WHAT DO WE MEAN BY HARM TO THE COMPETITIVE PROCESS?

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Persistent ambiguity surrounds the widely accepted view that antitrust law exists to prevent "harm to the competitive process." While interpretations of this phrase typically divide along familiar ideological lines, ambiguity in the meaning of harm to the competitive process presents an opportunity for dialogue. This essay advocates for more explicit interrogation of the normative criteria that define what constitutes harm to the competitive process. Thoughtful evaluation of the alternatives may support more robust, consistent, and accountable application of antitrust principles.

I. INTRODUCTION

No statement about the goals of U.S. antitrust law comes close to matching the authority of the proposition that antitrust law exists to protect competition and to prevent harm to the competitive process. In its first serious effort to articulate the substance of Section 1's rule of reason standard in *Chicago Board of Trade*, the Supreme Court equated "the true test of legality" with the question "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."[2] In modern shorthand, we would say that the rule of reason is offended by agreements that harm the competitive process.

Since that decision, the Court has rarely ventured far from the competitive process benchmark. Outside of situations like "boycott-related per se rule[s]," Section 1 plaintiffs are required to "prove harm, not just to a single competitor, but to the competitive process."[3] The purpose of Section 2 has been held not to be the protection of businesses but the protection of the public "against conduct which unfairly tends to destroy competition itself."[4] Even a dominant firm's imposition of "painful losses" on its competitors "is of no moment to the antitrust laws if competition is not injured."[5] In merger cases, Section 7 is said to reflect "congressional concern with the protection of competition, not competitors."[6] The Robinson-Patman Act has been held to "proscribe[] only price discrimination [that] threatens to injure competition."[7] And, of course, the underlying objection to collusion is now understood to be that it "deprives the marketplace of independent centers of decisionmaking,"[8] thereby impairing the diversity of economic interest that constitutes competition.[9]

For the most part, academics and practitioners agree that antitrust is about preventing harm to the competitive process — though what they understand this to mean varies rather dramatically from one thinker to the next. Some, like Robert Bork, equate cognizable harm to the competitive process with injury to consumer interests,[10] at least for a sufficiently flexible definition of what counts as "consumer" interests.[11] Others, like Greg Werden, understand harm to the competitive process to mean something closer to process-oriented proscriptions of specific conduct and changes in market structure.[12] Still others, like Jonathan Kanter, use prevention of harm to the competitive process more holistically, meaning something like the preservation of rivalry in order to promote "progress, quality, and innovation" as well as democratic values, diversity of choice, and opportunity,[13] perhaps with the added gloss that these underlying causal relationships should not need to be proved on a case-by-case basis. There are other possibilities besides these. Harm to the competitive process could be measured by output suppression or the exercise of market power,[14] or by the frustration of competitive dynamics,[15] to name a few of the candidates.

This breadth of possibility in what it means for something to harm the competitive process is interesting. The durability and appeal of the "harm to the competitive process" benchmark may derive, in significant part, from its ability to capture different conduct at different times and in different contexts.[16] But this same flexibility raises unsettling questions. What within the broad scope of possible interpretation is the consensus

2 *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

3 *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998).

4 *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).

5 *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993).

6 *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

7 *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 165–66 (2006) (internal quotation marks removed).

8 *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 195 (2010).

9 An alternative framework might differentiate between exploitation and exclusion. See Eleanor M. Fox, *What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 70 Antitrust L.J. 371 (2002).

10 Robert H. Bork, *Antitrust and Monopoly: The Goals of Antitrust Policy*, 57 Am. Econ. Rev. 242, 242 (1967).

11 *Cf.* Kenneth Heyer, *Consumer Welfare and the Legacy of Robert Bork*, 57 J. L. Econ. S19, S20 (2014) (arguing that "by consumer welfare Bork meant total welfare").

12 Gregory J. Werden, *The Competitive Process Standard*, 86 Antitrust L.J. 579 (2024).

13 Jonathan Kanter, Antitrust Enforcement: The Road to Recovery (Remarks as Prepared for Delivery at University of Chicago Stigler Center, Apr. 26, 2022), https://www.justice.gov/archives/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler.

14 See A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 Rev. Indus. Org. 741 (2019).

15 See Rebecca Haw Allensworth, *Long-Term Consumer Welfare*, Vand. L. Rev. (forthcoming).

16 *Cf.* Jonathan B. Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 Fordham L. Rev. 2175, 2180-92 (2013) (describing a related political bargain over antitrust's objectives).

understanding of the purpose of antitrust law? How do we know that something is anticompetitive? What do we (and the Supreme Court) mean when we say that antitrust law exists to prevent harm to the competitive process?

II. THE PROBLEM

The inescapable problem with this benchmark — "harm to the competitive process" — is that the concept itself is a category error. A "process" cannot be "harmed." Abstract ideas like "competition" cannot be injured, destroyed, or anything else. True, the way that competition unfolds can be changed by the actions of market participants, regulators, and others. And we might easily conclude that a particular change is for the better or for the worse. This is the familiar sense in which commentators invoke the idea of "harm to the competitive process" today. But note that in drawing the conclusion that a change in competition has been for the better or worse, we are relying on external normative criteria. Nothing in the raw concept of "harm to the competitive process" serves to identify anticompetitive injury.

This point is easiest to see in the context of concrete examples. Consider the following changes in the competitive process and the corresponding evaluative questions.

- In a city with 8 equally sized competitors, two competitors merge in a way that leaves the post-merger competitor bigger than the others and better able to negotiate cost reductions from its suppliers. Has this merger helped or harmed the competitive process?[17]
- In a context where buyers compete to acquire products through decentralized auctions, an overwhelming share of buyers agree to standardize the rules of bidding in a way that restricts the times and prices at which purchases can be made. By this act of self-regulation, has competition been promoted or destroyed?[18]
- In competition with a dominant incumbent seller, one startup after another is driven out of business when the incumbent seller cuts its prices to just below those of its rival (but above its own costs) — holding them there until the startup exits the market. Is the dominant firm injuring the competitive process, or is it engaged in the competitive process?[19]

In all three of these examples, there is space for competition before *and after* a change in the competitive process. "Competition" is neither created nor destroyed but the way competition unfolds is changed. We can always compare different states of a competitive process, and it is easy enough to imagine criteria we could use to evaluate the desirability of these changes. But that is precisely the point: to label a change in the competitive process as "good" or "bad" we must invoke some external normative criteria for saying what makes the respective change desirable or not.

As a simplistic example, suppose we adopt the normative position that all we care about is minimizing the concentration of competitors in a market. By this metric, the changes in the first and third examples constitute harm the competitive process; the second does not. Alternatively, we could say that our normative criteria is maximal flexibility in choice and competitive opportunity. By this metric, the changes in the second and third examples would seem to constitute harm to the competitive process; the change in the first example is ambiguous.

Of course, nothing compels us to adopt these simplistic normative criteria. Indeed, nothing requires that we adopt a fixed set of criteria, or that the same criteria be used in every setting. The important point, here, is simply that we need some normative basis for identifying what counts as harm to the competitive process. The problem with "harm to the competitive process" as the consensus focus of antitrust law is that it fails to surface what normative criteria are being used and why. The previously noted diversity in understanding about what counts as harm to the competitive process is really just diversity in opinion about what normative criteria should be used to evaluate changes in the competitive process.

III. THE OPPORTUNITY

Looked at this way, the concept of harm to the competitive process is not a standalone legal standard but instead a commonly accepted framework in which different normative criteria can be adopted, joined, ordered, and rejected. This presents an interesting opportunity. The different

17 Einer Elhauge poses a similar hypothetical in making a related point. Einer Elhauge, *Should the Competitive Process Test Replace the Consumer Welfare Standard?*, Promarket (May 24, 2022), https://www.promarket.org/2022/05/24/should-the-competitive-process-test-replace-the-consumer-welfare-standard/.

18 *Cf. Chicago Board of Trade v. United States*, 246 U.S. 231 (1918).

19 *Cf.* Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 Yale L.J. 941 (2002).

schools of antitrust thought have often struggled to find the common meaning and vocabulary needed for constructive dialogue.[20] But on the point that antitrust is concerned with harm to the competitive process, nearly all appear to be united. And within this unifying framework, perhaps there is progress to be made. As a tentative exploration of this thought, consider how some of the common arguments about the goals of antitrust law can be recast as ways of giving normative content to what it means for something to constitute harm to the competitive process.

A. Harm to Consumers and Trading Partners

One obvious way to give normative content to the harm-to-competitive-process benchmark is to adopt the consumer welfare standard: a change in the competitive process could be said to constitute harm to the competitive process if it is shown to — or if it predictably would — operate to the disadvantage of consumer interests. An immediate complication is that we must further disambiguate what we mean by "consumer interests." Like the broader concept of harm to the competitive process, the notion of harm to "consumer welfare" admits surprisingly varied interpretations.[21] It could be interpreted literally as wealth transfers from consumers to producers.[22] It could be interpreted figuratively as certain forms of wealth transfers from one trading partner to another.[23] Or it could be interpreted as a term of art, signifying reductions in output or traded volume.[24]

While the consumer welfare standard is much maligned today,[25] it is difficult to see how it could ever be disregarded as a normative criterion for identifying harm in antitrust law. True, its claimed primacy in the legislative history of the Sherman Act has been sharply critiqued.[26] But the Supreme Court's reliance on consumer welfare reasoning across multiple opinions renders academic any claim that the standard has no place in antitrust analysis. Yes, the pedigree of the Court's oft-cited commentary in *Reiter v. Sonotone*[27] is evergreen fodder for debate, but reliance on some form of consumer welfare reasoning underlies a number of the Court's subsequent opinions.[28] The legislative history of the Sherman Act also indicates, unambiguously, that price elevation (a consumer interest) was among the evils that the antitrust laws were expected to address.[29]

Note that the proposition advanced here draws strength from its narrow scope. It is hard to deny that some form of consumer welfare focus constitutes a reasonable normative criterion for identifying harm to the competitive process. For present purposes, we needn't say more. Accepting this proposition does not compel agreement that the consumer welfare standard is unique in serving this normative role, nor that it takes precedence over other normative criteria.

B. Harm to Competitors and Opportunities

Indeed, as much as the legislative history of the Sherman Act demonstrates congressional concern with price elevation, what it demonstrates more clearly is congressional concern with harm to competitors. The legislative history and surrounding context strongly suggest that injuries to competitors were deemed more troubling than injuries to consumer interests.[30] A representative example of this primary concern with competitor interests can be found in the statements of Representative William Mason of Illinois in support of the Sherman Act:

> *Some say that the trusts have made products cheaper, have reduced prices; but if the price of oil, for instance, were reduced to 1 cent a barrel it would not right the wrong done to the people of this country by the "trusts" which have destroyed legitimate*

20 See Eleanor M. Fox, *Against Goals*, 81 Fordham L. Rev. 2157 (2013).

21 *Cf.* Barak Orbach, *How Antitrust Lost Its Goal*, 81 Fordham L. Rev. 2253, 2277 (2013) ("As a standard for competition laws, 'competition' is not more confusing or abstract than 'consumer welfare,' which has no particular meaning in antitrust.").

22 E.g. Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L.J. 65, 68-70 (1982).

23 E.g. Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 Yale L.J. 1996, 2000–2001 (2018).

24 E.g. Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 Yale L.J. 373, 375 (1966).

25 See *supra* note 14.

26 See e.g. Orbach, *supra* note 21.

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

28 E.g. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) ("[U]nsuccessful predation is in general a boon to consumers."); see also Elhauge, *supra* note 17 (discussing other opinions).

29 See 1 Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 103a (4th ed. 2013).

30 See *id.*, ¶ 103, at 42–43 ("[W]hile the framers of the Sherman Act were intent on condemning 'monopoly,' they saw the principal injury of monopoly as reach-competitors rather than consumers.").

competition and driven honest men from legitimate business enterprises.[31]

While antitrust opinions have sometimes evidenced a willingness to protect individual competitors from the aggressive acts of other competitors,[32] it is remarkable that harm to individual competitors and competitive opportunities is so readily dismissed as beyond the scope of harm to competition today. In *Brooke Group*, the Supreme Court declared that "Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws."[33] This would probably come as a shock to the Congress that passed the Sherman Act. It also strikes a questionable normative position. Why shouldn't the malicious injury of a competitor count as the type of harm to the competitive process that the antitrust laws are meant to address?

The obvious answer is that competition nearly always disadvantages at least some of the involved competitors, and that the reciprocal price of every person's right to compete is the absence of any legal right to object when others exercise their own right to compete. This point has been made countless times. It was put particularly well by Lord Justice Fry in the *Mogul Steamship* case:

> *To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the Courts. Competition exists when two or more persons seek to possess or to enjoy the same thing: it follows that the success of one must be the failure of another, and no principle of law enables us to interfere with or to moderate that success or that failure so long as it is due to mere competition.*[34]

But this answer, like most, speaks only to the right to injure competitors by "mere competition." Is malicious injury to a competitor an act of "mere competition?" Indeed, what is "mere competition?" Predicable responses include statements like competition that is "lawful," "legitimate," or "just,"[35] or competition that is "on the merits."[36] But these substituted labels only invite further definition, if they are not fundamentally circular from the start.

C. Proscribed Modes of Conduct and Unfairness

It might seem like a promising way to escape circularity is to define ideas like "mere competition" or "competition on the merits" as the negative of a set of specifically proscribed modes of unfair conduct and undesired changes in market structure. It is easy enough to build agreement around the idea that price fixing is unfair and should not be condoned. To varying degrees, support could also be marshalled for the ideas that market division, group boycotts, efforts to raise rivals' costs, predatory pricing, price discrimination, tying, and restrictive resale terms are unfair. When looking at something like a horizontal merger, the elimination of competition between rivals of appreciable size could be opposed for its effect on market structure alone.[37] In short, a change in the competitive process could be labeled harmful — illegal, unfair, not on the merits — if it approximated any of a number of proscribed acts, with or without the demonstration of consequences beyond this categorical assignment.[38] Tim Wu has suggested something similar in the idea that antitrust law should be understood as setting the "rules of the game" for competition.[39]

The pragmatic appeal of this approach could be great with a reliable method for deciding what conduct was fair or unfair, and what changes in market structure were neutral or negative. But the fairness of challenged conduct might not be a topic upon which there is as much agreement as initially appears. The evasiveness of fair prices has long been known.[40] Codes of Fair Competition, once promulgated under the National Industrial Recovery Act, would strike many today as manifestly unfair. Congress invested remarkable effort into debating the meaning of

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31 21 Cong. Rec. 4100 (1890).

32 E.g. *Utah Pie Co. v. Cont'l Baking Co.*, 386 U.S. 685, 690–91 (1967).

33 *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993).

34 *Mogul S.S. Co. v. McGregor, Gow & Co.*, (1889) 23 Q.B.D. 598, 625–26 (C.A.) (Fry, L.J.).

35 *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898).

36 E.g. Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice*, Competition Pol'y Int'l (Apr. 2018), https://www.competitionpolicyinternational.com/after-consumer-welfare-now-what-the-protection-of-competition-standard-in-practice/.

37 See Werden, *supra* note 12, at 637.

38 *Cf.* Melamed & Petit, *supra* note 14, at 746 (defining the consumer welfare standard to include a proscribed-conduct element).

39 Wu, *supra* note 36, at 2.

40 See *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397–98 (1927).

"unfair competition," but made little progress.[41] Competition itself might seem unfair: by the norms of industry participants, to enter the territory of a competitor "might be a good way to turn a quick dollar but that doesn't make it right."[42]

This indeterminacy in the meaning of "fairness" could, of course, be reduced by defining fair conduct by reference to other normative criteria. With creative license, fair competition could be defined as efficient competition.[43] Or it could be judged by the predicted consequences of the conduct for trading partners, competitors, or others; unfair conduct and disfavored market structures could be understood as those that do not adequately protect the interests of one interested group or another.[44] But all these refinements would simply make other normative criteria the real drivers in classifying changes in competition as good or bad. Fairness, and rules of the game, would merely act as abstract summaries of more basic norms and considerations. The critical question for defining "rules of the game" would thus be the exact same question we are presently interrogating: what normative criteria should we use to identify harmful changes in the competitive process?

D. Rivalry, Dynamic Competition, and Social Considerations

Those basic normative criteria could include the immediate interests of consumers, trading partners, and competitors — as already discussed — but they could include more. The competitive process could serve broader social and political ends, and harm to the competitive process could be understood in terms of consequences for these ends. James May summarizes the legislative record of the early years of antitrust as follows:

> *The debates do not suggest that a majority of congressmen in 1890, or even in 1914 . . . perceived intrinsic or inevitable conflict among the core political and economic elements that were traditionally thought to be in natural harmony. Instead, the debates appear to indicate a widespread congressional commitment to the long-established ideals of economic opportunity, security of property, freedom of exchange, and political liberty, and considerable hope that antitrust law might prove to be an effective vehicle for their substantial, simultaneous realization.*[45]

Put another way, the legislative history of the antitrust laws indicates at least the aspiration that competitive rivalry, and diversity within open competitive structures, would serve social ends both immediate and eventual. The concerns of earlier Congresses with the interests of small businesses, entrepreneurs, and farmers can be understood literally today,[46] but can also be viewed as a now familiar argument that future competition is promoted by providing startups and nascent technologies with room to grow.[47] A change in the competitive process could be deemed harmful by reference to any of these social, political, and economic ends.

Again, however, there are complications. May's acknowledgment of (unrecognized) potential conflicts in the simultaneous pursuit of different political and economic ends is one example. Potential conflicts are hardly unique to this set of normative criteria; conflicts are at least as evident between the interests of consumers and competitors. But the need to resolve conflicts and decide priorities is perhaps more pronounced in this context, given the breadth of interests that might need to be balanced and the extended timescales over which those interests might need to be considered.[48]

A more serious challenge for some of these criteria is likely to be the absence of a clear causal link between market conditions and the objective to be served. Despite their vagueness and generality — or perhaps because of it — the antitrust laws have rarely been construed to permit relief without a credible nexus between conduct and predicted effects.[49] Even the generously prophylactic standard of Section 7 has been

41 Gilbert Holland Montague, *Unfair Methods of Competition*, 25 Yale L.J. 20 (1915).

42 *Bell Atlantic Corp v Twombly*, 550 US 544, 551 (2007).

43 See Werden, *supra* note 12, at 624 (citing examples of this suggestion).

44 *Cf.* Draft Guidelines on the Application of Article 102 of the Treaty on the Functioning of the European Union to Abusive Exclusionary Conduct by Dominant Undertakings, Eur. Comm'n § 3.2 (Mar. 2024), https://competition-policy.ec.europa.eu/document/download/39c8d72e-5756-4feb-9c24-ab0885dec6bf_en?filename=guidelines_application_of_article_102_TFEU.zip.

45 James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 Ohio St. L.J. 257, 288 (1989).

46 *See* Eleanor M. Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window*, 61 N.Y.U. L. Rev. 554, 563–66 (1986).

47 *Cf.* Kevin A. Bryan & Erik Hovenkamp, *Startup Acquisitions, Error Costs, and Antitrust Policy*, 87 U. Chi. L. Rev. 331 (2020).

48 See Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, 94 Notre Dame L. Rev. 583, 583, 585 (2018) (discussing conflicts among social and political objectives).

49 But *cf. FTC v. Morton Salt Co.*, 334 U.S. 37, 49–50 (1948) (accepting "evidence sufficient to show that the less-than-carload purchasers might have been handicapped in competing with the more favored carload purchasers" as sufficient to show a violation of Section 2 of the Clayton Act); *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) (embracing the inference of causation from exclusionary conduct in monopoly maintenance cases).

understood from the start to demand more than speculation about future competitive effects.[50] Demonstrating a causal link between changes in market structure and these dynamic and social considerations does not mean proving causality with mathematical rigor. Not even the familiar inference of market power from market structure evidence can claim that foundation.[51] But it probably is not enough simply to hope that unconcentrated market structures will promote political liberty, for example. The important work is in demonstrating, persuasively, that the relevant causal links exist.[52]

IV. CONCLUSION

The argument that we should better interrogate what we mean by harm to the competitive process is not a new position. Writing in 1894, Oliver Wendell Holmes Jr. remarked on the complex issues raised by cases in which business people, by their conduct and interactions, cause injury to others.[53] Holmes mused that if injuries arising from competition were not legally actionable, then it must be because they were privileged; and if they were privileged, it must be because free competition generally worked to the advantage of the public.[54] Put another way, Holmes recognized that the freedom to engage in different forms of competition was a question of policy, in which the competing interests of individual businesses and the public were in the balance.[55] In contemplating how these policy questions should be decided, Holmes specifically warned against the danger of uninterrogated assumptions and reasoning:

> *I make these suggestions . . . to call attention to the very serious legislative considerations which have to be weighed. The danger is that such considerations should have their weight in an articulate form as unconscious prejudice or half conscious inclination. To measure them justly needs not only the highest powers of a judge and a training which the practice of the law does not insure, but also a freedom from prepossessions which is very hard to attain. It seems to me desirable that the work should be done with express recognition of its nature. The time has gone by when law is only an unconscious embodiment of the common will. It has become a conscious reaction upon itself of organized society knowingly seeking to determine its own destinies.*[56]

It is time we heeded Holmes's warning. We may excuse past Congresses for having dodged the legislative responsibility of clearly articulating and resolving these difficult weighing problems. But if we extend this grace to Congress, then the responsibility becomes our own. We should shoulder the burden of at least trying to state clearly and expressly what counts as harm to the competitive process *and why*. The answer to this fundamental question is — as Holmes says — no less than our own conscious determination of our collective social and economic destiny.

50 *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 & n.39 (1962).

51 See Sean P. Sullivan, *The Evolution (and Devolution) of Market Structure Reasoning, in* The 2023 U.S. Merger Guidelines - A Review 147 (Sean Sullivan ed., 2024).

52 See e.g. Eleanor M. Fox, *Antitrust and Democracy: How Markets Protect Democracy, Democracy Protects Markets, and Illiberal Politics Threatens to Hijack Both*, 46 Legal Issues Econ. Integration 317 (2019).

53 Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 Harv. L. Rev. 1, 3–4, 8–9 (1894).

54 *Id*. at 3 (referencing "the economic postulate that free competition is worth more to society than it costs").

55 *Id*. at 9.

56 *Id*.