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COMPETITION, CONSUMER WELFARE, & THE SHERMAN ACT

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Controversies continue to rage after more than a century of Sherman Act enforcement, but one thing should be settled: "the policy unequivocally laid down by the Act is competition."[1] With the Sherman Act, Congress "sought to establish a regime of competition as the fundamental principle governing commerce in this country."[2] The statutory scheme is to "safeguard consumers by protecting the competitive process."[3] "The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services," and the Act "precludes inquiry into the question whether competition is good or bad" in particular circumstances.[4]

The first two sections of this essay demonstrate that sections 1 and 2 of the Sherman Act are interpreted and applied "to protect the competitive process itself."[5] The third section explores alternative definitions of "consumer welfare," what courts mean by the term, and the role of "consumer welfare" in applying the Sherman Act. The following two sections examine the application of the Act in two particular contexts and reject arguments for limiting and extending the scope of liability in the interest of promoting "consumer welfare." These arguments fail because the Sherman Act protects the competitive process, and injury to consumers at the end of the supply chain therefore is neither necessary nor sufficient for liability.

I. COMPETITION AND SECTION 1 OF THE SHERMAN ACT

NCAA[6] contains the Supreme Court's most significant modern discussion of the goals and policies of the Sherman Act, and that discussion made clear that the essential inquiry under Section 1 is always about competition: "[W]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition. Under the Sherman Act the criterion to be used in judging the validity of a restraint of trade is its impact on competition."[7] The Court went on to explain in a footnote that:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest

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1 *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 n.27 (1984) (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958)).

2 *City of Lafayette, La. v. La. Power & Light Co.*, 435 U.S. 389, 398 (1978) (footnote omitted).

3 *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 489 (2d Cir. 2004).

4 *Nat'l Soc'y of Prof'l Eng'rs v. United States,* 435 U.S. 679, 695 (1978).

5 *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 794 (1st Cir. 1988) (Breyer, J.). *See also Tal v. Hogan*, 453 F.3d 1244, 1258 (10th Cir. 2006) ("The primary concern of the antitrust laws is the corruption of the competitive process . . . ."); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 963 (10th Cir. 1994) ("the Act's basic objective[] [is] the protection of a competitive process") (internal quotations omitted); *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1437 (7th Cir. 1986) (Posner, J.) ("The purpose of antitrust law, at least as articulated in the modern cases, is to protect the competitive process . . . .").

6 *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

7 *Id.* at 104 (footnotes omitted).

> quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.[8]

The Court critically distinguished between ends and means. The policy of Section 1 is to protect the competitive process in the expectation that doing so generally will further societal goals. In this regard, it does not matter whether conduct is evaluated under the rule of reason or is subject to the per se rule.

The per se rule against price fixing began to emerge in the earliest decisions interpreting the Sherman Act,[9] and it was fully crystallized in *Socony-Vacuum* when the Supreme Court held: "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se."[10] In a footnote, the Court explained that, while price fixing agreements vary in purpose and effect, "are all banned because of their actual or potential threat to the central nervous system of the economy."[11]

The Supreme Court's modern decisions apply the per se rule to any practice that "facially appears to be one that would always or almost always tend to restrict competition" rather than "'increase economic efficiency and render markets more, rather than less, competitive.'"[12] The consistent rationale for the per se rule has been that the Sherman Act condemns concerted conduct that necessarily eliminates competition, without regard to its actual effects in any particular case.

In *Discon*,[13] the Supreme Court applied the converse of the rationale for the per se rule, holding that the rule does not apply to conduct that necessarily is harmful unless the mechanism for inflicting harm is eliminating competition. The Court reversed a decision holding that the per se rule could be applied to a regulated utility's decision to use a particular supplier if there was "no legitimate business reason for that purchase decision."[14] The Court reasoned that a plaintiff "must allege and prove harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself."[15] Although the purchase decision was "not made for competitive reasons" but rather was "part of a regulatory fraud" obviously harming customers, the Court held that the Sherman Act had no application because "the competitive process itself does not suffer harm."[16]

The rule of reason was established by the landmark *Standard Oil* and *American Tobacco* cases.[17] A few years later, in *Chicago Board of Trade*, the Supreme Court explained that, under the rule of reason, "[t]he true test for legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[18] The Court has never departed from this basic formulation,[19] and its modern decisions consistently hold that the Sherman Act protects the competitive process whatever the implication may be.[20]

The most instructive case is *Professional Engineers*, in which the defendants argued their ban on competitive bidding "ultimately inures to the public benefit by preventing the production of

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8 *Id.* at 104 n.27 (quoting *N. Pac. Ry. Co. v. United States,* 356 U.S. 1, 4 (1958)).
9 *United States v. Joint Traffic Ass'n,* 171 U.S. 505 (1898); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 331 (1897).
10 *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).
11 *Id.* at 225 n.59.
12 *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19–20 (1979) (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978)). *See State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) ("Some types of restraints . . . have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se."); *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 103–04 (1984) ("Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.").
13 *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998).
14 *Id.* at 135.
15 *Id.*
16 *Id.* at 136–37.
17 *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *Am. Tobacco Co. v. United States*, 221 U.S. 106 (1911).
18 *Bd. of Trade of the City of Chicago v. United States,* 246 U.S. 231, 238 (1918).
19 *See Cal. Dental Assoc. v. FTC*, 526 U.S. 756, 780 (1999); *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 458 (1986).
20 Modern cases also hold that an abbreviated application of the rule of reason is employed when "an observer with even a rudimentary understanding of economics could conclude that the arrangement in question would have an anticompetitive effect on customers and markets." *Cal. Dental*, 526 U.S. at 770.

inferior work" and "deceptively low bids."[21] The Court refused to consider this argument, holding that the rule of reason "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions."[22] The Court further explained that:

> The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. The heart of our national economic policy long has been faith in the value of competition. . . . Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.[23]

II. COMPETITION AND SECTION 2 OF THE SHERMAN ACT

Section 2 of the Sherman Act prohibits certain "anticompetitive" or "exclusionary" conduct by single competitors,[24] but as Professor Hovenkamp observed, after "a century of litigation, the scope of and meaning of exclusionary conduct under [section 2 of] the Sherman Act remain poorly defined. No generalized formulation of . . . exclusionary conduct enjoys anything approaching universal acceptance."[25] Nevertheless, Section 2 jurisprudence makes clear that single-firm conduct is evaluated with respect to its impact on the competitive process.

First, Section 2 does not condemn monopoly or monopoly pricing, but rather only exclusionary conduct:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.[26]

Second, Section 2 does not condemn single-firm conduct merely because it harms rivals. The Supreme Court has often noted that the purpose of Section 2, like that of the antitrust laws in general, is "the protection of *competition*, not *competitors*."[27] The Court has specifically declared that the purpose of Section 2 "is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."[28]

As Judge Breyer explained, "a practice is not 'anticompetitive' simply because it harms competitors. After all, almost all business activity, desirable and undesirable alike, seeks to advance a firm's fortunes at the expense of its competitors. Rather, a practice is 'anticompetitive' only if it harms the competitive process."[29] And as Judge Easterbrook commented: "Competition is a ruthless process. A firm that reduces cost and expands sales injures rivals—sometimes fatally. . . . These injuries to

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21 *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 693–94 (1978).
22 *Id.* at 688.
23 *Id.* at 695 (internal quotation and citation omitted).
24 *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398, 407 (2004); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993); *United States v. Microsoft Corp*., 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam).
25 Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147, 147–48 (2005) (footnote omitted).
26 *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398, 407 (2004).
27 *Leegin Creative Prods., Inc. v. PSKS, Inc*., 127 S. Ct. 2705, 2724 (2007); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 224 (1993); *Atl. Richfield Co. v. USA Petroleum Co.,* 495 328, 338 (1990), *Cargill, Inc. v. Monfort of Colo., Inc.,* 479 U.S. 104, 110 (1986); *Copperweld Corp. v. Independence Tube Corp*., 467 U.S. 752, 767 n.14 (1984).
28 *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).
29 *Town of Concord v. Boston Edison Co*., 915 F.2d 17, 21 (1st Cir. 1990) (Breyer, C.J.). *See Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 486 (1st Cir. 1988) (Breyer, J.) ("'Anticompetitive' . . . has a special meaning. It refers not to actions that merely injure individual competitors, but rather to actions that harm the competitive process."); *United States v. Microsoft Corp*., 253 F.3d 34, 58 (D.C. Cir. 2001) ("to be deemed as exclusionary, a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive *process* and thereby harm consumers.") (en banc) (per curiam).

rivals are byproducts of vigorous competition, and the antitrust laws are not balm for rivals' wounds. The antitrust laws are for the benefit of competition, not competitors."[30]

Third, Section 2 does not condemn single-firm conduct merely because an opportunity to enhance competition or consumer interests presents itself. The Supreme Court pointedly rejected this idea in *Trinko*, holding that Section 2 "does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition."[31] To be found in violation of Section 2,

> [i]t is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient competitor may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster.[32]

Although the courts have not articulated a practical test for determining when single-firm conduct "harms the competitive process," they have made clear that the character of the conduct is critical. Conduct that eliminates competitors, creates a monopoly, or harms consumers nevertheless may be lawful competition on the merits. The most influential court of appeals decision in recent decades was the en banc opinion of the D.C. Circuit in *Microsoft*, which set out a multi-step analysis for the application of section 2 of the Sherman Act.[33] The first step is the plaintiff's demonstration that the challenged "conduct harmed competition, not just a competitor," i.e., the conduct must be shown to "harm the competitive *process*."[34] The second step is the defendant's opportunity to show that "its conduct is indeed a form of competition on the merits."[35] When the plaintiff and defendant both make these showings, the final step is the plaintiff's opportunity to demonstrate that "the anticompetitive harm of the conduct outweighs the procompetitive benefit."[36] Because this opportunity arises only after considering whether the conduct harms the competitive process and whether it is competition on the merits, the third step plainly does not permit conduct to be found exclusionary merely on the grounds that it harms consumers.[37]

III. CONSUMER WELFARE AND THE SHERMAN ACT

In the *Antitrust Paradox*, Professor Robert Bork famously argued that: "The Sherman Act was clearly presented and debated as a consumer welfare prescription."[38] He went on to state what he meant by the term: "Consumer welfare is greatest when society's economic resources are allocated so that consumers are able to satisfy their wants as fully as technological constraints permit. Consumer welfare, in this sense, is merely another term for the wealth of the nation."[39] Professor Bork maintained that the Sherman Act treated all people equally, and he used the term "consumer welfare" to refer to the well being of all persons in the economy. The Ninth Circuit has adopted Bork's definition of the term,[40] but the remaining courts of appeals have not indicated what they have meant when they referred to "consumer welfare."

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30 *Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986). *See also Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 394 (7th Cir. 1984) (Posner. J.) ("The exclusion of competitors is cause for antitrust concern only if it impairs the health of the competitive process itself.").

31 *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398, 415–16 (2004).

32 *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984).

33 *United States v. Microsoft Corp.*, 253 F.3d 34, 58–59 (D.C. Cir. 2001) (en banc) (per curiam).

34 *Id.* The Fourth and Eleventh circuits have adopted this requirement. *See Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1294 (11th Cir. 2004) ("In order for a practice to be exclusionary, '"it must harm the competitive *process* and thereby harm consumers."' (quoting *Microsoft*, 252 F.3d at 58)); *Dickson v. Microsoft Corp.*, 309 F.3d 193, 206 (4th Cir. 2002) ("To have an 'anticompetitive effect,' conduct 'must harm the competitive *process* and thereby harm consumers.'" (quoting *Microsoft*, 252 F.3d at 58)).

35 *Microsoft*, 252 F.3d at 59.

36 *Id.* at 59.

37 The *Microsoft* court found no need to undertake the task of weighing and provided no indication of how the weighing would be done. As to the practices for which the court affirmed liability, it held that Microsoft had put forward no legally sufficient argument that the practice was competition on the merits. *See id.* at 60, 62–64, 66–67, 71, 74, 76–78. Applying the *Microsoft* test, the D.C. Circuit recently held that deceptive conduct is not anticompetitive merely because it allows a defendant to charge its patent licensees higher royalties. *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).

38 ROBERT H. BORK, THE ANTITRUST PARADOX 66 (1978).

39 *Id.* at 90.

40 *See Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433, 1444 n.15 (9th Cir. 1995) ("Consumer welfare is maximized when economic resources are allocated to their best use." "[A]llocative efficiency is synonymous with consumer welfare.").

Professor Bork's usage of the term "consumer welfare" has caused confusion and generated controversy.[41] Critically, scholarly literature on antitrust policy has not followed his lead. The literature—especially that on the treatment of merger efficiencies[42]—has used the term "consumer welfare" to refer to the well being of just the consumers within the relevant market.[43] Thus, "consumer welfare" has been used as the antitrust law term for what economists call "consumers' surplus," which is defined as the amount the buyers in a market would have been willing to pay, over and above what they did actually had to pay, for the quantity they consumed.

This definition derives from the theory of consumer demand in which buyers are people. Most antitrust cases, however, involve markets in which corporations purchase intermediate goods. In such cases, "consumer welfare" may refer either to the well being of the corporations that are the buyers in the relevant market, or it may refer to the well being of the ultimate consumers at the end of the distribution chain. The latter notion of "consumer welfare" may be what most commentators mean by the term.[44]

Just five Supreme Court majority opinions used the term "consumer welfare," and not one has indicated what the Court meant by it. Quoting Professor Bork, the Supreme Court first observed that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[45] A few years later, the Court quoted this sentence and indicated that promoting consumer welfare was a "fundamental goal of antitrust law."[46] A decade after that, the Court referred to "the antitrust laws' traditional concern for consumer welfare" and stated that unsuccessful "predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced."[47] In one decision from last year, the Court quoted the latter statement.[48] In another the Court indicated that "competition and consumer welfare" both suffer if the antitrust laws force manufacturers to adopt inefficient alternatives to vertical restraints, and the Court declared that fair trade laws were "[d]ivorced from competition and consumer welfare" in that they sought to protect small retailers.[49]

Although these decisions did not indicate what the Court meant by "consumer welfare," a narrow definition of the term is irreconcilable with the Court's repeated admonition that the Sherman Act "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."[50] Thus, it is unlikely that the Supreme Court used the term "consumer welfare" to refer only to the welfare of end users.

The Supreme Court and the courts of appeals have been clearer about the role of "consumer welfare" than about the meaning of the term. The Supreme Court decisions referring to "consumer welfare" treat it as an overarching statutory goal rather than as a touchstone for legality. In addition, the passages from *NCAA* and *Professional Engineers* quoted above indicate that promoting "consumer welfare" is a goal of the Sherman Act, but only a goal.[51] Many court of appeals decisions specifically state that "purpose" of Sherman Act was to promote "consumer welfare,"[52] but only the Ninth Circuit decisions using the term to mean "aggregate welfare" indicate that harm to consumer

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41 *See* Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1032–33 (1987); Robert H. Lande, *Chicago's False Foundation: Wealth Transfers (Not just Efficiency) Should Guide Antitrust*, 58 ANTITRUST L.J. 631, 638 (1989).

42 *See, e.g.*, Thomas O. Barnett, *Substantial Lessening of Competition—The Section 7 Standard*, 2005 COLUM. BUS. L. REV. 293, 295–98; Joseph Farrell & Michael Katz, *The Economics of Welfare Standards in Antitrust*, COMPETITION POL'Y INT'L, Autumn 2006, at 3; Daniel J. Gifford & Robert T. Kudrle, *Rhetoric and Reality in the Merger Standards of the United States, Canada, and the European Union*, 72 ANTITRUST L.J. 423 (2005); Ken Heyer, *Welfare Standards and Merger Analysis: Why Not the Best?*, COMPETITION POL'Y INT'L, Autumn 2006, at 29; Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1, 7 (2007).

43 *See, e.g.*, Barnett, *supra* note 42, at 295–98; Brodley, *supra* note 41, at 1033; Steven C. Salop, Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard (Nov. 4, 2005) (submission to the Antitrust Modernization Commission).

44 *See infra* note 60 and accompanying text.

45 *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

46 *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 107 (1984).

47 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221, 224 (1993).

48 *See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 127 S. Ct. 1069, 1077 (2007).

49 *Leegin Creative Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2722, 2724 (2007).

50 *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 530 n.19 (1983) (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)); *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982).

51 *See supra* text accompanying notes 8 and 23.

52 *See, e.g.*, *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59, 63 (2d Cir. 1997) ("the Sherman Act's essential purpose [is] safeguarding consumer welfare"); Reazin v. Blu*e Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 960 (10th Cir. 1990) ("the purpose of the antitrust laws is the promotion of consumer welfare") (quoting *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1220 (10th Cir. 1986)); *Key Fin. Planning Corp. v. ITT Life Ins. Corp.*, 828 F.2d 635, 642 (10th Cir. 1987) ("the antitrust laws were designed to protect and promote consumer welfare"); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986) (Bork, J.) ("the purpose of the antitrust laws [is] the promotion of consumer welfare").

welfare is necessary for a Sherman Act violation,[53] and other circuits have held that harm to consumers is neither necessary nor sufficient for a Sherman Act violation.[54]

IV. MONOPSONY, CONSUMER WELFARE, AND COMPETITION

The recent *Weyerhaeuser* case[55] is a useful vehicle for examining the meaning and role of consumer welfare under the Sherman Act.[56] The case came to the Supreme Court after the Ninth Circuit upheld a jury verdict that Weyerhaeuser Co. violated Section 2 by paying too much for red alder logs used in its sawmills.[57] The jury found that this conduct excluded competition and thereby created a monopsony over alder logs, i.e., Weyerhaeuser became the sole (or at least dominant) purchaser.[58] The jury, however, also found that Weyerhaeuser had not monopolized any relevant output market and rejected the contention that alder lumber traded in a market separate from other hardwoods. The case, thus, presents the scenario of a firm that successfully engages in exclusionary conduct, obtains monopsony power, and yet does not have any potential to injure the end users of its products.[59] Rather, the conduct has the immediate effect of injuring competitors, and the longer-term effect of injuring input sellers.

FTC Commissioner J. Thomas Rosch and Professor Steven C. Salop have argued that legality of Weyerhaeuser's conduct should have turned on its "consumer welfare" effects, which they contend means its effects on end users.[60] These arguments, however, adopt an unreasonably narrow definition of "consumer welfare" and wrongly elevate it from a statutory goal to an operational test for liability.

Weyerhaeuser's conduct potentially harmed, and potentially benefitted, many people other than end users of products made from alder lumber. Indeed, people who make a living selling alder logs are affected far more by log prices than are people who buy alder furniture. Moreover, log prices indirectly affect people who work at, or own shares in, lumber mills and furniture factories, and log prices may indirectly affect many other people as effects ripple throughout the economy. At a minimum, the Sherman Act undoubtedly protects the immediate victims of successful monopsonization by Weyerhaeuser—the sellers of alder logs, and it does so without regard to effects on end users of product made from alder lumber.

The seminal case on protecting sellers from exploitation at the hands of buyers is *Mandeville Island Farms*, in which the Supreme Court considered a conspiracy in purchasing sugar beets.[61] Within a highly localized market in northern California, growers could sell to only three refiners, and those refiners entered into a "price-fixing arrangement."[62] Because the local refiners sold their sugar in competition with refiners throughout the United States, the price fixing had no apparent effect on the price of refined sugar, and the district court dismissed the growers' complaint for lack of the requisite nexus to interstate commerce. In reversing, the Court considered at length

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53 *See, e.g.*, *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1156 (9th Cir. 2003); *Cal. Dental Ass'n v. FTC*, 224 F.3d 942, 958 (9th Cir. 2000); *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 848 (9th Cir. 1996); *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1034 (9th Cir. 2001).

54 *See, e.g.*, *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 49 (1st Cir. 2001) (Boudin, C.J.) ("[I]n a rule of reason case, negative effects or threatened effects on consumer welfare are almost always a necessary element but they are not sufficient. One still has to identify a specific agreement, locate it within some doctrinal framework or body of precedent, and assess the competitive benefits and disadvantages of the agreement . . . ."); *Newman v. Universal Pictures*, 813 F.2d 1519, 1522 (9th Cir. 1987) ("the Sherman Act does not outlaw every action that hurts consumer welfare") (internal quotation omitted); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 536 (7th Cir. 1986) ("The antitrust laws are concerned with the competitive *process*, and their application does not depend in each particular case upon the ultimate demonstrable consumer effect. A healthy and unimpaired competitive process is presumed to be in the consumer interest.").

55 *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 127 S. Ct. 1069 (2007) (holding that the claim of "predatory bidding" was subject to the two-part test for predatory pricing set out in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 224 (1993)).

56 For more on the case and the issues raised by it, see Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L.J. 707 (2007).

57 *Confederated Tribes of Siletz Indians v. Weyerhaeuser Co.*, 411 F.3d 1030 (9th Cir. 2005).

58 *Weyerhaeuser*, 127 S. Ct. at 1075–76.

59 In the standard textbook analysis, a monopsonist's power over price stems from the upward slope in the supply function of the relevant input, i.e., from the fact that suppliers produce a greater quantity at a higher price. The monopsonist controls the quantity of the input utilized and reduces the price paid for the input by using less than would a competitive industry. *See generally* ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY: ANTITRUST LAW AND ECONOMICS 36–42 (1993). The economic effects of monopsony depend somewhat on the monopsonist's position in the associated output market. In one polar case, the monopsonist is a monopolist in the output market, so reducing the quantity of the input consumed reduces the quantity of the output produced, which drives up price. In the other polar case, the monopsonist has no market power in the relevant output market and thus can produce no price or output effects in that market. This can occur if the geographic scope of the relevant input market is far narrower than that of the output market, or if several different technologies, using different inputs, are used to produce a common output.

60 *See* J. Thomas Rosch, *Monopsony and the Meaning of "Consumer Welfare": A Closer Look at Weyerhaeuser*, 2007 COLUM. BUS. L. REV. 353; Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669, 677–78, 685–89 (2005); Remarks of Steven C. Salop, *General Approaches to Defining Abusive/Monopolistic Practices—Roundtable*, *in* 2006 FORDHAM COMP. L. INST. 541, 549–50 (Barry E. Hawk ed., 2007); Salop, *supra* note 43.

61 *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948).

62 *Id.* at 223.

whether the conduct was "of the types outlawed by the Sherman Act."[63] The Court held that: "It is clear that the agreement is the sort of combination condemned by the Act, even though the price-fixing was by purchasers, and the persons specially injured under the treble damage claim are sellers, not customers or consumers."[64]

The *Mandeville* Court also declared that the effects of the price fixing "fall squarely within the Sherman Act's prohibitions, creating the very injuries they were designed to prevent."[65] A review of the legislative history of the Sherman Act reveals that the Court was exactly right. The congressional opposition to trusts that resulted in the passage of the Sherman Act was based in large part on the effect they were thought to have had in reducing the prices paid to farmers.

Early in the Senate's consideration of the bill that became the Sherman Act, Senator Sherman condemned trusts equally for raising the prices of what they sell and for reducing prices for what they buy:

> These trusts and combinations are great wrongs to the people. They have invaded many of the most important branches of business. They operate as a double-edged sword. They increase beyond reason the cost of necessaries of life and business, and they decrease the cost of raw material, the farm products of the country. They regulate prices at will, depress the price of what they buy and increase the price of what the sell.[66]

In both houses of Congress, participants in the debates on the Sherman Act singled out the beef trust for condemnation, and they condemned it for reducing the prices paid to cattle farmers more than for raising prices to consumers.[67] For example, Senator Reagan declared

> It is the common and the current belief among farmers of the State in which I reside and of all of the West that there is a combination in the city of Chicago which not only keeps down the price of cattle upon the hoof but also has such relations and situations as respects the internal commerce of the country that its members are enabled to make the consumers of beef pay a high price for that article.[68]

And Representative Taylor argued that:

> The beef trust fixes arbitrarily the daily price of cattle, from which there is no appeal, for there is no other market. The farmers get from one-third to half of the former value of their cattle and yet beef is as costly as ever. . . . This monster robs the farmer on the one hand and the consumer on the other.[69]

Consistent with intent of Congress, buyer cartels are subject to the per se rule against price fixing,[70] and the government actively prosecutes participants in buyer cartels.[71] Buyer cartels are treated harshly not because they necessarily harm end users, but rather because they necessarily suppress competition. And, of course, successful buyer cartels harm do harm people, even if not end users, and the people harmed are protected by the Sherman Act just as much as end users.

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63 *Id.* at 235.

64 *Id.* (footnotes omitted).

65 *Id.* at 242.

66 21 CONG. REC. 2461 (1890) (statement of Sen. John Sherman (R.–Ohio) (quoting Sen. James Z. George (D.–Mass.))).

67 The role of the beef trust in causing cattle prices to decline prompted the Senate to appoint a select committee to investigate whether "there exists any combination of any kind . . . by reason of which the prices of beef and beef cattle have been so controlled or affected as to diminish the price paid to producer without lessening the cost of meat to the consumer." 19 CONG. REC. 4208–16 (1888). After taking extensive testimony, the Committee submitted its report on May 1, 1890. S. Rep. 829, 51st Cong. (1890). The report urged the passage of the Sherman Act (*id.* at 4, 33), which became law two months later.

68 *Id.* at 2470 (statement of Sen. John H. Reagan (D.–Tex.)). *See also id.* at 2606 ("Farmers who are producing beef have to sell it at an enormous sacrifice, at starvation prices.") (statement of Sen. William M. Stewart (R.–Nev.)).

69 *Id.* at 4098 (statement of Rep. Ezra B. Taylor (D.–Ohio)). *See also id.* at 4099 ("there is no trust in this country that to-day is robbing the farmers of the great West and Northwest of more millions of their hard-earned money than this so-called Big Four beef trust of Chicago") (statement of Rep. Richard P. Bland (D.–Mo.)); *id.* at 4101 ("A single combination, or trust, known as the 'dressed-beef combine' of Chicago and New York, . . . has within a few years last past absolutely prostrated the live-stock interest of the West and impoverished whole States and Territories by their infamous operations . . . .") (statement of Rep. John T. Heard (D.–Mo.)).

70 *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940) (quoted *supra* in text accompanying note 10); *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001) ("a horizontal conspiracy among buyers to stifle competition is as unlawful as one among sellers"); *Vogel v. Am. Soc. of Appraisers,* 744 F.2d 598, 601 (7th Cir. 1984) (Posner, J.) ("[B]uyer cartels, the object of which is to force the prices that suppliers charge the members of the cartel below the competitive level, are illegal per se. Just as a sellers' cartel enables the charging of monopoly prices, a buyers' cartel enables the charging of monopsony prices.").

71 Based on statistics complied by the author from case summaries in CCH *Trade Regulation Reporter*, 20% of Justice Department's criminal antitrust cases during 1997–2006 involved buyer cartels.

Non-cartel conduct by buyers also is condemned by the Sherman Act when it undermines the competitive process. Contrary to arguments advanced by defendants in two cases from the Tenth Circuit, liability under the Sherman Act does not require a showing of adverse end-user effects. The Sherman Act was intended to protect, and does protect, victimized sellers.

One case involved a Section 1 challenge to an NCAA rule effectively limiting wages paid to a category of basketball coaches. Although the court applied the rule of reason, it refused to give any weight to the NCAA's argument that the rule reduced the schools' costs and thereby likely benefitted fans who attend the games.[72] The other case involved a Section 2 challenge to conduct allegedly monopolizing the provision of pay phone services. The court rejected the defendant's argument that liability required proof of injury to people who make phone calls, and not just to people who derive income from allowing their property to be used as pay phone locations.[73]

V. EXCLUSIONARY CONDUCT, CONSUMER WELFARE, AND COMPETITION

The most interesting context in which to examine the meaning and role of consumer welfare may be single-firm conduct under Section 2. In this context, Professor Steven C. Salop proposes "the consumer welfare test, which is focused directly on the anticompetitive effect of exclusionary conduct on price and consumer welfare."[74] He favors a rather open-ended assessment of any challenged conduct directed solely to its impact on end-users. This approach, however, was explicitly rejected by the Supreme Court when it interpreted the Sherman Act to reflect "a purposeful policy decision by Congress" not to subject "a single firm's every action to judicial scrutiny for reasonableness" because that "would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote."[75] Moreover, the leading treatise declares that "Section 2 of the Sherman Act is not a general welfare prescription. It condemns conduct only when it injures competition by excluding rivals."[76]

Section 2 best furthers its goal of promoting consumer welfare by eschewing the case-by-case assessment of consumer welfare effects from single-firm conduct. One reason the Supreme Court has cited for this policy choice is that "it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects" and there is therefore a "risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur."[77] Thus, the Court has cautioned "against an undue expansion of Section 2 liability" on the basis that inevitable "false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'"[78]

In the Section 2 context, it also is important to take a long view of consumer welfare and focus on the dynamic aspects of the competitive process. The "unrelenting investment in innovation" has been responsible for "the unprecedented and unparalleled growth performance of capitalist economies,"[79] and the Supreme Court has interpreted the Sherman Act to "safeguard the incentive to innovate."[80] Thus, the Court recently declared that "charging of monopoly prices . . . is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period— . . . induces risk taking that produces innovation and economic growth."[81] To safeguard the incentive to innovate, the law heeds the warning of Judge Learned Hand more than a half century ago: "The successful competitor, having been urged to compete, must not be turned upon when he

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72 *Law v. NCAA*, 134 F.3d 1010, 1022 (10th Cir. 1998).
73 *Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co.,* 305 F.3d 1124, 1133–34 (10th Cir. 2002).
74 Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 313–14 (2006).
75 *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 775–76 (1984).
76 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 265 (Supp. 2007).
77 *Copperweld*, 467 U.S. at 768. *See also Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 ("Under the best of circumstances, applying the requirements of Section 2 'can be difficult' because 'the means of illicit exclusion, like the means of legitimate competition, are myriad.'" (quoting *United States v. Microsoft Corp*., 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (per curiam)).
78 *Trinko*, 540 U.S. at 414 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 594 (1986) (citation omitted)). False positive findings of exclusionary conduct harm consumers by chilling all forms of competition on the merits that may be wrongly found to be exclusionary, while false negatives harm consumers only by allowing the challenged conduct to go unremedied. The former harm is apt to be far greater because it is inflicted throughout the economy, while the latter harm is significant only in markets experiencing exclusionary conduct with substantial and long lasting effects that, but for the error, would have been prevented through the timely application of effective remedies. Crafting remedies that are effective yet do not themselves suppress competition is quite challenging.
79 WILLIAM J. BAUMOL, THE FREE-MARKET INNOVATION MACHINE 3 (2002). Empirical research indicates that technical progress accounted for as much as three-quarters of the economic growth in major industrialized countries since World War II. *See* Michael J. Boskin & Lawrence J. Lau, *Capital, Technology, and Economic Growth*, *in* TECHNOLOGY AND THE WEALTH OF NATIONS 17 (Nathan Rosenberg et al. eds., 1992).
80 *Trinko*, 540 U.S. at 398.
81 *Id.*

wins."[82] Over the long term, forcing the most successful competitors to accommodate their less successful and nascent rivals would cost consumers far more by retarding technical progress than it would benefit them by enhancing price competition.[83]

Professor Salop specifically rejects the notion that competition on the merits has any intrinsic meaning or value,[84] and he would condemn any conduct held responsible for a failure to fulfill society's highest aspirations on market performance. Indeed, he states specifically that even cost-reducing investments are subject to his test and might possibly be found unlawful.[85] In sharp contrast, the leading treatise observes that "the objective of antitrust law [is] to protect the process of competition on the merits" and interprets the case law to maintain that "aggressive but nonpredatory pricing, higher output, improved product quality, energetic market penetration, successful research and development, cost-reducing innovations, and the like are welcomed under the Sherman Act."[86]

The case law has long been animated by the notion that competition on the merits is lawful regardless of how well or poorly things work out for consumers. This critical notion got it first clear expression in Judge Learned Hand's statement in *Alcoa* that obtaining or preserving a monopoly through "superior skill, foresight and industry" is entirely lawful.[87] And in what remains the Supreme Court's most important formulation of Section 2's reach, the Court's *Grinnell* decision held that Section 2 condemns "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[88] As Professor Gavil explained: "By attaching the label 'willful acquisition or maintenance,' the courts have sought to draw a distinction between merits- and non-merits-based competition that excludes."[89]

The courts of appeals have long sought to implement the distinction between lawful competition on the merits and unlawful exclusionary conduct by identifying indicia that would allow a trier of fact to conclude reliably that challenged conduct falls into the latter category. A notable early effort maintained that, to violate Section 2, conduct

> must be such that its anticipated benefits were dependent upon its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power. Such conduct is not true competition; it makes sense only because it eliminates competition. It does not enhance the quality or attractiveness of the product, reduce its cost, or alter the demand function that all competitors confront.[90]

82 *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).

83 As Judge Easterbrook explained: "An antitrust policy that reduced prices by 5 percent today at the expense of reducing by 1 percent the annual rate at which innovation lowers the cost of production would be a calamity. In the long run a continuous rate of change, compounded, swamps static losses." Frank H. Easterbrook, *Ignorance and Antitrust*, *in* ANTITRUST, INNOVATION, AND COMPETITIVENESS 119, 122–23 (Thomas M. Jorde & David J. Teece eds., 1992).

84 Salop, *supra* note 74, at 325–26, 363.

85 *Id.* at 339–41, 373.

86 3 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW Paragraph 651c, at 78 (2d ed. 2002). *See also Gulf States Reorg. Group, Inc. v. Nucor Corp.,* 466 F.3d 961, 967 n.3 (11th Cir. 2006) ("The antitrust laws allow legal monopolies to compete vigorously on the merits in the relevant market, even if such competition drives out competitors."); *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir. 1986) (Posner, J.) ("A monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits.").

87 *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945). *See also Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922, 930 (1st Cir. 1994) (Breyer, J.) (quoting this dictum).

88 *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966). The Supreme Court cited this dictum as controlling authority in *Trinko*. Verizon *Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398, 407 (2004).

89 Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 14 (2004). The original Areeda-Turner treatise defined exclusionary conduct as "conduct, other than competition on the merits or restraints reasonably 'necessary' to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power." 3 PHILIP AREEDA & DONALD F. TURNER, ANTITRUST LAW Paragraph 626c, at 79 (1978). Several courts of appeals endorsed this definition. *See PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 822 (6th Cir. 1997); *S. Pac. Commc'ns Co. v. AT&T*, 740 F.2d 980, 999 n.19 (D.C. Cir. 1984); Barry *Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 230 (1st Cir. 1983).

90 *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., Inc.*, 668 F.2d 1014, 1030–31 (9th Cir. 1981).

When attempting to articulate a reliable basis for concluding that challenged conduct is not competition on the merits, many courts of appeals have expressed similar ideas.[91] *Aspen Skiing* focused on whether the defendant "sacrifice[d] short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival."[92] After *Trinko* stressed the significance of this sacrifice to the outcome of *Aspen*, two courts of appeals suggested that a short-run profit sacrifice is required for a Section 2 violation.[93] But whatever the precise formulation of the liability test,[94] the case law consistently holds that protecting the competitive process requires that the process be respected. Intervention in the interest of promoting consumer welfare is warranted only if there is a clear basis for concluding that the process has been undermined by conduct that is not competition on the merits.

VI. CONCLUSION

"The heart of our national economic policy long has been faith in the value of competition,"[95] and the Sherman Act is the most prominent expression of this faith. Competition is one of the principal means through which Congress sought to promote consumer welfare and further other social goals. The Sherman Act furthers the goal of promoting consumer welfare by intervening in the marketplace when competitors undermine the competitive process, and it does so by refraining from intervening when the rigors of the competitive process injure competitors or when the process fails to maximize consumer welfare.

Although Sherman Act cases often refer to "consumer welfare," they rarely suggest that it is more than a statutory goal, and they provide little indication of what they mean by the term. Professor Hovenkamp teaches that the "consumer welfare principle" of antitrust policy "is predicated on the observation that *everyone* is a consumer."[96] Thus, "an antitrust policy of maximizing consumer welfare is really a policy of maximizing everyone's welfare, at least in their capacity as consumers." Thus, the Supreme Court has consistently held that the Sherman Act protects all victims of violations—not just the end users in the relevant chain of distribution, and in cases involving alleged violations by buyers, harm to sellers has been a sufficient anticompetitive effect.

Recognizing that promoting consumer welfare is the goal of the Sherman Act can bring clarity to issues raised in particular cases, but this clarity serves primarily to help sort out whether particular conduct is best understood as promoting or eliminating competition. In particular, the consumer welfare mantra serves as a constant reminder that injury to a competitor, without more, does not give rise to a Sherman Act violation.[97] But the case law does not make actual, or even threatened, harm to consumers the touchstone under the either section of the Act.

The per se rule under Section 1 condemns concerted conduct that, on its face, necessarily undermines the competitive process, but it does not condemn all concerted conduct that necessarily harms consumers. The rule of reason under Section 1 does not open the door to arguments that

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91 *See Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1295 (11th Cir. 2004) ("anticompetitive conduct . . . is conduct without a legitimate business purpose that makes sense only because it eliminates competition.") (internal quotation omitted); *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 523 (5th Cir. 1999) ("[A] finding of exclusionary conduct requires some sign that the monopolist engaged in behavior that—examined without reference to its effects on competitors—is economically irrational."); *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 148 (4th Cir. 1990) ("if a plaintiff shows that a defendant has harmed consumers and competition by making a short-term sacrifice in order to further its exclusive, anti-competitive objectives, it has shown predation by that defendant"); *Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 427 (D.C. Cir. 1986) (Bork, J.) ("predation involves aggression against business rivals through the use of business practices that would not be considered profit maximizing except for the expectation that (1) actual rivals will be driven from the market, or the entry of potential rivals blocked or delayed, so that the predator will gain or retain a market share sufficient to command monopoly profits, or (2) rivals will be chastened sufficiently to abandon competitive behavior the predator finds threatening to its realization of monopoly profits"); *Trace X Chem., Inc. v. Canadian Indus., Ltd.*, 738 F.2d 261, 266 (8th Cir. 1984) ("To be labeled anti-competitive, the conduct involved must be such that its 'anticipated benefits were dependent upon its tendency to discipline or eliminate competition and thereby enhance the firm's long term ability to reap the benefits of monopoly power.'") (quoting *William Inglis*, 668 F.2d at 1030).

92 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610–11 (1985).

93 *See Covad Commc'ns Co. v. Bell Atl. Corp.*, 398 F.3d 666, 676 (D.C. Cir. 2005) ("a 'predatory' practice is one in which a firm sacrifices short-term profits in order to drive out of the market or otherwise discipline a competitor"), *reh'g denied*, 407 F.3d 1220 (D.C. Cir. 2005); *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1134 (9th Cir. 2004) (to "fall within the *Aspen Skiing* exception to the general 'no duty to deal' rule," a unilateral refusal to deal claim must "entail a sacrifice of short-term profits for long-term gain from the exclusion of competition").

94 For the author's views on the proper test, see Gregory J. Werden, *Identifying Single-Firm Exclusionary Conduct: From Vague Concepts to Administrable Rules*, *in* 2006 FORDHAM COMP. L. INST. 509 (Barry E. Hawk ed., 2007); Gregory J. Werden, *Identifying Exclusionary Conduct under Section 2: The "No Economic Sense" Test*, 73 ANTITRUST L.J. 413 (2006).

95 *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951).

96 HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 77 (3d ed., 2005).

97 A few decisions by the courts of appeals have specifically indicated that protecting "consumer welfare" does not mean protecting competitors. *See, e.g.*, *Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp.*, 175 F.3d 18, 23 (1st Cir. 1999); *George Haug Co., Inc. v. Rolls Royce Motor Cars Inc.*, 148 F.3d 136, 143 (2d Cir. 1998).

consumers may benefit from agreements among competitors to suppress competition. And Section 2 protects consumers largely by allowing the competitive process to operate unfettered by government intervention. Aggressive competition on the merits is considered lawful no matter what its effects on competitors or consumers, and only clear indications that a firm has not competed on the merits justify intervention. Moreover, the dynamic aspects of the process of competition, from which consumers greatly benefit, are protected by not invoking Section 2 in the effort to create competition with the most successful competitors.

Keeping firmly in mind that the Sherman Act serves to protect the competitive process can avoid mistaken notions about the scope of the Act's prohibitions and even can make some cases simple. Most often, however, the notion of protecting the competitive process provides only as a general policy guide that may be too vague to be of much practical utility. That vagueness should be addressed by refining the concept of competition on the merits, in particular, by delineating safety zones for particular categories of conduct, and not by abandoning the basic policy adopted by Congress and the Supreme Court.