Monopsony and the Consumer Harm Standard

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TABLE OF CONTENTS

INTRODUCTION .......................................... 1612

I. THE ECONOMICS OF MONOPSONY ......................... 1614
   A. MONOPSONY IS THE MIRROR IMAGE OF MONOPOLY ........... 1615
   B. BILATERAL MONOPOLY ..................................... 1619

II. COURTS GENERALLY TREAT MONOPSONY UNDER AN ANCILLARY RESTRAINTS APPROACH ................................ 1620
   A. THE HISTORY OF THE ANCILLARY RESTRAINTS APPROACH ...... 1620
   B. THE APPLICATION OF THE ANCILLARY RESTRAINTS FRAMEWORK TO MONOPSONY ..................................... 1621
      1. Naked Buyer Agreements are Per Se Illegal ............ 1622
      2. Buyer Agreements with Arguable Consumer Benefit Escape Per Se Condemnation .............................. 1624
      3. The Rule of Reason Focuses on the Agreement’s Effects on Consumers ........................................... 1626
   C. THE SHORTCOMINGS OF THE ANCILLARY RESTRAINTS APPROACH . . 1627

III. ECONOMISTS’ ATTEMPTS TO FILL THIS ANALYTICAL GAP HAVE FAILED ........................................... 1628
   A. THE FIRST PROPOSED SOLUTION: CONSUMERS ARE HARMED BY COLLUSIVE MONOPSONY .............................. 1628
   B. THE SECOND PROPOSED SOLUTION: CONSUMER HARM SHOULD NOT BE THE RELEVANT STANDARD ................... 1631

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INTRODUCTION

In his book, *The Antitrust Paradox*, Judge Robert Bork famously argues that the use of “competition” in antitrust jurisprudence has resulted in so many contradictory meanings that the idea has become incoherent. In order to craft intelligible antitrust doctrine, he says, courts should interpret “competition” as a “term of art, designating any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree.”¹ In part due to the influence of this book, judges and scholars have widely embraced the consumer harm standard,² although fierce debate continues over precisely who are consumers and what harms should be cognizable. Here I will argue that while consumer harm is enormously important to antitrust analysis, a richer conception of competition is required in order to capture and explain some aspects of antitrust jurisprudence, and of monopsony jurisprudence in particular.

Because debate has muddied the understanding of what precisely is meant by “the consumer harm standard,” throughout this Note this term will be used to refer to what is sometimes called the “pure consumer harm” or “pure consumer

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². It should be noted, however, that there are two distinct standards that judges and scholars refer to as the “consumer harm (or “welfare”) standard.” The first, often referred to as the “pure consumer harm” (or “welfare”) standard, takes as its touchstone of antitrust violation the effect of the practice at issue on end consumers of goods. The second is the same as the first, except that it also presumes that all inefficiency is, in the end, harmful to consumers even if no direct effects can be demonstrated. See, e.g., Richard O. Zerbe Jr., Monopsony and the Ross-Simmons Case: A Comment on Salop and Kirkwood, 72 ANTITRUST L.J. 717 (2005). This second version of the consumer welfare standard is problematic, because it is easily confused with a third standard advocated by some scholars: the efficiency standard. This third standard takes inefficiency as the touchstone of antitrust violation. While this is operationally the same as the second consumer welfare standard, it is distinguishable in a subtle way: The second consumer welfare standard focuses on consumers and is based on the idea that Congress, in enacting the antitrust laws, sought to protect consumers; it just also merely incorporates the economic assumption that the promotion of efficiency is the best way to do this. The efficiency standard, on the other hand, views antitrust law as a general protection of social welfare and is indifferent to which parties in society are specifically benefited or harmed.
welfare” standard. \(^3\) To reference Judge Bork’s more expansive standard, which includes consideration of aggregate efficiency as well as (according to some commentators) wealth transfers to and from consumers, this Note will use the term “aggregate efficiency standard.” This usage is not intended to stake a position in the larger debate over which standard antitrust law should use; its only aim is clarity. It should also be noted that this Note does not attempt to address mergers between horizontal competitors to which different standards may well apply.

Collusive monopsony—the practice of buyers getting together to fix the prices at which they will buy goods—is the economic mirror image of collusive monopoly, which is defined as the practice of sellers getting together to fix the prices at which they will sell goods; both are illegal under section 1 of the Sherman Act. In monopoly and monopsony, the quantity of goods transacted decreases and wealth is transferred to the parties with market power. Monopsony is described as the mirror image of monopoly rather than as its direct analogue, however, because in monopsony, the wealth is transferred not upstream from consumers to sellers, as it is in monopoly, but downstream, from input suppliers to manufacturers.

Because collusive monopsony is the mirror image of collusive monopoly, many have argued that the practices should be treated analogously—that is, that agreements among buyers to fix prices should be illegal unless the defendants can show that the agreement is necessary to achieve procompetitive benefits and that the overall effect is positive for consumers. \(^4\) In the monopoly context, this is known as the ancillary restraints model. Roger Blair and William Harrison have put forth the most complete and widely accepted account of this theory in the monopsony context, and their theory has been embraced by some courts. \(^5\)

The ancillary restraints model is largely correct as a descriptive matter. Normatively, however, the theory is incomplete. The underlying rationale for the theory is consumer harm, but the direct harm from monopsony flows to suppliers, not consumers. The question becomes why, then, collusive monop-

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\(^4\) For parallel reasoning in the case of predatory bidding, see Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069, 1076 (2007), where the Court noted that “[t]he kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and to claims of monopsonization.” But even here, where the Court determined that the same test should apply to both monopolization and monopsonization, it noted that the cases have different effects on consumers, which are relevant for antitrust analysis. See id. at 1078 (“In addition, predatory bidding presents less of a direct threat of consumer harm than predatory pricing. A predatory-pricing scheme ultimately achieves success by charging higher prices to consumers. By contrast, a predatory-bidding scheme could succeed with little or no effect on consumer prices because a predatory bidder does not necessarily rely on raising prices in the output market to recoup its losses.”).

sony should be initially presumed illegal when it does not clearly or directly harm consumers. Without an explanation for this initial presumption, the theory lacks analytical foundation.

Because courts have begun to explicitly embrace the ancillary restraints approach, economists and other antitrust scholars have been left scrambling to fill this analytical gap—or, in some cases, to use it to undermine the consumer harm standard. Here I argue, first, that these attempts have failed to explain the gap in a satisfying way, and second, that the reason they have failed is that they have overlooked the legal dimensions of the Sherman Act, focusing only on economic policy. Finally, I offer an explanation for the analytical gap in the ancillary restraints theory of monopsony that embraces both the idea that consumers are the intended beneficiaries of the Sherman Act and the role of the Sherman Act as a legal text.

The text of the Sherman Act makes no mention of consumers—it addresses only competition. When read carefully, the courts’ jurisprudence makes clear that while consumers are the intended beneficiaries of the Sherman Act, the legislative judgment reflected in the Act—that the best way to protect consumers is through competition—does not allow courts to simply craft the economic policy that they believe best serves consumers. While consumer harms and benefits are relevant to determining legality under the Act, there are situations where even if an agreement would benefit consumers and increase efficiency, the Act nonetheless requires its condemnation as a restraint on competition.

In order to frame the discussion, this Note begins, in Part I, with a discussion of the basic economics of monopsony and its parallels to, and distinctions from, monopoly. Part II will then show that courts apply something like an ancillary restraints approach to monopsony, drawing on economic analogies between monopoly and monopsony. This Part will also argue that, despite its practical utility, the ancillary restraints approach (as currently applied) to monopsony overlooks fundamental economic differences between monopoly and monopsony, and leaves a large analytic gap in the theory. Economists have tried and failed to fill this gap, and their proposed resolutions will be the topic of Part III. Part IV will present an original solution to this difficulty based on the legal significance of the Sherman Act and will explore some of this solution’s implications.

I. THE ECONOMICS OF MONOPSONY

The economic effects of monopsony on the input purchasing market are the mirror image of the economic effects of monopoly on the output market: fewer goods are transacted, wealth is transferred from the party without market power to the party with market power, and there is a loss of social welfare. This Part

will discuss the mechanisms and effects of monopsony. In addition to explaining the parallels between monopsony and monopoly, it will demonstrate how they differ in important ways.

A. MONOPSONY IS THE MIRROR IMAGE OF MONOPOLY

In a competitive market, the price a buyer pays for an input is unaffected by the quantity he demands (absent bulk discounts reflecting certain economies of scale in purchasing).\(^7\) The buyer will therefore demand the amount where the competitive price equals the marginal value of an additional unit to him; that is, the marginal revenue he can expect to earn on that unit.\(^8\) Where an input buyer possesses market power, however, he can affect the price of the input by varying the amount that he demands.\(^9\) Therefore, the marginal cost of an additional unit of input is not merely the cost of that individual unit.\(^10\) Because the cost of each unit purchased increases when the total number of purchased units increases, the marginal cost of the additional unit also includes the cost increase on the other units purchased.\(^12\) This marginal cost is called the “marginal factor cost” and is necessarily above the marginal cost of production for each input.\(^13\) Assuming a downward sloping demand curve, this means that a monopsonist will purchase less of an input than he would without monopsony power.\(^14\)

This is illustrated graphically in Figure 1. Line D represents an input buyer’s demand curve, which is assumed to be downward sloping. Line S represents the amount input sellers are willing to supply at a given price, which is assumed to slope upward, and which is equal to the social cost of the input. Line MFC represents the marginal factor cost curve, which is the cost of each additional unit of input to a monopsonist, and which is necessarily higher than the social cost.

In a competitive market, an input purchaser would buy quantity $q_1$ at price $p_1$, because that is where demand equals marginal cost of supply. Where an input purchaser has monopsony power, however, he will demand only quantity $q_2$, because that is where his demand equals the marginal factor cost. The decision to purchase only $q_2$ units rather than $q_1$ drives the price of the input down to $p_2$. This change in purchasing behavior has two effects in the input market. First, there is a wealth transfer from the input seller to the input buyer of the amount represented by rectangle $p_1fdp_2$. Second, there is a net loss in social welfare represented by triangle $bcd$.

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7. See Noll, supra note 6, at 594–95.
8. See id.
9. See Blair & Harrison, supra note 5, at 39; see also Salop, supra note 3, at 672.
10. See Blair & Harrison, supra note 5, at 37.
11. Id. at 38.
12. Id.
13. Id.
14. See id. at 39.
This is directly analogous to the effect of the exercise of monopoly power: the quantity of goods purchased is reduced, there is a wealth transfer to the party with market power, and there is a loss of social welfare. In fact, the graphical representation of monopoly is symmetrical to that of monopsony (see Figure 2).

For the monopolist, the decision to sell an additional unit of output is determined not merely by the price he can demand for that unit alone, but also by the fact that each additional unit sold drives down the price he receives for all the other units he sells. Thus, his marginal revenue, represented by the line marked MR, is lower than the demand curve, line D. Rather than sell quantity \( q_1 \) at price \( p_1 \), as he would in a competitive market, the monopolist sells quantity \( q_2 \), because this is where his marginal revenue equals the marginal cost of supply. His decision to sell only quantity \( q_2 \) drives the price charged to consumers up to \( p_2 \), resulting in a wealth transfer to the monopolist equal to

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15. See Blair & Harrison, supra note 5, at 39; Salop, supra note 3, at 672–73.
16. See Blair & Harrison, supra note 5, at 39.
17. See id.
and a social welfare loss equal to triangle $bcd$. The mechanisms and effects of monopoly and monopsony are, in this way, mirror images of one another. The only potentially significant difference between monopoly and monopsony is the character of the party from whom wealth is transferred through the exercise of market power: in monopoly, wealth is transferred from end consumers to output sellers (or from input buyers to input sellers), but in monopsony, wealth is transferred from input sellers to input buyers (or from output sellers to consumers).

Perhaps counterintuitively, the use of monopsony power to extract lower prices from input suppliers does not necessarily, or even probably, result in lower prices to end consumers in the output market. Although the monopsonist secures his inputs at a lower price, he does so by reducing the quantity he buys. Since he buys fewer inputs, he produces fewer outputs. Depending on the structure of the downstream market, this more limited output may or may not cause the price charged to consumers to increase. For instance, if the monopso-

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18. See id.
19. See Noll, supra note 6, at 591.
nist is just one of the many firms selling in the downstream market, other firms may make up for his decreased output, and the quantity and price of goods sold might be unaffected. On the other hand, if he also has market power as a seller, his decreased output will lower the total quantity of goods transacted and lead to higher consumer prices. The best case scenario for the consumer, at any rate, is that the output price stays the same, which will occur if the downstream market is perfectly competitive.20

For example, consider a coal mine in a small town.21 One of the major inputs for the mine is labor. If there are no other large industries in the town, then the mine will likely possess market power in the labor market. The mine can profitably exercise this market power by restricting the amount of labor it demands, which will drive down wages. The reduction in labor as an input will also diminish the amount of coal that the mine can produce. Because the mine saves money on each laborer it does employ by employing fewer workers overall, however, the mine’s profit-maximizing amount of labor will be lower than it would be in a competitive labor market where the mine’s demand had no effect on price.

Once it is removed from the ground, however, coal can be easily transported.22 Although the market for labor is a local market, the market for the output, coal, is a national one. In this national output market, by assumption, the mine does not possess market power, so the reduction in the mine’s output has no effect on the price. Thus, while the mine profits from its exercise of market power, and the input sellers, in this case workers, are harmed, the price of coal to end consumers remains unchanged. Moreover, this is far from a purely academic scenario: It is directly analogous to the situation in the California sugar beet market that was at issue in the Supreme Court’s leading collusive

20. See Roger D. Blair & Kristine L. Coffin, Physician Collective Bargaining: State Legislation and the State Action Doctrine, 26 CARDOZO L. REV. 1731, 1737 (2005) (“There are two cases to consider. First, suppose that the monopsonist has no market power in its output market. In that event, output price does not change. On the other hand, if the monopsonist has market power in its output market, then the monopsonist’s output reduction will lead to a higher price. In neither case does the ultimate consumer benefit from the exercise of monopsony power.”).

There is an additional scenario under which a buyer’s profitable exercise of monopsony power would have no direct effect on consumer prices regardless of whether the buyer also possesses market power in the output market. Suppose that a buyer uses two inputs which are substitutes. Further suppose that his demand curve for input A slopes downward whereas his demand curve for input B is flat at an input price $W^*$. Without monopsony power, the firm would buy input A until its marginal return on the input equaled $W^*$. It would purchase input B to fulfill the rest of its need. If the firm had monopsony power, however, the firm would only buy input A until its marginal factor cost equaled $W^*$, and then it would buy more of input B to make up its remaining need. Because the firm’s marginal cost per unit of output would be unchanged, its output would remain the same even in the face of a downward sloping demand curve. Because its output would not change, there would be no effect on the price for the final good and consumers would not be harmed.

21. This example is taken from BLAIR & HARRISON, supra note 5.

22. While there will be some transportation costs, I will make the reasonable assumption that they are not prohibitively expensive.
monopsony precedent.\textsuperscript{23}

Because the exercise of monopsony can be profitable to input buyers even when they cannot raise prices to consumers in the output market, monopsony will occur even where, as in the coal mine example above, the downstream market is competitive. The mere presence of monopsony, therefore, is insufficient to establish that consumers are necessarily, or even probably, directly harmed.

B. BILATERAL MONOPOLY

Not only are consumers not directly harmed in the most basic monopsony scenario, they may in fact benefit; in some situations, collusion among buyers is arguably the best way to combat the exercise of market power by sellers. The result is to ease the effects on consumers of monopoly power in the input market. Where both input sellers and input buyers possess market power, this situation is referred to as a bilateral monopoly. From an economic perspective, a shift from a pure monopoly to a bilateral monopoly tends to increase consumption and aggregate efficiency while lowering prices to consumers. In a sense, it is a case where two wrongs might make a right.

Consider the pure monopoly scenario outlined in Part I.A, and suppose the seller possessing market power is not a retailer, but rather is an input supplier. Just like a retailer, the input supplier will exercise his market power by restricting his output from $q_1$ to $q_2$. Since demand is unchanged, this will drive up the price of the input from $p_1$ to $p_2$. The increased price and reduced supply of the input will cause the input buyers to produce less output for sale in the downstream retail market. If the buyers of the input also have market power in the downstream market, their reduction in output will drive up prices to end consumers.

Now, suppose that the input buyers, who collectively, but not individually, possess market power in the input market, were allowed to collude, that is, they were allowed to exercise collusive monopsony power in the input market. Because the input buyers and input sellers will now possess comparable bargaining power, the input buyers can credibly threaten to reduce demand.\textsuperscript{24} Given this, the group of buyers and the seller will both realize (in theory) that it is in their collective best interest to transact the competitive amount of the input. In other words, the best case scenario for each is to mimic a vertically integrated enterprise. Nonetheless, although there is a determinative profit maximizing quantity that the buyers and seller can mutually agree will be transacted, this does not determine the price. In this case, the price acts not as a rationing mechanism but instead as a means for the buyers and sellers to divide the profits among themselves. In theory, through a series of protracted negotiations, the


\textsuperscript{24} See Blair & Harrison, supra note 5, at 109–10; see also A.L. Bowley, Bilateral Monopoly, 25 Econ. J. 651 (1928).
colluding buyers and the monopolistic seller will eventually decide to transact the competitive quantity of goods and will work out a price that apportions the profit between the two parties. Even in the perfect bilateral monopoly situation, where there is only one buyer and one seller, the equilibrium price will likely be above the perfectly competitive price. Nonetheless, the bilateral monopoly equilibrium is, at least theoretically, closer to the competitive equilibrium than the pure monopoly equilibrium. Thus, by colluding, the input buyers can, in theory, increase efficiency and benefit end consumers by raising output and lowering costs.

The implications of this theoretical increase in efficiency and benefit to consumers for antitrust purposes will be explored more thoroughly in Part IV.C. For the moment, however, it suffices to note the theoretical advantages that the deployment of countervailing market power on the buyer side can offer.

II. COURTS GENERALLY TREAT MONOPSONY UNDER AN ANCILLARY RESTRAINTS APPROACH

While the economics of monopoly and monopsony are similar, they differ in an important way: monopoly directly harms consumers through increased output prices while monopsony does not harm consumers directly and increases prices to downstream consumers only in certain circumstances. Given that consumer harm is considered by many to be the yardstick of a Sherman Act violation, one might expect that this difference would lead courts to treat monopsony differently than monopoly. Nonetheless, as other scholars have noted, the courts’ approach to collusive monopsony is remarkably similar to the ancillary restraints approach taken in the monopoly context.

A. THE HISTORY OF THE ANCILLARY RESTRAINTS APPROACH

Courts first developed the ancillary restraints framework in the context of collusive monopoly. In the early days of antitrust, courts read the Sherman Act literally and broadly. By its text, the Act prohibits all agreements between competitors that restrain trade. Since even the most basic contract restrains trade to some extent—for example, a partnership agreement eliminates competition between partners at a law firm—courts took Congress to have prohibited, effectively, all agreements between would-be competitors.

25. See Blair & Harrison, supra note 5, at 113–16.

26. Id.

27. Id.; see also Salop, supra note 3, at 672 n.12 (distinguishing monopsony power, on his usage, from buyer cooperation to increase bargaining power in the face of an upstream monopoly).


29. See, e.g., United States v. Trans-Mo. Freight Ass’n, 166 U.S. 290 (1897); see also Blair & Harrison, supra note 5, at 14.


31. See supra note 29.
Courts quickly realized that not all agreements between competitors are anticompetitive. Some agreements, while eliminating a particular type of competition between some parties in the market, actually increase competition in the market overall. And this increased competition, they realized, benefits end consumers. Since the purpose of the Sherman Act, according to these courts, is to promote competition for the benefit of consumers, it would be absurd to read it as prohibiting even those contracts which benefit consumers by increasing competition.

Starting in *United States v. Addyston Pipe & Steel*, the courts developed an approach that allowed some agreements between competitors to proceed when the defendants could show they were, in fact, beneficial to competition and consumers. This approach became the “ancillary restraints doctrine” and proceeds as follows: Agreements between competitors are presumed illegal and anticompetitive. Furthermore, such agreements are considered illegal per se, unless the defendants make a colorable argument that the agreement is procompetitive. In particular, a defendant must show that: (1) the agreement has procompetitive benefits; (2) the agreement on price fixing is necessary to achieve those benefits—that is, it is ancillary to the benefit; and (3) the agreement is no more restrictive than necessary. If the defendant is able to meet this burden, then the agreement’s procompetitive and anticompetitive benefits will be weighed under the rule of reason.

**B. THE APPLICATION OF THE ANCILLARY RESTRAINTS FRAMEWORK TO MONOPSONY**

Roger Blair and Jeffrey Harrison, among others, argue that courts’ approach to monopsony reflects what is, essentially, an ancillary restraints approach. They further argue that based on the consumer welfare standard, such an approach is correct because it renders illegal those agreements that harm consumers while simultaneously allowing procompetitive agreements to escape condemnation.

Blair and Harrison generally assert that agreements between buyers to fix prices...
prices should be illegal per se, unless the defendants can make a colorable showing that “(1) the agreement is ultimately procompetitive, (2) the anticompetitive agreement makes the procompetitive results possible, and (3) the anticompetitive agreement is no more restrictive than necessary.” If a defendant makes this showing, then the court should engage in a generalized balancing test to determine if the agreement is pro- or anti-competitive.

If “pro-” and “anti-competitive” are taken to mean beneficial and harmful to consumers, then this approach appears descriptively correct. Courts presume that agreements among buyers to fix prices are illegal, just as are agreements to fix price between sellers. However, where there is a colorable argument that consumers benefit from an agreement among buyers, courts hold that it is not per se illegal; instead, the rule of reason applies. Under the rule of reason, courts ask whether the agreement is beneficial overall to consumers.

1. Naked Buyer Agreements are Per Se Illegal

The Supreme Court’s leading precedent on collusive monopsony is *Mandeville Island Farms v. American Crystal Sugar Co.*, which held that buyer cartels—that is, collusive monopsonies—are illegal, even where harm to consumers is neither shown nor alleged. In that case, the plaintiffs, California sugar growers, accused the defendants, the only three sugar processors in California, of agreeing to fix the prices paid to sugar beet farmers. The Court noted that because sugar beets cannot be transported long distances, the three defendants constituted the entire market for the plaintiff’s product and thus possessed market power as buyers in the input market for raw sugar. Processed sugar, by contrast, is easily portable and is sold in a national market. It was therefore unlikely that consumers would be directly harmed by this agreement. Nonetheless, the Court condemned the processors’ agreement as an agreement to fix prices and held it illegal per se, declaring, “The [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these.”

While the Court did find, later in the opinion, that the defendants’ agreement injured competition in the downstream consumer market, it did so as a prerequisite to finding federal jurisdiction, not as an element of substantive illegality. The Court stated:

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39. *Id.* at 102.
41. *See infra* notes 43–55 and accompanying text.
42. *See infra* Part II.B.2.
44. *Id.* at 222 n.2.
45. *Id.* at 236.
There were indeed two distinct effects flowing from the agreement for paying uniform growers’ prices, one immediately upon the price received by the grower rendering it devoid of all competitive influence in amount; the other, the necessary and inevitable effect of that agreement, in the setting of the industry as a whole, to reduce competition in the interstate distribution of sugar.46

The Court used this finding to conclude that the agreement affected interstate commerce. The finding of end-market effects therefore went not to whether there was harm of the sort the antitrust laws are intended to prevent, but to whether interstate commerce was affected, and thus, whether the acts fell within the permissible jurisdiction of the Sherman Act.47

Since the Court decided *Mandeville Island Farms* in 1948, the categories of cases, whether monopsony or monopoly, qualifying for per se treatment have been substantially narrowed.48 This is largely because of developments in the study of economics and the discovery that many practices once thought harmful to efficiency or consumers in some cases actually benefit one or both.49 Nonetheless, there are still monopsony cases where courts purport to apply a per se rule. The most notable of these is *National Macaroni Manufacturers Association v. FTC*.50

In *National Macaroni*, macaroni manufacturers faced a shortage of durum

46. *Id.* at 240–41.

47. *See id.* at 240 (“Moreover it is inconceivable that the monopoly so created will have no effects for the lessening of competition in the later interstate phases of the overall activity . . . .”); *see also Blair & Harrison*, *supra* note 5, at 27. It is also interesting to note that Justice Jackson, in dissent, objected to the Court’s assumption that the defendant’s activities affected the market price for sugar and its subsequent reliance on that assumption to establish jurisdiction under the Sherman Act. His objection is based on the following account of the procedure:

On hearing, the trial judge apparently considered that a cause of action would be stated only if the complaint alleged that the growing contracts affected the price of sugar in interstate commerce. But the contracts accompanying the pleadings indicated that the effects ran in the other direction. The market price of interstate sugar was the base on which the price of beets was to be figured. The latter price was derived from the income which respondent and others received from sugar sold in the open market over the period of a year. The trial judge therefore suggested that the references to restraint of trade in sugar in interstate commerce created an ambiguity in the complaint. Accordingly, the plaintiff, at the suggestion of the court and for the specific purpose of this appeal, filed an amended complaint which completely eliminated the charge that the agreements complained of affected the price of sugar in interstate commerce . . . . The District Court then held that since no beets whatever moved in interstate commerce and since there was no charge in the amended complaint that the cost or quality of the product which did move in interstate commerce was in any way affected, no cause of action was stated.


49. *Id.* at 15–16.

50. 345 F.2d 421 (7th Cir. 1965). This discussion is largely dictum, however. Although the court analyzed the legality of the defendants’ behavior under multiple antitrust laws, it held the agreement to be a per se violation of the Federal Trade Commission Act, and thus the court did not formally rule on the claims under the Sherman Act. *See id.* at 427.
wheat due to crop damage. While other lesser-quality grains can be used to make macaroni, the quality of the macaroni depends on how much durum wheat is used; the higher the percentage of durum wheat, the higher the quality of the resulting macaroni. To avoid skyrocketing prices, macaroni manufacturers agreed through a trade association to restrict the percentage content of durum wheat in their products, and thus to restrict their purchases of the input. The Federal Trade Commission objected and alleged that the agreement constituted an illegal agreement in restraint of trade. The Seventh Circuit agreed, stating:

The Supreme Court has held “that price fixing is contrary to the policy of competition underlying the Sherman Act and that its illegality does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable. It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or to decrease prices.”

Thus, even though there was no allegation that consumers were harmed by the agreement, the court held an agreement to fix prices was sufficient for per se illegality.

2. Buyer Agreements with Arguable Consumer Benefit Escape Per Se Condemnation

Most cases are not treated as per se legal or illegal. Instead, courts apply something akin to the quick look. For instance, in Balmoral Cinema, Inc. v. Allied Artists Pictures Corp., movie distributors complained that movie exhibitors agreed to split the rights to show new films among themselves in order to avoid the unfavorable terms that resulted from competitive bidding. Although it found an agreement to do away with competitive bidding, the Sixth Circuit

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51. *Id.* at 424.
52. *Id.*
53. *Id.* at 424–25.
54. *Id.* at 423.
55. *Id.* at 427 (quoting United States v. McKesson & Robbins, Inc., 351 U.S. 305, 309–10 (1956)). The court did note, however, that some cooperative buying arrangements do not run afoul of the antitrust laws: “It seems appropriate to note here that, in the instant case, Commission did not hold ‘that all efforts at product standardization, or all buying agencies or other cooperative buying arrangements, or all attempts to cope with scarcity or other conditions of economic dislocation, are unlawful under the antitrust laws.’” *Id.*
56. See Cal. Dental Ass’n v. F.T.C., 526 U.S. 756, 763 (1999) (“[A]n abbreviated, or ‘quick look,’ rule of reason analysis [is] designed for restraints that are not per se unlawful but are sufficiently anticompetitive on their face that they do not require a full-blown rule of reason inquiry.” (quoting Cal. Dental Ass’n v. F.T.C., 128 F.3d 720, 727 (9th Cir. 1997))).
57. 885 F.2d 313 (6th Cir. 1989).
determined that the case should be tried under the rule of reason, because the economic impact of the arrangement was uncertain. More specifically, the court suggested that the agreement might represent a shift not from competition to monopsony but from a distributor monopoly to a bilateral monopoly that would benefit consumers. In other words, a plausible explanation for why the agreement benefited consumers shifted the case from the per se analysis to rule of reason.

Another instructive case is *North Jackson Pharmacy, Inc. v. Caremark Rx, Inc.* Caremark, a prescription drug buying company, was accused of coordinating a drug buying cartel on behalf of insurance companies, and thus impermissibly driving down the prices paid to pharmacies for prescription drugs. Like in *Balmoral Cinemas*, the court seemed to hold that prior to the agreement, drug prices were at higher-than-competitive levels, suggesting market power on the part of prescription drug sellers. Even though there was an agreement among buyers to drive drug prices down, the court concluded that this agreement arguably benefited consumers and therefore should not be held illegal per se.

Analysis of this case is complicated by the fact that the court seems to conflate the concepts of consumer harm and harm to aggregate efficiency. However, it is clear that the court objects to treating the agreement as per se illegal because that “automatically renders illegal a group buying arrangement...that lowers costs without restricting competition or decreasing

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58. *Id.* at 316 (“Balmoral seems correct in its position that the alleged combination is more akin to practices labeled a ‘group boycott’ or ‘concerted refusal to deal’ than to a vertical non-price restraint.... It does not follow, however, that the conduct of the distributors, the only remaining defendants, constitutes a group boycott which is *per se* illegal.... The Court said that application of the *per se* rule turns on whether the practice facially appears, always or almost always, to tend to restrict competition and decrease output or rather to increase efficiency and competition.... *Per se* analysis should not be extended ‘to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious....’ That is the situation we have here.” (internal citations omitted) (last alteration in original)).

59. As discussed *supra* in Part I.B, “bilateral monopoly” describes a scenario where both the sellers and the buyers have market power in their respective markets. Economists have shown that in theory the equilibrium in such a situation is closer to the competitive equilibrium than it would be if only one group (buyers or sellers) possessed market power. See *supra* Part I.B.

60. *Balmoral Cinemas*, 885 F.2d at 316–17 (“The practice at issue does not facially appear always or almost always to restrict competition, decrease output and raise prices. Rather it may simply lower prices paid by exhibitors to distributors and hence indirectly to producers in a market where the distributors and the producers have historically wielded great market power over film products at the expense of exhibitors. Exhibitors, as purchasers of films, may be justified in combating the market power of film suppliers by group action. Such action may lower prices to moviegoers at the box office and may serve rather than undermine consumer welfare.”).


62. *See id.* at 748–49 (“But an agreement is not anticompetitive because it seeks to lower prices, and antitrust plaintiffs have to do more than complain about their failure to make more money. So the fact that the purpose of the cooperative relationship between Caremark and the Plan Sponsors is to affect drug prices (indeed, to lower them) begs the question whether it does so in a procompetitive, efficiency-enhancing manner that benefits consumers, or whether instead that goal is accomplished through unlawful collusion that drives prices below competitive levels and thereby reduces social welfare.” (citation omitted)).
Thus, because the court believed the lower prices were passed on to consumers for their benefit, the mere wealth transfer from pharmacies to consumers or cartel members was not enough to render the agreement illegal.  

3. The Rule of Reason Focuses on the Agreement’s Effects on Consumers

Cases applying the rule of reason can result either from a showing of an arguable benefit to consumers under the analysis described above or from the fact that, under some circumstances, the rule of reason is applied automatically. There are very few published cases where the court conducts a complete rule of reason analysis. What cases there are, however, seem to demonstrate that the burden remains on the defendant to establish that the agreement is beneficial to consumers.

Telecor Communications, Inc. v. Southwestern Bell Telephone Co. is most aptly described as a monopsonization maintenance case, which, therefore, falls under section 2 of the Sherman Act. Southwestern Bell, which possessed market power in the market for buying payphone locations, was accused of attempting to lock-up such locations through long term contracts in an attempt to prevent others from entering the market. Because the conduct at issue was unilateral, the Court of Appeals for the Tenth Circuit refused to find a per se violation and instead affirmed the lower court’s treatment of the case under the rule of reason. While finding the practice illegal, the court specifically rejected the argument that consumer harm must be shown to make out a monopsony case. In dicta, the court seemed to endorse a view advocated by some economists that harm to competition at any level of the market eventually results in consumer harm. However, it appears that the court’s holding depends on clear precedent rather than on this conclusion. This dictum therefore seems to be merely an explanation for why the Sherman Act was crafted as it was rather than a finding of consumer harm resulting from reduced aggregate efficiency.

An interesting and famous section 1 case is Kartell v. Blue Shield of Massachusetts. There, physicians alleged that Blue Cross used its market power as a buyer to force unwilling physicians to stop balance billing. Since a ban on

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63. *Id.* at 751.
65. 305 F.3d 1124 (10th Cir. 2002).
66. *Id.* at 1134 (“Tenth Circuit case law also appears to reject the notion that a monopsony plaintiff must prove end-user impact . . . . [W]e rejected a monopsony defendant’s argument that injury to sellers without injury to end-users is not cognizable antitrust injury.”).
67. *See id.* at 1135–36 (“Economists too have long recognized that market inefficiencies created by anticompetitive restraints on input markets can be as destructive of a free market economy (and therefore ultimately damaging to consumers) as restraints on output markets . . . . So, even proceeding from the premise that antitrust laws aim only at protecting consumers, monopsonies fall under antitrust purview because monopsonistic practices will eventually adversely affect consumers.”).
68. 749 F.2d 922 (1st Cir. 1984).
balance billing had the effect of fixing, or at least driving down, the prices charged by physicians for their services, the doctors alleged an antitrust violation. The Court of Appeals for the First Circuit, in an opinion by then-Judge Breyer, held that the practice was not illegal. The opinion is confusing, because it incorporates many different strands of antitrust law and is not clear upon which one the holding rests. The case can be read as a straightforward application of the widely accepted antitrust principle that the unilateral exercise of market power does not give rise to an antitrust violation.\(^69\) However, this reading cannot explain why the court goes on to hold that the agreement actually benefits consumers due to the regulatory and market environment in the insurance industry.\(^70\) One way to view this second line of reasoning would be as an explanation of why, even if the insurance company is masking a final, buyer-side cartel, the cartel itself should be treated under the rule of reason and found legal—that is, because of the market and regulatory structure, such a cartel, though normally per se illegal, is beneficial to consumers.

Once courts are in the rule of reason analysis, they do not appear to balance the harms caused to input sellers or efficiency against the benefits that flow to consumers. In other words, a showing of a benefit to consumers seems to entirely trump harm to input sellers. It therefore seems the only way to win a case once a benefit to consumers has been shown is to demonstrate a countervailing and overwhelming harm to consumers that also flows from the agreement. Courts, then, appear to be applying an ancillary restraints model based on the pure consumer harm standard.

C. THE SHORTCOMINGS OF THE ANCILLARY RESTRAINTS APPROACH

Despite its descriptive accuracy, as a theory, the ancillary restraints approach outlined above has a large analytical flaw. While it does successfully differentiate in most cases between those agreements that benefit consumers and those that do not, it fails to answer the fundamental question that monopsony poses for the pure consumer welfare standard: Why should agreements between buyers to fix prices be presumed illegal in the first place? In other words, if the dominant view, that consumer harm is the touchstone of Sherman Act jurisprudence, is correct, why are agreements that do not generally harm consumers presumed illegal? It may seem, at first, that the ancillary restraints approach satisfactorily avoids this problem by providing sufficient escape for agreements

\(^{69}\) See id. at 925; BLAIR & HARRISON, supra note 5, at 64.

\(^{70}\) Kartell, 749 F.2d at 931 (“[T]he relevant economic considerations may be very different when low prices, rather than high prices, are at issue. These facts suggest that courts at least should be cautious—reluctant to condemn too speedily—an arrangement that, on its face, appears to bring low price benefits to the consumer.”). As a factual matter, this assessment of the situation in *Kartell* has been challenged by legal scholars who argue that managed care organizations are far from the benevolent agent of the consumer that then-Judge Breyer perceived them to be. See Peter J. Hammer & William M. Sage, *Monopsony as an Agency and Regulatory Problem in Health Care*, 71 ANTITRUST L.J. 949, 962–64 (2004).
that benefit consumers. The per se condemnation of naked buyer agreements
puts the lie to this response, however, by condemning agreements with no
alleged consumer harm.71

What those advocating for application of the ancillary restraints approach
have failed to explain is why an ancillary restraints approach for monopsony
makes sense if consumer welfare is the standard for antitrust. In particular,
while monopoly and monopsony are directly analogous from an aggregate
efficiency standpoint, they differ in a fundamental way: the harm from monop-
sony flows directly to sellers, not consumers.72 It is not obvious from the mere
fact that monopoly and monopsony are mirror images why, if the goal of
antitrust is to protect consumers from harmful exercises of market power,
collusion among buyers should be presumed illegal.73 What is missing from
these arguments for an ancillary restraints approach, and what is offered in this
Note, is an explanation for why the presumption against buyer agreements is
justified regardless of whether consumers are typically harmed, even though
preventing consumer harm—not increasing overall efficiency—is the underly-
ing purpose of the Sherman Act. While at first this may seem self-contradictory,
this is only so if one conflates the purpose of the Sherman Act with the
legislative judgment it reflects. Before presenting this solution, however, the
next section will explain and critique the solutions offered by others to this
dilemma.

III. ECONOMISTS’ ATTEMPTS TO FILL THIS ANALYTICAL GAP HAVE FAILED

Economists and antitrust scholars recognize the analytical problem that the
presumption against buyer agreements poses for the consumer harm standard.
Some seem to think the ancillary restraints approach successfully avoids it. I
believe I have shown that it does not. Others, however, have attempted to solve
this puzzle in different ways. These attempts fall into two broad categories—
those that argue consumers are generally harmed by monopsony and those that
argue the Sherman Act is intended to protect other parties or society in general
in addition to consumers—and they all largely fail.

A. THE FIRST PROPOSED SOLUTION: CONSUMERS ARE HARMED BY COLLUSIVE
MONOPSONY

Many economists have argued that consumers are in fact harmed by monop-
sony, and that this economic harm justifies the per se rule against buyer

71. Recall that even those agreements that do not benefit consumers may not harm them. See supra
Part I.A.
72. See, e.g., Salop, supra note 3, at 673.
73. See, e.g., Jonathan M. Jacobson & Gary J. Dorman, Monopsony Revisited: A Comment on Blair
& Harrison, 37 ANTITRUST BULL. 151, 151 (1992).
agreements. However, these arguments are ultimately unsatisfying, both economically and legally. For instance, Richard Zerbe argues:

The distinction [between consumer and supplier harm] is unrealizable. The implicit identification of consumer welfare with price changes to consumers (consumer surplus) for a limited set of markets is incorrect. . . . Consumer and producer surpluses are income equivalent measures of welfare. Both measure the loss of satisfaction, and the distinction between them is largely artificial, expedient, and not substantive. There are circumstances in which using price changes as a measure of economic efficiency is justified by ease of use and income differences between parties. The rationale for using economic efficiency as the general standard is the reasonable presumption that consumers will lose from inefficiency wherever it is found. In the final analysis, everyone is a consumer.

Furthermore . . . there is no reason to confine ourselves to the consideration of welfare only in the primary markets. For example, if the price of one good goes down so that it is below marginal costs, prices will fall and there will be a loss of consumer surplus in the markets for substitute goods . . . . In the absence of consumer benefit . . . the presumption should be that the market distortion introduced by the monopsonization will cause consumer harm, both in the output market and in all related markets taken together.

On this theory, the per se rule against naked buying cartels can be justified on the same grounds often used to explain the per se rule against price-fixing agreements between sellers: such agreements so consistently harm consumers that a rule condemning them outright is more efficient than an inquiry into the actual effects of the agreement.

There are many difficulties with this proposed solution. First, to the extent that it depends on the idea that input suppliers are consumers because they “consume” money, it does not even address the dilemma. The pure consumer welfare standard is not a notion that antitrust protects any party that can be described as consuming something or that is the economic equivalent of a consumer. Rather, it is based on a conclusion that Congress enacted the Sherman Act to protect a particular class of people: end consumers of goods. It is only by ignoring the origins and meaning of the consumer welfare standard, and naively substituting its label for its content, that this explanation appears to resolve the underlying issue.

The second problem is that reliance on effects in other markets to show harm

74. See e.g., Noll, supra note 6, at 591 (“[I]f one adopts either the ‘harm to consumers’ standard or the ‘deadweight loss’ standard for evaluating monopsony, exercise of monopsony power is likely to be harmful . . . .”); Zerbe, supra note 2, at 718.
75. See Zerbe, supra note 2, at 718–19, 724.
76. See, e.g., F.T.C. v. Superior Court Trial Lawyers Ass’n, 493 U.S. 411, 434 (1990) (“In part, the justification for per se rules [against naked agreements between sellers] is rooted in administrative convenience. They are also supported, however, by the observation that every speeder and every stunt pilot poses some threat to the community.”).
to consumers has been expressly rejected by the Supreme Court as a permissible approach in antitrust law. In United States v. Philadelphia National Bank, the Court put it this way: “If anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating §7, embark on a series of mergers that would make it in the end as large as the industry leader.” While acknowledging that agreements have effects in other markets, the Court recognized that giving legal recognition to attenuated effects such as these would render the Sherman Act toothless. Legal cognizance of effects in other markets would make it impossible to argue that any agreement is without some procompetitive benefits, or in this case, anticompetitive harms, and would convert every antitrust case into a generalized cost-benefit inquiry.

Finally, the proposal is largely a conflation of the pure consumer welfare and aggregate welfare standards. In fact, this is quite similar to Judge Bork’s “consumer welfare” standard, which has caused so much confusion. Unless one is willing to accept the idea that harm under the aggregate welfare standard implies harm under the pure consumer welfare standard, this explanation cannot suffice. Such an attenuated and generalized inference of harm does not normally suffice for a legal showing of harm. Furthermore, the consumer welfare standard encompasses not just the protection of consumers from efficiency losses but also includes protection from wealth transfers, which an aggregate efficiency standard does not reach at all. There are accordingly many examples of situations where harm under the aggregate welfare standard does not give rise to harm under the consumer welfare standard.

79. See BORK, supra note 1, at 61 (arguing that “consumer welfare” is the only legitimate goal of antitrust); id. at 110 (explaining that because monopolists are also consumers, his “consumer welfare” standard does not consider a shift of income from consumers to monopolistic producers to be “consumer harm”); see also Robert H. Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 HASTINGS L.J. 65, 67 n.2 (1982).
80. An additional and related problem is that antitrust law, traditionally and emphatically, has only taken notice of relatively short-term effects. Thus, for instance, to the extent that Blair and Harrison argue that the presumption against monopsonistic agreements is justified by the long-term effects that such arrangements have on consumers by causing sellers to exit the market and reducing input supply, this argument fails as a legal justification. See Roger D. Blair & Jeffrey L. Harrison, Antitrust Policy and Monopsony, 76 CORNELL L. REV. 297, 316–20 (1991) (arguing that monopsony jurisprudence should be based on the long-term effects of buyer agreements). Even if all market inefficiencies do impact consumers, this does not imply that consumers will be harmed within the traditional time horizon taken into account in antitrust enforcement.
81. See Blair & Harrison, supra note 80, at 315–16 (“Further economic consequences, however, particularly in the context of inelastic supply, require specific attention. Since supply is inelastic, the collusion among buyers will have little impact on quantity in the short run. Thus, in these circumstances, collusion among buyers to depress demand artificially has only distributional significance in the short run.”); Noll, supra note 6, at 610–11 (noting that where monopsonists are able to push suppliers onto the all-or-nothing supply curve, consumers are more likely to benefit than suffer in the short term); Salop, supra note 3, at 673 (“The exercise of monopsony power reduces economic
B. THE SECOND PROPOSED SOLUTION: CONSUMER HARM SHOULD NOT BE THE RELEVANT STANDARD

Others have taken the view that the presumption against buyer cartels comes not from the fact that consumers are generally harmed; instead, they argue that the presumption is grounded in a belief that consumer harm is not what matters or that other harms also matter. These scholars fall mainly into two camps: those who argue that aggregate efficiency should be the yardstick for antitrust harm and those who argue that the Sherman Act protects other identifiable groups to the same extent and in the same way that it protects consumers. Both of these views suffer from a number of flaws, and neither ultimately provides a satisfactory explanation.

Any theory which argues that consumer welfare is not privileged under the Sherman Act (and in antitrust jurisprudence generally) has a number of significant, and likely insurmountable, hurdles to overcome. First, the legislative history of the Sherman Act demonstrates a clear concern for consumer welfare that largely overshadowed other concerns. Second, any such theory cannot explain the overwhelming emphasis that courts and agencies charged with enforcing the Sherman Act place on consumer harm. Either of these obstacles poses serious problems for any theory that would reject consumer harm, but there are additional problems with each particular such theory.

The aggregate efficiency theory is ahistorical and contrary to legislative efficiency but does not necessarily harm consumers. The profitability of exercising monopsony power can come solely from reducing input costs. In particular, when the monopsonist is a perfect competitor in a broad output market in which other suppliers have perfectly elastic supply at the current price, the monopsonist would reduce its input purchases and its output, but the other competitors would expand by an equal amount.”.

82. The most famous of these is Robert Bork. See supra note 79.
83. See Grimes, supra note 64, at 570–71.
84. This is not to say that Congress was unconcerned with market power’s effect on sellers. Rather, the argument is that Congress was specifically concerned with seller harm only to the extent that it was detrimental to competition generally and to consumers. See Lande, supra note 79, at 84–94.
intent. While it may be sound economic policy to argue that antitrust laws should guard against threats to aggregate or allocative efficiency threats, when the Sherman Act was crafted, economists (and, no doubt, legislators) had little understanding of allocative efficiency as a concept. To make aggregate efficiency harms the cornerstone of antitrust jurisprudence would be to ignore the fact that this could not possibly have been the legislature’s intent. Some scholars respond by arguing that protecting aggregate efficiency is the best way to protect consumer welfare, and thus to give effect to Congress’s intent. But while it is generally undebatable that an efficient economy benefits consumers, this benefit is far too indirect to be considered a true consumer welfare standard. Furthermore, such a standard fails to guard consumers against harmful wealth transfers resulting from the exercise of market power.

The theory that the Sherman Act is designed for the protection of other market actors, and not primarily consumers, is based on flimsy evidence and is ultimately unsupportable. Many have read the Court’s pronouncement in Mandeville Island Farms to outline just such a theory of antitrust. There, sugar cane buyers in California were accused by sellers of colluding to monopsonize the sugar cane market. In condemning the agreement, the Court said:

It is clear that the agreement is the sort of combination condemned by the Act, even though the price-fixing was by purchasers and the persons specially injured under the treble damage claim are sellers, not customers or consumers . . . . The [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these.

The Court’s pronouncement in this passage should not, however, be read as a declaration that the purpose (or even a purpose) of the Sherman Act is to protect sellers or competitors. Rather, the Court simply held that certain types of agreements to fix prices are illegal, and that the text of the Act broadly prohibits these agreements regardless of the parties perpetrating (or harmed by) them. In other words, agreements to fix prices are illegal because of the nature of the agreement, not because of the parties to the agreement or the parties harmed.

86. See Lande, supra note 79, at 86–87.
87. See Bork, supra note 1, at 69–70.
88. See supra notes 74–81 and accompanying text.
89. See Telecor Commc’ns, Inc. v. Sw. Bell Tel. Co., 305 F.3d 1124, 1133–34 (10th Cir. 2002); Todd v. Exxon Corp., 275 F.3d 191, 214 (2d Cir. 2001).
91. See Kartell v. Blue Shield of Mass., Inc., 749 F.2d 922, 930 (1st Cir. 1984) (“Of course, a buyer, as well as a seller, can possess significant market power; and courts have held that agreements to fix prices—whether maximum or minimum—are unlawful.”); In re Beef Indus. Antitrust Litig., 600 F.2d 1148, 1159 (5th Cir. 1979) (“The appellants urge that the Supreme Court has recognized that conspiracies aimed at sellers are especially abhorrent. None of the cases they cite, however, establish anything more than the unsurprising proposition that producers damaged by anti-competitive schemes have a remedy under the antitrust laws.”).
The Court explained as much later in the opinion: “The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.”92 The Court thus declared that the agreement was illegal because it represented a forbidden practice—price fixing—and that anyone directly harmed by the agreement had standing to sue.93

None of the economists’ attempts to fill the analytical gaps in monopsony theory have succeeded in effectively doing so. The next section offers what I argue is the correct solution and explores the implications of that solution for ancillary restraints theory and jurisprudential practice.

IV. THE ANCILLARY RESTRAINTS APPROACH IS ANALYTICALLY COHERENT, BUT ONLY IF THE LAW IS TAKEN INTO ACCOUNT

Antitrust scholars’ attempts to justify the courts’ condemnation of collusive monopsony have failed. In this Part, I argue that the common source of this failure is the insistence on viewing antitrust jurisprudence as a pure economics exercise rather than as a process of giving effect to a text representing a legislative judgment.94 By taking this distinctly legal aspect of antitrust law into account, I argue, the apparent theoretical gaps in monopsony jurisprudence can be explained. In particular, while the underlying purpose of the Sherman Act is important to understanding how it should be interpreted, it is a mistake to let that inquiry into the general purpose of the Act displace an inquiry into the specific means for achieving that purpose which are embodied in the Act. It is this decision about the best means for achieving a general purpose—a decision which is properly the role of the legislature and not the courts—that is at the heart of legislative action.95

The Sherman Act mentions neither consumers nor efficiency, but rather it condemns restraints on trade.96 Even assuming that its general purpose is to protect consumers, the Act reflects a legislative judgment that the best way to do that is to preserve competition.97 The reason why naked buyer agreements are

92. Mandeville Island Farms, 334 U.S. at 236.
93. See Blair & Harrison, supra note 80, at 337 (explaining that those who sell to a collusive monopsony have standing because they suffer direct injury from the anticompetitive effects of the agreement).
94. Judge Bork’s approach on this point, much like his approach to the consumer welfare standard, attempts to bridge this gap. In particular, he argues that “[t]he polar models of the Clayton Act and its various amendments, therefore, are ‘competition’ and ‘monopoly.’ Since these are models derived from economics rather than sociology or political science, this usage would seem to rule out all but economic goals.” BORK, supra note 1, at 58.
95. See id. at 53 (rejecting Judge Hand’s interpretation of the Sherman Act as a delegation of a “free value-choosing role to the courts” and noting that if this had been Congress’s intent, the courts should have refused the delegation (presumably by holding it a violation of separation of powers)).
per se illegal is not that they harm consumers nor that they reduce efficiency, although both may be true; rather, such agreements are illegal because they reduce competition.

Here, the term “competition” is used to mean something akin to a “process of rivalry.” Judge Bork was certainly correct that the Sherman Act (and antitrust laws generally) cannot be taken to prohibit all acts that eliminate some rivalry, since the economic consequences of such an interpretation would be so economically disastrous that this could not possibly have been the legislature’s intent. And the Court long ago squarely held that this cannot be the meaning of the Sherman Act. Nevertheless, it seems equally clear that the preservation of rivalry among market participants is a key part of what Congress sought to achieve through the Sherman Act. This is not to say that all agreements that reduce rivalry should be illegal; however, certainly those whose sole purpose is to do so must be.

In this Part, I look to the text of the Sherman Act and argue that, while it is far from precise, it does give some content to antitrust laws. This content, I argue, underlies the Supreme Court’s application of the Sherman Act in a way that is crucial to understanding monopsony jurisprudence. Finally, I use the case of bilateral monopoly to explain why this distinction has practical, as well as theoretical, importance.

A. THE SHERMAN ACT REFLECTS A LEGISLATIVE JUDGMENT THAT COMPETITION BEST SERVES CONSUMERS

Considering the scope of the behavior that it seeks to regulate, the Sherman Act is incredibly vague. It is so vague that some scholars have argued it is, effectively, not a law at all but rather a delegation to the courts by Congress of

98. See also Eleanor M. Fox, What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect, 70Antitrust L.J. 371, 372–73 (noting an alternative to the microeconomic model that focuses on the market mechanism, rather than simply effects, and distinguishing this from a protectionist model designed to benefit small, inefficient firms); cf. Bork, supra note 1, at 58.
99. See Bork, supra note 1, at 58–59.
100. See, e.g., Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 687–88 (1978) (“One problem presented by the language of §1 of the Sherman Act is that it cannot mean what it says. The statute says that ‘every’ contract that restrains trade is unlawful. But, as Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, §1 would outlaw the entire body of private contract law.”); United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), aff’d 175 U.S. 211 (1899).
101. The Court has consistently rejected arguments that agreements to render markets non-rivalrous on price are permissible, even where the defendants argue that price rivalry is not in consumers best interests. See Nat’l Soc’y of Prof’l Eng’rs, 435 U.S. at 685 n.7, 693 (1978) (rejecting defendants’ argument that “[e]xperience has demonstrated that competitive bidding for professional engineering services is inconsistent with securing for the recipients of such services the most economical projects or structures”).
102. This is really just a restatement of the general rule that naked agreements are per se illegal.
the power to enact sensible regulatory policy. Here I argue that while the Sherman Act is far from a comprehensive regulatory scheme, its text remains important. In particular, at a broad level, the text reflects a legislative judgment that the preservation of competition is in the public interest. Regardless of whether the legislature was concerned about preventing harm to consumers or harm to efficiency, the fact remains that it chose to prevent that harm by protecting competition, and it is this judgment that is reflected in the text of the Act.104

Section 1 of the Sherman Act mentions neither consumers nor efficiency. Rather, it reads: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”105 By its text, the Sherman Act makes all agreements restraining trade illegal, regardless of their effects on consumers or efficiency.106 “[I]n restraint of trade” has long been read by courts and scholars to mean “in restraint of competition.”107 The Act, therefore, read literally and broadly, prohibits all agreements between competitors to cooperate rather than compete.108

After a brief period of enforcing this reading, however, it became apparent to courts and commentators that such a literal interpretation was unworkable and could not possibly have been what the legislature intended.109 Rather, the Court held, the Sherman Act prohibits only “unreasonable” restraints on trade, that is, unreasonable reductions of competition.110 Some have treated this introduction of “reasonableness” into the Sherman Act as an outright rejection of the text as

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103. See infra note 111.

104. This is not to say that the Act was intended to preserve rivalry without limits. As the Supreme Court itself has said, such an intent is unthinkable given the consequences of such an act. See supra note 100. The only point here is that Congress generally sought to preserve markets where price was controlled by rivalry rather than by other means, such as by agreements between competitors. While its primary motivation for doing so was that it concluded this would best serve consumers, the precise target of the Sherman Act was the elimination of rivalry as a means for controlling prices.


106. See id.; see also supra note 100.

107. See, e.g., F.T.C. v. Superior Court Trial Lawyers Ass’n, 493 U.S. 411, 422 (1990) (“[R]espondents’ boycott ‘constituted a classic restraint of trade within the meaning of Section 1 of the Sherman Act.’ As such, it also violated the prohibition against unfair methods of competition in § 5 of the FTC Act.” (citation omitted)); Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 290 (1985) (“This Court has long held that certain concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as per se violations of § 1 of the Sherman Act.”); Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 694–95 (1978) (“The Sherman Act does not require competitive bidding; it prohibits unreasonable restraints on competition.”).

108. See, e.g., supra note 100.

109. See supra note 100.

110. See United States v. Addyston Pipe & Steel, 85 F. 271 (6th Cir. 1898), aff’d 175 U.S. 211 (1899); see also Nw. Wholesale Stationers, Inc., 472 U.S. at 289 (“The decision of the cooperative members to expel Pacific was certainly a restraint of trade in the sense that every commercial agreement restrains trade. Whether this action violates §1 of the Sherman Act depends on whether it is adjudged an unreasonable restraint.”).
too vague to provide any guidance and an adoption of the theory of delegation of the duty of economic policy making to courts.\textsuperscript{111} Putting aside the constitutional objections to such a reading, it is nonetheless not the most sensible way to understand the Court’s decision to qualify the Act’s prohibitions.\textsuperscript{112}

The text of the Sherman Act is, admittedly, imprecise. In order to determine the contours of the Act’s prohibitions, then, the Court predictably looked to the legislative history and purpose underlying its passage. In doing so, the Court determined that while the Act prohibited agreements with no purpose beyond the elimination of competition, it was not intended to stand in the way of agreements with other beneficial purposes that also technically restrain competition in some way.\textsuperscript{113} This choice, however, was not a rejection of the text as too vague to provide guidance or as a delegation of a policy-making role to the courts. Rather, the Court chose the more reasonable of two possible levels of generality for the phrase “in restraint of trade.”\textsuperscript{114}

\textbf{B. THE COURT HAS RECOGNIZED THAT THIS JUDGMENT MUST BE RESPECTED}

Although refusing to give the Sherman Act its broadest and most literal reading, the Court has nonetheless made clear that the Act represents a policy judgment that competition best serves consumers.\textsuperscript{115} It is beyond the role of the courts to second-guess such a legislative determination. And therefore, the Court has consistently rejected arguments by defendants that in the case at hand consumers are not, in fact, best served by the preservation of competition.\textsuperscript{116}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{111} For instance, Judge Learned Hand, in \textit{United States v. Associated Press}, 52 F. Supp. 362, 370 (S.D.N.Y. 1943), noted that weighing the costs and benefits of a combination and determining on that basis whether it should be illegal is ordinarily a “legislative” function, but that sometimes courts are “called upon to make similar choices.” He went on to hold: “[W]e have here [in the Sherman Act] a legislative warrant, because Congress has incorporated into the Antitrust Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case.” \textit{Id.}
\item \textsuperscript{112} Such a reading would at least present serious questions about the separation of powers.
\item \textsuperscript{113} \textit{See} Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23 (1979) (noting that many joint ventures technically restrain competition and fix prices, but are nonetheless legal “where the agreement on price is necessary to market the product at all”).
\item \textsuperscript{114} It is interesting to note that, while he strongly rejects the specific reading that I give the Sherman Act here, Robert Bork vehemently objects to Judge Hand’s interpretation of the Act as a broad delegation of legislative powers to the courts. \textit{See} Bork, \textit{supra} note 1, at 53 (“[C]ongress, by its use of common law terminology in the Sherman Act, most certainly did not delegate any such free value-choosing role to the courts. And if it had attempted to do so, the courts should have refused the commission.”); \textit{see also} Mark Popofsky, \textit{Charting Antitrust's New Frontier: B2B}, \textit{9 Geo. Mason L. Rev.} 565, 569–73 (2001) (noting that the introduction of ‘reasonable’ into the reading of the Sherman act did not strip it of all content or render it a license to look only to consumer harm).
\item \textsuperscript{115} \textit{See} F.T.C. v. Superior Court Trial Lawyers Ass’n, 493 U.S. 411, 424 (1990) (“The statutory policy underlying the Sherman Act ‘precludes inquiry into the question whether competition is good or bad.’” (citation omitted)); Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 692 (1978) (“[T]he purpose of [antitrust] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry.”).
\item \textsuperscript{116} \textit{See supra} note 115.
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For example, in *National Society of Professional Engineers v. United States*, Justice Stevens made the point forcefully. The question presented was whether the lower court had erred by refusing to inquire factually into the defendants’ argument that price competition in the market for engineering was contrary to the public interest. Justice Stevens, writing for the Court, held that no inquiry into the factual validity of this argument was required, even under the rule of reason. Acknowledging that Congress “did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations,” the Court noted that the rule of reason “has been used to give the Act both flexibility and definition.” Nonetheless, the Court held that “[c]ontrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint’s impact on competitive conditions.”

Sometimes, the Court reasoned, temporary or limited restraints on competition must be tolerated in order to enhance competition in the entire market or in the long run. For this reason, it concluded, not all cases involving literal restraints on competition can be held per se illegal. The fact, however, that in this sense Section I of the Sherman Act “cannot mean . . . that ‘every’ contract that restrain trade is unlawful,” does not open the door to arguing that competition should be sacrificed to attain other social goals. “The 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.” The purpose of the rule of reason inquiry “is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.”

In the monopoly context, then, the Court has made it clear that where an agreement reduces competition, a defendant cannot escape condemnation by arguing that consumers are not best served by competition. In other words, one cannot successfully argue in court that the legislature made the wrong policy determination. This highlights the problem of treating “procompetitive”

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118. Id. at 681.
119. See id.
120. Id. at 688.
121. Id.; see also Popofsky, supra note 114, at 569–73 (noting the same point).
122. See Nat’l Soc’y of Prof’l Eng’rs, 435 U.S. at 688–89.
123. Id. at 687–88.
124. Id. at 691 (internal quotation omitted).
125. Id. at 692.
126. The DOJ’s Competitor Collaboration Guidelines also make this point explicitly. See *Fed. Trade Comm’n & U.S. Dep’t of Justice, Antitrust Guidelines for Collaborations Among Competitors* §3.36(a) (2000) (“Some asserted efficiencies, such as those premised on the notion that competition itself is unreasonable, are insufficient as a matter of law.”).
as synonymous with “consumer benefit,” because where consumers actually would benefit from the elimination of competition, to hold that this allows the elimination of competition contradicts legislative intent and longstanding Supreme Court precedent.

In enacting the Sherman Act, Congress intended to protect consumers, but the protection took a particular form and was aimed at a very particular sort of harm: Congress protected consumers from the increased prices and decreased choices that generally result from the elimination of competition by prohibiting attempts to decrease rivalry between competitors.127 While concerns about harms to consumers drove the legislation, the statute itself guards against acts, not their effects.128 Courts have rightly recognized that some agreements should not be prohibited by the Act even though they reduce rivalry; however, such a finding is proper only where such reductions are necessary to achieve another purpose and not where the sole purpose is the elimination of rivalry itself—even if the elimination of rivalry is in the best interest of consumers.129 There are certain types of consumer benefit that Courts have rightly recognized that Congress, acting through the Sherman Act, prohibited them from considering: those that come from the elimination of rivalrous competition.130

In National Society of Professional Engineers, the Court unanimously upheld the lower court’s refusal to even consider the defendants’ argument that competition over price was not in the best interests of consumers and the public.131 The defendants argued that, faced with price competition, consumers would choose based only on price, ignoring other important criteria.132 That this argument flies in the face of the basic tenet of economic theory that the consumer will behave rationally seems reason enough for the Court’s skepticism. Nevertheless, the Court went further, making it clear that even were it true that consumers would be better served by the elimination of rivalry on price, the Sherman Act forbade them from even considering such an argument, because it would contradict the policy choice made by Congress.133

Although it has recognized that the Sherman Act cannot be read literally, the Court has consistently held that it nonetheless reflects certain broad policy judgments, which the judiciary should not second-guess. While the mere fact that an agreement eliminates rivalry is insufficient to condemn an agreement with another beneficial purpose, one cannot escape per se condemnation by arguing that the elimination of competition is, itself, in the best interest of

127. See Lande, supra note 79, at 67 (“While it is unanimously agreed that Congress enacted these laws to encourage competition, disagreement continues over Congress’ ultimate goals.”); see also Farrell & Katz, supra note 97, at 2–8.
128. See 15 U.S.C. §1 (Supp. IV 2004); see also supra Part II.A.
129. See supra notes 98–102 and accompanying text.
130. See supra notes 98–102 and accompanying text.
132. Id. at 685 n.7.
133. Id. at 693–95.
consumers. That competition is beneficial to consumers and the public is a determination that has already been made by Congress and must be respected.

C. A FRIENDLY AMENDMENT TO THE CURRENT ANCILLARY RESTRAINTS APPROACH

The recognition that the Sherman Act reflects certain policy judgments does not require the rejection of the ancillary restraints approach to monopsony. Rather, the ancillary restraints model should be maintained, but courts should guard against naively substituting “consumer benefit” for “procompetitive.”

Instead, so-called “procompetitive” benefits should encompass both consumer benefits and efficiency benefits, but only where those benefits arise from something besides the reduction in rivalry itself.

The primary reason for maintaining the ancillary restraints approach is that it generally provides a workable framework for distinguishing between pro- and anti-competitive agreements. As Blair and Harrison convincingly argue, in most cases the ancillary restraints model of monopsony will accurately distinguish between the relevant economic scenarios and condemn only those agreements that actually restrain trade. Furthermore, the ancillary restraints framework has a long history in antitrust jurisprudence and is already familiar to courts. Finally, applying the ancillary restraints framework to monopsony takes into account the symmetries between monopoly and monopsony.

For analytic and jurisprudential reasons, however, one should be careful not to naively substitute “consumer benefit” for “procompetitive benefit” in the first step of escaping per se condemnation. Analytically, such a substitution is problematic, because it conflates the expected benefits of competition with competition itself in a way that makes it impossible to explain the per se rule against buyer agreements. It implies that the reason for the per se rule is the expected harm to consumers from the agreement, which leads to the question of why the per se rule persists in the face of economics showing such harm does not typically result.

Jurisprudentially, such a substitution confuses Congress’s purpose in enacting the Sherman Act with the requirements of the Act itself. This amounts to courts second-guessing Congress’s legislative judgment that competition is in the best interests of consumers. While it is certainly true that there are situations where

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134. Recall that the basic ancillary restraints model is as follows: Agreements between competitors to fix prices are considered illegal per se, unless the defendants make a colorable argument that the agreement is procompetitive. In particular, the defendants must show that: (1) the agreement is procompetitive, (2) the procompetitive benefit of the agreement cannot be achieved without price fixing, that is, it is ancillary to the restraint, and (3) the agreement is no more restrictive than necessary. If the defendant is able to meet this burden, the agreement’s procompetitive and anticompetitive benefits would be weighed under the rule of reason.

135. See Blair & Harrison supra note 5, at 106–07.

136. Id.

137. See supra Part II.A.

138. See supra Part I.A.
consumers and society would benefit from the elimination of competition, the proper way to address such situations is for Congress to create a statutory exception to the antitrust laws.

An ancillary restraints approach to monopsony that takes these concerns into account would be the following: Agreements between buyers to fix prices should be illegal per se, unless the defendants can make a colorable showing that (1) the agreement has a benefit to consumers or efficiency that does not arise from the elimination of rivalry between competitors, (2) the elimination of rivalry between competitors is nonetheless necessary in order to achieve that benefit, and (3) the agreement eliminates no more rivalry than necessary. If the defendant can make such a showing, the court should balance the harm to consumers from the elimination of rivalry against the benefit to consumers from the agreement.

With such an approach, the per se rule against buyer agreements is explicable. Additionally, the framework makes clear how courts have gone astray in their application of the ancillary restraints framework to bilateral monopoly.

In this version of the ancillary restraints approach, the per se rule against buyer agreements without a showing of consumer harm makes sense, even though a showing of consumer benefit allows an agreement to escape that per se rule. The elimination of rivalry (or, as used here, competition) renders such agreements illegal. Nonetheless, this reduction of competition will be tolerated, or at least will not be condemned outright, if it is a necessary part of an agreement with a distinct purpose that benefits consumers or efficiency.

Even though the ancillary restraints approach is the appropriate framework, the courts have misapplied it in the case of bilateral monopoly. The difficulty with bilateral monopoly is that the benefit to consumers from buyer agreements in such situations stems directly from the elimination of rivalry between buyers. In the ancillary restraints model outlined above, then, because there is no benefit to consumers or efficiency that arises from another aspect of the agreement, a bilateral monopoly defense should not allow escape

139. Natural monopolies are the obvious scenario, but a large imbalance in bargaining power might also present a compelling case.

140. Statutory exceptions from the antitrust law for labor unions are a prime example of a situation where Congress created a statutory exception to counteract an imbalance in bargaining power.

141. The distinction between points one and two can be analogized to that between proximate and “but for” causation. The reduction in rivalry or competition must be a “but for” cause of the benefit, but it may not be the proximate cause. BMI is perhaps an example of a situation meeting both criteria. See Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 411 U.S. 1 (1979). There, the organizations formed to negotiate bulk licenses for copyrighted songs were accused of forming an agreement with the individual copyright holders to fix the prices of licenses. The Court held that the licensing scheme had large efficiency benefits, stemming from reduced negotiation costs, and that fixing prices was a necessary part of achieving those efficiency benefits. See id. at 20–21.

142. This is not to say that it represents the correct policy approach to addressing market power concerns, but only that it is the correct way to implement the Sherman Act as that law currently stands.

143. See supra Part I.B.
from the per se rule.\textsuperscript{144} Put another way, the anticompetitive agreement is not ancillary to an agreement with a purpose beyond eliminating competition, albeit eliminating competition for consumer benefit.\textsuperscript{145}

In \textit{Balmoral},\textsuperscript{146} and \textit{Kartell},\textsuperscript{147} the courts incorrectly allowed the benefit to consumers from the elimination of competition to get the defendants out from under the per se rule. Because the agreements eliminated competition, they should have been held per se illegal unless the defendants could have shown a purpose other than eliminating rivalry between, and thus concentrating market power among, the buyers. That in those cases the alleged concentration of market power was itself for the benefit of consumers and efficiency should not have been enough, because, as the Court made clear in \textit{National Society of Professional Engineers}, the determination that competition is the best means for protecting consumers has already been made by Congress and it is not the place of the courts to second-guess it.\textsuperscript{148}

While it may seem that no theory of monopsony jurisprudence that condemns an efficiency-enhancing, pro-consumer agreement can possibly be correct, there are two reasons this outcome should not doom the theory. First and foremost, Congress’s judgment about what policy would best effectuate its goal of protecting markets and consumers may not always be correct in every case. In fact, such accuracy would be downright surprising. However, this does not

\textsuperscript{144}. Cf. Noll, \textit{supra} note 6, at 606–07.

\textsuperscript{145}. It could be argued that even though bilateral monopoly decreases rivalry among buyers, it does not reduce competition. Such an argument could take one of two forms, both of which are opposite sides of the same coin. First, one could argue that while it decreases rivalry among buyers, bilateral monopoly increases the rivalry between the buyers and input seller. The main difficulty with this tack, however, is that parties operating at different levels of a market are not considered competitors, and thus it fails as a matter of common sense. The second version of the argument defines competition as the absence of market power. While buyers and sellers may not be “competitors” in an intuitive sense, by equalizing the bargaining power between them, bilateral monopoly constrains either’s ability to exercise market power. The problem with this argument can be seen most easily by noting that if competition is merely the absence of market power, then any regulated market is, by definition, competitive. This cannot be correct.

It should also be noted that courts have not accepted the “equalization of bargaining power” argument in cases where sellers have attempted to collude in the face of a single large buyer. \textit{See, e.g.}, Md. & Va. Milk Producers Ass’n v. United States, 362 U.S. 458, 464–65 (1960) (noting that without statutory exception, agricultural cooperatives and labor unions would violate the antitrust laws); United States v. Dairy Farmers of Am., Inc., 426 F.3d 850 (6th Cir. 2005) (overturning a grant of summary judgment for dairy farmers on issue of monopolization of market for selling milk to school districts); Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037 (2d Cir. 1980) (citing with approval Justice White’s dissent in \textit{Maryland & Virginia Milk Producers Association} to the extent that the statutory exemption to the antitrust laws created for agricultural cooperatives creates a bilateral monopoly situation benefiting “both the producer and the consumer”); \textit{cf.} Renae Merle, \textit{Rocket Monopoly Approved: Boeing-Lockheed Alliance Likely to Increase Costs}, \textit{WASH. POST}, Oct. 4, 2006, at D1 (reporting that despite acknowledging its detrimental effects on competition and prices, the FTC had approved a joint venture between the two largest rocket manufacturers, because the Department of Defense claimed the venture was in the interests of national security).

\textsuperscript{146}. Balmoral Cinema, Inc. v. Allied Artists Pictures Corp., 885 F.2d 313 (6th Cir. 1989).

\textsuperscript{147}. \textit{Kartell} v. Blue Shield of Mass., Inc., 749 F.2d 922 (1st Cir. 1984).

\textsuperscript{148}. \textit{See supra} notes 98–102 and accompanying text.
change the legal fact that Congress made the judgment that competition is the
best device to protect consumers and memorialized that judgment in the binding
law of the Sherman Act.

Second, Congress may not have the bilateral monopoly situation as wrong as it appears. Bilateral monopoly is far too complex a situation to fully examine here. Instead, pointing to a few of the potential issues should be sufficient to show why condemnation of bilateral monopoly, despite its apparent benefit to consumers and efficiency, may be a good idea. If one takes the existence of monopoly power among the input suppliers as given, then bilateral monopoly appears to be purely efficiency enhancing. However, an important non-legislative force keeping monopoly in check is that monopoly situations often devolve into competitive ones as new sellers, drawn by higher prices, enter markets. The existence of a bilateral monopoly makes this less likely for two reasons: first, it reduces the market price, which decreases the incentives for new entrants and second, it has the potential to limit entry to two-tiered entry, particularly if the input buyers and sellers begin to collude. A final issue is that allowing any collusion between input buyers makes it easier for them to collude not just in the input buying market, but in the output selling market as well. All of these concerns weigh against giving free reign to bilateral monopolists, even if in the short term it results in a benefit to consumers. Furthermore, such concerns may explain why Congress determined that competition, rather than judicial judgments about efficiency, is the best way to protect consumers.

149. See generally Blair & Harrison, supra note 5, at 109–29; Richard D. Friedman, Antitrust Analysis and Bilateral Monopoly, 1986 Wisc. L. Rev. 873.
150. Cf. Blair & Harrison, supra note 5, at 63 (arguing that courts should not interfere with price but instead should only focus on effects resulting from unilateral monopsony, because the supracompetitive prices serve as lure for competitors that will tend to erode the monopsony naturally).
151. In other words, bilateral monopoly may prevent one from entering only the input or purchasing market, forcing the party to enter both simultaneously or neither.
152. It could be argued that since a bilateral monopoly achieves price and quantity close to the competitive level, one should not be concerned if it prevents the market from becoming competitive. The argument goes like this: The Sherman Act was enacted to protect consumers from the high prices that result from the exercise of market power. Since bilateral monopoly achieves the same result, by ensuring prices at the competitive level, there is no reason under the Sherman Act to prefer horizontal competition to vertical bilateral monopoly. There are two problems with this argument. First, although bilateral monopoly ultimately, in theory, arrives at the competitive price and quantity, it only does so after a series of protracted negotiations which are quite costly. Thus, regardless of the price and quantity of goods transacted, the transaction costs of bilateral monopoly arguably make it less efficient than competition. Second, the Sherman Act does not merely guarantee low prices to consumers; it protects consumers from particular acts that the legislature deemed to hurt consumers, that is, agreements that restrain trade. In other words, the legislature chose competition as the means for guaranteeing fair prices to consumers, and that is reflected in the text of the Act and its legislative history. This alone provides a strong reason to prefer competition to bilateral monopoly.
153. See Noll, supra note 6, at 607–08.
CONCLUSION

While effects on aggregate efficiency and consumer prices are important for evaluating legality under the Sherman Act, the Act also places restrictions on the efficiencies and consumer benefits that courts can properly take into account in evaluating agreements. Recognizing the textual and legislative commitment to competition over other means of obtaining efficiency or low consumer prices fills the gap in the ancillary restraints model of monopsony and makes it theoretically coherent. This theory takes into account both the role of law and the role of economics in applying the Sherman Act. Furthermore, this point has implications beyond theory, particularly in situations, such as bilateral monopoly, where the competitive solution may diverge from the most efficient solution or the solution most favorable to consumers. While this divergence may provide a case for asking the legislature to rethink the Sherman Act or to provide statutory exceptions where competition does not adequately protect consumers, it does not justify ignoring the text and history of the Sherman Act simply to achieve what courts and commentators view as sound economic policy; determining such a policy is a job for Congress, not the courts.