit "additional evidence").

341. *See* United States v. Baker Hughes Inc., 908 F.2d 981, 991 (D.C. Cir. 1990) (emphasizing that section 7 assesses probabilities).

Clayton Act precludes the assertion of this defense.[342] Section 7 notably contains no affirmative defenses, unlike the original section 2 and the Robinson-Patman Act, which recognize defenses for meeting good-faith competition.[343] The Supreme Court has also suggested from legislative history that "[p]ossible" economies cannot justify mergers that would otherwise harm competition.[344]

Exclusion of efficiencies confuses the Clayton Act's forbidden effects with evidence of such. Evidence is relevant when it pertains to the elements of the offense.[345] For antitrust claims, this evidence must be relevant to proving or disproving that business conduct violates a statutory provision.[346] As the current merger guidelines recognize, demonstrating cognizable efficiencies from a merger may be difficult, but doing so attacks the government's prima facie case by showing that "the merger would not substantially lessen competition in any relevant market in the first place."[347]

This approach enjoys a long historical pedigree within the text of the Clayton Act. When that law first passed, courts considering the prima facie case of whether a merger would substantially lessen competition or tend to create a monopoly looked to whether the public would benefit.[348] Cost savings proved one relevant factor in evaluating the probable effects of

342. *See, e.g.*, Lande, *supra* note 27, 832–34 (arguing that tendency to monopoly cannot encompass this defense); *cf.* Herbert Hovenkamp, *Appraising Merger Efficiencies*, 24 GEO. MASON L. REV. 703, 703 (2017) (making the observation that "some courts continue to doubt whether the defense exists at all").

343. *Compare* 15 U.S.C. § 18, *with* 38 Stat. at 730–31, *and* 15 U.S.C. § 13(a)–(b).

344. *See* FTC v. Proctor & Gamble Co., 386 U.S. 568, 580 (1967) (citing Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962)) (reasoning that the legislative history of Celler-Kefauver prefers "occasional higher costs" to concentrated industry).

345. *See* FED. R. EVID. 401, 402; *see also id.* 702 (setting rules for expert witness admissibility).

346. *See* Anna Pletcher, Kelse Moen, & John Gonzalez, *Why Economics Matters in Criminal Antitrust Cases*, 37 ANTITRUST 25, 25–28 (2023).

347. 2023 MERGER GUIDELINES, *supra* note 1, at 32–33; *see also* HOVENKAMP & AREEDA, *supra* note 22, ¶ 908b5 (explaining that this defense requires proving "extraordinary" efficiencies because merger thresholds presume "ordinary" efficiencies).

348. *See* Ft. Worth & D.C. Ry. Co. v. State, 87 S.W. 336, 337, 342–43 (Tex. 1905) (concluding that an exclusive deal to offer sleeping cars would not create a monopoly); State *ex rel.* Att'y Gen. v. Terminal Ass'n of St. Louis, 81 S.W. 395, 398 (Mo. 1904) (finding that a terminal merger would enhance the city's competitiveness); Dady v. Ga. & A. Ry., 112 F. 838, 844–45 (S.D. Ga. 1900) (concluding that a railway merger would enhance interbrand competition).

a merger, at least when consumers also benefitted.[349] Had Congress wanted to exclude consideration of these effects entirely, it should have followed those states that banned mergers, exclusive dealing, or price discrimination per se, or at least used terms other than "competition" and "tendency to create a monopoly" to represent these bans.[350]

While antitrust defendants can assert that evidence of efficiencies satisfies evidentiary relevance, they can also oppose other potential evidence as irrelevant to a prima facie case. Consider the assertion that the amended Clayton Act protects small business, a purpose that some today link to the goals of checking political corruption and other social ailments.[351] Those concerns certainly featured in debates about competition policy as understood in 1914, to say nothing of 1936 and 1950.[352] But Congress's textual emphasis on competition left little probative role for these concerns even before considering that the Clayton Act's test incorporates a reasonableness standard.[353] While extreme concentration may predict where a merger's harms probably outweigh its benefits, the economies of scale and scope associated with size provide plentiful opportunities for large-scale enterprise to foster competition.[354] Moreover, companies large and small can lobby the government for anticompetitive legislation without violating antitrust law, so evidence of the

349. United States v. Republic Steel Corp., 11 F. Supp. 117, 124–25 (N.D. Ohio 1935) (concluding that merger would enhance competition by reducing costs if "used fairly and . . . passed on to the consuming public and to employees"); State v. Cent. of Ga. Ry. Co., 35 S.E. 37, 43–44 (Ga. 1900) (noting that cost savings would reduce tariffs and outweigh merchant losses).

350. *See* Commonwealth *ex rel.* Breathitt v. Louisville & Nashville R.R. Co., 138 S.W. 291, 294 (Ky. 1911) (applying the state constitution's strict ban despite public benefits from a railway acquisition); *see also* HOVENKAMP & AREEDA, *supra* note 22 ¶ 905h & n.33 (explaining that mergers producing no efficiencies could be condemned per se, whereas modern merger enforcement presumes that every merger will produce some "ordinary" efficiencies).

351. *See supra* notes 302–09; Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 767 (2017).

352. 51 CONG. REC. 9167 (1914) (statement of Sen. Nelson) (predicting that big business would exploit politics "to protect profits" and increase prices); TAFT, *supra* note 103, at 4 (explaining that business methods "directed to the same purpose of suppressing competition and controlling prices" threaten to replace democracy with "plutocracy").

353. *See supra* Part I.

354. *See From* Von's *to* Schwinn *to the Chicago School: Interview with Judge Richard Posner, Seventh Circuit Court of Appeals*, 6 ANTITRUST 4, 4–5 (1992) (acknowledging, after arguing *Von's Grocery* as an attorney and subsequently becoming a judge and gaining perspective, that the government's theory of competitive harm in the case was incorrect).

ability to influence politics by legitimate means proves irrelevant to determining whether an act may substantially lessen competition or tend to create a monopoly.[355]

2. Robinson-Patman Today

More than any other component of the Clayton Act, enforcement of the Robinson-Patman Act has ebbed and waned with changing ideas about the goals of antitrust law.[356] Given the lack of textual reasoning behind this shift, many scholars have criticized government enforcers and the courts for placing their own views of economic efficiency above Congress's mandate against price discrimination.[357] The FTC's recent interest in revitalizing Robinson-Patman enforcement reflects this belief that Congress in 1936 expressed a preference for protecting small business, not least as some modern congressional leaders continue to egg on the agency to expand its enforcement of this law.[358]

These criticisms too quickly ignore that Robinson-Patman bans price discrimination when it prevents, injures, or destroys competition involving the grantor or beneficiary of the discrimination.[359] Price differentials that fall harder on small businesses will not necessarily produce that forbidden effect on competition overall.[360] As an illustration, consider what FTC

355. *See* Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56, 60 (1993).

356. *See* Sokol, *supra* note 318, at 2071–76, 2084.

357. *See, e.g.*, Daniel A. Hanley, *Controlling Buyer and Seller Power: Reviving Enforcement of the Robinson-Patman* Act, 52 HOFSTRA L. REV. 313, 316–17 (2024); Crane, *supra* note 13, at 1238–41.

358. *See* Bedoya, *supra* note 281, at 7–8 (collecting sources); Letter from 16 Senators and Members of Congress to Lina Khan, Chair, FTC (Mar. 28, 2024) (urging the FTC to use Robinson-Patman to address high concentration in food and retail markets).

359. *See* 15 U.S.C. § 13(a).

360. The Supreme Court has tempered its recognition that Robinson-Patman requires a showing of competitive injury by permitting fact-finders to infer that element from harm to a competitor or customer, such as "evidence that a favored competitor received a significant price reduction over a substantial period of time." Volvo Trucks N. Am. Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 177 (2006); *see also* HOVENKAMP & AREEDA, *supra* note 22, ¶ 2342d & n.31 (collecting cases allowing inference from harm to a competitor while critiquing a leading Ninth Circuit decision applying it). Although courts may allow that inference to be rebutted by "substantial evidence of absence of competitive injury," this practice in effect places the burden of disproving competitive injury on the defendant. Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1144 (D.C. Cir. 1988); *see also* HOVENKAMP & AREEDA, *supra* note 22,

Commissioner Alvaro Bedoya has recently described as a potential target of the agency's renewed Robinson-Patman push.[361] A manufacturer's price discrimination between big box stores and independent grocers' purchasing cooperatives led to the closure of a remote region's only grocery store.[362] The grocer was unable to afford supplies at the prices its impoverished clientele could afford to pay and had bought its supplies from the nearest big box store a hundred miles away, which retailed them cheaper than the grocer could purchase at wholesale.[363] Several senators and representatives have likewise urged the Commission to use Robinson-Patman to target the "waterbed effect" that results when dominant retailers extract favorable prices from suppliers, leading the suppliers to make up losses by charging independent stores more.[364] As with Commissioner Bedoya, the congressional letter notes that "[t]he harm to consumers may be greatest in communities most likely to be served by independent groceries and pharmacies, such rural communities or areas with higher levels of poverty."[365] Yet given the distances involved, it is unlikely that competition for consumers with the manufacturer's favored customers (the large retailers) ever included independent retailers in remote or rural areas.[366] And even if competition somehow bridged that distance, price discrimination that harmed independent stores

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¶ 2333b (defending this inference where it can be assumed that "the favored and disfavored purchasers actually compete for the same customers"). Robinson-Patman's price-discrimination prohibition instead requires that the plaintiff demonstrate not only the existence of competition but also an injury to that competition as part of the prima facie case. *See* FTC v. Simplicity Pattern Co., 360 U.S. 55, 65 (1959).

361. Bedoya, *supra* note 281, at 7–8.

362. *See id.* at 6–7.

363. *Id.*; *see also* Matthew Perlman, *FTC's Bedoya Looking for Market Power in Pricing Cases*, LAW360 (Apr. 11, 2024, 9:31 PM), https://www.law360.com/articles/1824599/ftc-s-bedoya-looking-for-market-power-in-pricing-cases [https://perma.cc/65MZ-LHR6] (reporting Commissioner Bedoya's comments that "he has visited independent grocers in both rural and urban areas" and "is seeing a big impact in communities that rely on independent grocers").

364. Letter from 16 Senators and Members of Congress to Lina Khan, *supra* note 358, at 2.

365. *Id.*

366. *See* 2023 MERGER GUIDELINES, *supra* note 1, at 45 ("A market's geography depends on the limits that distance puts on some customers' willingness or ability to substitute to some products, or some suppliers' willingness or ability to serve some customers.").

would not necessarily injure, prevent, or destroy competition among the remaining retailers.[367]

Likewise, consider how the Commission has conceived of harms to competition in its first Robinson-Patman lawsuit in decades. In December 2024, the agency sued Southern Glazer's Wine & Spirits, the nation's largest distributor of wine and spirits, for allegedly charging independent retailers more than it does chain retailers.[368] The FTC explained that in this secondary-line discrimination setting, the possible injury to competition occurs at the retail level, "between favored and disfavored retailers."[369] That theory of injury proves too narrow because section 2(a)'s elements of "competition with any person" and "with customers" also encompasses competition among favored customers.[370] And because price cuts prove hypercompetitive in the absence of recoupment, it will be difficult for private parties or the FTC to establish that competition suffers when favored retailers secure lower prices from a supplier.[371]

367. *See* U.S. Wholesale Outlet & Distrib, Inc. v. Innovation Ventures, LLC, 89 F.4th 1126, 1145 (9th Cir. 2023) ("[T]he jury could have determined that the Wholesalers and Costco were competing, but there was no potential harm to competition."); Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1144 (D.C. Cir. 1988) (holding that "[s]pecific, substantial evidence of absence of competitive injury" can "rebut" the inference that harm to competitors also harms competition).

368. *See* Complaint at 1, FTC v. Southern Glazer's Wine and Spirits, LLC, No. 24-cv-02684 (C.D. Cal. Dec. 12, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/001-REDACTED-Complaint.pdf [https://perma.cc/GM6N-HHA9]; *see also* Petition of the FTC for a Show Cause Hearing and an Order Enforcing Civil Investigative Demand at 1, 5, 7, FTC v. Retail Servs. & Sys., Inc. No. 23-mc-00028 (E.D. Va.), https://www.ftc.gov/system/files/ftc_gov/pdf/total_wine_petition.pdf [https://perma.cc/S2UK-8J2F]; Josh Sisco, *FTC Preparing Lawsuit over Alcohol Pricing*, POLITICO (June 3, 2024, 6:00 PM), https://www.politico.com/news/2024/06/03/ftc-lawsuit-southern-glazer-wine-spirits-00161323 [https://perma.cc/RE9A-8VAJ].

369. Complaint, *supra* note 368, at 20–21; Order Denying Petition to Limit Civil Investigative Demand at 5, *In re Civil Investigative Demand Issue to Retail Services & Systems, Inc.*, No. 211-0155 (FTC May 19, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2110155retailsystemscommorderdenyingptqpublic.pdf [https://perma.cc/PUV7-544J].

370. 15 U.S.C. § 13(a); *see* CHAIN STORE INVESTIGATIONS, *supra* note 242, at 19, 34 (observing in 1935 that "chain companies within the various commodity groups actively compete with other chains in the same group").

371. *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 225–32 (1993) (discussing recoupment in the primary price discrimination context); HOVENKAMP & AREEDA, *supra* note 22, ¶ 2342d (arguing that the statutory language extends *Brooke Group*'s recoupment requirement to secondary-line discrimination despite the authors' misplaced concerns that this holding provides a "too harsh standard" for interpreting Robinson-Patman in the first instance). *But see*

3. Merger Guidelines and Section 7

Some of the most contentious debates over applying the Clayton Act today concern merger policy under section 7. The Supreme Court has not decided a major merger case in over a half century, leaving the evolution of antitrust law in this field to the FTC, Department of Justice, and lower courts.[372] The most influential development has been the Department of Justice's merger guidelines, first published in 1968 to provide guidance about when the government would enforce section 7.[373] The guidelines also underlie modern litigation of section 7 cases by providing standards for the government to meet its burden in defining product and geographic markets and demonstrating probable effects on competition or monopoly.[374] The burden then shifts to the defendant to show that no substantial lessening of competition may occur.[375] As then-Judge Clarence Thomas influentially described in an opinion joined by then-Judge Ruth Bader Ginsburg, this burden-shifting analysis enables a reviewing court to sift between two different "probabilities" about a merger's effect, promoting the focus on incipiency without diluting "may" into mere possibility.[376]

The most recent guidelines, finalized in December 2023, have proposed many new enforcement priorities.[377] The lack of textual engagement in the guidelines underscores that the text of section 7 as currently written does not authorize all of these efforts.[378] Consider the concern that a company can lessen competition by acquiring a potential or nascent competitor before it has entered the market.[379] Competition law in 1914 did understand that newcomers could promote competition

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HOVENKAMP & AREEDA, *supra* note 22, ¶ 2333c1 (noting that competitive injury may be more likely when induced by downstream purchasers as opposed to upstream sellers).

372. HOVENKAMP & AREEDA, *supra* note 22, ¶ 902c.

373. U.S. DEP'T OF JUST., 1968 MERGER GUIDELINES 2–3, https://www.justice.gov/archives/atr/1968-merger-guidelines [http://perma.cc/VN73-GTPY].

374. *See generally* HOVENKAMP & AREEDA, *supra* note 22, ¶ 908b.

375. *See, e.g.*, United States v. Baker Hughes Inc., 908 F.2d 981, 982–83 & 983 n.3 (D.C. Cir. 1990). *See generally* HOVENKAMP & AREEDA, *supra* note 22, ¶ 905g2.

376. *Baker Hughes*, 908 F.2d at 991.

377. 2023 MERGER GUIDELINES, *supra* note 1, at 2–3 (listing eleven principles).

378. *See* sources cited *supra* note 14 (noting the lack of textual support for current guidelines).

379. *See* 2023 MERGER GUIDELINES, *supra* note 1, at 3 ("Guideline 4: Mergers Can Violate the Law When they Eliminate a Potential Entrant in a Concentrated Market.").

while the threat of "potential competition" could suffice to "hold[] prices within bounds."[380] But contemporaries also believed that competition required some trade to already exist.[381] A "line of commerce" likewise presumed that business already existed.[382] And it would make little sense to evaluate the probable outcomes that "may" result if it were improbable that any competition would exist.[383]

A company accused of harming nascent competition via acquisition could raise the textual shield that no competition will probably arise in that field, or, at least, use this straightforward argument to ease a court into evaluating an argument dependent on technical economic models and business statistics. Consider the FTC's recent unsuccessful effort to block Meta's acquisition of Within Unlimited, which produces a fitness app for use on virtual reality devices.[384] Meta develops some apps on its own and allows others to be sold on its Quest Store for its virtual reality (VR) devices.[385] After deciding to acquire Within, Meta showed less interest in developing its own VR fitness apps.[386] The FTC charged that this acquisition would lessen actual and perceived potential competition in the nationwide market for VR-dedicated fitness apps.[387]

The district court denied the FTC its requested preliminary injunction.[388] The FTC failed to satisfy the Clayton Act's standard of "may."[389] Evidence of Meta's economic incentives and ability to enter the market, as well as its lack of progress through its own apps, made it less than likely that Meta would actually enter this market.[390] The FTC had not shown that this acquisition would probably eliminate perceived potential entry because no rivals already perceived Meta this way.[391] The district court rejected the FTC's argument that it needed to

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380. CLARK & CLARK, *supra* note 50, at vi–vii.

381. *See* sources cited *supra* note 51.

382. Great Atl. & Pac. Tea Co. v. Cream of Wheat Co., 224 F. 566, 572 n.7 (S.D.N.Y. 1915) (recognizing that "line of commerce" meant "trading or dealing in the commodities").

383. 15 U.S.C. § 18.

384. FTC v. Meta Platforms Inc., 654 F. Supp. 3d 892, 903 (N.D. Cal. 2023).

385. *Id.* at 903–04.

386. *Id.* at 908–10.

387. *Id.* at 921, 925.

388. *Id.* at 903.

389. *Id.* at 926–27.

390. *Id.* at 926–41.

391. *See id.* at 940.

show only "[p]robabilistic proof of 'likely influence' on existing competitors," a standard that the FTC, Meta, and the district court all traced from case law and not statutory text.[392]

A second textual difficulty with the revised guidelines appears in their emphasis on serial or roll-up mergers, in which a company engages in a pattern of small acquisitions that together lead to anticompetitive outcomes.[393] The guidelines justify examining individual acquisitions for this overall concern based on congressional statements about the trend to oligopoly that accompanied the Celler-Kefauver Act.[394] The guidelines explain that the agency will take that opportunity to "examine the impact of the cumulative strategy . . . to determine if that strategy may substantially lessen competition or tend to create a monopoly."[395] Section 7 does not share that perspective. It requires that no one shall acquire the "whole or any part of the assets of another person" when "the effect of such acquisition" may be to lessen competition substantially or tend to create a monopoly.[396] The focus on "another person" and "such acquisition" subjects only the immediate transaction to scrutiny.[397]

Anticipating that concern, FTC Commissioner Rebecca Slaughter and others have recently argued that even if an individual merger in this pattern may not substantially lessen competition, it can still further a firm's tendency to create a monopoly.[398] This argument assumes that "may . . . tend to create a monopoly" employs the broad definition of "tend" to

392. *See id.*; *see also* Defendants' Motion to Dismiss Amended Complaint at 18–19, *Meta Platforms Inc.*, 654 F. Supp. 3d at 892 (No. 22-cv-04325) (arguing that the FTC's speculative conclusion falls short of judicial standards for proof of independent entry).

393. 2023 MERGER GUIDELINES, *supra* note 1, at 23.

394. *Id.*

395. *Id.*

396. 15 U.S.C. § 18.

397. *See* JOINT DISSENTING STATEMENT OF COMMISSIONER MELISSA HOLYOAK AND COMMISSIONER ANDREW N. Ferguson, *IN RE* EXXONMOBIL CORP., COMM'N FILE NO. 241-0001, at 3 (May 2, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2410004 exxonpioneermh-afstmt.pdf [https://perma.cc/3L3Q-U39T] (arguing that conduct by a board member of a merging company "warrants scrutiny" but does not create "reason to believe *the transaction* violates Section 7"); *cf.* Niz-Chavez v. Garland, 593 U.S. 155, 161–65 (2021) (explaining that "a" means "one").

398. STATEMENT REGARDING MERGER GUIDELINES, *supra* note 14, at 2; Transcript Enforcers Summit, *supra* note 12, at 51–52; *see also* Lande, Newman, & Slaughter, *supra* note 30, at 38 ("Regardless of whether a beachhead acquisition may 'substantially lessen competition,' however, it may 'tend to create a monopoly' by moving the acquirer in the direction of possessing monopoly power.").

mean "encompass[] any movement in the direction of monopoly."[399] That literal approach overlooks that contemporaries of the Clayton Act understood a tendency to create a monopoly as a legal term of art describing a result that would naturally or inevitably occur as opposed to one that someone intended but might not have been able to achieve.[400] Subsequent FTC and judicial interpretation that this clause condemns even "minute" increases in concentration owe far more to mid-century legislative fears of oligopoly than the original text of the Clayton Act.[401] Section 7 does not prohibit an individual merger unless it actually displays the probable effect of inevitably tipping the scales to monopoly acquisition. Disallowing it on the FTC's proposed theory would confound the higher standard of tending to create a monopoly with the lesser standard of substantially lessening competition.[402]

These limitations do not mean that text exclusively shields firms from more aggressive enforcement. Textual briefing and arguments by regulators or private plaintiffs can hammer home the statutory legitimacy of their newly expansive priorities more so than would arguments based on precedent and policy.[403] The new emphasis on using merger law to combat labor market harms, for instance, plausibly satisfies the expanded language of "any activity affecting commerce," even though the current guidelines justify this approach entirely through Sherman Act case law and labor does not qualify as a line of commerce.[404] The 1980 textual amendment that expanded section 7 to activities affecting commerce could also provide a textual basis for the 2023 Merger Guidelines' emphasis on identifying mergers that eliminate "substantial

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399. Lande, Newman, & Slaughter, *supra* note 30, at 16 (quoting *In re* Brillo Mfg. Co., 56 F.T.C. 1672, 1679 (1960)).

400. *See supra* Section I.B; *see also* Bostock v. Clayton Cnty., 590 U.S. 644, 784 (2020) (Kavanaugh, J., dissenting) ("*First,* courts must follow ordinary meaning, not literal meaning. And courts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.").

401. *See* Lande, Newman, & Slaughter, *supra* note 30, at 19–20 (quoting *In re* Brillo Mfg. Co., 56 F.T.C. 1672, 1679 (1960)).

402. See *supra* Sections I.A–B; *cf.* Lande, Newman & Slaughter, *supra* note 30, at 28 (concluding—wrongly—that tendency to create a monopoly requires a lesser effect than does substantially lessening competition).

403. *See supra* Section IV.A.

404. 2023 MERGER GUIDELINES, *supra* note 1, at 1, 26; *see supra* Section I.D (explaining the original meaning of line of commerce); *see* The Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, 94 Stat. 1154 (1980) (codified as amended at 15 U.S.C. § 18) (marking the expansion of text decades after Celler-Kefauver was enacted).

competition between firms" even when market definitions remain hazy.[405] Still, the 2023 Merger Guidelines continue to stress the need to identify a "line of commerce," and plaintiffs following that guidance must take care that they define a product market that satisfies the original meaning of this statutory requirement.[406] For instance, while it could be difficult to show that a merger between high-tech firms may substantially limit competition for a technology when no other company has yet to introduce a competing product, the government can still show that such a merger violates section 7 if it can demonstrate that investment in research and development qualifies as a line of commerce separate from the technology itself.[407]

Moreover, even when section 7 falls short, the government possesses other statutory tools to challenge mergers, including the Sherman Act and section 5 of the FTC Act.[408] In the case of serial mergers, for instance, these laws provide flexibility to consider multiple transactions together even where no individual merger violates section 7.[409] Still, those who plan to

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405. *See* Bryan Koenig, *FTC 'Hopeful' Merger Judges Can See Past Market Definition*, LAW360 (Apr. 11, 2024, 8:07 PM), https://www.law360.com/articles/1824485/ftc-hopeful-merger-judges-can-see-past-market-definition [https://perma.cc/F56Z-QA65] ("When judges can't get past market definition, [FTC Competition Bureau Director Henry] Liu called the result 'analytically backwards' and against the intent of the Clayton Act, which focuses only on mergers that threaten to substantially lessen competition while saying 'nothing about market shares.'").

406. 2023 MERGER GUIDELINES, *supra* note 1, at 39–41. For instance, when the Federal Trade Commission recently requested a preliminary injunction against the merger of handbag companies, it proposed "accessible luxury handbags" as a relevant product market. FTC v. Tapestry, Inc., No. 24-cv-03109, 2024 WL 4647809, at *9 (S.D.N.Y. 2024). The district court accepted that definition by applying the qualitative factors *Brown Shoe* deemed relevant in the 1960s as well as the FTC's quantitative analysis, whereas it dismissed the companies' commercial arguments as overbroad. *Id.* The court was correct in its textual recognition that section 7's application to "*any* line of commerce" permits "no hierarchy of products" that would exclude "less essential" consumer products from merger analysis. *Id.* at *69. But the defendants may have missed the opportunity to argue that the FTC's proposed submarket for handbags did not qualify in the first instance as a line of commerce as section 7 uses that phrase.

407. *See* Illumina, Inc. v. FTC, 88 F.4th 1036, 1050, 1051 n.9 (5th Cir. 2023) (recognizing that the FTC can demonstrate that companies compete in a research and development product market).

408. *See* United States v. Rockford Mem. Corp., 898 F.2d 1278, 1280, 1283 (7th Cir. 1990) (holding that a non-profit's merger did not violate section 7 but could violate the Sherman Act); *In re* Beatrice Foods, 67 F.T.C. 473, 725–26 (1965) (blocking a non-corporate merger under section 5 of FTC Act).

409. *See* 2023 MERGER GUIDELINES, *supra* note 1, at 23 n.42.

use these tools should recall that litigants can assert these laws as textual shields just as much as they could the Clayton Act.[410] Section 5 speaks of "unfair methods of competition," for example, so the FTC would have to show the existence of and consequences for competition beyond the socio-political concerns of legislative history.[411]

CONCLUSION

When a company seeks to invalidate an exclusive purchasing arrangement, the Department of Justice next challenges a merger, or the FTC dusts off its mothballed Robinson-Patman enforcement power, the only question that matters in court is whether the law permits or forbids the action. The mere existence of the Clayton Act on the books and the surface-level recognition that competition means rivalry fail to provide sufficient answers. Modern interpreters require a cipher into the long-past world from which this law emerged. That analysis cannot rest on what an individual senator thought about market concentration and democracy. It cannot consist of how economic textbooks defined competition. And it certainly cannot depend upon what someone today thinks makes for good economic policy as a matter of first principles.

Determining the original public meaning of antitrust law is not a simple task. But it is the only way for courts, government enforcers, and businesses to know when conduct crosses the line. When members of Congress decided to modify antitrust law in 1914, they may have thought they were enacting sweeping changes to how competition functioned in the United States. But when they chose to ban price discrimination, exclusive dealing, and mergers that may have the effect to substantially lessen competition or tend to create a monopoly in any line of commerce, they implemented a system that closely resembled the rule of reason already employed under the Sherman Act. The supporters of the Robinson-Patman Act may have desired to give mom-and-pop retailers ammunition against chain stores. But when they targeted injuries to competition and not to competitors, they extended the law of price discrimination as it already existed. The advocates of the Celler-Kefauver Act may have feared oligopoly and concentration as evils to democracy. But when they brought

410. *Compare* Milner, *supra* note 23, at 168–74 (arguing that section 5's text limits FTC claims), *with* Averitt, *supra* note 165, at 275–90, 297–98 (arguing that section 5 grants the FTC discretion to set unfairness policy).

411. 15 U.S.C. § 45(a); *see supra* notes 166–74 and accompanying text.

section 7 into conformity with the test first established in 1914, they adopted that standard for merger law as well.

Mergers, price discrimination, and exclusive dealing do not become unlawful simply because they raise prices or reduce consumer welfare. They become unlawful when they bring about a set of economic consequences that a previous generation would have described as an effect that may substantially lessen competition or tend to create a monopoly in any line of commerce. The Clayton Act specifies those effects and no others. If the FTC and Department of Justice fail to stay within those textual bounds, the businesses they target will surely not remain silent in pointing out the proper textual meaning to the courts. And even if they do, the democratic process remains available to pass competition laws with updated meanings for modern readers.