A Corrective Justice Theory of Antitrust Regulation

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This Article argues for an alternative perspective on antitrust injury and liability. The goal is to analyze the nature of wrongful conduct as defined in this distinctly economic policy oriented area of law. Following this analysis, this Article proposes a theoretical alternative to dominant and conventional economic, efficiency-based theories that effectively limit antitrust sanctions and generally restrict marketplace regulation. To the extent coercive or unfair business behavior by individuals appears anticompetitive and generates civil and criminal antitrust penalties, this Article argues that an alternative philosophical tradition that is not essentially economic in nature better explains and justifies compensatory sanctions. The alternative theory is called corrective justice. It is an ancient principle that establishes a normative standard for balancing the general rights and duties of individuals in society.

This Article focuses on the use of classical corrective justice principles as an explanation for per se rules that categorically prohibit concerted and unilateral business activity that unfairly injures economic competitors. The argument traces the devolution of the per se doctrine and the rise of efficiency based “rule of reason” standards. Corrective justice would require an adherence to per se rules where unfair practices disrupt the competitive process regardless of efficiency concerns. This practice contradicts the modern trend that focuses exclusively on consumer welfare maximization at the expense of fairness to individual business competitors. Part I presents the primary argument for the classical principle of corrective justice in the context of contemporary antitrust doctrine.

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The argument draws primarily on two types of antitrust problems to illustrate how the corrective principle explains antitrust regulation in a manner superior to conventional, efficiency-based welfare economic analysis. The first type of problem focuses on the continuing viability of the per se rule in the context of section 1 Sherman Act litigation.

Part II also extends the corrective justice approach to antitrust issues involving trade associations, and explores its application to anticompetitive uses of certification and standardization processes. Concerted trade association activity involving certification and standardization often serves as a coercive basis for securing unwilling competitors' participation in price-fixing schemes. These cases show how industry standards are sometimes either rigged to injure competitors unfairly or serve as barriers preventing prospective entry into particular markets. This Article discusses these problems in the context of the evolving status of the per se rule as it relates to harmful concerted activity that would be compensable under a system of corrective justice. While Part II focuses primarily on certification and standardization cases, it also presents important cases that do not involve technical standards and certification to illustrate further the doctrinal impact of the devolution of the per se rule.

Part III explores a second type of problem related to the "rule of reason" alternative to per se analysis. This Part discusses how even under a rule of reason analysis unilateral acts intentionally designed to injure competitors are necessarily compensable under the principle of corrective justice. Part III examines the content and evolution of the law of monopolization under section 2 of the Sherman Act to argue for the corrective justice norm. This Part draws parallels to the common law tort of unfair competition with an emphasis on the role of anticompetitive "intent." Recognizing the distinct features of tort remedies, Part III argues for a derivative corrective justice rule that provides a basis for statutory remedies in the context of the broader goals of antitrust policy. Finally, Part IV examines coercive effects of tie-in arrangements and vertical constraints from a corrective justice perspective in contrast to an efficiency-based welfare-maximizing rule. In conclusion, this Article argues that corrective justice provides a principled basis for statutory compensation for antitrust injuries stemming from substantively unfair economic behavior despite the restrictive pro "efficiency" bias that dominates contemporary antitrust jurisprudence.
I. THE PRINCIPLE OF CORRECTIVE JUSTICE AND CONTEMPORARY ANTITRUST DOCTRINE

A. The Aristotelian Version of Corrective Justice

The principle of corrective justice has classical roots that date back two thousand years.1 Despite their classical origins in the thought of Aristotle, the core ideas of social justice articulated in the *Nicomachean Ethics* remain the seminal basis for most operational systems of justice in contemporary western societies. For Aristotle, it was important first to distinguish between two fundamental conceptions of justice as a social institution. He described the two concepts as “universal justice” and “particular justice.”2 Aristotle characterized justice in general as “the whole of virtue.”3 In his scheme, “universal justice” as an independent concept represents the highest social virtue.4 John Rawls characterized this idealized conception of justice as the “first virtue” of social institutions.5 On the other hand, Aristotle introduces “particular” justice as a much narrower conception of justice. Particular justice is the ideal ethical standard for distributing material goods in society.6 Idealized particular justice then divides into “distributive justice” and “corrective justice.”7

To Aristotle, distributive justice is an algorithmic virtue, a rule for fairly allocating goods and wealth among members of society.8 Society ought to allocate goods according to a moral baseline of well-defined merit.9 The practical effects of distributive justice are considered to be social solidarity and social stability. Hence, society allocates goods according to that social rule that best effectuates the basic purposes of the

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1. *See Aristotle, The Ethics of Aristotle, The Nicomachean Ethics* 179 n.2 (J.A.K. Thomson trans., Penguin Books rev. ed. 1976). In Thomson’s translation, the term “rectificatory” is substituted for its linguistic equivalent “corrective.” *See id.* Despite this somewhat idiosyncratic interpretation of the original Greek, I prefer this text because it offers the most lucid of contemporary English translations. Most translations use the term “corrective justice”; however, in recent translations the term “restorative” is gaining currency as an alternative to both “corrective” and “rectificatory.” *See also Aristotle, The Nicomachean Ethics of Aristotle* 109 (Sir David Ross trans., Oxford Univ. Press 1963) (continuing to use the term “rectificatory”).
2. *See Aristotle* (Thomson trans.), supra note 1, at 175.
3. *Id.* at 173 (quoting a proverb attributed to both Theognis and Phocylides).
7. *See id.* at 176-77.
8. *See id.* at 177-79.
9. *See id.* at 178.
polity. In this sense, Aristotle's conception of distributive justice would be welfare maximizing. The definitive test of a "just" allocative rule is that its resulting allocations are proportionate to a primary social value. For example, under a communist scheme of distributive justice, society would allocate goods in proportion to need because communism is not a meritocracy and individual human need is a primary social value.

Distributive justice as defined by Aristotle arguably is a proper concern for antitrust analysis.\textsuperscript{10} Monopoly redistributes wealth and consumer surplus away from purchasers in a manner inconsistent with the welfare-maximizing rule requiring that price equal marginal cost. Where the distortional effect, however, is evaluated \textit{a posteriori}, distributive justice pursuant to a welfare maximizing rule cannot resolve a compensation claim. It also fails to provide an independent basis for determining whether the gains of a monopolist were wrongful or inconsistent with practices and procedures that recognize other primary social values, i.e., merit, need, or fairness. Finally, it provides no basis for determining the amount of compensation a monopolist must pay.

Corrective justice in control does much more than merely protect the status quo by following a proportionality algorithm. Corrective justice is primarily restorative. It serves to correct for any distortions in the allocative scheme previously established by a system of distributive justice.\textsuperscript{11} Distributive justice corrects for allocative inequities before the establishment of a social rule that regulates exchanges. Corrective justice applies after the rules of social interaction have been laid down and are already appreciated as binding on social agents. Aristotle believed that society should enact corrective justice as a principle independent of any particular distributive concerns.

In \textit{Book V} of his \textit{Nichomachean Ethics}, for example, Aristotle wrote:

For it makes no difference whether a good man has defrauded a bad one or vice versa, nor whether a good man or a bad man has committed adultery; all that the law considers is the difference caused by the injury; and it treats the parties as equals, only asking whether one has committed and the other suffered an injustice, or whether one has inflicted and the other suffered a hurt.\textsuperscript{12}


\textsuperscript{11} See ARISTOTLE (Thomson trans., supra note 1, at 179-81.

\textsuperscript{12} Id. at 180.
This is a profound statement of how corrective justice disregards the relative position of the agent. It requires compensation for wrongdoing regardless of the prior social or economic position of the parties. Furthermore, the principle of corrective justice disregards considerations of the impact of just reallocations on third parties.

The Aristotelian notion of corrective justice is completely compatible with the end of promoting equitable results when disputes arise regarding discrete transactions between individuals. The moral basis for a corrective justice approach that requires compensation for injuries caused by coercion, fraud, or theft is highly intuitive. When there is an allegation of a wrongful dispossession of something of value, corrective justice serves as a principle that promotes the equitable resolution of the aggrieved parties' complaint by mandating restitution in fair proportion to the loss.

The nature of the alleged injury (trespass, breach of contract, or intentional tort) and the manner of the harm (coercion, theft, or fraud) are indispensable elements for establishing the baseline for equitable relief. The actual baseline established suggests society's evaluation and disfavor of certain types of transactional behavior (e.g., violence, duress, or fraud). If society can utilize the principle of corrective justice to promote equity in disputes between individuals, then utilizing the principle to vindicate public policy through state action is also logical. Nothing in the Aristotelian conception of corrective justice implies that only private actions, "either tort suits or suits for breach of contract satisfy the remedial demands of corrective justice." The behavioral norms of society establish grounds for legal liability. For example, societal sanctioning of fraudulent and coercive exchanges help establish the basis for compensating fraud and extortion victims.

B. Antitrust and Economic Theory: The Argument for Corrective Justice

Given the inherent economic nature of antitrust policy, it is not surprising that at the core of contemporary antitrust decision-making is the neoclassical economic model and its distinct rhetoric. Modern economic theory provides the paradigm in the search for a coherent methodological approach to analyzing legal rules and institutions. Drawing upon conceptions that postulate man as a rationally self-interested maximizer of perceived interests, economic theory allows for the conversion of its

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13. See id. at 179-81.
14. See id. at 175 (attributing the gain from certain offenses solely to injustice).
behavioral propositions into a powerful tool for explaining law as a social institution. Jurists and commentators have broadly incorporated an economic methodology providing both a positive and normative foundation for legal discourse in diverse areas of legal decisions. One of the most economically laden areas of the law is found in contemporary antitrust doctrine. Both direct judicial reference and legislative policymaking have infused antitrust analysis with the method and rhetoric of neoclassical economics.

The consensual goal of our national antitrust policy is both implicitly and explicitly economic in a variety of its stated objectives. These include (1) the maximization of consumer welfare, (2) economic efficiency, (3) the equitable diffusion of economic and political power, (4) facilitating the clearing of dysfunctional markets, (5) facilitating entry into markets by eliminating illegal barriers, and (6) the protection of competitors with relatively limited market power. Predominant contemporary economic theories of antitrust claim that the exclusive goals of antitrust policy should be: (1) welfare maximization; and (2) allocative efficiency.

In describing the primacy of the efficiency-based approach to antitrust policy, Robert Bork states that “the whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss to consumer welfare.”

The primary argument, however, for utilizing the principle of corrective justice is premised on a rejection of this narrow, hegemonic characterization of the goals of antitrust policy. An efficiency-based view that characterizes the “whole” purpose of antitrust as minimizing consumer prices or maximizing consumer welfare ignores the impact of normative rules. This Article presents an analysis of the evolution of antitrust case law, attempting to balance the social welfare goals embodied in the antitrust statutes with fundamental norms of reasonable and decent behavior, making market processes possible.

The central tenet of antitrust law is the preservation of competition between various sellers of a given good or commodity in the most desirable form of economic organization. Though monopoly may exist as the natural consequence of limited resources or fixed property rights, it is still disfavored. Commentators often say, however, that some form of illegal conduct is required and that the objection is to the process of monopoli-

zation rather than to the state of monopoly itself. Courts have deemed the wrongful act of intentionally exercising an unfair advantage in order to promote monopoly to be highly objectionable. Notwithstanding this qualification, however, monopoly—a situation with an exclusive seller in a given market—remains a highly undesirable form of economic organization. Monopoly is undesirable because the unfair power held by the monopolist allows him or her to subvert competition by exploiting consumers and harming competitors. Yet, where there are many sellers and many buyers, no seller asserts any control over price, and each enjoys the ability to sell as much at the market price as he desires. If price is equal to marginal cost, producers and sellers will make and sell only those units of a given product that should be made and sold. The competitive process monitors overproduction and underproduction, which in turn rests upon the self-interested decision making of individuals. The general message is clear and consistent whether we state the proposition in terms of efficiency, wealth, consumer welfare, or utility.

The monopoly model stands in sharp opposition to perfect competition. Here the existence of the single profit-maximizing seller in the market ensures that production will be reduced to a point where price exceeds marginal cost. All units that are made should be made, but some units are not made that could be made. As gains from trade are left unexploited, society can no longer regard the situation as optimal. Under conventional welfare analysis, social loss is equal to the welfare triangle that assumes that most of the increased costs to those buyers that remain in the market are simply a transfer payment to the monopoly seller.

A contract between competing sellers to fix the price of their products (or to limit their output) is an agreement that is most often injurious to consumers. When a single firm dominates a market and undertakes conduct designed to preserve its monopoly position, it potentially injures would-be competitors through effective monopolization. Section 2 of the

18. See United States v. Aluminum Co. of Am., 148 F.2d 416, 429 (2d Cir. 1945).
19. See id.
20. For a straight economic approach to the antitrust laws, see RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976). Judge Learned Hand, the author of the Aluminum Co. of America opinion, stated that certain other elements might lie behind the adoption of these laws, in particular the organization of an industry with small firms in direct competition with each other, or the destruction of the "great aggregations of capital because of the helplessness of the individual before them." Aluminum Co. of Am., 148 F.2d at 428-29.
21. See BORK, supra note 17, at 107 (adopting the consumer welfare standard).
The Sherman Act condemns monopolization. The monopolist's efficiency gains can readily injure competitors. In many cases, such injury cannot be considered harmful to competition per se, especially where efficiency-enhancing monopolization promotes overall economic welfare. When a monopolist or the conspiratorial behavior of oligopolists results in injury to would-be competitors because of unfair behavior (e.g., conspiracies), courts often find such behavior per se illegal under section 1 of the Sherman Act. One may find classic examples of per se illegal behavior that is essentially coercive in nature in the case law involving concerted refusals to deal.

C. The Application of Corrective Justice to Contemporary Antitrust Policy

Unlike a general economic behavioral theory of social policy, the goal of corrective justice is not to attain a social optimum to maximize either wealth or aggregate utility. The goal of corrective justice is to provide equity whenever coercive, fraudulent, or grossly unfair acts wrongfully injure individuals. Therefore, explicit economic justifications for sanctions seeking to promote economic welfare through antitrust legislation often may conflict with corrective justice principles. For example, per se prohibitions of business practices associated with antitrust injuries forbid many behaviors that might enhance efficiency or maximize overall consumer welfare. In such cases, the per se rule makes little economic sense to those who hold that allocative efficiency is the exclusive goal of antitrust policy. From the perspective of the injured party, though, corrective justice requires compensation consistent with a baseline rule promoting fair economic competition. Applied in the context of antitrust disputes, the ultimate goal of this approach is to promote procedural justice in market relationships. This Article primarily focuses on a regulatory ideal regarding transactions between competitors, not on its welfare effect on consumers and other third parties.

A complete theory of corrective justice is inherently individualistic in orientation. Corrective justice is superior to efficiency-based theories because it provides equitable remedies for wrongful injuries regardless of the relative economic position of the parties. The rectificatory (or corrective) principle focuses on fairness to persons because conventional welfare analysis often fails to provide a coherent theory of just economic

25. For a discussion of the use of the term "rectificatory," see supra note 1.
institutional relations in the context of antitrust disputes. This principle
can best generate social rules establishing norms of fair behavior and
compensation consistent with the public policy goals expressed in the
federal antitrust laws.

Contemporary legal scholarship illustrates the attractiveness of correc-
tive justice as a special ideal. There is an emerging trend favoring the
corrective justice approach to analyzing legal rules and sanctions. This
Article follows the mode of corrective justice analysis made famous by
Professor Richard Epstein in his seminal 1979 law review article entitled
_Nuisance Law: Corrective Justice and Its Utilitarian Constraints._ 26 This
work spawned a significant, growing body of legal literature emphasizing
how the corrective justice norm is a powerful tool in analyzing the foun-
dations of legal decisions in the areas of torts, property, and contract.
The predominant scholarly application of corrective justice principles has
been in tort theory. 27

To appreciate the breadth of a corrective justice analysis, it is neces-
sary to understand how foundational principles link the common law of
property, torts, and contracts. These distinct areas of law are function-
ally linked in the determination of a just behavioral baseline that extends
to all agents participating in exchanges or transactions of legal signifi-
cance. The law of property, for example, establishes the prerequisites for
ownership and acquisition. The law of contract follows the establish-
ment of ownership rights through property rules and signifies the means
through which society legitimizes the exchange of property. Finally, tort
law protects the rights of persons to physical integrity and private owner-
ship without undue interference through coercion, violence, fraud, or
negligent acts. It is at this level that the three predominant forms of the
common law reflect a baseline of right and wrong behavior by individu-
als. The private common law provides a broad category of compensatory
remedies for harms stemming from untenable business practices called
unfair competition torts. These actions include damages and equitable
injunctions for fraud, misrepresentations, patent and trademark in-

26. Richard A. Epstein, _Nuisance Law: Corrective Justice and Its Utilitarian Con-
straints_, 8 J. LEGAL STUD. 49 (1979).

27. See generally JULES L. COLEMAN, _Corrective Justice and Wrongful Gain, in
MARKETS, MORALS AND THE LAW_ 184 (1988) (providing excellent discussions of the cor-
rective justice norm); Posner, _supra_ note 15, at ch. 11 (same); Richard A. Posner, _The
Concept of Corrective Justice in Recent Theories of Tort Law_, 10 J. LEGAL STUD. 187
(1981) (same); Catherine Pierce Wells, _Tort Law as Corrective Justice: A Pragmatic Justifi-
cation for Jury Adjudication_, 88 MICH. LAW REV. 2348 (1990) (same). See also generally
Symposium, _Corrective Justice and Formalism: The Care One Owes One's Neighbors_,
fringement, and tortious interference with contractual relations. Where such wrongful behavior has moral content that is repugnant to society, it is often criminalized. Wrongful economic behavior that transgresses deeply held societal notions of the duties of honesty and fair play may result in strict personal punishment to the transgressor.

The same regulative ideal that sanctions coercive and unfair business behavior in the private common law is implicit in the public policy goals embodied by the federal antitrust statutes. The adoption of corrective justice principles similarly would require compensation for harms stemming from such wrongful acts in the context of public law. For example, corrective justice principles would require public law prohibitions and sanctions for unfair trade practices. The absolute behavioral restrictions expressed by antitrust per se rules represent non-consequentialist corrective justice norms conflicting with the wealth maximizing rules favored in conventional law and economic analysis.

The federal antitrust laws as conceived and originally drafted necessarily embody corrective justice principles. In fact, Congress expressly acted to eliminate unfair trade practices by empowering the Federal Trade Commission (FTC) to enforce section 5 of the FTC Act which has specific though inadequate corrective features. The method of enforcement by the FTC consists of injunctive relief in the form of “cease and desist” orders. The goal is to correct the problem through the cessation of the harmful act. From the Aristotelian perspective of corrective justice, this remedy is inadequate because it offers no mandatory compensation or restitution to the victim of the wrongful trade practice. Section 4 of the Clayton Act, however, allows for both treble damages and attorney’s fees for any private plaintiff who can prove injury to his business or property as a direct result of an antitrust violation. The criminal

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28. See Robert H. Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 HASTINGS L.J. 65, 69 (1982). In a seminal article challenging the Chicago School thesis that economic efficiency was the exclusive legislative purpose of the Sherman Act, Prof. Lande argued that the Antitrust statutes were passed primarily to prevent the “unfair” acquisition of consumer wealth by firms with market power. See id.


31. See 15 U.S.C. § 15(a) (1994). This raises the obvious question about whether treble damages for antitrust injuries are consistent with corrective justice’s basic requirements for equivalent compensation. I agree with Professor Robert Lande’s position that treble damages merely approximate the actual economic value of losses sustained by victims of Sherman and Clayton Act violations, generally understating the loss. See generally
provisions of sections 1 and 2 of the Sherman Act entail prison sentences and fines for violators that can equal $10,000,000.  

While this Article does not deny that some commentators view corrective justice as an important value in antitrust remedies, the primacy of efficiency-based welfare analysis presently overshadows the theories' contemporary importance as a behavioral regulative ideal. This Article presents an extended argument for reinterpreting the statutory and decisional rules that form the corpus of contemporary antitrust doctrine in a manner that will require compensation for all injuries to competitors resulting from substantively unfair and monopolistic trade practices. The narrow and hegemonic focus on "efficiency" as touted in conventional "Chicago School" doctrine, while paradigmatically dominant, fails to value or secure necessary conditions of social morality and procedural fairness required for any competitive market to function.

Central to the theme of corrective justice is the moral concept of fairness. The concept of fairness is essential to Aristotle's overall theory of general justice. Aristotle wrote:

Let us begin, then, by taking the various senses in which a man is said to be unjust. Well, the word is considered to describe both one who breaks the law and one who takes advantage of another, i.e. acts unfairly. Then evidently also both the law-abiding man and the fair man will be just. So just means lawful and fair; and unjust means both unlawful and unfair.

The prohibition of unfair trade practice is arguably an essential feature of antitrust policy. In general, fairness requires that society treat persons equally in the context of their circumstances. Unfair behavior under the Aristotelian conception would be relevant where one firm, because of its monopoly position "takes advantage of another." The term "unfair" applies easily to a broad range of transactions that could be in-


34. ARISTOTLE (Thomson trans.), supra note 1, at 172.


36. See generally T.M. Scanlon, Rights, Goals, and Fairness, in PUBLIC AND PRIVATE MORALITY 93 (Stuart Hampshire ed. 1978). Here, the author develops a rule-utilitarian theory of fairness that serves as a moral guarantee of procedural equality and consistent respect for individual rights regardless of short term social utility.

37. ARISTOTLE (Thomson trans.), supra note 1, at 172.
Jurious to competitors. Harms stemming from such behavior would have to be distinguishable from accepted forms of competitive injury. For example, "conspiracy" is a morally pejorative term that implies wrongdoing. It suggests an agreement to do a harm made in a manner that unfairly disadvantages the victim.

Fairness as a conceptual basis for corrective justice remedies serves as a limit on opportunistic and strategic behavior by market participants. Section 1 of the Sherman Act explicitly prohibits all conspiracies in restraint of trade. Antitrust regulation categorically prohibits conspiratorial behavior. Evidence of its existence generates per se condemnation. This is an excellent example in the context of antitrust legislation of how a moral norm that disparages various types of behavior because of substantive unfairness matches the rule of law. It also presupposes, however, that conspiratorial behavior is distinguishable from normal competitive processes. The imposition of these prohibitions in order to promote competition completely denies any premise holding that competition is exclusively the end product of totally amoral autonomous acts by market participants. Rather, in determining acceptable competitive acts, one must evaluate the moral quality of the actions of market participants by including substantive fairness.

Along with conspiratorial behavior, society has long deemed coercion incompatible with free market decision-making. Antitrust regulation also prohibits coercion. Unlike conspiracies, however, economic coercion has been difficult to distinguish from the normal consequences of competitive processes in all but extreme cases. Where firms have significant market power in the context of monopoly, forbidding coercive uses of that power becomes a central element of antitrust policy making. Substantive fairness, again, requires restraining monopolies from injuring would-be competitors through coercive devices aimed at solidifying their

38. See generally, Louis Kaplow & Steven Shavell, The Conflict Between Notions of Fairness and the Pareto Principle, 1 AMER L. & ECON. REV. 63, 66 (1999). Kaplow and Shavell argue that endorsing a notion of fairness in evaluating a legal rule will, in some cases, limit the well-being of everyone by eliminating Pareto improvements in a symmetrically sub-optimal manner.


40. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-26 n.59 (1990) (Justice Douglas in the famous footnote 59 states that where horizontal competitors have combined for the conspiratorial purpose of fixing prices and act in furtherance of that conspiracy, it is not necessary to prove sufficient market power to effectuate the scheme in order to find a violation of section 1 of the Sherman Act).

41. See generally JULES COLEMAN, RISKS AND WRONGS 53-59 (1992). Coleman argues that the concept of competition presupposes fair cooperation between market participants. See id. at 59-62.
market superiority. In their seminal text, *Antitrust Policy: An Economic and Legal Analysis*, Professors Kaysen and Turner wrote:

> Forbidding the use of unfair tactics as a means of acquiring monopoly power has of course been an important element in antitrust policy. Nevertheless, this description of the problem is to some extent superficial. If a firm can coerce rivals, suppliers, or customers, there must be some reservoir of force on which it draws that accounts for the acquiescence of the coerced party in a situation that, by definition, is not the result of mutually free bargaining.\(^{42}\)

They also went on to define economic coercion as the ultimate result of the unfair use of market power by dominant firms. They write:

> Typically, then, coercion consists in the ability of a firm with market power to impose terms in a bargain, which the other party would refuse, were there an alternative transactor with whom he could deal more advantageously. The normal instruments of business bargaining, delays, refusals to deal, representations which fall short of complete candor \(...) can be turned uniformly to the advantage of the powerful bargainer, because his partner in the transaction would be even worse off if he did not accept the terms imposed. This is \(\ldots\) to argue that this meaning of unfairness must be viewed as an aspect of market power, and that if the prevention of unfair conduct is a distinct policy aim, it must refer to the kind of characteristics of transactions discussed above in terms of equal treatment of those similarly situated.\(^{43}\)

These comments by Kaysen and Turner are profound affirmations of the connection between substantive fairness and the procedural goals of modern antitrust policy. The theory of corrective justice is predicated on the dictates of substantive fairness.\(^{44}\) To the extent that the goals of modern antitrust policy are consistent with a vision of market participants behaving in a manner that will make the competitive process possible, the theory of corrective justice best serves that vision.

Two antitrust cases provide excellent examples of judicial attempts to reconcile the need for sanctioning grossly unfair behavior by competitors with concerns for preserving efficient results. In *Klor's Inc. v. Broadway-*

\(^{42}\) CARL KAYSEN AND DONALD F. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* 16-17 (1959).

\(^{43}\) Id. at 17.

Hale Stores, Inc., the plaintiff owned a small appliance store located close to the defendant's larger store and alleged that the defendant utilized its superior market power to force manufacturers not to deal with him, to the total detriment of his business. The defendant did not deny these allegations. Instead, he sought and won summary judgment. The Supreme Court reversed and held that Klor's had stated a proper cause of action under the per se rule. The Court stressed that there were classes of restraints, which both common law and statute forbade by their very nature or character. This was true even if the disfavored behavior did not affect "the opportunities for customers to buy in a competitive market."

The Court's analysis in Klor's is entirely consistent with a corrective justice requirement that, had the plaintiff been guilty of conduct that wrongfully harmed the defendant, compensation would be mandatory regardless of its general effect on the marketplace. The Klor's court designed its rule to be a regulative ideal that categorically forbids conduct found intrinsically anticompetitive. More important, the Court's reference to restrictions or conduct that are an enduring part of the common law evokes an analogy to longstanding unfair competition torts. Common law torts provide legal and equitable remedies for false advertising, tortious interference with contract relations, and misappropriation of trade secrets.

In Albert Pick-Barth Co. v. Mitchell Woodbury Corp., the Court found that a conspiracy intentionally to injure a competitor through unfair tortious behavior—in this case hiring away employees to obtain trade secrets—was a per se violation of section 1 of the Sherman Act. The court held that it was not necessary to show a successful restraint of trade where there was proof of a conspiracy to utilize an unfair trade practice for anticompetitive purposes.

Largely, courts disfavor the rule of Albert Pick-Barth. The Fifth Circuit has indirectly overruled it. One can directly attribute the demise of this case as doctrine to the rise of economic formalism, in which effi-

46. See id. at 210-14.
47. See id. at 211.
48. Id. at 210.
49. 57 F.2d 96 (1st Cir. 1932).
50. See id. at 101-03.
51. See id.
52. See Northwest Power Prods., Inc. v. Omark Indus., Inc., 576 F.2d 83, 90 (5th Cir. 1978) (indirectly overruling Albert-Pick v. Barth for being too "vague").
ciency concerns and market for wrongful behavior endure in the competitive process. Increasingly with the rise of efficiency-based economic formalism, the explicit recognition of how "unfair competition" generates section 1 Sherman Act violations under a per se standard has devolved. The case of Deauville Corp. v. Federated Department Stores, Inc. provides a good example of how current judicial emphasis on competition as an economically wealth maximizing process has immunized substantively unfair devices from effective antitrust regulation. In Deauville, the plaintiff, a shopping center developer, sued a competing developer for allegedly using acts of unfair competition to induce a key anchor tenant into backing out of a project under development by the plaintiff. The court held that, standing alone, acts of unfair competition that would violate the state common law do not trigger a violation of section 1 of the Sherman Act, even if the violation stems from willful or wantonly unfair behavior. Having thus rejected a per se test, the court alternatively applied the rule of reason to determine whether the plaintiff had made out a violation of law. The evidence showed that numerous alternative anchor tenants and shopping center projects were available and would have efficiently maximized the economic value of the plaintiff's contract. Hence, the defendant's conduct had little, if any, effect on competition, and therefore the court concluded:

Where a defendant uses unfair methods to eliminate a competitor from the market, but does not harm competition, at most a claim for "unfair competition" can be made out. Congress has repeatedly declined to create a private federal law of unfair competition . . . . In addition, the policies of state unfair competition laws and the federal antitrust laws are often in conflict; an act condemned by the former need not violate the latter . . . . Accordingly, we affirm the directed verdict against [the plaintiff] on the issue.

53. 756 F.2d 1183 (5th Cir. 1985).
54. See id. at 1192-93.
55. See id. at 1192.
56. Id. at 1192-93. Even the First Circuit, the source of the doctrine, has narrowed its original scope significantly. That court retreated from the original Pick-Barth proposition that conspiracies to injure a competitor through unfair methods of competition constitute per se violations of the antitrust laws. See George R. Written, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 574, 561-62 (1st Cir. 1974). In place of the original rule, the court adopted a more limited standard applicable only when at least one of the defendants is a significant factor in the market. See id. at 562; see also infra Part III (discussing section 2 offenses). The more limited standard arguably shifted the analysis away from Sherman Act section 1 and more toward a Sherman Act section 2 claim of actual or attempted monopolization or conspiring to monopolize.
From the perspective of corrective justice, however, the wisdom of the *Pick-Barth* rule is clear. If competitors are guilty of harmful behavior that is grossly unfair and inimical to the competitive process, and if they have used these devices in a conspiratorial manner, they violate section 1 of the Sherman Act. Such violations require that the offender compensate the victim by paying damages calibrated in a restorative manner.

The tension this Article explores is whether an act should be considered anticompetitive only when its effect is to promote an inefficient allocation of resources (a distributive question) or might it be anticompetitive in a broader sense because it violates norms of fair conduct that must be followed if competition is to be possible. Some welfare maximizing exercises of market power injure competitors but might promote a welfare maximizing result. Should we see it as the essence of competition? The argument for corrective justice claims that whenever market participants intentionally injure actual or potential competitors through fraudulent, conspiratorial, or coercive means, they must pay compensation. The principle of corrective justice requires that offenders pay compensation in an amount equivalent to the wrongful gain or the harmful effects of wrongful action.

Corrective justice as a philosophical principle is compatible with the ultimate goals of the public law. To the extent that corrective justice requires that antitrust offenders be sanctioned and disgorge any profits attained through coercion, fraud, or other unfair advantages, it effectively promotes equity and preserves fair and open economic competition. Federal antitrust decisions utilize per se rules that categorically prohibit behavior tending to promote the monopolization of economic resources through unfair and coercive activity. These laws also forbid attempts at monopolization whereby a unitary actor seeks unfairly to subvert the competitive process in order either to attain monopoly status or to enhance an existing monopoly position. The law provides remedies and sanctions for harms to persons injured by such antitrust violations. Therefore, the federal antitrust policies and remedies are totally consistent with the Aristotelian vision of corrective justice.

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57. Though most courts and commentators generally have rejected the *Pick-Barth* rule, many courts still hold that conspiratorial uses of unfair competition methods might violate section 1 of the Sherman Act under the rule of reason. See, e.g., Redwing Carriers, Inc. v. McKenzie Tank Lines, Inc., 594 F.2d 114-15 (5th Cir. 1979); *Omark*, 576 F.2d at 90.

II. SECTION 1 SHERMAN ACT CASES INVOLVING CONCERTED
ACTIVITY: THE DEVOLUTION OR EROSION OF THE PER SE RULE

Case law regarding the viability of the per se rule in the context of indus-
try standardization and certification disputes is continually evolving.
The initial focus is on antitrust litigation involving concerted activity by
trade associations.

Independent trade associations perform the overwhelming majority of
industry standardization and certification processes. Trade associations
are nonprofit organizations whose members are usually competing busi-
ness firms. Committee engineers or other scientists employed by mem-
ber companies often conduct trade association programs for drafting in-
dustry standards. Most antitrust litigation regarding technical standards
and certification processes involve challenges to actions by trade associa-
tions from either association members or for other market participants
who claim economic loss due to trade association decisions.

Trade association decision-making by definition is concerted activity.
In the trade association context, courts have held consistently that con-
certed activity that has either the purpose or the effect of unreasonably
restraining trade violates the Sherman Act. Courts have also held such
behavior to violate section 5 of the FTC Act, which explicitly prohibits
unfair trade practices. The primary statutory statement on the illegality
of such concerted activity is found in section 1 of the Sherman Act, which
prohibits "[e]very contract, combination in form of trust or otherwise, or
conspiracy in restraint of trade." The Supreme Court has not construed
section 1 to prohibit every restraint of trade, but only those "unrea-
sonably restrictive of competitive conditions," i.e., a rule of reason standard
for such restraints, before they are condemned as illegal.

Under conventional analysis, a restraint is found unreasonable when its
harm to the competitive process outweighs its benefits. In Board of
Trade of Chicago v. United States, for example, the court stated that
"[t]he true test of 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." When a given
restraint of trade provides no competitive benefits, it is automatically

60. See Fashion Originators Guild v. Federal Trade Comm'n, 312 U.S. 457, 467-68
(1941); American Column & Lumber Co. v. United States, 257 U.S. 377, 411-12 (1921).
62. See Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).
63. 246 U.S. 231 (1918).
64. Id. at 238.
condemned.

Unreasonable restraints sometimes take the form of certification standards promulgated by a trade association, professional society, or standard-setting organization. The undesired restraint occurs when an association adopts a standard or practice that interferes with the competitive functioning of the market it seeks to regulate. In *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, the Supreme Court recognized the potential impact that standard-setting organizations can have on competition. The Court noted that standard-setting organizations “can be rife with opportunities for anticompetitive activity.” The court held that the American Society of Mechanical Engineers was liable for its agents’ refusal to certify the safety of a competing product in violation of section 1 of the Sherman Act. For certain categories of unreasonable offenses, the court has adopted a per se rule of illegality. For example, courts generally hold that group boycotts, price-fixing, and territorial agreements are per se illegal.

In essence, there is an artificial distinction between the process of standardization by trade associations and concerted activity such as group refusals to deal and economic boycotts that are forbidden as per se. Regardless of whether a standard is performance, design, or safety oriented, its ultimate goal is to influence purchasers not to deal with substandard producers. In this sense, it harms would-be competitors who cannot meet the standards. The courts, however, generally have held that standardization and certification processes are inappropriate for per se analysis in the context of legitimate trade association activity.

Although courts recognize the pro-competitive effects of industrial self-regulation (of which certification standard development is an example), they also recognize that much self-regulation is put into place on the initiative of the active competitors. Therefore, courts generally utilize the rule of reason approach rather than the per se analysis when seeking to distinguish competitive from anticompetitive activity. In cases where

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65. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218-220 (1940) (stating that the elimination of the evils of competition is not a legal justification for these practices).
67. See id. at 571.
68. Id.
69. See id. at 570-73.
71. See, e.g., Eliason Corp. v. National Sanitation Found., 614 F.2d 126, 128-29 (6th
substantively unfair or coercive behavior has a harmful effect on a plaintiff, however, courts may still find such behavior per se unreasonable.

A. Establishing Procedural Fairness Under Section 1

In *Silver v. New York Stock Exchange*, the U.S. Supreme Court used the per se rule to condemn the Exchange's exclusion of a broker from access to its telephone system, which made it impossible for him to conduct transactions. The Court granted that the Exchange had statutory authority to regulate the activity of its brokers. In this case, however, the Exchange presented Silver (the broker) with no explanation for his termination and gave him no opportunity to respond.

The Court recognized that the Exchange's self-regulatory powers gave it immense economic power that it might use to inflict competitive injury not justified by legitimate public policy. The Court held that the Exchange's action was illegal because it took place "under totally unjustified circumstances." The Court said that, given the principle that Exchange self-regulation could be justified in response to antitrust charges only to the extent necessary to protect public policy goals, "it is clear that no justification can be offered for self-regulation conducted without provision for some method of telling a protesting nonmember why a rule is being invoked to harm him and allowing him to reply in explanation of his position."

In *Silver*, the Court concluded that the antitrust laws should be used to perform the essential due process function of ensuring that self-regulation is conducted in a fair manner and is not being used to disguise anticompetitive purposes. Though *Silver* is not a certification or standardization case, it is important for identifying the role that fair procedures play in promoting economic competition. *Silver* spawned a line of cases that helped enshrine the rule of reason as the legal standard of review for "self-regulatory" decisions by private standard-setting organizations when standard setting is conducted in a non arbitrary way and the defendant has substantial market power.

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73. *See id.* at 347-49.
74. *See id.* at 357.
75. *See id.* at 361-65.
76. *See id.* at 359.
77. *Id.* at 361.
78. *Id.*
79. *See id.* at 364-66.
In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, the Supreme Court further narrowed the *Silver* per se rule by holding that even an unexplained expulsion of a member of a buying cooperative would be scrutinized under a rule of reason standard unless the defendant association had substantial market power. In *Northwest*, the Court said that not even all horizontal concerted refusals to deal are to be judged under the per se rule. Only those horizontal concerted refusals to deal that are "characteristically likely to result in predominately anticompetitive effects" are to be judged. The Court denied that the expulsion of a member from a cooperative was necessarily going to have the requisite effects. Therefore, the Court deemed the rule of reason appropriate. For the *Northwest* Court, the absence of procedural safeguards, such as a hearing—an important focal point in the *Silver* opinion—did not convert this refusal to deal into a per se violation. Although a variety of factors may enter into the determination of which refusals to deal or boycotts are likely to be so anticompetitive as to generate a per se analysis, the two predominant factors remain substantial market power and exclusive access to an essential facility.

**B. The Contemporary Status of the Per Se Rule in Section 1 Certification and Trade Association Cases**

In *Consolidated Metal Products, Inc. v. American Petroleum Institute*, the court affirmed a summary judgment against an oil rod manufacturer who suffered economic loss due to an unexplained delay in certifying his product. In *Consolidated Metal*, the court held that when "a trade association that evaluates products and issues opinions, without constraining others to follow its recommendations," it does not violate section 1 of the Sherman Act per se merely by failing to evaluate a manufacturer's product favorably.

When the rule of reason is applied, courts must make some examina-
tion of the market effects of the restraint in question to determine whether it is unreasonable. Courts have developed a series of threshold questions to simplify this task. Judges generally ask: (i) Is the restraint reasonably related to the achievement of a goal that is acceptable under the antitrust laws?; (ii) Is the restraint necessary to achieve this goal or is a less restrictive alternative available?; (iii) Do the anticompetitive terms of the restraint outweigh its competitive benefits? The first two are threshold inquiries. Failure to satisfy either of these steps indicates that the restraint provides no competitive benefit. The last question enables a court to balance the pro-competitive and anticompetitive effects of the restraint at issue. Such a balancing of behavior not obviously inimical to fair competition is reasonable. Yet, such balancing is not appropriate for grossly unfair, conspiratorial, or coercive acts.

Radiant Burners, Inc. v. Peoples Gas Light & Coke Co. involved an association of gas heater manufacturers and natural gas utilities (the American Gas Association) that evaluated products that burned natural gas. The association placed its seal of approval on those products it judged to be safe. The plaintiff, a manufacturer of gas heaters was denied passive approval. He sued, claiming that the standards applied by the association were arbitrary and that the harmful effect of nonapproval was the refusal by member utilities to supply gas to facilities that used his heater. The Supreme Court held that the allegation of both arbitrary decision-making and the subsequent forced removal of the plaintiff's product from the market were sufficient to state a cause of action for a per se violation.

Clearly, Radiant Burners reiterates the Court's hostility to procedurally unfair, arbitrary and capricious use of market power by self-regulating entities for anticompetitive purposes. The use of unwarranted pressure exerted by standard setters and their ability to force non-compliers out of the market without providing an objective basis for the exclusion satisfies all of the necessary elements for per se prohibition.

92. See id. at 658.
93. See id.
94. See id.
95. See id.
96. See id. at 659-60.
In *Radiant Burners*, the extent of the unfairness of the action defined the contours of the competitive process. In cases where there is no evidence of grossly unfair activity by standard setters, the results are often quite different. For example, in *Southern Pacific Communications Co. v. AT&T*, the court held that the reasonable use of exclusionary practices under the "public interest standard" of the FCC Act provided AT&T with regulatory justification exempting it from antitrust liability. Merely promulgating certification standards detrimental to AT&T's competition without evidence of unfair self-enforcement activity could not serve as a successful basis for an antitrust claim. As in *Consolidated Metal*, the ruling in *Southern Pacific* reflects the established principle of law that a standard setter is never per se liable for merely issuing opinions without also coercing others to follow its recommendations.

The Court restated its rationale for the per se rule in *Jefferson Parish Hospital District No. 2 v. Hyde*,

> [t]he rationale for per se rules is in part to avoid burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the cost of determining whether the particular case at bar involves anticompetitive conduct.

This cost-benefit efficiency oriented explanation of the viability and use of the per se rule is also consistent with a conduct oriented normative prohibition of categories of disfavored conduct. For example, where the probability is great that a particular type of unfair behavior has occurred, and that behavior is by definition anticompetitive (e.g., conspiracies), the per se rule would prohibit behavior contrary to that normative standard.

The rule of reason approach to alleged section 1 Sherman Act violations has served an important role in balancing the utility of per se prohibitions with the social utility of the alleged restraint. In *National Collegiate Athletic Ass'n (NCAA) v. Board of Regents of the University of Oklahoma*, the Supreme Court considered a rule by the NCAA that set limits on the number of television appearances its members were allowed to make per season. The court found that this arrangement constituted

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98. 740 F.2d 980 (D.C. Cir. 1984).
99. See id. at 1009; see also id. at 1011 (holding that AT&T did not violate section 2 of the Sherman Act).
101. Id. at 15-16 n.25.
103. See id. at 91-92.
a classic price-fixing agreement. It also found, however, that per se condemnation was "inappropriate." The Court held that the rule of reason must be applied to this industry because agreements among competitors were essential if the product was to be produced at all. The Court condemned the agreement as a violation of the horizontal price-fixing restrictions of section 1 of the Sherman Act, but only after a rule of reason analysis presented no competitive justification for market restraints. It is clear, therefore, that the Court has significantly eroded the per se standard under the predominant efficiency oriented climate of contemporary antitrust doctrine. In cases where plaintiffs prove grossly anticompetitive behavior, however, courts continue to apply the rule.

C. The Contemporary Status of the Per Se Rule in Section 1
Non-certification and Standardization Cases
(Horizontal and Vertical Restraints)

The ascendancy of efficiency-based erosions on per se restrictions against arguably unfair market behavior is evidenced by the U.S. Supreme Court's rulings in several major vertical and horizontal cases during the mid-1980s and early 1990s. For example, in Rothery Storage & Van Co. v. Atlas Van Lines, Inc., the Court further eroded the per se rule as an independent behavioral standard that categorically forbids group boycotts without regard to their efficiency. The majority in Rothery held that vertically effected group boycotts were not per se illegal and that the defendant's decision to terminate an agent, where it only controlled six percent of the market, was efficiency maximizing and therefore immunized under the rule of reason. In this case, the relative unfairness of the termination was irrelevant to the outcome.

In Federal Trade Commission v. Indiana Federation of Dentists, the Supreme Court held that under the rule of reason certain categories of formal agreements are unreasonable due to their coercive potential. In this case, the Court found that an association of dentists that refused to supply x-rays to insurers did not participate in a boycott that was per se

104. See id. at 95-96, 120.
105. Id. at 100.
106. See id. at 101.
107. See id. at 113-15.
108. 792 F.2d 210 (D.C. Cir. 1986).
109. See id. at 226-29.
110. See id. at 229-30.
111. 476 U.S. 447 (1986).
illegal under section 1 of the Sherman Act. The Court held, however, that the horizontal agreement to withhold a particular service without procompetitive justifications was illegal under the rule of reason. The absence of a procompetitive explanation combined with a coercive business practice aimed at effecting price was sufficient to condemn the practice under the rule of reason. The significance of Indiana Dentists in the context of section 1 Sherman Act decisions is that the rule of reason does not immunize a defendant’s coercive business behavior that involves price-fixing. However, in this case, the substantive unfairness and the unfair coercive power of the combination were found “on balance” not to immunize the behavior. This rule of reason balancing was a retreat from any formal per se behaviorally-based categorical prohibition.

In Business Electronics Corp. v. Sharp Electronics Corp., the Supreme Court applied the evolving limitations on the categorical application of the per se rule by holding that a vertical restraint on trade is not per se illegal under section 1 of the Sherman Act unless it contains some agreement on price. In Sharp, a retailer whom the defendant manufacturer terminated for its pricing policies claimed its termination resulted from an illegal agreement between the defendant and a rival retailer. In that case, there was insufficient evidence of a coercive agreement to terminate the plaintiff for disfavored pricing policies.

In Federal Trade Commission v. Superior Court Trial Lawyers Ass’n (SCTLA), the Supreme Court held that an agreement by attorneys not to accept appointments to represent indigent criminal defendants until the District of Columbia substantially increased compensation rates was potentially a per se violation of section 1 of the Sherman Act. Further, the Court held that despite the agreement’s First Amendment expressive component, it was a horizontal boycott involving competitors, and therefore, a naked restraint of price and output in violation of the antitrust laws. The Court rejected the appellate court’s assumption that the antitrust laws required proof of a defendant’s market power before condemnation could apply. The Court reaffirmed the traditional notion

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113. See id. at 453.
114. See id. at 459.
116. See id. at 724-25, 735-36.
117. See id. at 721.
118. See id. at 735-36.
120. See id. at 414, 436.
121. See id. at 436.
122. See id. at 432, 436.
that the per se rule reflected a long-standing judgment that “[e]very such horizontal price-fixing arrangement among competitors poses some threat to the free market,” even if the participants lack the power to control prices.\(^\text{123}\)

For the purpose of this argument, \textit{SCTLA} is highly illustrative of the Court’s hostility to coercive horizontal restraints despite the defendant’s strong argument for the overall social benefits the boycott would provide. The SCTLA claimed that the purpose of its boycott was the enactment of long overdue favorable legislation that would maximize social welfare by providing an adequate incentive for quality legal representation of indigents.\(^\text{124}\) The Court rejected this social welfare argument, stating that “[t]he social justifications proffered for respondents’ restraint of trade thus does not make it any less unlawful. The statutory policy underlying the Sherman Act ‘precludes inquiry into the question whether competition is good or bad.’”\(^\text{125}\) The majority opinion went on to quote from Justice Douglas’ famous \textit{Socony-Vacuum} footnote: “Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their potential threat to the central nervous system of the economy.”\(^\text{126}\)

\textit{SCTLA} stands for the proposition that an inherently coercive horizontal boycott designed to fix prices is never immunized from per se scrutiny, despite its proffered welfare benefits. This is a strong reaffirmation of the viability of the per se rule regardless of the defendant’s relative market power whenever conspiratorial behavior is involved. The affirmation of the per se rule indicates that such disfavored behaviors are found anticompetitive because of their deviation from norms of fairness and freedom of choice that define competition.

\textit{D. The Theory of Corrective Justice Applied to Injuries Resulting from Standard Setting, and Certification Processes Under Section 1 of the Sherman Act}

There are two competing theories of value that underlie conventional economic analysis of antitrust law. The dominant efficiency-based theories of competitive markets urge allocative efficiency, the maximization of consumer welfare, or wealth maximization as the ultimate goal of anti-

\(^{123}\) \textit{Id.} at 434-36.

\(^{124}\) \textit{See id.} at 421.

\(^{125}\) \textit{Id.} at 424.

\(^{126}\) \textit{Id.} at 435 (quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 225-26 n.59 (1940)) (emphasis added).
trust policy. The alternative theories hold that antitrust law provides a regulatory ideal, setting a standard for permissible business behavior, thereby promoting economic justice by protecting weaker economic entities (and consumers) from the unrestrained market power of monopolists.127 (Depending on which of these notions a judicial decision adopts, the effective scope of antitrust injury is defined.) Subsequent rules of compensation and sanction follow consistent with the chosen position. Corrective justice principles belong in the latter category.

A problem with the corrective justice approach to antitrust is that as a principle it is firmly rooted in a vision promoting a particularized regulatory ideal. The baseline moral rules that define just procedures also presuppose a prior societal commitment to fairness in market exchange.128 Therefore, whenever unfair trade practices harm a competitor or customer, the principle of corrective justice grants him or her due compensation.

The ideal background drawn upon in the context of corrective justice responses to antitrust injury is the same classical competitive market—the image of a system involving a large number of firms with undifferentiated products competing with each other as pure price-takers. The rules for appropriate market behavior are basic normative directives that prohibit firms from using fraud, coercion, or violence to attain a competitive advantage. Where firms have enough market power—either singularly as monopolists, or through concerted behavior as a functional cartel, to behave as price setters—they may also have the power to injure other competitors by predatory pricing or by extracting a higher than competitive price from consumers.129

The nature of market competition under the ideal scheme is that the demise of less successful competitors is inevitable. Society deems some antitrust injuries unacceptable, however, because they stem from impermissible trade practices despite their efficiency-creating consequences. Just as under the Aristotelian formula it is irrelevant whether a rich man defrauds a poor man, it is also irrelevant from a pure corrective justice perspective whether a small competitor unfairly injures a more powerful

128. See COLEMAN, supra note 41, at 53.
129. See Richard S. Markovitz, The Limits to Simplifying Antitrust: A Reply to Professor Easterbrook, 63 TEX. L. REV. 41, 80-81 (1984) (also cited in SCTL A, 493 U.S. at 435 n.17.). Professor Markovitz argues that due to market failure, a small competitor (one without substantial market power) may be able to cause anticompetitive injury to a stronger rival for some time.
rival. These types of injuries are invariably compensable under a theory of corrective justice.

When a trade association, utilizing arbitrary standards as a cover, refuses to certify a competitor for refusing to engage in a price fixing scheme, it is guilty of a violation of section 1 of the Sherman Act under the doctrine of Radiant Burners. Concerted refusals to deal, designed to punish firms that refuse to assist in fixing prices, are by definition both unfair and anticompetitive. The rhetoric of the Supreme Court has been somewhat misleading regarding the absolute priority of the rights of individual competitors versus the social virtues of "competition" in some recent cases.

The rhetorical excess of dicta that prioritizes "competition over competitors" is logically untenable because without antitrust enforcement of rules mandating fair and honest behavior between competitors, competition as a social institution would not be possible. Furthermore, the statutory objectives of the Sherman Act are inconsistent with such a hegemonic conception of fair competition. Professor Louis B. Schwartz wrote in his 1979 symposium article "Justice and Other Non-Economic Goals of Antitrust:

The dogma that "antitrust laws protect competition not competitors" overstates the case and ignores considerations of justice. One must amend that declaration by adding at least the following qualification: "unless individual competitors must be protected in the interest of preserving competition." A conspiracy to put a single small competitor out of business violates the Sherman Act even if there is no showing of significant impact on competition generally. In the Robinson-Patman Act, Congress explicitly extended the anti-discrimination ban to attempts to eliminate "a competitor" as well as to cases of impairment of competition. But [these cases] may be seen as a congressional concern for a non-economic goal: "justice," in the sense of fair and equal treatment of persons in like situations.

130. While there is no empirical evidence that smaller competitors individually have sufficient market power to injure larger rivals, it is theoretically plausible. Furthermore, certain categories of per se prohibited behavior are sanctionable regardless of the relative market position of the actor, e.g., section 1 Sherman Act violations involving express price fixing agreements or conspiracies.


132. See Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338 (1990) (re stating its dictum that Congress designed the antitrust laws to protect "competition, not competitors").

133. Schwartz, supra note 127, at 1078 (citations omitted).
Clearly, in cases of concerted refusals to deal under the per se *Radiant Burners* standard, it is apparent that the Court will forbid the setting of arbitrary standards that put coercive pressure on other industry members to deny an excluded party access to the market.\(^{134}\) This is a classic example of where the antitrust law reflects the threshold corrective justice standard that forbids the unfair use of the market power.

While standard-setting practices, as a rule, are analyzed under a rule of reason analysis, wherever there is evidence that those standards have been arbitrarily used for anticompetitive or coercive reasons and the defendant has substantial market power, the per se rule may be applied. This result is perfectly consistent with the theory of corrective justice which requires equitable compensation through sanctions whenever a would-be competitor is financially injured as a result of a coercive abuse of standard setting practices. Some commentators have proposed "that a party be regarded as having suffered antitrust injury whenever the loss incurred is a necessary consequence of an antitrust violation that harms consumers when it is successful."\(^{135}\) The principle of corrective justice, unlike wealth maximizing theories, requires compensation for fellow competitors if they are victims despite its efficiency effects on others (consumers).\(^{136}\) This is a deviation from the Kaldor-Hicks type of economic efficiency that would not require compensation for economic injuries creating greater social efficiencies.\(^{137}\)

The principle of corrective justice is deontological in that it requires compensation in the form of damages commensurate with statutory remedies if the harmful behavior is unfair, regardless of whether in the particular case its effect is to promote a welfare-maximizing result.\(^{138}\) For example, in *SCTLA*, the Court ruled that a boycott designed to raise lawyers' fees was per se illegal without making a finding with respect to the defendant lawyer association’s relative market power.\(^{139}\)

The Court demonstrates the corrective justice approach to antitrust liability in *Silver*, holding that where competitors employed an institutional regulatory process in an unfair manner" under totally unjustified

\(^{134}\) See *Radiant Burners*, 364 U.S. at 659-60.


\(^{136}\) This deontological feature would sometimes result in Pareto inefficient but technically fair outcomes. See Kaplow & Shavell, *supra* note 38, at 66.

\(^{137}\) See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 13-14 (3d ed. 1986).


circumstances" it was a per se violation of the Sherman Act.\textsuperscript{140} Corrective justice requires that the standard of compensation be commensurate with the amount of injury associated with the unfair activity. At this level, it does not matter from a corrective justice viewpoint whether the resulting injury involved a group of bad actors or purely individual malfeasance.

The threshold standard of "substantial market power" under more recent cases such as \textit{Consolidated Metal} is a measure of coercive potential rather than pure economic concentration. It follows that the rule of reason analysis would apply rather than the per se rule where there is little evidence of the defendant having substantial market power.\textsuperscript{141} Without market power, the standard setter is unlikely to be responsible for a compensable injury to the plaintiff. The rule of reason analysis, however, does not exempt behavior from per se liability where the source of the constraint is fraudulent, coercive, or conspiratorial in violation of section 1 of the Sherman Act. This result is consistent with the dictates of corrective justice where such liability results in mandatory compensation to the victim.

Where a standard setter leads a successful boycott, it would not matter, if consistent with the Aristotelian notion of corrective justice, whether the boycott leader was a lesser player in terms of market share. If that boycott leader coercively injured a dominant competitor because of a conspiratorial agreement, the injury would still constitute a per se violation of section 1.\textsuperscript{142} The injured competitor would be due compensation regardless of his relative market power under a theory of corrective justice. Therefore, the corrective justice approach explains the results reached in both per se and rule of reason analysis where evidentiary concerns regarding probable conduct ultimately determine the application of the rule.

\section*{III. Monopolization and Wrongful Intent: The Case for Corrective Justice Under Section 2 Sherman Act Cases}

This Part explores the content and evolution of the law of monopolization under section 2 of the Sherman Act. The purpose of this Part is to examine the extent to which intentional unilateral acts in pursuit of monopoly power that injure competitors are sanctionable under the anti-

\textsuperscript{141} See Consolidated Metal Prods., Inc. v. American Petroleum Inst., 846 F.2d 284, 292 (5th Cir. 1988).
\textsuperscript{142} See, e.g., Silver, 373 U.S. at 347-49.
trust laws. This Part is important for building a foundation for evaluating the viability of corrective justice as an alternative theory to efficiency based reasons for sanctioning antitrust injuries to competitors, where those injuries stem from effective monopolization.

A. Establishing & Maintaining Monopoly Power: An Introduction to the Role of Anticompetitive Intent

One key feature of monopolization actions under section 2 of the Sherman Act is that since the Supreme Court decision in *Standard Oil Co. of New Jersey v. United States*, the rule of reason has governed these actions. While violations of section 1 of the Sherman Act by a monopolist also violate section 2 in a monopolization suit, the per se standard is not applicable without a prior determination of the anticompetitive effects of the questioned activity.

As the previous Part indicates, in assessing the legality of standard setting and certification programs from an antitrust perspective, the courts have emphasized the concept of reasonableness. A court may first infer monopoly power from the defendant's dominant share of the market. The Supreme Court defined monopoly power in *United States v. E.I. Dupont de Nemours & Co.*, as "the power to control prices and exclude competition." Under the dictates of section 2 of the Sherman Act, the willful acquisition of monopoly power is wrongdoing tantamount to a serious crime: "Every person who shall monopolize or attempt to monopolize, or combine and conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, would be deemed guilty of a felony." In *United States v. Grinnell Corp.*, the Supreme Court defined the offense of monopolization as follows: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historical accident."

Generally, a plaintiff must prove four elements to establish monopol-
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(1) monopoly power in the relevant market; (2) anticompetitive conduct; (3) intent to monopolize; and (4) resulting injury to the plaintiff.\textsuperscript{151}

An important part of this analysis focuses on the role of "reasonableness" under section 2 in evaluating the content of certification standards. As explained previously in this Article, when courts assess the legality of specification standards and certification programs, they consistently emphasize the concept of reasonableness. The First Circuit in \textit{Clamp-All Corp. v. Cast Iron Soil Pipe Institute (CISP)}\textsuperscript{152} restated the role of this concept in antitrust analysis.

"In evaluating these claims, one must keep in mind the special antitrust meaning of the terms 'reasonable' and 'unreasonable,' a meaning that draws its content from the basic objectives of antitrust law's 'rule of reason.'"\textsuperscript{153} The rule of reason limits the Sherman Act's literal words to forbidding only those arrangements, the anticompetitive consequences of which outweigh their legitimate business justification.\textsuperscript{154}

Whether developed by a trade association, a government agency, or an independent laboratory, a standard should be reasonably designed to assure the accomplishment of its goal—be it safety, efficiency of performance, capacity, or whatever. If there is to be certification, the fees and requirements for submission of products for testing must also be reasonable. The certification standards must be reasonable, so that only those products that are truly deficient will not be certified. The per se line of cases establish that reasonable avenues for appeal from adverse rulings by the standard setter (certifier) must be provided. The doctrine of \textit{Radiant Burners} requires that an objective review of a denial to certify must be guaranteed for producers whose products fail to meet the specified standard.\textsuperscript{155} As argued earlier, this makes procedural fairness a central factor in determining reasonableness.

In section 2 of the Sherman Act, after establishing that a defendant actually has monopoly power as a threshold issue, the court examines whether the defendant has "willfully" maintained that power, and whether the defendant has caused the plaintiff economic injury.\textsuperscript{156} To

\textsuperscript{151} See Berkey Photo., Inc. v. Eastman Kodak Co., 603 F.2d 263, 272-97 (2d Cir. 1979).

\textsuperscript{152} 851 F.2d 478 (1st Cir. 1988).

\textsuperscript{153} See \textit{id.} at 486.

\textsuperscript{154} \textit{id.}


prove that a defendant has engaged in an "attempt to monopolize," the plaintiff must establish the following: "(1) specific intent to control prices or destroy competition with respect to a part of commerce; (2) predatory or anticompetitive conduct directed to accomplish the unlawful purpose; (3) dangerous probability of success; and (4) causal antitrust injury."\(^{157}\)

Unilateral refusals to deal are illegal under section 2 when they constitute monopolization or attempts to monopolize. Courts must evaluate the anticompetitiveness of unilateral refusals to deal under the rule of reason. A monopolist's actions violate section 2 if they erect "unnatural barriers" or "unnecessarily exclude actual or potential competition" or "restrict a free market."\(^{158}\) Section 2 proscribes the use of monopoly power attained in one market to gain a competitive advantage in another even when there has not been an attempt to monopolize the second.\(^{159}\)

The issue of a monopolistic refusal to deal and the market effects of such a practice has been decided in various situations under section 2 of the Sherman Act. In *Lorain Journal Co. v. United States*,\(^{160}\) the Supreme Court condemned a newspaper's policy of refusing to sell advertising to any customer of a nearby radio station.\(^{161}\) The Court found that the refusal was an attempt to preserve a monopoly for itself and thus constituted an illegal attempt to monopolize.\(^{162}\) In *Otter Tail Power Co. v. United States*,\(^{163}\) the Court ruled that an electric power company that refused to sell power or even to transport power to municipalities that had attempted to establish their own power sources was in violation of section 2 of the Sherman Act.\(^{164}\) Otter Tail Company had claimed that the Federal Power Act gave it an implied exemption from the antitrust

\(^{157}\) Id. at 1382.


\(^{159}\) See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979).

\(^{160}\) 342 U.S. 143 (1951).

\(^{161}\) See id. at 153 (finding that "advertisers wished to supplement their local newspaper advertising with local radio advertising but could not afford to discontinue their newspaper advertising in order to use the radio").

\(^{162}\) See id. at 152 (condemning the newspaper for attempting to monopolize the market by coercing advertisers to boycott a nearby radio station, which the Court found violated the Sherman Act).


\(^{164}\) See id. at 377 ("The record makes abundantly clear that Otter Tail used its monopoly power in the towns in its service area to foreclose competition or gain a competitive advantage, or to destroy a competitor, all in violation of the antitrust laws.").
laws. The Court completely rejected this claim. The Court emphasized that where Otter Tail Company had monopoly power and acted to preserve it, it was guilty of violating the antitrust laws.

In *Otter Tail*, the Court also stated its position that activities that come under the jurisdiction of federal administrative agencies nevertheless may be subject to scrutiny under the antitrust laws, unless Congress explicitly has stated otherwise. The Supreme Court has restated the limits of implied immunity under the *Noerr-Pennington* doctrine in which a private standard setting organization is not immune from antitrust liability for biasing the standard setting process to the detriment of a market competitor. The Court found that *Noerr* immunity depended on the "context and nature" of the activity.

In *Litton Systems Inc. v. American Telephone & Telegraph*, evidence of anticompetitive intent was central to the Second Circuit's concurrence that AT&T had engaged in predatory practices. In this case, AT&T promoted and enforced interconnection to its network through the "PCA" device. The court ruled that AT&T's interconnect decision making was not made in "good faith." Given AT&T's dogged resistance to certification, the court found that those decisions were designed to stifle and delay competition in the interconnect market. It is clear, from the voluminous fact finding and stringent adverse judgment in *Litton*, that certification was a less restrictive alternative than the PCA requirement. In *Litton*, the court held that AT&T's bad faith behavior fell within the "sham" exception to *Noerr-Pennington* and denied it antitrust immunity.

As the Court emphasized the "nature" and "context" of the standard setter in *Allied Tube*, evidence of anticompetitive intent was

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165. See *id.* at 372 ("Otter Tail contends that by reason of the Federal Power Act it is not subject to antitrust regulation with respect to its refusal to deal. We disagree with that position.").

166. See *id.* (finding there is nothing in the Federal Power Act protecting utilities from antitrust liability when they refuse to deal with municipalities).

167. See *id.* at 382 (concluding that power companies are not shielded from the Sherman Act when they abuse their economic power by engaging in anticompetitive practices).

168. See *id.* at 373-74 ("[C]ourts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws.").


170. See *id.* at 499.

171. 700 F.2d 785 (2d Cir. 1983).

172. *Id.* at 812-13, 828.

173. See *id.* at 813-14, 828.
also crucial in determining AT&T's liability under section 2 of the Sherman Act for injuries to those competitors with whom it had refused to deal. The court, in effect, refused to immunize AT&T's bad faith policies, which unfairly injured potential participants in the interconnect market.\textsuperscript{174}

\textbf{B. Anticompetitive Intent, Wrongful Attempt, and Conduct Thresholds for Corrective Justice}

Because the Supreme Court defined the offense of monopolization to include "the willful acquisition or maintenance of [monopoly] power," it makes anticompetitive intent an essential feature of section 2 action.\textsuperscript{175} In cases involving monopolization, a court may infer intent from evidence that the firm had engaged in one or more exclusionary practices.\textsuperscript{176} For example, in \textit{Litton}, subjective evidence of AT&T's "bad faith" was contained in a memorandum in which AT&T conceded that certification was a superior, achievable alternative to its "PCA."\textsuperscript{177}

AT&T's ability to exclude competitors from the market that failed to meet industry standards demonstrated its market power. This was not sufficient of itself to constitute grounds for a Section 2 violation without further corresponding evidence of anticompetitive intent. Rather, AT&T's market power, combined with a deliberate strategy to resist certification unfairly, sufficiently established anticompetitive intent.

Not all refusals to deal by monopolists are section 2 violations unless there is supporting evidence of anticompetitive purpose. In \textit{Paschall v. Kansas City Star Co.},\textsuperscript{178} the Eighth Circuit held that it was not an antitrust violation for a newspaper monopoly to begin self-delivery, thereby cutting off all its independent carriers.\textsuperscript{179} The court stated:

\textit{[W]e emphasize that there is nothing unlawful about the mere possession of monopoly power. Nor is it unlawful per se for a}

\begin{footnotesize}\textsuperscript{174} See id. at 828. In the relatively recent case of \textit{Spectrum Sports, Inc. v. McQuillan}, 506 U.S. 447, 459 (1993), the Supreme Court ruled that motive is insufficient to establish a section 2 violation under the rule of reason without proof of market power. Such an interpretation limits the scope of corrective justice by invalidating unfair motivation for competitive injury as sufficient grounds for compensation even under a rule of reason analysis. The case is a significant victory for efficiency based economic formalism in the context of section 2 monopolization cases.


\textsuperscript{176} See Swift Co. v. United States, 196 U.S. 375, 395-402 (1905).

\textsuperscript{177} See \textit{Litton}, 700 F.2d at 795.

\textsuperscript{178} 727 F.2d 692 (8th Cir. 1984).

\textsuperscript{179} See id. at 704 ("In this case appellees have failed to prove that any anticompetitive effects that might result from Star Co.'s vertical integration and refusal to deal are unreasonable.").\end{footnotesize}
A Corrective Justice Theory of Antitrust Regulation

monopolist to unilaterally refuse to deal with a former distributor or to vertically integrate. However, a monopolist may be subject to antitrust liability if it misuses its monopoly power to accomplish a vertical integration and a refusal to deal that results in unreasonable anticompetitive effects.\textsuperscript{180}

Therefore, the \textit{Paschall} court reiterated the role of the rule of reason in determining whether valid business justification exists for a monopolist's actions.

In \textit{Aspen Skiing Co. v. Aspen Highlands Skiing Corp.},\textsuperscript{181} the Supreme Court gave full recognition to the \textit{Paschall} doctrine on intent. In \textit{Aspen Skiing}, the Court returned to the debate over the intent requirement in section 2, concluding that in monopolization cases "evidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive.'"\textsuperscript{182} The Court decided in \textit{Aspen Skiing} that a company that has monopoly power may refuse to deal with a competitor in some manner that does not violate section 2 of the Sherman Act if a valid business reason exists.\textsuperscript{183} While \textit{Aspen Skiing} held that a unilateral refusal to deal did violate section 2 of the Sherman Act, it only did so because it was unreasonable and the plaintiff provided evidence of anticompetitive intent. In this case, the refusal to deal was coupled with significant market power in a manner that validated the inference of anticompetitive intent because that refusal created no efficiencies.

In \textit{Trans World Airlines v. American Coupon Exchange},\textsuperscript{184} a federal district court upheld an airline's decision to terminate agencies that brokered discount flyer coupons, ruling that the behavior was "reasonable" to the extent the action sought to enforce the airlines tariffs.\textsuperscript{185} The rule of reason doctrine as expressed in \textit{Aspen, Paschall}, and \textit{TWA} allows monopolists to optimize business relationships for legitimate business reasons, as long as those terminations are reasonable and promote competitive results. In all cases, however, the court determines "reasonableness" by both the propriety of the proffered business rationale and the substantive nature of the act.

Under section 2 of the Sherman Act, the promulgation of certification

\textsuperscript{180} Id. (emphasis added).
\textsuperscript{181} 472 U.S. 585 (1985).
\textsuperscript{182} Id. at 602.
\textsuperscript{183} See id. at 604.
\textsuperscript{184} 682 F. Supp. 1476 (C.D. Cal. 1988), aff'd, 913 F.2d 676 (9th Cir. 1990).
\textsuperscript{185} See id. at 1486 (determining that TWA's actions were "not unreasonable to the extent that they are merely an effort at enforcement of their tariffs").
standards that economically injure producers of nonconforming products is also subject to the rule of reason analysis. In *Eliason Corp. v. National Sanitation Foundation*,186 the Sixth Circuit stated that “a monopolist that achieves that status because of superior product, business acumen, or historical accident” could not be faulted187 and that the National Sanitation Foundation held a deserved position of market importance because of its excellent certification policies.188 According to the court, “[w]here the alleged boycott arises from standard making or even industry self-regulation, the plaintiff must show that either it was barred from obtaining approval of its products on a discriminatory basis from its competitors, or that the conduct as a whole was manifestly anticompetitive and unreasonable.”189 In essence, *Eliason* stands for the proposition that where certification standards provide market benefits that are fairly conducive to competition and that are non-discriminatory, injury to specific competitors cannot constitute “unreasonable” behavior under section 2 analysis.

In this Article, the exposition of the role of anticompetitive intent is important beyond its threshold requirement status for section 2 violations under the *Grinnell* doctrine. This is because the intentional violation of antitrust laws effects the baseline moral criterion that regulates market behavior. Such coercive or unscrupulous use of market superiority constitutes conduct contrary to accepted norms of competitive behavior. The conduct requirement for proving anticompetitive intent in attempting to monopolize under section 2 of the Sherman Act establishes a standard for liability. It also satisfies conditions for sufficiently wrongful behavior to justify compensation under the principle of corrective justice when that conduct injures competitors.

The attempt clause of section 2 of the Sherman Act forbids acts by monopolists that are intentionally designed to affect monopolization. Wrongful conduct in this context is evidence of specific intent where the conduct is by definition anticompetitive. For example, in cases where one could find section 1 per se liability because of conspiratorial behavior, one could also draw the inference of an attempt to monopolize under section 2.190 Strong arguments for relaxing the strict evidentiary require-

186. 614 F.2d 126 (6th Cir. 1980).
187. Id. at 131 n.8.
188. See id. at 128.
189. Id. at 129.
190. Several cases from the Ninth Circuit have broadened the scope of the attempted monopolization offense to include a virtually per se emphasis on categories of disfavored behavior regardless of the relative market power of the defendant. See Greyhound Com-
ments for proving the defendant’s market power can be made where it is clear that his or her conduct was harmful, grossly unfair or predatory in nature. In such cases, it is reasonable to conclude that actors engage in conduct that is morally noxious and normally inimical to competition for anticompetitive reasons. Areeda and Turner wrote in their classic treatise on antitrust:

[W]e suggest that the attempt clause of section 2 might reasonably be applied, without proof of significant market position, to conduct (1) which is totally unrelated to competition on the merits that is, lacking any plausible claim to redeeming virtue; (2) which clearly implies the presence or prospect of some degree of durable market power as, for example, conduct not likely to be rationally undertaken by a firm without such power or the hope of attaining it through the challenged conduct; and (3) which has potentially significant exclusionary effects in the generality of cases—in that there is a clear and direct causal connection between the conduct and the power.

This result is particularly troublesome for an efficiency-oriented formalist who would insist that when unfair or predatory conduct is efficiency-creating or welfare-maximizing the courts should never sanction it. Blind faith that only those firms possessing demonstrable market power can affect antitrust injury ignores the difficulty of resolving disputes about contested markets. In many cases, proof of the disfavored conduct is easy, while establishing its overall effect on the market is impossible. In such cases, the rule of reason approach is obviously inappropriate. Only the per se rule will allow a just mandate for compensation to be issued. At worst, such economic formalism deliberately ignores the tradition of per se condemnation of various types of disfa-

cputer Corp., Inc. v. International Bus. Mach. Corp., 559 F.2d 488 (9th Cir. 1977); Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964). But see Daniel J. Gifford, The Role of the Ninth Circuit in the Development of the Law of Attempt to Monopolize, 61 NOTRE DAME L. REV. 1021 (1986). Professor Gifford criticizes the line of Ninth Circuit cases that follow Lessig as overly expansive. Those cases utilized a “double inference” of anticompetitive intent relying heavily on the qualitative nature of the defendant’s conduct, as well as dispensed with the requirements of first proving “dangerous probability of success” and “relevant market” in order to establish the prima facie case. In effect, the Ninth Circuit’s decisions made proof of the defendant’s market power in the monopolization context secondary to its appraisal of the appropriateness of the defendant’s conduct. These results are perfectly consistent with the rationale favoring corrective justice remedies where the relevant market position of the defendant is indeterminate but the plaintiff’s harm stemmed from easily provable wrongful behavior. However, in Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 453-54 (1993), the U.S. Supreme Court has overruled the Lessig line of cases where the primary emphasis of evidentiary presumption was put on the moral appropriateness of conduct without proof of market power held by the defendant.

191. See AREEDA & HOVEKAMP, supra note 16, at 352.
vored anticompetitive conduct in order to promote a pro-business agenda. In either case, courts often ignore fundamental concerns about justice and fairness in market mechanisms by this preoccupation with economic formalism.

IV. THE APPLICATION OF THE PRINCIPLE OF CORRECTIVE JUSTICE TO TIE-IN CASES

A. The Classic Tie-In Case: International Business Machines Corp. v. United States

The general prohibition of coercive activity that is compatible with a scheme of corrective justice is also relevant to the antitrust analysis of tying arrangements. In International Business Machines Corp. (IBM) v. United States,\(^\text{192}\) the Supreme Court rejected the use of specification standards as a ruse for implementing an impermissible tying arrangement.\(^\text{193}\) In IBM, the Court condemned an arrangement that tied paper computer cards manufactured exclusively by IBM to the lease of its computer machines.\(^\text{194}\) The Court held that the arrangement constituted a violation of section 3 of the Clayton Act, which forbids “tying clauses” that tend to lessen competition.\(^\text{195}\) IBM argued that the restrictive clause served to protect its good will by preventing the use of unsuitable cards that would interfere with the successful performance of its machines.\(^\text{196}\) The Court rejected this argument:

\[\text{[IBM] is not prevented from proclaiming the virtues of its own cards or warning against the danger of using, in its machines, cards which do not conform to the necessary specifications, or even making its leases conditional upon the use of cards which conform to them. For ought that appears such measures would protect its good will, without creation of monopoly or resort to suppression of competition.}^\text{197}\]

The Court also noted, “[i]t affirmatively appears, by stipulation, that others are capable of manufacturing cards suitable for use in the appellant’s machine.”\(^\text{198}\) Thus, whenever such specification standards are adopted, it is clear that no illegal tying arrangement is presented unless

\(^{192}\) 298 U.S. 131 (1936).
\(^{193}\) See id. at 139.
\(^{194}\) See id. at 139-40.
\(^{195}\) See id. at 139.
\(^{196}\) See id. at 138-39.
\(^{197}\) Id. at 139-40.
\(^{198}\) Id. at 139.
the seller actually forces the buyer to take an unwanted product as a pre-
condition for attaining the needed tied product.

At least five elements are required to make out a tying violation: (1) separate tied and tying products; (2) actual coercion; (3) sufficient economic power in the tying product market; (4) anticompetitive effect in the tied product market; and (5) a substantial amount of interstate commerce in the tied product market.\(^{199}\) The coercive element of the leveraging behavior violates fundamental preconditions for free competitive exchange.

**B. The Role of Economic Coercion in Tie-In Disputes: The Case for Corrective Justice**

In *Jefferson Parish Hospital District No. 2 v. Hyde*,\(^{200}\) the Court said that tying arrangements should be condemned when the defendant has sufficient market power "to force a purchaser to do something he would not do in a competitive market."\(^{201}\) This condition is an operative definition of "coercion" in the antitrust context. While in this case the Court upheld an apparent non-coercive tying arrangement, the dictum forbidding coercion is totally compatible with the principles of corrective justice. Where a private plaintiff is injured by being forced to purchase a tied package, the damages are equal to the "monopoly overcharge"; that is, the difference between the amount paid for the tied packet and the price if no purchase had been made or if a competitive substitute was found. Subjecting the guilty party to treble damages under the Sherman Act compensates for the monopoly overcharge price. This trebling effect is also consistent with corrective justice because the antitrust statute establishes the actual baseline standard of equitable distribution.\(^{202}\) These private damages serve to satisfy the compensatory requirements of corrective justice while reinforcing our societal interests in deterring anti-competitive and coercive conduct.

Prohibiting coercion is a baseline behavioral criterion under a theory of corrective justice. Corrective justice requires an equitable resolution of disputes alleging economic coercion. For example, cartel members often use concerted refusals to deal when pressuring non-members to conform to pricing or output strategy. Coercive actions that injure competi-

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199. *See* Yentsch v. Texaco, Inc., 630 F.2d 46, 56-57 (12th Cir. 1980) (holding that where there is no coercion, there is no tie-in); W.H. Brady Co. v. Lem Prods., Inc., 659 F. Supp. 1355, 1358 (N.D. Ill. 1987).
201. *Id.* at 13.
tors violate the element of free choice in economic decision-making that is necessary for a free and competitive marketplace to survive. At this level, standard welfare economic analysis of antitrust rules differs substantially from corrective justice theories. General economic welfare analysis seeks to justify the elimination of monopoly or anticompetitive practices because of overall adverse effect on competition and indirect harm to consumers. Whenever such results are inefficient, welfare theory argues for the elimination of monopolistic practices. For example, monopoly under standard welfare analysis leads to higher prices that subsequently leads to lower consumer welfare. Standard welfare analysis provides the strongest efficiency-based objection to monopoly. A theory of corrective justice, however, would require compensation for any harms stemming from monopolistic practices because the willful exercise of such advantages is unfair and inimical to competition. The corrective justice theory of compensation for antitrust injury recognizes both the economic harm of monopoly-based inefficiency and the institutional harm of unfair trade practices. By compensating individuals for losses due to unfair market practices, corrective justice prevents final transfers of wealth that promote monopoly power. The effect of the corrective justice norm is to promote substantive fairness, market efficiency, and free competition.


Apparently, in Eastman Kodak Co. v. Image Technical Services, Inc., the Court has arrested the slide toward a total efficiency based "Chicago-School" approach to the law of tying. Plaintiffs in Kodak, independent service organizations (ISOs) that repaired and maintained Kodak copying and micrographic equipment, alleged that Kodak violated sections 1 and 2 of the Sherman Act by unlawfully tying the sale of service to the sale of replacement parts and by monopolizing and attempting to monopolize the service market for Kodak equipment. According to the ISOs, after obtaining control over the supply of Kodak brand replacement parts—the only brand that would work with its equipment—Kodak refused to sell parts to equipment owners who employed the ISOs, effectively driving ISOs from the market. The district court granted Kodak summary judgment on both counts of the complaint. The Court of

204. See id. at 456.
205. See id. at 458.
206. See id. at 459; see also Image Tech. Servs., Inc. v. Eastman Kodak Co., 1989-1
Appeals for the Ninth Circuit reversed, holding that despite Kodak’s conceded lack of power in the primary equipment markets, the possibility of “market imperfections” raised a factual question as to whether Kodak possessed sufficient power in replacement parts to force some customers to purchase service from Kodak.207

Before both the Ninth Circuit and the Supreme Court, Kodak argued that the dictates of neoclassical price theory, coupled with the concession that Kodak’s primary equipment market was competitive, precluded it from possessing power in the after-market for Kodak parts.208 Neoclassical economic theory of the “Chicago School” variety suggests that equipment buyers would regard a rise in the price of parts as an increase in the overall price of the equipment; in Kodak’s concededly competitive equipment market, a unilateral price increase would have led to lost revenues. Because “market power” when exercised would have reduced its profitability, Kodak argued that “market power” in this instance should not be considered market power at all. Thus, according to the dictates of economic theory, Kodak claimed that it could not have violated the antitrust laws.209

The Kodak Court indicated that while Kodak’s argument was “intuitively appealing,” price theory “may not accurately explain the behavior of primary and derivative markets for complex durable goods.”210 In such markets, said the Court, “difficult and costly” information gaps and “high switching costs” can confer market power on sellers with relatively low market shares.211 The Court emphasized how switching costs and asymmetric gaps in buyer information—two types of market failure inconsistent with “Chicago School” assumptions regarding perfect information—necessitated further factual inquiry into the anti-competitive effects of Kodak’s policies on plaintiff ISOs.212

The Court’s refusal to uphold summary judgment raises the possibility that Kodak intended to drive the ISOs from the market by implementing policies that both disadvantaged them as competitors and also disadvantaged consumers due to market imperfections. Information gaps and

208. See id. at 616.
211. See id. at 473-78.
212. See id.
high switching costs were so substantially unfair that efficiency-based justifications would no longer be recognized as "a matter of law." Some commentators have construed Kodak as a jurisprudential milestone in its retreat from conventional "Chicago School" reasoning.213 In this decision, a more expansive type of economic reasoning than the traditional Pareto allocative efficiency-based "Chicago School" approach raises the possibility of providing compensatory antitrust remedies for aggrieved plaintiffs in a manner more consistent with the dictates of corrective justice.

V. CONCLUSION

This Article provides an alternative philosophical explanation for the evolution of the conduct and compensation standards of the federal antitrust laws. The classical idea of corrective justice is more compatible with modern antitrust standards and remedies than conventional welfare economic analysis. At present, however, efficiency-based reasoning provides the predominant paradigm in antitrust analysis. Corrective justice promotes results that emphasize justice to individuals. Most importantly, corrective justice requires compensation and legal sanction whenever unfair and coercive business practices result in injuries to competitors, regardless of benefits to third parties. The examples drawn from trade association activities involving standards and certification in the section 1 and section 2 unilateral refusals to deal contexts are illustrative of the viability of corrective justice as a sound alternative perspective for existing antitrust injury, conduct, and compensation requirements. In sum, the principle of corrective justice explains how the law requires compensation for antitrust injuries even when those "wrongful acts" serve to create efficient or welfare maximizing outcomes in a particular case. This tenet is, of course, contrary to predominant efficiency-based norms.

While antitrust prohibitions are not ends in themselves, these laws re-

213. The potentially devastating effects of Kodak on the "Chicago school's" methodological hold on contemporary anti-trust jurisprudence has generated significant academic comment. See, e.g., Lawrence T. Festa, III, Eastman Kodak Co. v. Image Technical Services, Inc.: The Decline and Fall of the Chicago Empire?, 68 NOTRE DAME L. REV. 619, 620 (1993); see also Robert H. Lande, Chicago Takes It on the Chin: Imperfect Information Could Play a Crucial Role in the Post-Kodak World, 62 ANTITRUST L.J. 193, 193 (1993); but see Eleanor M. Fox, Eastman Kodak Company v. Image Technical Services, Inc.: Information Failure As Soul or Hook?, 62 ANTITRUST L.J. 759 (1994) (where Prof. Fox argues that Kodak is essentially a case about powerful firms abusing competitors and subverting the competitive process). She argues the Court's opinion is strategically cloaked in the language of information-cost economics, and consumer exploitation analysis. She writes: "[I]n Kodak, a sufficient number of Supreme Court Justices simply refused to jettison the legitimacy and process values of antitrust." Id. at 761.
reflect moral norms requiring just compensation for damages sustained by economic agents unfairly or coercively injured by the devices of their competitors. The simple maxim that the legislature designed antitrust laws to protect competition and not competitors is at best misleading. A narrow welfare economic notion of competition defined exclusively by efficiency concerns and measured by market position cannot explain the per se doctrine that forbids conspiratorial and coercive actions or attempts regardless of potential economic benefits. A corrective justice approach to antitrust injury promotes a generous notion of competition based on fairness, freedom, and process equity for every agent in the marketplace. Therefore, corrective justice provides a profoundly richer explanation of our national antitrust laws and its sanctions than those theories exclusively promoting welfare economic efficiency.