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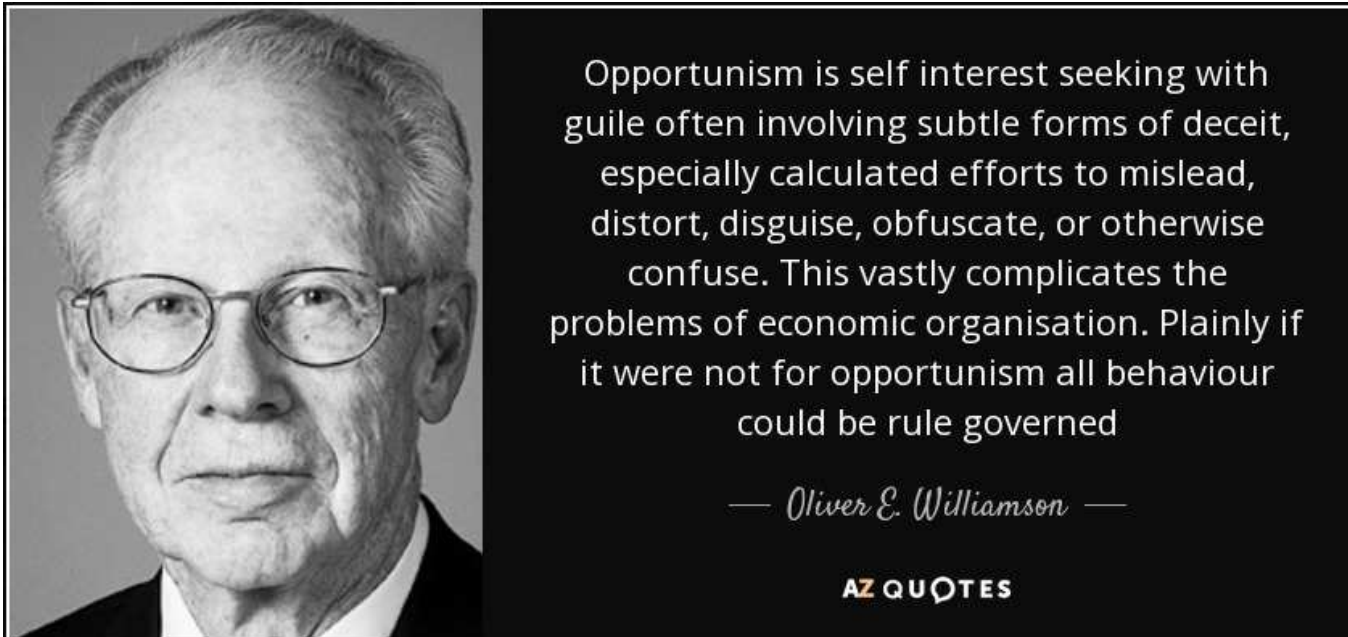
***The Patent Hold-up Debate:
A Critical Re-assessment***

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Definitional Debate: what “is” patent hold-up?

- Williamson: opportunism with guile?
- Leveraging lock-in to extract (excessive) rent?
- Threatening to seek injunctive relief against infringers?
- Maximizing patent returns?



Three axes of the Hold-Up Debate

1. Empirical

- There is no empirical (marketwide? systemic? Statistical?) evidence of hold-up, so we don't know whether it's actually happening

2. Effects

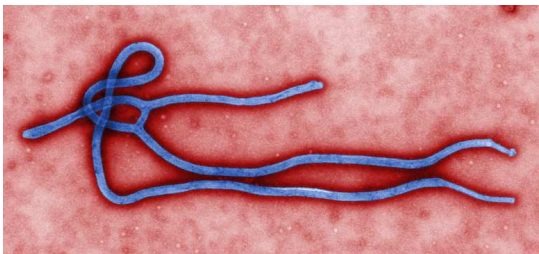
- Even if there were some hold-up, the market is doing so well that it can't be a real problem

3. Distraction

- What about *hold-out*? That's bad too!
- Does this excuse/mitigate hold-up?
- No good guys in this story?

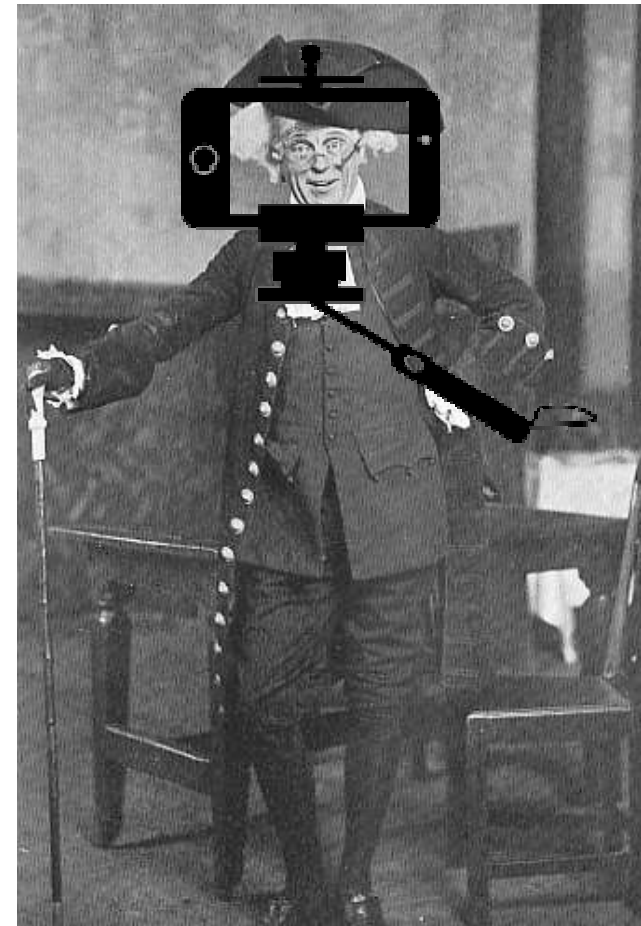
1. Empirics: The Search for Hold-up

- Direct evidence obscured from market/scholars
- But this is the *kind* of market where it is likely to arise (Shapiro)
- Search for *secondary* effects
 - Reduced output and increased prices? (Galetovic, Haber)
- But anecdotal evidence abounds
- Action (regulatory, SSO) taken on basis of theoretical possibility may have reduced prevalence
 - The “Ebola effect”



2. Effects: Do we live in the best of all possible worlds?

- The wireless telecom market is characterized by increasing functionality and decreasing prices (Mallinson, Gupta)
 - How can there be hold-up in such an amazing market?
- But what's the counterfactual?
- Anticompetitive conduct can occur even (especially?) in markets with positive indicators
 - Historical examples exist



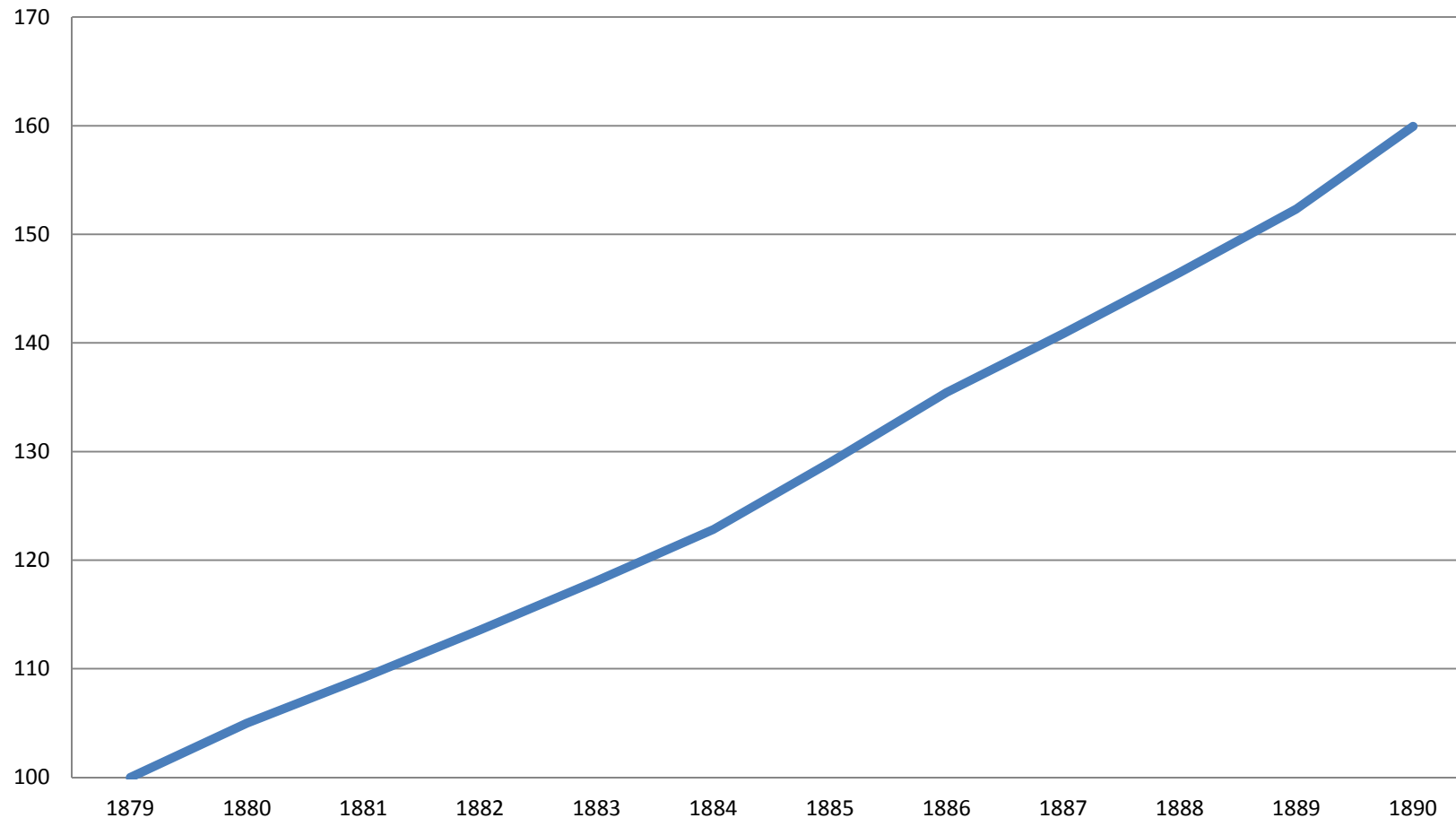


Sherman Antitrust Act of 1890

Reductions of Output?

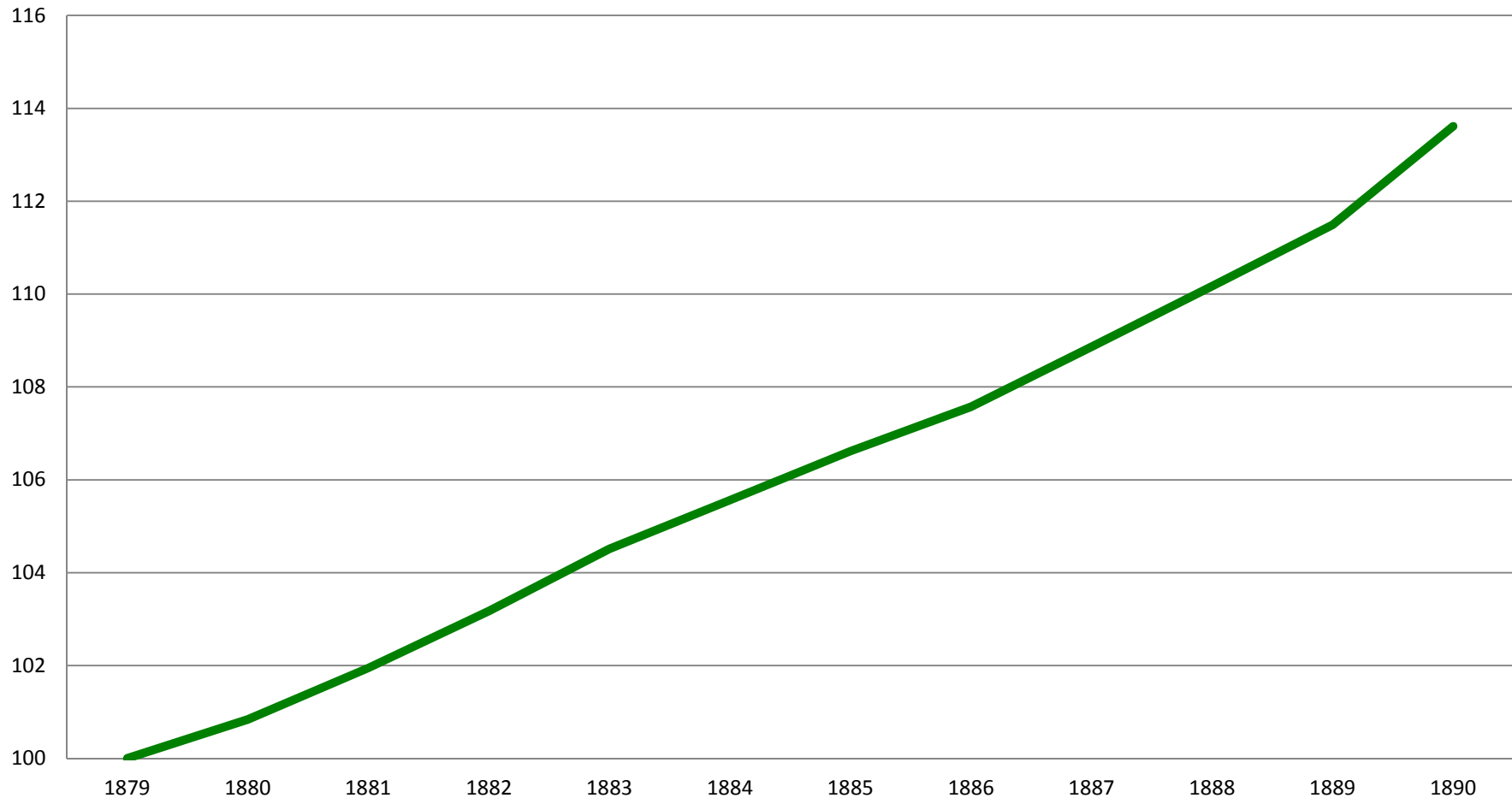


U.S. Output 1880-1890: Salt



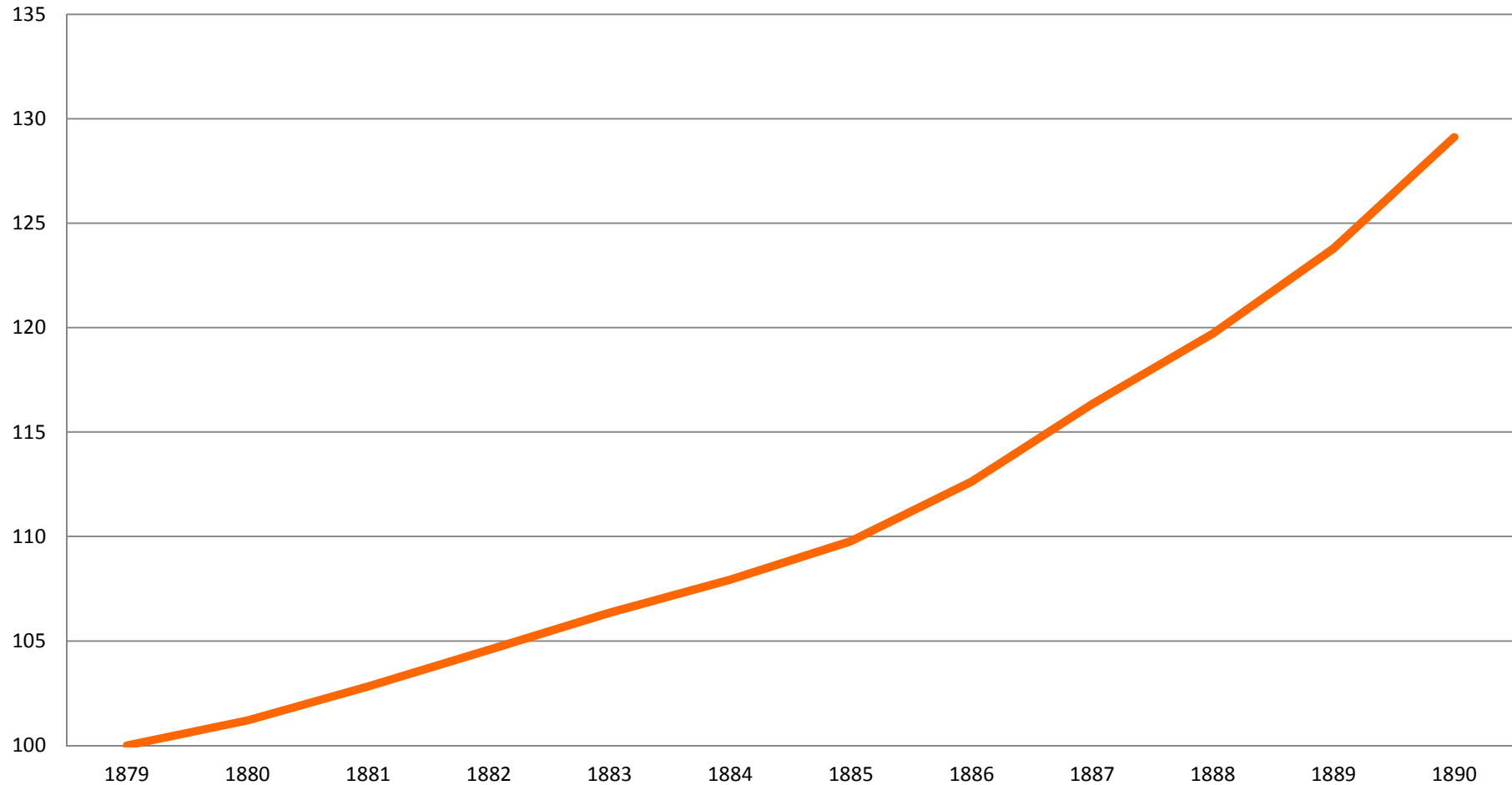
Source: Thomas J. DiLorenzo, *The Origins of Antitrust: An Interest Group Perspective*, 5 Intl. Rev. L. Econ. 73, 78-79 (1985) (citing US Bureau of the Census, Statistical Abstract of the U.S., various years and US Bureau of the Census, Historical Statistics of the U.S.)

U.S. Output 1880-1890 : Petroleum



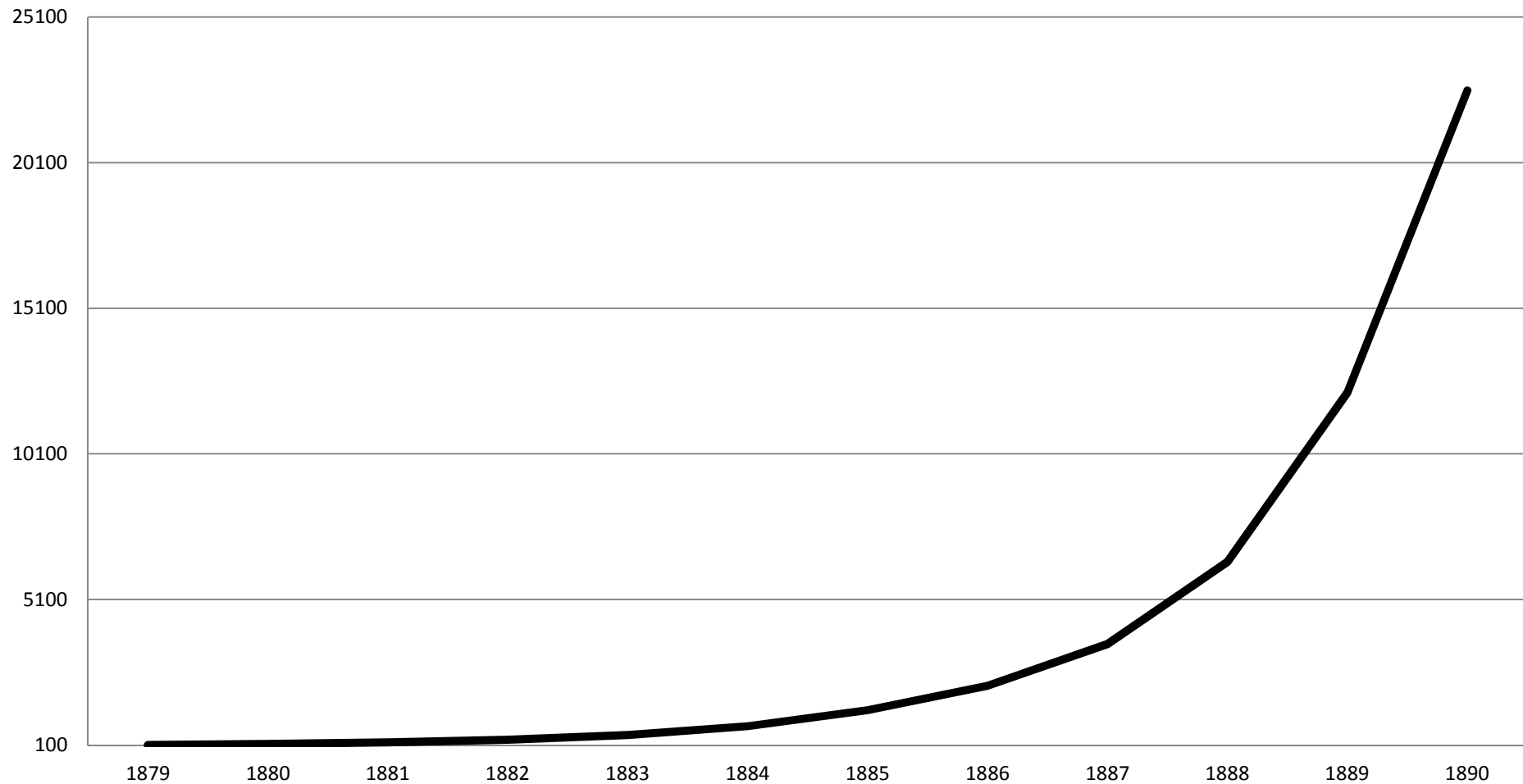
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U.S. Output 1880-1890: Steel



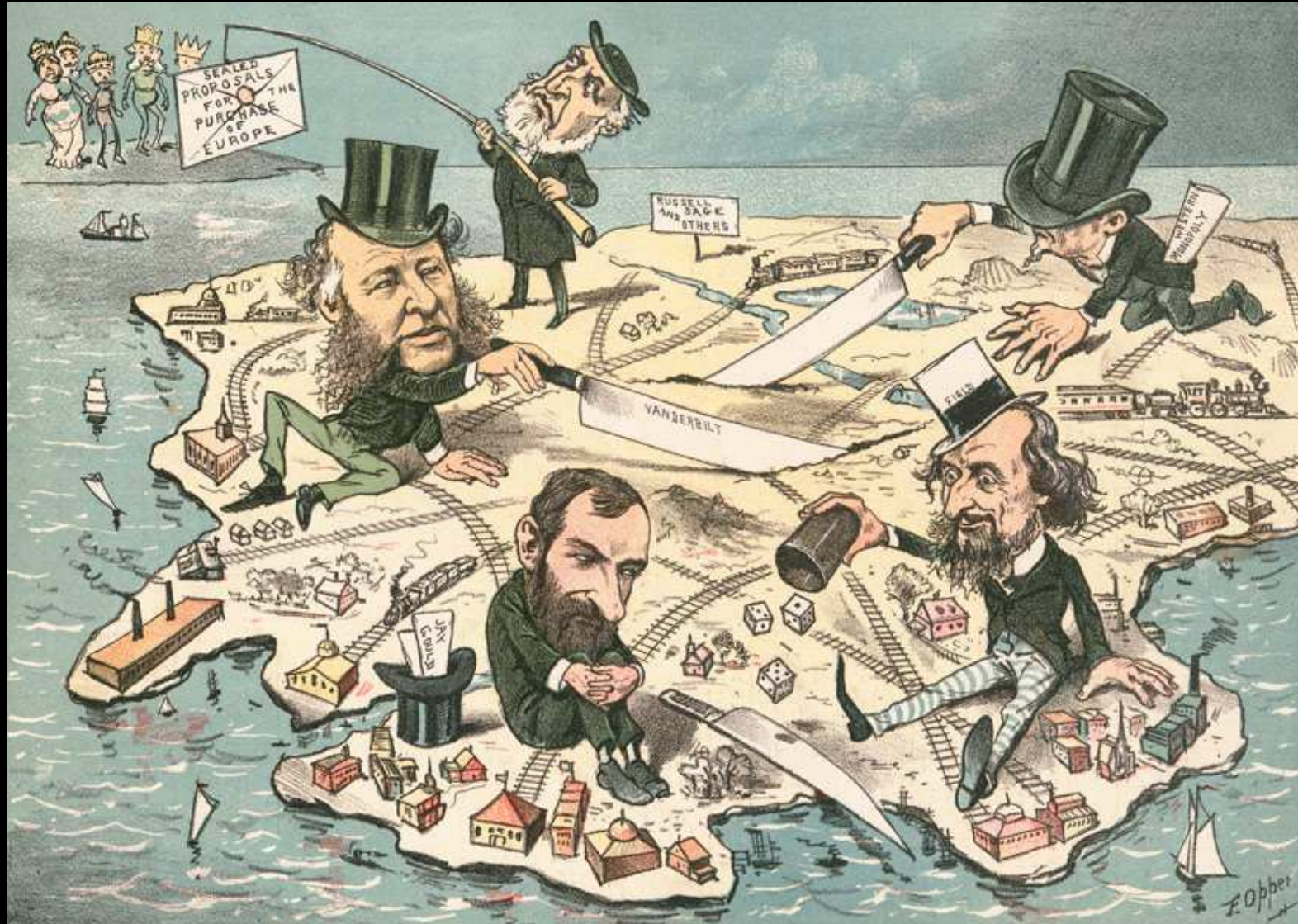
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U.S. Output 1880-1890: Coal

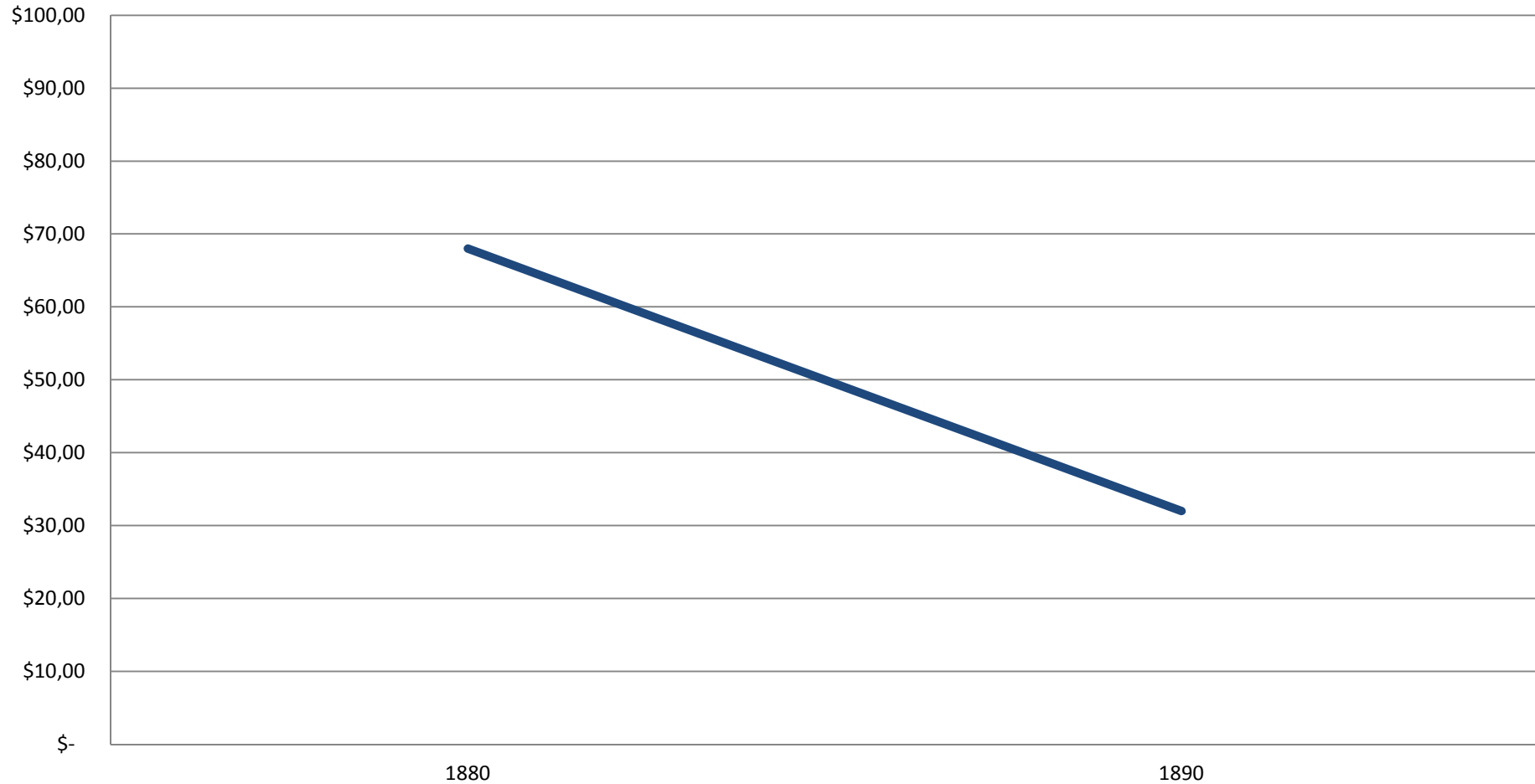


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Increased Prices?

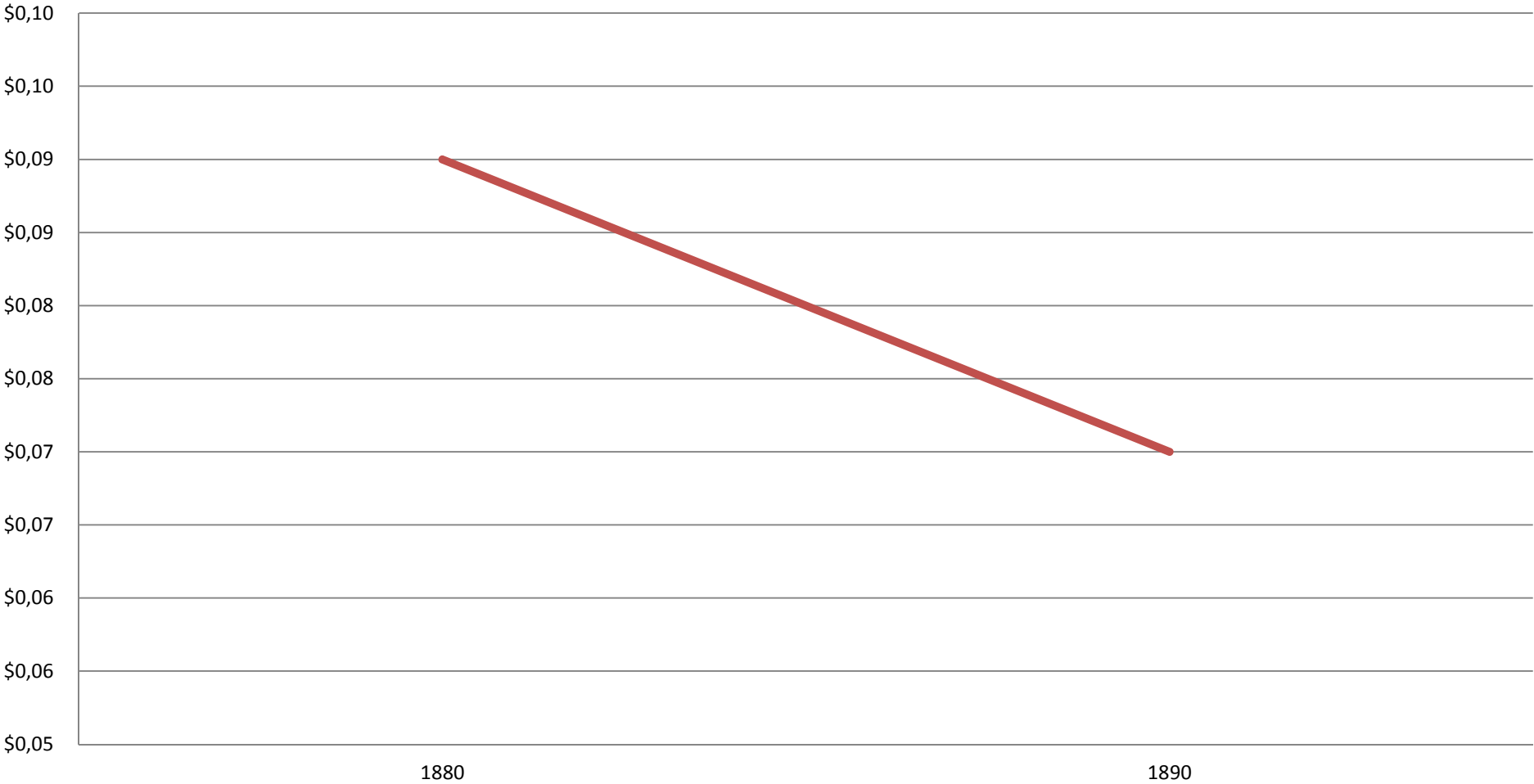


U.S. Prices 1880-1890: Steel Rail



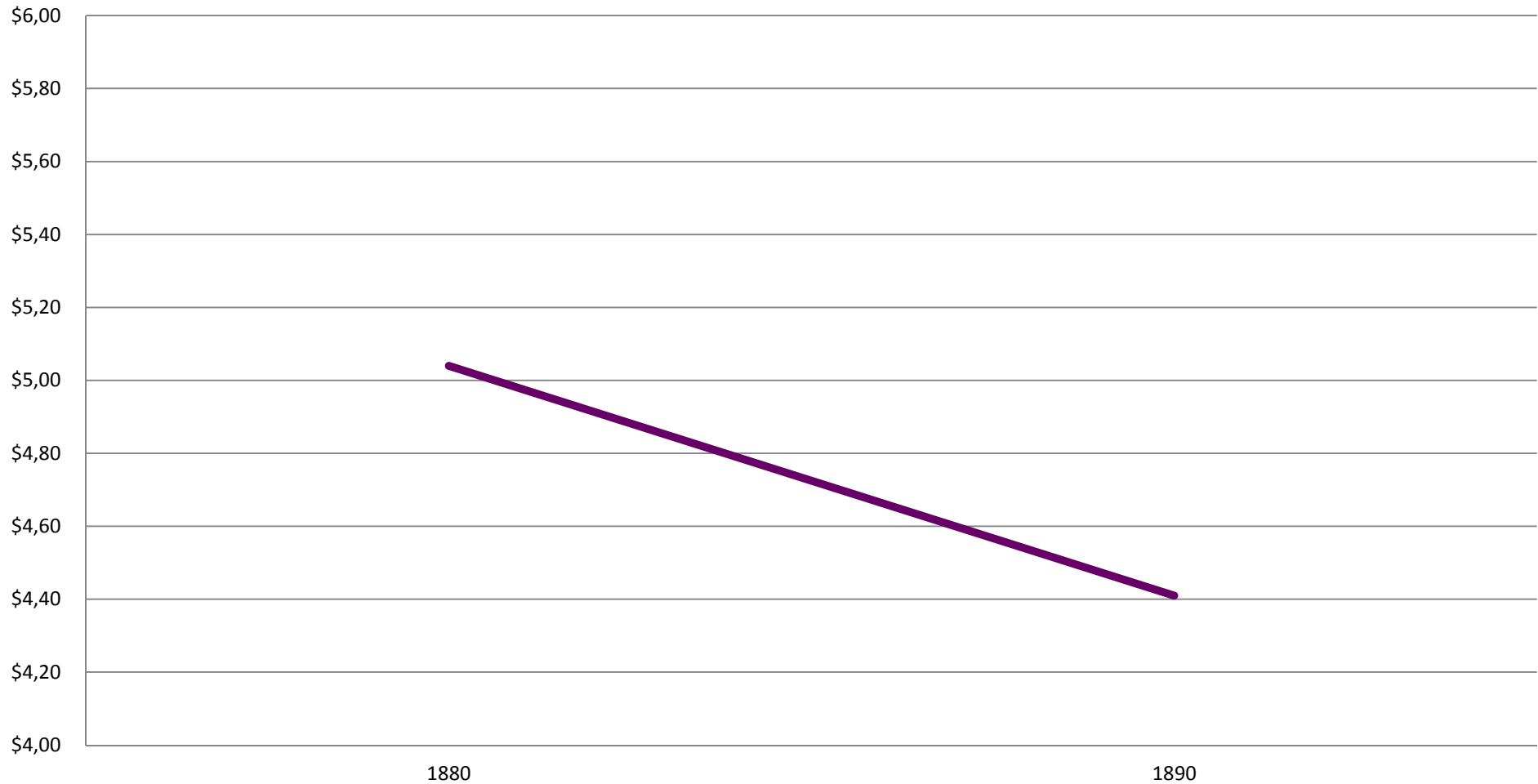
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U.S. Prices 1880-1890: Sugar



Source: Thomas J. DiLorenzo, *The Origins of Antitrust: An Interest Group Perspective*, 5 Intl. Rev. L. Econ. 73, 80 (1985) (citing US Bureau of the Census, Statistical Abstract of the U.S., various years)

U.S. Prices 1880-1890: Lead



Source: Thomas J. DiLorenzo, *The Origins of Antitrust: An Interest Group Perspective*, 5 Intl. Rev. L. Econ. 73, 80 (1985) (citing US Bureau of the Census, Statistical Abstract of the U.S., various years)

Lessons from History?

- Would we say the Sherman Act was unnecessary in 1890 even with these positive market indicators?
- Anticompetitive conduct can occur even when markets appear to be doing well
 - Reduced competition
 - Barriers to entry
 - Reduced innovation



So why *should* Law care about hold-up?

- Hold-up is an economic phenomenon
 - Source of market inefficiency
- Hold-up may be evidence of anticompetitive conduct
- But hold-up *per se* is NOT illegal or prohibited under US, EU or other statutory or case law



When is hold-up legally actionable?

- When it results in:
 - antitrust/competition injury
 - abuse of market power, deception, exclusion, discrimination
 - Breach of private commitments (FRAND/RF)
- Statistical, market-wide (“empirical”) evidence is not required to prove anticompetitive conduct or harm
 - Only conduct by the accused party is probative (*Ericsson v D-Link* (Fed Cir 2014))
 - E.g., citywide crime statistics are irrelevant to convicting suspect of a crime



Preventing Hold-Up Is a Valid Policy Goal

- Many SSO policies are designed to reduce potential hold-up (and stacking)
 - Disclosure of SEPs
 - FRAND/RF licensing
 - *Ex Ante* disclosure of license terms (VITA)
 - More detailed FRAND definitions (IEEE)
 - Waiver of injunctive relief (IEEE)
- Internal association policies– majority rule
- Allow competition among SSOs in the “marketplace of ideas”
 - Exit, Voice, (Dis)loyalty



Conclusions

- Anecdotal evidence is sufficient to prosecute antitrust/competition violations
- Market-wide statistical/empirical evidence is not required
- Legislature can act if market conditions so warrant
- Agencies should continue to monitor, investigate and prosecute anticompetitive conduct involving SEPs (with or without holdup)
- Improved transparency would help
- **And let's stop obsessing over hold-up!**

