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Editor's Column
Trevor V. Stockinger

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Evolutions in Antitrust: Perspectives

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The Journal of the Antitrust and Unfair Competition Law Section of the California Lawyers Association

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As my tenure as Chair draws to a close, I am reminded of all we have accomplished in the past challenging year, as the Section and our practice continue to adapt and adjust to the changing environments in which they find themselves. I must take a moment to acknowledge and thank all the Section volunteers who contributed so much of their time and talent to help ensure the continued effectiveness and vitality of our Section. The Section could not function without your dedication and hard work.

We began the year with strategic planning by setting up a coherent set of objectives in the four subject areas of the Section's work: programming, publication, diversity, and membership. These objectives are guideposts by which the Executive Committee aligns our effort with the Section's mission: to engage, inform, and inspire generations of lawyers to further the practice of antitrust and competition law in California. In each of these subject areas, we implemented a series of integrated initiatives and changes aimed at improving the Section's member services.

In programming, our objective is to consistently provide innovative, accessible, and high-quality programs that enrich Section members' knowledge. In addition to delivering CLE programs on cutting-edge topics such as big tech and antitrust, litigation finance, and pandemic-related unfair business practices, the Section will hold its Fifth Annual "Celebrating Women in Competition Law in California" event in the Spring, featuring a panel of female trailblazers of the competition bar who will share their paths to leadership and advice for navigating gender-based obstacles. On November 18, 2021, our flagship annual conference, the Golden State Institute, will return to the historic Julia Morgan Ballroom in San Francisco. Immediately following the conference is a reception and dinner/ceremony honoring Daniel M. Wall of Latham & Watkins LLP as the 2021 "Antitrust Lawyer of the Year." A truly iconic figure in antitrust, Dan has litigated landmark antitrust matters throughout his forty-year career, with a focus on the evolving field of high-tech antitrust law. I hope many of you can join us at this annual event. Register while seats last!

In publication, our objective is to provide an academic forum and effective research tool for antitrust and UCL practitioners through timely delivery of high-quality treatise, scholarly articles, and practice-oriented legal analysis. Publication has long been an important focus of the Section, and this year was no exception. As part of the yearly updates of our beloved treatise, California Antitrust and Unfair Competition Law, we are embarking on the process of refreshing and improving the content of many chapters. We have also expanded the coverage of the Section's monthly newsletter—now called E-briefs, News and Notes—to include review of noteworthy cases, "deeper dive" articles on selected topics of interest, significant antitrust agency press releases, and other news items. We published two themed issues of *Competition* on hotly debated antitrust issues, policies, and reforms. To ensure top-quality publications, the publication team is also in the process of establishing guidelines for manuscript preparation and submission requirements. One

of the immediate goals is to increase diversity of authors and contributors, and articles on inclusion and social justice. We have successfully expanded the contributor pools for all three publications. In particular, this Fall edition includes articles that will enhance awareness and encourage examination of inclusion and social justice.

In the area of diversity, our objective is to actively promote diversity and meaningful inclusion within the Section and antitrust practice in general. The Diversity & Inclusion Committee oversees the Executive Committee's various selection processes to ensure compliance with the Section's Diversity Initiative goals, conducts review of the Section's programs and activities to identify areas of improvement, and develops methods and strategies in furtherance of the Section's diversity goals. This past year, the D&I Committee devoted considerable time and effort in launching the Section's inaugural Inclusion & Diversity Fellowship. We congratulate the Section's inaugural Fellowship recipient, LeeAnna Bowman-Carpio, and thank our law firm and corporate sponsors for their generous support of the Fellowship program. But the D&I Committee has so much more to offer. To enhance diversity in the antitrust practice by supporting and nurturing diverse law students and early-career attorneys, the Committee organized presentations on "Pathways to Antitrust" to law students with the goal of introducing the students to different verticals of antitrust practice. The Committee also anticipates developing a podcast and learning modules to offer skills training for diverse and early-career lawyers.

In the area of membership, our objective is to engage and grow the Section's membership. Particularly gratifying is the progress made this year toward the implementation of the Section's website. The new website (https://calawyers.org/section/antitrust-unfair-competition-law/) is easy to navigate, content rich, and frequently refreshed. As a Section member, this is your one-stop portal for all membership benefits, including the CLE catalog, past editions of monthly newsletters, past issues of *Competition*, the mentorship program, and more. Please take the time to visit the Section's website and see what the Section has being doing. I hope that you will consider either joining the Section if you are not currently a member, or, if you are already a member, increasing your participation in the activities and programs the Section offers. I am sure if you choose to participate in the activities and programs sponsored by the Section, you will discover and experience the great benefit that such participation can bring. We are always looking to embrace new members, and I have no doubt that your participation will contribute significantly to enhancement of our mission and goals.

It has been an honor and privilege to serve the Section. I look forward to watching the continued progress that will be made under the leadership of our new Chair, David Goldstein, and the continued involvement of a very able and talented Executive Committee. Finally, thanks to Courtney Palko, Trevor Stockinger, and Elizabeth Castillo, who have been indispensable in bringing the Section success during their tenures on the Executive Committee. And thanks to our Section Coordinators Erin Ravenscraft and Victoria Loeffler for their support throughout the year.

EDITOR'S NOTES

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Welcome to the Fall issue of Volume 31 of *Competition,* our Section's official journal published biannually both in print and electronically. We are witnessing a reinvigorated debate among politicians, scholars, and lawyers alike relating to the role antitrust should play in governing American socioeconomic structures. Our Fall issue embraces this debate, publishing articles on the theme of *Evolutions in Antitrust: Perspectives.* Here you will find articles arguing for an interpretation of antitrust law to support social justice reform. You will also find others arguing that the path antitrust has been on over the past decades has served us well and should be maintained. On either side, the history and evolution of antitrust law is illuminated.

The issue begins with two articles on the consumer welfare standard. First, **William Markam**, a 33-year antitrust practitioner, presents a comprehensive history of the evolution of the consumer welfare standard. In this article, Markham argues that the consumer welfare standard is inconsistent with the original goals and policies of United States antitrust law and that the law should return to its classical interpretation.

Next, **Lawrence Wu, Ph.D.** and **Craig Malam, Ph.D.**, economists at NERA Economic Consulting, set aside the policy debates and provide an economic perspective on the consumer welfare standard. They conclude that it provides a useful framework for considering antitrust issues and that current criticisms can be addressed through developing better theoretical and empirical economic models and tools.

We are also privileged to publish an article by **Dan M. Wall**, partner at Latham & Watkins and 2021's Antitrust Lawyer of the Year. Wall traces the evolution of using economic theory in antitrust litigation during his over-40-year career. He ultimately concludes that antitrust law should continue to embrace advances in economic theory contrary to the current populist movement, which he views as stepping away from administrable antitrust standards based on economics.

In the following article, **Neely B. Agin**, partner at Winston & Strawn, **Susannah P. Torpey**, Co-Chair of Winston's Technology Antitrust Group, and **Dana Cook-Milligan**, Associate of Winston's San Francisco office, center the recent successful private challenge of a vertical merger in *Jeld-Wen* within the history of private challenges in the United States and discuss how this decision may fit into the landscape of future private merger litigation.

The issue further features two articles concerning the growing trend of arbitrating antitrust claims. **Professor Christopher R. Leslie**, Chancellor's Professor of Law at University of California, Irvine School of Law, provides a history of arbitration law, and traces the relationship between arbitration and antitrust law. He offers that the expansion of arbitration requires a reconsideration of the *Illinois Brick* rule, and the relationship between antitrust arbitration and merger review.

Robert S. Kitchenoff, managing partner of Weinstein Kitchenoff & Asher, **Heidi Silton**, partner at Lockridge Grindal Nauen, **Pamela Gilbert**, partner in Cuneo Gilbert & LaDuca, **Nigar A. Shaikh**, associate of Lieff Cabraser Heimann & Bernstein, and **Geoffrey H. Kozen**, associate of Robins Kaplan, next evaluate Big Tech's use of forced arbitration clauses and class action waivers. They explore the history and policies behind arbitration, arguing that most are not met by Big Tech's use of arbitration, and that arbitration and class action waivers are inimical to antitrust enforcement. They move forward to propose solutions and assess the current proposals for reform in the legislature.

This issue also offers two articles concerning the overlap of antitrust and patent law. **DeForest McDuff, Ph.D.**, **Mickey Ferri, Ph.D.**, and **Noah Brennan, M.I.A.**, economists at Insight Economics, provide a comprehensive public policy evaluation of the success of antitrust enforcement in limiting potential anticompetitive excesses of the patent system. They conclude by offering proposals to improve both the antitrust and patent regime.

Anne Y. Brody, Of Counsel at Gibson, Dunn & Crutcher LLP, and **Elisabeth Ponce**, a member of the legal and compliance team at AlphaSights, survey the evolution and continuing harmonization of the standards related to *Walker Process* fraud antitrust claims and the inequitable conduct defense to patent infringement. They survey case law on the subject over the last decade and explore whether the patent law doctrine of infectious unenforceability has a role to play in proving *Walker Process* fraud and other antitrust theories.

Finally, the Antitrust and Unfair Competition Law Section has sought to bring focus to issues of equity, inclusion, and social justice. This issue continues that focus. **Rosa Morales**, counsel in Crowell & Moring's Antitrust & Competition Group, explores the relationship between antitrust policy and racial inequality in the United States, ways in which antitrust law may be used to address systemic racism, foreign regimes that embed racial or social equity principles in their competition policies, and the future of antiracist enforcement in upcoming reforms in U.S. antitrust policy.

Finally, the issue concludes with an article by **Danielle Joy Healey**, Senior Principal at Fish & Richardson, in which she shares her experiences as a transwoman lawyer and her insights into the practical success of inclusion policies in a society that struggles with equity for transgender individuals.

I would like to express my appreciation to the Section's Executive Committee and Advisors. In particular, I would like to thank Joanna Fuller who has provided invaluable support as a member of the Editorial Board and our Section's Chair, Qianwei Fu, who continued to be generous with her advice and mentorship as I worked to publish this issue.

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THE CONSUMER-WELFARE STANDARD SHOULD CEASE TO BE THE NORTH STAR OF ANTITRUST

By William Markham[1]

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1 William Markham (www.markhamlawfirm.com) is an antitrust attorney based in San Diego who has practiced law for thirty-three years. A graduate of Harvard Law School (J.D., 1987), he obtained his initial training in antitrust litigation at the San Francisco office of a global firm (Coudert Brothers, now dissolved). He opened his own practice while still a young attorney in order to try his own cases. Since then, he has litigated and tried many commercial and real estate disputes and brought and opposed several appeals. Since 2005, he has worked mostly on large antitrust matters and other complex business disputes, litigating only a few large cases at a time and offering ongoing antitrust counseling. He has represented and advised global companies, industry-leading firms, their challengers, disruptive innovators, investors, and others. He has also written several articles on antitrust, trial practice, and other matters, all of which are available on his firm's website. A dedicated surfer, he lives with his family close to the sea.

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I. INTRODUCTION

In this article, I argue that federal antitrust law has been undermined by the consumer-welfare standard and related doctrines, and in direct consequence it has failed to accomplish its intended purposes and failed even according to the very narrow, myopic standards of consumer-welfare jurisprudence. To restore antitrust law, so that it will sufficiently protect and promote competitive markets and curtail monopolistic and anticompetitive practices, it is not necessary to adopt new doctrines or standards, but only to revive and faithfully observe the classical common-law prohibitions against restraint of trade and unauthorized monopolies. Senator Klobuchar's bill now pending in the Senate appears to accomplish this very result and thus seems to be the kind of reform that would redress the systematic under-enforcement of federal antitrust law during the consumer-welfare era.

Since the late 1970s, antitrust law in the United States has been transformed out of recognition and rendered largely toothless by consumer-welfare jurisprudence, which was first developed in the 1960s by "neo-classical price theorists" at the University of Chicago, then embraced by Robert Bork and other conservative jurists, who believed that antitrust law imposed excessive, harmful burdens on successful companies. Their consumer-welfare standard and its related teachings were adopted by the Burger Supreme Court in the late 1970s, after which the leading treatise on antitrust law, Areeda and Hovenkamp's *Antitrust Law,* explained and further developed the consumer-welfare approach to antitrust law. That treatise, long regarded as the bible of modern American antitrust law, has been regularly consulted by federal judges seeking guidance in their antitrust cases, leading to innumerable published decisions that incorporated its consumer-welfare precepts. The treatise in turn has reported, explained and analyzed those court decisions, further confirming consumer-welfare's primacy in the antitrust canon, and leading to yet more federal decisions premised on this view of antitrust law. It has been by this self-reinforcing feedback loop that consumer-welfare jurisprudence has swept the field in the modern era, transforming American antitrust law.

The federal courts have had the authority to develop this approach, since the principal antitrust law, the Sherman Act, confers on them the obligation to develop a federal common law of competition and commerce that is supposed to govern the interstate and foreign commerce of the United States. For all that, consumer-welfare jurisprudence in my view has badly overshot its mark and should be largely abandoned before it occasions even further harm. The courts can and should use their common-law authority to reform our antitrust law accordingly.

The change is needed because consumer-welfare jurisprudence has gone much too far, not only weeding out opportunistic and ill-conceived cases that never should have been brought, but also severely limiting the reach of antitrust law, so that it now prohibits only the most egregious instances of anticompetitive conduct, but little else. Some jurists might believe that this approach has been beneficial. I respectfully disagree and argue in this article that the best possible reform of our antitrust laws would be a simple, ringing restoration of the classical doctrines on restraint of trade and unauthorized monopoly. Those doctrines remain on the books and can be easily re-affirmed without doing violence to principles of *stare decisis*.

Thankfully, my call for antitrust reform is not merely that of an obscure litigator whose lonely voice remains unheard in the wilderness. Rather, the era of consumer-welfare jurisprudence finally seems to be nearing its end, or at least its unquestioned primacy in the antitrust canon: mainstream Democrats, moderate Republicans, progressive leftists, populist right-wingers, *Economist*-magazine liberals like me, and, far more important, many federal judges both conservative and liberal all seem to favor a revival of classical antitrust. The left-wing progressives and right-wing populists perhaps wish to push matters much further, while skeptical conservatives generally accept that some sort of reform of our antitrust law is now needed. Antitrust reform thus appears to be headed our way.

Indeed, Justice Kavanaugh has already written two forceful, eloquent antitrust decisions (one a concurrence), which remind me of President Theodore Roosevelt's preferred approach to antitrust enforcement: announce strong antitrust principles, enforce them vigorously against the worst offenders, and aim in that manner to prod all others to restrain their anticompetitive inclinations. That is likely the best approach and the one most likely to elicit bipartisan support as well as a simpler, more sensible administration of our antitrust laws. I add that Congressional reform of the kind now being debated should afford further, highly welcome relief: at a minimum, it should clarify that *the aim of antitrust law is to prevent and redress restraint of trade and monopolization, not promote maximal output in each market.*

As I explain below, American antitrust law is supposed to enforce across all markets the common-law prohibitions of *restraint of trade* and *unauthorized monopoly.* These classical doctrines are codified in the Sherman Act and constitute a political and commercial judgment, discerned from centuries of experience, concerning what kinds of business practices are most likely to promote our broader prosperity, economic opportunity, honest dealings, low prices for consumers, and a healthy democracy. Regrettably, those doctrines sometimes seem to have become distant third cousins in modern antitrust jurisprudence, which for these past forty years has been largely guided by consumer-welfare jurisprudence.

According to the consumer-welfare theory, antitrust law exists solely to ensure that sellers "maximize" their output in all markets. When they do so, antitrust law offers no reproach or relief. That is the proper explanation of the misnamed consumer-welfare standard. It is premised on revisionist history, promises analytical clarity and simplicity, delivers the opposite, and serves in practice to absolve most restraints of trade and most kinds of monopolizing conduct, with catastrophic consequences for our commerce, national economy, polity, and society.

Even so, the classical doctrines of antitrust law largely remain on the books and should be revived and enforced again with vigor, as they were most notably during the long, prosperous post-WWII era. Consumer-welfare jurisprudence has been used to abrogate a succession of per se rules, but not the classical precepts. Rather, consumer-welfare jurisprudence has imposed additional, largely impossible burdens of proof that antitrust plaintiffs must meet in addition to the classical requirements. It is past time to remove the consumer-welfare obstacles from antitrust prosecutions.

The north star of antitrust should cease to be the standard consumer-welfare tests – restricted marketwide output and unprovable supracompetitive prices. Rather, the

lynchpin of antitrust should again be the *exclusionary practices test,* which asks whether the defendant uses a challenged practice to co-opt or impede competitors or to improve its offerings. If the former, the defendant has committed predicate conduct that exposes it to antitrust liability; but if the latter, the defendant has competed on the merits and is absolved of any possible antitrust liability. What better message could our law of competition express to market participants?

By this approach, and by narrowing or abrogating various consumer-welfare doctrines, the classical doctrines on restraint of trade and monopolization would be fully restored and guided by easily understood, easily applied rules against *naked restraints* and *exclusionary conduct.* Judges and juries could readily understand and rule on these matters, and antitrust claims would cease to be obscured by often elusive microeconomic arguments about market output, efficient practices, and supracompetitive pricing put forth by competing experts. None of that was ever supposed to be central to antitrust.

Broadly speaking, restraint of trade as used in the common law and original antitrust cases prohibited the following commercial practices: (1) contracts and concerted business arrangements that, for the sake of hindering or suppressing competition, restrain or prevent counterparties or others from plying their trades or competing in a market; (2) business arrangements by which most sellers or buyers in a market combine their operations in order to control the market; and (3) collusion between buyers or sellers to take advantage of their common sellers or customers (e.g., conspiracies to fix prices, allocate markets or rig ostensibly competitive bidding). Classical antitrust enforced these doctrines, holding offenders in violation of Section 1 of the Sherman Act. Classical antitrust also used these doctrines to explain the meaning of unlawful monopolization in violation of Section 2 of the Sherman Act. Namely, the offense of monopolization condemned a company's deliberate efforts to gain control of a market by acquiring or sabotaging its rivals, but never reached a company that became a monopoly by its commercial excellence or because its market naturally admitted only one seller. Those doctrines should be revived and vigorously enforced. Lastly, Section 7 of the Clayton Act should prevent many more mergers and acquisitions than it has done these past forty years. I explain below an easy, simply administered approach that is faithful to the original Clayton Act and its amendment in 1950 by the Celler-Kefauver Act.

Crucially, all of these doctrines remain on the books and are sometimes enforced by courts disinclined to require the strict showings of consumer-welfare jurisprudence. If these doctrines were openly enforced in all cases and unburdened by consumer-welfare requirements, our antitrust law would be revived, fulfill its purpose, and lay a necessary foundation for our country's long-term prosperity.

This is not an esoteric matter that matters only to antitrust practitioners and concerned companies. Under-enforcement of antitrust law has led to a profusion of economic, political, and social harms of the very kind that antitrust law was originally enacted to prevent and redress – the myriad, worsening evils of unfettered monopoly and oligopoly, which typically include lower overall productivity, diminished economic prosperity, a less innovative economy, higher consumer prices, fewer career and business opportunities, extreme and rising inequality of wealth, and the private capture of public governance. Restoring classical antitrust law by itself cannot answer all of the many challenges that our country faces, but without it we likely cannot enjoy long-term, broad-based economic

prosperity that rests on sound fundamentals, nor expect social comity or reliably honest governance. Monopolistic economies do not nurture those outcomes and likely render them impossible for any extended duration. The common law was right on these points, and history proves the point. It is long past time to revive our antitrust law and enforce it according to its intended meaning.

II. THE COMMON LAW OF TRADE RESTRAINTS AND MONOPOLIES

The original antitrust laws of the United States were codifications of existing common-law doctrines that prohibited restraints of trade and the willful, unauthorized acquisition of monopoly power. At common law, offending contracts, combinations, and monopolies were unenforceable and subject to equitable decrees. The antitrust laws rendered them civil and even criminal offenses and gave private litigants strong incentives to bring claims against offenders.[2]

The common-law doctrines were generally understood at the time and so were not explained in the antitrust statutes themselves.[3] In modern times, the common-law doctrines have perhaps become unfamiliar to many jurists and the general public, so that a review of them seems vitally important to understanding why we have antitrust laws, what they are supposed to do, and why we have gone so badly astray in the modern era. I therefore offer the following review of the common-law doctrines that were codified in our antitrust laws.

A. Restraint of Trade

At common law, a *contract in restraint of trade* meant a covenant by which the covenantor promised to the covenantee not to practice a lawful trade, participate in

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2 *See infra*, Section III.C.

3 *See generally* Albert H. Walker, History of the Sherman Law of the United States of America 14 (1910) ("[W]hat is this bill? A remedial statute to enforce, by civil process in the courts of the United States, the common law against monopolies. How is such a law to be construed? Liberally, with a view to promote its object.") (Senator Sherman, characterizing a draft version of the bill that in its final form became the Sherman Act); *see also Apex Hosiery Co. v. Leader*, 310 U.S. 469, 497 (1940) ("The common law doctrines relating to contracts and combinations in restraint of trade were well understood long before the enactment of the Sherman law. They were contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market. Such contracts were deemed illegal and were unenforcable at common law. But the resulting restraints of trade were not penalized and gave rise to no actionable wrong. Certain classes of restraints were not outlawed when deemed reasonable, usually because they served to preserve or protect legitimate interests, previously existing, of one or more parties to the contract.").

lawful commerce, or compete in some way against the covenantee.[4] Such restraints were permitted only when they were ancillary and narrowly tailored to legitimate transactions or collaborations.[5] In contrast, a *combination or conspiracy in restraint of trade* was an agreement between two or more persons by which they established a monopoly, excluded others from competing, coordinated prices, or allocated sales within a market; restraints of this

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4 *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 279 (6th Cir. 1898), *aff'd after modification on other ground* 175 U.S. 211 (1899) ("From early times it was the policy of Englishmen to encourage trade in England, and to discourage those voluntary restraints which tradesmen were often induced to impose on themselves by contract. Courts recognized this public policy by refusing to enforce stipulations of this character."); *see also Mitchel v. Reynolds*, 1 P.Wms. 181, 190 (1711) (Parker, C.J.) ("The mischief which may arise from [such restraints of trade are] (1) to the party by the loss of his livelihood and the subsistence of his family; (2) to the public by depriving it of an useful member. Another reason is the great abuses these voluntary restraints are liable to; as, for instance, from corporations who are perpetually laboring for exclusive advantages in trade, and to reduce it into as few hands as possible."); *Alger v. Thacher*, 19 Pick. 51, 54 (Mass. S. Ct. 1837) (same); *Oregon Steam Nav. Co. v. Winsor*, 87 U.S. 64, 68 (1873) ("[A] contract in restraint of trade is void as against public policy. One is, the injury to the public by being deprived of the restricted party's industry; the other is, the injury to the party himself by being precluded from pursuing this occupation and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such gave objection is clearly against public policy.").

5 *Addyston Pipe & Steel*, 85 F. at 280–81 (extended dissertation on contractual restraints of trade at common law); *see also N. Sec. Co. v. United States*, 193 U.S. 197, 404 (1904) (at common law, a contract in restraint of trade meant one by which the covenantor agreed not to compete in some way against the covenantee and was lawful only if it was reasonable in scope and duration and used to afford the covenantee appropriate protection) (Holmes, J., dissenting on unrelated grounds); *Horner v. Graves*, 7 Bing. 735, 743, 131 Eng. Rep. 284 (1831) ("An agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable, and there be a consideration to support it. In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made. A contract, even on good consideration, not to use a trade anywhere in England is held void in that country as being too general a restraint of trade."); *Oregon Steam*, 87 U.S. at 66 ("Questions about contract in restraint of trade must be judged according to the circumstances on which they arise, and in subservience to the general rule that there must be no injury to the public by its being deprived of the restricted party's industry, and that the party himself must not be precluded from pursuing his occupation and thus prevented from supporting himself and his family.").

kind were always unlawful.[6] At common-law, all unlawful restraints of trade were void *ab initio,* unenforceable, and subject to a permanent injunction prohibiting their further use.[7]

Lastly, the common law condemned trade restraints because of their *tendency* and *likely effects*. Contracts that unreasonably restrained trade subjected covenantors to idleness and penury in exchange for immediate gain; deprived society of the covenantors' labor and skill; and allowed covenantees gradually to monopolize their markets.[8] Combinations and conspiracies in restraint of trade deprived the public of the protections afforded by vigorous competition between competing sellers or competing buyers.[9]

B. Unauthorized Monopolies

At common law, an unlawful monopoly could be enjoined or dissolved as a matter of law and meant any business or combination of businesses that willfully acquired

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6 *See N. Sec.*, 193 U.S. at 404 (At common law, "[c]ombinations or conspiracies in restraint of trade ... were combinations to keep strangers to the agreement out of the business. The objection to them was ... to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large. [T]hey were regarded as contrary to public policy because they monopolized, or attempted to monopolize, some portion of the trade or commerce of the realm."); *United States v. E. C. Knight Co.*, 156 U.S. 1, 25 (1895) ("[A] general restraint of trade has often resulted from combinations formed for the purpose of controlling prices by destroying the opportunity of buyers and sellers to deal with each other upon the basis of fair, open, free competition. Combinations of this character ... have always been condemned as illegal because of their necessary tendency to restrain trade. Such combinations are against common right, and are crimes against the public.") (Harlan, J., dissenting on other grounds); Sir William Erle, Law Relating to Trade Unions 5-7 (1869) (Chief Judge of Court of Common Pleas writing: "Restraint of trade, according to a general principle of the common law, is unlawful.... [A]t common law every person has individually, and the public also have collectively, a right to require that the course of trade should be kept free from unreasonable obstruction," and "the right to a free course for trade is of great importance to commerce and productive industry, and has been carefully maintained by those who have administered the common law.").

7 *Addyston Pipe & Steel*, 85 F. at 279 ("Contracts that were unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but were simply void, and were not enforced by the court.") (*citing Mogul Steamship Co. v. McGregor, Gow & Co.,* App. Cas. 25 (1892); *Hornby v. Close, L.R.* 2 Q.B. 153 (1867); *Hilton v. Eckersley*, 6 El.& Bl. 47, 66 (1893); *Farrer v. Close*, *L.R.* 4 Q.B. 602, 612 (1869)); *N. Sec.*, 193 U.S. at 339-41.

8 *See supra* note 4.

9 *See, e.g.*, *Craft v. McConoughy*, 79 Ill. 346, 350, 22 Am. Rep. 171, 174 (1875) ("So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the rigor of competition, was all the guaranty the public required; but the secret combination created by the contract destroyed all competition, and created a monopoly against which the public interest had no protection.") (invalidating a combination among grain dealers).

control over an entire line of commerce without a valid public writ to do so.[10] Even an authorizing public writ might be later deemed an illegitimate grant of monopoly power,[11] but monopoly charters of limited duration could be properly granted to encourage useful, novel inventions (patent rights), authors' works (copyrights), to encourage private investment in public works, and to regulate the skilled professions for the sake of public safety.[12] Crucially, a monopolist could never defend its acquisition of monopoly control

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10 *See N. Sec.*, 193 U.S. at 339-41 (listing numerous common-law decisions that condemned combinations that gave the combining parties control over a line of commerce); *see also Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 451 (1837) ("A monopoly, then, is an exclusive privilege conferred on one, or a company, to trade or traffick in some particular article; such as buying and selling sugar or coffee, or cotton, in derogation of a common right. Every man has a natural right to buy and sell these articles; but when this right, which is common to all, is conferred on one, it is a monopoly, and as such, is justly odious."); *Richardson v. Buhl,* 77 Mich. 632, 43 N.W. 1102, 1110 (1889) ("[C] onsolidation of separate, otherwise competing, companies into one large corporation amounted to a restraint of competition, and an illegal monopoly…."); *People v. Chicago Gas Trust Company,* 130 Ill. 268, 22 N.E. 798, 801-803 (1889) (same); *Distilling & Cattle Feeding Co. v. People,* 156 Ill. 448, 41 N.E. 188, 202 (1895); *see, e.g.*, *Arnot v. Coal Co.*, 68 N.Y. 558, 565 (1877) (decreeing invalid a contract between two coal companies by which they established a monopoly over the sale of anthracite coal in part of New York State) ("A combination to effect such a purpose is inimical to the interests of the public. [A] ll contracts designed to effect such an end are contrary to public policy, and therefore illegal. If they should be sustained, the prices of articles of pure necessity, such as coal, flour, and other indispensable commodities, might be artificially raised to a ruinous extent far exceeding any naturally resulting from the proportion between supply and demand.").

11 *See United States v. E. C. Knight Co.,* 156 U.S. 1, 9-10 (1895) ("In commenting upon the statute (21 Jac. I. c. 3), at the commencement of chapter 85 of the third institute, entitled 'Against Monopolists, Propounders, and Projectors,' Lord Coke, in language often quoted, said: 'It appeareth by the preamble of this act (as a judgment in parliament) that all grants of monopolies are against the ancient and fundamentall laws of this kingdome. And therefore it is necessary to define what a monopoly is. 'A monopoly is an institution, or allowance by the king by his grant, commission, or otherwise to any person or persons, bodies politique, or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politique, or corporate, are sought to be restrained of any freedome or liberty that they had before, or hindred in their lawfull trade.'").

12 *See Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 763-64 (1884) ("I do not mean to say that there are no exclusive rights which can be granted, or that there are not many regulative restraints on civil action which may be imposed by law. There are such. The granting of patents for inventions, and copyrights for books, is one instance already referred to. This is done upon a fair consideration, and upon grounds of public policy…. So, an exclusive right to use franchises, which could not be exercised without legislative grant, may be given; such as that of constructing and operating public works, railroads, ferries, etc…. So, licenses may be properly required in the pursuit of many professions and avocations which require peculiar skill or supervision for the public welfare…. But this concession does not in the slightest degree affect the proposition ... that the ordinary pursuits of life, forming the large mass of industrial avocations, are and ought to be free and open to all, subject only to such general regulations, applying equally to all, as the general good may demand; and the grant to a favored few of a monopoly in any of these common callings is necessarily an outrage upon the liberty of the citizen as exhibited in one of its most important aspects, – the liberty of pursuit. [S]uch a grant [is] beyond the legislative power, and contrary to the constitution....").

by arguing that it had not abused its power or charged excessive prices, since the danger lay in its power to take advantage of counterparties, including customers.[13]

III. ANTITRUST LAW WAS ORIGINALLY DIRECTED AGAINST THE GREAT INDUSTRIAL TRUSTS OF THE SECOND INDUSTRIAL REVOLUTION

American antitrust law codified and reinvigorated the common-law doctrines against restraint of trade and unauthorized monopoly. It was enacted to establish general, charter principles for American commerce and specifically to redress the problems that a broad consensus of Americans believed had been and would continue to be caused by the great industrial monopolies and business "trusts" that emerged during the Second Industrial Revolution (c., 1865 to 1914). A brief overview of this era provides an invaluable understanding of this key point.

A. The Rise of the Great Industrial Trusts During the Second Industrial Revolution

The great industrial trusts of the United States arose during the Second Industrial Revolution. It was a remarkable period, during which the United States played a pioneering role in developing and harnessing industrial processes that transformed every aspect of its economy and society.[14] To manage the new industrial work, American companies opened and operated mines, mills, foundries, factories, pipelines, and vast logistical

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13 *See E. C. Knight*, 156 U.S. at 25 (at common law, trade restraints were "illegal because of their necessary tendency to restrain trade.") (Harlan, J., dissenting on other grounds); *see, e.g.*, *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666, 672 (1880) (decreeing unlawful "an association of substantially all the manufacturers of salt in a large salt-producing territory," and declaring that "[p]ublic policy unquestionably favors competition in trade to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies which tend to advance market prices, to the injury of the general public. The clear tendency of such an agreement is to establish a monopoly, and to destroy competition in trade, and for that reason, on grounds of public policy, the courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public."); *State of California ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147, 1167 (1988) (summarizing the "clear majority view at common law," which was that combinations of business operations that resulted in a monopoly were unlawful because of their "purpose, tendency, or natural consequences").

14 Among the many striking advances of the era were the introduction and increasing use of mass-produced steel; the laying of steel railroads and use of greatly improved locomotives for regional and transcontinental transport; industrial shipping; macadamized roads paved with asphalt; gas-fired internal-combustion engines; automobiles; greatly improved cable telegraph networks and the first telephone systems; still photography; the greatly improved use of kerosene, gasoline, and coal for lighting and heating; the earliest uses of electrical power; a growing array of chemical compositions for industrial uses; the laying of steel pipelines for carrying water, sewage, petroleum products, and other liquids; greatly improved industrial mining and manufacturing systems; and the increasingly ubiquitous use of standardized machinery, tools, and parts to produce food and finished goods of every description. Towards the end of this era, industrialists initiated the mass production of automobiles and began to build airplanes. These remarkable technologies and new industries came one after the other at a dizzying space. *See generally* Peter N. Stearns, The Industrial Revolution in World History 61-68 (2018); Hugh Brogan, The Penguin History of the United States of America 377-406 (2nd Rev. Ed. 2001); Michael Hiltzik, Iron Empires: Robber Barrons, Railroads, and the Making of Modern America, *Introduction* (2020).

operations, and they employed professional managers to direct and oversee hundreds of thousands of wage laborers, who performed increasingly specialized tasks, often doing so in increasingly large, busy cities. To fill these jobs, the United States began to receive legions of immigrants from all parts of Europe, Asia Minor, China, and elsewhere.[15] All of these developments transformed the country: the largely agrarian, homogenous society of farmlands and trading centers that existed before the Civil War (1861-1865) swiftly evolved into a bustling, polyglot, increasingly urban, and highly industrialized society. By the outbreak of the First World War in 1914, the United States had already become the world's greatest and most dynamic industrial power.[16]

To succeed, the great commercial endeavors of the era required enormous funding and were largely undertaken by well-connected, sophisticated entrepreneurs who had close ties to the wealthiest investors.[17] The firms that became most successful in the new industrial economy quickly grew very large and sought to limit competition in their markets so as to avert strong competition on price, which they feared might ruin their costly investments.[18] In one industrial market after another, the largest sellers combined and thereafter acquired all other substantial sellers.[19]

Some of these combinations were challenged by state prosecutors as *ultra vires* transactions, since the combining businesses were incorporated under corporate charters that did not authorize either the combinations themselves or the unregulated monopolies created by them.[20] To avert this problem, large sellers of the same products began to use "business trusts" to combine their operations. These trusts designated trustors (the combining sellers), properties held in trust (the sellers' respective stock or their operations and assets), one or more trustees (to manage the sellers' businesses), and beneficiaries (the sellers). By this means, the largest sellers in each market merged their operations, acquired other competitors, and thereby gained control over their markets. The largest trusts also acquired their suppliers and commercial customers, foreclosing yet more competition at different levels of distribution, and they also began to combine with other large trusts to form immense industrial conglomerates.[21]

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15 *See generally* Stearns, *supra* note 14 at 61-68; Brogan, *supra* note 14 at 377-406.

16 *See generally* Stearns, *supra* note 14, at 61-68; Brogan, *supra* note 14 at 377-406.

17 *See* Brogan, *supra* note 14 at 381-91.

18 *See id.*

19 *See supra* note 14 at 61-68; Brogan, *supra* note 14 at 377-406.

20 *See, e.g.*, *State v. Vanderbilt*, 37 Ohio St. 590, 593-95 (1882) ("The attempted consolidation [of competing railroads] was *ultra vires* of the corporations joining therein….The attempted consolidation is contrary to public policy. The [railroads] are competitive, and the object of the consolidation is to prevent competition. It is the settled public policy of the country not to permit consolidation of competing [railroads]. In nine states of the Union this principle has been incorporated in strong terms into the constitution.... In six states the same principle has been established by statute.... In twelve states there is no general provision authorizing consolidation. Such action can be there taken only by special act....All of the remaining States, with the exception of two (California and Nevada), impose various limitations upon the power of consolidation.This principle of public policy is recognized by the courts.The policy of the state of Ohio upon the subject is the same....This court has recognized the public policy which forbids monopolies.") (internal citations omitted).

21 *See generally* Brogan, *supra* note 14 at 381-91; Stearns, *supra* note 14 at 61-68.

In this manner, the great industrial trusts quickly gained dominant positions in the great new markets of the era. Towards the end of the nineteenth century, they had become so dominant in their markets, and so large, wealthy and powerful, that they easily outmatched public authorities charged with regulating them and appeared poised to dominate not only the national economy, but American society.[22]

The Standard Oil Trust offers an instructive example. Its head, the legendary John Rockefeller, formed the Standard Oil Company in Cleveland during the Civil War. He and a partner astutely managed the business and made shrewd acquisitions, and Standard Oil thus emerged as a leading concern by the end of that war. From 1870 onwards, Standard Oil steadily acquired some competitors and purposefully ruined others in order to avert meaningful competition. To this end, Standard Oil colluded with giant railroad carriers to obtain preferential shipping rates; purchased numerous competitors after threatening to ruin them if they did not accept its miserly purchase proposals; and impeded and ruined independent competitors by various means, such as (a) using its control of pipelines to cut off supplies of crude petroleum to rival refineries; (b) buying land along the pathways of rival pipeline projects and then using it to uphold or prevent the completion of these projects; (c) selling refined petroleum products at below-cost prices in places where any competing refiner made sales until the rival went out of business; and (d) bribing state legislators to deny competitors required regulatory approval. By 1880, Standard Oil had become the kingpin of the petroleum industry in the United States, controlling its extraction, transport, refinement into various petroleum products, and final delivery to customers for various industrial and household uses.[23]

To avoid increasingly skeptical Ohio regulators, Standard Oil moved its operations to New York City in 1882 and there formed a "business trust," which held the stock of Standard Oil as well as the stock of most other remaining refiners and distributors of petroleum in the country. At the time of its formation, this trust's holdings included refiners that handled more than 90% of all petroleum in the country as well as an indispensable pipeline system (over 4,000 miles long) that alone could provide required crude petroleum to petroleum refiners. John Rockefeller became the principal "trustee" of this trust, and in that capacity he acted as the manager and director of nearly the entire petroleum industry of the United States from 1882 onward.[24]

Rockefeller's Standard Oil Trust treated its counterparties with brutal ruthlessness. Its distinguishing characteristic was that it drove mercilessly hard bargains with everyone. It underpaid suppliers and employees while taxing them with overbearing demands; it overcharged its customers, except when offering pockets of them below-cost goods for a short duration in order to destroy a local competitor; it bribed public officials; and it systematically co-opted or destroyed its competitors. Everyone who dealt with this trust resented but submitted to its demands.[25]

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22 *See* Brogan, *supra* note 14 at 381-91; Stearns, *supra* note 14 at 61-68.

23 Matt Clayton, The Gilded Age: A Captivating Guide to an Era in American History at 48-51 (2021); Brogan, *supra* note 14 at 385, 389-90.

24 *See* Clayton, *supra* note 23 at 48-51 (2021); Brogan, *supra* note 14 at 385, 389-90.

25 *See* Clayton, *supra* note 23 at 48-51 (2021); Brogan, *supra* note 14 at 385, 389-90.

The Standard Oil Trust was one of many such trusts. Other trusts and giant industrial conglomerates accomplished comparable feats of monopolization in most of the other great industries of the era. These giant industrial trusts incited widespread fear and apprehension in the United States in the late 1800s.[26]

As I explain below, antitrust law was established to prevent and redress this kind of business conduct and to ensure that, once curtailed, it would not arise again in some new form. As originally conceived, antitrust law was supposed to check the industrial trusts' economic power and increasing control of entire industries. More broadly, it was also intended to establish a regime of competition that would underpin American commerce for the ages.

B. The American Antitrust Movement of the Late 1800s

In the United States, unlike Europe, the economic and social conditions of the Second Industrial Revolution never gave rise to a powerful socialist movement. Instead, the American public preferred and increasingly demanded vaguely defined "antitrust relief" – laws suitable to the American polity that would check and prevent the abuses of the great industrial trusts. The broad antitrust movement of the late 1800s was widespread and strong, having begun among farmers, traders, merchants, and displaced businesses, and having evolved into one of the great social movements of the era. By the late 1880s, public demands for antitrust relief were a highly popular rallying cause in every part of the country and perhaps the only issue on which there was bipartisan agreement among Democrats and Republicans (which at the time were very different formations from their current incarnations). Those who demanded antitrust relief did not belong to a single group or ascribe to a common platform, but at best constituted a diverse coalition, one whose constituents had differing aims and policy preferences. It was ever thus in America.[27]

For all that, there was one animating fear that united the entire movement, infused the historic public debates, and informed the original antitrust laws of the various states and the United States: it was the fear and profound distrust of the giant trusts' unchecked economic power. This matter is easily confirmed by even a casual review of the era's Congressional debates, similar debates in various state legislatures, contemporary newspaper articles, politicians' speeches, and court decisions.[28]

Here is how Senator Sherman, a conservative Republican, characterized the matter in 1890 when addressing Congress to explain the antitrust law that would later bear his name:

> This bill [a draft version of the Sherman Act] does not seek to cripple combinations of capital and labor; the formation of partnerships or corporations; but only to prevent and control combinations made with

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26 *See* Brogan, *supra* note 14 at 381-391; Stearns, *supra* note 14 at 61-68.

27 *See* Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age 29-32 (2018); Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 Md. L. Rev. 766, 771-777 (2019); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051, 1053-54 (1979); John J. Flynn, *The Reagan Administration's Antitrust Policy, Original Intent, and the Legislative History of the Sherman Act*, 33 Antitrust Bull. 259, 304-305 (1988); Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 Duke L.J. 263, 314-315 (1991).

28 *See* Walker, *supra* note 3, at 13-16.

a view to prevent competition or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer….

Associated enterprise and capital are not satisfied with partnerships and corporations competing with each other, and have invented a new form of combination, commonly called 'trusts,' that seeks to avoid competition by combining and controlling corporations, partnerships and individuals engaged in the same business, and placing the power and property of the combination under the government of a few individuals, and often under the control of a single man called a trustee, a chairman or a president.

The sole object of such a combination is to make competition impossible....

It dictates terms to transportation companies. It commands the price of labor without fear of strikes, for in its field it allows no competitors. Such a combination is far more dangerous than any heretofore invented, and when it embraces the great body of all the corporations engaged in a particular industry in all the states of the Union, it tends to advance the price to the consumer of any article produced. It is a substantial monopoly injurious to the public, and by the rule of both the common law and the civil law is null and void and the just subject of restraint by the courts....

It is this kind of combination we have to deal with now. If the concentrated powers of this combination are entrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the state and national authorities.

If we will not endure a king as a political power, we should not endure a king over the production, transportation and sale of any of the necessaries of life. If we would not submit to an emperor, we should not submit to an autocrat of trade with power to prevent competition and to fix the price of any commodity…. These trusts and combinations are great wrongs to the people. They have invaded many of the most important branches of business. They operate with a double-edged sword. They increase beyond reason the cost of the necessaries of life and business, and they decrease the cost of the raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy, and increase the price of what they sell. They aggregate to themselves great enormous wealth by extortion, which makes the people poor. Then making this extorted wealth the means of further extortion from their unfortunate victims, the people of the United States, they pursue unmolested, unrestrained by law, their ceaseless round of peculation under the law, till they are fast producing that condition of our people in which the great mass of them are servitors of those which have this aggregated wealth at their command.[29]

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29 *See* 21 Cong Rec. 2462 (1890).

C. The Original Meaning of American Antitrust Law

What was the antitrust remedy demanded by the public? After much debate, and with strong disagreement on emphasis, the consensus was that the best antidote to the power of the industrial trusts was to *dust off and reinvigorate the common-law doctrines on restraint of trade and monopolies and treat them as actionable offenses when committed in the interstate or foreign commerce of the United States.*[30] The courts would be charged with applying and developing this law,[31] and to this end they would proceed from the following general precepts. First, the law against restraint of trade would forbid companies to use contracts or coordinated business arrangements in order to impose unreasonable restrictions on market participants that would prevent or hinder them from competing or plying their lawful trades. Second, the law against unauthorized monopolies would prevent any company from using contracts, combinations or business practices to undermine or co-opt competitors and thereby gain or preserve control over an entire line of commerce. Third, the courts would have broad authority to grant traditional common-law remedies, such as decrees of avoidance, dissolution, and divestiture, as well as a sweeping array of statutory remedies not available at common law: treble damages and attorney's fees to a prevailing plaintiff in a private action, and civil fines and even criminal penalties in successful public prosecutions. Lastly, the federal version of this law would concern only the interstate and foreign commerce of the United States, and each State would bear responsibility for

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30 *See* George F. Edmunds, *The Interstate Trust and Commerce Act of 1890*, 194 No. Am. Rev. 801, 813 (1911) (Senator Edmunds, principle co-draft of Sherman Act, writing: "[A]fter most careful and earnest consideration by the Judiciary Committee of the Senate it was agreed by every member that it was quite impracticable to include by specific description all the acts which should come within the meaning and purpose of the words 'trade' and 'commerce' or 'trust', or the words 'restraint' or 'monopolize', by precise and all-inclusive definitions; and that these were truly matters for judicial consideration"); 36 Cong. Rec. 522 (Jan. 6, 1903) (statement of Senator Hoar) ("We undertook by law to clothe the courts with the power and impose on them and the Department of Justice the duty of preventing all combinations in restraint of trade. It was believed that the phrase 'in restraint of trade' had a technical and well-understood meaning in the law."); *see also* Walker, *supra* note 3 at 47-48.

31 *See supra* note 30.

enacting and enforcing its own competition law for its own intrastate commerce. That is American antitrust law in its original, essential conception.[32]

Thus conceived, antitrust law was enacted across the land: from the late 1880s onwards, numerous States enacted their own antitrust laws,[33] and in 1890 the U.S. Congress, acting almost unanimously,[34] enacted the Sherman Act, which became the country's first national antitrust law.[35] To redress perceived gaps in the law, Congress enacted the Clayton Act and the Federal Trade Commission Act in 1914.[36] Congress further supplemented these laws by its passage of the Robinson-Patman Act (1936), which clarified and expanded the Clayton Act's prohibition of commercial price discrimination,[37] and by its passage of

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32 *See Apex Hosiery*, 310 U.S. at 497-98 ("The common law doctrines relating to contracts and combinations in restraint of trade were well understood long before the enactment of the Sherman law. They were contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market. Such contracts were deemed illegal and were unenforcible [sic] at common law. But the resulting restraints of trade were not penalized and gave rise to no actionable wrong. Certain classes of restraints were not outlawed when deemed reasonable, usually because they served to preserve or protect legitimate interests, previously existing, of one or more parties to the contract. In seeking more effective protection of the public from the growing evils of restraints on the competitive system effected by the concentrated commercial power of 'trusts' and 'combinations' at the close of the nineteenth century, the legislators found ready at their hand the common law concept of illegal restraints of trade or commerce. In enacting the Sherman law they took over that concept by condemning such restraints whereever they occur in or affect commerce between the states. They extended the condemnation of the statute to restraints effected by any combination in the form of trust or otherwise, or conspiracy, as well as by contract or agreement, having those effects on the competitive system and on purchasers and consumers of goods or services which were characteristic of restraints deemed illegal at common law, and they gave both private and public remedies for the injuries flowing from such restraints."); *see also* 15 U.S.C. §§ 1-7 (original Sherman Act passed in 1890); 15 U.S.C. §§ 8-11 (supplemental statutes enacted in 1894).

33 *See Texaco,* 46 Cal. 3d at 1154-62 (discussing state antitrust laws that were adopted around the same time as the Sherman Act, including antitrust laws adopted in Arkansas, California, Kansas, Maine, Michigan, Mississippi, Missouri, Nebraska, New York, North Dakota, Ohio, South Dakota, Tennessee and Texas.); *see, e.g.*, *Marin Cty. Bd. of Realtors, Inc. v. Palsson*, 16 Cal. 3d 920, 925 (1976) ("A long line of California cases has concluded that the Cartwright Act is patterned after the Sherman Act and both statutes have their roots in the common law.").

34 The vote in the House was unanimous, and in the Senate all but one member voted for the bill. *See* Walker, *supra* note 3 at 34, 41-46.

35 *See* 15 U.S.C. §§ 1-7 (original Sherman Act passed in 1890); 15 U.S.C. §§ 8-11 (supplemental statutes enacted in 1894).

36 These laws are now codified at 15 U.S.C. §§ 12 *et seq.*

37 *See* 15 U.S.C. § 13. The Clayton Act's original prohibition of price discrimination was directed against predatory pricing schemes conducted by dominant sellers to undermine lesser rivals. The Robinson-Patman Act supplemented this prohibition to protect smaller commercial customers from large chain-store buyers that could otherwise prevail on manufacturers to give them preferential prices. *See F.T.C. v. Morton Salt Co.*, 334 U.S. 37, 43 (1948) (explaining why Congress enacted the Robinson-Patman Act – to ensure that large commercial buyers could not undermine competition in their markets by prevailing on sellers to give them favorable prices for commodities, except where the lower prices were justified by cost-efficiencies or competitive conditions).

the Celler-Kefauver Act (1950), which closed a loophole and expanded the reach of the Clayton Act's prohibition of anticompetitive mergers and acquisitions.[38]

As originally conceived, antitrust laws were meant to ensure that, as a general rule, the interstate and foreign commerce of the United States would be conducted by private parties whose vigorous competition with one another would regulate and guide their behavior.[39] Wherever possible, markets would be generally competitive, and sellers and buyers in them would vie against one another and thus keep one another honest, even if this approach to commerce proved not to be the most efficient possible way to produce goods and provide services.[40]

The immediate aim of antitrust was to curtail and check the immense power of the giant industrial trusts, and the larger purpose was to prevent marketwide restraints of commerce, corrupt trading practices, and the purposeful monopolization of entire markets.[41] The underlying rationale was that curtailing these practices would preserve the best traditions and potential of American society, protect society from the unchecked power and likely malign influence of dominant industrial combinations, and thereby afford better opportunities and greater prosperity for a larger number.[42]

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38 *See Brown Shoe Co. v. United States*, 370 U.S. 294, 315-18 (1962) (explaining that the Celler-Kefauver Act amended the Clayton Act's prohibition of anticompetitive acquisitions so that it reached asset acquisitions, vertical mergers, and conglomerate mergers, and further explaining that the purpose was to arrest a general tendency towards economic concentration in the country's private markets).

39 *See N. Sec.*, 193 U.S. at 337 (1904).

40 Walker, *supra* note 3 at 47-62; *see also United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428-29 (2d Cir. 1945)("*Alcoa*") ("Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.").

41 *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 83-84 (1911) ("All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The nation had been rid of human slavery,—fortunately, as all now feel,—but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people; namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life. Such a danger was thought to be then imminent, and all felt that it must be met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong. Congress therefore took up the matter and gave the whole subject the fullest consideration.... Guided by these considerations, and to the end that the people, so far as interstate commerce was concerned, might not be dominated by vast combinations and monopolies, having power to advance their own selfish ends, regardless of the general interests and welfare, Congress passed the anti-trust act of 1890....") (Harlan J., concurring in part and dissenting in part on unrelated grounds).

42 *See* Walker, *supra* note 3 at 16 (Senator Teller, commenting on the same law) ("[T]he general complaint against trusts is that they prevent competition"); *see also Alcoa*, 148 F.2d at 427-29 (examining the original statutes and early case law to discern and explain their purpose and meaning); *see also United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323-24 (1897) (explaining that the Sherman Act was intended to protect competition, prevent any combination from destroying it in any line of commerce, and thereby promote economic opportunity and self-reliant commercial enterprise, both of which are vital to a healthy economy and society).

IV. CLASSICAL ANTITRUST LAW

A. The Charter Principles of Classical Antitrust Law

Stated broadly, and subject to key exceptions described below, the federal antitrust statutes and key federal court decisions established the following charter principles of American commerce during the classical period of antitrust law (c. 1890 – 1975). Namely, the interstate and foreign commerce of the United States shall be free of undue restraints of trade and monopolization.[43] In particular, the interstate and foreign commerce of the United States shall be free of the following commercial practices: (1) undue restraints of trade – i.e., trade covenants, concerted arrangements, and combinations used to limit or suppress competition rather than reasonably facilitate legitimate transactions and collaborations;[44] (2) monopolization – i.e., serious attempts, conspiracies, and successful

43 *See N. Sec.*, 193 U.S. at 337 (the Sherman Act establishes "a rule for interstate and international commerce ... that it should not be vexed by combinations, conspiracies, or monopolies which restrain commerce by destroying or restricting competition.").

44 *See* 15 U.S.C. § 1; *see also Addyston Pipe & Steele*, 85 F. at 279-284 (confirming the doctrine of ancillary restraints summarized above); *United States v. Joint Traffic Assn.*, 171 U.S. 505, 568-570 (1898) (agreement between railroad companies to set prices is an unlawful restraint of trade even if the prices thus established are reasonable or fair); *N. Sec.*, 193 U.S. at 331-32 ("[T]he natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promoting trade and commerce; ... to vitiate a combination such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result, in a total suppression of trade or in a complete monopoly, but it is only essential to show that, by its necessary operation, it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition...."); *Standard Oil*, 221 U.S. at 58-60 (Section 1 codifies common-law prohibition of unreasonable restraints of trade, which are contracts and business arrangements that impose "an undue limitation on competitive conditions"); *Nash v. United States*, 229 U.S. 373, 376 (1913) (The Sherman Act forbids "contracts and combinations" that "by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."); *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) ("Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. 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."); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) ("[F]or over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense."); *id.* at 221 ("Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.").

efforts to control a market by suppressing or co-opting competitors;[45] (3) unjustified price discrimination in sales of any commodity to commercial customers that harms either competition between the seller and its customers or downstream competition;[46] (4) commercial bribery;[47] (5) exclusive-dealing or tie-in arrangements for the sale of commodities, when any such arrangement unreasonably impedes or necessarily excludes competitors of the exclusive dealer or tying seller by depriving them of access to inputs or sales outlets that they likely require to compete proficiently;[48] (6) a firm's acquisition of

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45 *See* 15 U.S.C. § 2; *see also United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) ("The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."); *Alcoa*, 148 F.2d at 429-32 (a firm that purposefully acquires or preserves a monopoly over a given line of commerce commits unlawful monopolization in violation of Section 2); *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946) (concerted conduct to acquire or preserve monopoly power is unlawful under Section 2); *Apex Hosiery*, 310 U.S. at 497 ("A combination of two great railroads resulting in destroying or greatly abridging the free operation of competition theretofore existing was enjoined in *United States v. Union Pacific R. Co.*, 226 U.S. 61 [1912]" and a combination that confers the "power to control the output, supply of the market and the transportation facilities of potential competitors, in the anthracite coal market, the arrangement was held void in *United States v. Reading Co.*, 253 U.S. 26, 47-48 [1920].").

46 *See* 15 U.S.C. § 13(a)-(b), (d)-(f); *see also Morton Salt*, 334 U.S. at 43 ("The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price.").

47 *See* 15 U.S.C. § 13(c).

48 *See* 15 U.S.C. § 14; *see also Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961) (Exclusive dealing contract violates Section 3 of the Clayton Act when "it [is] probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected."); *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 605 (1953) ("Tying arrangements, we may readily agree, flout the Sherman Act's policy that competition rule the marts of trade. Basic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition; that the public, acting through the market's impersonal judgment, shall allocate the Nation's resources and thus direct the course its economic development will take. Yet tying agreements serve hardly any purpose beyond the suppression of competition. By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market.").

another firm or its assets, where the likely result is a substantial lessening of competition in any market;[49] and (7) certain kinds of interlocking directorates.[50]

B. The Underlying Rationale for Classical Antitrust Law

The judicial policies that underpinned the charter principles of antitrust were explained in the common-law decisions and early antitrust cases. The statutory supplements and ringing court decisions in the post-WWII era merely reinforced the ancient common-law doctrines. These policies are simple to recite and necessary to a proper understanding of the original purpose of antitrust law.

First, every person is entitled to practice a lawful trade and to compete to make sales and purchases, and every business to offer its services or wares, subject only to properly exercised public authority and regulation, which in appropriate cases can be delegated to private actors.[51]

Second, private markets should be naturally regulated by uncorrupted commercial rivalry between rival sellers and between rival buyers at each stage of every supply chain. That is the best way to promote economic opportunity, commercial honesty, and good trading practices without repressive public regulation that itself leads to public corruption and a stultified, excessively bureaucratic economy.[52]

Third, competitive rivalry in our markets, if vigorous, protects all market participants. If suppliers compete to make sales to competing dealers that in turn make sales to competing commercial customers, all of them will tend to act on their best behavior and to deal fairly with their counterparts in all dealings. A seller that overcharges its customers will lose them to another seller that offers better terms. A customer that drives an overly hard bargain will find that suppliers have sold their wares to other, more reasonable customers. At the very end of a supply chain, retail sellers will not abuse consumers for fear of losing their business. More generally, competitive rivalry at each stage of a supply

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49 *See* 15 U.S.C. § 18; *see also Brown Shoe*, 370 U.S. at 315-18 ("The dominant theme pervading congressional consideration of the 1950 amendments [of the Clayton Act] was a fear of what was considered to be a rising tide of economic concentration in the American economy. Apprehension in this regard was bolstered by the publication in 1948 of the Federal Trade Commission's study on corporate mergers. Statistics from this and other current studies were cited as evidence of the danger to the American economy in unchecked corporate expansions through mergers. Other considerations cited in support of the bill were the desirability of retaining 'local control' over industry and the protection of small businesses. Throughout the recorded discussion may be found examples of Congress' fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose. [Congress] hoped to make plain that [Section 7 of the Clayton Act] applied not only to mergers between actual competitors, but also to vertical and conglomerate mergers whose effect may tend to lessen competition in any line of commerce in any section of the country.... [I]t is apparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum.").

50 *See* 15 U.S.C. § 19.

51 *See supra* Section II.

52 *See* Walker, *supra* note 3 at 13-16; *Alcoa*, 148 F.2d at 429-32.

chain keeps market participants honest and prevents them from taking advantage of their counterparties. Competitive markets thus encourage best practices, commercial honesty, innovation, and responsive dealings: laggards, swindlers, overly hard bargainers, and the hidebound will tend to lose business to rivals that are enterprising, honest, accommodating, and innovative.[53]

Lastly, a business may lawfully become a monopoly or dominant firm in a highly concentrated market only if it does so by its superior skill, happenstance, or a market's structural limitations, but it cannot acquire or maintain its dominance by any commercial practice that needlessly impedes or prevents any rival from competing against it.[54]

C. The Principal Exceptions to Classical Antitrust

During the classical era of antitrust (c. 1890 to 1975), the federal courts clarified how the common-law doctrines might be applied in the various cases that came before them. Along the way, various courts differed on numerous points, but usually acknowledged the intended meaning of the Sherman Act's central prohibitions: they were codifications of the above-described doctrines against restraint of trade and unauthorized monopolies.[55] Even so, the courts disagreed sharply on certain key points, which I examine directly below.

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53 *Alcoa*, 148 F.2d at 427 (L. Hand, J.) (The Sherman Act protects customers from price-gouging imposed by monopolists, and it also has "wider purposes" and therefore forbids the willful acquisition or preservation of a monopoly position even when the monopolist does not charge monopoly rents. The animating theory is "that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. [C]ompetitors, versed in the craft as no consumer can be, will be quick to detect opportunities for saving and new shifts in production, and be eager to profit by them.").

54 *See id.,* 148 F.2d at 429-30.

55 *See* Walker, *supra* note 3 at 295-96 (commenting on the "numerous judicial decisions" that interpreted and applied the Sherman Act during its first twenty years, and observing that these decisions, "with a close approach to unanimity," agreed on the meaning of the Sherman Act's prohibitions); *see also United States v. Trans-Missouri Freight Assn.,* 166 U.S. 290, 340-343 (1897) (expansive statement of the law of restraint of trade, so that it encompasses all contracts by which companies combine to control any line of commerce and thereby avert price competition, regardless of whether they charge reasonable prices or unreasonably high prices); *Addyston Pipe & Steele*, 85 F. at 279-284 (explaining doctrine of ancillary restraints); *Alcoa,* 148 F.2d at 428-29 (examining the original statutes and early case law, and finding that they agreed on the following matters: "[T]he vice of restrictive contracts and of monopoly is really one, it is the denial to commerce of the supposed protection of competition.... We have been speaking only of the economic reasons which forbid monopoly; but, as we have already implied, there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results. In the debates in Congress Senator Sherman himself in the passage quoted in the margin showed that among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them.... Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.").

1. The First Exception: The Commerce-Clause Limitation and Early Price-Fixing Cases Led to a Great Era of Industrial Consolidation

While the Sherman Act's meaning seemed clear to its contemporaries, its *reach* occasioned strong disagreement. In its first antitrust ruling, given in 1895, a reactionary Supreme Court adopted an extraordinarily narrow reading of the Constitution's Commerce Clause,[56] holding that the Sherman Act did not apply to manufacturing performed within a State, since Congress lacked authority to regulate intrastate activities; rather, the Sherman Act governed only the interstate transport and sale of commodities, but never their manufacture or production, which by definition could be done only in one place at a time.[57] Shortly afterwards, the Supreme Court confirmed in a string of rulings that price-fixing by rival sellers of commodities was per se unlawful under the Sherman Act.[58]

By these early rulings, the Supreme Court established that (1) the Sherman Act prohibited rival sellers from fixing prices or enforcing naked restraints of competition when dealing in the interstate transport and sale of commodities;[59] but (2) this law did not reach mining, agriculture, or manufacturing operations, so that producers of commodities could combine with impunity to dominate the production of any commodity.[60] Sellers that acted in interstate commerce could not allocate markets or fix prices to escape the pressures of competition, but producers could combine their operations as much as they wished, but subject to state laws.

Sellers were guided accordingly. The Supreme Court's rulings on the Sherman Act directly led to an unprecedented wave of mergers and market consolidation from the mid-1890s to the early 1900s. These mergers were so significant that they lastingly re-shaped American commerce, and their effects persist to the present day.[61] For example, the legendary financier J.P. Morgan oversaw the formation of the United States Steel Company in 1901 by combining the operations of steel producers that collectively produced nearly

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56 Congress' power to regulate interstate commerce is conferred by the Constitution's Commerce Clause. *See* U.S. Const., art. I, § 8 ("The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States....").

57 *See E. C. Knight*, 156 U.S. at 16-17. This ruling permitted the infamous Sugar Trust to proceed with its challenged acquisitions of several large sugar refineries by which it gained ownership and control over 98% of all refined sugar produced in the United States. *See id*. at 18.

58 *See Trans-Missouri Freight*, 166 U.S. at 339 (holding that agreements among railroad operators to fix their respective rates were unlawful under Section 1 even if the rates are reasonable); *Joint Traffic Assn.*, 171 U.S. at 568-570 (1898) (agreement between railroad companies to set prices is an unlawful restraint of trade under Section 1 even if the prices thus established are reasonable or fair); *Addyston Pipe & Steele, Co.* 85 F. at 291 (covenants to fix prices and coordinate bidding made between producers of cast-iron pipes were violations of Section 1).

59 *See id*.

60 *See E. C. Knight*, 156 U.S. at 16-17.

61 *See* Vaheesan, *supra* note 27 at 783-786.

70% of all steel made in the United States, and shortly afterwards US Steel enlarged itself even further by acquiring its largest remaining competitor.[62]

The Supreme Court's severe limitation of the Sherman Act's reach under the Commerce Clause was gradually lessened by a succession of decisions from the early 1900s onward,[63] but it was abrogated only much later, in the landmark case of *Wickard v. Filburn* in 1942.[64] In the meantime, the great wave of mergers at the turn of the century were largely left intact, but federal antitrust prosecutors brought several landmark cases and succeeded at dissolving several major monopolies during the Administrations of Theodore Roosevelt, William Howard Taft, and Woodrow Wilson.[65]

2. The Second Exception: Which Restraints of Trade Are Prohibited?

A second notable dispute concerned an early disagreement as to whether Section 1 barred all restraints of trade or only unreasonable ones. This disagreement, although it occasioned lengthy dissents in the earliest opinions, seems to have been more semantic than substantive: courts that viewed the prohibition as absolute defined restraints of trade narrowly, so that the term as defined included only practices that other courts would have characterized as unreasonable restraints.[66] This debate was definitively resolved in *Standard*

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62 *See* Charles R. Morris, The Tycoons: How Andrew Carnegie, John D. Rockefeller, Jay Gould, and J.P. Morgan invented the American supereconomy 255-58 (2005); Len Boselovic, Steel Standing: U.S. Steel celebrates 100 years, PG News – Business & Technology, Feb. 25, 2001.

63 *See, e.g.*, *Swift & Co. v. United States*, 196 U.S. 375, 396-397 (1905) (ruling that several combinations to control production and sale of commodity within various states was part of overall plan to restrain interstate commerce, and that this outcome fell within Congress' authority under the Commerce Clause because the effect on interstate commerce was "not accidental, secondary, remote, or merely probable," but rather was the plan's "direct object," so that "the case [was] not like *United States v. E. C. Knight Co*."); *see generally United Leather Workers' Int'l Union, Loc. Lodge or Union No. 66 v. Herkert & Meisel Trunk Co.*, 265 U.S. 457, 468-69 (1924) ("The *Knight* Case has been looked upon by many as qualified by subsequent decisions of this court. The case is to be sustained only by the view that there was no proof of steps to be taken with intent to monopolize or restrain interstate commerce in sugar, but only proof of the acquisition of stock in sugar manufacturing companies to control its making.").

64 *See Wickard v. Filburn*, 317 U.S. 111, 124 (1942) ("The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce....").

65 *See* Walker, *supra* note 3 at 179-216, 270-284 (recounting the federal government's prosecution of Sherman Act claims during the Administrations of Theodore Roosevelt and William Howard Taft); *see also* Vaheesan, *supra* note 27 at 787 ("Although the administrations of Theodore Roosevelt, William Howard Taft, and Woodrow Wilson launched a vigorous anti-monopoly campaign, these efforts, at most, undid only a part of the consolidation that resulted from the merger mania between 1897 and 1904…. Given the creation of monopolies in a number of key industries, the public clamored for government action. The administrations of Theodore Roosevelt and especially of William Howard Taft and of Woodrow Wilson initiated a number of major monopolization suits.").

66 *Compare, e.g.*, *N. Sec.*, 193 U.S. at 331-32 (all restraints of trade are outlawed, but the term refers only to a practice intended to "prevent [the] play of competition" and that "restrains instead of promoting trade and commerce") *with Standard Oil*, 221 at 1, 58-60 (Section 1 codifies common-law prohibition of unreasonable restraints of trade, which are contracts and business arrangements that impose "an undue limitation on competitive conditions").

Oil and again in *Chicago Board of Trade*, both of which clarified that Section 1 prohibited only "undue"or "unreasonable" restraints of trade.[67]

3. The Third Exception: What Is a Monopoly?

During the classical era of antitrust, the courts largely agreed that the offense of monopolization meant the purposeful acquisition or preservation of market dominance by acquiring rivals or impeding their efforts to compete proficiently.[68] But at least one Supreme Court decision set a very exacting threshold, finding that the US Steel Corporation was not an unlawful monopolist even though it was a "combination" of 180 different steel producers that collectively accounted for 80% to 90% of steel production in the United States from 1901 to 1911. In that case, the court reasoned that US Steel, despite its immense size, faced genuine competition from other producers that remained outside its fold, and that US Steel and its remaining competitors had definitively abandoned their challenged trade restraints in response to the government's lawsuit, obviating the need for further enforcement action.[69] Regardless, the courts eventually agreed that monopolization occurred whenever one seller willfully acquired or maintained sufficient power in a given line of commerce either to exclude rival sellers or raise prices without losing profits.[70]

4. The Fourth Exception: Industrial Policy and Managed Trade

The fourth great exception to the original antitrust consensus arose during the Great Depression of the 1930s, when the country endured a broad, severe economic collapse. In a desperate bid to revive the economy, Congress enacted industrial-policy legislation in 1933 that authorized producers to coordinate sales, establish production quotas, and set prices and wages under the supervision of federal authorities.[71] In one case, the Supreme Court upheld

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67 *See Standard Oil*, 221 U.S. at 58-69; *Chicago Board of Trade*, 246 U.S. at 238 ("Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. 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.").

68 *See* 15 U.S.C. § 2; *see also United States v. Union Pacific R. Co.*, 226 U.S. 61, 88 (1912); *Reading*, 253 U.S. at 47-48. *See generally Grinnell*, 384 U.S. at 570-71; *Alcoa*, 148 F.2d at 429-32.

69 *See United States v. U.S. Steel Corp.*, 251 U.S. 417, 444-445 (1920).

70 *See United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 389 (1956) ("Our cases determine that a party has monopoly power if it has, over any part of the trade or commerce among the several states, a power of controlling prices or unreasonably restricting competition.").

71 *See* The National Recovery Act of 1933, Pub. L. 73-67, 48 Stat. 195 (to encourage growth and full employment at higher wages, this law suspended federal antitrust law, authorized federal supervision of entire industries, and, subject to this federal supervision, allowed producers in various industries to coordinate and set prices, production quotas, market allocations, and wages); *see generally* Wu, *supra* note 27 at 78, 92.

one such arrangement,[72] but in 1935 it invoked constitutional grounds to strike down key provisions of the principal law that authorized this form of industrial management.[73] In a similar vein, Congress passed another law in 1937 that authorized individual States to permit vertical price-setting schemes undertaken by a producer and its sellers. This law remained in effect until Congress repealed it in 1975 after finding that it had led to increased retail prices.[74]

The federal policy of managed industry not only raised constitutional concerns, but also failed to accomplish its purposes – which were to spur economic activity, increase employment, and restore general prosperity. Franklin D. Roosevelt's Administration therefore pivoted away from this policy from the late 1930s onward, when it chose instead to favor expansive, aggressive enforcement of the Sherman Act to prevent market concentration. Strong antitrust enforcement thus became a bulwark of American policy from the late 1930s onwards. This approach was continued by ensuing Administrations until the election of Richard Nixon in 1968, and it was generally embraced by the federal courts until the late 1970s, when Nixon's judicial appointees began to develop a common-law of consumer-welfare jurisprudence.[75]

5. The Exceptions Were Secondary and Never Upended the Charter Principles of American Commerce

Subject to the above exceptions, and with varying degrees of emphasis, the federal courts during the classical era largely agreed on the meaning of the Sherman Act's prohibitions, which I have summarized above. This general consensus lasted from 1890 to the late 1970s. According to this consensus, companies subject to the Sherman Act could not use contracts to restrain or prevent counterparties or others from competing against them unless the restraint was both ancillary and narrowly tailored; nor could companies allocate markets or fix prices; nor could any company purposefully acquire or maintain a monopoly or near-monopoly by acquiring or sabotaging rival sellers. To make any of these showings was to prove an offense that fell within the prohibitions of the Sherman Act. The supplemental federal statutes reinforced these overarching, general prohibitions and established complimentary, specific prohibitions. State

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72 *See Appalachian Coals v. United States*, 288 U.S. 344, 359-378 (1933), *overruled on unrelated ground by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984). In *Appalachian Coals*, the Supreme Court rejected a Sherman Act challenge to an agreement among rival coal producers in Appalachia to appoint a single sales agent to coordinate their sales, set prices, set wages, allocate profits, and thereby ensure that the producers did not undercut one another's prices and thus bring ruin upon themselves. In that decision, the Court went out of its way to identify the unfavorable economic circumstances that beset the Appalachian coal industry, and it endorsed industry-wide collaboration as an appropriate means to address these threats to the industry's stability and prosperity. That approach constituted a radical departure from the classical common-law doctrines.

73 *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) ("On both the grounds we have discussed, the attempted delegation of legislative power and the attempted regulation of intrastate transactions which affect interstate commerce only indirectly, we hold the code provisions here in question [key provisions of the National Industrial Recovery Act of 1933] to be invalid and that the judgment of conviction must be reversed.").

74 *See Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 904-05 (2007) ("In 1937, Congress passed the Miller-Tydings Fair Trade Act, 50 Stat. 693, which made vertical price restraints legal if authorized by a fair trade law enacted by a State. Fifteen years later, Congress expanded the exemption to permit vertical price-setting agreements between a manufacturer and a distributor to be enforced against other distributors not involved in the agreement. McGuire Act, 66 Stat. 632. In 1975, however, Congress repealed both Acts.").

75 Wu, *supra* note 27 at 78-83; Vaheesan, *supra* note 27 at 792-93.

antitrust laws codified some of these prohibitions, most notably those that condemned restraint of trade and commercial price discrimination. The principal limitation, finally removed in 1942, was the Supreme Court's formerly narrow construction of the Commerce Clause.

Indeed, it was during the great postwar era (c. 1945-1973) that the American economy became the most competitive, innovative, and prosperous in its history. During this era, vigorous antitrust enforcement became strongly associated not only with robust economic growth and greater economic opportunities, but also with good governance.[76] On repeated occasion, influential members of Congress and successive Presidents publicly decried the political dangers then associated with unchecked industrial monopolies – those of authoritarian nationalism and communism. During the interwar period, monopolies had secretly supported, funded, and facilitated fascist movements in Nazi Germany, Mussolini's Italy, and Imperial Japan, and those movements, once in power, had been impelled by their own internal dynamics to launch unprovoked wars of naked aggression (later called the Second World War) and to commit unspeakable atrocities against vulnerable minorities in the lands that they controlled.[77] Industrial monopolies also engendered intense antipathy and disillusionment among their many victims, giving rise to powerful socialist and communist movements that eventually led to a different form of repressive dictatorship. Antitrust, it was widely agreed, protected not only our markets and broader prosperity, but the very character of our culture, society, and political order.[78] These kinds of concerns had informed the original antitrust debates and became all the more heightened after the Second World War.[79]

V. THE CONSUMER-WELFARE STANDARD HAS CONTORTED AND EMASCULATED FEDERAL ANTITRUST LAW

It all changed with President Nixon's overhaul of the Supreme Court, which ever since has been a largely conservative court dominated by jurists who often have been skeptical of the merits of federal antitrust law, and who have narrowed its reach and meaning while completely redefining its intended purpose. From the late 1970s onward, the Supreme Court and lower federal courts have adopted one restrictive or unworkable antitrust doctrine after another, all of them premised on the absurdly misnamed consumer-welfare standard, which has *harmed* consumers by permitting every species of monopoly and trade restraint to hinder and suppress competition with impunity, so long as the offenders take care not to charge prices that are demonstrably and provably supracompetitive.[80]

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76 *See* Wu, *supra* note 27 at 78-81; Vaheesan, *supra* note 27 at 779.

77 *See* Wu, *supra* note 27 at 78-81; Vaheesan, *supra* note 27 at 779.

78 *See* Wu, *supra* note 27 at 78-81; Vaheesan, *supra* note 27 at 779.

79 *See* Wu, *supra* note 27 at 78-81; Vaheesan, *supra* note 27 at 779.

80 Wu, *supra* note 27 at 102-109; Vaheesan, *supra* note 27 at 792-800.

A. The Consumer-Welfare Standard, Explained

The consumer-welfare standard was originally formulated by a legendary conservative jurist, Robert Bork, who was famously hostile to federal antitrust law, believing that it did more harm than good and imposed indefensible burdens on American businesses.[81]

According to the consumer-welfare standard, the *only* proper purpose of federal antitrust law is to *promote maximum productive efficiency*, which is usually if not always best accomplished by permitting sellers and other market participants to make commercial agreements among themselves and to conduct commerce and allocate resources as they deem fit to do without any hindrance imposed by federal antitrust law.[82] Antitrust law should therefore condemn conduct only when (1) it constitutes an antitrust offense under classical antitrust jurisprudence; *and* (2) its effect or necessary tendency is to reduce overall output of a good or service in a properly defined market. Under this standard, an antitrust plaintiff must prove the traditional elements of its claim and further prove that the defendant's conduct has diminished or inevitably must diminish overall output in a given line of commerce.[83]

That is the consumer-welfare standard. Its title is a misnomer, since it is solely concerned with conduct that lessens overall output in a given market: an alleged antitrust violation might severely harm customers, but if it does not reduce or promise to reduce marketwide output, it

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81 To develop this standard, Judge Bork relied heavily on the antitrust teachings of the so-called "Chicago School," which purported to apply neo-classical price theory to antitrust issues, an exercise that almost invariably entailed making a complicated, counter-intuitive showing as to why the defendant's conduct should not be condemned as an antitrust violation. Once the Supreme Court adopted this approach to antitrust, it was more fully developed and explained with more nuance and moderation in a widely respected treatise on antitrust law compiled by two highly regarded law professors, the late Philip Areeda of Harvard Law School and his protegé, Herbert Hovenkamp, who now teaches law and economics at the University of Pennsylvania. That treatise in turn has long served as the authoritative guide to federal antitrust law that is routinely consulted by federal judges in antitrust cases. *See* Wu, *supra* note 27 at 102-109.

82 *See* Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself locs. 634, 696, 733 (Digital Ed. 2021).

83 *See id.; see also* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act,* 9 Journal of Law and Economics 7 (1966), reprinted in The Political Economy of the Sherman Act: The First One Hundred Years 39 (1991) (When enacting the Sherman Act, "Congress intended the courts to implement ... only that value we would today call consumer welfare.... [T]he policy the courts were intended to apply is the maximization of wealth or consumer want satisfaction. This requires courts to distinguish between agreements or activities that increase wealth through efficiency and those that decrease it through restriction of output."); *id.* at 43-47, 52-58, 61-70 (arguing that the Sherman Act condemns only trade restraints and monopolization that lessen "economic efficiency," which occurs when a cartel fixes prices or allocates markets, and which otherwise occurs only when the challenged practices are used to eliminate marketwide competition in order to restrict marketwide output and force customers to pay supracompetitive prices); *see generally* Herbert Hovenkamp, Federal Antitrust Policy: the Law of Competition and Its Practice 62-64, 77 (3rd Ed. 2005) ("The consumer welfare principle in use has become identical with the principal that the antitrust laws should strive for optimal allocative efficiency" – a concept whose "cruder" statement is that antitrust law exists to promote the "highest output and lowest prices in the market in question.").

is absolved.[84] Under the consumer-welfare standard, the apprehended evil is *economic inefficiency, not harm to consumers*, much less the unchecked power of giant industrial monopolies and combinations. A business commits an antitrust violation *only* when it charges captive customers so much for its goods that the customers end up purchasing fewer of them, thus ensuring that resources that otherwise would have been used to make these goods are instead diverted to another, less efficient use in another market.[85]

Consumer-welfare jurists describe this diversion of resources as the "social cost" of monopoly pricing: an offending monopolist or cartel reduces marketwide output of its product or raises prices and thereby forces customers to bid up prices for the product; the monopolist or cartel thereby generates higher profits from fewer overall sales; customers in the aggregate receive less of the product, while paying more for it; and the national economy is thus deprived of the additional output of the product that would have been produced in a competitive market (one in which sellers, to survive, would be forced to set prices as low as those charged by competitors, resulting in customers buying more of the product and in sellers producing more of it to meet the customers' increased demand for the product).[86]

It is that deprivation of output alone that bothers proponents of the consumer-welfare standard. They refer to it as the "dead weight of monopoly."[87] A monopolist that can practice perfect price-discrimination should be permitted to do so if the practice allows it to maintain the same level of output that sellers would provide in a competitive market, which is possible if the seller's price discrimination is perfectly calibrated to each buyer's reservation price and not too costly to administer.[88]

Under the consumer-welfare standard, the telltale signal of a cognizable antitrust offense is "supracompetitive prices" – prices higher than those that a seller could profitably charge in

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84 *See generally* HOVENKAMP, *supra* note 83 at 63-64 (according to consumer-welfare jurisprudence, "[a] ntitrust enforcement should be designed in such a way as to penalize conduct precisely to the point that it is inefficient, but to tolerate or encourage it when it is efficient," and "the decision to make this market efficiency model the exclusive guide for antitrust policy is nonpolitical…. Thus if a practice produces greater gains to business than losses to consumers, it is efficient and should not be illegal under the antitrust laws.").

85 *See id.*

86 *See generally id.* at 17-26.

87 *See generally id.* at 18-20. Related harms entailed by the same conduct are monopoly rents, *id.* at 20-23, and lost competitor investment, *id.* at 23-26. All of these harms result in less output and less efficient economic production, which in turn are the only proper concerns of antitrust law, according to consumer-welfare jurisprudence.

88 *See id.* at 575 ("Perfect price discrimination has two important results. First, the [amount] of traditional monopoly profits, or producers' surplus, is increased. Everything that would be consumers' surplus in a competitive market may become monopoly profits under perfect price discrimination. Second, output under perfect price discrimination is ... the same as under perfect competition. For this reason perfect price discrimination is often said to be as efficient as perfect competition, even though one result of perfect price competition is that customers are far poorer and the seller far richer.").

a competitive market.[89] According to the theory, supracompetitive prices can be profitably charged for an extended duration only by a monopolist or cartel whose customers are largely beholden to it for want of a viable alternative.[90] Even then, supracompetitive prices are unobjectionable when they do not result in lesser output – an outcome that is possible when a monopolist can implement "perfectly calibrated" price discrimination.[91]

It is only when a monopolist or cartel successfully imposes supracompetitive prices without practicing perfect price discrimination that market inefficiencies occur: buyers pay more to receive less of the product in question; and the monopolist or cartel earns higher profits from selling less of the product in question. Therefore, the monopolist or cartel makes less and

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89 *See Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995) ("[A]n act is deemed anticompetitive under the Sherman Act only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality.") (*citing Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223-225 (1993) (holding that a seller's predatory pricing, even if undertaken to destroy rival sellers, becomes unlawful under the Sherman Act only if the plaintiff can show that the seller, after excluding its rivals by predatory pricing, is likely to "recoup" the cost of predatory pricing by imposing supracompetitive prices)).

90 *See* William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 937 (1981) ("The term 'market power' refers to the ability of a firm (or a group of firms, acting jointly) to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded."); *see, e.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) ("[A] firm is a monopolist if it can profitably raise prices substantially above the competitive level.").

91 *See* Hovenkamp, *supra* note 83 at 575.

delivers less of the product to the buyers.[92] That is the sole or principal evil to be prevented and redressed by the Sherman Act, according to consumer-welfare jurisprudence.[93]

To justify using the consumer-welfare standard, its proponents have argued that federal antitrust law was originally enacted and should always be enforced only to prevent trade restraints and monopolizing conduct that result in sub-optimal output, supracompetitive prices, and the ensuing misallocation of resources in the national economy, which is the "social cost" of monopoly. Only these matters constitute "harm to competition" under the consumer-welfare standard. Nothing else should be condemned as an antitrust violation, nor was ever intended to be condemned.[94] On this telling, the evil to be averted is not the economic power of giant business concerns that can dominate their counterparties and regulators, but reduced output in a given line of commerce.[95] If a widget company commits a classical violation and in so doing causes less widgets to be produced in the United States, it can be held liable for an antitrust violation. Otherwise, it gets a free pass. Indeed, monopolies are to be encouraged

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92 *See* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶¶403-405 (2021). In a competitive market, sellers would have sold the product at lower prices, buyers would have purchased more of the product, and sellers therefore would have made and delivered more of it. Inputs that would have been used to make this product in a competitive market are diverted to less efficient uses elsewhere in the economy when this market is monopolized or allocated by a price-fixing cartel. That diversion of inputs to other markets is the sole concern of the consumer-welfare standard. *See id*.

93 *See Rebel Oil*, 51 F.3d at 1433. In theory, consumer-welfare jurisprudence acknowledges that harm to competition can also occur when the "quality" of output is reduced by the challenged conduct, *id*.), but the courts almost never find a defendant liable on this ground, *see* Areeda & Hovenkamp*, supra* note 92 at ¶¶403-405. Indeed, there are vanishingly few cases in which the courts have even taken up the matter in earnest. Perhaps the most well-known instance occurred in the *Glen Holly* case, in which the Ninth Circuit held that a plaintiff had adequately pled an antitrust claim under Section 1 by alleging that two sellers, whose offerings competed directly, agreed to remove one of their product offerings from the market, thereby obliging customers to buy the sole remaining offering; this conduct, if presumed true, was actionable under Section 1 because it "limited consumers' choice to one source of output." *See Glen Holly Enter., Inc. v. Tektronix Inc.*, 343 F.3d 1000, 1010-11 (9th Cir.), *opinion amended on denial of reh'g*, 352 F.3d 367 (9th Cir. 2003). But even this example shows how narrow is the reach of antitrust under the consumer-welfare standard: under classical antitrust law, any such agreement between the only two sellers in a market would be readily condemned as market allocation, or as an unlawful "combination," and at best could be justified only if the defendants were able to show at trial that they had removed one of their offerings in order to improve the other under a joint collaboration agreement – which would have been a highly implausible and difficult showing. Any complaint alleging such an agreement *never* would have been dismissed on the pleadings as it was by the district court in *Glenn Holly*. Even more startling, the most aggressive proponents of consumer-welfare jurisprudence have cast doubt on the very *theory* of harm to competition caused by the removal of an entire product offering in order to force consumers to buy the only remaining version of the product at a higher price. *See Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1202 (9th Cir. 2012) ("[A]llegations that an agreement has the effect of reducing consumers' choices or increasing prices to consumers does not sufficiently allege an injury to competition. Both effects are fully consistent with a free, competitive market.").

94 *See* Bork*, supra* note 82 at loc. 696, 733; *see also* Bork, *supra* note 83 at 39, 43-47, 52-58, 61-70; *see generally* Hovenkamp, *supra* note 83 at 62-64; Areeda & Hovenkamp, *supra* note 92 at ¶¶402-405.

95 *See* Bork*, supra* note 82 at loc. 696, 733; *see also* Bork, *supra* note 83 at 39, 43-47, 52-58, 61-70; *see generally* Hovenkamp, *supra* note 83 at 62-64; Areeda & Hovenkamp, *supra* note 92 at ¶¶402-405.

and congratulated for their contributions to the economy unless they restrict overall output in their lines of commerce.[96]

Perhaps the most forthright characterization of consumer-welfare jurisprudence is the following passage from *Rebel Oil*, a famous antitrust decision rendered by the Ninth Circuit in 1995 (with original citations preserved in the quotation):

> Competition consists of rivalry among competitors. *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1040 (9th Cir.1987), *aff'd*, 496 U.S. 543 … (1990). Of course, conduct that eliminates rivals reduces competition. But reduction of competition does not invoke the Sherman Act until it harms consumer welfare. *Products Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Cos.*, 682 F.2d 660, 663 (7th Cir.1982); *see Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 … (1979) (Congress designed the Sherman Act as a "consumer welfare prescription") (quoting ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 66 (1978)). Consumer welfare is maximized when economic resources are allocated to their best use. *National Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 387-88 & n. 13, … and when consumers are assured competitive price and quality. *Products Liab. Ins.*, 682 F.2d at 663-64. Accordingly, an act is deemed anticompetitive under the Sherman Act only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality.[97]

Apart from everything else, this theory of federal antitrust law is *contrary* to the original aim of antitrust law, which was to deter and prohibit undue restraint of trade and monopolization even if doing so entailed a sacrifice of commercial efficiency.[98]

B. The Practical Significance of the Consumer-Welfare Standard

In practice, the consumer-welfare standard has been usually impossible to satisfy. That is because its principal required showing – supracompetitive prices – is usually difficult or impossible to make in most markets, in which sellers offer differentiated products or services that are sold at varying prices, often under confidential contracts, so that a defendant's prices might be higher than those of its rivals, but justified by its brand, or by superior or additional features in its product, or because the defendant offers related services that its rivals do not

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96 *See Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (Scalia, J.) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.").

97 *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995).

98 *See supra* Sections III & IV.

provide or provide in slightly different ways.[99] Also, it is usually difficult or impossible to ascertain a firm's true marginal cost – the economic cost of selling an additional unit; but Chicago School price theory posits that a monopolist or cartel charges supracompetitive prices only when its pricing is higher than its marginal costs, including the cost of attracting capital investment (i.e., paying reasonable profits to investors).[100]

That means that antitrust plaintiffs usually must make a poorly defined substitute showing, using "indirect evidence" to prove that a defendant's challenged practices likely have resulted in reduced output.[101] In most cases, the courts find these proofs to be deficient.[102]

It turns out that supracompetitive prices can be readily shown only in *perfectly competitive markets*, where by definition such prices *will never be charged,* except when a secret cartel organizes and enforces a marketwide conspiracy to fix prices or allocate markets. In perfectly competitive markets, all sellers offer an undifferentiated commodity at the market price (say, sweet corn by the bushel for sale at Chicago). The market price, in turn, is the price that it costs reasonably efficient sellers to bring the commodity to market, including a minimally reasonable profit. If any seller strays above this price, it will instantly lose all future sales to other sellers that continue to charge the market price. If a seller charges below the market price, its ensuing sales will be done at a loss, and it will be quickly inundated with orders that will harm it the more it fills them.[103] In such a market, sellers have no power over their prices, and every seller can deprive every other of business if the other charges uncompetitive prices or otherwise imposes unfair terms of trade. That is a perfectly competitive market. It is perfectly competitive precisely because many sellers vie to make sales of an undifferentiated commodity that buyers will readily buy from any seller that offers it at the market price.[104] Cartels might occasionally try to fix prices and allocate sales in such markets, giving rise to conduct that is condemned under the consumer-welfare standard. It is the mere low-lying fruit of antitrust law, but seemingly the only target of consumer-welfare jurisprudence.[105]

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99 Areeda & Hovenkamp, *supra* note 92 at ¶504 ("[T]he technical measure of [proving supracompetitive pricing] ... can seldom be used explicitly in antitrust cases.... Many firms do not sell their products at a single price. Rather, they have a schedule of prices, to which they may not adhere consistently. They have different prices for differing conditions of sale, different size containers, different transaction sizes, different degrees of risk assumption, and perhaps for different classes of customers. In addition, the firm may offer several differentiated products whose prices and costs vary from one to the next.").

100 *Id.* (explaining the practical impossibility of proving "the excess of price over marginal cost to find market power"); *see also Microsoft*, 253 F.3d at 51 ("[D]irect proof [that a firm profitably charges supracompetitive prices] is only rarely available....").

101 *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) ("*Amex*") ("Direct evidence of anticompetitive effects would be proof of actual detrimental effects on competition, such as reduced output, increased prices, or decreased quality in the relevant market. Indirect evidence would be proof of market power plus some evidence that the challenged restraint harms competition.").

102 *See Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2161 (2021) ("[C]ourts have disposed of nearly all rule of reason cases in the last 45 years on the ground that the plaintiff failed to show a substantial anticompetitive effect.") (*citing* Brief for 65 Professors of Law, Business, Economics, and Sports Management as Amici Curiae 21, n. 9 ("Since 1977, courts decided 90% (809 of 897) on this ground")).

103 *See generally* Hovenkamp, *supra* note 83 at 3-12 (explaining how firms set prices in perfectly competitive markets); Vaheesan, *supra* note 27 at 792-800.

104 *See generally* Hovenkamp, *supra* note 83 at 3-12 (explaining how firms set prices in perfectly competitive markets)*; see also* Paul A. Samuelson, Economics 483-509 (1st Ed. 1948).

105 Wu, *supra* note 27 at 104-109 ; Vaheesan, *supra* note 27 at 792-800.

In contrast to a perfectly competitive market, a monopolized market is one in which one seller or a cartel has so much power over its customers that it can profitably charge higher prices than it could ever do in a perfectly competitive market.[106]

Most markets, however, are neither perfectly competitive, nor monopolized, but are said to be "monopolistically competitive." Sellers in these markets have varying degrees of market power over subsets of customers, and each tries to distinguish its offerings from those of rival sellers by brand, product features, service options, financing terms, and so forth. It is almost impossible to measure supracompetitive prices in these markets, since by their very nature they include differentiated products or services.[107]

There lies the rub. Supracompetitive prices can be readily shown only in markets where they typically cannot be charged – i.e., in perfectly competitive markets. In consequence, antitrust claims in the modern era too often fail because the consumer-welfare standard requires a showing of a classical antitrust offense, plus a further showing of supracompetitive prices, but this second showing usually cannot be made by direct evidence in the very markets where classical antitrust offenses are most likely to occur – markets that have been monopolized or are monopolistically competitive. The courts have limited any possible daylight by usually taking

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106 *See generally* Hovenkamp, *supra* note 83 at 12-14 (explaining how monopolies and cartels set prices in monopolized or cartelized markets); *see also* Samuelson, *supra* note 104 at 493-509.

107 *See* Samuelson, *supra* note 104 at 491-493.

a skeptical, narrow view of "indirect evidence" used to show how a defendant's challenged practices have reduced economic efficiency in such markets.[108]

The upshot is easy to state. In the age of consumer-welfare antitrust, countless plaintiffs have forgone claims that would likely have prevailed on simple proofs in the era of classical antitrust jurisprudence, while countless others have made the attempt in vain, devoting much of the case to proving supracompetitive prices or other harms to economic efficiency, and paying fortunes to expert economists to prepare supporting reports, but all too often with the same luck as Don Quixote enjoyed when trying to joust against the windmills of Spain. In these cases, any court so inclined can find fault with the plaintiff's evidence, or merely find that the plaintiff has failed to provide preponderant evidence of supracompetitive prices, which properly speaking do not exist or are usually impossible to discern or demonstrate in markets that are monopolistically competitive or monopolized.[109]

Even so, some antitrust claims have miraculously survived the consumer-welfare standard. Most notably, when the charging offense is a trade restraint challenged under a *per se* or quick-look standard, the courts presume "harm to competition" (i.e., macroeconomic inefficiency)

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108 *Cf.* Areeda & Hovenkamp, *supra* note 92 at ¶504 (explaining practical difficulties of proving that a defendant is charging supracompetitive prices). In fairness, during the consumer-welfare era the Supreme Court has expressly clarified that restraint of trade concerns all "undue" restrictions on competition, *see Amex*, 138 S. Ct. at 2283, and that restraint of trade encompasses a broader range of business practices than do attempted or actual monopolization, *see Copperweld*, 467 U.S. at 768 ("§ 1 prohibits any concerted action in restraint of trade or commerce, even if the action does not threaten monopolization."); *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 190 (2010) ("Section 1 applies only to concerted action that restrains trade. Section 2, by contrast, covers both concerted and independent action, but only if that action monopolizes or threatens actual monopolization, a category that is narrower than restraint of trade."). A necessary corollary is that a plaintiff should never be obliged to prove supracompetitive prices or restricted marketwide output in a Section 1 case, since, by definition, those practices can be implemented only by a monopolist or cartel. *See id.* This point is impliedly confirmed by Supreme Court decisions during the consumer-welfare era. *See, e.g.*, *California Dental Ass'n v. F.T.C.*, 526 U.S. 756, 781 (1999) (remanding case for full rule-of-reason review of dental association's restrictions of dental advertising, since the restraints were binding on most dentists in various local markets and, as worded, appeared likely to result in less competition on price and quality in these markets, but with no required showing of supracompetitive prices or restricted market output); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) (an association of dentists violated Section 1 under the rule of reason by enforcing a rule that none of its members could provide x-rays to their payors, since the rule was binding on the "great majority" of dentists in three counties in Indiana and tended to diminish marketwide competition among them). Nonetheless, some lower courts appear to have overlooked this key distinction, using the same requirement of harm to competition for claims under Section 1 and Section 2, and thus rendering all such claims overly difficult to prove. *See, e.g.*, *Rebel Oil*, 51 F.3d at 1433 (for purposes of antitrust law, actionable harm to competition occurs only when the defendant's exclusionary conduct results in supracompetitive prices, restricted output, and a misallocation of economic resources). Even if the reform that I recommend in this article is not adopted, the courts should clarify the foregoing points and make clear that harm to competition under Section 1 does not require proof that the defendant has acted as only a monopolist or marketwide cartel can do. Otherwise, Section 1 would be rendered a largely superfluous statute that merely duplicates Section 2 and even imposes an additional requirement (proof of concerted conduct) that is not required under Section 2. *See Copperweld*, 467 U.S. at 768.

109 *See Alston*, 141 S. Ct. at 2161 (the overwhelming majority of rule-of-reason cases lose on the ground that the plaintiff has failed to show harm to competition); Vaheesan, *supra* note 27 at 792-800.

and excuse a demonstrative showing of supracompetitive prices.[110] This concession has mattered less than it should, since the same courts have abolished *most* of the per se prohibitions from the classical era, finding that these prohibitions cannot be reconciled with the ideal of "economic efficiency" extolled by consumer-welfare jurisprudence.[111]

The courts have also been willing to issue preliminary injunctions to prevent anticompetitive mergers and acquisitions challenged under Section 7 of the Clayton Act by the Federal Trade Commission or the U.S. Department of Justice.[112] But here too the relief has been very modest, often amounting to mere tinkering at the edges, since merger challenges in the modern era are infrequent and made only in accordance with the FTC-DOJ's highly exacting merger guidelines, which are predicated on consumer-welfare analysis.[113]

Lastly, a few courts sometimes invoke classical antitrust doctrines still on the books to condemn especially egregious misconduct that plainly exposes the defendant's exclusionary aims and practices, but these cases are rare and always vulnerable to challenge on appeal on the

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110 For *per se* violations, harm to competition is presumed, and there is no need to show supracompetitive prices or a reduction of output. *See Amex*, 138 S. Ct. at 2283 ("A small group of restraints are unreasonable *per se* because they always or almost always tend to restrict competition and decrease output."). For quick-look violations, harm to competition is presumed, but the defendant is afforded an opportunity to justify its use of the challenged trade restraints, after which the plaintiff can rebut the asserted justification as either a pretext or as unnecessarily restrictive because a lesser restraint could readily accomplish the defendant's stated purposes. *See Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1020 (10th Cir. 1998) (a quick-look review is used when a trade restraint is not unlawful per se, but "has obvious anticompetitive effects," in which case the court need not conduct a market analysis and can directly decide "whether the procompetitive justifications advanced for the restraint outweigh the anticompetitive effects.").

111 *See infra* Section V.C.

112 *See, e.g., F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 715-725 (D.C. Cir. 2001); *F.T.C. v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008); *F.T.C. v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337-39 (3d Cir. 2016). To do so under the current standards, the plaintiff must show that each seller's market share in a properly defined market; then calculate the sum of each market share squared. The resulting number, if sufficiently high, confirms that the market is "highly concentrated" according to the DOJ-FTC Horizontal Merger Guidelines of 2010. Any such merger is presumptively anticompetitive and subject to injunction or divestiture, especially if it directly eliminates existing competition between the merging parties. Even then, the merger's proponents can try to justify it by arguing that on balance it is pro-competitive. *See generally H.J. Heinz*, 246 F.3d at 715-25. In these cases, the required threshold showings are so high that successful challenges are usually made only to patently anticompetitive mergers, which mergers likely would never have even been *attempted* in the classical era. More generally, antitrust has utterly failed to check rampant, pervasive market consolidation during the consumer-welfare era. Public prosecutors and private claimants, knowing what to expect, choose not to challenge most of them.

113 *See generally* U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines (2010); Vaheesan, *supra* note 27 at 800-03.

ground that the plaintiff failed to show harm to competition – i.e., supracompetitive prices or reduced marketwide output.[114]

Indeed, the consumer-welfare standard has not been absolutely fatal to American antitrust law only because it has been superimposed on existing classical precepts, even if many of the bright-line rules have been abrogated by consumer-welfare jurisprudence. Courts inclined to enforce antitrust law expansively have therefore been able to recite the consumer-welfare standards in passing while imposing antitrust liability that typically depends at bottom on classical doctrines. Courts disinclined to find antitrust liability have tended to apply the consumer-welfare standard more rigorously to absolve defendants, except those that have committed a core cartel offense (price-fixing, market-allocation, or bid-rigging secretly undertaken by orthodox cartels).

None of this should come as any surprise. The consumer-welfare standard was initially developed and applied by judges who did not want to enforce antitrust law at all, and the standard was one that sounded eloquent and easily applied on paper, but meant in practice that the antitrust laws would hardly ever be enforced.[115] Here is how Professor Eleanor Fox stated the matter when this transformation of antitrust law was underway but not yet completed:

Proponents of one currently popular formula for the solution of all antitrust problems would examine challenged behavior to determine whether it is primarily output-restricting and therefore inconsistent with short-run aggregate consumer welfare as adduced from neo-classical price-theory. If so, the business activity would be condemned. If not, it would be encouraged. This conception of antitrust would prohibit almost nothing at all.[116]

C. Consumer-Welfare's Evisceration of Classical Antitrust's Bright-Line Rules to Protect Competition

From the start, consumer-welfare jurists allowed that certain kinds of trade restraints should remain unlawful per se, but only those that fit within their extraordinarily narrow

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114 *See, e.g., F.T.C. v. Qualcomm Inc.*, 969 F.3d 974, 982-1003 (9th Cir. 2020) (a district court held that defendant, a maker of computer chips for smartphones, had committed unlawful restraint of trade and monopolization by (1) fraudulently obtaining standard-essential patents ("SEPs") that rendered its computer chips the compulsory industry-standard for smartphones, and (2) thereafter using its SEPs to exclude rivals and force its customers to pay exorbitant royalties: specifically, the defendant obtained the SEPs from neutral standard-setting organizations only on condition that it sell or license its chips or technology to all comers, including rival chip makers; but afterwards the defendant largely refused to sell or license its chips or technology to rivals and obliged its captive customers to accept licenses under which they must pay royalties to it based on the number of smartphones that they sell, including those that used a rival's chip; but on appeal this judgment was reversed for want of showing of harm to competition within the meaning of the consumer-welfare standard).

115 Wu, *supra* note 27 at 102-09 ;Vaheesan, *supra* note 27 at 792-800.

116 Eleanor Fox, *The Modernization of Antitrust: A New Equilibrium,* 66 Cornell L. Rev. 1140 (reprinted in *The Political Economy of the Sherman Act: The First One Hundred Years* 260 (1991)) (citing Rowe, *New Directions in Competition and Industrial Organization Law in the United States*, Enterprise Law of the 80's, at 177, 201 (1980) ("Carried to its full logical rigor, as it has been by the Chicago School of economics, economic analysis keyed solely to 'efficiency' and 'consumer welfare' has revealed with stark simplicity that there will be very little remaining of antitrust.")).

construct.[117] Using this analysis, they have shortened the list of per se offenses, so that it now includes only secret conspiracies between "horizontal competitors" to fix prices, allocate markets, and rig bids. During the consumer-welfare era, the Supreme Court has struck down and abrogated the classical per se rules against vertical market allocations,[118] vertical maximum price-fixing,[119] resale price maintenance (vertical minimum price fixing),[120] most kinds of group boycotts,[121] and most kinds of tie-in arrangements,[122] all of which used to be treated as trade restraints that were unlawful per se under Section 1.

During the consumer-welfare era, the courts have also adopted other restrictive doctrines that have further limited the reach of antitrust law, such as the doctrines on antitrust injury,[123] circumstantial evidence of antitrust conspiracies,[124] predatory pricing,[125] beneficial

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117 *See Leegin*, 551 U.S. at 886 ("Resort to *per se* rules is confined to restraints, like those mentioned, that would always or almost always tend to restrict competition and decrease output. To justify a *per se* prohibition a restraint must have manifestly anticompetitive effects, and lack any redeeming virtue."); *see generally* Areeda & Hovenkamp, *supra* note 92 at ¶2000 (explaining how naked price-fixing and market-allocation can be successfully employed only by a cartel – i.e., a group of sellers that collectively wield market power – since only such sellers can increase their profits by restricting output or levying supracompetitive prices).

118 *See Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977) (abrogating *per se* rule against manufacturer restraints that prohibit a distributor from selling its products in specified locations or to specified categories of customers).

119 *See State Oil Co. v. Khan*, 522 U.S. 3, 7 (1997) (abrograting *per se* rule against vertical maximum price-fixing – which is a producer's requirement that its sellers not sell its products above specified prices).

120 *See Leegin*, 551 U.S. at 907 (abrogating *per se* rule against resale price maintenance – which is a producer's requirement that its sellers not sell its products below specified prices).

121 *See Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 294 (1985) (limiting the *per se* rule against group boycotts); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) (further limiting the *per se* rule against group boycotts, so that it applies only to agreements between direct competitors to withhold their facilities, products or services from one or more targeted customers in order to deprive them of inputs or sales channels that they require to compete proficiently).

122 *See Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15-17 (1984) (significantly limiting *per se* rule against tie-in arrangements); *Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 31 (2006) (abrogating *per se* rule against tie-ins of a patented tying product and a tied product).

123 *See Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 429 U.S. 477, 489 (1977) (to prevail on an antitrust claim, a plaintiff must prove its antitrust injury, which is harm that "should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."); *Rebel Oil*, 51 F.3d at 1433 (the doctrine of antitrust injury requires a private plaintiff to "prove that his loss flows from an anticompetitive aspect or effect of the defendant's behavior....").

124 *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587-88 (1986) ("On summary judgment the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case.... Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.").

125 *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-23 (1993) (severely limiting, or rendering unprovable, the rule against predatory pricing and primary-line price discrimination, doing so by requiring plaintiff to prove that (1) the defendant has sold its products at prices lower than its own costs, and (2) the defendant is likely to recoup its loss after driving its rivals from the market).

monopoly,[126] beneficial vertical price-fixing,[127] beneficial price discrimination,[128] beneficial tie-in arrangements,[129] "two-sided markets",[130] and the presumption of legality for all vertical mergers.[131] Crucially, it is the consumer-welfare standard that justifies these other doctrines, so that all of them properly belong within the category of consumer-welfare jurisprudence.

Collectively, the various consumer-welfare doctrines have been repeatedly used during the past forty years to defeat antitrust claims, exonerate the defendant, and absolve conduct that likely would have been condemned during the classical era.[132] Under the consumer-welfare standard, very little conduct is prohibited by federal antitrust law, and conduct that would have been readily deemed unlawful and therefore rarely or never attempted is openly tolerated under our modern antitrust law.

D. The Consequences of Consumer-Welfare Jurisprudence

The debate is anything but academic. The consumer-welfare standard, as presumably intended, has severely limited the reach and force of federal antitrust law, which in its modern version prevents only the most egregiously anticompetitive behavior. For this reason, antitrust law has ceased to accomplish its original purposes.

That has mattered greatly. It has been during the forty-year period of consumer-welfare jurisprudence that the American economy has ceased to be one characterized by competitive markets. Instead, markets in the United States have been increasingly dominated by monopolies, duopolies, and closed oligopolies that overcharge and underserve their captive

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126 *See Trinko,* 540 U.S. at 407 (2004).

127 *See Leegin*, 551 U.S. at 887-892 (explaining why resale price maintenance should not be unlawful *per se* and recounting its various procompetitive, beneficial uses and effects).

128 *See generally* Hovenkamp, *supra* note 83 at 574-575 (explaining how a monopolist's perfect price discrimination does not result in any reduction of output); *id*. at 578-581 (explaining how rules against price discrimination abet cartels that practice price-fixing, impose unreasonable enforcement costs, and do not distinguish between procompetitive and anticompetitive practices).

129 *See generally* Hovenkamp, *supra* note 83 at 399-410 (explaining how economic efficiency can be improved by tie-in arrangements, warning against the cost of enforcing rules against tie-in arrangements that do not diminish economic efficiency, and explaining how locked-in customers forced to buy after-market products likely should pursue contract claims, not antitrust claims).

130 *See Amex*, 138 S. Ct. at 2287 (to prevail on a claim for unlawful restraint of trade "in two-sided transaction markets," such as a credit-card platform that affords credit to customers and immediate payments to merchants, the plaintiff must define a single market that captures these transactions and show how the challenged trade restraint has increased the cost or reduced the overall number of these transactions).

131 *See Alberta Gas Chemicals Ltd. v. E.I. Du Pont de Nemours & Co.*, 826 F.2d 1235, 1244 (3d Cir. 1987) ("Indeed, respected scholars question the anticompetitive effects of vertical mergers in general.") (citing William H. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. 467, 495 (1980) ("Foreclosure [by vertical merger] does not, however, reflect an actual reduction in competition in any meaningful sense."); Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself 226, 237 (1978) ("Antitrust's concern with vertical mergers is mistaken. Vertical mergers are means of creating efficiency, not of injuring competition. The foreclosure theory is not merely wrong, it is irrelevant."); Herbert Hovenkamp, *Merger Actions for Damages*, 35 Hastings L.J. 937, 961 ("[O]f all mergers, vertical acquisitions are the most likely to produce efficiencies and the least likely to enhance the market power of the merging firms.")).

132 *See Alston*, 141 S. Ct. at 2161; *see generally* Lino A. Graglia, *The Antitrust Revolution*, 9 Engage 3, 37-42 (2008).

customers, underpay their suppliers and employees, and stifle threatening innovators before they can get their operations off the ground.

In 2016, the *Economist* published a groundbreaking study on the dearth of competition in American markets, characterizing the modern United States economy as follows:

> After a bout of consolidation in the past decade the [American airline industry] is dominated by four firms with tight financial discipline and many shareholders in common. And the return on capital is similar to that seen in Silicon Valley.
>
> What is true of the airline industry is increasingly true of America's economy as a whole. Profits have risen in most rich countries over the past ten years but the increase has been biggest for American firms....
>
> Profits are an essential part of capitalism. They give investors a return, encourage innovation and signal where resources should be invested. Their accumulation allows investment in bold new ventures….
>
> But high profits across a whole economy can be a sign of sickness. They can signal the existence of firms more adept at siphoning wealth off than creating it afresh, such as those that exploit monopolies. If companies capture more profits than they can spend, it can lead to a shortfall of demand. This has been a pressing problem in America….
>
> High profits can deepen inequality in various ways. The pool of income to be split among employees could be squeezed. Consumers might pay too much for goods. In a market the size of America's prices should be lower than in other industrialised economies. By and large, they are not. Though American companies now make a fifth of their profits abroad, their naughty secret is that their return-on-equity is 40% higher at home.
>
> [T]he most troubling aspect of America's profit problem [is] its persistence. Business theory holds that firms can at best enjoy only temporary periods of 'competitive advantage' during which they can rake in cash. After that new companies, inspired by these rich pickings, will pile in to compete away those fat margins, bringing prices down and increasing both employment and investment. It's the mechanism behind Adam Smith's invisible hand.
>
> In America that hand seems oddly idle…. The obvious conclusion is that the American economy is too cosy for incumbents.[133]

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133 *Too much of a good thing,* The Economist, Mar. 26 , 2016, https://www.economist.com/briefing/2016/03/26/too-much-of-a-good-thing.

Dave Leonhardt of *The New York Times* performed independent research in 2018 and reached similar conclusions: large firms have increasingly dominated American commerce and use their dominance to exploit their counterparties – their suppliers, employees, and customers.[134]

Indeed, a surprising number of markets in the United States have become highly concentrated, including markets for key online services, air travel, wireless telephone, cable television, broadband internet, hospital services, food products, beer, and numerous other markets.[135] Before the coronavirus pandemic began in early 2020, the number of start-ups in the American economy had been in decline since 1979, resulting in a clear loss of innovation and commercial dynamism.[136]

As the *Economist* explained in its above study, large firms not only hold dominant positions across the American economy, but generate far higher pre-tax profits from their sales in U.S. markets than they do from their sales in foreign markets.[137] That sounds like the very kind of harm that the consumer-welfare standard supposedly seeks to prevent (unless all of these incumbents have successfully practiced perfect price-discrimination all the while, which would seem to be an impossible scenario as well as a highly unwelcome one to most people).

The consumer-welfare standard, it appears, has failed even according to its own myopic terms: plaintiffs have been too often rebuffed by stringent applications of the standard, and many have been discouraged from even trying to meet it. Modern antitrust law, informed by the consumer-welfare standard, has failed even to redress the one evil that the standard was purportedly invented to redress. As happened before during the original Gilded Era, dominant firms in our own era increasingly control the country's markets and regularly abuse this control to charge supracompetitive prices that result in the misallocation of resources, lesser overall output, and the dead weight of monopoly pricing.[138] But the consumer-welfare standard, rather than redress even this circumstance, weeds out cases that by its own standards it should condemn. The standard is too difficult to prove and largely unworkable, and more than anything else it resembles a "get-out-of-jail-for-free" card that adroit monopolists and oligopolies can readily invoke to defeat antitrust challenges.

In direct consequence, the private markets of the United States have become far less competitive than they otherwise would have been. Indeed, a persistent, endemic dearth of

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134 David Leonhardt, *The Charts That Show How Big Business Is Winning*," N.Y. Times, June 17, 2018, https://www.nytimes.com/2018/06/17/opinion/big-business-mergers.html (explaining how in the 1980s small companies – those that employ less than 50 employees – collectively employed millions more employees than did large firms – those that employ more than 10,000 employees, but now the reverse is true, and explaining how large firms in recent years have been able to "take advantage of workers, consumers, taxpayers, and small businesses.").

135 David Autor, et al., *Concentrating on the Fall of the Labor Share*, 107 Am. Econ. Rev.: Papers & Proceedings 180, 183 (2017) (identifying "a remarkably consistent upward trend in concentration" in various industries that provide manufacturing, finance, services, utilities, retail trade, and wholesale trade).

136 *See* Ryan A. Decker, et al., *Where Has All the Skewness Gone? The Decline in High-Growth (Young) Firms in the U.S.*, 86 Eur. Econ. Rev. 4 (2016) (finding a decline in the firm entry rate since 1979); *see also* Ian Hathaway & Robert E. Litan, *Declining Business Dynamism in the United States: A Look at States and Metros* 1, fig. 1 (2014), https://www.brookings.edu/search/?s=Hathaway+Litan (finding a decline in the firm entry rate between 1978 and 2011).

137 *See Too Much of a Good Thing*, *supra* note 133.

138 *See id.*

competition has become the hallmark of our modern economy: this fatal flaw in the national commerce has foreclosed business opportunities, stifled innovation, diminished general prosperity, and given rise to various popular discontents. Our antitrust laws, hobbled by consumer-welfare doctrines, have permitted this state of affairs and as currently interpreted are largely powerless to redress it.

It is time, then, to reform federal antitrust law.

VI. EXCLUSIONARY CONDUCT BY DOMINANT FIRMS SHOULD AGAIN BECOME THE LYNCHPIN OF ANTITRUST LAW

The antidote is simple. The federal courts have long recognized their authority to develop and revise a common law of American commerce under the Sherman Act and its sequel statutes.[139] The courts should exercise this prerogative to clarify that the consumer-welfare standard is never a *sine qua non* of any antitrust claim, but at most one method among others to prove a relevant market, a defendant's monopoly power or a defendant's anticompetitive conduct.

The lynchpin of antitrust, however, should be the *exclusionary practices test* – i.e., deciding whether the defendant's challenged conduct has been used to exclude or impede competitors rather than improve its own offerings. Under this standard, an antitrust offense occurs when a firm uses a trade restraint (an agreement with another that somehow limits competition) to subdue or prevent marketwide competition rather than improve its offerings; and an antitrust offense likewise occurs when a firm nearly acquires, gains or preserves a monopoly position by using one or more practices whose primary purpose is to subdue or prevent competition rather than improve its offerings. These standards

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139 *See Leegin*, 551 U.S. at 899-900 ("From the beginning the Court has treated the Sherman Act as a common-law statute. Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on restraints of trade evolve to meet the dynamics of present economic conditions. The case-by-case adjudication contemplated by the rule of reason has implemented this common-law approach."); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 271-72 (2d Cir. 1979) ("The Sherman Antitrust Act of 1890 has been characterized as a charter of freedom. For nearly ninety years it has engraved in law a firm national policy that the norm for commercial activity must be robust competition…. In passing the Sherman Act, Congress recognized that it could not enumerate all the activities that would constitute monopolization. Section 2, therefore, in effect conferred upon the federal courts a new jurisdiction to apply a common law against monopolizing."); *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 98, n. 42 (1981) ("In antitrust, the federal courts act more as common-law courts than in other areas governed by federal statute."); *see also* Edmunds, *supra* note 30 at 813 ("[A]fter most careful and earnest consideration by the Judiciary Committee of the Senate it was agreed by every member that it was quite impracticable to include by specific description all the acts which should come within the meaning and purpose of the words 'trade' and 'commerce' or 'trust', or the words 'restraint' or 'monopolize', by precise and all-inclusive definitions; and that these were truly matters for judicial consideration"); 36 Cong. Rec. 522 (Jan. 6, 1903) (statement of Senator Hoar) ("We undertook by law to clothe the courts with the power and impose on them and the Department of Justice the duty of preventing all combinations in restraint of trade. It was believed that the phrase 'in restraint of trade' had a technical and well-understood meaning in the law."); *see also* Walker, *supra* note 3 at 47-48.

are already recognized by the modern law,[140] but are burdened in most cases by the additional requirement of proving supracompetitive prices or some other marketwide reduction of output.[141] It is long past time to remove these crippling obstacles to successful antitrust prosecutions.

Above all, the exclusionary-practices test furthers the original and enduring aim of federal antitrust law, which is to protect the interstate and foreign commerce of the United States from undue restraint of trade and monopolizing conduct, which historically have been the preferred methods of dominant firms to repress competition and thereby preserve and enlarge the advantages of incumbency.

Crucially, the exclusionary-practices test distinguishes between *commercial excellence*, which should always be encouraged, and *deliberate efforts to hinder or suppress marketwide competition*, which should always be prohibited when accomplished by trade restraints or used to acquire a dominant market position.

The exclusionary-practices test is also much easier for judges and juries to apply than is the consumer-welfare standard. Experts can still opine on matters suitable for their testimony, but antitrust cases will cease to be mystifying, mind-numbing sagas between competing microeconomic analyses, each dwelling on abstract, elusive notions of supracompetitive pricing and restricted output that are far removed from the common experience of most people and the actual behavior of firms in most markets.

Lastly, the courts have long recognized the exclusionary-practices test. It is classical antitrust jurisprudence, encapsulated in an easily applied standard that jurists and jurors can readily grasp. Adopting this test as the seminal criterion in antitrust cases will not require the heavy lifting and judicial controversy that other standards currently under debate might entail.

Concretely, here is how the exclusionary practices test can be applied in cases that come before the courts.

First, and perhaps most important, two or more independent firms that agree in some way not to compete against one another commit a per se violation of Section 1 unless their agreement is necessary to their collaboration or reasonably promotes its success and is

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140 *See Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008) ("Anticompetitive conduct tends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way.") (adopting the test stated in P. Areeda & D. Turner, 3 Antitrust Law 78 (1978)); *see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) ("If a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory.").

141 *See supra* Section V.

narrowly tailored to serve only this purpose.[142] Such agreements include naked horizontal restraints such as price-fixing, market-allocation, and employers' no-poaching agreements.

Second, a firm's participation in a group boycott (concerted refusal-to-deal) should constitute an antitrust offense if the demonstrable aim of the boycott is to prevent competition rather than to improve the offerings of any of its participants. When a defendant can plausibly argue that the boycott improves its own offerings or those of another participant, the boycott should be condemned only if (1) its use substantially forecloses access on commercially reasonable terms to necessary inputs or sales channels, or (2) its use forecloses a significant part of overall competition for sales in a market.

Third, the exclusionary-practices test should be used to assess the propriety of tie-ins and exclusive-dealing.[143] Specifically, a firm commits predicate antitrust misconduct if its tie-in or exclusive dealing is imposed by contract or accomplished by connivance with another firm and is clearly used to prevent competition rather than to improve its offerings. When a defendant can plausibly assert that its tie-in or exclusive dealing improves its offerings, the practice should be condemned only if (1) its use substantially forecloses access on commercially reasonable terms to necessary inputs or sales channels, or (2) its use forecloses a significant part of overall competition for sales in a market.

Fourth, vertical price-fixing imposed by a manufacturer should be presumptively unlawful, but can be saved if the manufacturer can justify its use by showing how it improves the manufacturer's offerings. Vertical price-fixing imposed at the behest of any dealer or reseller should be unlawful per se. The old distinction between *Colgate* pricing policies and concerted vertical price-fixing should be abolished because it is unworkable and leads to unpredictable outcomes.

Fifth, a gatekeeper firm (i.e., one that controls an essential input or facility required to compete) commits predicate antitrust misconduct when it denies others access to necessary inputs or sales channels on commercially reasonable terms. If it does so by contract or in connivance with another firm, it should be held in violation of Section 1; and if it does

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142 *Addyston Pipe & Steel*, 85 F. at 279-84 (explaining doctrine of ancillary restraints); *L.A. Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1395 (9th Cir. 1984) ("The common-law ancillary restraint doctrine was, in effect, incorporated into Sherman Act section 1 analysis by Justice Taft in [*Addyston Pipe*, supra]. [T]he doctrine teaches that some agreements which restrain competition may be valid if they are subordinate and collateral to another legitimate transaction and necessary to make that transaction effective.... Generally, the effect of a finding of ancillarity is to remove the per se label from restraints otherwise falling within that category."); *Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 188-89 (7th Cir. 1985) (naked restraints are horizontal covenants between competitors that exist merely to suppress competition; as such, they are unlawful per se; ancillary restraints are horizontal covenants between competitors that restrain their competition, but exist to facilitate "a larger endeavor whose success they promote;" as such, they are reviewed under the rule of reason).

143 Tie-ins and exclusive dealing of commodities can be challenged under Section 1 or Section 3 of the Clayton Act, 15 U.S.C. § 14.

so to acquire, gain or preserve its own near-monopoly or monopoly, it should be held in violation of Section 2.[144]

Sixth, a defendant commits predicate antitrust misconduct when it obtains a standard-essential patent (SEP) and thereafter uses it to restrict marketwide competition or monopolize a market. Where it does so by contract or connivance, it should be held in violation of Section 1. Where it uses its SEP to acquire, gain or preserve its own near-monopoly or monopoly, it should be held in violation of Section 2. One leading decision already recognizes this rule.[145]

Seventh, the exclusionary-practices test should be used to assess all other challenged trade restraints and alleged monopolization. The fundamental inquiry should be whether the defendant uses the accused practice to improve its offerings or prevent competition. In Section 1 cases, the plaintiff must also show that the accused practice is accomplished by contract or connivance and either (1) substantially forecloses access on commercially reasonable terms to necessary inputs or sales channels, or (2) affects or forecloses a significant part of overall competition for sales. In Section 2 cases, the defendant's use of the accused practice must have significantly contributed to its acquisition or maintenance of a monopoly or near-monopoly position.

Eighth, predatory pricing constitutes predicate antitrust misconduct when a firm uses it to drive rivals out of business and thereby gain or preserve a monopoly or near-monopoly position. There should be no required showing of the predator's subsequent recoupment of its loss-making sales.

The exclusionary-practices test should thus become the lynchpin of antitrust law. In addition, the courts should further revive antitrust law by adopting the following modifications or abrogations of consumer-welfare jurisprudence.

First, a merger or acquisition of a rival's business should be presumptively unlawful if it takes place or results in a market that is "moderately concentrated" per existing HHI

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144 *See Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973) ("The record makes abundantly clear that Otter Tail used its monopoly power in the towns in its service area to foreclose competition or gain a competitive advantage, or to destroy a competitor, all in violation of the antitrust laws. The District Court determined that Otter Tail has a strategic dominance in the transmission of power in most of its service area and that it used this dominance to foreclose potential entrants into the retail area from obtaining electric power from outside sources of supply. Use of monopoly power to destroy threatened competition is a violation of the attempt to monopolize clause of s 2 of the Sherman Act. So are agreements not to compete, with the aim of preserving or extending a monopoly. In *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013, a cooperative news association had bylaws that permitted member newspapers to bar competitors from joining the association. We held that that practice violated the Sherman Act, even though the transgressor had not yet achieved a complete monopoly.").

145 *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007) ("We hold that (1) in a consensus-oriented private standard-setting environment, (2) a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, (3) coupled with an SDO's reliance on that promise when including the technology in a standard, and (4) the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct. This holding follows directly from established principles of antitrust law and represents the emerging view of enforcement authorities and commentators, alike. Deception in a consensus-driven private standard-setting environment harms the competitive process by obscuring the costs of including proprietary technology in a standard and increasing the likelihood that patent rights will confer monopoly power on the patent holder.").

guidelines, and absent extraordinary circumstances it should be prohibited if it takes place or results in a market that is "highly concentrated."[146]

Second, a vertical merger or acquisition should be presumptively unlawful if it raises dual barriers to entry at two levels of distribution, or if it exposes rivals at either level of distribution to a plausible threat of increased costs or limited access to a necessary input or sales channel. Existing case law supports this rule.[147]

Third, a merger or acquisition of a rival's business should not be permitted if its purpose is to avert or stifle a competitive threat posed by a disruptive or innovative rival.

Fourth, proving antitrust injury should never be a plaintiff's burden, but a defendant can still invoke the doctrine of antitrust injury as a narrowly construed affirmative defense. The doctrine, which defendants routinely employ to confuse issues, should be clearly stated as follows: when a defendant has committed an antitrust violation, a private plaintiff cannot obtain money damages caused by the violation if the plaintiff's damages have been caused by increased competition with the defendant rather than the defendant's efforts to overcharge or underserve its customers or exclude or impose burdens on its rivals.

Lastly, the courts and Congress should confirm that the Sherman and Clayton Acts exist to prevent firms from unduly restraining or monopolizing the interstate and foreign commerce of the United States. If the immediate aim was to check the increasing power and encroachments of the original industrial trusts, the larger aim will always be to keep our commerce free of trade restraints and monopolizing conduct aimed at suppressing or limiting competition. I can think of no better way to promote general prosperity, economic opportunity, honest business practices, innovation, low prices, social comity, and sound democratic governance.

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146 The Herfindahl-Hirschman Index or "HHI" is used by the DOJ, the FTC and the courts to measure the degree of market concentration in a given relevant market. It is used most frequently to review proposed or contested mergers, and is also used to detect cartel activity and assess the competitive performance of markets. *See Malaney v. UAL Corp.*, 2010 WL 3790296, at *12 (N.D. Cal. 2010), *aff'd*, 434 F. App'x 620 (9th Cir. 2011) ("The Herfindahl-Hirschman Index ("HHI") is an index used to measure concentration in a market, which is calculated by squaring the market share of each firm competing in a market and then summing the resulting numbers. DOJ uses HHI numbers to determine thresholds for when an industry is considered highly concentrated or when potential mergers require investigation.")

147 *See Fruehauf Corp. v. F.T. C.*, 603 F.2d 345, 352 (2d Cir. 1979) (if a vertical merger obliges competitors to vertically integrate, and if this vertical integration by itself does not create inherent efficiencies, it poses a probable threat to competition and may be properly enjoined under Section 7 of the Clayton Act).

AN ECONOMIC PERSPECTIVE ON THE USEFULNESS OF THE CONSUMER WELFARE STANDARD AS A GUIDING FRAMEWORK FOR ANTITRUST POLICY

By Lawrence Wu and Craig Malam[1]

I. INTRODUCTION

In the area of antitrust, the consumer welfare standard is under fire. This is not the first time. In 1978, noted legal scholar and judge, Robert Bork, made the case that the purpose of antitrust law was to protect consumer welfare.[2] He could not have been more clear when he stated that "[t]he only legitimate goal of antitrust is the maximization of consumer welfare."[3] At the time, this was a controversial opinion as antitrust policy was largely focused on other goals, such as protecting small business owners.[4] Maximization of consumer welfare as the goal of antitrust policy also challenged existing perspectives because it was made at a time when the application of economics to antitrust was fairly new, and possibly not well accepted.[5] But in the 30 years that followed, Bork's view of antitrust policy prevailed.[6] Indeed, in 2007, when the Antitrust Modernization Commission concluded its review of the antitrust laws, it seemed to most that there was little to debate when it came to the goals of antitrust policy. As the Commission stated in the introduction of the report, "[f]ree trade, unfettered by either private or governmental restraints, promotes the most efficient allocation of resources and greatest consumer welfare."[7]

The debate is back, though. In an article titled "Amazon's Antitrust Paradox," which famously references the title of Robert Bork's influential 1978 book, *The Antitrust Paradox*, Lina Khan—now the Chair of the Federal Trade Commission—describes her view of the goals of antitrust policy quite differently:

> the current framework in antitrust—specifically its equating competition with "consumer welfare," typically measured through short-term effects on price and output—fails to capture the architecture of market power in the twenty-first century marketplace. In other words, the potential harms to competition posed by Amazon's dominance are not cognizable if we assess competition primarily through price and output. Focusing on these metrics instead blinds us to the potential hazards.[8]

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2 Robert H. Bork, The Antitrust Paradox: A Policy At War With Itself (1978).

3 *Id.* at 7.

4 *See* Kenneth Heyer, *Consumer Welfare and the Legacy of Robert Bork*, 57 J.L. & Econ. S19, S20 (2014).

5 *Id.* at S23.

6 Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 Loyola Consumer L. Rev. 336-53 (2010).

7 Antitrust Modernization Comm., Report and Recommendations i (April 2007).

8 Lina M. Khan, *Amazon's Antitrust Paradox*, 126 The Yale L.J. 710, 716-717 (2017).

In Khan's view, not only is consumer welfare the wrong standard, focusing on consumer welfare as the goal of antitrust policy is a mistake and inconsistent with the legislative intent of the antitrust laws, which was meant to be a "safeguard against excessive concentrations of economic power."[9]

In this paper, our goal is not to discuss the legislative intent of the antitrust laws or what it should be, nor are we focused on examining whether the courts have made decisions that are consistent with the consumer welfare standard. Instead, our aim is to give an economic perspective on the consumer welfare standard and to explain its practical and theoretical usefulness as a framework, whether the goal of antitrust policy is to maximize consumer welfare or some other goal such as protecting the "process of competition." In Section II, we define and discuss what consumer welfare means from the perspective of an economist. In Section III, we discuss whether, how, and why consumer welfare is a useful metric for evaluating competition and monopoly. There are criticisms of the consumer welfare standard, however, and in Section IV, we discuss one particular criticism, which is that the consumer welfare standard is wrongly focused on short-term price effects and on the outcome of the competitive process.[10] We offer a few concluding comments in Section V.

Our conclusion is that the consumer welfare standard is a reasonable and practical framework for antitrust practitioners, enforcement agencies, the courts, and policymakers. This is because focusing on consumer welfare is consistent with economic theory and with the empirical approaches that make antitrust analysis such a data-driven and evidence-based area of law. FTC Chair Lina Khan and others have questioned whether the consumer welfare standard can be a guiding framework for antitrust policy. In our view, it can, and the way to address the concerns that have been raised is not to change the standard, but to improve the theoretical and empirical economic models and tools that will enable the enforcement agencies, courts, and policymakers to make policy decisions that will ensure that the benefits of price and non-price competition will remain in the short term and long term.

II. THE CONCEPTS BEHIND CONSUMER WELFARE AND CONSUMER SURPLUS

The OECD defines consumer welfare in terms of the "individual benefits derived from the consumption of goods and services."[11] This is a fairly general description of what many people have in mind when they talk about consumer welfare, but it is useful because it explains why aggregate consumer welfare is used synonymously with the economic concept

9 *Id.* at 743.

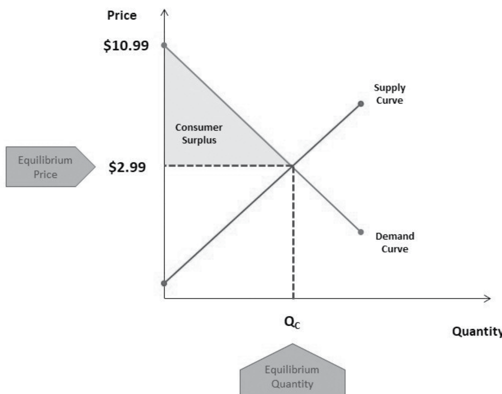
10 *See generally Id.*; Tim Wu, *After Consumer Welfare, Now What? The 'Protection of Competition' Standard in Practice*, Competition Policy Int'l (Apr. 2018), available at https://scholarship.law.columbia.edu/faculty_scholarship/2291; Herbert J. Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. Corp. Law 101 (2019), available at https://scholarship.law.upenn.edu/faculty_scholarship/1985; Leon B. Greenfield et al., *Antitrust Populism and the Consumer Welfare Standard: What Are We Actually Debating?*, 83 Antitrust L.J. 393 (2020); Elyse Dorsey et al., *Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement*, 47 Pepperdine L. Rev. 861 (2020).

11 Directorate for Financial, Fiscal and Enterprise Affairs, OECD, Glossary of Industrial Organisation Economics and Competition Law (R. S. Khemani & D. M. Shapiro ed. 1993), https://stats.oecd.org/glossary/detail.asp?ID=3177.

of consumer surplus.[12] From an economic perspective, consumer surplus is a concept that is much easier to describe and analyze—it is the difference between the price that consumers are willing to pay for a good or service and the price that consumers actually pay for that good or service. The benefit or consumer surplus to any one individual is therefore derived from the fact that he or she paid less for that good or service than what he or she was willing to pay for it. For example, if the price of a cup of coffee is $2.99, consumers who are willing to pay more than $2.99 get consumer surplus from buying that cup of coffee at $2.99. Consumers who are willing to pay exactly $2.99 get to enjoy their coffee, but they would not get any consumer surplus. And consumers who are not willing to pay more than $2.99 for a cup of coffee would not buy that cup, and would also therefore not get any consumer surplus. The benefit to all consumers in aggregate (i.e., aggregate consumer welfare) would therefore be the sum across each individual's consumer surplus.

Visually, we can see this in Figure 1, which is a stylized graph of the supply and demand for a particular good or service (e.g., a cup of coffee).[13] The demand curve is downward sloping because when the price is lower, the quantity demanded is more. This is because when the price is lower, it is likely that more consumers will demand the good or service and/or consumers will buy more of the good or service. The supply curve is upward sloping because when the price is higher, producers have an incentive to supply more of the good or service. The intersection of the two curves is called the equilibrium point, and that is where demand equals supply. It is at that point that the price is in equilibrium. At the equilibrium point, the price is at the level where the amount of goods and services demanded by consumers equals the amount of goods and services that are produced. In Figure 1, the equilibrium price for a cup of coffee is $2.99. That is the price that consumers pay for a cup of coffee, even if they are willing to pay more.

Fig. 1. Consumer Surplus



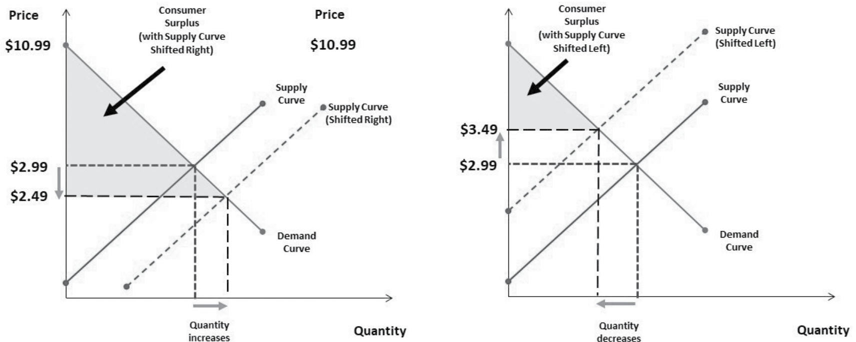
12 As noted by Jonathan Jacobson, "[t]he consumer welfare standard equates with consumers' surplus in economic terms…" Jonathan M. Jacobson, *Another Take on the Relevant Welfare Standard for Antitrust*, The Antitrust Source, August 2015, at 2.

13 The graphs in this paper are stylized in that the demand and supply curves are drawn as linear functions of price (i.e., straight lines). Although supply and demand curves can take on any number of functional forms, the linear supply and demand graphs in this paper are still useful in illustrating and explaining the basic economic propositions and concepts that describe how the amount of consumer surplus in a market is calculated and affected by the degree of competition in the market and by shifts in supply and demand.

The consumer surplus across all individuals is visually shown as the shaded triangle that is underneath the demand curve, but above the $2.99 price (which is the point at which supply equals demand). The shaded area captures the consumer surplus of an individual that is willing to pay $10.99 for a cup of coffee; the consumer surplus of someone willing to pay $5.99 for a cup of coffee (which is $3 for this consumer); the consumer surplus of someone willing to pay $4.99 for a cup of coffee (which is $2 for this consumer); and so on until we have captured the surplus of everyone who is willing to pay $2.99 or more for a cup of coffee. This total is the consumer surplus that is generated when the price of a cup of coffee is $2.99.[14]

The panels in Figure 2 make it clear how important the supply curve is in determining how much consumer surplus will be generated. If the price were to fall (because, for example, producers innovate and learn how to make the good or service more cheaply), the aggregate consumer surplus would increase. This change would be represented by a rightward shift of the supply curve. When the supply curve shifts to the right (as shown in the left panel of Figure 2), more supply of the good or service can be made available at a given price. This would happen if suppliers were to improve their productivity, lower their costs, and expand their capacity. Because these changes in supply will push the market price down (to $2.49 for example), there are two effects on consumer surplus. First, everyone who was willing to buy a $2.99 cup of coffee would now pay less for that cup. Second, the drop in price would induce even more consumers to buy a cup of coffee. For example, at a price of $2.99 for a cup of coffee, a consumer might buy a cup every other day. But if the price were to fall to $2.49, the consumer might start to buy that cup of coffee every day.

Fig. 2. Consumer Surplus Changes With Shifts in the Supply Curve



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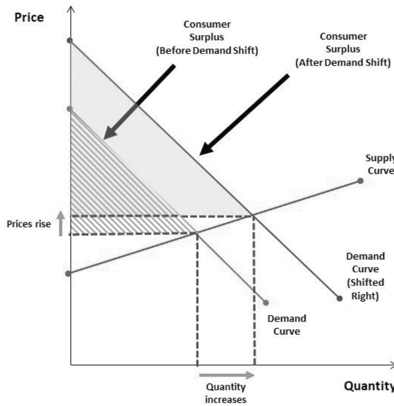
14 The way to think about consumer surplus is the same, whether demand is elastic (in which case the demand curve would be flatter) or inelastic (in which case the demand curve would be more steep). When demand is elastic, the quantity that consumers buy is more sensitive to price. When demand is inelastic, the quantity that consumers buy is not as sensitive to price. The demand for a good or service may be inelastic and less sensitive to price if there are fewer substitutes for the good or service, or if the good or service was particularly important or valuable. Whether demand is elastic or inelastic will affect the amount of consumer surplus in the market. For example, consider the supply and demand graph in Figure 1 and what would happen if the demand curve were to be rotated around the equilibrium point in such a way that the demand curve was flatter (and therefore more elastic). The area under the demand curve would be smaller, which means that the amount of consumer surplus would be less.

The opposite effect occurs when the supply curve shifts to the left (as shown in the right panel of Figure 2). Causes of a leftward shift in the supply curve (of coffee) could include a freeze in Brazil that leads to a shortage of coffee beans or an increase in the cost of transporting beans from farm to table. If, for example, the price were to increase from $2.99 to $3.49, fewer consumers would end up buying that cup of coffee and there would be less consumer surplus as a result. This is because the only consumers buying that cup of coffee would be those who were willing to pay $3.49 or more. And for each of those consumers, the difference between how much they are willing to pay for that cup of coffee and the price that they actually paid just got smaller.[15]

Similarly, shifts in demand also will affect consumer surplus. This is shown in Figure 3 below. Before the shift in demand, the consumer surplus is the striped area. If the demand for coffee were to shift to the right because new research showed that coffee was good for your health, then the price of coffee would rise. At the same time, the amount of coffee demanded would increase. This is because the equilibrium point shifted to the right and up along the supply curve. The consumer surplus that is generated by the shift in demand is the area shaded. As drawn, the consumer surplus after the shift in demand (i.e., the shaded area) is larger than the consumer surplus before the shift in demand (i.e., the striped area). Figure 3 is therefore an illustration of how an increase in demand can lead to an increase in consumer welfare. A price increase might not seem like something that would increase consumer surplus, but if prices rise only by a little, and many more people are buying coffee, then the shift in demand would lead to an increase in consumer surplus.

Fig. 3. The Change in Consumer Surplus Resulting from an Increase in Demand



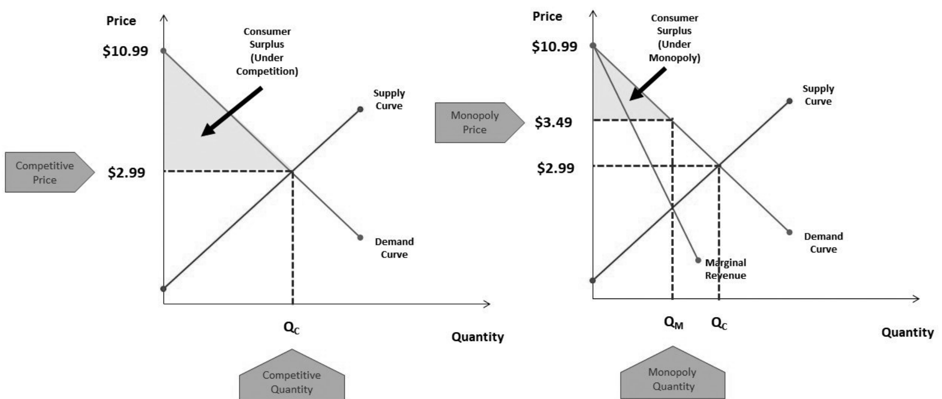
15 There are many factors that would affect whether a shift in the supply curve is likely to lead to a large or small change in consumer surplus. One such factor is the elasticity of demand. If the demand curve is more inelastic, a rightward shift in supply would lead to a greater increase in consumer surplus. At the other extreme, if the demand curve were completely elastic (i.e., perfectly flat), a rightward shift in supply would not lead to any increase in consumer surplus.

With this definition of consumer surplus and these concepts in mind, we can now turn to a discussion of whether, how, and why consumer surplus is a useful metric when it comes to evaluating competition and monopoly.

III. CONSUMER SURPLUS AS A MEASURE OF COMPETITION

The supply and demand graph in Figure 1 describes the textbook market outcome under conditions of perfect competition. The price is where supply equals demand and the consumer surplus is the shaded area. If that same market were to be monopolized, the demand curve would not change, but the price that consumers would pay would change. Figure 4 shows the difference. The graph in the left panel illustrates the competitive outcome, which is the same graph shown in Figure 1. The graph in the right panel illustrates the monopoly outcome. A monopolist would produce the amount of good or service that equates marginal revenue with marginal cost. As shown in the right panel of Figure 4, the monopolist would only make Q_M units of the good or service. The monopolist would set the price that consumers are prepared to pay for the amount of the good or service that the monopolist actually made. As illustrated in Figure 4, the monopolist could sell everything that it produced (Q_M) if it charged a price of \$3.49 because Q_M is the total quantity that consumers would demand at that price of \$3.49. A comparison of the two panels makes it clear that consumer surplus is lower under monopoly conditions than under perfect competition. The individual preferences that shape the demand curve are the same, but the market price is higher. As a result, consumer welfare is lower for two reasons. First, there is a loss in consumer surplus because the consumers who continue to buy their cup of coffee from the monopolist are now paying more for their cup. Second, there is a loss of consumer surplus because some consumers are no longer buying coffee or, perhaps, buying coffee once a week instead of every day or every other day.

Fig. 4. Consumer Surplus Under Competition and Monopoly Conditions



The comparison that is shown in Figure 4 illustrates why consumer welfare is, in general, lower when markets are less competitive. A price fixing cartel that conspires to raise price from \$2.99 to \$3.49 would reduce consumer surplus in the same way that the monopolist did (as shown in the right panel of Figure 4). Similarly, an attempt by a firm to engage in

anticompetitive conduct may reduce consumer surplus if that conduct successfully resulted in the exit of competitors and the creation of monopoly power. That exit can lead to reduced consumer surplus in the direction as shown in the right panel of Figure 4.

Conversely, consumer surplus can be positively affected when firms engage in activities that could help them compete more effectively, expand output, and/or improve the quality of the goods and services they sell. For example, if a firm innovates and finds a way to produce with greater economies of scale, the result would be a rightward shift in the supply curve and an increase in consumer surplus. This is the situation that is shown in Figure 2, as discussed above. As shown in Figure 2, a rightward shift in the supply curve leads to an increase in consumer surplus for two reasons. First, there is a gain in consumer surplus because the consumers who were buying coffee at $2.99 can now purchase their coffee at a lower price ($2.49). Second, consumer surplus increases because there are now "new" consumers that were previously priced out of the market. At the lower price, some consumers may decide to buy coffee every day instead of every two days or once a week. And at the lower price, there may be an influx of new coffee drinkers.

The competition and monopoly scenarios shown in Figure 4 are extremes but they illustrate the main point, which is that a change in consumer surplus is a good measure of competitive impact. Activities that harm competition lower consumer surplus and activities that enhance competition increase consumer surplus. However, in many instances, the activities that are the subject of an antitrust investigation or litigation are those that could have positive and negative effects on competition and consumers in the short run and/or long run. Consider the following examples:

- *Predatory pricing*: An allegation of predatory pricing may refer to below-cost pricing that leads to the permanent exit of competitors and therefore the longer-term potential to raise prices above competitive levels. In the short run, prices may be below competitive levels (which would increase consumer surplus). However, with the exit of competitors, prices could rise in the long term if entry or re-entry by competitors does not occur (which would reduce consumer surplus). Focusing on both short-run and long-run consumer welfare, as measured by consumer surplus, provides a useful framework for thinking about the overall competitive impact of predatory pricing. This is because an analysis of consumer surplus in each of the various stages of predation can help in an assessment of the dynamics of predation that are inherent in this theory of competitive harm.

- *Monopsony power*: Allegations of monopsony power involve claims that a firm has the ability to pay below-market prices to its suppliers. Suppose, for example, there is evidence that the input prices paid to suppliers are lower in areas where the purchaser (i.e., the firm with potential monopsony power) accounts for a larger share of the purchases that are made. Because paying lower prices also may enable the purchaser to lower its costs and therefore the prices that it charges to customers, such evidence also may explain why that purchaser also has more business and sales. If the purchaser was exercising monopsony power, the purchaser would be paying lower prices for its inputs, but charging its customers higher prices or simply not extending the discounts that they would have offered in a competitive environment (either of which would reduce output and result in a reduction in consumer surplus). However, if the purchaser was lowering its

costs and passing along those cost savings to their customers in the form of lower prices, then the result would be an increase in output and therefore an increase in consumer surplus. Here again, focusing on the metrics that affect both short-run and long-run consumer welfare (e.g., the prices paid by the alleged monopsonist for inputs, the level of output that is produced, and the final goods prices charged to downstream customers) provides a useful framework for identifying monopsony power and distinguishing such conduct from the ordinary efforts of a firm that is trying to lower its input costs and final goods prices.

- *Exclusive territories*: Sellers that have exclusive territories sometimes find themselves the target of antitrust investigations or litigation. For example, the concern may be that the exclusive territories are a way for the sellers to allocate geographic markets. On the other hand, the sellers may say that they created exclusive territories in order to give their local distributor(s) a stronger incentive to compete against distributors that carry other competitors' brands. In these types of cases, it is important to distinguish harm to competition from harm to a competitor and the consumer welfare framework gives us a way to do that. Market allocation and other efforts that discourage entry into new areas restrict supply and reduce consumer surplus. However, efforts to give distributors greater incentives to compete and to make investments to increase sales would shift the supply curve to the right, which would increase consumer surplus. As with the examples above, focusing on consumer welfare (i.e., consumer surplus) provides a useful framework for an assessment of the overall competitive effect.

- *Proposed mergers and acquisitions*: A merger or acquisition could be subject to review by an antitrust agency. The agency may recognize that the transaction could have the potential of reducing competition with the result being higher prices, a reduction in quality competition, or less innovation. However, the agency also may recognize that the transaction could lead to economies of scale and other cost savings that could lead to lower prices, or combinations that create new products and increase variety. Because both effects are possible, the agency must consider the net effect of the transaction. A consumer welfare framework would allow the competition authority to do that. Indeed, the economic models that are often used to assess and/or simulate the impact of proposed transactions consider and account for the potential for a transaction to simultaneously eliminate the rivalry that exists between the merging parties (which would reduce consumer welfare), and for its potential to lower costs and therefore prices (which would increase consumer welfare).

As the examples above illustrate, the consumer welfare standard is useful because it can be applied generally to a variety of anticompetitive actions and can handle many types of potential competitive harms. In the case of predatory pricing, the consumer welfare framework can be used to assess conduct that may have beneficial short-term effects, but more harmful long-term effects. In the case of monopsony pricing, the consumer welfare framework can be used to differentiate procompetitive bargaining by suppliers from anticompetitive reductions in input prices. In the case of exclusive territories (and exclusionary conduct more generally), the consumer welfare framework can be used to assess conduct that could have either anticompetitively restricted competition across geographies or encouraged procompetitive investments. And in the case of proposed

mergers, the consumer welfare framework can be used to assess the net effect of a transaction (or conduct) that may generate economies of scale and other efficiencies.

IV. ADDRESSING THE CRITICISM THAT THE CONSUMER WELFARE STANDARD IS FLAWED OR INADEQUATE

Recent calls to find a new framework for antitrust policy and a move away from the consumer welfare standard seem to be motivated by a concern that focusing on consumer welfare has led to an underenforcement of the antitrust laws. A related concern is that the focus on consumer welfare may have caused us to miss important ways in which firms may acquire or exercise market power. Indeed, FTC Chair Lina Khan has argued that underenforcement of the antitrust laws is a consequence of an antitrust policy that is focused too much on short-term price effects.[16]

The specific criticisms of the consumer welfare standard take a number of different forms. One argument is that in the modern age, antitrust policy needs to pay more attention to the long-term consequences of a proposed transaction or some alleged misconduct. Another argument is that the protection of non-price competition and competition for innovation is just as important as the protection of price competition. A third argument is that evidence of short-term price competition is not a guarantee that there won't be harm in the future. And a fourth argument is that enforcement should be focused on the process of competition, as opposed to outcomes such as price, output, quality, and innovation. These may seem like very different arguments, but they have a common theme, which is that focusing on the short-term effects of some conduct or transaction reflects a myopic approach to antitrust enforcement.

These arguments, however, are not really about the standard that one ought to apply when developing and implementing antitrust policy. This is because an analysis of consumer welfare does not rule out analyses of long-term effects. Nor does an analysis of consumer welfare imply that quality competition, innovation, and other forms of non-price competition get short shrift or are somehow less important than price competition. Even if we were to adopt an entirely different standard, these fundamental issues do not go away. For example, suppose we were to adopt a standard that focuses on protecting the "process of competition."[17] One could still put too much emphasis on the process of competition in the short term and miss the long-term consequences, and one could inadvertently focus on how companies are competing on price, but overlook the process by which companies are competing on quality and innovation.

Moreover, even if one were to focus on protecting the process of competition, an assessment of consumer welfare would still be a valuable aspect of the analysis. Competition is expected to lead to lower prices, higher output, higher quality, and more innovation, which suggests that these basic elements of consumer surplus would only further or complement any other analysis that one might want to do to assess the "process of competition."

The arguments offered highlight an important issue, though, which is that policy decisions may require an assessment of opposing and complex questions. For example, should concerns about the long-term consequences take priority over the short-run changes that

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16 Greenfield, *supra* note 10 at 404.

17 See, for example, the "Protection of Competition" standard that was put forward by Tim Wu. Wu, *supra* note 10.

reflect innovation? Should policymakers sacrifice the benefits that come from economies of scale and scope to ensure that markets don't become too highly concentrated in the future? Should policymakers protect small firms, even if they are inefficient, to ensure that there are an adequate number of competitors in the future? Is the importance of non-price competition receiving adequate recognition? These are important policy questions for the enforcement agencies, policymakers, and the courts, and they are being asked today under a consumer welfare framework. And even if one were to consider other policy goals, there is no reason why one would not want to consider consumer welfare in assessing any of these questions.

If the concern is that the consumer welfare standard is leading to underenforcement of the antitrust laws, we can address that directly by being careful and thoughtful in how we apply the consumer welfare standard in practice. That is because it is up to antitrust practitioners and the enforcement agencies to ensure that enforcement decisions are based on analyses that are data-driven and consistent with economic theory. To do that, we can keep in mind a number of principles.

First, we should keep in mind that antitrust analysis is largely a situation-specific inquiry that requires a high degree of data and market-specific facts. This means that we must collect accurate data needed to do the empirical analyses that are most relevant and informative. If we want to avoid focusing on short-term price effects, then we should press for the collection and analysis of data on quality, innovation, and other aspects of non-price competition. For example, data on product improvements and innovation, as well as total market output, would be informative. These metrics are not new and they are completely consistent with a framework that rests on the importance of consumer welfare.

In addition, by focusing on these metrics, we can continue to perform the empirical analyses and quantitative modeling that the courts and enforcement agencies have found valuable over the years. Of course, we should be cognizant that we don't suffer from the myopia of focusing only on the things that we can measure. Opposing parties may disagree on the facts, but asking the right empirical questions, getting and analyzing the data, applying the right economic model that matches the underlying theory of competitive harm, and interpreting the results are all part of a reliable antitrust analysis.

Second, we should keep in mind that many theories of competitive harm are dynamic in that they specify actions that have consequences in the short term, and potentially different consequences in the long term. If we want to avoid focusing on short-term consequences and pay more attention to the longer term consequences, we can by developing the economic models that are needed to assess whether a consumer welfare-enhancing effort in the short run is likely to have adverse competitive effects over the longer term. There is nothing about the consumer welfare standard that prevents the consideration of such longer-term effects. There may be disagreement with respect to (a) whether the conditions are in place for future harm to competition, (b) if it is likely that competition will be harmed in the long term, and (c) how much weight should be given to these longer-term consequences, particularly if there is little evidence that consumers are harmed in the immediate term. Indeed, opposing parties may disagree on the likelihood of future harm and the weights that should be given to long-term effects over short-term effects, but this is the discussion that we can have within the consumer welfare framework.

Third, we should keep in mind that much of antitrust analysis is a forward-looking inquiry. This is particularly the case with respect to analyses of proposed mergers and acquisitions and in the investigation of ongoing and current business practices. In today's economy, markets can evolve and change quickly. But there is nothing in the consumer welfare framework that prevents or discourages an inquiry into how markets are likely to evolve over time.

In forward-looking analyses, there is also the potential to make Type I and Type II errors. Specifically, there is the cost of blocking activity that is not anticompetitive (a Type I error) and there is the cost of not blocking activity that is anticompetitive (a Type II error). Those who believe that there has been underenforcement of the antitrust laws would say that it is always more costly to make a Type II error than a Type I error. Thus, they argue that greater enforcement efforts are needed to reduce the likelihood of making Type II errors. Those who believe that it is more costly to make a Type I error than it is to make a Type II error would make the opposite argument. They would argue that the enforcement agencies should intervene only if they are sure that the activity or conduct at issue is anticompetitive.

Both types of errors are costly, and to reduce these errors, we should develop the economic models and evidence that will enable the enforcement agencies and courts to minimize both types of errors. In this respect, we should improve the precision and predictive power of the economic models that are applied, and we should continue to evaluate and test the models that are used and the assumptions behind those models. It is commonplace for policymakers and regulators to consider the error costs associated with their policies and enforcement decisions, and antitrust policy is no exception, whether consumer welfare is the goal of the antitrust laws or not.

Fourth, there is no substitute for making sure that we understand the market at issue and the nature of competition in that market. This is how we can ensure that antitrust analysis can focus on both the process of competition and on the indicia that are correlated with consumer welfare. From an economic standpoint, that means understanding the underlying economic theory of competitive harm and, importantly, the counterfactual world that would result if the merger did not happen or the counterfactual world that we would have observed had there not been the alleged misconduct. This is the analysis that will ultimately help us to ensure that antitrust is focused on protecting the competitive process and distinguishing harm to a competitor from harm to competition. These are fundamental economic issues and questions, and they have helped to make antitrust a discipline that is grounded in economic theory and empirical analysis. A rigorous approach that is rooted in economic theory and statistical and econometric analysis is the way antitrust is currently practiced, and with the greater availability of data and robust statistical tools to analyze these data, there is every reason to continue applying sound economic principles and empirical methods in antitrust, whether consumer welfare is the primary goal of the antitrust laws or not.

V. CONCLUDING OBSERVATIONS

From an economic standpoint, the consumer welfare standard is a useful framework for antitrust policy. Consumer welfare (with consumer surplus as its metric) is a framework that can be applied to many different types of antitrust issues and conduct. Importantly, consumer surplus is measurably lower as a result of the actions that the antitrust laws are often concerned about—monopolization, price fixing, mergers, exclusionary conduct, and buyer power. In addition, there are many benefits of having a standard that is based on consumer welfare.

Such a standard is consistent with economic theory and it provides antitrust practitioners, enforcement agencies, the courts, and policymakers with objective indicia with which to assess and implement competition policy.

There are criticisms about the usefulness of the consumer welfare standard. Critics point to the potential for the standard to overemphasize the short-term price effects over other effects, such as non-price effects and effects that may occur in the long term. However, consumer welfare can be analyzed in the short run or the long run. There is nothing in the standard itself that gives short-run price effects greater weight or importance. Moreover, an antitrust framework that is based on consumer welfare as a goal does not imply that quality competition, innovation, and other forms of non-price competition are somehow less important than price competition.

If the concern is that the consumer welfare standard is leading to underenforcement of the antitrust laws, we can address that directly in four ways. First, we can press for better data and more reliable and informative empirical analyses, especially with respect to non-price competition. Second, we can develop the economic models that are dynamic and capable of assisting in an assessment of the long-term effects, especially when there are consumer welfare-enhancing efforts in the short run that could have adverse competitive effects over the longer term. Third, we should recognize that there are Type I and Type II costs in any enforcement activity and since both types of costs are important, we should improve the precision and predictive power of the economic models that are applied. Fourth, we should continue to appreciate that harm to competition is not the same as harm to a competitor, which means that there is no substitute for understanding the underlying competitive process and the nature of competition in the market at issue.

We live in a complex economy, which means that markets are complex. Modern markets also can change quickly. There is no question that both the complexity and dynamics of the modern economy make antitrust a challenging area of law and economics, but that is exactly why the economic approach to antitrust is so important. The concept of consumer welfare is a key element of the economic approach and therefore a useful framework for antitrust. If there are concerns that antitrust has given short-term price effects more importance, that is not because we have an antitrust policy that is focused on consumer welfare. The consumer welfare standard is robust and flexible enough to incorporate assessments of price and non-price effects in both the short term and long term.

Moreover, we can address concerns about the underenforcement of the antitrust laws within a consumer welfare framework. To do that, antitrust practitioners, enforcement agencies, the courts, and policymakers should continue to look at all angles, demand rigorous analysis, and encourage efforts to improve the power and usefulness of the economic models and tools that are used. This is a solution that does not involve moving away from consumer welfare as a guiding framework. Instead, it is a solution aimed at ensuring that all of the issues are considered and that the inquiry goes beyond analyses of the short-term price effects that are more immediate and easier to quantify and assess.

A LITIGATOR'S PERSPECTIVE ON THE EVOLVING ROLE OF ECONOMICS IN ANTITRUST LITIGATION

By Daniel M. Wall[1]

I. PRELUDE

The first substantial assignment I had as an antitrust lawyer dropped me into the deep end of the law and economics pool. It was 1981 and I was a first-year lawyer in the DOJ Antitrust Division's Honors Program and I had been assigned to the trial team for *United States v. AT&T,* the landmark case that resulted in the breakup of the Bell System. After the government rested its case in chief, AT&T filed a comprehensive motion to dismiss. One part of that motion challenged the legal sufficiency of the government's predatory pricing theory on the ground that the government had not proven that AT&T had charged long distance rates below its average variable costs.

It would be difficult to overstate how intimidated I was when asked to respond to this particular part of AT&T's motion. AT&T's brief was strong and grounded in what was arguably the seminal article fusing antitrust law and economics into "one thing": Phillip Areeda and Donald F. Turner's *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*.[2] The "Areeda and Turner test" that originated in this article required the plaintiff in a predatory pricing case to show that the defendant's prices were below short run marginal costs or (as a proxy for marginal costs) average variable costs, and in the six years between the publication of that article and AT&T's motion numerous courts had already adopted that standard. The momentum behind the Areeda and Turner test was strong enough that AT&T boldly proclaimed that the "only accepted test for predatory pricing is whether rates were intentionally set at a level below marginal costs." AT&T also argued, for the most part correctly, that the government had not made a case under that test.

But that is not what made this assignment so intimidating. The fear I felt was because I had no idea whether AT&T's arguments were correct, whether they correctly described the Areeda and Turner test, whether there were alternatives, and most of all how I was supposed to figure that out.

I had no choice but to start reading law and economics articles, of which I discovered there were many. This led to the discovery that as well as the Areeda and Turner average variable cost test was doing in the courts, it was actually getting consistent negative

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2 88 Harv. L. Rev. 697 (1975).

criticism from economists and other academics.[3] Some of that criticism went right to the core point of whether short run cost measures were appropriate indicators of predatory pricing in markets, such as telecommunications, with high fixed costs.

The government's predatory pricing theory was, let us say, unusual. We argued that AT&T had priced its long distance services "without regard to costs" and that because it could subsidize unprofitable rates with profits made during the same period in another monopolized service, its conduct did not fall within the "lose money now, recoup later" model of the traditional predatory pricing claim. History has not been kind to this theory, and it is doubtful that any court would take seriously a similar argument made today. But history was not my concern in the Summer of 1981. I just wanted to beat a motion dismiss predicated on a clear overstatement about the role of short-run cost standards in the law. I recalled the advice I had received a year earlier when I was an extern for Judge David Bazelon of the D.C. Circuit, that "sometimes it is easier to say that the other side's argument is wrong rather than that your side's is right." And therefore I drafted an opposition brief that primarily said that AT&T was wrong: that the Areeda and Turner test was not the "only accepted test for predatory pricing"; that it was not appropriate for the telecommunications industry with its high fixed-costs; and that consequently AT&T's motion to dismiss could be denied without making a definitive determination of whether the government's "pricing without regard to costs" theory was right.

It worked. In September 1981, Judge Harold H. Greene denied AT&T's motion to dismiss across-the-board.[4] With regard to the predatory pricing claims, Judge Greene held that "defendants overstate the extent to which the marginal cost test (or its surrogate, the average variable cost test), advanced by Areeda and Turner … has become the sole legal standard for identifying non-compensatory pricing."[5] He reserved judgment on whether the government's theory could prevail ultimately. Judge Greene's denial of AT&T's motion to dismiss is widely regarded as the determinative moment in this historic litigation. Just four months later, in January 1982, AT&T agreed to be broken up.

II. THE HIGHLY CONTESTABLE MARKET FOR ANTITRUST ECONOMICS

This initial, formative experience in *AT&T* taught me that economics, like everything else in litigation, is contestable. Economics may be antitrust's lodestar, but it is an unstable star at best, and often appears to be more like the binary star system in which two stars orbit around an unseen common center of mass. There is a constant push and pull between today's accepted wisdom and the next great idea. There is more to it than the witticism that "no one ever got tenure by saying that everyone else was right," but that is part

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3 *See, e.g.*, Oliver E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis,* 87 Yale L.J. 284 (1977); F. M. Scherer, *Predatory Pricing and the Sherman Act: A Comment,* 89 Harv. L. Rev. 869 (1976); William J. Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing,* 89 Yale L.J. 1 (1979); Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy,* 89 Yale L.J. 213 (1979). Herbert Hovenkamp has written a succinct history of the Areeda and Turner test. *See* Herbert J. Hovenkamp, *Predatory Pricing under the Areeda-Turner Test*, Faculty Scholarship at Penn Law (2015), https://scholarship.law.upenn.edu/faculty_scholarship/1825.

4 *United States v. Am. Tel. & Tel. Co.,* 524 F. Supp. 1336 (D.D.C. 1981).

5 *Id.* at 1368.

of it. Economists advance their careers by advancing the state of the art in economics, which necessarily takes the existing literature as a baseline and argues for a better way of addressing the chosen topic, be it predatory pricing, merger analysis, or anything else. Since industrial organization economics is a "soft" science, no one is ever proven definitively right, leaving plenty of room to criticize even major advancements like the Areeda and Turner article.

Lawyers then enter the picture to operationalize (or weaponize) the latest economic thinking. William Kovacic has noted how "[e]conomically astute attorneys such as [Robert] Bork, [Richard] Posner, Frank Easterbrook, and Ernest Gellhorn" were largely responsible for the influence of Chicago School economics on antitrust law because they "took new Chicago School analytical precepts and translated them into operational principles that judges readily could apply."[6] On the other side of the ledger, lawyers arguing for more expansive (*i.e.*, restrictive) antitrust rules regularly cite the economic literature that favors the more expansive rule. I experienced this in the well-known *Kodak* case,[7] discussed below, in which the plaintiffs successfully used economics arguments credited to Steven Salop to convince the Supreme Court not to adopt a rule that a competitive "foremarket" precludes "aftermarket" monopolization claims.[8] Today, it is routine for litigants in Supreme Court cases to solicit *amicus* support from *ad hoc* groups of economists. In most cases, economists support both sides.[9] Lawyers, of course, write the briefs.

In my teaching, I illustrate the contestability of antitrust economics with the evolution of merger law and economics from the 1960s to the present day. There is a tendency to dismiss the discredited Supreme Court cases of the 1960s, the likes of *Von's*[10] or *Brown Shoe*,[11] as economics-free expressions of a populist antipathy to mergers. In reality, those decisions and the merger challenges that led to them were grounded in the prevailing economics of the day, in particular the "structure-conduct-performance paradigm" developed by Joe Bain and others. As Leonard Weiss summarized in 1979, "The main predictions of the structure-conduct-performance paradigm are: (1) that concentration will facilitate collusion, whether tacit or explicit, and (2) that as barriers to entry rise,

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6 William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking,* 14 J. Econ. Persps. 43, 53 (2000); *see also* William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy,* 36 Wayne L. Rev. 1413, 1437-39, 1445-51 (1990).

7 *Eastman Kodak Co. v. Image Tech. Servs., Inc.,* 504 U.S. 451 (1992).

8 *See* Daniel M. Wall, *Editor's Note:* Kodak: *A Personal Perspective,* 7 Antitrust 4 (1992).

9 As just one example, in *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018), the controversial 5-4 decision that Amex's anti-steering provisions did not violate Section 1 of the Sherman Act, eight economists filed an *amicus* brief supporting Ohio and the view that one did not need to consider both sides of a two-sided market. Brief for Amici Curiae John M. Connor et al. in Support of Petitioners, 2017 WL 6492474. Professors David S. Evans and Richard Schmalensee filed an *amicus* brief in support of American Express, and fifteen scholars of antitrust, law, and economics filed a separate brief supporting American Express. Brief for Amici Curiae Prof. David S. Evans and Prof. Richard Schmalensee in Support of Respondents, 2018 WL 798389; Brief for Amici Curiae Antitrust Law & Economics Scholars in Support of Respondents, 2018 WL 582320.

10 *United States v. Von's Grocery Co.,* 384 U.S. 270 (1966).

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

the optimal price-cost margin of the leading firm or firms likewise will increase."[12] Economists of the day were also very skeptical about the capacity of mergers to create efficiencies. It was therefore easy to reason that "[w]ith a considerable amount to lose and apparently nothing much to gain," a tough anti-merger policy was appropriate.[13] This was the economic mindset that led to successful challenges to mergers creating single-digit market shares, as in *Von's,* and to the *Philadelphia National Bank* rule that mergers leading to combined market share of 30% or more are presumptively unlawful.[14]

Then economists figured out that many of these assumptions were wrong. The Chicago School is given (and takes[15]) much of the credit for this, especially in challenging the assumption that mergers do not generate efficiencies.[16] Equally important was the work by empirical economists testing the predictions of the structure-conduct-performance paradigm. That work provided no support for the view that small increases in concentration led to increases in prices or profits. Eventually, consensus emerged that it was much more important to focus on already-concentrated markets and on mergers that increased concentration "at the top," *e.g.*, combinations of market leaders. Courts began retreating from the 1960s cases, most notably in *United States v. General Dynamics Corp.*,[17] in which the government suffered its first Supreme Court loss in a merger case since the 1950 amendments to the Clayton Act. "*General Dynamics* … shifted the evaluation of proposed mergers from a strict market-share-based approach to a functional approach under which a single ultimate question—whether there would be a substantial lessening of competition if the merger went forward—took center stage."[18] By 1984, the government itself proclaimed in its *Merger Guidelines* that it "will not challenge mergers solely on the basis of concentration and market share data without considering other relevant factors...."[19] The *1984 Merger Guidelines* also adopted the Herfindahl-Hirschman Index, a measure of concentration that gives more weight to the larger firms in a market, and is therefore particularly attuned to potential coordinated effects from mergers that create or strengthen oligopolies. The 1984 *Guidelines* also contained an extensive set of factors to consider in determining whether the market was prone to collusion, reflecting the prevailing view, as stated by Judge Richard Posner in *Hospital Corp. of America v. FTC,* that

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12 Leonard W. Weiss, *The Structure-Conduct-Performance Paradigm and Antitrust*, 127 U. Pa. L. Rev. 1104, 1105 (1979) (footnote omitted).

13 *Id*. at 1117.

14 *See United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 363 (1963) (holding that a presumption of anticompetitive effects arises when a merger "produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market.").

15 *See* Frank H. Easterbrook, *Workable Antitrust Policy,* 84 Mich. L. Rev. 1696 (1986).

16 *See* Kovacic & Shapiro, *supra* note 6, at 52-55.

17 415 U.S. 486 (1974).

18 Diane P. Wood, *Theory and Practice in Antitrust Law: Judge Cudahy's Example,* 29 Yale J. Reg. 403, 405-06 (2012); *see also United States v. Baker Hughes Inc.*, 908 F.2d 981, 990 (D.C. Cir. 1990) ("*General Dynamics* began a line of decisions differing markedly in emphasis from the Court's antitrust cases of the 1960s.").

19 *See* U.S. Dep't of Just., 1984 Merger Guidelines, 49 C.F.R. 26823-03, 1984 WL 88949 (1984), http://www.justice.gov/atr/hmerger/11249.pdf.

"[w]hen an economic approach is taken in a section 7 case, the ultimate issue is whether the challenged acquisition is likely to facilitate collusion."[20]

Then economists figured out that maybe collusion wasn't the key issue; unilateral effects were. The *1992 Merger Guidelines*, in no small measure the work of economists Janusz Ordover and Robert Willig,[21] revolutionized merger analysis by simultaneously adding requirements for a coordinated effects case that makes them very difficult to bring, and more importantly articulating the unilateral effects theory that now dominates the field.[22] Unilateral effects concerns are entirely different than coordinated effects concerns—even if both are ultimately about increased market power. A merger creates unilateral effects if eliminating competition between the merging firms themselves could create or enhance market power. A traditional coordinated effects theory is about collusion. An adverse unilateral effect occurs in a portion of a market (raising legal issues about whether it lessens competition in a "line of commerce," as Section 7 requires). Coordinated effects are inherently marketwide. The change in emphasis ushered in by the *1992 Guidelines* is therefore fundamental, and it all comes from economics and changing viewpoints on what economic risks mergers pose. This process has continued over the last 30 years, highlighted by the substantially more aggressive and litigation-hardened *2010 Merger Guidelines*.[23] Carl Shapiro has likened the evolution of the Guidelines over four decades to a transition from a hedgehog that "knows one big thing"—that "horizontal mergers that increase market concentration inherently are likely to lessen competition"—to a fox that "knows many things."[24] If so, it is a fox deeply influenced by the constant changes in the economics it has been studying.

The same process has been changing the standards that apply to conduct or behavioral cases brought under Sections 1 or 2 of the Sherman Act. That evolution is addressed by an extensive literature debating the influence of the Chicago School and whether

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20 807 F.2d 1381, 1386 (7th Cir. 1986).

21 *See* Janusz A. Ordover & Robert D. Willig, *Economics and the 1992 Merger Guidelines: A Brief Survey,* 8 Rev. Indus. Org. 139 (1993).

22 U.S. Dep't of Just. & FTC, Horizontal Merger Guidelines (1992, rev. 1997), http://www.justice.gov/atr/public/guidelines/hmg.pdf.

23 U.S. Dep't of Just. & FTC, Horizontal Merger Guidelines (2010), http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf. The 2010 *Guidelines* are unabashedly a litigation-oriented document—as its authors acknowledge. *See* Joseph Farrell & Carl Shapiro, *The 2010 Horizontal Merger Guidelines After 10 Years*, 58 Rev. Indust. Org. 1, 3 (2021) ("The 2010 Guidelines … sought to reinvigorate merger enforcement, within the contours of established case law, both where economic analysis had improved and also where accumulated interpretations of earlier Guidelines had made enforcement more difficult without sound reason."). Farrell and Shapiro served, respectively, as the FTC's Director of the Bureau of Economics and the DOJ Antitrust Division's Deputy Assistant Attorney General for Economics as the 2010 *Guidelines* were developed, and were undoubtedly driving forces behind them.

24 Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years,* 77 Antitrust L.J. 701, 702-03 (2010).

it "overshot the mark."[25] From my own perspective, the modern era of antitrust began with *Continental T.V. Inc. v. GTE Sylvania Inc.,* in which the Supreme Court held that all nonprice vertical restraints warrant rule of reason analysis.[26] I read *Continental T.V.* the year after it was decided, in my first antitrust class. Justice Lewis Powell's majority opinion bypassed an easy way to distinguish *United States v. Arnold, Schwinn & Co.,*[27] and instead overruled *Schwinn.* The analysis is notable for its citation to economists on both the competitive benefits of non-price vertical restraints and the folly of the *Schwinn* decision. Judge Richard Posner's scathing criticism of various Supreme Court antitrust decisions features prominently.[28]

This turned out to be the beginning of a trend, as throughout the late 1970s and 1980s, lawyers effectively marshaled Chicago School insights and arguments to change the antitrust common law that governed predatory pricing,[29] refusals to deal,[30] tying,[31] and practically everything else. This was the environment in which I began my career, and which provided repeated opportunities to integrate economics argument into my advocacy.

III. *KODAK* AND THE BIRTH OF POST-CHICAGO ECONOMICS

In 1987, eighteen Independent Service Organizations (or "ISOs") filed suit in San Francisco against Eastman Kodak Co. alleging tying and monopolization because Kodak refused to sell them spare parts used in servicing Kodak-brand copiers and micrographics

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25 *See, e.g.*, How The Chicago School Overshot The Mark: The Effect of Conservative Economic Analysis On U.S. Antitrust (Robert Pitofsky ed., 2008); William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix,* 2007 Colum. Bus. L. Rev. 1; Herbert J. Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis,* 168 U. Pa. L. Rev. 1843 (2020); Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case For Evidence-Based Antitrust,* 78 Antitrust L.J. 241 (2012). From a practitioner's perspective, debating whether "Chicago" or "Harvard" (both simplifications) had the most impact on antitrust law seems to miss the point. The Chicago School was undoubtedly a catalyst in the process by which economics arguments from all quarters infused antitrust analysis.

26 433 U.S. 36 (1977).

27 388 U.S. 365 (1967).

28 433 U.S. at 48 n.13 (citing Richard Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions,* 75 Colum. L. Rev. 282 (1975)).

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

30 *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585 (1985). This may seem an odd citation in relation to the Chicago School's influence, with Justice Scalia's 2004 decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398 (2004), the better example. In fact, for the central point of the decision—that disrupting a longstanding cooperative relationship might indicate an anticompetitive refusal to deal—the *Aspen Skiing* decision cites Robert Bork's The Antitrust Paradox (1978), a seminal if controversial contribution of the Chicago School. *See* 472 U.S. at 603 n.29 & 604 n.31.

31 *See Jefferson Par. Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 34 (1984) (O'Connor, J., concurring) (noting that despite the majority's ostensible retention of the *per se* rule against tying, "tying cases [have] always required an elaborate inquiry into the economic effects of the tying arrangement"). One of the defining positions of the Chicago School was that there is only one monopoly profit, and therefore that most if not all antitrust leveraging theories are misplaced. *See* Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 Yale L. J. 19, 20 (1957) ("[T]he tying sale is only a means of utilizing effectively a power already possessed….").

equipment. Kodak hired McCutchen, Doyle, Brown & Enersen to defend the case, and I was the junior partner on the team.[32]

Everyone knew that Kodak was a monopolist—in film. Xerox was the copier monopolist, "Xeroxing" having become a verb. No one, I soon learned, monopolized the various micrographics equipment markets. But the plaintiffs contended all that was irrelevant, because the "monopolies" at issue were in the *aftermarkets* for servicing Kodak copiers and micrographics equipment, and the leverage was coming from Kodak's control over the spare parts for its own products, which it also monopolized. Was it correct, I wondered, that a company with very modest equipment market shares could have monopolies in parts for its own products and servicing its own products?

A then-recent Ninth Circuit case seemed to provide a favorable answer for defendants. In *General Business Systems v. North American Philips Corp.,*[33] the court had affirmed summary judgment in relation to a claim that a computer company had tied service and warranty protection to computer hardware, precisely because of the defendant's small market share in the relevant computer equipment market. The *Philips* court identified the key issue as whether the manufacturer would have been able to "raise the price of its [parts] without reducing its profits," considering whether increased parts prices "would diminish sales of its computer system and … adversely affect aggregate profits."[34] The decision describes the basic dynamics of systems competition, including the role of lifecycle costs and lock-in, and ultimately concludes that had Philips "attempted to impose significant pressure to buy [computer parts] by use of the tying service," it "would have hastened the date on which Philips surrendered to its competitors in the small business computer market."[35] This seemed like a strong, if not perfect, analogy to the ISOs' claims against Kodak, so we chose a litigation strategy based on an early summary judgment motion on market and monopoly power.[36]

The Supreme Court would later say that Kodak's summary judgment motion was based exclusively on its low share of the equipment markets; that "Kodak [did] not present any actual data on the equipment, service, or parts markets"; and that Kodak sought a "*per se*" rule that equipment market competition invariably "precludes … monopoly power in derivative aftermarkets."[37] None of those assertions is true.[38] Kodak's motion in fact anticipated that lifecycle costs, information costs and switching costs (leading to lock-in) would be part of the summary judgment calculus, as they were in *Philips* and other relevant cases. So Kodak offered declarations by its executives on those subjects, and offered discovery on those issues. The plaintiffs only addressed one of those issues, lock-in, in their responsive papers. Their argument was more categorical and formalistic than anything Kodak argued: they distinguished between

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32 Donn P. Pickett was lead counsel, and Alfred C. Pfeiffer, Jr. and Holly House rounded out the team.

33 699 F.2d 965, 977-78 (9th Cir. 1983).

34 *Id.* at 972.

35 *Id.* at 977.

36 The district judge to whom *Kodak* was assigned, William W. Schwarzer, was an advocate of early summary judgment motions as a case management tool. *See* William W. Schwarzer, *Summary Judgment and Case Management,* 56 Antitrust L.J. 213 (1987).

37 *Kodak*, 504 U.S. at 466 & n.11.

38 *See* Wall, *supra* note 8, at 4.

"buyers" and "owners" of Kodak equipment, and claimed that for "owners" (those who had already bought) switching equipment because of high parts and services prices was not feasible.

The district court granted Kodak's motion; the Ninth Circuit reversed; and the Supreme Court granted *certiorari*.

This was when I learned that when the Supreme Court agrees to hear "your case," it is no longer your case. It becomes something much larger than the dispute between the litigants. Numerous interested third parties enter the fray either formally, as *amici*, or attempting to influence the arguments and outcome informally. And in 1991, after two decades of rising Chicago School influence in antitrust, *Kodak* became a kind of "barricade on the Rue de la Chanvrerie" which the resistance could use to slow, if not stop, the Chicago School's influence. Enter Steven Salop, one of the most preeminent post-Chicago economists, who was essentially handed the pen by plaintiffs' counsel to include in their merits brief an economic essay on how parts policies like Kodak's *might be* anticompetitive were Kodak willing to engage installed base opportunism.[39] Respondents also explicitly associated Kodak's arguments with the Chicago School, arguing that "Economic theory - even if valid - is not a substitute for law."[40]

Looking back at this, I still recoil at the suggestion that Kodak advanced a Chicago School economic argument. During the *certiorari* process and afterwards, Kodak was advised by Janusz Ordover and Carl Shapiro, who no one accuses of being Chicago School economists. Kodak's arguments were grounded in broadly accepted principles of systems competition that Shapiro discusses in a 1995 article.[41] They anticipated arguments that would not come "from Chicago," such as the possibility of a price discrimination strategy. And while Kodak cited to Chicago School figures such as Ward Bowman and Richard Posner, it cited to others as well.

On the other hand, a Chicago School precept certainly featured in Kodak's arguments: the idea that antitrust needs to consist of administrable rules that are not so preoccupied with the edge cases that they deter practices that are ordinarily competitively benign. Kodak's argument that this was an appropriate case for summary judgment definitely echoed that position, and in that regard we cited both *The Limits of Antitrust,* Judge Frank Easterbrook's classic article advocating the use of an error cost framework in formulating antitrust rules,[42] and an article in which Easterbrook argued specifically that addressing "questionable practices pursued by firms without [market] power will spin the wheels of the courts - at great expense - for no substantial result."[43]

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39 *See* Brief of Respondents at 20 n.13, 33, https://appliedantitrust.com/22_tying/00_classic_cases/09_kodak/3_sc/kodak_us_opp9_20_1991.pdf. In short, installed base opportunism is a strategy of exploiting locked-in customers by raising aftermarket prices enough to exceed reasonable expectations of total costs of ownership. Not any price increase will do that since rational customers expect some increases in parts, service and supply costs over time. Opportunism is most often an end-of-life strategy in declining industries. *See* Kathryn Rudie Harrigan & Michael E. Porter, *End-Game Strategies for Declining Industries,* Harv. Bus. Rev., July 1983.

40 Brief of Respondents, *supra* note 39 at 43 (citing Gordon B. Spivack, *The Chicago School Approach to Single Firm Exercises of Monopoly Power: A Response,* 52 Antitrust L.J. 651, 651-54, 672-74 (1983)).

41 Carl Shapiro, *Aftermarkets and Consumer Welfare: Making Sense of* Kodak, 63 Antitrust L.J. 483, 486 (1995).

42 Frank H. Easterbrook, *The Limits of Antitrust,* 63 Tex. L. Rev. 1 (1984).

43 Frank H. Easterbrook, *Comparative Advantage and Antitrust Law,* 75 Calif. L. Rev. 983, 989 (1987).

It is with respect to that administrability principle, a mix of substance and process, that Chicago lost out in *Kodak*. Salop's substantive installed base opportunism argument accomplished little in the long run. As others have noted, in subsequent ISO litigation courts limited *Kodak* to its facts and "the defendants almost uniformly prevailed."[44] The *Kodak* plaintiffs did not themselves pursue the installed base opportunism theory on remand, since Kodak's conduct could in no way be explained by it. In numerous later ISO cases I defended, no plaintiff ever pursued that theory either; to the contrary, it was an effective defense strategy to explain what an installed base opportunism theory requires and contrast that with what the plaintiff was arguing. The requirement that the allegedly anticompetitive practice was unanticipated, or a "surprise," was a particularly strong defense argument because almost invariably the challenged aftermarket practice was known or knowable to buyers when they purchased in the foremarket. All nine Justices on the *Kodak* Court agreed that had there been evidence that Kodak's restrictive practices were generally known, the foremarkets would have been the relevant markets, not the aftermarkets.[45]

Nevertheless, Salop's theories carried the day when combined with the plaintiffs' argument that summary judgment had been granted prematurely, without an opportunity to conduct meaningful discovery. That procedural context allowed a story not supported in the record to overcome the Chicago preference for limited, administrable rules that in this case would not entertain Salop's theory—not because it was wrong, but because as Phillip Areeda (of the Harvard School) once said, "relative clarity is itself an attribute of justice, allowing private parties to plan their affairs, minimizing the social burdens of uncertainty and the costs of litigation, and reducing the likelihood of quixotic results flowing from vague standards, inconsistently applied."[46] The majority in *Kodak* framed the case as procedural: "This is yet another case that concerns the standard for summary judgment in an antitrust controversy."[47] It declared, as the Court often does, that "[t]his Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record,'" instead of legal presumptions.[48] It claimed falsely that Kodak had not provided any evidence for its arguments and was seeking a *per se* rule of legality.[49] That procedure-versus-substance set-up is plainly

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44 Jonathan I. Gleklen, *The ISO Litigation Legacy of* Eastman Kodak Co. v. Image Technical Services: *Twenty Years and Not Much to Show for It*, 27 ANTITRUST 56, 62 (2012); *see also* Christopher S. Yoo, *The Post-Chicago Antitrust Revolution: A Retrospective*, 168 U. PA. L. REV. 2145, 2165 (2020) ("*Kodak* has not proven to be generative. The plaintiff abandoned its post-Chicago theory on remand, and 'lower courts have bent over backwards to construe *Kodak* as narrowly as possible,' as even supporters have been forced to concede." (footnotes omitted)).

45 *See Kodak*, 504 U.S. at 477 n.24 (majority opinion), 492 (Scalia, J., dissenting); *see also Digital Equip. Corp. v. Uniq Digital Techs., Inc.*, 73 F.3d 756, 763 (7th Cir. 1996) ("The Court did not doubt in *Kodak* that if … Kodak had informed customers about its policies before they bought its machines, purchasers could have shopped around for competitive life-cycle prices."); *PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 820 (6th Cir. 1997) ("[A]n antitrust plaintiff cannot succeed on a *Kodak*-type theory when the defendant has not changed its policy after locking-in some of its customers, and the defendant has been otherwise forthcoming about its pricing structure and service policies.").

46 Phillip Areeda, *Monopolization, Mergers and Markets: A Century Past and the Future,* 75 CALIF. L. REV. 959, 970 (1987), *quoted in Tying - Market Power at Summary Judgment*, 106 HARV. L. REV. 328, 338 (1992).

47 504 U.S. at 454.

48 *Id.* at 466-67.

49 *Id.* at 466 & n.11. This recalls another thing I learned in *Kodak:* that the first casualty of a Supreme Court opinion is the losing party's best argument—which often goes missing in action.

the battle between the majority and Justice Scalia's dissent, which begins with: "This is not, as the Court describes it, just 'another case that concerns the standard for summary judgment in an antitrust controversy.' Rather, the case presents a very narrow—but extremely important—question of substantive antitrust law…."[50] Justice Scalia's perspective was classically Chicago. The majority did not share it. That preference for resolving cases on the facts is arguably the only enduring principle from *Kodak,* and it is honored inconsistently at best.

If *Kodak* was a victory for post-Chicago economics, what are the spoils? In fact, it is difficult to identify clear-cut substantive "wins" for post-Chicago economics, *i.e.,* changes in decisional rules that arise from post-Chicago thinking comparable to how Chicago economics led to *Leegin.*[51] The "raising rivals' costs" ("RRC") concept developed by Salop and his collaborators is arguably the seminal contribution of post-Chicago economics, and I have found it very useful in assessing vertical foreclosure issues of all kinds. Yet it is very hard to identify any cases in which the particular RRC framework advanced in the Krattenmaker and Salop[52] article has been adopted as the legal decisional framework. In summary, the RRC analysis has two steps: "First, one should ask whether the conduct of the challenged firm unavoidably and significantly increases the costs of its competitors. If so, one then should ask whether raising rivals' costs enables the excluding firm to exercise monopoly power…."[53] Both are rigorous, even daunting requirements if one addresses them as the RRC literature requires.[54] Making out an RRC case is by no means as easy as saying that a monopolist raised the plaintiff's costs. And so it is notable that as often as the Krattenmaker and Salop article is cited in legal opinions, it tends to be collateral support for an analysis conducted under a different decisional framework derived from case law.[55]

I suspect part of the reason for this is that plaintiffs find only a watered-down version of the first part of the RRC test useful—they would like to start and finish by showing that the defendant's conduct meaningfully raises the rival's costs. Very few plaintiffs will find it useful to address that issue as the RRC literature says it should be addressed, which is either in relation to minimum viable or minimum efficient scale, or at the very least by

50 *Id*. at 486 (Scalia, J., dissenting).

51 *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,* 551 U.S. 877 (2007) (overruling the nearly 100 year-old rule that vertical agreements to fix minimum resale prices are *per se* unlawful).

52 *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price,* 96 Yale L.J. 209 (1986).

53 *Id*. at 214.

54 *See* David T. Scheffman and Richard S. Higgins, *Twenty Years of Raising Rivals' Costs: History, Assessment, and Future,* 12 Geo. Mason L. Rev. 371 (2003).

55 *E.g., McWane, Inc. v. FTC*, 783 F.3d 814, 832-33 (11th Cir. 2015) (applying the decisional framework of *United States v. Microsoft Corp.,* 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam), but stating: "Of particular relevance to this case, an exclusive dealing arrangement can be harmful when it allows a monopolist to maintain its monopoly power by raising its rivals' costs sufficiently to prevent them from growing into effective competitors."). In *Novell, Inc. v. Microsoft Corp.,* then-Judge Gorsuch rejected RRC as an alternative for a "profit sacrifice" test. 731 F.3d 1064, 1079 (10th Cir. 2013) ("This shouldn't be (mis)taken as suggesting raising rivals' costs theories play no role in antitrust. It is to say only and much more modestly that they do not displace *Aspen* and *Trinko's* profit sacrifice test in the narrow world of refusal to deal cases….").

proof that the burden of higher costs constrains rivals' output or ability to expand.[56] Fewer still will want to take on the burden of the second and more demanding requirement that the defendant's conduct creates "power over price." Therefore, as Janusz Ordover and I predicted in 1987,[57] the tendency has been to cite Krattenmaker and Salop's RRC article for the raising rivals' costs epithet but not to go down the complete, rocky road that they and other RRC economists modeled.

Post-Chicago economists have also made important contributions to our understanding of tying; for example Michael D. Whinston's, *Tying, Foreclosure, and Exclusion,*[58] which shows how tying can exclude rivals if the tied market is subject to economies of scale and leveraging induces exit or deters entry in the tied market by making continued operation unprofitable. But again, where is the case that adopts this as the decisional framework in a challenge to tying? My suspicion is that not very many antitrust plaintiffs have found it in their self-interest to embrace this test, because legal standards stated in terms of the tie affecting "a 'not insubstantial' amount of interstate commerce" in the tied product are more generous.[59] Contrast that with the eagerness of defense attorneys to embrace Chicago School proposals to limit prior antitrust doctrine. Selection bias goes a long way toward explaining the differential influence of the two schools of thought.

That "post-Chicago insights have had little apparent impact in litigation,"[60] does not mean that they have been unimportant. At the very least, post-Chicago economics has strongly elevated the importance of game theory, which is largely absent from Chicago and even Harvard models. The unilateral effects theories that are now the driving force in merger analysis are also fairly attributed to post-Chicago economics. Furthermore, the post-Chicago literature presents litigators with a wealth of ideas for how to approach the novel or difficult case, from either the plaintiff or defendant perspective. Post-Chicago economics are undoubtedly present in many expert reports and theories of the case; in my own cases, I have had to answer sophisticated economic arguments explicitly labeled as post-Chicago. So the impact is there, even if it is not directly apparent in new or modified legal standards.

III. EVIDENCE-BASED ANTITRUST – AND WHO OWNS IT

In recent years, both conservative and progressive scholars have tried to move beyond the Chicago/post-Chicago debate by saying that what they really favor is "evidence-based" antitrust analysis. Joshua Wright tries to own this moniker for the right,[61] while in a forthcoming paper Carl Shapiro defines a "Modern" approach to antitrust as one in which the

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56 *See* Steven C. Salop, *The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test,* 81 Antitrust L.J. 371 (2017).

57 Janusz A. Ordover & Daniel M. Wall, *Proving Predation after* Monfort *and* Matsushita*: What the "New Learning" Has to Offer,* 1 Antitrust 5 (1987).

58 80 Am. Econ. Rev. 837 (1990).

59 *E.g., Fortner Enters. v. U.S. Steel Corp.,* 394 U.S. 495, 498-99 (1969); *N. Pac. Ry. Co. v. United States,* 356 U.S. 1, 5-6 (1958).

60 *See* Christopher J. Sprigman, *Editor's Note: Monopolization Remedies and Antitrust After the Fall*, 76 Antitrust L.J. 5, 9 (2009).

61 Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust,* 78 Antitrust L.J. 241 (2012).

latest economic thinking is integrated with "reliable evidence, not … outdated assumptions or *laissez faire* ideology."[62]

Of course it is hard to be against evidence-based anything. An objection to evidence-based analysis sounds like an objection to reason itself. It is a particularly difficult concept for a litigator to oppose, since at its core litigation is the application of law to competing versions of the relevant evidence.

Joshua Wright argues that his version of evidence-based antitrust is agnostic to whether the economics come from Chicago, post-Chicago or elsewhere—"as long as such [theoretical] insights have empirical support."[63] That is a significant hedge given that one of the Chicago School's persistent criticisms of post-Chicago economics is that it is theoretical and lacks empirical support. He also incorporates into his evidence-based approach what I regard as a pillar of Chicago School thinking: the idea that one should "apply the tools of decision theory with the goal of producing liability rules that minimize the social and administrative costs of erroneous decisions."[64] That, I imagine, is what Shapiro would categorize as "*laissez faire* ideology." Shapiro argues that "Easterbrook's entire analysis [of error costs] was based on an economic *assumption* he made that 'Monopoly is self-destructive. Monopoly prices eventually attract entry.' But his assumption that monopoly power erodes soon enough was based on ideology, not evidence."[65]

I am a modernist at heart, simply because it seems wrong not to want to keep up with the latest, greatest economic thinking. At the same time, I have reservations that come from processing antitrust disputes through the courts for over forty years. The courts are imperfect generally, and our rules of civil procedure distort the decisions judges make in numerous ways. Preliminary challenges to complaints, *i.e.,* motions to dismiss, are constrained by rules that favor plaintiffs—even after *Twombly*.[66] If a complaint survives an initial challenge (or there is none), the next opportunity for a defendant to have the case dismissed is at summary judgment, probably a year or more down the road. Yet because summary judgment requires no reasonable

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62 Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, 35 ANTITRUST 33, 33-34, 39 (forthcoming 2021), https://faculty.haas.berkeley.edu/shapiro/fixingantitrust.pdf.

63 Wright, *supra* note 61, at 263.

64 *Id.*

65 Shapiro, *supra* note 62, at 37 (footnote omitted).

66 *Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). There is no clear evidence as to the effects of *Twombly* on antitrust litigation, in particular whether it results in more cases being dismissed with prejudice. A study by William H.J. Hubbard suggests that overall dismissal rates (*i.e.,* for all kinds of cases) remain about the same as they were prior to *Twombly* and *Iqbal*, but there were too few antitrust cases in Professor Hubbard's study set to come to statistically valid conclusions about antitrust cases. William H.J. Hubbard, *The Empirical Effects of* Twombly *and* Iqbal, Coase-Sandor Working Paper Series in Law and Economics, No. 773 (2016), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2479&context=law_and_economics. My own experience is that *Twombly* made successful motions to dismiss possible in antitrust cases, and undoubtedly increased the number of Rule 12(b)(6) motions that defendants file, but to what productive end I am not sure. Amended complaints (if not the first then the second) still survive in most cases, including most dubious cases. Whether the massive expenditure of time and money on motions to dismiss is worth weeding out a relatively small number of cases is an open question.

dispute over material facts,[67] not every case or issue is amenable to summary judgment. Worse, there is not always correlation between the strength of a plaintiff's case and its prospects at surviving summary judgment. Like other litigators, I have obtained summary judgment in relatively strong cases (from the plaintiff's perspective) because the plaintiff's weak point lined up with a legal principle that could be applied effectively in a summary judgment motion, and I have lost summary judgments in much weaker cases because they were factually weak but did not have the right kind of legal failing for this procedure.

The next decision point in most private civil cases would be a jury trial, a forum in which neither the nuances of economic models nor the fine points of legal doctrine play much of a role at all.

The judicial system compels me to recommend what some might regard as the Chicago approach (which is what I read Professor Wright to be advocating), but I see differently. Our decisional rules must be administrable in our district courts, and especially at summary judgment, even if to make them administrable they do not cover the meritorious edge case. This is not an endorsement of the "thumb on the scale" that Easterbrook proposes out of concern for error costs, in particular over-deterrence. Administrability as I use it here is a different, narrower concept focused on how a substantive rule interacts with procedural rules in the district courts. Then-Judge Stephen Breyer put it this way in *Barry Wright Corp. v. ITT Grinnell Corp.:*

> [W]hile technical economic discussion helps to inform the antitrust laws, those laws cannot precisely replicate the economists' (sometimes conflicting) views. For, unlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve.[68]

Two rules with identical intent—for example, each seeks to deter the same amount of predatory pricing—will in practice be differentially restrictive depending on how they can be applied in the district courts, and in particular at summary judgment. Broadly speaking, the rule with "fewer parts," so to speak, will give the defendant a better opportunity to obtain summary judgment and therefore be less restrictive in practice. The rule that is more factually intense and multi-dimensional will be harder to apply at summary judgment and therefore more restrictive in practice. The latter rule creates greater legal risk for those engaging in the behavior because they are more likely to have to defend it through trials and appeals. It is therefore not costless to promote flexibility or (in a *Kodak* sense) a desire to consider "all the facts." Flexibility almost always means a broader, more proscriptive legal principle, given the institutional setting in which those rules are applied.

In many ways, my views on this mirror those I have with regard to antitrust's quest for universal tests for exclusionary conduct. I refer to proposals such as Judge Richard Posner's

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67 *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 578-79 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

68 724 F.2d 227, 234 (1st Cir. 1983).

"equally efficient rival" test,[69] the profit sacrifice or "no economic sense" test,[70] the raising rivals' costs models discussed earlier, and so forth. The literature on this is substantial. All of these tests are in some sense alternatives to the bespoke standards that have developed through case law for particular practices, *i.e.,* the non-universal tests for predatory pricing, refusals to deal, tying, etc.[71] In this debate I am firmly in the non-universal camp for the reasons Mark Popofsky gives in his excellent treatment of this subject.[72] Specificity and clarity simply work better in a system administered by judges and juries, and bespoke decisional rules are inherently more likely to provide clarity and be more administrable. Ironically, the influential D.C. Circuit *en banc* decision in *Microsoft*[73] provides an object lesson in our natural preference for specific, administrable rules. The decision is primarily known for the "*Microsoft* balancing" approach to the rule of reason, and in it the court proclaimed that antitrust "courts routinely apply a … balancing approach" under which "the plaintiff must demonstrate that the anticompetitive harm … outweighs the procompetitive benefit."[74] But then the court issued a split decision whereby the government won on some issues and Microsoft prevailed on others *without the court ever doing any balancing.* Instead, as Herbert Hovenkamp has noted, "If the defendant offered a nonpretextual defense, the court simply accepted it, and it condemned behaviors for which no defense was offered."[75] This is the norm in rule of reason cases; courts strive to avoid the final, *ad hoc* step of balancing positives and negatives, and instead seek out, and latch on to, the administrable principle that can support the desired outcome.

As this is written, there are proposals in Congress and elsewhere to enact presumptions that will, in practice, make merger and monopolization litigation less evidence-based. For example, S. 225, the "Competition and Antitrust Law Enforcement Reform Act of 2021," would effectively reverse the burden of proof in many merger cases. There is no need for this in relation to mergers—unless one simply wants to move the goalposts and make merger law more restrictive. Non-jury merger trials are the high-water mark for antitrust from the perspective of rational decision-making. Both the evidence and the economics are addressed at a much deeper and nuanced level than one typically finds in the run-of-the-mill private action. Government conduct cases (such as *Qualcomm*[76] or *American Express*[77]) would be a close second because they too are tried to the court, often in lengthy trials. I have little sympathy for complaints that today's decisional rules make it too hard for the government to win these cases. Mistakes are made, as in *Qualcomm*, where I am inclined to agree that the Ninth Circuit panel

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69 *See* Richard A. Posner, Antitrust Law 194-95 (2d ed. 2001).

70 *See* A. Douglas Melamed, *Exclusive Dealing Arrangements and Other Exclusionary Conduct – Are There Unifying Principles?,* 73 Antitrust L.J. 375, 391-92 (2006) (no economic sense test); Janusz A. Ordover & Robert D. Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 Yale L.J. 8, 9 (1981) (the foundational article on the profit sacrifice test).

71 Marina Lao, *Defining Exclusionary Conduct Under Section 2: The Case for Non-Universal Standards*, 2006 Fordham Comp. L. Inst. 433, 435 (Barry E. Hawk ed., 2007).

72 Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 Antitrust L.J. 435, 437 (2006). Popofsky emphasizes error costs more than I would. Administrability is a standalone justification for clear legal rules.

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

74 *Id*. at 59.

75 Herbert J. Hovenkamp, *Antitrust Balancing*, 12 NYU J. Law & Bus. 369, 372 (2016).

76 *FTC v. Qualcomm Inc.,* 969 F.3d 974 (9th Cir. 2020).

77 *Ohio v. American Express*, 138 S. Ct. 2274 (2018).

displayed a remarkably poor understanding of antitrust basics. But if the story of the rise of the Chicago School and its effects on prior antitrust doctrine proves anything, it is that there are equilibrating processes in antitrust that eventually correct errors. Errors introduced into the system by legislation will not be correctible absent later, unlikely legislation.

IV. THE UNCERTAIN FUTURE FOR RATIONAL ANTITRUST ANALYSIS

The antitrust story of 2021 is the rise of the antitrust "populists" within the administration of President Joseph R. Biden. Shapiro identifies this group as "deeply concerned about the political power of large companies. They favor deconcentrating the economy to reduce that power and thereby open up opportunities for small businesses, benefit workers, and lessen racial and economic inequities. They favor simple, bright-line rules and are highly skeptical of the role of economics and expertise in antitrust."[78] Prominent populists include Tim Wu, the Columbia Law professor, current Special Assistant to the President for Technology and Competition Policy, and author of The Curse of Bigness: Antitrust in the New Gilded Age (2018) and The Master Switch: The Rise and Fall of Information Empires (2010); and Lina Khan, Chair of the Federal Trade Commission, who also taught at Columbia Law and made her name as a critic of Amazon and other large technology companies.[79] Khan was a principal author of the October 6, 2020, report by the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law, which is an aggressive, 449-page attack on Google, Apple, Facebook and Amazon.[80]

I fail to see any coherent, let alone legally cognizable, economic theory in the Subcommittee Report. To a very large degree, the contentions in the Subcommittee Report boil down to (a) an almost categorical aversion to vertical integration, and (b) Tim Wu's longstanding view that platforms should be required to be "open."[81] Take for example a primary complaint about Amazon: that it should not be both "referee and player" by operating both a platform and its own retail business. As Randal Picker notes, "We should start with the natural question: why is it useful for Amazon to both be a traditional retailer and then also operate as a platform?"[82] The answer, simple enough, is that having created an enormous presence as an online retailer, but having neither the capacity nor interest to supply everything Amazon customers want to buy, it makes sense for Amazon to sell platform services including its renowned back-end transaction and fulfillment services to third parties. That is not anticompetitive; it brings more capacity and competition to the market for back-end transaction and fulfillment services. Does anyone claim this makes "no economic sense" but for its tendency to exclude competition? No. Does anyone claim this raises Amazon's rivals' costs such that it gains power over price?

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78 Shapiro, *supra* note 62 at 34.

79 *See* Lina M. Khan, *Amazon's Antitrust Paradox,* 126 Yale L.J. 710 (2017).

80 Staff of H. Comm. on the Judiciary, 116th Cong., Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations 39 (Comm. Print 2020).

81 For a response, see Hanno F. Kaiser, *Are 'Closed Systems' an Antitrust Problem?,* 7 Competition Pol'y Int'l 91 (2011).

82 *Investigation into the State of Competition in the Digital Market Place Before the Subcomm. on Antitrust, Commercial, and Admin. L. of the H. Comm. on the Judiciary*, 116th Cong. 21 (2020) (statement of Randal C. Picker), https://picker.uchicago.edu/PickerHouseStatement.100.pdf.

No. The populists just do not like that fact that Amazon is enormous, vertically-integrated in multiple ways, and undoubtedly powerful. It really is a belief that big is bad.

But this is not surprising because the populists take aim straight at what makes economics important in antitrust: the consumer welfare standard. Tim Wu calls the generally accepted view that consumer welfare is antitrust's lodestar "absurd and exaggerated."[83] Lina Khan's *Amazon's Antitrust Paradox* article is, start-to-finish, an argument that applying traditional antitrust analysis grounded in the consumer welfare standard gets it all wrong.[84] So many populist proposals are just "put a limit on" size, share, integration or other metrics without any evident or even claimed economic justification. Regrettably, there appear to be strong political tailwinds behind this push.

There are some who say that behavioral economics may improve antitrust analysis.[85] This is the school of thought that replaces the classical notion of rational economic behavior whereby consumers maximize their utility and firms maximize their profits with "bounded rationality," a term that means that economic actors are rational (in the classical sense) to a point but are also influenced by biases, reference points, loss aversion, social considerations such as fairness and other factors.[86] There were some early efforts to suggest that behavioral economics showed that Chicago School economics were incomplete and therefore antitrust should not follow Chicago School economics any longer. My mentor and friend, the late FTC Commissioner J. Thomas Rosch, was among those espousing that view.[87] But there is a gargantuan problem with this line of reasoning ably explored by Avishalom Tor, which is that once one accepts that the classical notion of rational economic behavior upon which antitrust policy is based is flawed, it is not so clear that the antitrust system with its emphasis on promoting competition is very valuable. For example, if consumers really don't respond to a small but significant nontransitory increase in price, *i.e.,* a SSNIP, because in their bounded rationality calculus that is unimportant, what are we doing blocking mergers on the ground that they might lead to SSNIP-like increases in post-merger prices? As Tor puts it, "[t]his discrepancy between theory and reality [concerning consumer behavior] raises fundamental questions about the ability of competition and its protection to yield the efficiency and welfare benefits predicted by the

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83 Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age 135 (2018).

84 This attack on the consumer welfare standard is comprehensively explored in Leon B. Greenfield et al., *Antitrust Populism and the Consumer Welfare Standard: What Are We Actually Debating?,* 83 Antitrust L.J. 393 (2020).

85 *See, e.g.*, Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century,* 38 Loy. U. Chi. L.J. 513 (2007); Avishalom Tor, *The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy,* 101 Mich. L. Rev. 482 (2002).

86 A readable treatment of this subject is Elizabeth M. Bailey, *Behavioral Economics: Implications for Antitrust Practitioners*, Antitrust Source, June 2010, at 1.

87 *See* J. Thomas Rosch, Comm'r, FTC, *Behavioral Economics: Observations Regarding Issues that Lie Ahead,* Remarks at the Vienna Competition Conference (June 9, 2010), http://www.ftc.gov/speeches/rosch/100609viennaremarks.pdf; J. Thomas Rosch, Comm'r, FTC, *Managing Irrationality: Some Observations on Behavioral Economics and the Creation of the Consumer Financial Protection Agency,* Remarks at the Conference on the Regulation of Consumer Financial Products (Jan. 6, 2010), https://www.ftc.gov/public-statements/2010/01/managing-irrationality-some-observations-behavioral-economics-and-creation.

standard neoclassical model."[88] Furthermore, behavioral economics may be an even less helpful way to achieve administrable decisional rules than the classical alternatives because one of its key insights is that the behavior of both firms and consumer is very difficult to predict and not neatly correlated to the state of competition.

I therefore revert to the modernist approach of using the latest, greatest advances in classical economics to guide both the development of the law and the outcome in difficult cases—so long as the economics can be reduced to administrable principles. Alternatives that are fundamentally anti-economic or challenge the foundational belief that competition promotes consumer welfare do not seem like improvements.

V. CONCLUSIONS

Economics and the constant advances in economics are at the core of what makes the antitrust system work. Maybe these principles, or arguments if you prefer, are not neutral, but they are the closest thing we have to a "true north" for an analysis that constantly jumps from industry to industry, market structure to market structure, and covers a broad swath of potentially anticompetitive conduct. Economics allows us to say that "Chicago overshot the mark," and that today's populists are off the map. It allows us to say that the Areeda and Turner average variable cost test is right most of the time, and apply a better standard when it would be wrong. It allows us to jettison merger standards that would condemn the most innocuous combinations, but also redirect merger enforcement toward unilateral effects that were once ignored.

Antitrust lawyers also know how to use these tools, integrating economic analysis into the decisional rules we call the law. Institutional constraints such as administrability challenge those efforts, but the experience of the last 50 years—the period in which economics has taken center stage—shows that for the most part the antitrust system can appropriately debate and implement useful advances in antitrust economics.

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88 Avishalom Tor, *Should Antitrust Survive Behavioral Economics?,* CPI Antitrust Chronicle 8 (Jan. 2019), https://ssrn.com/abstract=3291886. Tor continues: "All is not lost, however. … First, while competition with real, boundedly rational consumers usually cannot maximize efficiency or welfare, it still has the general tendency of advancing these critical goals. Second, a competition-favoring approach remains a more attractive policy baseline than its realistic alternatives of diminished competition due to either increased private market power or enhanced governmental regulation, the substantial shortcomings of competition notwithstanding." *Id.*

JELD-WEN: OPENING THE DOOR TO PRIVATE MERGER CHALLENGES?

By Neely B. Agin, Susannah P. Torpey, and Dana Cook-Milligan[1]

I. INTRODUCTION

Private merger challenges can be messy, time consuming, and expensive, particularly when a private plaintiff is seeking to unwind a previously consummated transaction. Plaintiffs seeking divestiture from private merger challenges rarely have been successful, and such cases tend not to move the needle too much because they are often fact specific and thus limited in their application. In February 2021, however, the Fourth Circuit Court of Appeals granted divestiture in a private merger challenge years after the merger had been consummated. The court's decision raises several key questions. Will the decision be far reaching? What guidance does it provide for future merger challenges? How will merger challenges be presented in the future under Section 7 of the Clayton Act or Section 2 of the Sherman Act? And how will current Congressional proposals to dramatically change federal antitrust law contribute to the conversation?

In *Jeld-Wen*, the Fourth Circuit affirmed the lower court's order requiring divestiture to remedy the anticompetitive harm stemming from Jeld-Wen's acquisition of Craftmaster Manufacturing. The acquisition resulted in the combination of two of the three doorskin suppliers in the market and was consummated in 2012, about four years prior to the lawsuit being initiated by a purchaser of doorskins, Steves and Son Inc. The Department of Justice ("DOJ") had twice investigated the transaction but closed both investigations without enforcement action. Alleging direct harm from the merger, Steves was left to proceed in a costly and lengthy private litigation to seek redress. The Eastern District of Virginia ordered divestiture, and the Fourth Circuit affirmed.

Unquestionably, the court's decision in *Jeld-Wen* is an outlier. As the Fourth Circuit noted, "private suits seeking divestiture are rare and, to our knowledge, no court has ever ordered divestiture in a private suit before this case."[2] Nonetheless, *Jeld-Wen* provides precedent upon which future private plaintiffs can rely to seek divestiture in private litigation. Although this should not be minimized and could be followed in existential or "bet the business" disputes, on its own it is unlikely to become a significant new tool for addressing the very real market challenges of the day, such as serial acquisitions in niche markets fueled by venture capital firms or strategic acquisitions of nascent competitors to forestall competitive innovation and economies of scale. For this decision to have a greater impact, it would need to be accompanied by further guidance and regulatory advancement

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2 *Steves and Sons, Inc. v. Jeld-Wen, Inc.*, 988 F.3d 690, 703 (4th Cir. 2021).

out of Congress, the DOJ, and/or the Federal Trade Commission ("FTC"). Otherwise, we cannot expect private litigation to cure what ails these markets and competition in general.

Traditionally, private litigants have been reluctant to seek divestiture, which is a remedy in merger cases brought under Section 7 of the Clayton Act and in monopolization cases brought under Section 2 of the Sherman Act, and courts have been reticent to order it. Breaking up a merged entity is an extreme remedy,[3] and *Jeld-Wen* is unlikely to change this calculation by a significant degree without other movement in the legal landscape. Focusing on the divestiture itself could result in distractions as the parties argue over the severity of the requested relief, as opposed to the exclusionary conduct that the plaintiff would prefer to be the focus.

Post-*Jeld-Wen*, particularly if it is accompanied by federal antitrust reform, the threat of divestiture demands could serve as an important tool for competitors that suddenly have their supply chain disrupted by venture capital-backed and other aggressive acquisition sprees. Numerous industries have faced rapid consolidation over the last two decades as a result of the rise of venture capital funding and strategic directives to this end. The prospect of private divestiture litigation could serve as leverage for ensuring the continuity of fair terms in supply agreements but is unlikely to lead to a surge in private litigation seeking to unwind consummated mergers or divestiture of portions of vertically integrated entities.

Some might speculate that private divestiture may provide an opportunity to lessen large tech companies' grip over various markets, but the component manufacturing plant divested in *Jeld-Wen* is a far cry from the technologically integrated products in tech markets. Anticipating growing political threats of government divestitures, vertically integrated tech firms have in recent years made calculated efforts to quickly integrate their products with those of acquired competitors, in part to ensure their transactions will be harder to unravel. This is largely by design, and an issue that the DOJ and FTC will need to overcome when assessing remedies in connection with their ongoing tech investigations.

Increasingly, Congress has heightened its focus on regulating concentration in various industries because of its potential to lessen competition.[4] This newfound congressional exuberance has even been recognized in colorful terms.[5] Further, Congress has given particular focus to the tech industry and digital markets.[6] But generalized antitrust reform

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3 *See United States v. United Shoe Mach. Co. of N.J.*, 247 U.S. 32, 46 (1918) (dissolution is "extreme, even in the mildest demands").

4 U.S. Dep't of Justice, *New Legislation Supports More Effective Antitrust Enforcement: Division Update Spring 2021*, Mar. 24, 2021, https://www.justice.gov/atr/division-operations/division-update-spring-2021/new-legislation-supports-more-effective-antitrust-enforcement.

5 *See, e.g.*, Kevin Yeh, The American Bar Association, *Hipster Antitrust: A Brief Primer*, 2018, https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/antitrust/hipster-antitrust-brief-primer/.

6 Jerrold Nadler & David N. Cicilline, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations*, 2020, at 38, https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519 ("Consistent with winner-take-all dynamics, the digital economy is highly concentrated. A number of key markets online—such as social media, general online search, and online advertising— are dominated by just one or two firms. In some instances, this concentration is the result of a high volume of acquisitions by the dominant digital platforms. Together, the largest technology firms have acquired hundreds of companies in the last ten years.").

legislation that applies broadly across industries has bipartisan support across aisles.[7] Cases like *Jeld-Wen* ostensibly indicate that at least some courts share Congress's apparent desire to increase the reach of the antitrust laws.

The inherent tradeoff between choosing to support the merger or to oppose it proves that neither option is perfect. Often merging parties will put their customers in a difficult position by seeking the companies' support of the proposed transaction through a statement or declaration provided to the DOJ or FTC. If a customer agrees to do so, it may get a preferable supply contract in return. That supply contract will likely be limited in substantive or temporal scope, however, and does not guarantee the customer's position years later, when the merging firm has a dominant market position and the ability to charge anticompetitive prices. On the other hand, if customers choose not to sign the declaration, to sign an alternative declaration in support of the FTC or DOJ's position, or simply to remain quiet, they may put themselves at a competitive disadvantage by failing to secure the favorable supply contract. Supporting the government's position, however, may better position the customer in the long run because it ultimately may help the agency to block consummation of an anticompetitive merger.

The implications of the *Jeld-Wen* decision, particularly if coupled with legislative reform and increased focus on concentration occurring in many industries today, is discussed in detail in this article, the goal of which is to ensure that companies (both merging entities and customers) are in the best position to consider all the benefits and risks of mergers.

Section II of this Article provides a background on merger enforcement under Section 7 of the Clayton Act and Section 2 of the Sherman Act, as well as a discussion of the impact on such enforcement from the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act").

Section III of this Article provides a history of private merger challenges in the United States, including cases that have provided precedent on which future plaintiffs could rely and those that have limited the potential for private challenges, as well as insight into how private challenges differ from government challenges.

Section IV of this Article provides a summary of the *Jeld-Wen* case history, including a discussion of the market and the acquisition, the prior relationship with Steves, the Department of Justice's investigation, and the subsequent breakdown of the relationship between Steves and Jeld-Wen, which led to the filing of the private merger challenge.

Section V of this Article discusses what may come next in private merger challenges, both in the courts and in the legislature. It also provides guidance on implications of ongoing consolidation of various industries and what private plaintiffs should consider when deciding whether to support or challenge a proposed merger, and what to do if an anticompetitive effect arises post-consummation.

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7 Alvaro Mateo Alonso, et al., *117th Congress Takes Early Steps Towards Antitrust Reform*, JD Supra (Feb. 9, 2021), https://www.jdsupra.com/legalnews/117th-congress-takes-early-steps-6904745/.

II. BACKGROUND ON ANTITRUST MERGER ENFORCEMENT

Before discussing the *Jeld-Wen* case, it is helpful to understand antitrust law relevant to merger challenges, in addition to guidelines published by the government. The most significant substantive antitrust laws are Section 7 of the Clayton Act[8] and Section 2 of the Sherman Act.[9, 10]

A. Section 7 of the Clayton Act

Mergers typically are analyzed under Section 7 of the Clayton Act. Section 7 prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly."[11] Particularly if seeking to unwind a consummated acquisition, Section 7 is the most common vehicle, because it only requires *threat* of (not *actual*) lessened competition or creation of a monopoly. A merger that may be subject to Section 7 scrutiny generally involves two post-consummation features – (1) one fewer competitor in a particular market, and (2) a larger market share for the newly merged firm. The newly merged firm would then be subject to scrutiny for two primary risks. First, courts look for increased incidence of express or tacit collusion,[12] and second, courts look for increased prices resulting from the newly merged firm.[13] Section 7 challenges often turn on the definition of the relevant geographic and product markets, as Section 7 forms the basis for the court to determine the market participants and their market shares.[14]

As joint enforcers of Section 7, the DOJ and FTC have jointly published horizontal merger guidelines that, while not binding, provide guidance on the standards by which proposed or consummated mergers will be challenged.[15] According to the most recently published version of the guidelines, from 2010, the DOJ and FTC's unified goal is to prevent mergers that may "create, enhance, or entrench market power or to facilitate its exercise."[16] The DOJ and FTC largely focus on issues of decreased output or increased prices that may result from a merger and will look to actual effects, direct comparisons

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8 Section 7 of the Clayton Act (15 U.S.C. § 18).

9 Section 2 of the Sherman Act (15 U.S.C. § 2).

10 In addition, there are two remedies for private merger challenges – Section 4 of the Clayton Act (15 U.S.C. § 15) for monetary damages, and Section 16 of the Clayton Act (15 U.S.C. § 26) for injunctive relief. Divestiture falls under Section 16, which allows relief in equity "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity." 15 U.S.C. § 26.

11 Section 7 of the Clayton Act (15 U.S.C. § 18).

12 Herbert Hovenkamp, Federal Antitrust Policy § 3.1d (6th ed. 2020).

13 *See, e.g.*, *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391-92, 76 S. Ct. 994, 1005 (1956).

14 Hovenkamp, *supra* note 12 ("In antitrust cases that require proof of market power the court traditionally determines whether some 'relevant market' exists in which the legally necessary market power requirement can be inferred. In order to do this, the court usually 1) determines a relevant product market, 2) determines a relevant geographic market, and 3) computes the defendant's percentage of the output in the relevant market thus defined.").

15 U.S. Dep't of Justice and Fed. Trade Comm'n, *Horizontal Merger Guidelines*, Aug. 19, 2010, https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

16 *Id.* at § 1.

based on experience, market shares and concentration, head-to-head competition, and the potentially disrupting role of a merging entity.[17]

B. Section 2 of the Sherman Act

Section 2 of the Sherman Act is another but less common method of merger challenge. Section 2 makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."[18] Section 2 establishes three offenses, commonly termed "monopolization," "attempted monopolization," and "conspiracy to monopolize."[19]

Section 2 is not explicitly limited to challenging mergers but can be used to challenge both the merger directly and any anticompetitive conduct alleged to result from the merger. Put another way, monopolization or attempted monopolization that results from increased market share and market power stemming from a merger (and would not otherwise have existed) may more properly be challenged under Section 2. This provides a broader scope of conduct that can be alleged (the effects of the merger as a transaction and as a vehicle for post-acquisition conduct). As with Section 7, the relevant market definition is critical to a Section 2 challenge.

C. When to Use Section 7 and When to Use Section 2

As already mentioned, the operative difference between Section 7 and Section 2 is whether the alleged anticompetitive behavior is the merger itself or monopolistic behavior stemming from the firm's post-merger market power. The bar for alleged anticompetitive conduct under Section 7 may be lower than that of Section 2, requiring only a substantial lessening of competition, rather than a dangerous probability of monopolization.[20] A claim of attempted monopolization under Section 2 of the Sherman Act, however, does not require a showing that the defendant was *actually* successful in attaining a monopoly to face liability.[21] Further, the Section 7 standard of a substantial lessening of competition must be paired with a merger, whereas the broader language of Section 2 (i.e., that it is not solely tied to a merger) allows for more post-consummation anticompetitive conduct to properly be included. More recent merger challenges, particularly in the tech industry, have been brought under Section 2 to allow for allegations of post-consummation anticompetitive conduct, which shows a marked shift in the government's strategy of trying to block mergers they believe are likely to harm or lessen competition.

The balance between Section 7 and Section 2 is an interesting and important one. Section 7 is an important tool, where Section 2 might not reach the conduct at issue because the defendant is not a monopolist. Even with "attempt-to-monopolize" cases under Section 2, litigants must prove specific intent to monopolize, which can be challenging without the right evidence. The Clayton Act has a lower standard of proof

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17 *Id.* at § 2.1.

18 Section 2 of the Sherman Act (15 U.S.C. § 2).

19 *Id.*

20 *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 113 S. Ct. 884 (1993).

21 *Lorain Journal Co. v. United States*, 342 U.S. 143, 153, 72 S. Ct. 181, 186 (1951).

of anticompetitive effects than the Sherman Act, because it applies where the effect may be substantially to lessen competition in addition to tending to create a monopoly. It was intended to catch violations from their incipiency – or to catch the "weed in the seed," as the legislative history puts it.[22] How these two sections will be used in future cases, particularly as we continue to see a hyper-concentration of many industries, will be interesting to watch.

D. HSR Act

In addition to the question of which law is a more appropriate vehicle for a merger challenge, there is also a question of whether the merger requires pre-closing review by the government. The Clayton Act was amended in 1976 to include the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act"), which established a pre-merger notification program under which the entities proposing a merger that meets the statutory thresholds must notify the FTC and DOJ and observe a thirty-day waiting period, during which the agencies evaluate the proposed merger and its likely effects on competition.[23]

The HSR Act included an initial threshold in 1976 of $15 million – meaning that any proposed merger valued at more than $15 million had to be reported to the FTC and DOJ. In 2000, the HSR Act was revised to require the FTC to adjust the thresholds annually based on the percentage change in the gross national product from the previous year. Since that time, the monetary threshold has been updated on a periodic basis to account for inflation, with the current threshold at $92 million. This presents an interesting additional factor when considering a private merger challenge. If, for example, a proposed merger does not exceed the threshold, then the merger can be consummated without DOJ or FTC evaluation. This could affect future analyses in a private challenge because each party may be able to argue whether the government was on notice about the merger.

III. HISTORY OF PRIVATE MERGER CHALLENGES

Private merger challenges are rare and divestiture as a remedy is even more unusual. This section discusses the history of merger challenges, including DOJ and FTC merger challenges and how they differ from merger challenges brought by private plaintiffs.

A. Government Versus Private Merger Challenges

Section 4 and Section 16 of the Clayton Act expressly permit merger challenges seeking monetary damages and equitable relief, respectively.

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22 Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 Antitrust L.J. 125, 136 (2000).

23 Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. § 18a).

Divestiture, as an equitable remedy, is commonly sought by the FTC and DOJ to remedy anticompetitive mergers.[24] The government strongly prefers structural remedies, i.e., divestiture, over conduct-based remedies in merger cases. According to the DOJ's Merger Remedies Manual, most recently updated in 2020, structural remedies are more effective because they are "clean and certain, effective, and avoid ongoing government entanglement in the market. A carefully crafted divestiture decree is 'simple, relatively easy to administer, and sure' to preserve competition."[25] There is general acceptance of the government's right to seek divestiture. One reason for this difference is that a merger challenge by one of the agencies more likely "reflect[s] a thorough assessment of the situation and dispassionate conclusions regarding the public interest."[26] Conversely, private plaintiff challenges are more often rooted in personal, private loss.[27] The limitations of antitrust liability and the standard required for divestiture also prove to be a natural barrier that may dissuade the government from bringing a case but may not otherwise dissuade a private plaintiff. Further, if the government brings a merger challenge, it need only prove the antitrust violation, whereas a private plaintiff must also show standing and actual or threatened harm, which makes such a case more complicated for the private plaintiff.[28]

Private merger challenges also serve an important function of the overall system, because they fill the gap left by prosecutorial discretion and constrained government resources. Private plaintiffs are also uniquely situated – they can make independent determinations for whether a particular merger challenge is worth their resources, and in some situations, the challenge is an existential one under which the alternative is the destruction of the plaintiff entity. They are likewise able to point to specific harm the merger has caused in their own business – and while they still need to show harm to *competition* not just competitors, as the Supreme Court made clear in *Brown Shoe*,[29] harm to their own business can be nonetheless compelling.

B. Examples of Prior Merger Challenges

The common acceptance of divestiture as an available equitable remedy for the agencies historically was in direct contrast to the availability of such a remedy for private plaintiffs, for whom the circuits were split for decades on whether divestiture was even an option.

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24 *See, e.g.*, *Polypore Int'l, Inc. v Fed. Trade Comm'n*, 686 F.3d 1208 (11th Cir. 2012); *United States v. Bazaarvoice, Inc.*, No. 13-cv-00133-WHO, 2014 WL 203966 (N.D. Cal. Jan. 8, 2014); *In the Matter of Polypore Int'l, Inc.*, 2010-2 Trade Cas. (CCH) ¶ 77267, 2010 WL 5132519, *35 (F.T.C. Dec. 13, 2010) ("The purpose of relief in a Section 7 case is to restore competition lost through the unlawful acquisition. We recognize that complete divestiture is generally the most appropriate way to restore competition lost through an unlawful acquisition.").

25 U.S. Dep't of Justice, Antitrust Division, *Merger Remedies Manual*, Sept. 2020, https://www.justice.gov/atr/page/file/1312416/download, at 13 (quoting *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 331 (1961)). Conversely, the Manual indicates that conduct remedies are also a valuable tool and "[w]here cognizable efficiencies are significant but the merger is on balance anticompetitive, requiring a structural divestiture might remedy the competitive concerns only at the cost of unnecessarily sacrificing significant efficiencies." *Id.* at 16.

26 Phillip E Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application, ¶ 303e (4th ed. 2019).

27 *Id.*

28 *Id.* at ¶ 303e3.

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

The First and Third Circuit, for example, endorsed divestiture as an option in private suits.[30] Conversely, the Sixth and Ninth Circuits disapproved of divestiture as a private equitable remedy.[31] And the Second Circuit allowed for divestiture in limited circumstances.[32]

This situation changed in 1990, when the Supreme Court issued the landmark case *California v. American Stores*, in which the Court held that the equitable remedies available through Section 16 are equally available to private plaintiffs as they are to government plaintiffs.[33] While the State of California is a government actor, the suit was filed by the California Attorney General as a private plaintiff, as Attorneys General are often treated, and sought to enjoin the merger of two major grocery store chains. The district court granted the State's motion for a temporary restraining order and preliminary injunction, after which American Stores appealed, arguing that the decision was "tantamount to divestiture since the merger of the two companies had already been completed."[34]

The Ninth Circuit overturned the injunction, ruling that it was contrary to the Ninth Circuit's precedent in *International Telephone and Telegraph*, in which the appellate court denied divestiture as a remedy based on its reading of Section 16 legislative history.[35] The Supreme Court then disagreed and instead adopted the First Circuit's reasoning in *Cia. Petrolera Caribe, Inc.*, concluding that Section 16 "states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek, or that a court may order."[36] The Court held that the legislative history of Section 16 indicated that divestiture should be available to private plaintiffs but offered a caveat: "Our conclusion that a district court has the power to order divestiture in appropriate cases brought under [Section] 16 of the Clayton Act does not, of course, mean that such power should be exercised in every

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30 *See, e.g.*, *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 413-30 (1st Cir. 1985) (divestiture remedy permissible, based on extensive discussion of legislative history, policy, and principles of equity); *NBO Indus. Treadway Cos., Inc. v. Brunswick Corp.*, 523 F.2d 262, 278-79 (3d Cir. 1975) (rejecting Ninth Circuit's reasoning in *International Telephone and Telegraph*, 518 F.2d 913 (9th Cir. 1975), but refraining from ruling on availability of divestiture since less drastic remedy sufficient in this case), *vacated on other grounds by* 429 U.S. 477 (1977).

31 *See, e.g.*, *Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elecs. Corp.*, 518 F.2d 913, 920-25 (9th Cir. 1975) (denying divestiture remedy relying primarily upon legislative history); *Cont'l Sec. Co. v. Mich. Cent. R.R.*, 16 F.2d 378, 379 (6th Cir. 1926) (divestiture remedy denied with little explanation: 'Section 16 never has been held to reach such a case. The result sought is practically the same as would be asked for in a suit by the Attorney General."), *cert. denied*, 274 U.S. 741 (1927); *Am. Commercial Barge Line Co. v. E. Gas & Fuel Assocs.*, 204 F. Supp. 451, 453 (S.D. Ohio 1962) (divestiture denied without discussion).

32 *See Julius Nasso Concrete Corp. v. DIC Concrete Corp.*, 467 F. Supp. 1016, 1024-25 (S.D.N.Y. 1979) (allowing divestiture, relying primarily on policy and principles of equity); *Graves v. Cambria Steel Co.*, 298 F. 761, 762 (S.D.N.Y. 1924) (stating without further explanation "I cannot suppose that any one [sic] would argue that a private suit for dissolution would lie under section 16 of the Clayton Act"); *Venner v. Pa. Steel Co. of N.J.*, 250 F. 292, 296 (D.N.J. 1918) ("The suits covered by [Section 16] are limited to those seeking preventative relief…. [A]nd, as the relief sought in the present supplemental bill is not of a preventative character but to annul a consummated transaction, none of the venue provisions of the Sherman or Clayton Acts is available….").

33 495 U.S. 271, 295-296 (1990).

34 *Id.* at 277 (quotation marks omitted).

35 *Id.* (citing *Int'l Tel. & Tel. Corp.*, 518 F.2d 913 (1975)).

36 *Id.* at 281-82 (quoting *Cia. Petrolera Caribe, Inc.*, 754 F.2d at 416).

situation in which the Government would be entitled to such relief."[37] Private plaintiffs must still show standing and threatened loss or injury.

Since American Stores, private plaintiff actions resulting in a divestiture appear nonexistent. Conversely, government agencies are often successful in (either partially or completely) unwinding mergers they challenge. During the fiscal year 2019, for example, the DOJ challenged 17 proposed mergers and filed complaints in 11 of those challenges, eight of which included simultaneously filed settlement papers with partial divestitures as a component of the resolution.[38] Of the six challenges in which the DOJ did not file suit, five proposed transactions were abandoned and one was restructured to resolve the DOJ's concerns.[39] That same year, the FTC challenged 21 mergers, nine of which were abandoned, 10 of which resulted in consent orders with partial divestitures, and two of which the FTC challenged in court (resulting in one being abandoned and one challenge being voluntarily dismissed).[40] And during its fiscal year 2018, the DOJ challenged 17 proposed mergers, filing complaints in nine of those challenges, eight of which included simultaneously filed settlement papers with partial divestitures as part of the resolution.[41] Of the remaining eight challenges in which the DOJ did not file suit, four proposed transactions were abandoned and the remaining four were restructured to resolve the DOJ's concerns.[42] That same year, the FTC challenged 22 mergers, 12 of which resulted in consent orders with partial divestitures, and five of which the FTC challenged in court (resulting in abandoned transactions or divestitures in all five challenges).[43]

IV. THE *JELD-WEN* DIVESTITURE

A. Long-Term Supply Contract and CMI Acquisition

The dispute in this case arose from Jeld-Wen's 2012 acquisition of one of its competitors, Craftmaster ("CMI").[44] Jeld-Wen and CMI were doorskin manufacturers. Doorskins are molded fibrous panels placed on the front and back of a frame to make a "molded door"—the most common door in American homes. Prior to the acquisition, there were three main doorskin manufacturers in the United States: Jeld-Wen, Masonite, and CMI.[45] Masonite had a 46% market share, Jeld-Wen had 38%, and CMI had 16%.[46]

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37 *Id.* at 295.

38 Fed. Trade Comm'n and Dep't of Justice, *Hart-Scott-Rodino Annual Report, Fiscal Year 2019*, July 9, 2020, at 9-13, https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf.

39 *Id.*

40 *Id.* at 13-17.

41 Fed. Trade Comm'n and Dep't of Justice, *Hart-Scott-Rodino Annual Report, Fiscal Year 2018*, Sept. 16, 2019, at 9-12, https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/fy18hsrreport.pdf.

42 *Id.*

43 *Id.* at 12-18.

44 *Jeld-Wen*, 988 F.3d at 698-99.

45 *Id.* at 699.

46 *Id.*

Each competitor was vertically integrated and also sold its own molded doors, in addition to selling doorskins to independent door manufacturers (called "independents"), including the plaintiff, Steves and Sons, Inc. ("Steves").

In May 2012, Steves signed a long-term supply contract with Jeld-Wen, which required Steves to purchase a minimum of 80 percent of its doorskins from Jeld-Wen. The contract allowed Steves to terminate the contract if a Jeld-Wen competitor beat Jeld-Wen's prices, and it also included quality assurances and dispute resolution procedures. The contract included a termination provision under which Steves could terminate on two years' notice and Jeld-Wen could terminate on seven-years' notice.[47] At the time, Jeld-Wen's CEO told Steves that Jeld-Wen considered it to be a "life time [sic] deal."[48]

However, at the same time, Jeld-Wen was also in the process of acquiring CMI. CMI's business had been struggling since the housing bubble burst in 2007, and it began looking to sell in 2011. Steves was aware of the acquisition, having bid on the CMI business itself. Jeld-Wen did not notify the government of the merger until after it signed the long-term agreement contract with Steves and other independents. Jeld-Wen hoped that the long-term supply contracts it had signed, which appeared to protect Steves and other independents from price increases or refusal to sell, would quell any government concerns about the competitive impact of the merger. When it learned of the merger, the DOJ opened an investigation and reached out to Steves, which responded that it did not oppose the merger, seemingly based on the long-term supply contract it had secured with Jeld-Wen. The DOJ subsequently closed its investigation, and Jeld-Wen and CMI completed the merger in October 2012.[49]

The merger reduced the number of doorskin manufacturers from three to two (Jeld-Wen and Masonite), with Jeld-Wen consequently achieving a 54 percent market share.[50]

B. Post-Consummation Conduct

Steves and Jeld-Wen started having issues almost immediately after the merger closed. Steves began experiencing quality issues with Jeld-Wen's doorskins, and Steves started complaining about Jeld-Wen increasing its prices almost 8% more than the supply agreement allowed, despite indications that Jeld-Wen's costs were declining, and the quality was decreasing.[51] Internal documents showed that Jeld-Wen was aware that the merger gave it leverage in contract negotiations with independents because Jeld-Wen and Masonite were the only remaining doorskin manufacturers in the market.[52]

In 2014, Masonite announced that it would stop selling doorskins to independents, which left Jeld-Wen as the only manufacturer available to supply independents. Masonite intended for itself and Jeld-Wen to maintain a duopoly in doorskin manufacturing because

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47 *Id*. at 700.

48 *Id*.

49 *Id*.

50 *Id*.

51 *Id*. at 700-01.

52 *Id*. at 701.

barriers to entry were high and independents were not likely to survive in the industry long term.[53] Then in September 2014, Jeld-Wen invoked the seven-year termination provision in its long-term supply contract with Steves, causing the contract to terminate in 2021. Steves reached out to Masonite, but it refused to negotiate a new supply contract.[54] Steves then turned to foreign suppliers, but ran into cost and quality issues. In 2015, Steves triggered the dispute resolution provision, but its attempts to resolve the matter were unsuccessful.[55]

In the interim, Steves continued to buy from Jeld-Wen at increased rates and lower quality, which appeared to be its only option. As Jeld-Wen's prices increased and quality issues arose, Steves asked the DOJ to reexamine Jeld-Wen's merger with CMI. The DOJ did so, but it closed its investigation in April 2016 without any further action.[56]

C. Private Litigation in Eastern District of Virginia

Unable to secure any government enforcement action, in June 2016 Steves filed a private merger challenge in the Eastern District of Virginia, claiming that the Jeld-Wen/CMI merger violated Section 7 of the Clayton Act.[57] Steves alleged that the merger "gave Jeld-Wen too much power in the doorskin market, which emboldened it to charge higher prices, offer inferior products and customer service, and eventually try to 'kill off' Steves by refusing to sell it doorskins."[58] Steves requested past monetary damages for breach of contract, future damages for loss of access, and equitable relief to unwind the CMI acquisition.

At both the motions to dismiss and summary judgment stages, the district court upheld Steves' claim for equitable relief, including Jeld-Wen's potential divestiture of the doorskin manufacturing plant acquired from CMI.[59] The court then held a jury trial to address Steves' damages claims first, with the expectation that separate proceedings would be held on equitable claims if the jury found that the merger was anticompetitive.[60] At the conclusion of a 2018 trial, the jury ruled for Steves on all damages claims, finding that Jeld-Wen had breached the Supply Agreement and that the merger violated Section 7. On the antitrust claim, the jury awarded damages of approximately $58.5 million in past damages and future lost profits, which the court trebled to $175.8 million.[61]

As planned, the court then held additional hearings on the request for equitable relief, for which the DOJ filed a statement of interest regarding the proposed divestiture remedy.

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53 *Id.*

54 *Id.* at 701-02.

55 *Id.* at 702.

56 *Id.*

57 *Steves and Sons, Inc. v. Jeld-Wen, Inc.*, No. 3:16-cv-545, Complaint for Injunctive and Declaratory Relief, Damages, and Specific Performance, Doc. No. 1 (E.D. Va. June 29, 2016). The complaint also brought breach of contract claims, alleging that Jeld-Wen breached the long-term supply contract by improperly increasing prices and failing to ensure doorskin quality. *Id.*

58 *Jeld-Wen*, 988 F.3d at 702-03.

59 *Id.* at 703.

60 *Id.*

61 *Id.* at 704-05.

The DOJ argued that "divestiture of assets, particularly an ongoing business, normally is the best way to preserve and restore competition in the relevant market threatened by, or already harmed by, an anticompetitive merger."[62] The DOJ concluded that before ordering divestiture, the court should determine who would purchase the divested assets and whether that buyer would run the business "independently as a vigorous competitor," particularly because Steves had been interested in purchasing CMI, which may not protect competition.[63] Based on the DOJ's statement of interest, Jeld-Wen argued that the court should not order divestiture without first identifying a buyer.

After considering all arguments presented, the court ordered the CMI doorskin manufacturing plant to be divested through a public auction, to be conducted after the conclusion of any Jeld-Wen appeal, because it was the "most effective way of restoring the substantially lessened competition brought about by the merger" and in the public interest to create a third doorskin supplier.[64] The court held that absent divestiture, Steves would likely collapse once its agreement with Jeld-Wen expired in 2021.[65] The court also rejected the DOJ's and Jeld-Wen's argument that the court should identify and appropriately scrutinize a proposed buyer before ordering divestiture.[66] Rather, the court chose a two-step process: (1) rule for divestiture and thereafter (2) arrange an auction with a special master.[67] The court held that this process would reduce uncertainty that prospective buyers would face pending appeal.[68]

Importantly, the court also denied Jeld-Wen's argument that laches precluded the divestiture remedy. The court held that the four-year delay for bringing the claim did not bar equitable relief because Steves was not aware it had suffered an antitrust injury until Jeld-Wen terminated their agreement in 2014, and Steves had diligently pursued other alternative remedies thereafter, like dispute resolution.[69]

D. Fourth Circuit Appeal

Jeld-Wen then appealed to the Fourth Circuit, arguing that the district court's decision on divestiture was an abuse of discretion and that various other findings, including that the merger caused antitrust injury and impact, were improper. The Fourth Circuit vacated much of the antitrust damages award on the basis that the question of future lost profits was not a ripe issue that the trial court should have adjudicated but otherwise rejected Jeld-Wen's arguments.[70] Instead, the Fourth Circuit upheld the district court's decision on divestiture, noting that divestiture is a well-suited form of relief in Clayton Act Section

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62 *Steves and Sons, Inc. v. Jeld-Wen, Inc.*, No. 3:16-cv-545, Statement of Interest of the United States of America Regarding Equitable Relief, Doc. No. 1640, 1 (E.D. Va. June 6, 2018).

63 *Id.* at 1-2, 11.

64 *Jeld-Wen*, 988 F.3d at 706.

65 *Id.* at 706, 719, 721. The appellate court also noted that the future lost profits award would only have been awarded in the absence of divestiture. *Id.* at 725.

66 *Id.* at 706-07.

67 *Id.* at 707.

68 *Id.*

69 *Id.*

70 *Id.* at 724, 729.

7 cases because of its simplicity.[71] The Fourth Circuit agreed that Steves had satisfied the conditions for equitable relief.[72] The appellate court also considered whether a less burdensome equitable remedy could have been pursued but ultimately held that a conduct remedy, such as asking Jeld-Wen to supply doorskins to Steves at fair prices, would be a temporary fix that would not restore competition to the market.[73] The appellate court also upheld the district court's ruling that a delay in bringing the claim did not bar divestiture as an equitable remedy.[74]

In doing so, the Fourth Circuit acknowledged that private lawsuits under the Clayton Act "seeking divestiture are rare and, to our knowledge, no court had ever ordered divestiture in a private suit before this case," but that divestitures in private Clayton Act actions are based on well-established Supreme Court precedent.[75] Ultimately, the court concluded that the case was "a poster child for divestiture" given that the 2012 CMI merger had created a duopoly and the remaining suppliers "used their market power to threaten [the] survival" of independent door manufacturers like Steves.[76] The court further noted that the loss of a 150-year-old family business like Steves could not be fully compensated by monetary damages or less drastic conduct remedies, and concluded that divestiture would promote competition, as Congress had made a policy judgment that divestiture was "the remedy best suited to redress the ills of an anticompetitive merger."[77] The court found no error in the district court's view that Jeld-Wen would be able to "weather" the significant cost of divestiture and resulting reduction in its doorskin output, and that the potential harm to Steves of extinction outweighed any harm to Jeld-Wen.[78]

V. WHAT MAY COME NEXT

A. Antitrust Legislation Reform and the (Potential) *Jeld-Wen* Impact

The *Jeld-Wen* decision comes at an interesting time during which various industries are undergoing significant consolidation both vertically and horizontally, and simultaneously the executive branch, Congress, and the federal antitrust enforcement agencies are hyper-focused on how antitrust reform may inform and improve protections to competition that may be harmed by further consolidation.

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71 *Id.* at 703, 724.

72 *Id.* at 719-24.

73 *Id.* at 720.

74 *Id.* at 718.

75 *Id.* at 703.

76 *Id.* at 724.

77 *Id.* at 720.

78 *Id.* at 721. On March 22, 2021, the Fourth Circuit denied Jeld-Wen's petition for rehearing en banc, and shortly thereafter, mandate was issued. *See Steves and Sons v. Jeld-Wen, Inc.*, No. 19-1397, 2021 U.S. App. LEXIS 8387, at *2 (4th Cir. Mar. 22, 2021). Whether Jeld-Wen will petition the Supreme Court for certiorari is yet undetermined, the deadline for which is August 19, 2021, according to the Supreme Court's March 19, 2020 Order extending filing deadlines 150 days due to COVID delays and closures.

As a practical matter, the *Jeld-Wen* decision does not on its own change the legal landscape of merger challenges. The facts in *Jeld-Wen* were extreme – a private plaintiff that was persuaded to provide support for a merger in exchange for a long-term supply contract, while the remaining two competitors explicitly spoke of their intent to form a duopoly and squeeze independents like Steves out of the market and then made good on that plan. Such facts are not likely to be common, and such evidence of actual or threatened harm unlikely to be so readily available in every case. Under such extreme facts, the equally extreme remedy of divestiture was deemed appropriate and practically the only way to cure the egregious harm to competition that Jeld-Wen had caused.

The influence of the *Jeld-Wen* decision may, however, increase if it is accompanied by federal antitrust reform., and such reform seems imminent. On July 9, 2021, President Biden signed a comprehensive Executive Order on Promoting Competition in the American Economy, which aims to do exactly what the title suggests: to promote economic competition through enhanced antitrust enforcement.[79] According to the fact sheet published by the White House, the Executive Order calls for a "whole-of-government" approach to address corporate consolidation, rising consumer prices, and low wage growth resulting in growing income, wealth, and racial inequalities.[80] In remarks regarding the Executive Order, President Biden admonished corporations for acquiring competitors rather than engaging in competition,[81] particularly "killer acquisitions" in the tech industry that are meant to forestall potential competitive threats.[82] The Executive Order also calls on the enforcement agencies to review and revise their horizontal and vertical merger guidelines and to aggressively enforce existing antitrust laws, specifically with respect to unwinding anticompetitive mergers that were unchallenged by prior administrations, particularly in the tech and internet sectors.[83] While the Executive Order holds no binding power over Congress or the enforcement agencies, it signals a focus from the executive branch on protection of competition, particularly in ever-developing

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79 White House Briefing Room, *Executive Order on Promoting Competition in the American Economy* (July 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

80 White House Briefing Room, *Fact Sheet: Executive Order on Promoting Competition in the American Economy* (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.

81 White House Briefing Room, *Remarks by President Biden at Signing of an Executive Order Promoting Competition in the American Economy* (July 9. 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/.

82 White House Briefing Room, *supra* note 80.

83 White House Briefing Room, *supra* note 80.

and concentrating industries like Big Tech.[84] More significantly, on the same day the Executive Order was issued, FTC Chair Lina Khan and Acting Assistant Attorney General of the DOJ Antitrust Division, Richard A. Powers, issued the following joint statement:

> We must ensure that the merger guidelines reflect current economic realities and empirical learning and that they guide enforcers to review mergers with the skepticism the law demands. The current guidelines deserve a hard look to determine whether they are overly permissive. We plan soon to jointly launch a review of our merger guidelines with the goal of updating them to reflect a rigorous analytical approach consistent with applicable law.[85]

Congress has also exhibited a particular focus on antitrust reform in recent years, including a more robust merger approval standard and process. According to a report issued by the American Antitrust Institute in April 2020, nearly 60 antitrust-related bills have been introduced in Congress during the last few years, sending "a clear signal that voters are concerned about declining competition."[86]

Two reform proposals are getting the most attention, and they are being introduced from opposite ends of the political spectrum. The proposed Competition and Antitrust Law Enforcement Reform Act of 2021, which was introduced by Senators Klobuchar, Blumenthal, Booker, Markey, and Schatz in February 2021, seeks to change the very framework of antitrust regulation in America, and lowers thresholds of scrutiny placed on merger challenges.[87] In particular, the bill:

- prohibits mergers that "create an appreciable risk of materially lessening competition," with "materially" defined as "more than a de minimus amount." This replaces the current legal standard, which prohibits mergers that "substantially lessen competition;" and

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84 For further discussion of President Biden's Executive Order Promoting Competition in the American Economy, see Jeffrey J. Amato & David A. Bujarski, *Biden Signs Sweeping Executive Order Aimed at Promoting Competition*, Winston & Strawn LLP Competition Corner, July 9, 2021, https://www.winston.com/en/competition-corner/biden-signs-sweeping-executive-order-aimed-at-promoting-competition.html; Susannah P. Torpey & Aldo A. Badini, *Time for Tech Companies to Prepare for Increased Antitrust Enforcement and Private Litigation*, Winston & Strawn LLP Competition Corner, July 15, 2021, https://www.winston.com/en/competition-corner/time-for-tech-companies-to-prepare-for-increased-antitrust-enforcement-and-private-litigation.html. *See also generally Competition EO Series*, Winston & Strawn LLP Competition Corner, https://www.winston.com/en/competition-corner/index.html#!/tids=1041923.

85 Fed. Trade Comm'n, *Statement of FTC Chair Lina Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers on Competition Executive Order's Call to Consider Revisions to Merger Guidelines* (July 9, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/statement-ftc-chair-lina-khan-antitrust-division-acting-assistant.

86 *The State of Antitrust Enforcement and Competition Policy in the U.S.*, Am. Antitrust Inst., Apr. 14, 2020, at 35, https://www.antitrustinstitute.org/wp-content/uploads/2020/04/AAI_StateofAntitrust2019_FINAL2.pdf.

87 Senator Klobuchar Press Release, *Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement* (Feb. 4, 2021), https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement.

- shifts the burden to the merging parties to show that the transaction does not "create an appreciable risk of materially lessening competition" in (i) transactions that significantly increase market concentration, (ii) transactions involving firms with 50% or greater market share or a significant amount of market power, (iii) acquisitions of a disruptive competitor, (iv) transactions that would allow the buyer to exercise market power, and (v) transactions above a certain value or market-capitalization threshold.[88]

On the other end of the political spectrum, Senator Hawley introduced two antitrust reform bills in April 2021: the Trust-Busting for the Twenty-First Century Act, designed to "crack down on mergers and acquisitions by mega-corporations" and make it easier to break up dominant firms through antitrust enforcement;[89] and the Bust Up Big Tech Act, which is meant to "break up Big Tech companies seeking to dominate multiple industries simultaneously."[90] Senator Hawley's proposed bills pack in a number of major changes in a short text. In particular, the bills:

- Empower the FTC to label companies as "dominant digital firms," and any acquisition exceeding $1 million by a dominant digital firm would be presumed "an unfair or deceptive act or practice," which the bill would make unlawful;

- Prohibit mergers and acquisitions by companies with a market capitalization exceeding $100 billion where "the effect of such acquisition . . . may be to lessen competition in any way;"

- Eliminate the need for market definition and market share analysis whenever a plaintiff can demonstrate "the existence of substantial market power or the anticompetitive or otherwise detrimental effects of particular practices" by a preponderance of the evidence, effectively eliminating the need to involve experts in such analyses;

- Replace the longstanding consumer welfare standard with one centered on the "protection of economic competition within the United States;"

- Mandate disgorgement of profits earned as a result of the anticompetitive conduct; and

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88 For further discussion of the Competition and Antitrust Law Enforcement Reform Act of 2021, see Susannah P. Torpey, Ian L. Papendick, & Nasir Hussain, *Democratic-Led Congress and Biden Administration Gearing Up to Revamp Antitrust Law, Enforcement, and Merger Reviews/Challenges*, Winston & Strawn LLP Competition Corner, Feb. 8, 2021, https://www.winston.com/en/competition-corner/democratic-led-congress-and-biden-administration-gearing-up-to-revamp-antitrust-law-enforcement-and-merger-reviews-challenges.html.

89 Senator Hawley Press Release, *Senator Hawley Introduces the 'Trust-Busting for the Twenty-First Century Act': A Plan to Bust Up Anti-Competitive Big Businesses* (Apr. 12, 2021), https://www.hawley.senate.gov/senator-hawley-introduces-trust-busting-twenty-first-century-act-plan-bust-anti-competitive-big.

90 Senator Hawley Press Release, *Senator Hawley Introduces the Bust Up Big Tech Act* (Apr. 19, 2021), https://www.hawley.senate.gov/senator-hawley-introduces-bust-big-tech-act.

- Prohibit big tech companies from selling, advertising, or otherwise promoting their own goods and services on their own platforms.[91]

While Senator Hawley's proposal is accompanied by a political rhetoric of "woke mega-corporations" [92] that are comfortable being "coddled by Washington politicians,"[93] interestingly the result is very similar to what Senator Klobuchar proposes. Both proposed approaches to antitrust reform take aim at large tech companies that are making significant acquisitions both vertically and horizontally and are heavily contributing to the increasing consolidation in tech and other industries at the potential expense of American consumers and workers. The coalescing around similar results from opposite ends of the political spectrum suggests that there is bipartisan support for significant antitrust reform of at least big tech companies.

B. The Upside and Downside to Mergers and Divestiture

It is also important to consider that mergers can both help and hurt an industry, depending on the circumstances. Mergers can promote innovation and growth, improve efficiencies, and reduce costs to consumers. There are many real procompetitive effects of mergers. But in other circumstances, they can limit competition and drive competitors out of the market, which can lead to price increases that are not tied to costs but cannot be so easily controlled with less competitive players. In some circumstances, mergers deter innovation because there are fewer players in the market looking for ways to top each other – competition between evenly matched competitors is good, and when mergers take away that competitive atmosphere, the industry and consumers can suffer.

Debates over mergers are likely to continue playing out before Congress, in guidance provided by the enforcement agencies, and in the courts. As these debates continue, and without explicit guidance, there exist meaningful legal defenses and complications that make challenging these mergers all the more difficult. Recent tech merger challenges are a good example because they have shown the difficulties in even defining the relevant market. Vertical integration, or acquiring potential competitors in a similar or adjacent business before they develop a directly competitive product, makes defining a plausible relevant market complicated – what exactly is the market if the acquired companies were only *potential* competitors, and do the entities provide similar enough products and services to satisfy a reasonable interchangeability test? Added to that, particularly in the tech industry, products and services are ever-changing, and some exist in markets that did not exist just a few short years ago. What does seem clear is that the constant development and reinvention of what is considered a "market," what/who it serves, and how it generates revenue in a digital world will make challenging alleged anticompetitive mergers or conduct incredibly difficult.

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91 For further discussion of Senator Hawley's proposed antitrust legislation, see Ian L. Papendick & Mulan Cui, *Senator Hawley's Antitrust Bills Take Aim at Mega-Corporations*, Winston & Strawn LLP Competition Corner, Apr. 23, 2021, https://www.winston.com/en/competition-corner/senator-hawleys-antitrust-bills-take-aim-at-mega-corporations.html.

92 Senator Hawley Press Release, *supra* note 90.

93 Senator Hawley Press Release, *supra* note 90.

It can also be said that divestitures can be both good and bad, again depending on the circumstances. Some will promote competition and eliminate the harm from a merger, or at least return competition to its pre-merger status quo. But divestitures are not always perfect. The oft-debated breakup of Ma Bell in 1984 is a prime example. Initially, the breakup of the local telephone services into seven different "Baby Bells" gave customers of what is now commonly known as AT&T access to more choices and kept prices low and competitive for long distance service.[94] It forced AT&T to get rid of long-held rules that its telephone service could not be accessed by phones manufactured by other companies, so consumers had to rent phones from AT&T. But there is a strong debate in the industry regarding whether the breakup set back innovation and delayed availability of high-speed internet service for a lot of consumers. The Baby Bells were natural monopolies in their geographic areas and slow to upgrade their phone lines, so high-speed internet was delayed. And by 2018, most of the Baby Bells had been reunited under the AT&T umbrella,[95] leading to the second major criticism – that it was ultimately an unnecessary divestiture that was somehow allowed to "rewind" the unwinding through a series of acquisitions over the next few decades.

Interestingly, there have been at least two recent examples of companies choosing voluntarily to divest portions of their telecom business, suggesting that mergers can have unforeseen consequences that the merging parties themselves want to eliminate. Take for example Verizon's announcement in Spring 2021 that it had agreed to sell Yahoo and AOL to a private equity firm, just a few short years after their acquisition (Yahoo in 2017, AOL in 2015).[96] Only two weeks after Verizon's announcement, AT&T announced that it would spin off WarnerMedia, which includes HBO and Warner Bros., to a new company, which would be combined with Discovery, Inc., less than three years after AT&T's acquisition of Time Warner Inc.[97] Both of these examples indicate that the merging of media companies with telecom giants is not a seamless or simple process, and sometimes companies do not have as many synergies or efficiencies as initially anticipated.

Taking all of this together – both mergers and divestitures can have both positive and negative effects for the relevant market and for consumers generally. There can be unforeseen consequences for the market, parties, competitors, and consumers, and a decision to merge or to unwind should be carefully considered.

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94 *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982) (case filed by the DOJ that led to the consent decree that broke up AT&T into "Baby Bells").

95 Matthew Stuart, *How AT&T Conquered All Forms of Communication After the Government Forced it to Break Up*, Business Insider, Mar. 5, 2018, https://www.businessinsider.com/att-breakup-1982-directv-bell-system-2018-02. *See also* Jose Pagliery, *How AT&T Got Busted Up and Pieced Back Together*, CNN Business (May 20, 2014), https://money.cnn.com/2014/05/20/technology/att-merger-history/index.html ("When you look at the history of AT&T, you wonder why federal regulators ever bothered to break up the telecom giant.").

96 Verizon Wireless News Center, *Verizon Media to Be Acquired by Apollo Funds* (May 3, 2021), https://www.verizon.com/about/news/verizon-media-be-acquired-apollo-funds?AID=11365093&SID=100098X1555750X1e4caa54a09e47be30bdcf06028a031a&vendorid=CJM&PUBID=100017430&cjevent=844b340ace6111eb81c48b400a1c0e0d&CMP=afc_m_p_cj_na_ot_21_99_affiliate-100017430_11365093&cjdata=MXxOfDB8WXww.

97 AT&T Press Release, *AT&T's WarnerMedia and Discovery, Inc. Creating Standalone Company by Combining Operations to Form New Global Leader in Entertainment* (May 17, 2021), https://about.att.com/story/2021/warnermedia_discovery.html.

C. Advice for Competitors in a Changing Landscape

Consolidation has increased across many industries in the past two decades.[98] When combined with Congress's new desire for increased antitrust scrutiny and at least the *Jeld-Wen* court's approval of divestiture as an appropriate remedy in private merger challenges, it is likely that more legal challenges are forthcoming. While *Jeld-Wen* may not have moved the needle much, there may be a perception that it did, particularly if antitrust reform continues to be a focus in Congress. If Congress or the enforcement agencies are going to be more aggressive about antitrust reform and divestiture in the future, companies will need to take that into account when considering the potential risks related to acquisitions and post-transaction conduct, and private entities considering whether to support or challenge a merger will need to carefully consider the changing landscape and the impact it may have on the success of a potential merger challenge.

The facts of *Jeld-Wen* are a good vehicle for this discussion.

We start with the long-term supply contract. Jeld-Wen offered Steves the long-term supply contract to address Steves' concerns about the security of its supply post-transaction. Given the supply contract, when the DOJ reviewed the Jeld-Wen/CMI transaction, Steves chose not to complain to the DOJ about the combination. Companies in a similar situation – when their supplier is combining with a competitor and is offered a long-term supply contract by its supplier – should weigh the benefits of such a contract with the risks of what might happen at the end of that contract. At the same time, the customer should consider whether sharing its concerns with the government ultimately may lead to the transaction being challenged, and thus be better for the customer in the long run. Even without the quality and pricing issues, signing a "long-term" supply contract only guarantees access to the market for a finite amount of time, which would be considered "short term" in the span of the customer's business. And as we saw in *Jeld-Wen*, there is no guarantee that the supplier will not terminate at its first opportunity. Such a contract is a temporary fix, even if it seems long term. Steves then faced price and quality issues during the years the contract was still active, which further affected its business.

A company has options – on one end, it can offer explicit written support in the form of an affidavit or declaration, and on the other end it can publicly and explicitly object to a proposed merger. But there are a multitude of options in between, including a more obscure support or non-objection and a confidential complaint to the DOJ and FTC to voice potential harms to competition that the proposed merger presents. Due to the confidential nature of the enforcement agencies' evaluation of a proposed merger, it is not always clear how much weight support declarations are provided, but it should be understood that they are often provided with an expectation of future procompetitive behavior from the merged entity. Regardless, a company should weigh its options carefully and think about the short-term effects, long-term effects, and even longer-term effects. Short term, public objection may hurt a company's relationship with the merging parties, and it may not stop the merger from happening. But long term, support (or failure to object) could make a private merger challenge more difficult, absent facts

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98 Kathryn C. McDonald & Nicholas Giorgi, *The Great Consolidation: Industry and Equity Market Concentration After the Crisis*, Merril Investments, July 2020, https://mlaem.fs.ml.com/content/dam/ML/Articles/pdf/ML_The_Great_Consolidation_3160566_v4.pdf.

like those presented in *Jeld-Wen*. And realistically, a company that counts on a long-term supply contract following a merger that threatened its business may have limited future prospects. The negative impact on competition in general (not just on a competitor) cannot necessarily be avoided without a broader approach. And a broader approach is more appropriate coming from the government agencies, which could more aggressively enforce the antitrust laws to ensure that competition is not harmed.

We then consider what a company should do if post-consummation, it suffers harm due to the merger or the merging parties' post-merger anticompetitive conduct. Like Steves, a company can approach the DOJ or FTC and ask that the agency reopen its investigation into the merger based on post-merger anticompetitive effects. But as with Steves, this will not always be successful. A company can likewise file a private merger challenge, which also comes with pros and cons. In litigation, the private plaintiff has full control over the litigation strategy and scope, whereas if it is a government challenge, a harmed competitor may have little to no control (or even information) of the government's strategy, which could be frustrating to a company suffering anticompetitive harm. But conversely, as we all know, litigation is expensive, and many merger challenges could be viewed as "bet the business" litigation, so there is a significant financial risk for the private plaintiff. Further, as exhibited by *Jeld-Wen*, the potential of future lost profits may not present an issue ripe for adjudication, and allegations of threatened injury or *actual* harm may be required. The appellate court in *Jeld-Wen* noted that the anticipated refusal to sell after a contract has terminated does not create a specific injury that is "fit for judicial decision," because the conduct that would cause future lost profits had not yet occurred.[99] So even if a private plaintiff succeeds on the merits, the actual harm it may be able to establish may not be sufficient to make the litigation risks worthwhile.

It is also important to consider whether the merger has been consummated, and if so, how long ago. This is, again, a way the *Jeld-Wen* decision appears to be an outlier. It is not at all typical for a merger to be challenged years after closing. Unwinding a transaction is much easier if it has not been consummated or if the consummation is recent, so the need to establish that truly no alternative remedy exists at law is harder and harder to prove the longer it has been. Nonetheless, *Jeld-Wen* suggests that private plaintiffs may keep the threat of divestiture on the table long after the merger is cemented and vast resources, time, and efforts have already been spent on making the deal go though.[100] This type of business risk is likely to have a deterrent effect on mergers that are even beneficial to markets and consumers. But the existence of one case should not be taken as a significant change in jurisprudence without legislative changes or follow-on cases out of different circuits that

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99 *Jeld-Wen*, 988 F.3d at 725.

100 Note that while private merger challenges may be successful post-consummation, there are also examples of cases in which courts have denied divestiture under the laches doctrine because it would lead to stockholder harm. *See, e.g.*, *Antoine L. Garabet, M.D., Inc. v. Autonomous Techs. Corp.*, 116 F. Supp. 2d 1159, 1171-72 (C.D. Cal. 2000) (holding that divestiture was barred by the doctrine of laches because plaintiffs had delayed in bringing suit and divestiture "can have far-reaching effects on persons who are not parties to the litigation"); *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265, 277 (8th Cir. 2004) (holding that divestiture was barred by the doctrine of laches because "shareholders would be unduly prejudiced were this claim for equitable relief allowed to proceed"); *Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1235 (8th Cir. 2010) (holding that divestiture was barred by the doctrine of laches because it would result in "dramatic and certain" hardship and competitive disadvantage).

signal a shift in approach. Instead, private plaintiffs should continue to proceed cautiously and consider all possibilities of the decisions they make when presented with a proposed merger of competitors in their industry.

VI. CONCLUSION

The Fourth Circuit's *Jeld-Wen* decision is groundbreaking, because as the appellate court noted, divestiture had previously never been granted in a private plaintiff merger challenge. The facts presented were so specific and egregious, and the private challenge was a very stereotypical existential "bet the business" litigation, which makes the chances of *Jeld-Wen* moving the needle on its own somewhat unlikely. It sets a precedent upon which plaintiffs may now rely to seek divestiture in private litigation, to be sure, but the likelihood of success in future cases that rely on *Jeld-Wen* will turn on how severe the facts are; and if the facts are less egregious, it is likely that courts will conclude that less extreme remedies may be appropriate. So while the decision should not be minimized and could lead to future high-stakes and existential disputes that may warrant divestiture, it is unlikely to have a substantial impact on its own.

However, the decision coincides with a shifting focus on increasing industry concentration and an increasing tide of federal antitrust reform initiatives. If *Jeld-Wen* is coupled with real, meaningful change to the legislative groundwork for private merger challenges, it could signal the start of change.

One thing is clear – we appear to be in the nascent stages of antitrust reform, and there are many directions such reform may go. The protection of competition remains as important as ever; what is likely to change is the methods by which it is protected. Entities considering mergers and entities considering challenging mergers should think about the potential anticompetitive effects such mergers may have and weigh their options carefully. And as always, the advice of experienced antitrust counsel is a good place to start.

THE EVOLUTION OF ANTITRUST ARBITRATION

By Christopher R. Leslie[1]

Until the 1920s, arbitration was not generally an option for legal disputes being heard in federal court. But then Congress enacted the Federal Arbitration Act (the FAA) in 1925 to allow inter-merchant disputes to be decided in private arbitration. For the next sixty years, federal courts held that pre-dispute arbitration clauses were unenforceable with regards to federal statutory claims, including antitrust lawsuits. Beginning in the 1980s, however, the Supreme Court imagined a new revisionist history of the FAA as creating an omnibus federal pro-arbitration regime. Federal courts began enforcing arbitration clauses and compelling the arbitration of antitrust claims. In many ways, the expansion of antitrust arbitration has undermined America's antitrust law regime. This evolution compels courts and Congress to reevaluate aspects of antitrust doctrine that were premised on the non-arbitrability of antitrust claims. This Essay traces the relationship between antitrust law and private arbitration.

I. THE 1920S: THE EARLY DAYS OF PRE-DISPUTE BINDING ARBITRATION

In the early years of the Sherman Act, antitrust claims were not arbitrated because, broadly speaking, almost nothing was arbitrated. Although private arbitration is older than the country,[2] until the twentieth century arbiters' decisions were unenforceable without a court order.[3] Arbitration decisions and awards were not self-executing, but instead required judicial enforcement, which American judges often resisted because they viewed "irrevocable arbitration agreements as 'ousting' the courts of jurisdiction."[4] And, further, the parties retained the power to revoke their promise to arbitrate,[5] and either party could "repudiate arbitration agreements at any time before the arbitrator's award was made."[6] Some merchants in disputes with other merchants – such as retailers purchasing products or produce from wholesalers or distributors – preferred arbitration over litigation. Arbitrators chosen for their knowledge of the trade at issue were seen as better equipped to interpret contract terms and apply appropriate remedies.[7] Acceding to the merchants' requests, some states – most notably New York and New Jersey – enacted laws to enforce predispute arbitration agreements.[8]

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2 James E. Berger & Charlene Sun, *The Evolution of Judicial Review under the Federal Arbitration Act*, 5 N.Y.U. J. L. & Bus. 745, 748 (2009).

3 *Id.*

4 *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974). *See, e.g.*, *Home Ins. Co. v. Morse*, 87 U.S. 445, 451 (1874).

5 Christopher R. Leslie, *The Arbitration Bootstrap*, 94 Tex. L. Rev. 265, 300 (2015) ("Under the so-called revocability doctrine, either party could, at its will, refuse to honor the arbitration agreement.").

6 *Southland Corp. v. Keating*, 465 U.S. 1, 32 (1984) (O'Connor, J., dissenting).

7 Leslie, *supra* note 5 at 308.

8 *Id.* at 301.

Even as states in 1920s began to make arbitration agreements enforceable in state court, federal courts remained hostile to arbitration whether the claims arose from federal law or arrived in federal court through diversity jurisdiction.[9] Because their inter-merchant contractual disputes could end up in federal court through diversity jurisdiction, these business interests sought federal legislation that would make their arbitration agreements enforceable in federal court.[10] They championed the Federal Arbitration Act of 1925 (the FAA). The key provision of the FAA – Section 2 – provides that some predispute arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[11]

The promoters of arbitration in Congress highlighted private arbitration's advantages over litigation, including its efficiency, speed, and lower costs.[12] The FAA advocates stressed the importance of expeditiousness in resolving commercial disputes,[13] particularly when the dispute involves perishable goods.[14] These arguments proved persuasive and Congress enacted the FAA with no speeches in opposition and no dissenting votes.[15] While revolutionary, the FAA was extremely limited. Throughout the hearings, deliberations, and voting, every witness and every report emphasized that they were discussing only the arbitration of inter-merchant disputes, not consumer or labor claims.[16] For example, when clarifying that the FAA would not make labor disputes subject to arbitration, W.H.H. Piatt, Chairman of the Committee on Commerce, Trade, and Commercial Law of the American Bar Association, explained that the FAA "is purely an act to give *the merchants*

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9 *Id.*

10 *Id.* For a brief history of the personalities behind the push for the FAA, *see id.* at 302-06.

11 9 U.S.C. § 2.

12 Leslie, *supra* note 5 at 302-06; David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 61 (2007) ("After the 1923 and 1924 hearings, the House Judiciary Committee and the Senate Judiciary Committee each generated a report recommending passage of the FAA. Those reports make clear that, when it enacted the FAA, Congress understood arbitration to be something inherently prompt, inexpensive, and streamlined—in other words, just the type of proceeding that had been described by the witnesses during the pre-enactment hearings.").

13 Leslie, *supra* note 5 at 303 (noting that "supporters argued that the FAA was necessary to speed up dispute resolution in commercial matters"); Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: *Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 5 (1923) [hereinafter Arbitration Hearings] (statement of Charles I. Bernheimer) ("But the merchant finds that arbitration is a very direct and very expeditious method. Our courts are so clogged that it is sometimes years before they can reach a settlement: but the arbitration makes a prompt settlement…").

14 Leslie, *supra* note 5 at 304 ("Representatives of producers and shippers of vegetables and fruits testified in favor of the bill, asserting that arbitration would benefit business and 'the whole country.'"); Arbitration of Interstate Commercial Disputes: *Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 28-29 (1924) (statement of Henry L. Eaton).

15 Leslie, *supra* note 5 at 305 ("Not a single senator or representative voted against it. This is not surprising; nobody spoke or wrote in opposition to the legislation.").

16 *Id.* ("The most important fact about the testimony, hearings, and reports leading up to congressional enactment of the FAA is that every witness, every Senator, and every Representative discussed one issue and one issue only: arbitration of contract disputes between merchants."). *See also* Cohen & Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 281 (1926) (Arbitration "is not the proper method for deciding points of law of major importance involving . . . policy in the application of statutes.").

the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this."[17] These inter-merchant disputes could involve either breach of contract and maritime claims.[18] The FAA's narrow reach did not extend to statutory or constitutional claims. The FAA's prime advocate, Julius Henry Cohen, the general counsel of the New York State Chamber of Commerce, noted that arbitration was "'not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes.'"[19] While arbiters from the trade may be better positioned to decide certain factual issues, the FAA's proponents acknowledged that questions of statutory interpretation were "better left to the determination of skilled judges with a background of legal experience and established systems of law."[20] Furthermore, the FAA's drafters and proponents explicitly rejected the notion that the act would apply to contracts of adhesion.[21]

Neither the drafters of the Sherman Act nor the FAA ever considered that private antitrust claims were subject to arbitration.

II. THE 1930S: ARBITRATION AS ANTITRUST VIOLATION

In its first opinion considering the intersection of antitrust law and arbitration in the post-FAA period, the Supreme Court condemned concerted efforts by defendants to impose arbitration clauses. In 1930, the Court in *Paramount Famous Lasky Corp. v. United States*,[22] held that an agreement among ten movie distributors to impose upon all theaters a standard contract that included mandatory arbitration of all contractual disputes violated Section One. Using language evocative of the per se rule, the Court held that the distributors' agreement "*necessarily* and directly tends to destroy 'the kind of competition to which the public has long looked for protection.'"[23] The Court cast a skeptical eye on both arbitration and rivals that sought to collectively impose arbitration on their customers. The Justices were right to condemn this form of collusion because a conspiracy among competitors to impose arbitration clauses inflicts antitrust injury by denying consumers and employees the option of entering a superior contract that does not force them to waive their rights. In many contexts, these arbitration-laden contracts

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17 Arbitration Hearings, *supra* note 13 at 9 (statement of W. Piatt) (emphasis added); *see* Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 Fla. St. U. L. Rev. 99, 106 (2006) (describing Piatt's statement as "the central concept behind the Act: to provide for enforceability of arbitration agreements between merchants").

18 Moses, *supra* note 17 at 139 ("Moreover, the FAA was never described in the legislative history as applying to any claims other than contract and maritime claims.").

19 *Id.* at 111.

20 Cohen & Dayton, *supra* note 16 at 281.

21 Leslie, *supra* note 5 at 309 ("For example, in colloquy"); Moses, *supra* note 16 at 107 ("Cohen and his fellow supporters thus indicated that this bill would not apply in adhesion contracts for several reasons. First, there were protections written into law; second, protective requirements were issued by federal agencies; and third, that was simply not the intent of the legislation, which was specifically aimed at voluntary resolution of disputes between merchants.").

22 282 U.S. 30 (1930).

23 *Id.* at 43 (quoting *United States v. Am. Oil Co.*, 262 U.S. at 390) (emphasis added). *See also* Christopher R. Leslie, *Conspiracy to Arbitrate*, 96 N.C. L. Rev. 381, 402-03 (2018) (explaining how the Supreme Court took a per se approach in *Paramount Famous Lasky*).

constitute inferior products.[24] The federal court adjudicating an alleged conspiracy to arbitrate among banks to only issue credit cards burdened by arbitration clauses with class action waivers explained that "[t]he mere existence of the clauses, diminishes the cards' value by foreclosing the opportunity for cardholders to go to court and address grievances through class action litigation."[25] By agreeing to impose mandatory arbitration, firms are agreeing not to compete on product quality.[26]

Beyond a standalone conspiracy, members of a traditional price-fixing conspiracy may agree to also impose mandatory arbitration clauses on all of their customers. Such a move may help the illegal cartel in many ways. First, it can help conceal the cartel because consumers suspicious of price fixing who bring an antitrust claim will be denied the relatively generous discovery afforded in federal court.[27] Because antitrust plaintiffs generally require more discovery than antitrust defendants, discovery limitations favor the defendant.[28] Not only does arbitration offer less capacious discovery than litigation, price-fixing conspirators can draft their uniform arbitration clauses to explicitly limit discovery.[29] Second, price-fixing conspirators may attempt to use arbitration clauses to undermine various pro-plaintiff aspects of antitrust law, including treble damages, attorneys' fees, and reasonable costs for successful plaintiffs.[30]

III. FROM THE 1920S TO THE 1980S: SIXTY YEARS OF SOLITUDE WHEN ANTITRUST CLAIMS WERE NON-ARBITRABLE

For its first six decades of existence, federal courts recognized the limited scope of the FAA and refused to enforce arbitration clauses in the context of federal statutory claims.[31] In 1953, for example, the Supreme Court in *Wilko v. Swan* held that federal securities claims were not subject to mandatory arbitration because Congress "enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights."[32] The Court reasoned that arbitration may work fine for inter-merchant contractual disputes, but Congress never intended the FAA to apply to legal disputes

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24 Leslie, *supra* note 23 at 410 ("Primary conspiracies to arbitrate inflict antitrust injury because consumer contracts with arbitration clauses--especially those that include class-action waivers--are inferior products.").

25 *Ross v. Am. Express Co.*, 35 F. Supp. 3d 407, 434 (S.D.N.Y. 2014).

26 *See Ross v. Bank of Am., N.A. (USA)*, 524 F.3d 217, 224 (2d Cir. 2008) ("[T]he alleged conspiracy to limit the cardholders to cards that require arbitration of disputes also diminished the present value of the cards offered to the cardholders. A card that limits the holder to arbitration is less valuable (all other factors being equal) than a card that offers the holder a choice between court action or arbitration.").

27 Leslie, *supra* note 23 at 412-13.

28 Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Merger Approval*, 110 Nw. U. L. Rev. 1, 15-16 (2015); *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1155 (N.D. Ill. 1979) (citation omitted) ("the heart of any American antitrust case is the discovery of business documents. Without them, there is virtually no case.").

29 Leslie, *supra* note 23 at 413.

30 *See infra* notes 68-80 and accompanying text.

31 *Wilko v. Swan*, 346 U.S. 427, 438 (1953) *overruled by Rodriguez de Quijas v. Shearson/Am. Express*, Inc., 490 U.S. 477 (1989).

32 *Id.*

arising from the sale of securities.[33]The lower federal courts applied *Wilko*'s holding and reasoning to antitrust law, declining to enforce arbitration clauses in antitrust litigation. In the most influential opinion of this era, the Second Circuit in *American Safety Equipment Corp. v. J.P. Maguire & Co.*[34] held that arbitration claims had to be adjudicated by federal judges, not private arbiters, regardless of whether the parties had entered a pre-dispute arbitration agreement.[35] The Second Circuit articulated four independent reasons why pre-dispute arbitration agreements did not apply to antitrust claims:[36]

> (1) deference to private arbitration agreements could lessen the plaintiffs' incentive to pursue antitrust actions, weakening the use of "private attorneys general" as a foundation of Sherman Act enforcement; (2) arbitration clauses often result from adhesion contracts, and Congress intended that these matters be heard in the courts; (3) arbitrators may be incompetent to comprehend complex antitrust issues; and (4) arbitrators may be biased business people unable to reach fair outcomes.[37]

The *American Safety* doctrine became the law of the land as every circuit to consider the issue held that arbitration clauses did not cover antitrust claims.[38] For the next two decades, the American Safety doctrine was uncontroversial.

IV. THE 1980S: AN IMAGINED LEGISLATIVE HISTORY AND THE DAWN OF THE NEW ERA OF ANTITRUST ARBITRATION

This well-established body of law – and understanding of the FAA – underwent a sea-level change when the Supreme Court began rewriting the history of the FAA in the 1980s. The Court chipped away at the overreaching rule against arbitration of federal statutory claims by holding some[39] – and, later all[40] – private federal securities claims

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33 *Id.*

34 391 F.2d 821 (2d Cir. 1968).

35 *Id.* at 827-28.

36 *Id.*

37 Steven R. Swanson, *Antisuit Injunctions in Support of International Arbitration*, 81 Tul. L. Rev. 395, 409 (2006); *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1440-42 (9th Cir. 1994) ("In *American Safety,* the Second Circuit held that antitrust claims cannot be arbitrated because of the public interest in enforcing antitrust laws, the potential bias and limited expertise of arbitrators, the complexity of antitrust law, and the procedural differences between trials and arbitrations.").

38 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 620-21 (1985). *See, e.g.*, *Lake Commc'ns, Inc. v. ICC Corp.*, 738 F.2d 1473, 1479 (9th Cir. 1984); *Lee v. Ply*Gem Indus., Inc.*, 593 F.2d 1266, 1274 (D.C. Cir. 1979); *Cobb v. Lewis*, 488 F.2d 41, 47 (5th Cir. 1974) ("antitrust claims are not appropriate subjects of arbitration"); *Applied Digit. Tech., Inc. v. Cont'l Cas. Co.*, 576 F.2d 116, 117-119 (7th Cir. 1978); *Helfenbein v. Int'l Indus., Inc.*, 438 F.2d 1068, 1070 (8th Cir. 1971); *In the Matter of Arbitration between Aimcee Wholesale Corp. v. Tomar Prods., Inc.*, 21 N.Y.2d 621, 289 N.Y.S.2d 968, 237 N.E.2d 223 (1968); *Power Replacements, Inc. v. Air Preheater Co.*, 426 F.2d 980 (9th Cir. 1970); *A. & E. Plastik Pak Co. v. Monsanto Co.*, 396 F.2d 710 (9th Cir. 1968); *Coenen v. R. W. Pressprich & Co.*, 453 F.2d 1209, 1215 (2nd Cir. 1972); *A. & E. Plastik Pak Co. v. Monsanto Co.*, 396 F.2d 710 (9th Cir. 1968).

39 *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 223 (1985).

40 *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

were arbitrable. In the middle of this brief arc of securities cases, the Court pared back the *American Safety* doctrine.

In *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc.*,[41] the Supreme Court held that the *American Safety* rule should not prevent the *international* arbitration of antitrust claims. The international context proved dispositive, as the Court emphasized that "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context."[42] As written, the Court's holding was limited to international arbitration. In theory, the *American Safety* doctrine of non-arbitrability of domestic antitrust claims survived *Mitsubishi*. Although the Court also critiqued the Second Circuit's reasoning in *American Safety*,[43] the Court found it "unnecessary to assess the legitimacy of the *American Safety* doctrine as applied to agreements to arbitrate arising from domestic transactions."[44] Yet, despite the Court's explicit restraint, lower federal courts took Mitsubishi's reasoning and applied it to domestic arbitration of antitrust claims.[45] Some lower courts treated *Mitsubishi* as "effectively overrul[ing] *American Safety* and its progeny."[46] Consequently, an opinion limited to international arbitration effectively made all antitrust claims subject to arbitration.[47]Lower courts took their cue from the *Mitsubishi* opinion's critique of *American Safety* and its revisionist legislative history of the FAA. The *Mitsubishi* Court fashioned a new legislative intent behind the FAA, asserting, without evidence, that the FAA embodied an "emphatic federal policy in favor

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41 473 U.S. 614, 632-35 (1985).

42 *Mitsubishi*, 473 U.S. at 629.

43 *Id.* at 632 (expressing "skepticism of certain aspects of the *American Safety* doctrine"); *see also* Donald I. Baker & Mark R. Stabile, *Arbitration of Antitrust Claims: Opportunities and Hazards for Corporate Counsel*, 48 Bus. Law. 395, 406 (1993) ("Although the Court's holding in *Mitsubishi* is limited to the international arena, its logic is not.").

44 *Mitsubishi* 473 at 629.

45 *See* Lemley & Leslie, *supra* note 28 (collecting cases).

46 *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1442 (9th Cir. 1994).

47 *See, e.g.*, *Seacoast Motors of Salisbury, Inc. v. DaimlerChrysler Motors Corp.*, 271 F.3d 6 (1st Cir. 2001) (expressly rejecting *American Safety* in view of *Mitsubishi*); *Kotam Elecs., Inc. v. JBL Consumer Prods., Inc.*, 93 F.3d 724, 725-28 (11th Cir.1996) ("In light of *Mitsubishi* and its progeny..., we hold that ... arbitration agreements concerning domestic antitrust claims are enforceable."); *Nghiem*, 25 F.3d at 1442 (9th Cir. 1994) (same); *see also HCI Techs., Inc. v. Avaya, Inc.*, 446 F. Supp. 2d 518, 524 (E.D. Va. 2006) ("A review of subsequent case law reveals that while the grim reaper may not yet have found *American Safety*'s address, he is certainly in the neighborhood."); *DJ Mfg. Corp v. Tex-Shield, Inc.*, 998 F. Supp 140, 145 (D.P.R. 1998) ("[W]e also hold that domestic antitrust disputes … are arbitrable."); *Hunt v. Up N. Plastics, Inc.*, 980 F. Supp. 1046, 1049 (D. Minn. 1997) (same); *Acquaire v. Canada Dry Bottling*, 906 F. Supp. 819, 837 (E.D.N.Y. 1995); *Syscomm Int'l Corp. v. Synoptics Commc'ns*, 856 F. Supp. 135, 139 (E.D.N.Y. 1994) ("While American Safety has not been explicitly overruled, this Court believes that ... domestic antitrust claims are arbitrable"); *Hough v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 757 F. Supp. 283, 286 (S.D.N.Y. 1991) ("[T]he reasoning of Mitsubishi should apply with equal force to domestic claims"), *aff'd*, 946 F.2d 883 (2d Cir. 1991); *W. Int'l Media Corp. v. Johnson*, 754 F. Supp. 871, 873-74 (S.D. Fla. 1991) ("Although the Court supported its rejection of some of these concerns on grounds tied to the principles involved in international commercial transactions, the Court's reliance on arbitration principles and the legislative histories of antitrust provisions suggests that the result arrived at in *Mitsubishi* would be forthcoming in the domestic situation.").

of arbitral dispute resolution."[48] This echoed the Court's proclamation a year earlier in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[49] a non-antitrust case, that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."[50] The Court created this so-called pro-arbitration policy from whole cloth. Congress never intended the FAA to signal a federal policy in favor of arbitration writ large.[51] Congress passed the FAA in response to pressure and persuasion from business interests, primarily in New York, that sought a more efficient mechanism for resolving inter-merchant disputes.[52] The legislative history of the FAA clearly demonstrates the intent of legislators and witnesses to allow only the arbitration of disputes between merchants, not employment contracts or disputes involving customers.[53] The *Mitsubishi* Court, however, provided antitrust plaintiffs with one safety net: the Effective Vindication Doctrine. The foundation of the *Mitsubishi* opinion rests on the majority's statement that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral

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48 *Mitsubishi*, 473 U.S. at 631.

49 460 U.S. 1, 24 (1983).

50 *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

51 *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1089 (9th Cir. 1998) ("Specifically, the legislative history demonstrates that the Act's purpose was solely to bind merchants who were involved in commercial dealings."), *abrogated by Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); Imre Szalai, Outsourcing Justice 192-99 (2013); Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. Rev. 81, 117 (1992) (noting that the writings of the drafter of – and moving force behind – the FAA "reveals an intent to devise a remedy entirely for commercial disputes … between 'merchants.'"); Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. Rev. 449, 467 (1996) ("The unrebutted legislative history created prior to the FAA's passage establishes that only disputes arising out of commercial contracts were to be arbitrable; no agreements to arbitrate employment disputes in any industry were to be included."); Moses, *supra* note 17 at 106-08 (legislative hearings of the FAA ""make clear that the focus of the Act was merchant-to-merchant arbitrations, never merchant-to-consumer arbitrations"); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33, 81 (1997) (analyzing legislative history of FAA and concluding "that enforcement of arbitration clauses was intended to remain within the sphere of the commercial paradigm" of contracts between merchants); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 Stan. L. Rev. 1631, 1636 (2005) (noting that "to the limited extent that the possibility of [business-consumer or employer-employee] arbitration was considered by Congress in 1925, when it passed the FAA, those few who spoke on the issue made clear that they did not view such a use of arbitration as appropriate."); Jean R. Sternlight, *Compelling Arbitration of Claims Under the Civil Rights Act of 1866: What Congress Could Not Have Intended*, 47 U. Kan. L. Rev. 273, 310 (1999) ("When Congress passed the FAA in 1925, it did not intend to allow employers or sellers of goods or services to require employees or consumers of such goods or services to resolve civil rights disputes through arbitration rather than in court. Nothing in the wording of the statute or in its legislative history supports such an interpretation."); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. Rev. 931, 992 (1999) ("In the 1920s, most supporters of the FAA and the state arbitration laws intended the new statutes to apply to disputes between members of the same trade association or between participants in a common line of business."); Imre Stephen Szalai, *Correcting A Flaw in the Arbitration Fairness Act*, 2013 J. Disp. Resol. 271, 278 (2013) (explaining why "the FAA was not intended to cover consumer disputes").

52 Leslie, *supra* note 5 at 300-06.

53 *See, e.g.*, Arbitration Hearings, *supra* note 13 at 10 (FAA applies to disputes involving "a contract *between merchants* one with another, buying and selling goods") (statement of W. H. H. Piatt) (emphasis added)); Leslie, supra note 22 at 388 ("All of the Congressional testimony, hearings, and reports demonstrate that the FAA applied only to commercial disputes between merchants.").

forum, the statute will continue to serve both its remedial and deterrent function."[54] Under the Effective Vindication Doctrine, the "arbitration of the claim will not be compelled if the prospective litigant cannot effectively vindicate his statutory rights in the arbitral forum."[55] In theory, the Effective Vindication Doctrine should prevent antitrust defendants from using arbitration to thwart antitrust claims.

V. ARBITRATION AND CLASS ACTION WAIVERS

The Supreme Court's simultaneous endorsement of a federal policy favoring private arbitration agreements and the Effective Vindication Doctrine had important implications for antitrust class action litigation. Through the Effective Vindication Doctrine, the *Mitsubishi* Court made antitrust claims arbitrable only if plaintiffs could effectively vindicate their rights in private arbitration. A litigant could resist a motion to compel arbitration by showing that forcing its claims into arbitration would prevent effective vindication of the plaintiff's underlying rights.[56]

Class action litigation plays an important role in ensuring that antitrust laws are effectively enforced. Antitrust violations often injure millions of consumers, none of whom suffer damages that are sufficiently high to warrant an individual lawsuit.[57] Eliminating class action litigation and classwide arbitration can effectively eliminate the right to seek redress for antitrust violations altogether by leaving victims with no choice but a net-loss lawsuit (even if it's successful) or no lawsuit at all.[58] Even individuals with ironclad antitrust claims may lack the resources to initiate and endure a lawsuit.[59]

In order to prevent class action litigation, many firms have inserted class action waivers into their arbitration clauses. A class action waiver is a contract term that forbids an individual – such as consumer or employee – from participating in class action litigation against the defendant. When the expected cost of pursuing an individual lawsuit exceeds the expected (or maximum) damage award, if firms can prevent class action litigation,

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54 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

55 *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 282-83 (4th Cir. 2007) (citing *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000)); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 242 (2013) (Kagan, J., dissenting) (The Effective Vindication Doctrine provides that "[a]n arbitration clause will not be enforced if it prevents the effective vindication of federal statutory rights, however it achieves that result.").

56 *Cotton Yarn Antitrust*, 505 F.3d at 282-83 (noting that the Effective Vindication Doctrine provides that the "arbitration of the claim will not be compelled if the prospective litigant cannot effectively vindicate his statutory rights in the arbitral forum.").

57 *See In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677, 693-94 (N.D. Ga. 1991) ("The Court finds a class action the *only* fair method of adjudication for plaintiffs. The individual claims of many class members are so small that the cost of individual litigation would be far greater than the value of those claims.").

58 *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 407 (2005) (noting how class action waivers prevent the "spreading across multiple plaintiffs the costs of experts, depositions, neutrals' fees, and other disbursements [, which] forces the individual claimant to assume financial burdens so prohibitive as to deter the bringing of claims").

59 *Kristian v. Comcast Corp.*, 446 F.3d 25, 54-55 (1st Cir. 2006).

they can effectively immunize themselves from liability for their illegal conduct. Whether the liability lies in tort, contract, or antitrust, firms can evade responsibility. Despite the importance of collective action by antitrust plaintiffs, in 2010, the Supreme Court in *Stolt-Nielsen SA v. AnimalFeeds International Corp.,*[60] placed hurdles before antitrust plaintiffs forced into arbitration to have their claims adjudicated on a classwide basis. Although class-wide arbitration secures many of the benefits of class action litigation, the Supreme Court in *Stolt* made it harder for arbiters to replace hundreds or thousands or more individual arbitration with a single, more efficient class-wide arbitration. The *Stolt* majority held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."[61] The Court invalidated a decision by an arbitration panel to use class arbitration to settle antitrust claims because the parties had not previously agreed to do so.

Three years later, the Supreme Court began the wholesale dismantling of the Effective Vindication Doctrine. In *American Express Co. v. Italian Colors Restaurant*,[62] an antitrust case, the Supreme Court eviscerated the Effective Vindication Doctrine by enforcing an arbitration clause with a class action waiver even though "the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery."[63] Under Scalia's reasoning, no rational antitrust plaintiff would pursue her claims because the arbitration costs would exceed the maximum possible recovery.[64] The Effective Vindication Doctrine, which the *Mitsubishi* Court used to justify subjecting antitrust claims to arbitration has become a dead letter. Between *Stolt* and *Italian Colors*, antitrust plaintiffs are denied the most efficient mechanism to resolve antitrust disputes.

VI. THE CONSEQUENCES OF ANTITRUST ARBITRATION ERA

In the modern era in which federal courts generally enforce arbitration clauses, competing firms may pursue their collective interest in making arbitration clauses with class action waivers the industry standard, leaving consumers and workers no choice but to forego their rights to litigate. Entire industries – from cell phone service to credit cards – are governed by arbitration clauses, such that consumers cannot avoid mandatory arbitration.[65] Market-wide arbitration clauses signal a failure of competitive markets.

A. Arbitration Clauses as Vehicles for Anti-Consumer Terms

As courts have encouraged deference to arbitration clauses, firms have increasingly included terms in their arbitration clauses that could otherwise be unenforceable if they resided in a traditional contract, such as provisions to shorten statutes of limitations, to

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60 559 U.S. 662 (2010).

61 *Id.* at 684. Of course, the drafters and legislators behind the FAA never considered class-wide arbitration because they intended the law to apply only to individual inter-merchant disputes.

62 570 U.S. 228 (2013).

63 *Id.* at 231.

64 Lemley & Leslie, *supra* note 28 at 10-13.

65 *Homa v. Am. Express Co.*, 494 F. App'x. 191, 197 (3d Cir. 2012); Consumer Financial Protection Bureau, Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a) at 1-10, § 1.4.1 (2015).

limit damages, and to prevent injunctive remedies altogether.[66] Standard arbitration clauses now often contain a litany of pro-defendant terms. This is hardly surprising as firms craft their mandatory arbitration with an eye towards being sued by their customers and employees. Conversely, these firms are unlikely to sue their customers or employees and are, thus, unlikely to be at the plaintiffs' table in an arbitration. Although businesses do sue each other, firms impose mandatory arbitration on their customers, and employees rarely put arbitration clauses in their business-to-business contracts.[67]

B. The Risk of Arbitration Conspiracies

The pro-business nature of arbitration clauses increases the importance of antitrust law. No firm could unilaterally impose such terms without losing customers and employees to their rivals. But if every major firm agreed to pursue the same path, all firms would be better off. Thus, competing firms have a motive to collude to impose identical anti-consumer arbitration clauses. The incentive is particularly strong if firms are already colluding to fix prices, rig bids, or otherwise violate Section One of the Sherman Act.

Absent antitrust law, price-fixing conspirators may collude to draft identical arbitration clauses that circumvent the pro-plaintiff aspects of antitrust law that Congress designed to encourage and reward antitrust plaintiffs. For example, although Congress adopted mandatory treble damages for successful antitrust plaintiffs in order to maximize deterrence, to "compensate victims of antitrust violations for their injuries,"[68] and to "encourage private enforcement of the anti-trust laws,"[69] many firms put detrebling provisions in their arbitration clauses.[70] If enforced, such provisions encourage antitrust violations.[71] In addition to reducing money damages, firms may attempt to deny arbitrators the authority to order injunctive relief, [72] an inherent power that cannot be stripped from federal judges.[73] Price-fixing conspirators may also attempt to use the terms of their arbitration clauses to block antitrust's pro-plaintiff fee shifting provisions.[74]

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66 Leslie, *supra* note 5 at 282-92.

67 Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. Mich. J.L. Reform 871, 876 (2008) (For firms that impose arbitration clauses on their customers and employees, "less than 10% of their negotiated non-consumer, non-employment contracts included arbitration clauses.").

68 *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977).

69 *Pollock & Riley, Inc. v. Pearl Brewing Co.*, 498 F.2d 1240, 1242-43 (5th Cir. 1974) (citing *Bruce's Juices, Inc. v. American Can Co.,* 330 U.S. 743, 751-52 (1947)).

70 Lemley & Leslie, *supra* note 28 at 24-25 (citing examples).

71 Leslie, *supra* note 23 at 414.

72 James J. Calder et al., *A New Alternative to Antitrust Litigation: Arbitration of Antitrust Disputes*, 3 Antitrust 18, 18, 19-20 ("Parties to an arbitration generally. . . can limit the remedies available to the arbitrator." For example, an attorney representing a traditional antitrust defendant … might find it desirable "if the remedies available to the arbitrators are limited so as to exclude injunctive relief.").

73 *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1059 (6th Cir. 1984) (quoting *In re Multidistrict Vehicle Air Pollution*, 538 F.2d 231, 234 (9th Cir. 1976)).

74 *See, e.g., James C. Just. Cos., Inc., v. Deere & Co.*, No. 5:06-CV-00287, 2008 WL 828923, at *5 (S.D. W.Va. Mar. 27, 2008) ("Court cannot conclude that the Dealership Agreement's limitation on attorney's fees and costs is inconsistent with the policies of the Sherman Act.").

Additionally, conspirators may use arbitration clauses to truncate antitrust law's four-year statute of limitations.[75] For example, some antitrust defendants have drafted their arbitration clauses to require that arbitration for antitrust violations be brought within one year of plaintiffs' discovery.[76] Other antitrust defendants have used arbitration clause language to shorten the four-year statute of limitations to one or two years, a move permitted by some federal judges.[77] Using the terms in arbitration clauses in this fashion not only increases the likelihood of valid antitrust claims being barred entirely, it potentially reduces the plaintiff's available damages even when a claim is filed in time.[78]

Finally, and most insidiously, firms in a price-fixing conspiracy may collude to impose class action waivers on their customers and employees. Antitrust class actions are the most potent weapon that consumers have to hold price fixers accountable and to receive compensation for their antitrust injuries.[79] Absent the class action, no single plaintiff may bring suit because individual lawsuits are unlikely to be worth the effort.[80] Recognizing this, price-fixing conspirators may agree to impose arbitration clauses with class action waivers. With the Supreme Court's opinions in *Italian Colors* and *Stolt* as a shield, antitrust defendants can block their victims from both court and collective action and, thus, retain their ill-gotten cartel profits. Conspiracies to impose arbitration clauses with class action waivers can effectively prevent the victims of antitrust violations from pursuing their claims through litigation or arbitration because litigation is contractually forbidden and individual arbitration is prohibitively expensive or impractical.

In theory, conspiracies to arbitrate could be easily thwarted by federal judges denying defendants' motion to compel arbitration. At the beginning of the modern era of antitrust arbitration, courts continued to recognize that firms could not conspire to impose arbitration provisions in their consumer contracts.[81] Even though federal judges are necessary participants

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75 15 U.S.C. § 15b.

76 *See, e.g.*, *Kristian v. Comcast Corp.*, 446 F.3d 25, 43 (1st Cir. 2006); *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 287 (4th Cir. 2007). *See id.* at 299 (Johnston, J., concurring in part and dissenting in part).

77 Charles E. Buffon & Joshua D. Wolson, *Antitrust Arbitration Counseling*, 19 Antitrust 31, 35 (2004) (citing *Morrison v. Circuit City Stores, Inc.*, 70 F. Supp. 2d 815, 826-27 (S.D. Ohio 1999)) ("Thus, an arbitration agreement that requires the parties to file their claim within one year after becoming aware of a claim has been held enforceable, even when the statute of limitations period would otherwise be longer."); *see, e.g.*, *James C. Just.*, 2008 WL 828923 at *5.

78 Leslie, *supra* note 23 at 417 (explaining reducing the statute of limitations from four years to one year effectively reduces damages by three-quarters); *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 299-300 (4th Cir. 2007) (Johnston, J. concurring in part and dissenting in part) ("[W]hile the Antitrust Act effectively requires a four year look-back period, the contract at issue would only allow the arbitrator to consider one year of anti-competitive behavior.").

79 *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 527 (S.D.N.Y. 1996) (noting that "a class action is not only the most efficient and convenient method to resolve this controversy, it is the only 'fair' and 'efficient' means to adjudicate this controversy").

80 *See id.* at 527 ("Moreover, although a large number of individuals may have been injured, no one person may have been damaged to a degree which would induce him to institute litigation solely on his own behalf.") (citing *Green v. Wolf Corp.,* 406 F.2d 291, 296 (2d Cir. 1968)).

81 *See Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922, 930 (1st Cir. 1984) (Breyer, J.) ("Competitors cannot *agree*, for example, to insist that their contracts . . . contain arbitration clauses, even though each individual competitor can make up his own mind to insist upon such a term in any, or all, of his contracts.").

in the conspiracy's success, too many judges seem more than willing to unwittingly join the conspiracy. For example, the Fifth Circuit has held that "[e]ven if the district court were to find that such an antitrust conspiracy [to impose arbitration clauses] existed, this finding would not compel the invalidation of the agreement to arbitrate…"[82] Other federal judges have held that private arbitrators approved by the defendants should determine whether federal claims alleging a conspiracy to arbitrate are valid.[83] Although federal courts should be interpreting antitrust law to thwart such conspiracies, judges often misapply equitable doctrines in ways that reinforce conspiracies among competitors to impose arbitration clauses and collectively block all customers for seeking redress in court. First, some courts interpret equitable principles to require antitrust plaintiffs to arbitrate their claims against members of a conspiracy with whom they have no contractual relations whatsoever, bootstrapping the arbitration clause that they signed with one member of the alleged conspirators to protect all of the co-conspirators as well.[84] Second, courts in antitrust cases apply arbitration clauses retroactively, including to antitrust violations that occurred *before* the defendants inserted the arbitration clauses into their contracts.[85] Such opinions afford antitrust defendants the opportunity to block antitrust litigation after the violation has been exposed, limiting antitrust plaintiffs' remedies and perhaps forcing plaintiffs into less convenient forums.[86] As always, judges deciding antitrust cases assert that "the underlying federal policy in favor of arbitration lead[s] to the conclusion that these clauses apply retroactively."[87] Thus, the misconception that Congress intended the FAA to create a pro-arbitration federal policy blocks antitrust plaintiffs from being able to pursue their claims in federal court.

Even when they do hear antitrust claims involving arbitration conspiracies, courts seem ill-equipped to address the issue. In *Ross v. American Express Co.*,[88] a federal judge presided over a bench trial on claims that a group of banks had conspired to impose mandatory arbitration clauses with class action waivers on their customers. The banks had formed

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82 *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1155 (5th Cir. 1992) (affirming district court order compelling arbitration).

83 *In re Universal Serv. Fund Tel. Billing Pracs. Litig.*, No. 02-MD-1468, 2003 WL 21254765, at *6 (D. Kan. May 27, 2003) ("In sum, the court rejects plaintiffs' argument that the arbitration clauses in this case are not enforceable because they are allegedly the product of an antitrust conspiracy.").

84 *Valspar Corp. v. E.I. DuPont de Nemours and Co.*, 15 F. Supp. 3d 928, 933-34 (D. Minn. 2014); *In re Titanium Dioxide Antitrust Litig.*, 962 F. Supp. 2d 840 (D. Md. 2013); *In re Universal Serv. Fund*, 300 F. Supp. 2d at 1140; Leslie, *supra* note 22 at 429.

85 *Kristian v. Comcast Corp.*, 446 F.3d 25, 64 (1st Cir. 2006); *In re Titanium Dioxide*, 962 F. Supp. 2d at 854-55.

86 *TradeComet.com LLC v. Google, Inc.*, 435 F. App'x 31, 34 (2d Cir. 2011); Leslie, *supra* note 23 at 434; Leslie, *supra* note 5 at 289-90.

87 *In re Titanium Dioxide Antitrust*, 962 F. Supp. 2d at 854-55; *Kristian*, 446 F.3d at 35 (applying arbitration clause retroactively in decision that notes the "strong federal policy of resolving any doubts concerning arbitrability in favor of arbitration"); *In re Currency Conversion Fee Antitrust Litig.*, 230 F.R.D. 303, 312 (S.D.N.Y. 2004), *modified on reconsideration*, 2005 WL 1705285 (S.D.N.Y. July 22, 2005); *In re Universal Serv. Fund*, 300 F. Supp. 2d at 1124 (citing 9 U.S.C. § 2 and collecting cases) (claiming that "[t]he FAA specifically gives full force and effect to such retroactive arbitration provisions.").

88 35 F. Supp. 3d 407, 415 (S.D.N.Y. 2014), *aff'd sub nom.*, *Ross v. Citigroup, Inc.*, 630 F. App'x 79 (2d Cir. 2015), *as corrected* (Nov. 24, 2015).

a group, called "the Arbitration Coalition,"[89] which held almost thirty meetings.[90] The members shared their arbitration-related documents with each other,[91] including their non-public plans.[92] They discussed how to prevent their customers from opting out or changing the arbitration provisions.[93] At times, they seemed to seek assurances that other banks were imposing similar arbitration clauses.[94]At one meeting, a consultant working with the Arbitration Coalition "exhorted the group that 'class actions are getting out of hand' and have become 'a gaming business' and a 'shakedown racket,' but that the group could 'beat' the problem 'by working together.'"[95] Although at first only two of the banks had class-action-barring arbitration clauses in their card member agreements, after all of the members of the Arbitration Coalition eventually imposed similar arbitration clauses with class action waivers, the Coalition disbanded.[96]

The trial judge ruled for the defendants, finding no conspiracy to impose arbitration clauses in violation of Section One. To reach this result, however, the judge committed a series of mistakes.[97] More important than any individual error, however, was the judge's inability to see that he had, *in fact*, found the agreement that he claimed the plaintiffs failed to prove. Summarizing the evidence in the case, the judge concluded that "[d]irect evidence … abounds" that the defendant "Banks had an agreement to explore collective advocacy efforts aimed at expanding the enforceability of arbitration clauses and to establish class-action-barring arbitration as an industry norm."[98] That is the conspiracy alleged by the plaintiffs: that the defendants "had an agreement … to establish class-action-barring arbitration as an industry norm."[99] Why did the judge simultaneously find the agreement and hold there was no agreement? His judgment was perhaps clouded by his sympathetic view toward arbitration. For example, in declining to treat conspiracies to impose arbitration clauses as per se illegal, as the Supreme Court had intimated in *Paramount Famous Lasky*,[100] the judge quoted the 1980s

89 *Id*. at 416.

90 *Id*. at 439.

91 *Id*. at 418.

92 *Id*. at 419.

93 *Id*. at 426, 429.

94 Leslie, *supra* note 23 at 437 ("These facts suggest that some banks were reluctant to impose arbitration clauses unless all of their major competitors were doing so as well, and that they wanted some assurances that all of the members of the Coalition were imposing arbitration clauses on their customers.").

95 *Ross*, 35 F. Supp. 3d. at 424.

96 *Id*. at 439.

97 Leslie, *supra* note 22 at 440-48 (noting how *Ross* court failed to appreciate how antitrust conspiracies operate, impermissibly used evidence of legal activity to counterbalance illegal activity, misunderstood the antitrust law for inferring an agreement, misapplied the analysis of individual plus factors, mishandled the defendants' inability to explain their suspicious activity, and improperly compartmentalized the plaintiffs' evidence).

98 *Ross*, 35 F. Supp. 3d at 452.

99 *Id*.

100 *See supra* note 23.

era Supreme Court cases that asserted the "federal policy favoring arbitration."[101] Ultimately, the *Ross* case exemplifies how judges may view evidence through a pro-arbitration lens that distorts antitrust analysis.

VII. RESPONDING TO THE PROBLEM OF ANTITRUST ARBITRATION

The expansion of arbitration warrants reconsidering certain antitrust doctrines and policies. This section considers two areas of antitrust enforcement: (1) the *Illinois Brick* rule that denies antitrust standing to plaintiffs who are indirect purchasers, and (2) the relationship between antitrust arbitration and merger review.

C. Reconsidering *Illinois Brick*

The proliferation of mandatory arbitration clauses invites reconsideration of the *Illinois Brick* rule. In *Illinois Brick Co. v. State of Illinois*,[102] the Supreme Court limited antitrust standing to direct purchasers, reasoning that they were the most motivated and the best situated plaintiffs to bring appropriate antitrust claims.[103] The Court also worried allowing indirect purchasers to pursue antitrust claims "would create a serious risk of multiple liability for defendants."[104]

The Supreme Court's pro-arbitration jurisprudence undermines the underlying logic of the *Illinois Brick* doctrine. Because direct purchasers are more likely to be bound by arbitration clauses – including those with class action waivers – cases like *American Express v. Italian Colors*[105] make it significantly less likely that direct purchasers will be able to sue antitrust violators in federal court.[106] The *Illinois Brick* majority assumed that antitrust claims would be litigated, not arbitrated, and that class actions were available to ensure that direct purchasers were able to combine their monetarily insignificant individual claims into one significant, cost-justified lawsuit.[107] But these assumptions are no longer valid. Direct purchasers are apt to be bound by arbitration clauses that prevent the most direct victims of antitrust violations from being able to litigate their claims. Ironically, the "privity of contract" that the Supreme Court in *Associated General Contractors. v. California State Council of Carpenters* considered a positive factor for determining antitrust standing may become a negative factor when that privity of contract results in the consumer being contractually prohibited from litigating or participating in a class

101 *Ross v. Am. Express Co.*, 35 F. Supp. 3d 407, 455 (S.D.N.Y. 2014), *aff'd sub nom.. Ross v. Citigroup, Inc.*, 630 F. App'x 79 (2d Cir. 2015), *as corrected* (Nov. 24, 2015) (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

102 431 U.S. 720 (1977).

103 *See id.* at 745 (noting that apportioning damages among direct and indirect purchasers would create "additional uncertainty [that] would further reduce the incentive to sue).

104 *Id.* at 730.

105 570 U.S. 228 (2013).

106 Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Illinois Brick*, 100 Iowa L. Rev. 2115, 2116 (2015).

107 *Id.* at 2122 ("At the time of the *Illinois Brick* decision, antitrust arbitration was not a possibility.").

action.[108] Because indirect purchasers are less likely to be hamstrung by arbitration clauses, they may be better positioned to hold antitrust violators accountable.

The *Illinois Brick* Court's concerns about multiple recoveries are also less pertinent in the new arbitration era. When direct purchasers are effectively blocked from pursuing antitrust damages because of arbitration clauses with class action waivers, they are less likely to receive any recovery at all. Affording standing to indirect purchasers creates the opportunity for at least one set of plaintiffs to recover.[109] And even these damages are unlikely to exceed single damages.[110] As a result, even if indirect purchasers are granted standing, antitrust violators will not pay more than treble damages. In sum, the Supreme Court's arbitration jurisprudence provides more ammunition for overruling *Illinois Brick*.[111]

D. Merger Review Policy

The ubiquity of antitrust arbitration also has implications for merger policy. After coming to play a dominant role in private antitrust litigation, arbitration has begun to insinuate itself into merger review. When the DOJ Antitrust Division sought to block Novelis' acquisition of Aleris Corp. in 2019 – fearing diminished competition in the market for flat-rolled aluminum – the government eschewed litigation. Instead of litigating the case in federal court, the DOJ filed a notice with the court that "because this merger challenge would turn on a single dispositive issue [product market definition], the parties have agreed to refer this issue to binding arbitration … to lessen the burden on the Court and reduce litigation costs."[112] This represented the first time the DOJ Antitrust Division had used arbitration to resolve a merger dispute.[113]

Although the DOJ won the arbitration,[114] the use of private arbitration to resolve merger disputes raises important issues of public accountability. For example, the arbitration agreement between the DOJ and the parties had significant redactions. In making his opinion, the arbiter rejected expert evidence of both parties' experts, reasoning that "the underlying data used by both economists was not sufficiently verifiable to be definitively relied upon."[115] Yet, no clear

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108 *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 533 (1983).

109 *See* Lemley & Leslie, *supra* note 106 at 2131 ("Because direct purchasers are less likely to bring claims after *Italian Colors*, the *Illinois Brick* Court's worry about double compensation is also substantially reduced.").

110 Christopher R. Leslie, *De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation*, 50 Ariz. L. Rev. 1009 (2008).

111 Lemley & Leslie, *supra* note 106 at 2132.

112 Plaintiff United States' Explanation of Plan to Refer this Matter to Arbitration, *United States v. Novelis, Inc. et al.*, No. 1:19-cv-02033-CAB (N.D. Ohio Sept. 9, 2019), https://www.justice.gov/atr/case-document/file/1200821/download.

113 Press Release, U.S. Dep't of Justice Antitrust Div., Justice Department Sues to Block Novelis's Acquisition of Aleris (Sept. 4, 2019), https://www.justice.gov/opa/pr/justice-department-sues-block-noveliss-acquisition-aleris-1.

114 Press Release, U.S. Dep't of Justice Antitrust Div., Justice Department Wins Historic Arbitration of a Merger Dispute (Mar. 9, 2020), https://www.justice.gov/opa/pr/justice-department-wins-historic-arbitration-merger-dispute.

115 *United States v. Novelis, Inc. et al.*, No. 1:19-cv-02033-CAB (N.D. Ohio Sept. 9, 2019) (Arquit, Arb.), https://www.justice.gov/atr/case-document/file/1257031/download.

established process for reviewing these decisions exists. Donald Trump's Assistant Attorney General for the Antitrust Division, Makan Delrahim, supported increasing usage of arbitration in DOJ antitrust matters, stating that DOJ "look[s] forward to applying the learning from this case to future matters."[116]

Instead of treating the merger review process as an opportunity to expand antitrust arbitration, competition policy goals would be better served if antitrust officials used the merger review process as a means of rolling back anti-consumer arbitration clauses. During the merger review process, antitrust enforcement officials have leverage over major firms. Attorneys at the Federal Trade Commission and the Antitrust Division of the Department of Justice can negotiate specific conditions in exchange for not challenging a proposed merger in court. Using the leverage during merger review makes sense because it focuses on arbitration in concentrated industries, where the anticompetitive and anti-consumer effects of mandatory arbitration are most stark.[117]

Government enforcement agencies can pursue structural or behavioral conditions. While traditional behavioral conditions often involve commitments to act – like licensing intellectual property[118] – the federal agencies could request commitments to refrain from certain actions. The agencies could, for example, insist that the merged firm not impose or enforce mandatory arbitration clauses generally, not impose class action waivers, or – at a minimum – not enforce pre-dispute arbitration clauses in antitrust disputes.[119] While parties in an antitrust dispute could still agree to shift their litigation to arbitration if both parties agree *post-dispute* to use an arbiter, that would be an informed decision agreed to at arm's length upon the advice of counsel, a much better scenario than consumers unwittingly surrendering their right to litigate by accepting a contract of adhesion that includes an arbitration clause.

VII. CONCLUSION

Courts justify their repeated embrace of antitrust arbitration because of the FAA's purported announcement of a federal policy favoring arbitration. But no such policy exists. America's antitrust regime depends on private litigation.[120] The evolution of arbitration to include antitrust claims risks undermining the development of antitrust common law and makes it exceedingly hard for private antitrust plaintiffs to pursue their claims. This reduces the likelihood of the victims of antitrust violations to receive compensation for their injuries and it undermines deterrence of antitrust violations. Judges, antitrust enforcement officials, and policymakers should be reticent to embrace shifting antitrust claims from litigation to arbitration. The risks of this transition identified by the Second Circuit in its *American Safety* opinion over half a century ago remain true today.

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116 Press Release, U.S. Dep't of Justice Antitrust Div., Justice Department Wins Historic Arbitration of a Merger Dispute (Mar. 9, 2020), https://www.justice.gov/opa/pr/justice-department-wins-historic-arbitration-merger-dispute.

117 Lemley & Leslie, *supra* note 28 at 56.

118 *See, e.g.*, *United States v. Google Inc.*, No. 1:11-cv-00688 (RLW), at 13-21 (D.D.C. Oct. 5, 2011), http://www.justice.gov/atr/cases/f275800/275897.pdf; *In re Silicon Graphics*, No. C-3626 (F.T.C. Nov. 14, 1995).

119 Lemley & Leslie, *supra* note 28.

120 Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 Ga. L. Rev. 1, 26 (2013).

FAIRNESS REQUIRES THE ELIMINATION OF FORCED ARBITRATION

By Robert S. Kitchenoff, Heidi M. Silton, Pamela Gilbert, Nigar A. Shaikh, and Geoffrey H. Kozen[1]

Mandatory arbitration and its kissing cousin, the class action waiver, are virtually ubiquitous in contracts of adhesion. The dominant party uses its superior market power to impose these provisions on its powerless counterparty to the transaction. Arbitration is routinely forced upon small businesses, consumers, investors, franchisees, software users, and even employees in situations where the power imbalance makes specious any claim that arbitration was bargained for or voluntary. It was not always so.

Arbitration began as a means for "merchants . . . to resolve disputes of fact, not law, under the customs of their industries, where the parties possessed roughly equivalent bargaining power."[2] But courts, whether jealously guarding their jurisdiction or for other parochial reasons, often refused to enforce these consensual arbitration agreements.[3]

Enter the Federal Arbitration Act ("FAA"),[4] signed into law by President Calvin Coolidge in February 1925.[5] The FAA provides that "an agreement in writing to submit to arbitration . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[6] The FAA's legislative history shows that the Act was not intended to make new law but rather to ensure that arbitration agreements in commercial and admiralty contracts were considered on the same footing as other contracts.[7] For decades the FAA was uncontroversial, applying primarily to commercial contracts between companies engaged in business across state lines.[8]

Over time the use of arbitration provisions changed. They went from being a shield, used to resolve factual disputes employing knowledgeable intermediaries in an industry,

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2 *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 362 (2011) (Breyer, J., dissenting).

3 Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Merger Approval*, 110 Nw. Univ. L. Rev. 1, 6 (2015) (citing Donald I. Baker & Mark R. Stabile, *Arbitration of Antitrust Claims: Opportunities and Hazards for Corporate Counsel*, 48 Bus. L. 395, 401 (1993)); *see also* David L. Noll, *Arbitration Conflicts*, 103 Minn. L. Rev. 665, 675 (2018).

4 Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1-307 (2012)).

5 Jon O. Shimabukuro & Jennifer A. Staman, Cong. Rsch. Serv., R44960, Mandatory Arbitration and the Federal Arbitration Act 2 (2017).

6 9 U.S.C. § 2.

7 *Concepcion*, 563 U.S. at 359-60.

8 *See Defenses Using Contract Terms & the "Savings" Clause*, Inst. L. & Pol'y, http://employeerightsadvocacy.org/our-work/ending-forced-arbitration-in-the-workplace/justice-denied/defenses-using-contract-terms-the-savings-clause/ (last visited July 7, 2021).

to a sword used to protect one of the parties from, and to bar the other party from using, the dispute resolution tools of the judicial system.

Similarly, the settled law also began to change. In the 1980s the Supreme Court first announced that the FAA evidenced "a national policy favoring arbitration."[9] Under the banner of this newly recognized policy, the Court moved aggressively to permit statutory rights claims to be determined through arbitration while simultaneously limiting the discretion of both federal and state courts to find arbitration clauses unenforceable. This trend accelerated in the ensuing decades as the Supreme Court has consistently refused to recognize any circumstances where a forced arbitration clause does not preclude litigation despite the savings clause in Section 2.[10]

I. BIG TECH'S RISE TO FORCED ARBITRATION

No industry has profited more from the Supreme Court's warping of the FAA into its modern form than Big Tech. Across the board, tech companies use their enormous market power to require all those who do business with them, whether employees, customers, vendors or, in Amazon's case, marketplace sellers, to waive all right to their day in court as a condition of platform access.

Google, Facebook, and Amazon are among the largest and most profitable companies the world has ever seen. What is more, each is firmly ensconced in a platform market and armed with massive collections of consumer data, rendering competition by upstarts close to impossible. Without meaningful competition and with high barriers to entry, the leaders of Big Tech possess and exert monopoly power in the markets in which they participate.

One way that Big Tech exerts—and abuses—that monopoly power is through forcing customers, employees, and others to agree to pre-dispute arbitration provisions, including class-action waivers. And no member of Big Tech has leaned into that abusive tactic more than Amazon.

At the heart of Amazon's business is the Amazon Marketplace, which operates to connect third-party sellers with Amazon's customers.[11] The arrangement gives sellers access to millions of Amazon buyers, and buyers access to millions of Amazon sellers all in one location.[12] Amazon has few, if any, meaningful competitors.

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9 *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

10 *See, e.g.*, *Dr's. Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (applying FAA to preempt state court law requiring first page notice of an arbitration clause in a franchise agreement); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) (prohibiting class arbitration unless specifically provided for in arbitration agreement); *Concepcion*, 563 U.S. at 352 (California law on contract unconscionability preempted despite the fact that it applies not only to arbitration contracts but to all contracts); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (upholding individual arbitration of antitrust claims over objection that individual arbitration makes vindication of a statutory right impossible); *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612 (2018) (same under the Fair Labor Standards Act).

11 *See Reach Millions of Business Customers*, Amazon Bus., https://sell.amazon.com/programs/amazon-business.html (last visited July 7, 2021).

12 *See id.*

With such an overwhelming majority of the online marketplace market, third-party sellers have little choice and no viable alternative to signing up for the Amazon Marketplace to access those Amazon purchasers. By accepting the terms they are presented with, third-party sellers sign away their right to go to court and to pursue remedies collectively with others similarly harmed.

II. ARBITRATION ISN'T FAST, INEXPENSIVE, VOLUNTARY, OR BARGAINED FOR

At a recent House Judiciary Committee hearing in connection with its consideration of the Forced Arbitration Injustice Repeal ("FAIR") Act,[13] Jacob Weiss, an Amazon Marketplace third-party seller testified:

> There's no way for an e-commerce company to be successful today without selling on Amazon's marketplace – it simply has too much of the online retail market under its control. But before Amazon would let me sell anything on its marketplace, it forced me to sign what it calls a Business Seller Agreement. I had no ability to negotiate the terms of that agreement and I had no ability to sell on Amazon without signing that agreement. And as I just mentioned, you simply can't survive in e-commerce without access to Amazon's marketplace. Obviously, this left me, and thousands of others like me, with only one choice: to sign Amazon's agreement.[14]

And critically, those terms require that any disputes between third-party sellers and Amazon be resolved through "binding arbitration . . . rather than in court."[15] Further, the "seller agreement also forbids any class arbitration or class actions."[16] Proponents of arbitration have long claimed that such clauses benefit both parties by reducing the cost and time required to resolve disputes.[17] But Mr. Weiss's testimony puts the lie to those platitudes.

Mr. Weiss offered eye-opening testimony describing in detail his two experiences arbitrating disputes with Amazon. Those experiences showcase how, far from speeding a resolution while conserving both parties' resources, arbitration instead ensures that

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13 H.R.963, 117th Cong. (2021-2022). The Bill has also been introduced in the Senate as S.505, and has been referred to the Senate Judiciary Committee.

14 *Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights, Before the H. Subcomm. on Antitrust, Com. & Admin. L. and H. Comm. on the Judiciary*, 117th Cong. 1 (2021) (statement of Jacob Weis, President & CEO, OJ Commerce LLC), https://docs.house.gov/meetings/JU/JU05/20210211/111171/HHRG-117-JU05-Wstate-WeissJ-20210211.pdf.

15 *See Amazon Services Business Solutions Agreement*, Amazon Seller Cent., https://sellercentral.amazon.com/gp/help/external/G1791?language=en_US (last visited June 9, 2021).

16 *Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights, Before the H. Subcomm. on Antitrust, Com. & Admin. L. and H. Comm. on the Judiciary*, *supra* note 14, at 1.

17 *See, e.g.*, Letter from Neil L. Bradley, Exec. Vice President, Chief Pol'y Officer, & Head of Strategic Advoc., U.S. Chamber of Com., to the Members of the U.S. Cong., (Mar. 8, 2021), https://www.uschamber.com/letters-congress/us-chamber-letter-the-forced-arbitration-injustice-repeal-fair-act.

justice is never achieved. In Mr. Weiss's experience, "the process is slow, expensive, and financially infeasible for many claims."[18]

The first arbitration Mr. Weiss brought against Amazon was because "Amazon charged . . . more for shipping than my agreement with Amazon allowed."[19] Amazon agreed to fix the problem going forward but refused to reimburse Mr. Weiss for substantial overcharges.[20] Amazon pulled out all the stops to drive up the cost of the arbitration.[21]. The arbitration cost Mr. Weiss $50,000 in arbitration fees alone, in addition to the attorneys' fees he paid.[22] Even after Mr. Weiss prevailed, Amazon refused to pay the award until a court issued an order enforcing the arbitrator's judgment, which again raised Mr. Weiss's costs.[23] In total, after the costs of arbitration and legal fees, Mr. Weiss recovered very little, despite Amazon's wrongdoing.[24] The second arbitration had been pending for 9 months at the time of Mr. Weiss's testimony—hardly a quick and efficient resolution.[25]

Mr. Weiss's experience is more emblematic than unique. Few actually believe that arbitration agreements and class action waivers are freely negotiated by the parties.[26] Rather, they are imposed by dint of Big Tech's market power. Nor can you just choose not to purchase or contract with a company that imposes arbitration on its customers. Like it or not, interacting with Big Tech companies is a necessity of modern life. Interested in having a cell phone? Every major carrier requires their customers to submit to individual arbitration.[27] Interested in using social media to keep up with your friends and family? Instagram requires arbitration.[28] Considering those realities, claiming that consumers can avoid arbitration by passing on a cell phone or a computer is really no answer at all.

Likewise, any claim that by agreeing to an arbitration provision not expressly permitting class arbitration means the consumer knowingly agreed to waive his or her right to proceed as a class is not a realistic statement of the consumer experience. Consumer products impose arbitration on consumers even when there are no contracts. Forced arbitration provisions are, for example, "buried deep in the warranties, user manuals,

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18 *Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights, Before the H. Subcomm. on Antitrust, Com. & Admin. L. and H. Comm. on the Judiciary*, *supra* note 14, at 1.

19 *Id.* at 3.

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 *See, e.g.*, Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic* (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/ ("The employee or consumer has no real choice or ability to negotiate the terms of the arbitration clause.").

27 *See, e.g.*, *My Verizon Wireless Customer Agreement*, Verizon (June 9, 2021), https://www.verizon.com/legal/notices/customer-agreement/.

28 *See Terms of Use*, Instagram (Dec. 20, 2020), https://www.facebook.com/help/instagram/termsofuse.

or . . . a website's terms of use."[29] Even the Chief Justice of the U.S. Supreme Court has admitted to glossing over the fine print in contracts of adhesion.[30] Importantly, that legal fiction is anything but neutral. Instead, it operates as a ratchet, precluding consumers from enforcing more and more of their legal rights.[31]

It is no wonder, then, that both the House Judiciary Subcommittee on Antitrust and the Senate Judiciary Committee's Antitrust Subcommittee, have recently recommended strengthening private enforcement by eliminating forced arbitration clauses and limits on class actions.[32]

III. FORCED ARBITRATION IS INIMICAL TO THE ENFORCEMENT OF THE ANTITRUST LAWS

Forced arbitration is neither neutral nor benign. Although its proponents portray arbitration as a cheaper, quicker alternative to litigation that benefits all parties,[33] the evidence shows otherwise. Forced arbitration fails to provide a meaningful forum to resolve disputes in almost all cases. It reinforces the dominant party's market power, suppresses valid claims and competition, and extinguishes the rights of small companies, consumers, and workers. Prohibiting class actions, including class actions in arbitration, compounds the disadvantage to consumers and small businesses, particularly in situations where damages may be small, or claims may be complex and costly to pursue.[34] In other words, the market power that lets companies insist on individual arbitration serves to insulate them from laws designed to curb that very same market power.

More specifically, forced arbitration clauses keep claims and rulings away from the public eye; they overwhelmingly favor corporations through limitations on discovery, the arbitrator selection process favors corporations who are familiar with receptive arbitrators, and arbitration is often prohibitively expensive for smaller players. Nowhere is that truer than in antitrust actions. As Justice Kagan explained in her scorching dissent in *Italian Colors*:

> [An arbitration clause] imposes a variety of procedural bars that . . . make pursuit of the antitrust claim a fool's errand . . . even if [a party]

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29 *See* Scott Medintz, *Forced Arbitration: A Clause for Concern*, Consumer Reps., Jan. 30, 2020, https://www.consumerreports.org/mandatory-binding-arbitration/forced-arbitration-clause-for-concern/.

30 *See* Debra Cassens Weiss, *Chief Justice Roberts Admits He Doesn't Read the Computer Fine Print*, ABA J. (Oct. 20, 2010), https://www.abajournal.com/news/article/chief_justice_roberts_admits_he_doesnt_read_the_computer_fine_print.

31 *See generally* Jerett Yan, *A Lunatic's Guide to Suing for $30: Class Action Arbitration, The Federal Arbitration Act and Unconscionability After* AT&T v. Concepcion, 32 Berkeley J. Emp. & Lab. L. 551 (2011).

32 *See* Press Release, Jerrold Nadler, Statement for Subcommittee Hearing on "Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights" (Feb. 11, 2021), https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4368; Press Release, Richard Blumenthal, Blumenthal Leads Introduction of Legislation Opening the Courthouse Doors to Consumers, Workers (Mar. 1, 2021), https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-leads-introduction-of-legislation-opening-the-courthouse-doors-to-consumers-workers.

33 *See, e.g.*, Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 Yale L.J. 2994, 3008 n.49 (2015).

34 *See, e.g.*, Medintz, *supra* note 29 (discussing how the "potential financial recovery of an individual claim" disincentivizes pursuing "small-dollar claims").

> has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse . . . . [As such,] a company could use its monopoly power to protect its monopoly power, by coercing agreement to contractual terms eliminating its antitrust liability. [35]

Or, as Jacob Weiss testified: "[t]he system is completely rigged against us and other small to mid-sized business owners."[36]

One of the most significant harms of forced arbitration is that these private proceedings undermine *stare decisis* and the development of legal precedents. Furthermore, arbitration allows violations to continue without public detection, which makes it incredibly difficult to remedy wrongdoings on a broad scale and decreases the deterrent effect of the antitrust laws. In her 2019 testimony before the Senate Judiciary Committee, Benjamin N. Cardozo School of Law Professor Myriam Gilles stated:

> [M]andatory, pre-dispute arbitration provisions pose a more enduring threat to our polity because these provisions force disputes into hermetically-sealed, secret proceedings -- denying the American public the transparency, openness and accountability that are central to our civil justice system.[37]

Because most arbitration decisions are not recorded or made public, they do not create legal precedent that other entities can rely on to put them on notice of unlawful conduct and to guide their compliance with antitrust laws.[38] As Professor Gilles also notes, these closed-door proceedings create "grave inefficiencies" since the applicability of arbitrators'

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35 *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 240-41 (2013) (Kagan, J., dissenting).

36 *Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights, Before the H. Subcomm. on Antitrust, Com. & Admin. L. and H. Comm. on the Judiciary*, *supra* note 14, at 1.

37 *(Forced) Arbitration in America: Suppressing Claims Undermining Corporate Accountability, and Perpetuating Injustice Before the S. Judiciary Com.*, 116th Cong. 3 (statement of Myriam Gilles, Professor of Law, Benjamin N. Cardozo School of Law) (2019), https://www.judiciary.senate.gov/imo/media/doc/Gilles%20Testimony.pdf.

38 *See, e.g.*, Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 Univ. Ill. L. Rev. 371, 415-16 (2016) (discussing how if landmark antitrust cases such as *Twombly* and *Credit Suisse* had been deliberated in private arbitration instead of the judicial process, the impact on Sherman Act jurisprudence would have been immense); Lillian T. Howan, *The Prospective Effect of Arbitration*, 7 Indus. Rels. L.J. 60, 62 (1985) ("In contrast to the judicial doctrine of stare decisis, an arbitrator's interpretation of the contractual relation is not technically binding on a future arbitrator. Instead, the arbitrator must exercise independent and impartial judgment in each case."); *see also* Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 Univ. Mia. L. Rev. 831, 835 (2002) (noting that a hallmark of mandatory, binding arbitration is the "eliminati[on] [of] the claimant's right to present claims to a judge or jury . . . preventing litigants from setting public precedents"); Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679, 681 (2018) ("The relative invisibility of particular disputes and their outcomes in arbitration thus undermines the regulatory function of private-enforcement actions, which serve not only as a dispute resolution mechanism but also as an ex post alternative or supplement to *ex ante* prescriptive rules of conduct.").

rulings is limited to the claimant in the arbitration, and thus arbitrators cannot order relief on a systemic scale.[39]

Arbitration also benefits antitrust violators like Big Tech by severely limiting the scope of discovery. For example, "arbitration does not generally use the full panoply of depositions, interrogatories, document requests, and motions to compel that are common in federal court."[40] Additionally, third-party discovery is limited or non-existent.[41] Finally, the protections in place under the federal rules to protect against spoliation and perjury do not generally exist in arbitrations, potentially encouraging discovery abuse.[42] And though limited discovery does reduce costs, it presents unique challenges to successful antitrust litigation where plaintiffs generally need more discovery to prove their claims, as '"much of the information needed to prove that a monopolist is monopolizing is under the control of the monopolist.'"[43] Discovery requirements are also more onerous in antitrust cases because claimants must provide detailed evidence showing market definition.[44] Without sufficient discovery, many meritorious antitrust claims are doomed to fail.[45]

Though Big Tech and other companies have tried to justify these provisions as being faster and cheaper for claimants,[46] the ultimate results of these provisions clearly benefit corporate defendants, as they prevent parties from bringing claims and result in awards of less money than in litigation. As Deepak Gupta and Lina Khan note: "By both suppressing claims and yielding outcomes less favorable to workers and consumers, arbitration most likely transfers wealth upwards."[47] And these provisions work. Data submitted by Facebook, Google, Amazon, and Apple in 2019 in response to questions from the House Antitrust Subcommittee show that very few employees, customers, and contractors file

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39 *(Forced) Arbitration in America: Suppressing Claims Undermining Corporate Accountability, and Perpetuating Injustice Before the S. Judiciary Com.*, *supra* note 37, at 3.

40 Lemley & Leslie, *supra* note 3 at 14; *see also* Thomas Campbell, Roxane Busey, & Peter Koch, *Arbitrating Antitrust Claims—The Road Less Traveled*, 19 ANTITRUST 8, (Fall 2004)("The procedural formalities of litigation—depositions, interrogatories, document requests, objections to discovery, motions to compel, motions to dismiss, third-party discovery, motions for summary judgment—are generally disfavored. Their use, if allowed, is much less extensive.").

41 Lemley & Leslie, *supra* note 3 at 13 ("[T]hird-party discovery may be difficult or impossible depending on the circumstances."); *see also* Donald I. Baker & Mark R. Stabile, *Arbitration of Antitrust Claims: Opportunities and Hazards for Corporate Counsel*, 48 BUS. LAW. 395, 410 (1993).

42 Lemley & Leslie, *supra* note 3 at 16 (citing Kristen M. Blankley, *Taming the Wild West of Arbitration Ethics*, 60 UNIV. KAN. L. REV. 925, 928-29 (2012)).

43 *Id.* at 15 (quoting Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. STATE UNIV. L. REV. 99, 140 (2006)).

44 *See, e.g.,* Einer Elhauge, *How* Italian Colors *Guts Private Antitrust Enforcement by Replacing It with Ineffective Forms of Arbitration*, 38 FORDHAM INT'L L.J. 771, 771-72 (2015).

45 *See* Baker & Stabile, *supra* note 41 at 425 ("Adequate discovery often is key to the resolution of antitrust disputes.").

46 *See, e.g.*, David Lazarus, *Column: AT&T's New Arbitration Clause Isn't Doing You Any Favors*, L.A. TIMES (Mar. 19, 2021), https://www.latimes.com/business/story/2021-03-19/column-arbitration-clauses (detailing a call with an AT&T spokesperson who described arbitration as "faster [and] less expensive").

47 Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POL'Y REV. 499, 503 (2017).

arbitration claims against any of the giants.[48] Between January 1, 2014, and September 1, 2019, for example, Google contractors initiated only three arbitration claims, and Google employees only initiated 11 arbitration claims.[49]

Furthermore, those brave enough to litigate against Big Tech must deal with the repeat player effect and the likelihood that they will be awarded much less for the trouble they went through to submit a claim.[50] Several recent investigations show that arbitrators were more likely to rule in favor of corporate defendants in order to get repeat business, and that arbitrators were more likely to award significantly less money to claimants than juries in state and federal trials.[51] For example, a 2015 Economic Policy report showed the results from a 2011 study comparing the outcomes of 1,213 mandatory arbitration cases administered by the American Arbitration Association with the outcomes of employment discrimination cases in federal courts and non-civil rights employment cases in state courts over a five-year period.[52] The study found that, on average, plaintiffs' overall economic outcomes were 6.1 times better in federal court than in mandatory arbitration ($143,497 versus $23,548) and 13.9 times better in state court than in mandatory arbitration ($328,008 versus $23,548).[53] Because of this repeat player effect and the likelihood claimants will lose or be awarded much smaller damages, many also encounter difficulties trying to retain lawyers willing to represent them.[54] As David Gottlieb, employment attorney in New York who represents workers in arbitration notes: "What's really happening is that our judicial system is getting privatized . . . in a way that really favors one side, the employer."[55]

Other common arbitration clauses in contracts that favor Big Tech are those that mandate a venue that is geographically convenient for the corporate defendant; severely limit the ability to appeal; shift arbitration costs to the worker, consumer, or small business; limit the time within which plaintiffs must pursue arbitration despite longer statutes of

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48 *See* David Dayden, *Tech Companies' Big Reveal: Hardly Anyone Files Arbitration Claims*, Am. Prospect (Nov. 26, 2019), https://prospect.org/power/tech-companies-hardly-anyone-files-arbitration-claims/.

49 *See id.*

50 *See, e.g.,* Alexia Fernández Campbell & Alvin Chang, *There's a Good Chance You've Waived the Right to Sue Your Boss*, Vox, Sept. 7, 2018, https://www.vox.com/2018/8/1/16992362/sexual-harassment-mandatory-arbitration (discussing how "arbitrators can be biased toward employers who repeatedly pick them to handle their cases").

51 *See, e.g.*, Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System*,' N.Y. Times (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html; Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Econ. Pol'y Inst. (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/; Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Emp. Rts. & Emp. Pol'y J. 189, 199 (1997); Mark Gough, *A Tale of Two Forums: Employment Discrimination Outcomes in Arbitration and Litigation*, 74 ILR Rev. 875 (2020) (finding that rates of employee wins in arbitration are lower than wins in state and federal court).

52 *See* Stone & Colvin, *supra* note 26.

53 *See id.*

54 *(Forced) Arbitration in America: Suppressing Claims Undermining Corporate Accountability, and Perpetuating Injustice Before the S. Judiciary Com.*, *supra* note 37, at 5 (citing *AT&T Mobility LLC v. Concepcion*, 563, U.S. 333 (2011) (Breyer, J. dissenting) ("What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?")).

55 *See* Campbell & Chang, *supra* note 50 (internal quotations omitted).

limitations; and prohibit arbitrators from awarding certain kinds of relief, including treble damages or injunctive relief.[56] The inability to award treble damages is especially critical because treble damages serve to deter future antitrust violations.[57]

IV. CLASS ACTIONS ARE NECESSARY FOR ANTITRUST ENFORCEMENT

Additionally, a growing number of contracts now also contain class action waivers, which have been upheld as enforceable by the Supreme Court, even where the cost makes bringing the claim too prohibitively expensive for any rational actor to pursue.[58] Indeed, a study of the top 100 Fortune 500 companies of 2018 found that 81 of those companies used consumer arbitration agreements, and of those 81 companies with consumer arbitration agreements, 78 companies had class action waivers in their arbitration agreements.[59] As Professor Gilles notes "[u]nder these class-banning arbitration clauses, any claimant must bear 100% of all the costs of proceeding in arbitration by herself; her claim cannot be joined with those of any other arbitral claimant as a way of distributing costs and risks."[60]

Congress created the class action vehicle "to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."[61] Additionally, the aggregation of claims into a sizeable judgment deters misconduct and incentivizes companies to right wrongdoings quickly.[62] Consumers and small businesses with antitrust claims are particularly in need of a claims aggregation process. As Harvard Law Professor Einer Elhauge notes: "Now that the courts have interpreted federal antitrust law to require an economically rigorous showing on market definition, power, and effects, antitrust claims require an economics expert, precluding individual low-stakes suits and thus requiring some sort of class procedure to share the costs."[63] Furthermore, Congress created antitrust laws with the idea that private antitrust litigation would "provide a

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56 *(Forced) Arbitration in America: Suppressing Claims Undermining Corporate Accountability, and Perpetuating Injustice Before the S. Judiciary Com.*, *supra* note 37 at 11 (internal citations omitted).

57 Deborah A. Garza, et al., *Report and Recommendations* 246, Antitrust Modernization Com. (2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf ("Treble damages compensate for the reality that some anticompetitive conduct is likely to evade detection and challenge. If a company realizes that its anticompetitive conduct has only a 50 percent chance of being detected, and if its liability were limited to single damages, it would be more likely to engage in that conduct because the reward exceeds the risk.").

58 *See, e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013) ("[T]he fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.") (emphasis in original).

59 Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. Davis L. Rev. Online 233, 234 (2019).

60 *(Forced) Arbitration in America: Suppressing Claims Undermining Corporate Accountability, and Perpetuating Injustice Before the S. Judiciary Com.*, *supra* note 37 at 5.

61 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

62 *See* Medintz, *supra* note 29.

63 Elhauge, *supra* note 44 at 773.

significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations."[64]

By barring class actions, it becomes too costly and therefore irrational for individuals to pursue separate claims, "functionally immuniz[ing]" antitrust violators from private suit.[65] As Jacob Weiss notes:

> It simply makes no sense for a business to risk tens of thousands of dollars in arbitration, legal, and expert fees to recover a few thousand dollars. But as a business owner, recovering a few thousand dollars can sometimes be the difference between making payroll or having to shut down. In sum, Amazon's class action waiver effectively insulates Amazon from ever even having to face justice.[66]

V. THE EVOLUTION OF SUPREME COURT'S FAA PRECEDENT

To say that current Supreme Court precedent favors forced arbitration and class-action arbitration waivers would be an understatement. But that was not always the case. For the first sixty years of its existence, the Federal Arbitration Act was uncontroversial, and had little to no application to consumer disputes.[67] That began to change in 1984 with the Supreme Court's decision in *Southland Corp. v. Keating*, which for the first time recognized a theretofore unknown "national policy favoring arbitration" such that the FAA "withdrew the power of the states to require a judicial forum for the resolution of claims."[68] The Court, for the first time, held that the FAA applied in state courts, and superseded state laws that effectively compelled resolution of contractual disputes through the courts.[69]

The Supreme Court has subsequently reaffirmed and extended its *Southland* holding.[70] It can now be said that the FAA preempts any state law or judicial interpretation that

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64 *AAI Transition Report on Competition Policy to the 44th President of the United States* 222, Am. Antitrust Inst. (Oct. 6, 2008), https://www.antitrustinstitute.org/work-product/aai-transition-report-on-competition-policy-to-the-44th-president-of-the-united-states/ (citing *Reiter v. Sonotone Corp.,* 442 U.S. 330, 344 (1979); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) ("The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators."); *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987) (Clayton Act "bring[s] to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate").

65 Lemley & Leslie, *supra* note 3 at 38 (citing *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 245 (2013) (Kagan, J., dissenting) ("No rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands.")).

66 *Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights, Before the H. Subcomm. on Antitrust, Com. & Admin. L. and H. Comm. on the Judiciary*, *supra* note 14 at 2.

67 Lemley & Leslie, *supra* note 3 at 6 ("Although Congress passed the FAA in 1925, federal courts did not meaningfully address the arbitrability of antitrust claims until the 1960s.").

68 465 U.S. 1, 10 (1984).

69 *Id.*

70 Noll, *supra* note 3 at 679-82 (discussing the "arbitration revolution" that arose out of and expanded the dicta favoring arbitration in *Southland*).

prevents mandatory arbitration of any individual type of dispute.[71] It has also ruled that the FAA prevents states from singling out arbitration provisions for "suspect status," such as requiring them to appear on the first page of an agreement, or in bold.[72]

The Court's more recent decisions have centered on the FAA's "savings clause," which states that an arbitration agreement may be invalidated "upon such grounds as exist at law or in equity for the revocation of any contract."[73] In other words, on its face the FAA allows courts to hold arbitration agreements unenforceable based on factors that would invalidate the contract as a whole—including unconscionability.

Over the past decade, however, the Supreme Court has systematically excised that provision from the statute Congress passed, ruling that no state-law rules may be enforced in the context of arbitration if they stand as an obstacle of the Court's "national policy favoring arbitration."[74] While the interpretation of contracts is generally a matter of state not federal law, the Supreme Court has held state law unconscionability analysis, for example, to be preempted by the FAA. State law opinions, such as *Discover Bank v. Superior Court*,[75] and *Thibodeau v. Comcast Corp.*,[76] analyzing arbitration agreements and class action waiver provisions in contracts of adhesion under general state law contract provisions are no longer feasible.

In *AT&T Mobility LLC v. Concepcion*, the Defendant was alleged to have charged consumers sales tax for phones it had advertised as free.[77] Although the arbitration provision in each consumer's contract contained a class-action waiver and requirement to arbitrate individually, the consumers argued that California law clearly provided that class-action waivers are unconscionable when contained in certain types of consumer contracts.[78] The Ninth Circuit agreed with the consumers, holding that California law did not conflict with the FAA because *any* consumer class waiver was considered unconscionable, whether the contract contained an arbitration clause or not.[79]

The Supreme Court disagreed. While it paid lip service to the FAA's saving clause, it found that even arbitration-neutral unconscionability analysis was preempted by the FAA when it imposed restrictions on arbitration such as requiring class procedures.[80] It ultimately concluded that California law was preempted because it interfered with

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71 *State Courts and the Federalization of Arbitration Law*, 134 Harv. L. Rev. 1184, 1185 (2021) ("[T]he modern Supreme Court has interpreted § 2 of the [FAA] as a substantive commitment to a federal arbitration policy that preempts state laws contrary on their face or in application.").

72 *Dr's. Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)

73 9 U.S.C. § 2 (2012).

74 *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

75 36 Cal.4th 148, 163-173 ((2005).

76 912 A.2d 874, 887 (Penn. 2006).

77 563 U.S. 333, 399 (2011).

78 *Id.*

79 *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 856 (9th Cir. 2009).

80 *Concepcion*, 563 U.S. at 344.

the Supreme Court's slant on the FAA's objective: creating and promoting a bare-bones dispute resolution process.[81]

The Supreme Court doubled down on the *Concepcion* ruling two years later in *American Express Company v. Italian Colors Restaurant*.[82] There, merchants who accepted American Express challenged American Express's class arbitration waiver on the grounds that it fundamentally conflicted with the policies underlying the federal antitrust laws.[83] The merchants argued that American Express used its market power both to require acceptance of individual arbitration *and* to charge anti-competitive fees.[84] The merchants cogently argued that the expert costs associated with proving antitrust violations—which often run into the hundreds of thousands or millions of dollars—would render individual arbitration cost-prohibitive in every case, eliminating the deterrence function Congress wrote into the Clayton Act.[85]

The Supreme Court again elected to squelch consumer rights in favor of arbitration. Though it allowed that the FAA could be overridden by a "contrary congressional command," the majority held that neither the Sherman Act nor the Clayton Act contained an explicit section precluding waiver of class action procedures in arbitration.[86] To add insult to injury, the Court also opined that necessarily prohibitive costs of pursuing individual arbitration should not be viewed as preventing the effective vindication of the merchants' rights under the antitrust laws because the merchants retained "the *right to pursue*" a remedy.[87]

VI. WHAT TO DO

Given the Supreme Court's recent decisions, including most prominently *Concepcion*, and *Italian Colors*, the solution to the abuse of forced arbitration and class action waivers will not lie in the Courts. It has indeed been suggested that the Supreme Court's interpretation of the FAA in cases such as *Concepcion* may well be the death of class actions.[88] But the sky is not necessarily falling. Big Tech and Consumer Products Companies are highly sensitive to economic pressure and negative publicity. Congress will need to act, and consumers, consumer advocates, academicians, and lawyers will need to organize, lobby, and use social media to sensitize Congress and corporations to the detriments of forced arbitration.

While corporations do not have a soul or a moral compass, they are quite sensitive to public opinion and, it turns out, to the cost of arbitration. Despite having touted its cost

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81 *Id*.

82 570 U.S. 228 (2013).

83 *Id*. at 233.

84 *Id*. at 245 (Kagan, J., dissenting).

85 *Id*. at 231.

86 *Id*. at 233-34. This is, of course, absurd given that the Sherman Act was passed in 1890 and the Clayton Act in 1914 - 35 and 10 years before the FAA. Nor would one expect either statute to make a reference to class actions which, in their modern form, didn't exist until the 1966 Amendments to the Federal Rules of Civil Procedure.

87 *Id*. at 235 (emphasis in original).

88 *See generally* Brian Fitzpatrick, The Conservative Case for Class Actions 5 (2019).

effectiveness for both parties to disputes, Amazon removed the arbitration provisions from retail customer contracts in May 2021 when lawyers representing aggrieved consumers organized more than 75,000 separate, individual arbitrations against Amazon.[89] Deepak Gupta, who represented AT&T's customers in *Concepcion* dubbed this the "cynicism of forced arbitration."[90] Gupta stated: "It was never about making it easier for customers to resolve disputes – it was about killing claims . . . Once Amazon saw it would have to face an avalanche of claims, it decided to walk away." Class actions might be more beneficial than arbitrations after all.

Similarly, Google workers banded together to stage a 20,000 person walk out in December 2018 in protest of the mandatory arbitration provision in Google's employment agreements for employee sexual harassment claims.[91] Google agreed to change the practice and, after further pressure, agreed to abandon forced arbitration altogether in employee disputes.[92] Facebook followed Google's lead and removed forced arbitration provisions from its employment contracts.[93] Mass actions may not be the solution in all situations but they have demonstrated the hypocrisy of the benefits of forced, pre-dispute arbitration and the vulnerability of Big Tech to having its bluff called.[94]

Antitrust law is having a moment, and opposition to forced arbitration and class action waivers is gaining momentum.[95] If this trend continues it will be at the expense of Big Tech, which finds itself a target of both Democrats and Republicans, albeit for different reasons not relevant here. Six new antitrust bills specifically targeting the practices of Big Tech have been passed by the House of Representatives Judiciary Committee.[96] If enacted by the full Congress, these six bipartisan bills would prohibit Big Tech from: preferring

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89 *See* Amanda Robert, *Amazon Drops Arbitration Requirement After Facing Over 75,000 Demands*, ABA J. (June 2, 2021), https://www.abajournal.com/news/article/amazon-drops-arbitration-requirement-after-facing-75000-demands. It is also worth noting that Amazon replaced the consumer arbitration provision with a forum-selection provision that requires bench-trial litigation in Amazon's home of King County, Washington. *See Conditions of Use*, Amazon, https://www.amazon.com/gp/help/customer/display.html?nodeId=GLSBYFE9MGKKQXXM (last visited June 9, 2021).

90 Michael Corkery, *Amazon Ends Use of Arbitration for Customer Disputes*, N.Y. Times, July 22, 2021, https://www.nytimes.com/2021/07/22/business/amazon-arbitration-customer-disputes.html.

91 *See* Daisuke Wakabayashi, Erin Griffith, Amie Tsang, & Kate Conger, *Google Walkout: Employees state Protest Over Handling of Sexual Harassment*, N.Y. Times, Nov. 1, 2018, https://www.nytimes.com/2018/11/01/technology/google-walkout-sexual-harassment.html.

92 Daisuke Wakabayashi, *Google Ends Forced Arbitration for All Employee Disputes*, The N.Y. Times, Feb. 21, 2019, https://www.nytimes.com/2019/02/21/technology/google-forced-arbitration.html.

93 *See id.*

94 The FAIR Act is clear that arbitration remains an option when, after a claim arises, both parties elect to arbitrate. It only prohibits pre-dispute mandatory arbitration where forcing arbitration on consumers, employees, small business, and others may serve to prevent claims from being brought. Thus, Section 5 of the Act states: "Nothing in this Act . . . shall be construed to prohibit the use of arbitration on a voluntary basis after the dispute arises."

95 For example, in addition to the FAIR Act, the Ending Forced Arbitration of Sexual Assault & Sexual Harassment Act has been introduced in both the Senate and the House and referred to their respective Judiciary Committees. Paige Smith, *Lawmakers Crossing Aisle to End Harassment Claim Arbitration,* Bloomberg Law, July 14, 2021, https://news.bloomberglaw.com/daily-labor-report/lawmakers-push-to-end-forced-arbitration-of-harassment-claims.

96 *See Cecilia Kang & David McCabe, House Lawmakers Are Considering 6 Bills Aimed at Big Tech*, N.Y. Times, June 23, 2021, https://www.nytimes.com/2021/06/23/technology/big-tech-antitrust-bills.html.

their own products over those of competitors who use their platforms;[97] holding more than a quarter of a competitor's stock or profits, taking over competitors;[98] creating its own products to disadvantage competitors using its platform;[99] and seeking to shift State Antitrust proceedings to friendlier courts.[100] The bills would also increase merger filing fees to provide the DOJ and FTC with more resources to enforce antitrust laws.[101] They would further allow users to take some or all of their data if they leave the platform.[102] If passed, these business model disrupting bills would fundamentally and significantly change the competitive landscape for Big Tech, and might even require the breakup of one or more of these companies. Importantly, the American Choice and Innovation Online Act and the Platform Competition and Opportunity Act provide for private rights of action, including treble damages, costs, and attorneys' fees, and simple interest on actual damages in certain instances.

In addition, the Senate is considering the Competition and Antitrust Law Enforcement Reform Act, introduced by Senator Klobuchar, which would modernize and beef up antitrust regulation, enforcement, and penalties.[103] Senator Klobuchar also recently introduced her own Big Tech reform measure – the Health Misinformation Act of 2021 – which would amend Section 230 of the Communications Act to "strip online platforms such as Facebook Inc. and Twitter Inc. of their liability protections if their technologies spread misinformation related to public-health emergencies, such as the Covid-19 pandemic."[104]

While these landmark antitrust bills are important, ending forced arbitration and class action waivers in **all** antitrust, consumer, employment, and civil rights disputes[105] is still the most important way to level the playing field for consumers, entrepreneurs, small business, employees, and victims of civil rights violations. The FAIR Act reflects years

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97 The American Choice and Innovation Online Act, H.R. 3816 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/3816/text?r=43&s=1.

98 The Platform Competition and Opportunity Act of 2021, H.R.3826 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/3826/text?r=5&s=1.

99 The Ending Platform Monopolies Act, H.R.3825 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/3825/text.

100 The State Antitrust Enforcement Venue Act of 2021, H.R.3460 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/3460.

101 The Merger Filing Fee Modernization Act of 2021, H.R. 384, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/3843/text. This bill has also been introduced in the Senate as S.228, sponsored by Senators Klobuchar and Grassley, https://www.congress.gov/bill/117th-congress/senate-bill/228/text.

102 The Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021 (the "Access Act"), H.R. 3849 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/3849/text.

103 Press Release, Amy Klobuchar, Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement (Feb. 4, 2021), https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement.

104 Siobhan Hughes, *Bill Would Strip Social Media of Protections for Health Misinformation*, Wall St. J., July 22, 2021, https://www.wsj.com/articles/bill-to-strip-social-media-of-protections-for-health-misinformation-11626976800.

105 *See id.*

of work by groups such as COSAL to bring this issue to the fore.[106] The Act passed the House in 2019 but could not muster the necessary support in the Senate. It is likely that the Act will, once again, pass the House. Passage in the Senate remains the challenge, and Big Tech and other large corporations will do their best to protect their turf.

There is much work yet to be done but the tide just may be turning.

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106 *See* Statement, Heidi Silton, President of COSAL, The Committee to Support the Antitrust Laws Urges Congress to Pass the Forced Arbitration Injustice Repeal Act (FAIR Act) (Feb. 11, 2020), https://static1.squarespace.com/static/5ed9557b62edf55d38fcd5bf/t/60256319e3e03868421365d6/1613062939352/COSAL+Statement+in+Support+of+the+FAIR+Act.pdf.

PATENTS AND ANTITRUST IN THE PHARMACEUTICALS INDUSTRY

By DeForest McDuff, Ph.D., Mickey Ferri, Ph.D., and Noah Brennan, M.I.A.[1]

I. INTRODUCTION

Patent rights are a core element of protecting innovation in the United States. The pharmaceutical industry is often identified as an example of the patent system working well, by compensating innovators for research and development and then allowing competition after innovators have been rewarded. Over the past 10-15 years, however, there has been increased concern of anticompetitive behavior associated with prolonged patent protection, which has led to a number of antitrust lawsuits attempting to restrain the long duration of exclusivity.

Antitrust enforcement efforts have had mixed success to date, depending primarily on whether the efforts are focused on patent-based strategies versus market-based strategies. Patent-based strategies relying purely on seeking additional patents on existing products, such as evergreening and patent thickets, have been difficult to address in the antitrust domain because of constitutional rights to seek patents. By contrast, market-based strategies impacting the availability of competing products, such as product hopping and reverse payments, have shown to be more susceptible to antitrust enforcement. The distinction in effectiveness appears to stem from the legal system's stronger ability to identify anticompetitive conduct in the market domain, compared to the pursuit of patentable innovations in good faith.

Ultimately, antitrust enforcement efforts in the last decade have shown that foundational principles of protecting competition through the antitrust laws serve the public interest well, with some room for policy improvement around the edges, not necessarily limited to antitrust law, in order to address aspects of market exclusivity that are specific to the pharmaceutical industry.

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This article proceeds as follows: Section 2 describes the economic framework for patent protection and why it has caused potential for certain economic incentives and unintended consequences. Section 3 describes antitrust enforcement as a framework for limiting potential excesses of the patent system that may cause anticompetitive behavior. Section 4 provides a public policy evaluation of antitrust enforcement and other policy initiatives designed to limit extreme outcomes that may be socially undesirable. Section 5 concludes.

II. PATENT PROTECTION

A. A Brief History

The grant of exclusive property rights vested in patents has a long history, tracing back to medieval guild practices in Europe.[2] The very first Article of the U.S. Constitution established the intellectual property clause providing for the patent system, which instructs Congress to "promote the Progress of Science and useful Arts, by securing ***for limited Times*** to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" (*emphasis added*).[3] The Patent Act of 1790 originally included a patent term duration of 14 years from patent issuance.[4]

The legal system has reinforced the effectiveness of the patent system, developing rules and procedures to enforce the rights of patentees and their assignees. For example, Supreme Court Justice Joseph Story, the intellectual property expert of the early courts, offered this perspective in *Ex parte Wood*: "[T]he inventor has …a property in his inventions; a property which is often of very great value, and of which the law intended to give him the absolute enjoyment and possession ... involving some of the dearest and most valuable rights which society acknowledges, and the constitution itself means to favour."[5] Congress has adapted the law to improve the system, including the Patent Act of 1836 that introduced an examination system that is still in use today, whereby each patent application is scrutinized by technically trained examiners to ensure that the invention conforms to the law and constitutes an original advance in the state of the art.[6]

The term length of issued patents has also undergone revision over time. The Patent Act of 1836 originally increased the term from 14 years to 21 years from issuance. In 1861, the term was changed to 17 years. The signing of the 1994 Uruguay Round Agreements Act changed the patent term from 17 years from the date of issuance to 20 years from the earliest filing date, which remains active today.[7]

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2 B. Zorina Khan & Kenneth L. Sokoloff, *The Early Development of Intellectual Property Institutions in the United States*, 15 J. Econ. Perspectives 233, 235 (2001).

3 Robert P. Merges, *The Hamiltonian Origins of the U.S. Patent System, and Why They Matter Today*, 104 Iowa L. Rev. 2559, 2569 (2019); Khan & Sokoloff, *supra* note 2 at 235.

4 Patent Act of 1790 (1 Stat. 109-112), at 110.

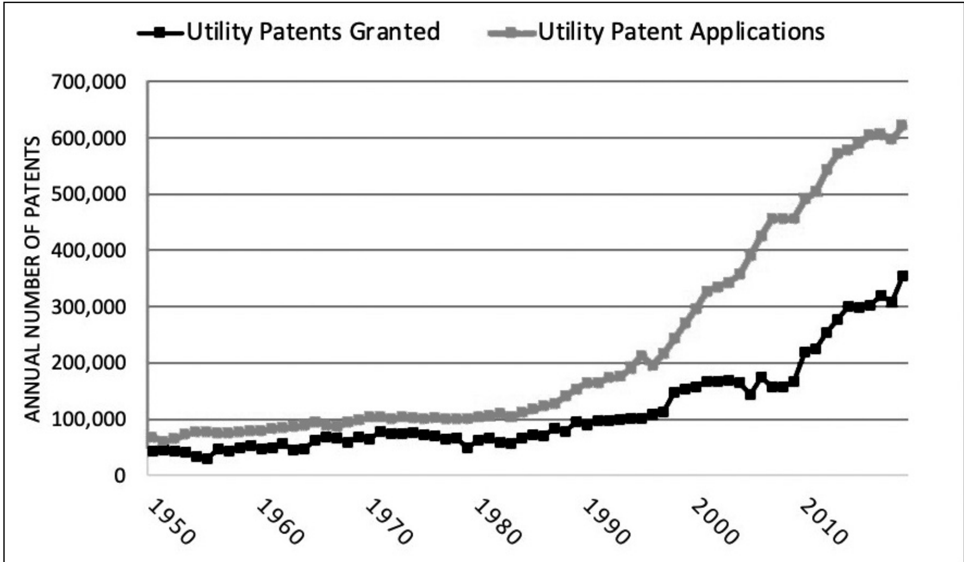
5 *Ex parte Wood*, 22 U.S. 603, 608 (1824); *see* Khan & Kenneth L. Sokoloff, *supra* note 2 at 236.

6 Robert P. Merges, *The Hamiltonian Origins of the U.S. Patent System, and Why They Matter Today*, 104 Iowa L. Rev. 2559, 2568-2569 (2019); Khan & Sokoloff, *supra* note 2 at 236.

7 *See* 35 U.S.C. § 154. *See also* U.S. Patent and Trademark Office, 2701 Patent Term [R-10.2019], https://www.uspto.gov/web/offices/pac/mpep/s2701.html.

In the last few decades, the number of patents and patent applications has increased dramatically. See Figure 1. For example, data from the U.S. Patent and Trademark Office (USPTO) show that the number of utility patent applications increased from just over 100,000 in 1979 to over 600,000 in 2019. Similarly, the number of utility patents granted grew from nearly 50,000 in 1979 to more than 350,000 in 2019. Said another way, there were nearly 1,000 new patents granted per day in 2019.[8] In the context of the increasing volume of patents in recent years, it is worth evaluating the role of patents in the overall economy, including the economic trade-offs between patent holders, consumers, and potential competition.

Figure 1. U.S. Patent Activity (1950-2019)



A comparison between patent grants, U.S. gross domestic product (GDP), and population growth show that growth in patents has become more correlated with growth in GDP in recent years, with both growing faster than the population.[9] This trend can be seen by separating the data into two time periods: (1) 1950 to 1985 and (2) 1985 to 2019.[10] First, from 1950 to 1985, GDP growth far outpaced both patent growth and population growth. See Figure 2.A. Annual GDP in 1985 was 14.5 times its 1950 level, while annual patent grants were 1.7 times their 1950 level and population was 1.5 times its 1950 level. By comparison, from 1985 through 2019, GDP growth closely aligned with patent growth, while population growth was far lower. See Figure 2.B. Using 1985 as the base year,

8 Data are from United States Patent and Trademark Office, https://www.uspto.gov/web/offices/ac/ido/oeip/taf/h_counts.htm.

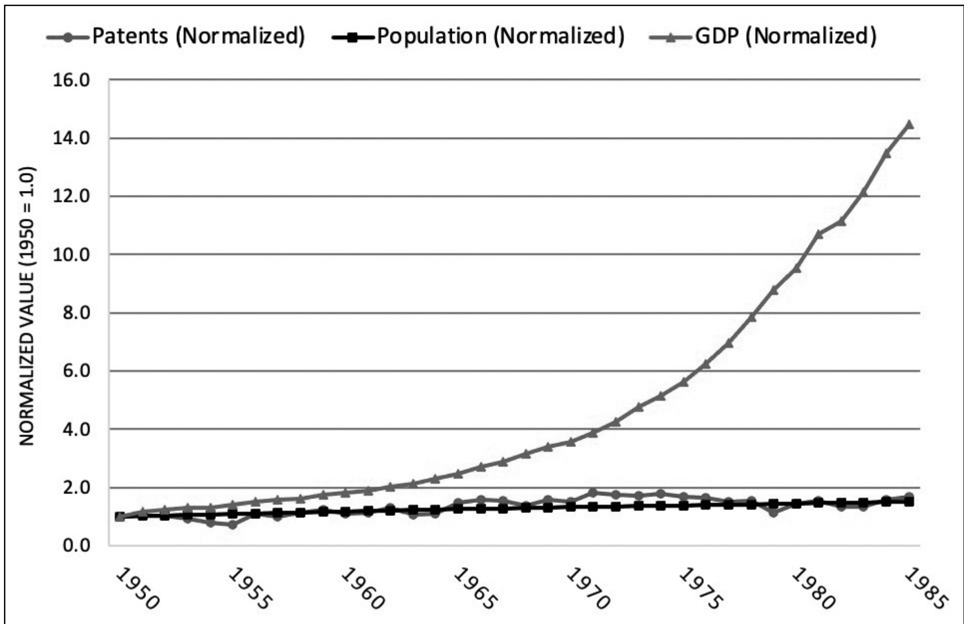
9 GDP data are from https://fred.stlouisfed.org/series/GDP/#0. Population data are from https://www.macrotrends.net/countries/USA/united-states/population.

10 1985 was selected for this analysis because it is the approximate midpoint between the start of the data analyzed (1950 to 2019). The pattern found here would generally be robust to any base year from 1979 through 1997, which can be seen in the similar slopes of GDP (Normalized) and Patents (Normalized) in Figure 2.A, compared to the far flatter slope of Population (Normalized).

the 2019 levels of both GDP and patent grants were 4.9 times their 1985 levels, while population growth was just 1.3 times its 1985 level.

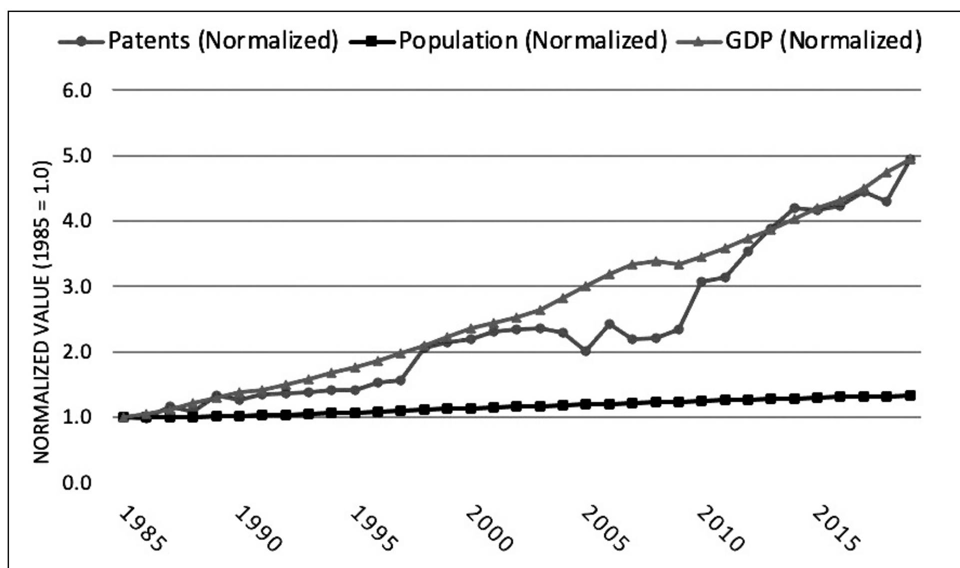
The pattern that growth in patents has been aligned with GDP growth beginning in 1985, yet not in the prior period, is generally consistent with commentary and analysis from a number of sources on the increasing contribution of capital (which includes intellectual property such as patents) and decreasing contribution of labor to the U.S. economy over the past few decades.[11]

Figure 2.A Patents, Population, and GDP (1950-1985)



11 *See generally, e.g.*, Erik Brynjolfsson & Andrew McAfee, The Second Machine Age: Work, Progress, and Prosperity in a Time of Brilliant Technologies (2014); Thomas Piketty, Capital in the Twenty-First Century (2017).

Figure 2.B Patents, Population, and GDP (1985-2019)



B. Economic Incentives and Unintended Consequences

As a matter of economics, patent rights are typically justified based on allowing inventors to recoup returns on investments in research, development, and regulatory approval.[12] Economically, a profit opportunity is larger for a patent holder who has the exclusive right to make, use, or sell a patent protected product as compared to a profit opportunity in a competitive market, with competition from other suppliers. The large potential profit opportunity from a patented drug with high demand can incentivize research and development, which can lead to scientific and medical advances that benefit consumers and patients. Data from the USPTO indicate that patents related to "Pharmaceuticals and Medicines" comprise approximately 5% of all utility patents granted.[13]

Patent protection in pharmaceuticals is of particular importance because pharmaceutical research and development costs for individual drugs can be substantial, with many drugs costing billions of dollars and a decade or more to bring a new drug to market. One study published in JAMA in 2020 found that the median capitalized research and development investment to bring a new drug to market was estimated at $985.3 million and the mean

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12 See, *e.g.*, Congressional Research Service, Drug Pricing and Pharmaceutical Patenting Practices at Summary (2020), https://crsreports.congress.gov/product/pdf/R/R46221.

13 From 2008 to 2012, there were 49,930 patents in "Pharmaceuticals and Medicines." *See* U.S. Patent and Trademark Office, Patenting By NAICS Industry Classification, https://www.uspto.gov/web/offices/ac/ido/oeip/taf/naics/naics_stc_wg5/09naics_stc_wg.htm.

From 2008 to 2012, there were 1,022,395 patents granted overall. *See* U.S. Patent and Trademark Office, Patenting By NAICS Industry Classification, https://www.uspto.gov/web/offices/ac/ido/oeip/taf/naics/naics_stc_wg5/31naics_stc_wg.htm.

49,930 ÷ 1,022,395 = 4.9%.

investment was estimated at $1.3 billion.[14] Other studies have reported similar findings, including estimated mean costs of developing a single new therapeutic agent in the multiple billions of dollars when all economic costs are included, with recent estimates in economic literature and medical literature of $2 to $3 billion per new drug.[15]

In addition to the monetary research and development costs, substantial time typically passes from the initial drug discovery, research & development, and patent filing, through clinical trials and regulatory approval until the eventual product launch. One study in 2016 indicated that the process of drug development can take 15 years, with 3–5 years of drug discovery, 1–2 years of pre-clinical time, 6–7 years of clinical trials, and 1–2 years of regulatory approval.[16] Another study found that the average time from the start of clinical testing to marketing approval was 8.1 years.[17] Further, there is an economic risk that the drugs may never make it to market. One study found that the overall probability of clinical success (*i.e.*, the likelihood that a drug that enters clinical testing will eventually be approved) was just 12%.[18]

In pharmaceuticals, the period of exclusive patent protection can sometimes be limited if the duration of development is long. For example, if a product launches 13 years after the earliest filing date, the patent holder may have limited years of exclusivity to follow. From a profit maximization perspective, the patent holder will often have strong economic incentives to make as much profit as possible during this period of exclusivity. When generic competition enters, revenues and profits earned by the patent holder can fall substantially. For example, according to an FDA study using data on generic entry from 2015 through 2017, generic prices were lower than the reference product by an average of 39% with one generic competitor, 54% with two generics, and 68% or greater as generic competition increases.[19]

Despite the importance of patent protection in the pharmaceutical industry, the economic dynamics described above can lead to some unintended consequences. When pharmaceutical products successfully launch under patent protection, there can be large annual profits during the period before the relevant patents expire. For patent holders, extending patent protection by a few more years may be worth hundreds of millions or even billions of dollars by delaying generic competition that can take market share from the reference product. Strategies to stave off competition can be immensely valuable, even if for just a short time longer. The following figure illustrates the potential impact and thus dollars at stake for a patent holder facing generic competition, such that extending patent

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14 Oliver J. Wouters, et al., *Estimated Research and Development Investment Needed to Bring a New Medicine to Market, 2009-2018*, 323 JAMA 844, 844 (2020).

15 *Id.*; *see* Joseph A. DiMasi, et al., *Innovation in the Pharmaceutical Industry: New Estimates of R&D costs*, 47 J. Health Econ. 20, 20–33 (2016); Jorge Mestre-Ferrandiz, et al., *The R&D Cost of a New Medicine*, Off. Health Econ., Dec. 2012, at 5–6, 19–24.

16 Holly Matthews, et al., *"Omics"-Informed Drug and Biomarker Discovery: Opportunities, Challenges and Future Perspectives*, Proteomes 3 (Sept. 2016).

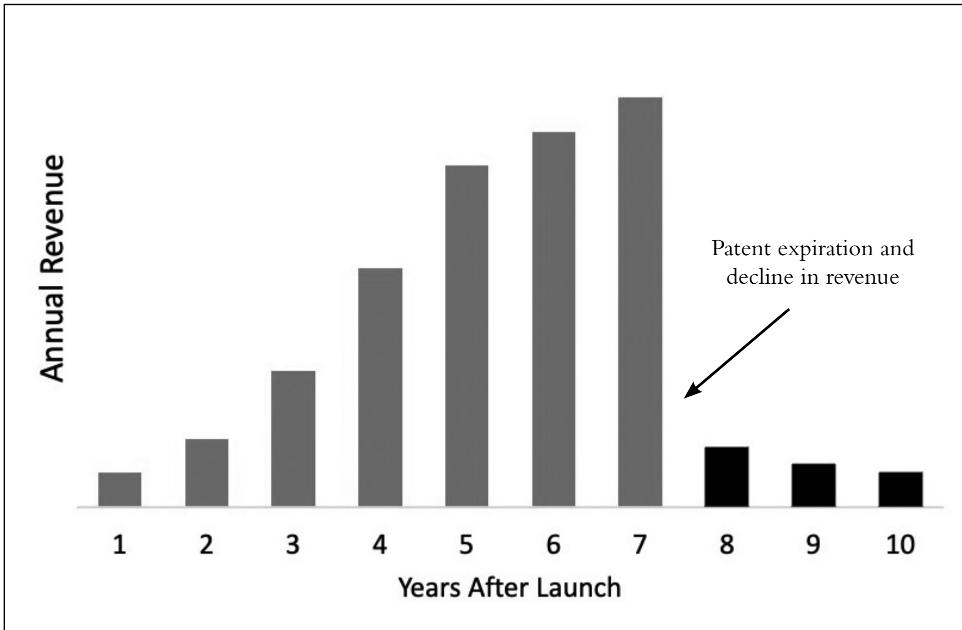
17 Joseph A. DiMasi, et al., *Innovation in the Pharmaceutical Industry: New Estimates of R&D costs*, 47 J. Health Econ. 20, 24 (2016).

18 *Id.* at 23.

19 Ryan Conrad & Randall Lutter, *Generic Competition and Drug Prices: New Evidence Linking Greater Generic Competition and Lower Generic Drug Prices*, U.S Food & Drug Admin. 9 (Dec. 2019).

protection for a few additional years may have a substantial impact on the overall revenue earned over the product life cycle:

Figure 3. Illustrative Revenue Profile of a Pharmaceutical Product



In the case of pharmaceuticals and patents, incentives provided by patent rights have the potential to create economic misalignment with the goals of the system. In recent years, patent holders have sought ways to extend the period of exclusive rights for products,[20] through strategies such as evergreening and product hopping, all discussed in more detail in Section 3. While each patent has a term limited to 20 years from earliest filing date, the collective set of patents provides a period of exclusivity that can be much longer. The trade-off between exclusivity to encourage innovation, on the one hand, and lower prices for consumers, on the other hand, has been a historical source of policy tension. In 1984, for example, Congress passed the Hatch-Waxman Act to tweak the balance between the competing interests of innovation and competition by rewarding generic competitors who challenge patents held by pharmaceutical companies.[21] The Act provides for an Abbreviated New Drug Application ("ANDA") process for generic drug manufacturers, whereby rather than undergoing lengthy preclinical and clinical periods, they simply have to show bioequivalence to an already-approved drug.[22]

In recent years, the economic incentives provided by the patent system have led to some products with an extremely long duration of market exclusivity. For example, one recent study found that the 12 top grossing drugs of 2017 had an average duration of

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20 *See, e.g.*, Congressional Research Service, *supra* note 12 at Summary.

21 Colleen Kelly, *The Balance Between Innovation and Competition: The Hatch-Waxman Act, the 2003 Amendments, and Beyond*, 66 Food & Drug L.J. 417, 417 (2011).

22 *Id.* at 417.

market exclusivity of 38 years (and up to nearly 50 years for some products!),[23] well beyond the 20-year duration that is provided by any single patent.

All of this begs relevant questions for law and policy, such as "How long is too long?" and "If we agree that some market exclusivity appears to be too long, what is the best law and policy to curb the duration?" We address those questions in the context of antitrust enforcement as one potential pathway in Section 3 and more broadly in public policy in Section 4.

III. ANTITRUST ENFORCEMENT

A. Overview

Given the economic incentives to extend patent protection for branded pharmaceutical products, it is not surprising that some companies have identified strategies to extend patent life. The most notable and observed strategies in the pharmaceutical industry can broadly be described as: (1) patent-based strategies, which relate to seeking additional and sometimes excessive numbers of patents (*e.g.*, evergreening and patent thickets); and (2) market-based strategies, which relate to seeking patent protection from product-based coordination (*e.g.*, product hopping and reverse payments). In response to each of these strategies, would-be competitors and government regulators have alleged potential anticompetitive behavior on the part of the patent holders by employing these strategies. In this section, we discuss what these strategies are, why anticompetitive behavior has been alleged, and how these cases have been evaluated by the courts.

Antitrust enforcement efforts by potential competitors, government regulators, and others can best be understood as an attempt to use existing antitrust laws to "fix" the potential economic distortions and/or unintended consequences described above. As discussed, patent protection provides rights granted by the U.S. Constitution designed to encourage, protect, and reward innovation. In some cases, however, it appears that competition may be stifled or at least reduced due to individual incentives to extend patent protection beyond what patent policy is designed to protect.

It is important to distinguish the difference between the meaning of "patent monopoly" for an invention compared to "monopoly power" in the context of antitrust law. When a patent holder has a patent monopoly right, the patent legally protects the patent holder's particular invention and enables it to maintain its temporary monopoly over use of a specific invention. Once the patent expires and the exclusivity period ends, the patent holder loses its legal right to a monopoly. By contrast, monopoly power in an antitrust context refers to market power and certain market shares that have been achieved via competition and/or anticompetitive conduct.[24] According to the Supreme Court, market power is "the ability to raise prices above those that would be charged in a competitive market,"[25] and

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23 I-MAK, Overpatented, Overpriced: How Excessive Pharmaceutical Patenting is Extending Monopolies and Driving up Drug Prices 6-7 (2018), https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0055-d-0036-155042.pdf.

24 *See, e.g.*, Thomas G. Krattenmaker, et. al., *Monopoly Power and Market Power in Antitrust Law*, 76 Geo. L.J. 241 (1987), available at https://www.justice.gov/atr/monopoly-power-and-market-power-antitrust-law.

25 *NCAA v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85, 109 n.38 (1984); *see, e.g.*, Krattenmaker, *supra* note 24.

monopoly power (at least for Sherman Act § 2 cases) is "the power to control prices or exclude competition."[26] Yet the exclusive right over a specific invention, as granted by a patent, does not necessarily lead to market or monopoly power for the product as a whole if the patented product competes with other products, patented or not, in a competitive marketplace. For pharmaceutical products, there are important distinctions between patent exclusivity (*i.e.*, exclusive rights to practice an invention), product exclusivity (*i.e.*, exclusive rights to produce a product free of generic competition), and market exclusivity (*i.e.*, being the only product in a competitive market).[27] Indeed, the Supreme Court has stated: "a patent does not necessarily confer market power upon the patentee."[28]

From a policy perspective, we want to encourage competition and legitimate patent protection, but we would also like to discourage certain market exclusivities that may result from unintended consequences of the patent system. Potential distortion can occur, for example, if companies use the patent system to prevent or discourage competition above and beyond the duration or scope of what the patent system is designed to protect. In such a circumstance, the patent protection being granted to a company may provide *too much* economic reward at the expense of competition.

The solution, some have argued, is to bring antitrust actions against companies who have sought to extend exclusivity protection beyond what is intended by the law. If actions are taken with the intent of stifling competition rather than pursuing protectable innovations in good faith, then antitrust enforcement may be a potential solution. But, how to distinguish between legitimate patent protection and violations of antitrust law remains a challenge and was articulated at the heart of the landmark California Supreme Court opinion *In re Cipro* on reverse payments:[29]

> To protect competition in the marketplace, antitrust law prohibits agreements that create or perpetuate monopolies. Patent law, in contrast, grants temporary monopolies to inventors to encourage the development of useful innovations. We consider here a crucial question at the intersection of these two bodies of law: what limits, if any, does antitrust law place on the ability of a patent holder to make agreements restricting competition during the life of its patent?

This question has additionally been raised in the courts in a number of contexts, described as follows.

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26 *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956); *see, e.g.*, Krattenmaker, *supra* note 24.

27 Admittedly, some of these terms are confusingly interchanged, such as the FDA granting drug products "market exclusivity" for being a new chemical entity, though the term in that context really means product exclusivity with no generic competitors rather than being exclusive of any market competition.

28 *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 45 (2006).

29 *In re Cipro Cases I & II*, 61 Cal.4th 116, 129-130 (2015).

B. Patent-Based Strategies

Patent-based strategies refer to efforts by patent holders to prolong patent exclusivity by covering an existing product with numerous or additional patents. While individual patents provide 20 years of invention exclusivity, pharmaceutical products may enjoy market exclusivity from generic competition as long as one or more valid patents covering the products remain. Those commercializing patented products benefit if the period of restricted competition is strengthened or lengthened through additional patents. Two main types of patent-based strategies have been engaged in by patent owners and challenged in the courts are commonly known as: (1) patent thickets and (2) evergreening.

[1] Patent thickets. One patent-based strategy pharmaceutical manufacturers are alleged to have engaged in is the creation of "patent thickets" around profitable drugs. A patent thicket refers to many patents covering a single product such that would-be competitors deem it too costly or risky to challenge all of the patents (*i.e.*, they are deterred by the "thicket" of patent protection). The effect is that the patent holder is able to reap the economic rewards of unchallenged product exclusivity.

Evidence indicates that the prevalence of patent thickets is growing over time. For example, the average number of patents per drug rose from 1.9 for drugs approved between 1985 and 1987 to 6.1 for drugs approved between 2012 and 2014.[30] Patent thickets are especially salient for blockbuster drugs, with an average of 71 issued patents (!) among the 12 top grossing drugs of 2017.[31]

Branded drug manufacturers argue that creating complex blockbuster drugs is difficult work that requires numerous subsequent innovations. Detractors claim the patent thickets may contain obvious or minor incremental innovations that provide little consumer benefit and detract from potential generic or biosimilar use. Examples of patent thicket allegations, or allegations that could impact the ability to maintain a patent thicket, in the antitrust context include:

- *In Re: Humira (Adalimumab) Antitrust Litigation* (N.D. Ill. 2020): The plaintiffs in this case (indirect purchasers of Humira) alleged that defendant AbbVie "created a thicket of intellectual property protection so dense that it prevented would-be challengers from entering the market with cheaper biosimilar alternatives" in violation of § 2 of the Sherman Act. Despite noting that AbbVie's 100-plus patents contributed to Humira's profitability, the court ruled this did not constitute an antitrust violation, stating: "AbbVie has exploited advantages conferred on it through lawful practices and to the extent this has kept prices high for Humira, existing antitrust doctrine does not prohibit it." Further, the court found AbbVie's conduct before the USPTO in pursuing the patents at issue was not objectively baseless and concluded with respect to patents and antitrust

30 C. Scott Hemphill & Bhaven N. Sampat, *When Do Generics Challenge Drug Patents?*, 8 J. Empirical Legal Stud. 613 Figure 1: Patents Per Drug (2011); OnPoint Analytics, *Patent Proliferation: A 30-Year Increase in the Number of Patents Per Drug*, Sept. 12, 2016, https://onpointanalytics.com/pharma/patent-proliferation/.

31 I-MAK, *supra* note 23 at 6-7.

law that: "[t]he patent prosecution system is no doubt imperfect, but… the proper fix is not to use antitrust doctrine…."[32]

- *In Re: Lantus Direct Purchaser Antitrust Litigation* (1st Cir. 2020): The plaintiffs in this case (direct purchasers of insulin glargine) alleged that defendant Sanofi improperly listed a patent in the FDA Orange Book as purportedly covering the insulin product "thereby delaying competition in the insulin glargine market and resulting in inflated prices" in violation of § 2 of the Sherman Act. At first, the district court dismissed the Sherman Act claims on the reasoning that the decision to list the patent was not objectively baseless. However, the First Circuit vacated the district court's dismissal, finding that Sanofi is potentially liable under antitrust laws. Although Sanofi argued that any improper patent listings were objectively reasonable, the First Circuit stated that it must show "that the challenged conduct be both reasonable and in good faith," and remanded for further proceedings to answer these questions.[33]

[2] Evergreening. A second patent-based strategy frequently implemented is called "evergreening," which involves seeking additional patents on an already patented product as the existing patents approach expiration. Rather than face competition as an unprotected product, patent exclusivity is effectively reset (*i.e.*, "evergreened") with the issuance of the subsequent patents. Research indicates seeking additional patents is frequently pursued among manufacturers of branded pharmaceutical products, with 78% of drug products associated with newly issued patents were existing drugs as opposed to new drugs.[34] Further, 70% of the 100 best-selling drugs extended patent protection at least once, and 50% extended more than once.[35]

The debate over whether evergreening constitutes anticompetitive behavior typically centers around the significance and timing of the follow-on development. Patent holders often describe subsequent patents as innovative developments that benefit consumers, while detractors of the practice allege that follow-on patents are trivial and intended to earn more profits rather than improve patient health. Examples of evergreening allegations in the antitrust context include:

- *Bristol-Myers Squibb Co. v. Ben Venue Labs., Inc.* (D.N.J. 2000): The defendants in this case asserted counterclaims against Bristol-Myers Squibb, alleging fraudulent procurement and enforcement of patents in violation of § 2 of the Sherman Act. The district court noted that "[A]ntitrust liability under section 2 of the Sherman Act may arise when a patent has been procured by knowing and willful fraud, the patentee has market power in the relevant market, and has used its fraudulently obtained patent to restrain competition," and concluded the Hatch-Waxman defendant had standing to bring Sherman Act claims.[36] After an April 2001 Federal Circuit opinion affirmed a district court ruling

32 *Humira (Adalimumab) Antitrust Litigation*, 465 F. Supp. 3d 811 (N.D. Ill. 2020) (appeal filed).

33 *Lantus Direct Purchaser Antitrust Litigation*, 950 F.3d 1 (1st Cir. 2020).

34 Robin Feldman, *May Your Drug Price Be Evergreen*, 5 J.L. & Biosciences 590, 590, 597 (2018).

35 *Id.*

36 *Bristol-Myers Squibb Co. v. Ben Venue Labs., Inc.*, 90 F. Supp. 2d 540, 542 (D.N.J. 2000).

that certain patent claims were invalid,[37] the parties settled litigation,[38] which included the mutual release from all actions based on any alleged monopolization or attempted monopolization.

- Robert Nichols, et al. v. SmithKline Beecham Corp. (E.D. Pa. 2005): Plaintiffs in a class-action suit against GlaxoSmithKline alleged that GSK violated § 2 of the Sherman Act by "stockpiling and causing patents to be listed with the [FDA] in a manner which enabled [GSK] to unlawfully extend its market monopoly for Paxil by delaying FDA approval of generic paroxetine hydrochloride." Specific allegations include misleading the USPTO into issuing invalid patents and defrauding the FDA by submitting those patents for listing in the Orange Book to wrongfully exclude competition by generic manufacturers. After a 2004 Federal Circuit opinion in another case found a key patent invalid, and GSK delisted two others patents from the Orange Book, the parties in this case began settlement negotiations. Ultimately, the court approved a $65 million settlement paid by GSK to end this antitrust litigation.[39]

Indeed, some pharmaceutical follow-on patents have even been alleged to be "double patents," *i.e.*, second patents that are not patentably distinct from claims in a first patent. Though typically addressed through litigation related to patent validity (*i.e.*, not antitrust), double patents represent the same core issue: whether patent protection has been improperly extended. Examples of recent cases involving double patenting include:

- Sun Pharmaceutical Industries, Ltd. v. Eli Lilly and Co. (Fed. Cir. 2010): The Federal Circuit affirmed a district court judgment that asserted claims in that case were invalid for obviousness-type double patenting over an existing patent. The Federal Circuit noted two types of double patenting: (1) statutory, which prohibits a patent covering the same invention, and (2) obviousness-type, which prevents a later patent from covering a slight variation of an earlier patented invention. The Federal Circuit acknowledged the market exclusivity granted by a patent when it stated the specification of the earlier issued patent may be consulted to assess the utility of an invention, since double patenting rejections "rest on the fact that a patent has been *issued* and later issuance of a second patent will continue protection, beyond the date of the expiration of the first patent" (emphasis in original).[40]

- Immunex Corp. v. Sandoz, Inc. (Fed. Cir. 2020): In a 2018 bench trial, the district court held that defendant Sandoz failed to show the asserted claims of the patents-in-suit were invalid. Although the Federal Circuit agreed that the plaintiff in this case did not run afoul of double patenting laws (because double patenting can only apply if the patents share common ownership), the Federal Circuit emphasized the importance of the double patenting doctrine to reduce improper

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37 *Bristol-Myers Squibb Co. v. Ben Venue Labs., Inc.*, 246 F.3d 1368, 1371, 1381 (Fed. Cir. 2001).

38 Stipulation of Dismissal of Action with Prejudice, Doc. No 220, *Bristol-Myers Squibb Co. v. Ben Venue Labs., Inc.*, No. 97-6050-WHW (D.N.J. Dec. 20, 2001).

39 *Robert Nichols, et al. v. SmithKline Beecham Corp.*, 2005 WL 950616, at *1-3, *8 (E.D. Pa. Apr. 22, 2005).

40 *Sun Pharmaceutical Industries, Ltd. v. Eli Lilly & Co.*, 611 F.3d 1381, 1389 (Fed. Cir. 2010).

patent protection, stating: "Obviousness-type double patenting is a judicially-created doctrine aimed at preventing claims in separate patents that claim obvious variants of the same subject matter where granting both exclusive rights would effectively extend the life of patent protection."[41] In May 2021, the Supreme Court denied a petition to review the case.

C. Market-Based Strategies

Market-based strategies refer to efforts by a patent holder to prolong patent exclusivity through actions intended to influence the marketplace outside of, or in addition to, the pursuit of additional patents (*e.g.*, by impacting the availability of competing products). While strategies of this type are in some sense intended to preserve exclusivity, that goal is sought by actions that are separate from patent protection. Two main types of market-based strategies have been engaged in by patent owners and challenged in courts: (1) product hopping and (2) reverse payments.

[1] Product hopping. Product hopping refers to transitioning consumers from a product that is approaching the end of its patent exclusivity to a new, but similar, patent-protected product. The similar product may have a new form factor (*e.g.*, switching from/to a capsule, tablet, injection, or other form), a new drug release profile (*e.g.*, extended release rather than immediate release), a different combination of active ingredients, or some other modification.

Like the patent-based strategy of evergreening described above, the debate surrounding the desirability of product hopping focuses on the perceived significance of the product improvement. Here, too, patent holders often describe the subsequent products as significant improvements, while opponents often claim the new products represent minor incremental improvements and detract from generic use of the original drug. A second issue concerns the degree to which the manufacturer encourages product switching, ranging from "hard switches" in which the original product is removed from the market, to more "soft switches" in which the original product is kept on the market, but a product transition is encouraged by means such as the shifting of marketing and promotion expenditures, among others. Examples of product hopping allegations in the antitrust context include:

- *Abbott Laboratories v. Teva Pharmaceuticals USA, Inc.* (D. Del. 2006): In 1998, Abbott received FDA approval for a capsule version of the cholesterol-lowering drug TriCor. Teva and Impax filed ANDAs, upon which Abbott filed suit for patent infringement triggering a statutory 30-month stay of any FDA approval of the ANDAs. During the stay, Abbott filed an NDA for a tablet formulation and proceeded to remove the capsule version from the market by suspending sale of the capsule formulation and buying back pharmacy supplies of that formulation, among other actions. After a second round of tablet ANDAs, Abbott again filed suit triggering another 30-month stay. In counterclaims, the ANDA filers asserted violations of § 2 of the Sherman Act. Abbott moved to dismiss, but the district court rejected the motion and opined that Abbott prevented a consumer

41 *Immunex Corp. v. Sandoz, Inc.*, 964 F.3d 1049, 1056 (Fed. Cir. 2020), *cert. denied*, ___ S.Ct. ___, 2021 WL 1951811 (May 17, 2021).

choice between products "by removing the old formulations from the market while introducing new formulations."[42] The parties ultimately agreed to settle the case during trial.[43]

- *Walgreen Co. v. AstraZeneca Pharmaceuticals LP* (D.D.C. 2008): Walgreen alleged that AstraZeneca violated § 2 of the Sherman Act by deterring generic competition when it introduced a new heartburn drug, Nexium, just as patent exclusivity for its nearly identical drug, Prilosec, was about to expire. However, the district court granted a motion to dismiss, opining that "[t]he fact that a new product siphoned off some of the sales from the old product and, in turn, depressed sales of the generic substitutes for the old product, does not create an antitrust cause of action."[44]

- *New York ex rel. Schneiderman v. Actavis plc* (2nd Cir. 2015): Actavis, through its wholly owned subsidiary Forest Laboratories, removed virtually all of Namenda IR, a twice-daily Alzheimer's drug, from the market shortly before its patent expiration and replaced it with Namenda XR, a once-daily version. The patents on Namenda XR granted defendants an additional 14 years of patent protection on the branded version of the drug. Plaintiffs argued that because drug substitution laws would not allow pharmacists to substitute the branded XR version for generic IR, a "hard switch" to Namenda XR would impede generic competition for the IR drug. The district court issued a preliminary injunction barring the defendants from restricting access to Namenda IR prior to generic IR entry. The Second Circuit affirmed this ruling stating that the defendants' "hard switch crosses the line from persuasion to coercion and is anticompetitive," and that the plaintiff "has made a strong showing of irreparable harm to competition and consumers in the absence of a preliminary injunction."[45]

- *FTC v. Reckitt Benckiser Group PLC* (W.D. Va. 2019): The Federal Trade Commission filed suit against Reckitt regarding the opioid addiction treatment drug Suboxone, which was originally approved as a tablet in 2002. Reckitt, now known as Indivior, developed a dissolvable film version which was approved in 2010 and allegedly attempted to switch tablet customers to the film version by marketing it as reducing the risk of accidental pediatric exposure despite an earlier FDA rejection of this claim. Further, Indivior allegedly raised the price of the tablet above that of the new film version to coerce switching before discontinuing the tablet version in 2013.[46] The parties settled the dispute, with Reckitt agreeing to pay $50 million, provide the FTC notice upon future follow-

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42 *Abbott Labs. v. Teva Pharmaceuticals USA, Inc.*, 432 F. Supp. 2d 408, 422 (D. Del. 2006).

43 Stipulation of Dismissal, Doc. No. 736, *Abbott Labs. v. Teva Pharmaceuticals USA, Inc.*, No. 02-cv-01512-SLR (D. Del. Dec. 9, 2008) and Order re Stipulation of Dismissal, *Abbott Labs. v. Teva Pharmaceuticals USA, Inc.*, No. 02-cv-01512-SLR (D. Del. Dec. 11, 2008).

44 *Walgreen Co. v. AstraZeneca Pharmaceuticals LP*, 534 F. Supp. 2d 146, 152 (D.D.C. 2008).

45 *New York ex rel. Schneiderman v. Actavis plc*, 787 F.3d 638, 643, 651, 654 (2d Cir. 2015).

46 Complaint for Injunctive and Other Equitable Relief, Doc. No. 1, *FTC v. Reckitt Benckiser Group PLC*, No. 19-cv-00028-JBJ-PMS (W.D. Va. Jul. 11, 2019).

on product approvals, and be prohibited from destroying or withdrawing original product from the market.[47]

[2] Reverse payments. Reverse payments are a second market-based strategy branded manufacturers may employ to prolong patent protection. Also called "pay-for-delay," reverse payments occur in the context of litigation between a competing company attempting to bring a generic product to market and the branded manufacturer. Specifically, reverse payments refer to when a branded and generic company settle litigation before the merits of the case, including patent validity, are settled and the plaintiff might pay the defendant (the reverse direction that one might expect) to refrain from entering the market until a certain date.

This strategy allows a branded company to avoid the risk of a patent being declared invalid and continue to earn economic profits as the exclusive supplier of a drug until the agreed upon date of generic entry. Examples of reverse payment allegations in the antitrust context include:

- *FTC v. Actavis, Inc.* (U.S. 2013): In 2009, the FTC filed a complaint challenging a reverse payment settlement between Solvay Pharmaceuticals and two generic drug manufacturers. The FTC argued that Solvay paid the generic manufacturers millions of dollars essentially to delay the release of the generic testosterone replacement drug AndroGel. The district court dismissed the complaint, and the Eleventh Circuit affirmed that ruling, opining that "absent sham litigation or fraud in obtaining the patent, a reverse payment settlement is immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent." In 2013, the case was heard by the Supreme Court where the dismissal was reversed, permitting antitrust review of reverse payment settlements. The Supreme Court noted that "patent and antitrust policies are both relevant in determining the scope of the patent monopoly—and consequently antitrust law immunity—that is conferred by a patent."[48] The Supreme Court stated that "a reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects," and the anticompetitive effects and potential justifications can be assessed without litigating the validity of the patent. In February 2019, the parties settled the case and the defendants were prohibited from entering into similar agreements.[49] This opinion greatly influenced California antitrust law, when the California Supreme Court found patents are not presumptively "ironclad" for antitrust purposes (see discussion of *In re Cipro* below).

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47 Joint Motion for Entry of Stipulated Order for Permanent Injunction and Equitable Monetary Relief, Doc. No. 2, *FTC v. Reckitt Benckiser Group PLC*, Case No. 1:19-cv-00028-JBJ-PMS (W.D. Va. Jul. 11, 2019).

48 *FTC v. Actavis, Inc.*, 570 U.S. 136, 146, 148, 158 (2013).

49 Stipulation and Order Dismissing with Prejudice as to Defendants Actavis, Inc. and Actavis Holdco US, Inc., Doc. No. 844, *FTC v. Actavis, Inc.*, No. 1:09-cv-955-TWT (N.D. Ga. Feb. 25, 2019); Joint Motion for Entry of Stipulated Order for Permanent Injunction, Doc. No. 866, *FTC v. Actavis, Inc.*, No. 1:09-cv-955-TWT (N.D. Ga. Feb. 28, 2019).

- FTC v. Cephalon, Inc. (E.D. Pa. 2015): In 2002, four generic drug manufacturers sought to make a generic version of Provigil, a Cephalon drug indicated to treat narcolepsy and other sleep related disorders.[50] Cephalon paid over $200 million to settle the lawsuit and delay market entry until 2012.[51] In 2008, the FTC sought injunctive relief related to the settlements under Section 13(b) of the FTC Act to prevent Cephalon from enforcing the settlements and engaging in similar agreements in the future. However, in 2011, the patent at issue was invalidated in a related case due to inequitable conduct in the patent procurement process. Generic Provigil then entered the market in 2012. Following the *FTC v. Actavis* decision, a status conference was held, during which the FTC indicated that it would "potentially be looking for some redress of the consumer harm that's been caused by the years and years of delayed generic entry." Cephalon filed a motion to preclude the FTC from seeking disgorgement. The court ruled the FTC was permitted to seek disgorgement.[52] Ultimately, the parties settled with Cephalon, which had been acquired by Teva, paying $1.2 billion into a settlement fund as equitable monetary relief.[53]

- In Re: Lipitor Antitrust Litigation (3rd Cir. 2017): From 2002 to 2008, Ranbaxy and Pfizer entered numerous litigations regarding patents including: (1) a 2002 Lipitor litigation, (2) a 2004 Accupril litigation, and (3) another 2008 Lipitor litigation related to two additional process patents. Not long after the second Lipitor litigation the parties entered into a near-global settlement agreement relating to multiple disputes. Per the terms of the agreement, Ranbaxy paid Pfizer $1 million in connection with the Accupril litigation in addition to delaying its generic Lipitor product until November 2011. Pfizer agreed to settle the Accupril litigation despite expressing confidence it would obtain a substantial monetary judgment from Ranbaxy. Direct-purchaser and end-payor plaintiffs then filed suit alleging Pfizer violated § 2 of the Sherman Act through the reverse payment. The district court dismissed the claims. On appeal, the Third Circuit ruled that "*Lipitor* plaintiffs have plausibly pled an unlawful reverse payment settlement agreement. Their allegations sufficiently allege that Pfizer agreed to release the *Accupril* claims against Ranbaxy, which were likely to succeed and worth hundreds of millions of dollars, in exchange for Ranbaxy's delay in the release of its generic version of Lipitor," and that the dismissal of the *Lipitor* plaintiffs' allegations was an error.[54] As of the writing of this article, the case is ongoing.[55]

In California, reverse payments have been addressed in state courts, Federal courts, and state legislation:

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50 *FTC v. Cephalon, Inc.*, 100 F. Supp. 3d 433, 435 (E.D. Pa. Apr. 15, 2015).

51 Plaintiff Federal Trade Commission's First Amended Complaint for Injunctive Relief, Doc. No. 40, *FTC v. Cephalon, Inc.*, No. 08-cv-02141-MSG, at ¶ 3 (E.D. Pa. Aug. 12, 2009).

52 *FTC v. Cephalon, Inc.*, 100 F. Supp. 3d 433, 434-436 (E.D. Pa. Apr. 15, 2015).

53 Stipulated Revised Order for Permanent Injunction and Equitable Monetary Relief, Doc. No. 410, *FTC v. Cephalon, Inc.*, No. 2:08-cv-02141-MSG, at 18(E.D. Pa. Feb. 21, 2019).

54 *Lipitor Antitrust Litigation*, 868 F.3d 231, 243-244, 246 (3d Cir. 2017), *cert. denied*, 138 S.Ct. 983 (2018).

55 Docket Report, *Lipitor Antitrust Litigation*, No. 3:12-cv-02389-PGS-DEA (D.N.J. Feb. 26, 2021).

- In re Cipro Cases I & II (Cal. 2015): In 2015, California's Supreme Court weighed in on nine coordinated class action suits brought by indirect purchasers of the antibiotic Cipro. In 1987, Bayer was issued a U.S. patent on the active ingredient in Cipro that expired in December 2003. In 1991, Bayer filed suit, and Barr responded that Bayer's patent was obvious and an invalid double patent, among other things. In early 1997, the parties settled, and Barr agreed to postpone marketing of its generic Cipro until the expiration of the Cipro patent. Bayer agreed to supply Barr with Cipro (at 85% of its current price) for licensed resale six months prior to patent expiration and made additional payments that totaled $398.1 million between 1997 and 2003 (a period during which Bayer's profits from Cipro exceeded $1 billion). The trial court in this case found the agreement did not violate California's Cartwright Act since it did not restrain competition longer than the exclusionary scope of the patent at issue, and the Court of Appeal agreed, stating restraint of competition within the scope of a patent was lawful unless the patent was procured by fraud or the suit to enforce it was objectively baseless. The California Supreme Court disagreed. Citing *Actavis* (see discussion of the Supreme Court case above), the California Supreme Court stated, "patents are in a sense probabilistic, rather than ironclad: they grant their holders a potential but not a certain right to exclude," further noting the mere fact "that a settlement resolves a patent dispute does not immunize the agreement from antitrust attack."[56] Ultimately, the class settled with the defendants for a total of $399 million.[57]

- FTC v. Endo Pharmaceuticals Inc., et al. (N.D. Cal. 2017): In the Northern District of California, in 2017, the FTC filed suit against Endo Pharmaceuticals and a number of other entities alleging a reverse payment agreement to obstruct generic competition for Endo's branded lidocaine patch Lidoderm. In 2012, in the face of generic competition from Watson, Endo and Watson entered into an agreement whereby, according to the FTC: (1) Watson agreed to delay generic launch for more than a year, (2) Watson agreed to abandon its related patent challenge, (3) Endo agreed to delay launch of an authorized generic to allow Watson a period as the only generic (*i.e.*, a "no-AG commitment") worth hundreds of millions of dollars, and (4) Endo further provided Watson with branded Lidoderm patches valued between $96 to $240 million dollars that Watson could sell through its distribution subsidiary for profit.[58] The FTC and Endo agreed to settle the case and another proceeding by entering into a stipulated order for permanent injunction, whereby Endo was prohibited for ten years from entering into patent infringement settlement agreements that contained a no-AG commitment or a payment by the NDA holder to the generic filer.[59]

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56 *In re Cipro Cases I & II*, 61 Cal.4th at 130-34, 143, 161.

57 Joseph Saveri Law Firm, *Cipro Reverse Payment: Settlement Reached*, https://www.saverilawfirm.com/our-cases/cipro/.

58 Complaint for Injunctive and Other Equitable Relief, Doc. No. 1, *FTC v. Endo Pharmaceuticals Inc., et al.*, No. 17-cv-00312-JCS at ¶¶ 1-4 (N.D. Cal. Jan. 23, 2017).

59 Joint Motion for Entry of Stipulated Order for Permanent Injunction, Doc. No. 4, *FTC v. Endo Pharmaceuticals Inc., et al.*, Case No. 17-cv-00312-JCS at ¶¶ 6, 11 (N.D. Cal. Jan. 23, 2017).

- California Assembly Bill 824 (2019): As discussed in Section 4 below, the California law Preserving Access to Affordable Drugs (AB-824) took effect in 2020 with the goal of reducing reverse-payment patent settlements,[60] and in July 2020, the Ninth Circuit dismissed a challenge to the statute.[61]

D. Enforcement to Date

As the cases above show, disentangling legitimate patent protection from anticompetitive conduct has been challenging. The last 10 to 15 years have involved a number of antitrust enforcement attempts with mixed success to date.

For market-based behavior, antitrust enforcement has been successful in identifying violations and influencing market behavior. For example, reverse payments to keep generic competitors off the market have essentially stopped occurring, following successful enforcement in several cases. In 2006 and 2007, 40-50% of final settlements filed with the FTC contained reverse payments; by comparison in 2015 and 2016, no final settlements contained a side deal like that found in *Actavis*.[62] Companies now think twice before paying a generic competitor to stay off the market. Similarly, in recent years, the most impactful forms of product hopping, such as pulling the predecessor product off the market (*i.e.*, a switch that "crosses the line from persuasion to coercion and is anticompetitive"),[63] have largely been identified by the courts. Especially with the FTC beginning to weigh in as in *FTC v. Reckitt*, we expect companies to further orient towards at least keeping old medicines available to patients and doctors who prefer them. In these areas, antitrust enforcement advocates can point to cases that have successfully reduced the prevalence of practices that are thought of as reducing competition.

On the other hand, antitrust enforcement has been less successful in combating practices related to patent-based behavior like evergreening and patent thickets. In these cases, challenges exist in determining whether patent practices are indeed anticompetitive actions, or simply protecting patentable innovations in good faith. Unlike reverse payments and product hopping, which have less to do with the validity or number of patents and more to do with directly evaluating potential anticompetitive behavior, evergreening and patent thickets allegations can be defended by arguments of simply seeking patents within the proper procedures of the patent system.

Said another way, the spectrum of successful antitrust enforcement appears to depend primarily on how easy it is to distinguish between clear anticompetitive behavior, such as paying a potential competitor to stay off the market, and legitimate patent protection (or not) when a company pursues dozens of patents or more on its products and a potential violation may be less clear. If companies engage with the patent system in good faith,

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60 *See* Cal. Health & Safety Code § 134002(a)(1) (added by Stats. 2019, Ch. 531 § 1 (AB-824)).

61 *Ass'n for Accessible Medicines v. Becerra*, 822 F. App'x 532, 534 (9th Cir. 2020) (dismissing case due to a lack of standing).

62 Jamie Towey & Brad Albert, *Then, Now, and Down the Road: Trends in Pharmaceutical Patent Settlements After FTC v. Actavis* (May 28, 2019), https://www.ftc.gov/news-events/blogs/competition-matters/2019/05/then-now-down-road-trends-pharmaceutical-patent.

63 *New York ex rel. Schneiderman v. Actavis plc*, 787 F.3d 638, 654 (2d Cir. 2015).

seeking patent rights on protectable innovation, it may be difficult to determine when that crosses over into an antitrust violation, if ever.

Even in the more successful domains of enforcement, companies have modified behaviors in a way where some unintended economic consequences may still persist. Rather than paying a generic competitor to stay off the market, companies may instead simply negotiate the length of time a generic competitor should stay off the market before competing. In that context, is there anything inherently anticompetitive with a generic company agreeing to stay off the market until certain patent protection expires? After all, legitimate patent protection is a foundational goal and function of the patent system. Similarly, is there anything inherently anticompetitive with seeking more than 100 patents on a single pharmaceutical product? This volume of patents frequently occurs in other industries – computers, telecommunications, electronics, software – and that volume of patents may or may not be applicable or necessary for pharmaceutical products.

The product life cycle strategies described above clearly extend patent protection at the expense of competition, at least in the short run, but the question for policy is whether they extend patent protection too far – *i.e.*, beyond what is socially desirable. If we think that some strategies extend product exclusivity for too long, then the goals of antitrust enforcement may be legitimate, even if an antitrust violation is difficult or impossible to establish.

From a social welfare perspective, we may want to discourage companies from extending patent protection on an individual pharmaceutical product for too many years, so that individual gains to innovating do not come at the expense of competition (or vice versa if the balance were tipped in the other direction). But there is still an open question for whether antitrust enforcement is the best means to achieve that goal. As the Northern District of Illinois court concluded with respect to antitrust claims based on a patent thicket: "The patent prosecution system is no doubt imperfect… [yet] the proper fix is not to use antitrust doctrine."[64]

Which leaves some questions. Are we satisfied with patent protection and antitrust enforcement to date, recognizing its successes but also its limits? Or do we think that new policy or legislation should be implemented to move the needle towards more competition in some circumstances? Some policymakers have introduced bills to tighten regulation and discretion in these areas. Ultimately, as described, the goal of the patent system is to balance innovation rewards with incentives for competition. With that goal in mind, what is the policy maker to do?

IV. PUBLIC POLICY

A. Public Policy Objectives

As a matter of economics, the goal of public policy is to evaluate trade-offs and collective action in order to harness economic self-interest and promote the common good. Public policy decisions are based on how policy impacts individual incentives, collective incentives, and the long-term success of a market economy and the society at large.

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64 *IHumira (Adalimumab) Antitrust Litigation*, 465 F. Supp. 3d at 834.

For antitrust policy, the core economic trade-offs involve encouraging market success and economics of scale for business interests, on the one hand, while preserving and fostering competition for consumer interests, on the other hand. We would like private companies to grow, thrive, and seek economies of scale if they meet consumer demand and succeed in the marketplace, yet we also want to foster competition in the long run and prevent companies from maintaining market power through anticompetitive actions. For patents and intellectual property, the core economic trade-offs involve encouraging and rewarding innovation in the short run while allowing for the benefits of innovation to be shared by all in the long run. On the one hand, we would like new ideas and advances to generate economic value by granting economic rights to those who innovate. On the other hand, after those rewards are justly earned, we would like consumers and competing companies to be able to capture the economic benefits more broadly.

In both areas, the economic goal of public policy is to understand the economic trade-offs as best we can and design policy that best balances those trade-offs. If antitrust enforcement is too strong, then companies may be wary of growing and succeeding in the market for risk of penalty or being broken up; if antitrust enforcement is too weak, then companies may actively discourage competition by engaging in anticompetitive actions. If patent protection is too strong, then innovation is overrewarded with consumers paying monopoly prices for too long; if patent protection is too weak, then innovation is stifled since the incentives to innovate are not large enough. Successful public policy aligns rewards with those who create economic value. If antitrust enforcement has limitations, described above, then we should consider whether there are areas to improve that extend beyond what is currently available.

For the purposes of potential policy improvements, we start with the premise that at least *some* instances of patent protection appear to provide too much product exclusivity. There may be nothing wrong with legitimate patent protection, of course, but certain situations can extend the benefits of exclusivity beyond what is intended, as granted by the U.S. Constitution and designed in patent policy. With that starting point in mind, the policy objective would be oriented towards correcting some of the more extreme and impactful situations that deter reasonable competition. The question for policy, then, is how best to identify those situations and counteract them. In that regard, there are several avenues to consider for potential improvement.

B. Market-Based Strategies

We begin by addressing law and economic policy around market-based strategies, since current antitrust enforcement has had more success in that domain. Whereas strictly patent-based strategies have been difficult to address with antitrust enforcement, as discussed, market-based strategies can be addressed to some degree by the existing law. From that perspective, we evaluate several approaches for limiting unintended consequences like product hopping and reverse payments, starting with continued enforcement of existing efforts.

[1] Continue current enforcement efforts. One perspective is that current antitrust enforcement efforts are working as they should, by evaluating limits to competition and assessing whether and to what degree those limits promote a competitive market environment. Cases can be filed and adjudicated in the court system, as current

practice already permits. While the track record over the last 10 to 15 years provides a range of successes in such enforcement, the net result has been a change in action among market participants reducing conduct that may be a violation.

Reverse payments are the most salient example where antitrust enforcement efforts have been successful in changing behavior. While the Supreme Court in *FTC v. Actavis*, did not find reverse payments to be per se illegal, the Court did describe why such circumstances could be anticompetitive, and then left lower courts to consider those cases on a case-by-case basis. As a result, according to the FTC, reverse payments in their most direct form have all but ceased.[65]

This is an example of how successful court enforcement flows back to the real economy. If court enforcement becomes predictable, as it did with reverse payments even without a determination of per se illegality, then behavior changes by market participants in a way that will avoid penalties down the line – in other words, a real correction to anticompetitive action that no longer occurs and no longer causes limits to competition. On the other hand, refinements to reverse payment strategies, such as parties mutually agreeing to delay competition, have been harder to enforce because determining whether such agreements to stay off the market are anticompetitive is harder.

To date, the authors have seen no evidence that antitrust enforcement efforts in these areas have systematically gone too far. While any single case may be subject to individual evaluation, the courts have not found many behaviors to be universally accepted as antitrust violations and, in fact, have tended to find violations in only the most extreme cases. On the whole, traditional economic principles of antitrust enforcement have been reiterated and applied to the best extent possible, and that is the best we can ask of our court system. If anything, more violations in gray-area cases may have been expected, given the public attention and long duration of exclusivity observed for many pharmaceutical products (*e.g.*, a jury finding or court finding based on fairness and emotional appeal that patent protection may extend too far). The majority of the observed violations, however, strike the authors as having sufficient factual and economic support, at least as far as reasonable minds can see the arguments and courts have sufficient basis to rule in accordance with antitrust law.

As long as there are sufficient incentives for enforcement, either through public enforcement by regulatory agencies or private enforcement by harmed plaintiffs, then the practice of establishing parameters in which violations exist and enforcing those circumstances should, in the long run, tend towards better market outcomes as anticompetitive practices are reduced.

[2] Improve antitrust enforcement. The above discussion notwithstanding, some parties and lawmakers have expressed concern that current antitrust enforcement has not gone far enough, even for market-based strategies where there has been some traction in the courts. If antitrust laws as currently defined and historically enforced have not curbed certain unintended consequences of the patent system, proponents argue, then perhaps enforcement or even the laws themselves need to be expanded or refined.

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65 Jamie Towey & Brad Albert, *Then, Now, and Down the Road: Trends in Pharmaceutical Patent Settlements After FTC v. Actavis*, May 28, 2019, https://www.ftc.gov/news-events/blogs/competition-matters/2019/05/then-now-down-road-trends-pharmaceutical-patent.

In a sense, this was the path that was sought by the government in *FTC v. Actavis*, which was considered and ruled by the U.S. Supreme Court. In that case, as discussed, the FTC sought to have reverse payments be deemed as a per se violation of antitrust doctrine. Such a finding would have had immediate impact on antitrust enforcement and reverse payment behavior. In that case, the Supreme Court commented specifically on the interplay between patent law and antitrust law in achieving proper balance of public policy through the law:

> That form of [reverse payment] settlement is unusual. And … there is reason for concern that settlements taking this form tend to have significant adverse effects on competition. Given these factors, it would be incongruous to determine antitrust legality by measuring the settlement's anticompetitive effects solely against patent law policy, rather than by measuring them against procompetitive antitrust policies as well. … [P]atent and antitrust policies are both relevant in determining the scope of the patent monopoly—and consequently antitrust law immunity—that is conferred by a patent.[66]

However, perhaps unsurprisingly, the Supreme Court did not find that reverse payments should be presumptively unlawful, and instead pointed to the traditional rule of reason analysis for determining whether or not a particular situation is anticompetitive:

> The FTC urges us to hold that reverse payment settlement agreements are presumptively unlawful and that courts reviewing such agreements should proceed via a "quick look" approach, rather than applying a "rule of reason." We decline to do so. … [T]he FTC must prove its case as in other rule-of-reason cases.[67]

In other words, at least in this example, the Supreme Court showed resistance to extending the reach of antitrust law, even despite noting the "reason for concern" with reverse payments. Instead of actively redefining what would constitute a violation in this context, the Court relied on traditional notions and tests for how to evaluate antitrust conduct. In principle, while antitrust laws can be revised or enforced in a way that better encompasses the situations of public policy concern, this path seems less promising, given the duration and robust history of antitrust law itself, dating back to the late 1800s and early 1900s.

Accordingly, evaluating each circumstance on a case-by-case basis may be the best approach we have. If companies are colluding to benefit from market exclusivity at the expense of consumers, we can try to determine that factually and economically. If companies are merely seeking to recognize and negotiate over properly granted market exclusivity, we can approach that the same way. This is what the fact-based inquiry of the court system and rule of reason enforcement are all about, and perhaps that will remain the leading principle for enforcement.

[3] Legislate targeted extensions to enforcement. A third policy path forward in addressing market-based strategies involves new legislation that extends anticompetitive

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66 *FTC v. Actavis, Inc.*, 570 U.S. at 147-148.

67 *Id.* at 158-159.

enforcement to specific situations that commonly come up and, in the eyes of the public and legislature, have not been adequately addressed by the court and thus have tilted the balance towards too much market exclusivity. In other words, if antitrust principles and active enforcement are in principle robust but not broad enough to curb specific exceptional unintended consequences, then lawmakers may want to address these specific circumstances with direct legislation.

The Hatch-Waxman Act (1984), described above, is a great example of this kind of approach, with a policy objective being achieved through legislation. From a policy standpoint, lawmakers were concerned that the patent system, as designed and implemented, did not give generic competitors strong enough economic incentives to challenge patents as invalid. Rather than fundamentally change the patent system, though, the legislature added the new policy to give patent challengers economic incentives to address the already functioning system.

A similar path forward of identifying and targeting specific legislation where economic distortions have occurred seems to the authors to be a viable path forward. In that sense, antitrust enforcement is not being fundamentally changed at first principles, it is just that specific undesirable situations, which may be near or just beyond the reach of antitrust enforcement efforts, can be corrected if we collectively decide that antitrust doctrine is not strict enough to foster the kind of competition we want as a society. Indeed, this kind of legislation has been considered over the past few years and is currently being considered today.

In California, the California law Preserving Access to Affordable Drugs (AB-824) took effect in 2020 with the goal of reducing reverse-payment patent settlements.[68] The California law goes further than the rule of reason principle, stating a settlement agreement "shall be presumed to have anticompetitive effects and shall be a violation… if both the following apply: (A) A nonreference drug filer receives anything of value from another company asserting patent infringement, including, but not limited to, an exclusive license or a promise that the brand company will not launch an authorized generic version of its brand drug. (B) The nonreference drug filer agrees to limit or forego research, development, manufacturing, marketing, or sales of the nonreference drug filer's product for any period of time."[69] That is, where antitrust law reach a limit at the Supreme Court in *FTC v. Actavis*, California has legislated a specific type of circumstance that it wishes to stop. It remains to be seen, of course, how enforcement of this new code will play out.

At the federal level, proposals have been made but currently none have been passed. One example is the Affordable Prescriptions for Patients Act, which was introduced as a bill in the Senate in 2019 and designed to "amend the Federal Trade Commission Act to prohibit anticompetitive behaviors by drug manufacturers, and for other purposes."[70] Specifically, the bill defined product hopping as having several elements, including that the manufacturer engaged in a "hard switch" (*e.g.*, withdrawing the reference product) or a "soft switch" (*e.g.*, unfairly disadvantaging the reference product), and provided the FTC

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68 *See* Cal. Health & Safety Code § 134002(a)(1).

69 *Id*.

70 Affordable Prescriptions of Patients Act of 2019, S. 1416, 116th Cong. (2019), available at https://www.govtrack.us/congress/bills/116/s1416/text.

with the ability to identify and prohibit product hopping as anticompetitive behavior.[71] The bill included remedies of disgorgement (*i.e.*, giving back the profits earned) and restitution (*i.e.*, restoring to the plaintiff what was taken).[72]

A second example federally is the Preserve Access to Affordable Generics and Biosimilars Act, which was introduced to the Senate in 2019 and designed to "prohibit brand name drug companies from compensating generic drug companies to delay the entry of a generic drug into the market."[73] Specifically, the bill referenced the Hatch-Waxman Act of 1984 and reverse payment actions that "allow a branded company to share its monopoly profits with the generic company as a way to protect the branded company's monopoly," and defined "compensation for delay" as unlawful under the Federal Trade Commission Act.[74]

Neither national bill has been voted into law, though both were designed to extend anticompetitive enforcement to specific situations, the former for product hopping and the latter for reverse payments. Similar bills have been introduced "to reduce the impact of later-filed patents…; to facilitate generic market entry…; [and] to increase transparency as to the patents that cover biological products…."[75] As recently as April 2021, versions of these bills along with two others were re-introduced into the House and Senate to re-engage with the goal of tweaking existing law and policy to curb some of the extreme outcomes of the current system.[76]

C. Patent-Based Strategies

For patent-based strategies, as discussed, antitrust efforts to date have thus far not been effective in reducing the unintended consequences of long durations of product exclusivity. Because the court system and we as a society value the constitutionally protected rights of patent holders, antitrust enforcement has not been a viable path to success for challenging whether products are protected by "too many" patents or for "too long." Thus, rather than refinement of antitrust doctrine or law, the public policy path forward may involve thinking more fundamentally about first principles of patent issuance and protection. Several proposals are discussed.

[1] Improve patent issuance at the USPTO. One approach is to focus on patent issuance at the USPTO. Better identification of valid patents with real contributions, proponents argue, would reduce overcompensating innovators for follow-on inventions that extend exclusivity for minor improvements.

The difficulty with this kind of approach, of course, is figuring out where to draw the line. In the trade-off between granting more patents on the one hand (*i.e.*, nudging policy

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71 *Id.*

72 *Id.*

73 Preserve Access to Affordable Generics and Biosimilars Act, S. 64, 116th Cong. (2019), available at https://www.govtrack.us/congress/bills/116/s64/text.

74 *Id.*

75 Congressional Research Service, *supra* note 12.

76 Michael Gallagher, et al., *Federal Lawmakers Turn Their Sights to Drug Pricing, Introducing a Package of Bills Seeking Changes to Antitrust and Patent Law*, May 25, 2021, https://www.whitecase.com/publications/alert/federal-lawmakers-turn-their-sights-drug-pricing-introducing-package-bills.

towards lower standards for issuance) versus granting fewer patents on the other hand (*i.e.*, nudging policy towards higher standards for issuance), it is unclear which direction we should push. There is no systematic evidence that the authors are aware of that too few patents or too many patents are being awarded, and thus seeking improvements at the USPTO, while a fine pursuit in theory, may bear limited benefit in practice without more clearly defined objectives.

Proponents of this approach may argue for additional funding for the USPTO to increase the quality of patents being issued. While the authors have no disagreement with this idea, in theory, it is unclear whether "throwing money at the problem" will result in tangibly better outcomes. There is some evidence that patent grants have high variability across examiners, and that likelihood of appeal and reversal are higher than desired.[77] Such variability may be mitigated by review from additional examiners, or other similar approaches. Better patent issuance is a desirable goal, if it can be achieved, that may pay for itself in economic benefits that flow back into the real economy. That said, further research on potential improvements from targeted approaches and additional funding seems warranted before pursuing this path too strongly.

[2] Focus on patent infringement remedies. Another approach to better aligning patent enforcement with public policy considerations is to focus on appropriate remedies for patent infringement. In this regard, the authors consider two primary remedies: (1) injunction: keeping a competitor off the market; and (2) damages: monetary award for infringement.

On injunction rights, one economic challenge associated with pharmaceutical patent enforcement is whether and to what degree incremental improvements from follow-on patents should allow for rights to enjoin competition. With strict requirements for bioequivalence for generic pharmaceuticals (and analogous clinical requirements for biologics and biosimilars), generic drug companies may be enjoined from competing and may be unable to design around less impactful follow-on patent protection.

As an example, let's say a drug company has a dozen patents on its pharmaceutical product, ranging from patent protection on the chemical compound to formulations to methods of treatment to dosing – *i.e.*, a full range of attributes of the product. Even if all developments were arguably innovative, they may differ in their degrees of contribution. A generic competitor may have no choice, due to FDA policy, to match all aspects of the reference drug product, even for less important attributes. As a result, the patent holder may be able to get injunction rights for its strongest and most innovative patents, but also for its weaker and less important patents. In such a situation, the interplay of the patent system (rights of exclusivity) and FDA policy (requirements for clinical equivalence) preserves the brand product monopoly for years after some of the earlier patents have expired. Is that a good result, from a policy perspective?

One issue here is that patent issuance is binary (either issued or not) and an injunction is also binary (either a competitor is enjoined or not). Injunction remedies may be more

77 Jeff O'Neill, *Visualizing Outcome Inconsistency at the USPTO*, IP Watch Dog, Oct. 31, 2018, https://www.ipwatchdog.com/2018/10/31/visualizing-outcome-inconsistency-uspto/id=102810/; Alex Szypa, *Patent Trial and Appeal Board Statistics Through January 2020*, Garlson Gaskey Olds, Jan. 2020, https://cgolaw.com/patent-trial-and-appeal-board-statistics-through-january-2020/.

aligned with public policy objectives for foundational patents but less aligned for patents representing modest incremental improvements, whether innovative or not.

Patent injunction rights may or may not be socially desirable, depending on the specifics of the situation. On one hand, we want to reward innovation with limited exclusivity rights; after all, that's the whole point of the patent system. On the other hand, we may want to limit injunction rights for overlapping patents if such rights overcompensate the patent holder with unreasonable exclusivity periods. Whether injunctions should be awarded may be less subject to universal standards and should be evaluated on a case-by-case evaluation, which, to some degree, is already the approach taken by courts in evaluating issues of irreparable harm, balance of hardships, and public interest.[78]

On damages remedies, the type and amount of damages that can be awarded also impacts the long-run success of the economic system. Over the past decade, courts have placed considerable ongoing emphasis on proper patent damages through the concept of apportionment—*i.e.*, aligning the damages remedy to the economic footprint of the innovation.[79] From an economic standpoint, the better we can align damages remedies with the economic value of the innovations that are occurring, the better the economic incentives will flow back into the real economy into R&D and innovation decisions. The Federal Circuit appeals court for patent cases has had damages remedies via lost profits and reasonable royalties top of mind in aligning public policy considerations over the past decade and appears to have achieved more consistency in that regard in recent years.

Considering both remedies, there may be some balance between them that is better than currently being allowed. Injunction rights may be warranted up to a point, and then allowing competition and reasonable compensation for the patent owner thereafter may make more sense. Yet, all things considered, this is already how the current system works, and, despite challenges, substantial revision may not be needed.

[3] Limit product exclusivity terms. A third policy approach might be to limit product exclusivity terms directly in some way, beyond unexamined enforcement of patent duration. As discussed, the Patent Act of 1790 originally included a duration of 14 years for patent term, and the term has fluctuated from 14 to 21 years since then, with current duration at 20 years from earliest filing date.[80] However, in some circumstances described above, companies have enjoyed product exclusivity for more than 30 years from launch, potentially 40 years or more from original conception. Perhaps that duration represents a justly earned consequence of subsequent inventions, or, as discussed, perhaps there are systems and incentives in place that cause the unintended consequence of duration to be too long.

One way to curb excesses of product duration would be to regulate limits on it directly – in other words, allowing new pharmaceutical products to earn exclusive rights

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78 *See, e.g.*, *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006); *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 695 F.3d 1370 (Fed. Cir. 2012).

79 For references and discussion, see DeForest McDuff & Justin Skinner, *Reasonable Royalties: All About That Base… Or That Rate*, Law360, Dec. 18, 2014, and DeForest McDuff & Ryan Sullivan, *AstraZeneca and Damages in At-Risk Generic Drug Launches*, Law360, Apr. 28, 2015.

80 *See also* U.S. Patent and Trademark Office, 2701 Patent Term [R-10.2019], https://www.uspto.gov/web/offices/pac/mpep/s2701.html.

granted by FDA or Congressional law as opposed to the patent system. Determining or limiting exclusivity based on product life rather than the patent conception could have several advantages: (1) guaranteeing innovators a certain duration of exclusivity regardless of invention timing, (2) reducing incentives to improperly extend the duration of exclusivity, (3) reducing the need to rush through FDA approval to achieve as long an exclusivity period as possible, and (4) putting a limit as to how long monopoly profits can be collected before the benefit of competition kicks in. On the other hand, designing new duration laws may add unnecessary complexity to a system that is already designed to balance rewards and competition. On net, similar to the targeted legislation described in the market-based strategies, imposing some limits to product exclusivity seems like a policy path with potential for success.

[4] Variable patent term length. A fourth way to tackle duration would be to allow for variable patent lengths for different industries or degrees of innovation. One can imagine a system where original patent protection has a longer duration, and follow-on innovations may add duration in smaller increments, which would apply to multiple patents on the same product. In other words, additional patents may increase exclusivity rights of a product, but to a lesser degree as the innovations become more incremental. In theory, this could be implemented by granting the USPTO discretion of patent length on a sliding scale based on evaluation of multiple factors, for example: (a) the degree of innovation, (b) existing patents on the same product, (c) the impact on competition, and others. Such a sliding scale may better align the economic value of the innovation with the patent duration that is awarded.

With this approach, the details matter a lot. On the one hand, a flexible and discretionary system could be implemented, which would allow for individual assessment of the patent issuance circumstances but may be less clear and predictable for those seeking patents. On the other hand, a more defined yet tiered system could be implemented, which would allow for some variation in patent length but still provide clear rules and instruction for which circumstances warrant longer or shorter durations. Either way, any sort of policy proposal in this regard should provide proper guidelines so that experienced examiners and attorneys have clarity and consistency of when patent terms may be awarded for longer or shorter durations. All that said, the authors recognize the appeal of simplicity of the current system, where all patents receive the same term. Further analysis and research may be warranted to determine the best structure for a variable patent term length.

D. Summary

Whatever the mechanism, the policy concern seems to be that some products have exclusivity for too long. From a policy perspective, focusing on the duration of product exclusivity may be the best path forward, at least in the pharmaceutical industry where the process of generic competition is well defined, since this represents the most tangible unintended consequence and causes us to rethink whether we have gotten the public policy trade-off correct. Naturally, no system is perfect, and each will have its own costs, benefits, and distortions. In the end, the goal is to pick the system that works aligns incentives and rewards innovation sufficiently but not indefinitely.

In the view of the authors, the viability of potential policy based on the discussion above can be summarized as follows:

Table 1. Summary of Public Policy Approaches

Policy Approach	Assessment
Market-based strategies	
(e.g., product hopping and reverse payments)	
[1] Continue current enforcement efforts	Helpful, but nearing limits
[2] Improve antitrust enforcement	Potential for improvement
[3] Legislate targeted extensions to enforcement	Promising path forward
Patent-based strategies	
(e.g., patent thickets and evergreening)	
[1] Improve patent issuance at the USPTO	Potential for improvement
[2] Focus on patent infringement remedies	Helpful, but nearing limits
[3] Limit product exclusivity terms	Promising path forward
[4] Variable patent term length	Potential for improvement

Whatever the approach, further assessing the length of duration has clear public interest. In 2019, a bipartisan bill was introduced to the Senate to "tackle the pharmaceutical industry's practice of gaming the patent system to extend monopolies on lifesaving drugs."[81] The Reforming Evergreening and Manipulation that Extends Drug Years Act (REMEDY) included provisions to (1) amend the "FDA statute to remove incentives for drug manufacturers to file excessive patents," (2) "lift onerous legal barriers that delay generic market entry" and (3) "increase[] transparency and remove[] hurdles for generic drug companies by ensuring that when a patent is invalidated by a ruling at the [USPTO], and upheld on appeal, the FDA's listing of relevant drug patents would be updated."[82] Policy has yet to be finalized, though future legislation proposals seem likely as we continue to find the best approaches for improvement.

V. CONCLUSION

For public policy, deciding what matters most and what will work best usually involves going back to first principles of what the system is designed to achieve. At the core, the patent system was put into place to solve an economic externality, based on the belief that individual rewards to innovation are not as large as societal benefits of innovation, such that innovation would be undersupplied in a purely *laissez-faire* economy. By granting patent rights to those who develop innovations, we incentivize individuals to share and bring to market innovations that otherwise may not have been developed.

Though, of course, it is not only the *existence* of a solution (*i.e.*, the rights themselves) but the *degree* to which they are implemented (*i.e.*, the strength and duration of those rights). For patents, we focus on the resulting length of product exclusivity as a basic observable measure for how well the patent system is working. Too short a duration, and innovation

81 Dick Durbin, *Durbin, Cassidy Introduce REMEDY Act To Lower Drug Prices By Curbing Patent Manipulation, Promoting Generic Competition*, Apr. 11, 2019, https://www.durbin.senate.gov/newsroom/press-releases/durbin-cassidy-introduce-remedy-act-to-lower-drug-prices-by-curbing-patent-manipulation-promoting-generic-competition.

82 *Id.*

is not sufficiently rewarded. Too long a duration, and innovation is overrewarded at the expense of consumers.

The pharmaceutical industry has historically been a shining example of the patent system working well, encouraging billions of dollars of research and development towards modern medicines that we all value. But lately, with the amount of money being made and the length of market exclusivity for some products at the extremes, courts and lawmakers have become concerned that the trade-off towards protection has gone too far. As a result, several methods are seeking to curb the most extreme unintended consequences, antitrust policy and enforcement being one of them.

In the view of the authors, antitrust enforcement on patent issues in pharmaceuticals does not need major revision. Core principles of preventing anticompetitive conduct are alive and well, in the pharmaceutical industry and otherwise, and provide reasonable limits to restraints on competition. Accordingly, we should continue to embrace the limits of market-based strategies insofar as they violate historical tenets of antitrust law. Indeed, many of the boundaries may already have been tested over the last 10 to 15 years, leaving us with successful enforcement in some areas and less successful enforcement in others. In that regard, there appear to be certain unintended economic consequences where patent protection goes too far and cannot be fixed by current antitrust law. In those cases, we may benefit from targeted policy that puts limits on product exclusivity that will otherwise persist with the current system.

This is the age-old balancing act between two competing objectives, so that the broader society can benefit from individuals pursuing self-interest (by rewarding innovation) and collective benefit that comes from market systems (by allowing competition). In cases where the reward and protection seem "too long," we want to think about mechanisms that can simply and reasonably move the trade-off back towards the optimum, without losing what is already working well. Our market economy works best when rules are clear, incentives are aligned, and companies are rewarded for creating economic value. And that is an objective on which we can all be aligned.

TEN YEARS POST-*THERASENSE*: CLOSING THE GAP BETWEEN *WALKER PROCESS* FRAUD AND INEQUITABLE CONDUCT

By Anne Y. Brody and Elisabeth Ponce[1]

I. INTRODUCTION

Prior to 2011, inequitable conduct (a defense to a patent infringement claim) was considered and analyzed as a lesser charge than *Walker Process* fraud—an antitrust claim alleging unlawful monopolization through the enforcement of a patent obtained by fraud on the Patent Office. That distinction began to change, in practice, in 2011, when the Federal Circuit responded to an "absolute plague" of "charging inequitable conduct in almost every major patent case" by issuing *Therasense, Inc. v. Becton, Dickinson & Co.*[2] The post-*Therasense* decade has crystallized that, although minor differences remain in the application of the two charges, the showing required for proving inequitable conduct and the fraud component of *Walker Process* liability "seems to be 'nearly identical.'"[3] Indeed, today's courts largely treat *Walker Process* and inequitable conduct claims equivalently. The continual harmonization of these two charges recently culminated in *Complete Genomics, Inc. v. Illumina, Inc.*, where the court suggested that a finding of inequitable conduct in an earlier patent case may have preclusive effect and may narrow or focus the issues in a later, separate antitrust *Walker Process* case.[4] This emerging trend will likely have a significant impact in future patent and antitrust cases.

This article discusses recent case developments that illustrate the continual harmonization of the inequitable conduct and *Walker Process* fraud charges, and it analyzes both parties' arguments and the courts' opinions. Lastly, it examines whether the doctrine of infectious unenforceability has any role to play in proving *Walker Process* fraud and other antitrust theories.

II. THE CONVERGING STANDARDS FOR PROVING INEQUITABLE CONDUCT AND *WALKER PROCESS* FRAUD

By way of background, in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, the Supreme Court set the standard for proving fraud on the Patent Office in an antitrust case. The Court held that in order "to strip [a patentee] of its exemption from the

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2 *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1289 (Fed. Cir. 2011) (quoting *Burlington Indus., Inc. v. Dayco Corp.*, 849 F.2d 1418, 1422 (Fed. Cir. 1988)).

3 *Inline Packaging, LLC v. Graphic Packaging Int'l, LLC*, 962 F.3d 1015, 1024-25 (8th Cir. 2020) (quoting *TransWeb, LLC v. 3M Innovative Props. Co.*, 812 F.3d 1295, 1307 (Fed. Cir. 2016)).

4 *Complete Genomics, Inc. v. Illumina, Inc.*, No. 21-CV-00217-WHO, 2021 WL 1197096, at *3 (N.D. Cal. Mar. 30, 2021).

antitrust laws," an antitrust plaintiff must prove that the patentee "obtained the patent by knowingly and willfully misrepresenting facts to the Patent Office."[5] In *Nobelpharma*, the Federal Circuit further explained that two elements—deceptive intent and a but-for material misrepresentation or omission—must be present for a finding of *Walker Process* fraud.[6]

In *Therasense*, the Federal Circuit clarified certain elements of proving inequitable conduct. With respect to the materiality of withheld information, the Federal Circuit held that "the materiality required to establish inequitable conduct is but-for materiality." [7] This formulation exactly parallels the "but-for" materiality standard utilized by courts in assessing *Walker Process* antitrust claims. As such, the sole germane inquiry for materiality may arguably be the same in both inequitable conduct and *Walker Process* fraud cases: whether patent examiners would have allowed patent claims had they been aware of the allegedly undisclosed information. As for showing deceptive intent for inequitable conduct, the Federal Circuit in *Therasense* clarified that the patent challenger must show that intent to deceive is the "single most reasonable inference" that can be drawn from clear and convincing evidence.[8] By comparison, the Supreme Court's recitation of the intent standard for *Walker Process* fraud was less instructive (i.e., "knowingly and willfully").[9] Given this lack of clarity, it felt like only a matter of time before courts would begin analyzing deceptive intent for a *Walker Process* fraud claim in accordance with the *Therasense* intent standard.

III. COURTS' CONSEQUENT COLLAPSING ANALYSES OF INEQUITABLE CONDUCT AND *WALKER PROCESS* FRAUD

Recent *Walker Process* fraud case law makes clear that, in analyzing deceptive intent for fraud on the Patent Office in an antitrust case, courts have adopted the *Therasense* "single most reasonable inference" standard of intent for inequitable conduct. Additionally, it appears that in cases where both claims of inequitable conduct and *Walker Process* fraud are asserted, courts are first analyzing the materiality and deceptive intent elements of the alleged inequitable conduct, and then, without further analysis, making the same findings on the materiality and deceptive intent elements of the *Walker Process* fraud claim. These cases indicate that courts are treating their evaluations of intent to deceive in the inequitable conduct context as also dispositive in the *Walker Process* fraud context, and they demonstrate that the single most reasonable inference standard is equally applicable to the deceptive intent element of a *Walker Process* claim.[10]

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5 *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965).

6 *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1070-71 (Fed. Cir. 1998).

7 *Therasense*, 649 F.3d at 1291-92.

8 *Id.* at 1290-91.

9 *Walker Process Equip.*, 382 U.S. at 177; *see also Nobelpharma*, 141 F.3d at 1068-69.

10 *See In re Loestrin 24 Fe Antitrust Litig.*, 433 F. Supp. 3d 274, 305 (D.R.I. 2019) (explaining that in a *Walker Process* case, "[i]ntent to deceive must be 'the single most reasonable inference able to be drawn from the evidence'" (quoting *Therasense*, 649 F.3d at 1290)); *Targus Int'l LLC v. Victorinox Swiss Army, Inc.*, No. 20-464-RGA, 2020 WL 7264199, at *6-7 n.9-10 (D. Del. Dec. 10, 2020) (explaining that "[t]he parties do not dispute that if the Court finds (as it has) that Victorinox has adequately pleaded inequitable conduct as to Counterclaim III and the Third Defense, it has also sufficiently pleaded the fraud component of a *Walker Process* claim"); *Guardant Health Inc. v. Found. Med., Inc.*, No. 17-1616-LPS-CJB, 2020 WL 2461551, at *8-13 (D. Del. May 7, 2020).

A. *TransWeb, LLC v. 3M Innovative Properties Co.*

1. Case Background & *Walker Process* Fraud Allegations

The Federal Circuit has acknowledged the harmonization of these two standards, having done so for the first time in *TransWeb, LLC v. 3M Innovative Properties Co.* There, 3M, a company offering aircraft, abrasive, animal, architecture, construction, and automotive products, accused TransWeb of allegedly infringing two claims of 3M's '458 patent.[11]

In response to 3M's infringement allegations, TransWeb contended that 3M's '458 patent and another of its patents, the '551 patent, were invalid. According to TransWeb, it had offered products (so-called T-Melt P products), which were prior art, that were publicly known, used, and/or offered for sale in the relevant time period before 3M filed the application leading to the issuance of the '458 and '551 patents.[12] TransWeb additionally averred that the '458 and '551 patents were unenforceable due to inequitable conduct because 3M had deliberately misled the Patent Office regarding "the public disclosure, use, and/or offers for sale of TransWeb's prior art products."[13] Lastly, TransWeb contended that 3M violated the antitrust laws by suing TransWeb for patent infringement with the intent to obtain monopoly power in the relevant markets and while knowing that its own patents were unenforceable.[14]

3M responded to these allegations by contending that TransWeb lacked the requisite clear and convincing evidence of both deceptive intent and materiality. Specifically, it contended that TransWeb had failed to prove two things: first, that anyone involved in prosecuting the '458 patent knew anything about the T-Melt P products prior to filing the application that gave rise to the issuance of the relevant patent, and second, that the only reasonable inference was that the individuals involved in prosecuting the patent acted with deceptive intent.[15]

After an 11-day trial, the jury found that the relevant claims of the patents at issue were invalid as obvious and that 3M's inventor and patent prosecutor had intentionally misled the Patent Examiner into issuing 3M's patents. As such, the jury found the inequitable conduct defense applicable and issued an advisory verdict in favor of TransWeb. Based on the exact same conduct, the jury also found that 3M had violated the antitrust laws and committed a *Walker Process* fraud violation by asserting fraudulently obtained patents in an anticompetitive manner.[16]

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11 *TransWeb, LLC v. 3M Innovative Props. Co.*, 812 F.3d 1295, 1307 (Fed. Cir. 2016). The '458 patent was an innovation covering filter material for respirators. TransWeb had ostensibly infringed this patent by "producing a non-woven web of melt-blown filter media, plasma fluorinating the web, contacting the web with water in a manner sufficient to impart a charge, and then drying." Final Jury Instructions, *TransWeb, LLC v. 3M Innovative Props. Co.*, No. 2:10-cv-04413-FSH-JBC, Doc. No. 506 at 4 (D.N.J. Nov. 30, 2012) ("TransWeb Final Jury Instructions").

12 TransWeb Final Jury Instructions at 2.

13 *Id.*

14 *Id.* at 2-3.

15 *Id.* at 5-6.

16 *TransWeb, LLC v. 3M Innovative Props. Co.*, 812 F.3d 1295, 1300, 1306-07 (Fed. Cir. 2016).

2. Jury Instructions Delineated Different Standards

Though the *TransWeb* jury's finding—that 3M committed antitrust and patent violations—was based on the same conduct, the case's jury verdict form and instructions delineated rather different standards for making findings on inequitable conduct[17] and

17 Specifically, regarding the prerequisites for finding inequitable conduct, the jury was instructed as follows regarding "material information" and "intent to deceive":

> *Material*
> Information or statements are material if the Examiner would not have granted the claims of a patent if it had been aware of the information alleged to be material. This is known as "but-for" materiality. To assess whether omitted information or an incorrect statement is but-for material, you must decide whether the Examiner would have refused to issue the claims of the patent if it had been aware of the withheld information or the accurate statement. In the case of egregious misconduct, for example, filing an unmistakably false affidavit, as opposed to mere nondisclosure, the but-for materiality is presumed. You may only find information or statements to be material if there is clear and convincing evidence that they are but-for material.
>
> *Intent to Deceive*
> In order for inequitable conduct to have occurred, TransWeb must establish that the only reasonable explanation for any failure to disclose but-for material information or for making false or misleading statements that were but-for material is that the actions were done with an intent to deceive the Examiner. Specifically, for information TransWeb contends a patent prosecutor, named inventor, or other individual who was substantively involved in the prosecution of the patent or patent at issue failed to disclose, TransWeb must demonstrate that the individual knew of the information, knew it was but-for material, and nevertheless made a deliberate decision to withhold it. If that individual's actions amount to no more than negligence, oversight, carelessness, or an error in judgment, even if it was grossly negligent, then there was no intent to deceive and there is no inequitable conduct. Intent may be shown through direct evidence, such as documents or testimony about one's intent to deceive. Intent also may be shown through indirect evidence or, in other words, it may be inferred from conduct. However, intent requires that the person allegedly making false statements know they are false or allegedly withholding information [they] know [] is material. If you believe it is reasonably possible there was deceptive intent, but also believe it is reasonably possible there was not deceptive intent, then you should conclude that there was no intent to deceive. You may only find intent to deceive if TransWeb proves by clear and convincing evidence that the only reasonable explanation is deceptive intent.

TransWeb Final Jury Instructions at 28-29.

fraudulent procurement of a patent.[18] However, these forms and instructions did not attempt to further clarify the differences in the legal standards for these two charges.

In particular, on "materiality" for inequitable conduct, the jury instructions inexplicably asked the jury to apply *the clear and convincing standard* instead of *the preponderance of the evidence standard* as prescribed in *Therasense* in determining whether the withheld information was "material." And on *Walker Process* fraud, the jury instructions recited the less instructive (and potentially different) standard of "knowingly" enforcing a patent obtained by fraud and did *not* insist that intent to deceive be the single most reasonable inference.[19] The germane questions on the jury verdict form simply asked: "Is the '458 patent unenforceable by virtue of inequitable conduct?", "Is the '551 patent unenforceable by virtue of inequitable conduct?" and "Did 3M violate the antitrust laws by enforcing or attempting to enforce fraudulently-procured patents?"[20] After post trial-briefing and argument, the district court ultimately ruled in favor of TransWeb on the inequitable conduct defense, reaching identical conclusions as the jury on the issues of materiality and intent.[21]

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18 The jury instructions on finding fraudulent procurement of a patent were a bit different. Specifically, the jury was instructed that:

> TransWeb must prove by clear and convincing evidence that 3M intentionally withheld or deliberately falsified information that, had the Patent Office known about it, would have resulted in the Patent Office denying the patent to 3M. Inadvertent errors or honest mistakes by 3M do not constitute fraud. By the same token, even deliberate falsification of information is not sufficient to support a Section 2 charge if you determine that the Patent Office, knowing of the falsification, would have issued the patent anyway. **This is different than a situation involving egregious misconduct in the context of inequitable conduct where but-for materiality is presumed.** …
>
> If you find that TransWeb has not met its burden in proving fraud by clear and convincing evidence, you must find for 3M and against TransWeb on TransWeb's contention that 3M violated the Sherman Act by fraudulently obtaining a patent.
>
> If you find that TransWeb has proven fraud by clear and convincing evidence, then you must determine whether 3M has enforced or attempted to enforce the fraudulently obtained patent with knowledge of the fraud. **This does not have to be proven by clear and convincing evidence. Instead, it is sufficient if you find from a preponderance of the evidence that 3M knowingly enforced or attempted to enforce the fraudulently obtained patent**.
>
> If you find that 3M has not attempted to enforce the fraudulently obtained patent, then you must find for 3M on TransWeb's contention that 3M violated the Sherman Act by fraudulently obtaining a patent. If, after having found from clear and convincing evidence that 3M fraudulently obtained a patent, you also find that 3M knowingly enforced or attempted to enforce the fraudulently obtained patent, then you must decide whether the remaining elements of a Section 2 monopolization charge have been proven by TransWeb as well. I will instruct you on those remaining elements shortly.

Id. at 36-38 (emphases added).

19 *Id.* at 37.

20 Final Jury Verdict Form, *TransWeb, LLC v. 3M Innovative Props. Co.*, No. 2:10-CV-04413-FSH-JBC, Doc. No. 512, at 2–3 (D.N.J. Nov. 30, 2012) ("TransWeb Final Jury Verdict Form").

21 *TransWeb, LLC v. 3M Innovative Props. Co.*, 812 F.3d at 1300.

3. Appeal of the District Court's Ruling

On appeal, 3M did not attempt to argue that the materiality and intent elements of inequitable conduct did not mirror those elements of a *Walker Process* charge (or that a finding of inequitable conduct was not also dispositive in the *Walker Process* context).[22] As TransWeb summarized in its appellee brief, "the jury's *Walker Process* finding is supported by the same evidence supporting the district court's inequitable conduct determination" and "3M does not meaningfully argue that the materiality and intent requirements for inequitable conduct are different from those requirements for a *Walker Process* claim."[23]

At that time, the Federal Circuit had not yet acknowledged the harmonization of *Walker Process* fraud and inequitable conduct. While a read of the jury instructions might have suggested an alternative ruling, the Federal Circuit in *TransWeb* ultimately concluded that "the showing required for proving inequitable conduct and the showing required for proving the fraud component of *Walker Process* liability may be nearly identical."[24] In reviewing the relevant inequitable conduct and fraudulent patent procurement charges, since the patentee did not contest that, if affirmed, the inequitable conduct showing proved the fraud component of the *Walker Process* charge, the Federal Circuit then accepted as admitted sufficient demonstration of the *Walker Process* claim.[25] In sum, *TransWeb* is significant as the first instance where the Federal Circuit not only espoused that inequitable conduct and *Walker Process* fraud are basically equivalent but actually *treated* the two charges identically.

A. *Inline Packaging, LLC v. Graphic Packaging International, LLC*

4. Case Background

Since the issuance of *TransWeb*, an increasing number of courts have adopted and built upon the Federal Circuit's equivalent treatment of *Walker Process* and inequitable conduct claims. One recent example is *Inline Packaging, LLC v. Graphic Packaging International, LLC*, where Inline sued Graphic, alleging that the latter had monopolized the susceptor-packaging market for frozen microwave foods through anticompetitive conduct, including fraudulently procuring patents.[26] Specifically, Inline alleged that Graphic had committed *Walker Process* fraud by intentionally withholding information from the Patent Office regarding omitted unnamed co-inventors and allegedly material prior art sales.[27]

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22 *See* Answering Brief of Appellee TransWeb ("TransWeb Answering Appellee Br."), *TransWeb, LLC v. 3M Innovative Props. Co.*, Appeal No. 14-1646, 2015 WL 512710, at *45–47 (Fed. Cir. Jan. 29, 2015) (appeal from D.N.J., No. 10-cv-04413); *see generally* Brief of Appellant 3M Innovative Properties Co. ("3M Appellant Br."), *TransWeb, LLC v. 3M Innovative Props. Co.*, Appeal No. 14-1646 (Fed. Cir. Nov. 3, 2014) (appeal from D.N.J., No. 10-cv-04413).

23 TransWeb Answering Appellee Br., at *46-47.

24 *TransWeb, LLC v. 3M Innovative Props. Co.*, 812 F.3d at 1307.

25 *Id.*

26 *Inline Packaging, LLC v. Graphic Packaging Int'l, LLC*, 962 F.3d at 1021-25. Inline also brought claims of tortious interference, discount bundling, and trade secret misappropriation.

27 Brief of Defendant-Appellee, Graphic Packaging International, LLC ("Graphic Appellee Br."), *Inline Packaging, LLC v. Graphic Packaging Int'l, LLC*, Appeal No, 18-3167, 2019 WL 721618, at *16, *18-19 (8th Cir. Feb. 15, 2019) (appeal from D. Minn., No. 0:15-cv-03183-ADM).

5. The Substance of *Inline*'s *Walker Process* Fraud Allegations

Regarding its first allegation, Inline contended that Graphic had intentionally withheld material information from the Patent Office by fraudulently omitting the name of a co-inventor on the relevant Graphic patents.[28] Inline alleged that the named inventor on one of the Graphic patents, Fitzwater, was not the sole inventor of said patent and that "someone at or associated with Nestlé," a company that Graphic had worked closely with, should have also been named on the patent. Inline did not identify this allegedly omitted co-inventor by name.[29]

The district court ruled that Inline's failure to actually name this ostensible co-inventor barred Inline's inequitable conduct claim as a matter of law. The court quoted case law for the proposition that, "[i]n the absence of allegations identifying the specific individual or individuals who allegedly co-invented the claimed invention and setting forth specific facts showing how each of these individuals contributed to the conception of a particular claim or claims, [a plaintiff's] inequitable conduct allegation . . . is insufficient as a matter of law."[30]

Regarding its second *Walker Process* fraud claim, Inline averred that Graphic failed to disclose allegedly material prior art sales to the Patent Office by not mentioning its sales of certain sleeve design samples. The district court plainly rejected this contention. The court found that it did not need to even address the issue of whether the prior sales actually were material given that "Inline has offered no argument or evidence (and certainly not clear and convincing evidence) that anyone at Graphic owing a duty of candor to the [Patent Office] knew that the prior sales were material yet deliberately chose not to disclose them."[31]

Specifically, the court had held that there were two individuals at Graphic who owed a duty of candor to the Patent Office. It individually examined both these individuals (while also evaluating, for good measure, the actions of another individual who the court held *did not* ultimately owe a duty of candor to the Patent Office), to assess whether any of these relevant people knowingly chose not to disclose material information regarding the prior art sales.[32] The court found that none of these individuals had any knowledge that the prior sales were material. As such, it held that Inline could not show that "the 'single most reasonable inference' to be drawn is that [the relevant individuals] intended to deceive the [Patent Office] by not disclosing the prior sales."[33] The district court squarely rejected all of Inline's other claims on summary judgment.[34]

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28 Graphic Appellee Br., at *18–19.

29 *Id.* at *19.

30 *Inline Packaging, LLC v. Graphic Packaging Int'l, LLC*, 351 F. Supp. 3d 1187, 1204 (D. Minn. 2018) (internal quotation and citation omitted).

31 *Id.*

32 *Id.* at 1204-05.

33 *Id.* at 1205 (quoting *Therasense*, 649 F.3d at 1290).

34 *Id.* at 1194.

6. Appeal of the District Court's Ruling

Inline appealed, urging the Eighth Circuit to overturn the district court's ruling and find that Graphic had fraudulently procured its patents. Inline contended that "the district court erred by dismissing Inline's claims arising from Graphic's fraudulent procurement of the Asserted Patents and enforcement of those patents to maintain Graphic's monopoly, erroneously disregarding evidence of Graphic's intent to defraud the [Patent Office] by concealing inventorship information and prior sales."[35] Inline's appellate brief zeroed in on the issue of whether the district court had properly found that no Graphic employee intended to defraud the Patent Office.

In focusing on this issue, Inline contended that the district court had applied an erroneously high standard in assessing the intent prong of a *Walker Process* fraud claim and claimed that "[s]ummary judgment is improper if the jury could find clear and convincing evidence of intent to defraud the [Patent Office]."[36] Inline contended that courts do not and should not treat *Walker Process* and inequitable conduct intent claims equivalently and that the district court had erred in so doing. It argued that "[t]he Federal Circuit has held that inequitable conduct requires that intent to defraud be the 'most reasonable inference to be drawn from the evidence.' However, the Federal Circuit has not applied this standard to *Walker Process* claims, and neither has the Eighth Circuit."[37]

The Eighth Circuit did not agree with Inline. Instead, citing to *TransWeb*, it expressly adopted the *Therasense* standard in analyzing the fraud element of a *Walker Process* antitrust claim. The court found that Inline had failed to establish "knowing and willful fraud" since "the single most reasonable inference" was *not* that defendants intended to deceive the Patent Office.[38] As this makes evident, the Eighth Circuit plainly espoused and applied the *Therasense* "single most reasonable inference" standard in evaluating deceptive intent for *Walker Process* fraud.

A. *In re Loestrin 24 Fe Antitrust Litigation*

District courts have also recognized and applied identical standards to *Walker Process* and inequitable conduct claims. For example, in *In re Loestrin 24 Fe Antitrust Litigation*, on a motion for summary judgment, the court evaluated three allegations of *Walker Process* fraud relating to defendants' birth control product, Loestrin 24 Fe.[39] First, plaintiffs contended that defendants committed *Walker Process* fraud because an individual with a duty of candor to the Patent Office, Dr. Hodgen, had intentionally concealed an article (the so-called "Molloy Article") from the Patent Office. The Molloy Article contained the following allegedly material statement: "[t]o reduce the risk of missed pill conception a 28 day pack containing

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35 Brief of Plaintiff-Appellant, Inline Packaging, LLC ("Inline Appellant Br."), *Inline Packaging, LLC, v. Graphic Packaging Int'l LLC*, Appeal No, 18-3167, 2018 WL 6828626, at *29 (8th Cir. Dec. 21, 2018) (appeal from D. Minn., No. 0:15-cv-03183-ADM).

36 *Id.* at 30 (quotation marks omitted and emphasis removed).

37 *Id.* & n.1 (quoting *Therasense*, 649 F.3d at 1290).

38 *Inline Packaging*, 962 F.3d at 1028.

39 *In re Loestrin 24 Fe Antitrust Litig.*, 433 F. Supp. 3d at 305 (explaining that, in a *Walker Process* case, "[i]ntent to deceive must be 'the single most reasonable inference able to be drawn from the evidence'" (quoting *Therasense*, 649 F.3d at 1290)).

23 pills and 5 blanks could be substituted for current 21 day pack. This would still permit a withdrawal bleed without the risk of significant follicular development."[40]

In response, defendants argued that plaintiffs had adduced no evidence that anyone with a duty of candor had deliberately deceived the Patent Office regarding the Molloy Article. Agreeing with defendants, the court cited to *Therasense*'s "single most reasonable inference" standard,[41] explaining that "[t]o meet their burden, Plaintiffs must show evidence from which a rational juror could find by clear and convincing evidence that an intent to deceive is the single most reasonable inference."[42] Holding that plaintiffs' "evidence related to intent to deceive falls short," the court dismissed the allegation that the omission of the Molloy Article could form the basis for a finding of *Walker Process* fraud.[43]

Next, plaintiffs contended that defendants had committed *Walker Process* fraud because Dr. Hodgen had failed to disclose a study, the so-called 30-Woman Study, to the Patent Office.[44] As the court synthesized the issue, "the real question is whether the jury could find that intent to deceive is the single most reasonable inference."[45] After an evaluation of the undisputed facts regarding Dr. Hodgen's failure to disclose the 30-Woman Study to the Patent Office, the court opted to reserve this issue for the jury, concluding that a reasonable jury could find that intent to deceive was the single most reasonable inference underlying the omission of the study.[46] The court took a similar approach to plaintiffs' last basis for their *Walker Process* fraud claim—their contention that Dr. Hodgen and another individual with a duty of candor to the Patent Office had "fraudulently misrepresented the amount of estrogen in other commercially available oral contraceptives" and that if these individuals had been honest about the amount of ethinyl estradiol in Loestrin, defendants' patent would never have actually issued.[47] After evaluating the pertinent evidence, the court held that "a jury could conclude by clear and convincing evidence that intent to deceive is the single most reasonable inference."[48] The *Loestrin* court's analysis of

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40 *Id.* at 309.

41 *Id.* at 305.

42 *Id.* at 309.

43 *Id.* at 310.

44 *Id.* at 310 (emphasis omitted). The 30-Woman Study "was designed to determine whether Loestrin 1/20 would suppress ovarian activity more efficiently when given for a 25 day regimen as opposed to the normal 21 day cycle of the pill," and its objective "was to establish that a shorter pill free interval could increase the efficacy of low dose contraceptives while providing a more regular and agreeable bleeding pattern." *Id.*

45 *Id.* (internal citations omitted).

46 *Id.* at 310, 313.

47 *Id.* at 312.

48 *Id.* at 313.

these three allegations thus makes its utilization of the *Therasense* "single most reasonable inference" standard in the context of a *Walker Process* claim eminently clear.[49]

IV. WHAT DIFFERENCES REMAIN?

Despite this relative harmonization of the two standards, there are a few remaining differences between proving inequitable conduct and proving fraud on the Patent Office. However, these differences are unlikely to make any practical difference in the courts—at least not in the near future. For one, to prevail on a claim of *Walker Process* fraud in an antitrust case, in addition to proving fraud on the Patent Office, an antitrust plaintiff must also prove other elements of an antitrust claim (such as relevant market and market power) as well as proving a patentee's knowledge of this fraud when enforcing the patent.[50]

Another remaining difference between the materiality prongs of inequitable conduct and *Walker Process* fraud is in the analysis of a false declaration. Namely, the *Therasense* court retained an exception to the "but-for" standard of materiality in instances of "affirmative acts of egregious misconduct, such as the filing of an unmistakably false affidavit."[51] No such corollary exists in the *Walker Process* context. Accordingly, in those instances, the *Walker Process* "but-for" materiality standard remains a higher standard than that required for inequitable conduct. In practice, however, it appears that courts hearing inequitable conduct defenses rarely, if at all, apply the *Therasense* exception to "but-for" materiality. Hypothetically, if certain information is only tangential and not material to patentability, it is unlikely that an applicant intended to deceive the Patent Office by falsifying that information.[52]

Moreover, while inequitable conduct defenses are equitable claims adjudicated by judges, *Walker Process* antitrust claims are legal claims tried before juries. In cases where both charges are present, juries will now likely decide these charges together by issuing an advisory verdict for inequitable conduct and then rendering their findings on the *Walker Process* claim. Also, in pre-trial motions, these two charges will probably rise and fall together.

The recent *Complete Genomics, Inc. v. Illumina, Inc.* opinion foreshadows how courts eventually may hold that a finding of inequitable conduct from an earlier bench trial has preclusive effect on a subsequent legal claim of *Walker Process* fraud in a later antitrust action.[53] While the *Complete Genomics* court did not ultimately decide this issue, its

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49 Although not discussed in detail in this article, one other recent example of a district court's clear utilization of the *Therasense* standard is *Targus Int'l LLC v. Victorinox Swiss Army, Inc.*, No. 20-464-RGA, 2020 WL 7264199 (D. Del. Dec. 10, 2020). In that case, after analyzing the inequitable conduct claims (using the single most reasonable inference standard), the court found its prior evaluations of materiality and intent (using the same standard) dispositive on the *Walker Process* fraud claim. In the court's words, "the parties do not dispute that if the Court finds (as it has) that Victorinox has adequately pleaded inequitable conduct as to Counterclaim III and the Third Defense, it has also sufficiently pleaded the fraud component of a *Walker Process* claim." *Id.* at *6-7 n.9-10.

50 *Walker Process Equip.*, 382 U.S. at 174, 176-77; *Inline Packaging*, 962 F.3d at 1024-25.

51 *Therasense*, 649 F.3d at 1292.

52 *See, e.g.*, *Outside the Box Innovations, LLC v. Travel Caddy, Inc.*, 695 F.3d 1285, 1294 (Fed. Cir. 2012) (per curiam).

53 *Complete Genomics, Inc. v. Illumina, Inc.*, No. 21-CV-00217-WHO, 2021 WL 1197096, at *3 (N.D. Cal. Mar. 30, 2021).

opinion acknowledged preclusion as a potential result in light of fraud allegations. This case will be explored in depth below.

A. *Complete Genomics, Inc.*—The Preclusive Effect of a Finding of Inequitable Conduct

1. Case Background

In this case, Illumina had sued Complete Genomics, Inc. ("CGI") for patent infringement.[54] Subsequently, CGI moved to amend its answer to include an inequitable conduct defense. While its motion to amend was pending, CGI asserted a separate antitrust suit against Illumina, alleging that Illumina had violated federal antitrust laws and California unfair competition laws by enforcing its patents. According to CGI, Illumina had committed fraud on the Patent Office by knowingly and intentionally withholding a prior art reference during patent prosecution, and that Illumina was then enforcing these fraudulently obtained patents against CGI in its patent infringement case. Illumina moved to stay the antitrust action pending the resolution of the patent infringement action. The court granted Illumina's motion.

2. The Parties' Arguments Assumed the Complete Harmonization of The Legal Standards for Inequitable Conduct and *Walker Process* Fraud.

In moving to stay the antitrust case, Illumina argued that CGI's inequitable conduct defense and its *Walker Process* fraud claim were based on the same factual allegations.[55] Significantly, in its reply, Illumina argued that any factual determination on the inequitable conduct claim might have preclusive effect on the antitrust *Walker Process* fraud claim, contending that:

> There is no issue with this Court deciding CGI's inequitable conduct defense in the Infringement Action and that result being given collateral estoppel effect in this action. . . . [T]he Court may exercise its discretion to stay this separate action advancing legal claims, and any factual determinations in the Infringement Action as to CGI's inequitable conduct defense may be given collateral estoppel effect in this action. [56]

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54 *Id.* at *1, *3-4.

55 Illumina's Motion to Stay Pending Final Resolution of the Related Infringement Action, *Complete Genomics, Inc. v. Illumina, Inc.*, No. 21-CV-00217-WHO, Doc. No. 33, at 6 (N.D. Cal. Feb. 19, 2021) ("CGI's inequitable conduct defense in the Infringement Action as to the '444 and '973 Patents is premised on the same factual allegations that form the basis of its *Walker Process* claims here. If CGI's inequitable conduct defense is defeated in the Infringement Action, then CGI's *Walker Process* antitrust claims as to the '444 and '973 Patents must also fail.").

56 Illumina's Reply in Support of Motion to Stay Pending Final Resolution of the Related Infringement Action, *Complete Genomics, Inc. v. Illumina, Inc.*, No. 21-CV-00217-WHO, Doc. No. 36, at 4-5 (N.D. Cal. Mar. 12, 2021); *see also id.* at 6 ("Moreover, having filed an action that overlaps with a separate, earlier-filed action, CGI does not have a ***right*** to have a jury reconsider issues that are decided in the earlier action and subject to collateral estoppel.").

As explored in detail below, Illumina's arguments on preclusive effect were essentially predicated on a complete harmonization of the legal standards for inequitable conduct and *Walker Process* fraud, particularly with respect to two aspects of these standards.

First, Illumina assumed that the standards for proving deceptive intent for inequitable conduct and *Walker Process* fraud are (nearly) identical. Theoretically, the facts surrounding an intentional omission or misrepresentation of a material fact with respect to inequitable conduct and the fraudulent component of *Walker Process* are almost always identical. However, at least before *Therasense*, the *legal standards* for the intent elements of inequitable conduct and *Walker Process* fraud were different. Moreover, prior to *Therasense*, one would not have assumed that a finding of deceptive intent in the inequitable conduct context would have preclusive effect on the fraudulent intent finding of a *Walker Process* claim, even if the predicate factual allegations were similar or identical.

Yet, in light of the gradual harmonization of the standards for proving inequitable conduct and *Walker Process* fraud, Illumina was able to argue that any factual determinations relating to CGI's deceptive intent might be given preclusive effect in evaluating the intent prong of an antitrust *Walker Process* fraud claim. Illumina even offered a middle ground of using an advisory jury to render an advisory opinion or letting the jury render a verdict on the inequitable conduct defense in response to CGI's argument on a potential violation of the Seventh Amendment right to a jury trial.[57]

Second, Illumina's argument assumed that the burdens of proving but-for materiality are identical in both charges, despite the fact that they may actually be quite different. Specifically, the Federal Circuit in *Therasense* stated that for inequitable conduct, courts should apply a preponderance of the evidence standard in analyzing the but-for materiality of a withheld reference[58]; in *Nobelpharma*, however, the Federal Circuit held that to show *Walker Process* fraud, courts must find "a *clear* showing of reliance [by the patent examiner] that the patent would not have issued but for the misrepresentation or omission."[59]

However, because Illumina assumed that the intent and materiality elements are identical in all respects, it argued that a finding of inequitable conduct would fully address the fraud component for the antitrust *Walker Process* charge such that the court then would

57 *Id*. at 7 n.8 ("The Court has the discretion to try the issue of inequitable conduct before an advisory jury (*see* Fed. R. Civ. P. 39(c)(1); *TransWeb, LLC v. 3M Innovative Prop. Co.*, 812 F.3d 1295, 1299 (Fed. Cir. 2016) ('In accordance with an advisory jury from the verdict, the district court found the patents unenforceable due to inequitable conduct.')), or to let the jury in the Infringement Action render a final verdict on the issue.").

58 *Therasense*, 649 F.3d at 1291-92 ("[I]n assessing the materiality of a withheld reference, the court must determine whether the [Patent Office] would have allowed the claim if it had been aware of the undisclosed reference. In making this patentability determination, the court should apply the preponderance of the evidence standard and give claims their broadest reasonable construction.").

59 *Nobelpharma*, 141 F.3d at 1071 (emphasis added).

need to focus only on the other elements of the antitrust claim, such as market definition, market power, and antitrust injury.[60]

CGI appeared to have conceded that the legal standards for inequitable conduct and *Walker Process* fraud are identical. Thus, it simply argued that because of the patent trial's potentially preclusive effect, CGI's legal claim of *Walker Process* fraud would need to be determined prior to adjudicating its equitable claim of inequitable conduct.[61] To not do so would violate CGI's Seventh Amendment right to a jury trial.

The magistrate judge granted Illumina's motion to stay without any oral argument. Among other things, the court appeared to agree with Illumina and reasoned that:

> If these issues are resolved in Illumina's favor in the Infringement Action, CGI's antitrust claims would likely be mooted or unviable. A mixed resolution of these issues, or a decision in CGI's favor, could narrow or focus the remaining issues for the antitrust litigation.[62]

The court did not discuss the use of an advisory jury. Instead, it discussed at length how a judge's resolution of an equitable claim could have preclusive effect on a later legal claim without violating the Seventh Amendment. The court never actually addressed whether the legal issues between inequitable conduct and *Walker Process* fraud are identical. Rather, it simply presumed that these legal issues were identical, and, thus, that the resolution of one claim should have preclusive effect in some way over the other claim.

While the magistrate judge's reasoning was arguably foreseeable given the gradual harmonization of these two charges, the judge's reasoning is ultimately inconsistent with the notion that an inequitable conduct defense is a lesser charge than the antitrust claim of *Walker Process* fraud. Moreover, this decision may cause future patent challengers asserting an inequitable conduct defense to be more likely to assert an antitrust *Walker Process* claim in the same patent case in order to have a jury adjudicate both of these issues. Even if an antitrust *Walker Process* claim is not brought in the same patent case, now, one party or both parties may want to advocate for an advisory jury on the inequitable conduct defense in light of its almost certain preclusive effect on any potential *Walker Process* antitrust claims in the future.

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60 Illumina's Motion to Stay Pending Final Resolution of the Related Infringement Action, *supra* note 55, at 7 ("If CGI were to prevail on some of these issues in the Infringement Action, CGI's antitrust and unfair competition claims would *not* be established. A win for CGI in the Infringement Action would not establish all the elements of CGI's antitrust and unfair competition claims, as issues such as market definition, market power, subjective intent, [and] antitrust injury would remain. But in that scenario certain issues of infringement and/or validity would have been resolved, simplifying the adjudication of this derivative antitrust case.").

61 Complete Genomics' Opposition to Illumina's Motion to Stay Pending Final Resolution of the Related Infringement Action, *Complete Genomics, Inc. v. Illumina, Inc.*, No. 21-CV-00217-WHO, Doc. No. 34, at 1 (N.D. Cal. Mar. 5, 2021) ("When legal claims involve factual issues that are common with those upon which [the] claim to equitable relief is based, the legal claims involved in the action *must be determined prior to* any final court determination of [the] equitable claims." (quotation marks omitted; emphasis and alterations in original)).

62 *Complete Genomics*, 2021 WL 1197096, at *3.

As of July 2021 (the time of the submission of this article), the *Illumina* patent case was heading to trial. It will be interesting to see if the district court will try the inequitable conduct defense before an advisory jury, knowing that the parties had earlier argued that any factual and legal determinations on this defense may have preclusive effect on a later antitrust legal claim.

A. Guardant—The Doctrine of Infectious Unenforceability

Guardant Health, Inc. v. Personal Genome Diagnostics, Inc. sheds light on what role, if any, the doctrine of infectious unenforceability plays in proving *Walker Process* fraud.[63] In this case, Guardant Health, Inc. ("Guardant") and Personal Genome Diagnostics ("PGDx") disputed whether a party can assert an antitrust *Walker Process* fraud claim based on a patentee's alleged misconduct while prosecuting a related patent, rather than focusing on the patentee's behavior while prosecuting an at-issue patent. As the case elucidates, fitting the doctrine of infectious unenforceability within the antitrust legal framework may be like fitting a round peg into a square hole.

1. Case Background

By way of background, in this case, Guardant had sued PGDx for infringement of four patents.[64] In a related case, Guardant had also sued Foundation Medicine, Inc. ("FMI") for infringing these same patents.[65] Both defendants PGDx and FMI asserted inequitable conduct counterclaims against each of the four patents. First, PGDx and FMI alleged that Guardant had committed inequitable conduct by omitting a true joint inventor and making affirmative misrepresentations in identifying only one sole inventor when prosecuting three "Talasaz" patents at the Patent Office.

Second, PGDx and FMI both alleged that the last patent, the '992 patent, was unenforceable based on the doctrine of infectious unenforceability. Specifically, they contended that because the '992 patent significantly overlapped with the three Talasaz patents, the inequitable conduct committed during the prosecution of these three earlier patents also rendered the '992 patent

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63 The magistrate judge, in the report and recommendation in this action and a related action, provided a brief background on the doctrine of infectious unenforceability. According to the court, "Inequitable conduct regarding any single claim in the prosecution of a patent renders the entire patent unenforceable, not just that claim. Moreover, the taint of a finding of inequitable conduct can affect not just the improperly-prosecuted patent, but can also render unenforceable other related patents and applications in the same technology family. This concept is what courts have referred to as the doctrine of infectious unenforceability. Pursuant to this infectious unenforceability doctrine, inequitable conduct associated with one patent may render a related patent unenforceable—so long as the inequitable conduct at issue bears an immediate and necessary relation to the enforcement of a related patent." *Guardant Health, Inc. v. Found. Med., Inc.*, No. CV 17-1616-LPS-CJB, 2020 WL 2477522, at *4-5 (D. Del. Jan. 7, 2020) (quotation marks omitted).

64 U.S. Patent Nos. 9,598,731 ("the '731 patent"), 9,834,822 ("the '822 patent"), 9,840,743 ("the '743 patent"; and collectively with the other two patents, the "Talasaz patents") and 9,902,992 ("the '992 patent"; and collectively with the other Talasaz patents, "the asserted patents").

65 *Guardant Health, Inc. v. Found. Medicine, Inc.*, No. 17-1616-LPS-CJB (D. Del. filed Nov. 9, 2017).

unenforceable.[66] Both defendants did not dispute that the inventorship of the '992 patent was correct—indeed, the '992 patent explicitly named the inventor that was purportedly omitted from the Talasaz patents. They also did not dispute whether inequitable conduct was committed during the prosecution of the '992 patent.[67]

PGDx (and not FMI) additionally asserted antitrust *Walker Process* counterclaims with respect to the four patents in question. PGDx's allegations appeared to acknowledge that the allegedly willful misrepresentation and omission were committed only during the prosecution of the three earlier patents.[68] Although PGDx contended that all four patents were obtained by knowingly and willfully misrepresenting facts to the Patent Office, PGDx did not explain why or how the last patent, the '992 patent, was fraudulently obtained.

Guardant moved to dismiss the defendants' inequitable conduct counterclaims with respect to the '992 patent.[69] While its motion to dismiss was pending, Guardant also moved for summary judgment on the defendants' inequitable conduct counterclaims and on PGDx's antitrust counterclaims.[70]

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66 PGDx's Answer to Third Amended Complaint, No. 17-1623-LPS-CJB, Doc. No. 296, p.29 at ¶ 50 (D. Del. June 20, 2019), alleges:

> Eltoukhy and Talasaz's broad pattern of inequitable conduct was also directly related to the '992 Patent, rendering the claims of that patent unenforceable as well. There is a significant relationship between and among the '731, '822, '743, and '992 Patents. The '992 Patent shares an almost identical specification to the '731, '822, and '743 patents, and relies on the earlier disclosed subject matter for written description support for its claims. By not naming Eltoukhy as an inventor on the '731, '822, and '743 Patents, Eltoukhy and Talasaz concealed that Eltoukhy also invented the fundamental ideas underlying the '992 Patent.

See also FMI's Answer to Plaintiff's Third Amended Complaint, No. 17-1616-LPS-CJB, Doc. No. 182, p.34 at ¶ 74 (D. Del. July 18, 2019) (similar allegation).

67 *Guardant Health, Inc. v. Found. Med., Inc.*, No. CV 17-1616-LPS-CJB, 2020 WL 2477522, at *5-12 (D. Del. Jan. 7, 2020).

68 PGDx's Answer to Third Amended Complaint, No. 17-1623-LPS-CJB, Doc. No. 296, p.49 at ¶¶ 149-50 (D. Del. June 20, 2019), alleges:

> Guardant has willfully maintained and will further maintain its monopoly power in this market through exclusionary and anticompetitive means. During prosecution of the '731, '822, and '743 Patents, Eltoukhy and Talasaz, acting on behalf of Guardant, misrepresented and fraudulently withheld that Eltoukhy was an inventor. They intentionally withheld this information and suppressed evidence to prevent Illumina from asserting an ownership interest in the Patents-in-Suit. They did so to consolidate rights to the Patents-in-Suit and bolster an anticompetitive scheme to exclude competition in the liquid biopsy market.
>
> As a result, Guardant obtained the Patents-in-Suit by knowingly and willfully misrepresenting facts to the [Patent Office]. Guardant then attempted to enforce the Patents-in-Suit knowing that they are invalid and unenforceable. . . . .

69 Guardant's Motions to Dismiss, No. 17-1616-LPS-CJB, Doc. No. 186 (D. Del. July 22, 2019) (redacted version of Doc. No. 169) *and* No. 17-1623-LPS-CJB, Doc. No. 320 (D. Del. July 8, 2019) (redacted version of Doc. No. 285).

70 Guardant's Motions for Summary Judgment, No. 17-1616-LPS-CJB, Doc. No. 291 (D. Del. Dec. 10, 2019) *and* No. 17-1623-LPS-CJB, Doc. No. 434 (D. Del. Dec. 10, 2019).

The magistrate judge recommended denying Guardant's motion to dismiss the inequitable conduct counterclaims with respect to the '992 patent.[71] The magistrate judge recommended granting Guardant's motion for summary judgment that no *Walker Process* fraud was committed with respect to the '992 patent.[72] The magistrate judge also recommended denying Guardant's motion for summary judgment of no inequitable conduct for all of the asserted patents and no *Walker Process* fraud with respect to the three Talasaz patents.[73]

In recommending the denial of Guardant's motion to dismiss the inequitable conduct counterclaims with respect to the '992 patent, the court found that the defendants' theory of infectious unenforceability was not primarily based on any inequitable conduct that occurred during the prosecution of the '992 patent, but was instead predicated on the '992 patent's relationship to the other three "infectious" patents.[74] However, because, in the magistrate judge's eyes, there was no misconduct during the prosecution of the '992 patent, the court also recommended granting Guardant's summary judgment motion of no *Walker Process* fraud with respect to the '992 patent.[75]

2. Competing Considerations Regarding Whether Fraud on the Patent Office Can Be "Infectious"

Guardant and PGDx both raised reasonable arguments and flagged competing policy considerations. In its objections to the magistrate's recommendations, PGDx argued that "[t]he relationship between infectiously-unenforceable patents and related patents directly obtained through fraud supplies the necessary fraud to support a *Walker Process* claim."[76]

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71 *Guardant Health*, No. CV 17-1616-LPS-CJB, 2020 WL 2477522, at *1.

72 *Guardant Health, Inc. v. Found. Med., Inc.*, No. CV 17-1616-LPS-CJB, 2020 WL 2461551, at *1, 16 (D. Del. May 7, 2020) (stating, "the Court recommends that Guardant's antitrust MSJ be GRANTED-IN-PART only to the extent that PGDx's *Walker Process* counterclaims are premised on the '992 patent, and that it be DENIED in all other respects"), *report and recommendation adopted by* No. CV 17-1616-LPS-CJB, 2020 WL 5994155 (D. Del. Oct. 9, 2020).

73 *Id.* at *1, 8 (stating, "at the summary judgment stage, the Court finds that the evidence, viewed in the light most favorable to Defendants, is sufficient to demonstrate at least a genuine dispute of fact as to whether an immediate and necessary relation exists between the inequitable conduct alleged with respect to the Talasaz patents and the enforcement of the '992 patent").

74 *Guardant Health*, No. CV 17-1616-LPS-CJB, 2020 WL 2477522, at *4 ("Defendants' theory as to the unenforceability of the '992 patent is not primarily based on inequitable conduct said to have occurred during the '992 patent's prosecution itself. Instead, it rests on the relationship between the '992 patent and the prosecution of other related patent applications—i.e., on what is known as the doctrine of infectious unenforceability." (quotation marks omitted)).

75 *Guardant Health*, No. CV 17-1616-LPS-CJB, 2020 WL 2461551, at *10 n.18 ("Guardant further argues that PGDx's *Walker Process* claim with respect to the '992 patent fails even if that patent were found to be unenforceable under the doctrine of infectious unenforceability. Guardant states that this is because such a finding would not demonstrate materiality of the alleged misconduct with respect to prosecution of the '992 patent, and thus would not rise to the level of fraud on the [Patent Office] required for a *Walker Process* claim. In its answering brief, PGDx does not really respond in a persuasive manner to this charge. (Doc. No. 453 at 14 ('[E]ven if PGDx could not assert *Walker Process* claims based on the '992 Patent, PGDx's claims are still properly based on Guardant's other patents.')) Therefore, the Court recommends that Guardant's antitrust MSJ be granted-in-part to the extent that PGDx's *Walker Process* counterclaims are premised on the '992 patent.").

76 PGDx's Objections to Magistrate Judge's April 22, 2020, Report and Recommendation, No. 17-1623-LPS-CJB, Doc. No. 571, at 7 (D. Del. May 11, 2020) (emphases omitted).

Guardant, on the other hand, argued that "[i]nfectious unenforceability is not a finding of fraud, it is a finding that a patent is unenforceable despite the absence of fraud with respect to that patent."[77] According to Guardant, "a finding of infectious unenforceability does not demonstrate materiality of the alleged misconduct with respect to the prosecution of the '992 Patent, and therefore does not rise to the level of fraud on the PTO and cannot be relied on as the basis for a *Walker Process* claim."[78] Before the district court could resolve this issue, Guardant and PGDx subsequently settled.[79]

On one end of the debate raised by the parties' arguments, if one takes the Supreme Court's language in *Walker Process* literally—i.e., that the antitrust plaintiff must prove that the patentee "obtained the patent by knowingly and willfully misrepresenting facts to the Patent Office"—then a finding of *Walker Process* fraud can<u>not</u> be based on a patent obtained without any misrepresentation to the Patent Office.[80] Similarly, if one takes the Federal Circuit's language in *Nobelpharma* literally—that a finding of *Walker Process* fraud must be based on "a clear showing of reliance, *i.e.*, that the patent would not have issued but for the misrepresentation or omission"—then a finding of *Walker Process* fraud cannot be based on a misrepresentation and/or an omission that is <u>not</u> directly related to the patentability of the pending claims.[81] This literal interpretation might lead to a result where a patentee could assert a patent that might be rendered unenforceable under the doctrine of infectious unenforceability and yet still be free of any antitrust *Walker Process* fraud liability, just like the PGDx magistrate's decision on the '992 patent. Such a literal result appears to be consistent with the notion that inequitable conduct and the related doctrine of infectious unenforceability are lesser charges compared to the antitrust *Walker Process* claim.

At the other end of the debate, if the fraudulent misconduct from the prosecution of an earlier patent was never cured during the prosecution of the later, related patent, then that later patent was ultimately obtained by failing to disclose a material fact—that is, the fraudulent misconduct during the earlier prosecution—to the Patent Office. And even if the fraudulent misconduct was not directly related to the patentability of the later patent application, the Patent Office could have asked for additional information and/or declarations from the applicant before allowing or rejecting the pending claims. Thus, the fraudulent misconduct during the prosecution of an earlier patent could have still affected (and infected) the prosecution of the later related patent in some way. When viewed this way, the extension of the doctrine of infectious unenforceability to an antitrust *Walker Process* claim seems appropriate and reasonable.

In the *Guardant* case, for example, instead of lumping together all four patents as obtained by willfully misrepresenting the inventorship of the earlier three patents, PGDx could have differently framed the misrepresentation and/or omission with respect to the '992 patent. Because PGDx admitted that the inventorship of the '992 patent was correct,

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77 Guardant's Response to PGDx's Objections to the Magistrate Judge's April 22, 2020, Report and Recommendation, No. 17-1623-LPS-CJB, Doc. No. 585, at 4 (D. Del. May 27, 2020) (emphasis omitted).

78 *Id.*

79 *See, e.g.*, Stipulation of Dismissal, No. 17-1623-LPS-CJB, Doc. No. 622 (D. Del. Aug. 31, 2020).

80 *Walker Process Equip.*, 382 U.S. at 177.

81 *Nobelpharma*, 141 F.3d at 1071.

the parties thus disputed only whether the inventorship of the earlier patents was incorrect and misrepresented. Nonetheless, had Guardant disclosed during the prosecution of the ’992 patent that the inventorship of the earlier patents might have been incorrect, the patent examiner could have taken action. For example, he or she could have required, among other things, that Guardant submit declarations and proof of inventorship for the application of the ’992 patent before deciding to allow its claims. Seen in this way, the disclosure of the inventorship of the earlier patents could have thus affected (and infected) the prosecution of the later ’992 patent.

One interesting question is whether an antitrust plaintiff may be able to allege that a patentee asserted a sham patent litigation knowing the infected patent was unenforceable under the doctrine of infectious unenforceability. In that case, the plaintiff will need to prove that the patentee’s enforcement of the infected patent was objectively baseless and in bad faith. There, a direct link between the fraudulent misconduct before the Patent Office and the prosecution of the infected patent would be helpful, though not necessary. In the end, however, proving that a patent suit was objectively baseless may be more difficult than proving the but-for materiality of a misrepresentation and/or a link between the misrepresentation and the infected patent. Thus, the doctrine of infectious unenforceability may not fit well within the objective baselessness and bad faith prongs of sham patent litigation. This result tends to support the notion that inequitable conduct is a lesser charge than antitrust violations. Ultimately, though, the doctrine of infectious unenforceability probably does not fit neatly with any antitrust theories.

V. CONCLUSION

As this article has explored, the post-*Therasense* decade has shown that courts are by and large treating inequitable conduct and *Walker Process* cases equivalently. The coalescence in the treatment of these two charges has been acknowledged and applied by the Federal Circuit and other appellate courts, as well as at the district court level. While there are a few remaining, minor differences in the application of *Walker Process* fraud and inequitable conduct, it seems unlikely that these differences will make any practical difference in the courts now. While the degree to which the CGI magistrate judge’s suggestion that a finding of inequitable conduct in an earlier patent case may have preclusive effect, and may narrow the issues in a subsequent *Walker Process* case, remains to be seen, there is no doubt that this suggestion is likely to have a significant impact in future patent and antitrust cases. Moreover, although the Federal Circuit in *Therasense* addressed the charges of inequitable conduct that plagued the major patent cases at that time, it and other appellate courts have not had any opportunity to closely examine whether the charges of *Walker Process* fraud have been prevalent in major antitrust-patent cases. And regardless of whether or not the Federal Circuit intended to completely harmonize these two charges in *Therasense*, at the next opportunity, it could perhaps provide further clarity on their relationship.

"COMPETITION POLICY IN ITS BROADEST SENSE": CAN ANTITRUST ENFORCEMENT BE A TOOL TO COMBAT SYSTEMIC RACISM?

By Rosa M. Morales[1]

The debate among academics, lawyers, politicians, and others about the proper role of antitrust policy in addressing wealth inequality—and by extension, racial inequality—in the United States has intensified. Some critics blame conservative judicial interpretations and applications of antitrust law for increasing concentrations of corporate power, which they argue has contributed to growing wealth inequality, and in turn, racial economic inequality. As such, they posit, modern antitrust enforcement—or lack thereof—has aided and perpetuated systemic racism.

In the past year, a growing chorus has called for antitrust laws to be deployed as a tool to combat systemic racism. Proponents argue that an anti-racist approach to enforcement is consistent with the original purposes of the U.S. antitrust laws, which they claim was to rein in corporate concentrations of power and ensure equal access to markets.[2] Indeed, finding ways to prevent antitrust enforcement from perpetuating structural inequality will bring U.S. competition policy closer to its stated policy goals of restoring balance and fairness in the marketplace, and promote racial equity.[3]

Among the chief proponents of anti-racist antitrust enforcement is Federal Trade Commission ("FTC") Commissioner Rebecca Kelly Slaughter, who in September 2020 ignited a conversation about whether and how antitrust enforcement can and should be anti-racist.[4] Slaughter's statements echo the Biden/Harris Administration's prescription for a "whole-of-government" approach for eradicating systemic racism, including through competition policy and enforcement.[5] Her comments also come at the cusp of what may

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2 *See, e.g.*, Hal Singer, *Antitrust Can Address Racial Inequities*, The Am. Prospect (Feb. 10, 2021), https://prospect.org/economy/antitrust-can-address-racial-inequities; Brendan Kennedy, *Yes America, Antitrust Laws Do Perpetuate Structural Racism But They Don't Have To*, N.Y. State Bar News (Jan. 27, 2021), https://nysba.org/yes-america-antitrust-laws-do-perpetuate-structural-racism-but-they-dont-have-to; Sandeep Vaheesan, *How Antitrust Perpetuates Structural Racism*, The Appeal (Sept. 16, 2020), https://theappeal.org/how-antitrust-perpetuates-structural-racism.

3 For example, Federal Trade Commission attorney Synda Mark explained that the goals of antitrust ("ensuring appropriate balance within markets") and those of racial equity ("balancing that which is unbalanced") are ultimately similar. *See Equity and Antitrust – A Framework for the Future?*, Am. Bar Ass'n, Antitrust L. Section (Jan. 11, 2021), https://www.americanbar.org/groups/antitrust_law/committees/committee_program_audio/january-2021/011121-equityandat.

4 *See* @RKSlaughterFTC, Twitter (Sept. 9, 2020, 11:28 AM), https://twitter.com/RKSlaughterFTC/ status/1303762111433265153 ("But I don't think there has been nearly enough discussion about whether our #antitrust laws can play a role in racial equity. I think the answer is YES! #Antitrust can and should be #antiracist. 5/14").

5 On July 9, 2021, President Joe Biden signed a sweeping executive order titled the "Executive Order on Promoting Competition in the American Economy" seeking to "enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony." Exec. Order No. 14036, 86 Fed. Reg. 36,987 (July 9, 2021).

be a significant realignment in U.S. antitrust and competition policy triggered by unusual bipartisan support for reining in market power in and beyond "Big Tech."[6]

This Article explores the relationship between antitrust policy and racial inequality in the United States, ways in which antitrust law may be used to address systemic racism, foreign regimes that embed racial or social equity principles in their competition policies, and the future of anti-racist enforcement in upcoming reforms in U.S. antitrust policy.

I. THE ANTITRUST AND RACIAL INEQUALITY CONNECTION

According to commentators, the federal antitrust laws—the Sherman Antitrust Act,[7] the Federal Trade Commission Act,[8] and the Clayton Antitrust Act[9]—were originally designed to curb increasing concentrations of economic and social power held by "trusts"—famously, American Tobacco and Standard Oil.[10] The drafters, some argue, "understood that concentration of economic power concentrates political power, posing a threat to democracy akin to monarchy or dictatorship."[11] Their aims were therefore to promote economic justice, equal opportunity, and democratic ideals by preventing undue concentrations of economic power and facilitating equal access to markets.[12] But some have observed that the antitrust laws' egalitarian origins have eluded communities of color because of America's highly

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6 Karl Herchenroeder, *Slaughter Pushes Progressive FTC Agenda, Hints at Bipartisanship*, Comms. Daily, Feb. 17, 2021, https://communicationsdaily.com/article/2021/02/17/slaughter-pushes-progressive-ftc-agenda-hints-at-bipartisanship-2102160076.

7 26 Stat. 209, 15 U.S.C. §§ 1-7.

8 15 U.S.C. § 45 (2006).

9 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53.

10 *See, e.g.*, Singer, *supra* note 2; Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 Harvard L. & Pol'y Rev. 235 (2017).

11 Khan & Vaheesan, *supra* note 10, at 265-66 (citing D. M. Mickey, *Trusts*, 22 Am. L. Rev. 538, 549 (1888), and David K. Millon, *The Sherman Act and the Balance of Power*, 61 S. Cal. L. Rev. 1219, 1220 (1988)).

12 Khan & Vaheesan, *supra* note 10, at 265-66; Singer, *supra* note 2. Hal Singer argues that, while the face of economic and social power has changed since the passage of the Act, the "same questions over who wields power in America" persist today: "dominant platforms or the citizens whose economic well-being antitrust laws were meant to protect." Singer, *supra* note 2.

racialized economic structure, which is characterized by predominantly white (and male) corporate ownership and control that largely persists today.[13]

For example, America's racially skewed economy has resulted in a lack of access to capital for entrepreneurs of color—effectively acting as an entry barrier to markets that has stunted Black and Brown wealth and exacerbated racial inequality.[14] Indeed, a recent Silicon Valley Bank study has shown that, in 2019, Black entrepreneurs received only one percent of the $130 billion spent by venture capitalists in the United States.[15] Another analysis of a 2014 Census Bureau survey revealed that 28 percent of Black entrepreneurs had reported hurt profits from lack of access to capital in contrast to just 10 percent of their white counterparts.[16] And when Black entrepreneurs have accessed capital, their funding levels on average are much lower than those of their white counterparts, at $35,000 and $107,000, respectively, which further limits their ability to robustly compete and grow.[17]

Observers have also blamed increasing corporate consolidation for exacerbating the inability of entrepreneurs of color to enter and compete in markets dominated by entrenched or powerful businesses.[18] They argue that increased market concentration has pushed out small businesses or denied them entry altogether, which thereby has "contribut[ed] to the economic and structural obstacles Black business owners

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13 Vaheesan, *supra* note 2. Darrick Hamilton and Madeline Neighly have noted that:

> The rise of corporate concentration, market power, financialization, and shareholder primacy has proven extremely lucrative for those already at the top of the economic hierarchy at the same time as it has increased stratification and has negatively affected those who lack wealth and power. Because of the hidden rules of race, black and brown communities have long been locked out of the mechanisms necessary to accumulate wealth and, thus, hold much less wealth and power than whites in our society. As such, the rise of corporate power has further entrenched the wealth and power of those at the top of our economic hierarchy and has had a detrimental impact on those at the bottom. By privileging the already wealthy and those who already own property or capital—America's upper-middle class, which is overwhelmingly white—this economy has disadvantaged everyone else—disproportionately black and brown Americans.

Darrick Hamilton & Madeline Neighly, Roosevelt Inst., The Racial Rules of Corporate Power: How Extractive Corporate Power Harms Black and Brown Communities and How Race-Conscious Solutions Can Create an Inclusive Economy 9 (2019) (internal citations omitted).

14 Reed Albergotti, *Black Tech Entrepreneurs Lack Legal Protections Against Discrimination in Venture Capital*, Wash. Post, July 22, 2020, https://www.washingtonpost.com/technology/2020/07/22/black-entrepreneurs-venture-capital.

15 *Id*.

16 *Id*.

17 Tyler Goodwin, *Analysis: Using Antitrust Law as a Means for Racial Equit*y, The Plug, June 22, 2021, https://tpinsights.com/2021/06/22/analysis-using-antitrust-law-as-a-means-for-racial-equity (citing a recent report by McKinsey's Institute for Economic Mobility explaining the disproportionate hardships Black entrepreneurs face when starting businesses).

18 Hamilton & Neighly, *supra* note 13, at 20-21. Indeed, Hal Singer observes: "Although the identities of the trusts have changed, we are still grappling with the same questions over who wields power in America: dominant platforms or the citizens whose economic well-being antitrust laws were meant to protect." Singer, *supra* note 2.

experience."[19] Market concentration, thus, further perpetuates and exacerbates racialized wealth inequality.

In addition, conservative judicial interpretations and applications of facially neutral antitrust laws and policies dating back to the 1960s and 1970s have been blamed for facilitating and exacerbating these racialized economic effects.[20] Specifically, critics blame conservative federal judges and enforcers for refocusing antitrust law to the "consumer welfare standard." According to critics, this efficiency-focused lens has elevated consumers above "all other economic agents" and prevented the unwinding of monopolists or cartels unless the alleged anticompetitive conduct has harmed consumers, typically in the form of higher prices.[21] But the standard permits antitrust law to address harm to racial minorities only as consumers, while "ignor[ing] that consumers can also be producers, whether workers, small-business owners, or entrepreneurs." [22] Critics have argued that the consumer welfare standard's limitations therefore restricts the degree to which antitrust law can be used "as a tool to combat inequality" or systemic racism.[23]

II. USING EXISTING ANTITRUST TOOLS TO BRING DOWN SYSTEMIC RACISM

The year 2020 was marked by a racial reckoning in the United States. The killings of George Floyd, Breonna Taylor, and others at the hands of police sparked nationwide outrage. Compounding these tragedies was the disparate impact suffered by communities of color, particularly African Americans, from the global pandemic. Many reacted by marching the streets demanding an end to racial injustice on a systemic level.

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19 Goodwin, *supra* note 17.

20 Joseph E. Stiglitz, The Price of Inequality: How Today's Divided Society Endangers Our Future 44-45 (2012) (arguing that the Chicago School economic theories of competition and antitrust, which apply the "consumer welfare standard," have played a role in creating monopolistic conditions that have exacerbated wealth inequality); Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 Geo. L.J. Online 1, 11 (2015) (claiming that "[t]he adoption of more permissive antitrust rules during the past quarter century has . . . likely increased the prevalence of market power" and, consequently, wealth inequality); Barry C. Lynn, *Killing the Competition: How the New Monopolies Are Destroying Open Markets*, Harper's Mag., Feb. 2012, at 27, 32 (same).

21 Singer, *supra* note 2; Vaheesan, *supra* note 2.

22 Singer, *supra* note 2.

23 *Id*. Recently, opponents on both sides of the aisle have argued that courts should abandon the consumer welfare standard in favor of one that considers the broader public interest, including those of workers, entrepreneurs, and small businesses. A House antitrust subcommittee report issued last year, for example, urged Congress to reassert the original democratic and equitable goals of the antitrust laws by clarifying that antitrust are designed to protect workers, entrepreneurs, small businesses, as well as consumers. Jerrold Nadler & David N. Cicilline, Subcomm. on Antitrust, Com. & Admin Law, Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations 392 (2020).

In September 2020, FTC Commissioner Rebecca Slaughter joined the cries for systemic reform through a series of tweets[24] challenging antitrust enforcers to "get creative and bold" to combat structural inequality at this "moment of national racial reckoning."[25] Slaughter gave two core justifications for why antitrust enforcement should and can be "anti-racist" to "right the wrongs of systemic racism."

First, Slaughter challenged the notion that antitrust policies should be a "value-free zone," considering that no other area of the law is value-neutral.[26] For instance, when prosecutors target white-collar crime, as opposed to violent crime, these prosecutorial decisions necessarily reflect specific values.[27] Similarly, when the FTC chooses to focus on curbing predatory lending or discrimination in auto financing, areas known to disproportionally affect African-American communities, these decisions, too, reflect certain values.[28]

Nor is the idea of "race blind" enforcement possible or workable, she argued.[29] To the contrary, antitrust enforcement—or the lack thereof—in economic and market structures that are "historically and presently inequitable" inevitably affects structural "equity or inequity," rendering "race blind" enforcement merely "aspirational."[30] According to Slaughter, purportedly "race blind" enforcement can merely reinforce these unequal economic systems and perpetuate racial inequality.[31] She therefore advocates for "open-eyed" enforcement of the antitrust laws that would consider the skewed ways that minorities have been affected by antitrust enforcement without regard to the inherent values at play.[32] According to Slaughter, reinventing antitrust to fight systemic racism

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24 *See* @RKSlaughterFTC, Twitter (Sept. 9, 2020, 11:28 AM), https://twitter.com/RKSlaughterFTC/ status/1303762111433265153 ("But I don't think there has been nearly enough discussion about whether our #antitrust laws can play a role in racial equity. I think the answer is YES! #Antitrust can and should be #antiracist. 5/14"); @RKSlaughterFTC, Twitter (Sept. 9, 2020, 11:28 AM), https://twitter.com/RKSlaughterFTC/status/1303762113001926656 ("#Antitrust is about ensuring fair #opportunity for all competitors to the benefit of #consumers. As long as Black-owned businesses & Black consumers are systematically underrepresented and disadvantaged, we know our markets are not fair. We need to fix these inequities. 6/14").

25 Kirk Victor, *Slaughter's Tweets on Antitrust and Race Spark Backlash*, FTCWatch, Sept. 21, 2020, https://twitter.com/RKSlaughterFTC/status/1303762113001926656.

26 Rebecca Kelly Slaughter, Comm'r, Fed. Trade Comm'n, Antitrust at a Precipice: Remarks of Commissioner Rebecca Kelly Slaughter at the GCR Interactive: Women in Antitrust at 4 (Nov. 17, 2020), https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf [hereinafter Antitrust at a Precipice].

27 *Id.* at 3.

28 *Id.* at 3-4.

29 *Id.* at 4.

30 *Id. See also* Max Fillion, *US FTC's Slaughter Seeks to Examine Impact of Antitrust Enforcement on Systemic Racism*, MLex Market Insight (Sept. 15, 2020), https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/us-ftcs-slaughter-seeks-to-examine-impact-of-antitrust-enforcement-on-systemic-racism.

31 Antitrust at a Precipice, *supra* note 26 at 4.

32 Lauren Feiner, *How FTC Commissioner Slaughter Wants to Make Antitrust Enforcement Antiracist*, CNBC (Sept. 26, 2020), https://www.cnbc.com/2020/09/26/ftc-commissioner-slaughter-on-making-antitrust-enforcement-antiracist.html.

would be unnecessary, as existing antitrust tools can be used creatively to mete out structural inequality.[33]

One tool is demographic data gathering. Data can be used for merger review and conduct challenges to assess disproportionate effects, *e.g.*, of price hikes, on communities of color.[34] Indeed, others have noted that "data collection that is more sensitized to the[] antiracism issues" can be used to help enforcers identify "the full range of implications of conduct and company mergers" to avoid further "marginalizing already marginalized groups" through enforcement.[35]

For example, studies have shown that there are different tolerance levels that are highly racialized for lower-quality products and price discrimination in neighborhoods where those practices occur.[36] Traditional price analyses, however, do not consider that the impact of a price increase on high-income consumers is lower than the impact on lower-income consumers.[37] Predatory pricing is another instance where data could be useful to determine whether there is an outsized impact on, for example, the ability of minority-owned businesses to compete with below-market prices or other exclusionary conduct by dominant firms.[38] Data could thus account for such disparate effects within the existing antitrust framework.

Slaughter has also suggested reprioritizing enforcement to target conduct and transactions with lopsided outcomes for consumers and businesses in communities of color.[39] In healthcare, for example, people of color tend to suffer poorer health outcomes, lower quality of care, higher costs, and fewer options than their white counterparts.[40]

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33 *Id.* Slaughter does not believe existing antitrust tools are sufficient to eradicate systemic racism. In her November 17, 2020 remarks, Slaughter recognized the need for "Congressional intervention [as] an essential input to reinvigorating antitrust law" in light of "bad case law" and "periods" of lax enforcement in the past forty years. Antitrust at a Precipice, *supra* note 26, at 5-7. Slaughter believes "permissive" jurisprudence has "incentivize[d] companies to take a chance" "at engaging in anticompetitive or monopolistic conduct or proposing mergers that are so clearly anticompetitive." *Id.* at 6.

34 Antitrust at a Precipice, *supra* note 26 at 4.

35 Brendan Kennedy, *Yes America, Antitrust Laws Do Perpetuate Structural Racism But They Don't Have To*, N.Y. State Bar Ass'n, Jan. 27, 2021, https://nysba.org/yes-america-antitrust-laws-do-perpetuate-structural-racism-but-they-dont-have-to.

36 Maria Stoyadinova, *Towards Inclusive Competition Analyses: The Questions We Overlook*, Competition Pol'y Int'l, Apr. 26, 2021, https://www.competitionpolicyinternational.com/towards-inclusive-competition-analyses-the-questions-we-overlook (citing Darrick Hamilton, Equity and Antitrust ABA Panel).

37 *Id.*

38 *Id.* (citing Nell Abernathy, Roosevelt Inst., The Effects of Market Power on Women and People of Color, Presentation to the Congressional Antitrust Caucus (Feb. 16, 2018), https://rooseveltinstitute.org/2018/03/07/the-effects-of-market-power-on-women-and-people-of-color, and Feiner, *supra* note 32).

39 Antitrust at a Precipice, *supra* note 26 at 3-4.

40 According to Jamila Taylor, African American families spend a disproportionate share of their household income on healthcare and out-of-pocket costs compared to the average American family, unduly burdening such families and making it difficult for them to access quality care. Jamila Taylor, *Racism, Inequality, and Health Care for African Americans*, The Century Found., Dec. 19, 2019, https://tcf.org/content/report/racism-inequality-health-care-african-americans.

Recent studies reveal that healthcare industry consolidation is the "driving force behind the sky-high cost of medical care and pharmaceutical drugs," consequently inflating health insurance premiums employers and individuals pay, which "disproportionately burden[s] people of color and create[s] a barrier to accessing quality care."[41]

Refocusing enforcement on markets and anticompetitive practices that have disproportionately harmed consumers of color could "help reduce racial inequity" more broadly and promote inclusion.[42] In this way, Slaughter believes the FTC's "enforcement tools [will] ensure that markets are competitive and inuring to the benefit of historically underrepresented and economically disadvantaged consumers rather than incumbents."[43]

Finally, Slaughter argues that the FTC could use its rulemaking authority to end problematic practices, such as non-compete clauses in employee contracts in industries "disproportionately populated by workers of color."[44] She argues that rulemaking may be an effective tool to address anticompetitive practices that are "difficult to litigate on a case-by-case basis" in light of the "challenging [antitrust] jurisprudence."[45]

Slaughter's enforcement recommendations were met with backlash, with some critics decrying her anti-racist prescription as inconsistent with the purposes of the antitrust laws.[46] Indeed, one countered that the FTC's jurisdiction cannot be invoked unless "the challenged conduct harms competition and the competitive process," and it would not suffice for the FTC to articulate a "goal of making markets fairer or less discriminatory."[47] Others responded that antitrust enforcers are not well-suited to achieve anti-racist objectives, and that other programs and statutes are specifically designed to address discrimination.[48]

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41 Dani Kritter, *Antitrust as Antiracist*, Cal. L. Rev. Online, Mar. 2021, https://www.californialawreview.org/antitrust-as-antiracist (citing Open Markets Institute and Rand Corporation studies showing the link between hospital consolidation and higher insurance premiums). Kritter also noted that Black families spend a greater percentage of their household income on insurance premiums and out-of-pocket healthcare costs than other American families, and that, of the more than 30 million uninsured Americans, half are persons of color, putting into "sharp focus" that "racial and ethnic minority groups are more likely to contract the [COVID-19] virus, get severely ill, and die from the" virus. *Id.*

42 Antitrust at a Precipice, *supra* note 26 at 4.

43 *Id.*

44 Fillion, *supra* note 30.

45 *Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power: Hearing Before the Subcomm. on Antitrust, Com. & Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. (2021) (prepared statement of Rebecca Kelly Slaughter, Acting Chairwoman of Fed. Trade Comm'n), *available at* https://www.ftc.gov/system/files/documents/public_statements/1588320/p180101_prepared_statement_of_ftc_acting_chairwoman_slaughter.pdf.

46 Victor, *supra* note 25.

47 *Id.*

48 *Id.* In the past, enforcers also have reacted skeptically to calls for prioritizing social considerations in antitrust enforcement. Former Assistant Attorney General Makan Delrahim acknowledged racial justice as commendable, but rejected competition law as the appropriate mechanism to address it. Similarly, former FTC Commissioner Maureen Ohlhausen did not believe antitrust to be well-suited to address socio-economic problems like wealth inequality. *See* Karen Hoffman Lent & Kenneth Schwartz, *Examining the Biden Administration's Antitrust Priorities*, N.Y. L.J. (Feb. 9, 2021), *available at* https://tinyurl.com/ysem8tk4.

But Slaughter's approach finds precedent in South Africa and beyond. Indeed, recent legislative and executive developments suggest U.S. antitrust law and policy could be redefined and expanded to consider disparate effects on communities of color in antitrust enforcement and policy.

III. LESSONS FROM SOUTH AFRICA AND BEYOND

A. South Africa

South Africa uses competition policy to redress systemic racism and promote openness and inclusivity of its market economy to right the racial wrongs of the country's past. Post-apartheid, South Africa adopted a new Constitution that contains a Bill of Rights prioritizing equality above all other enumerated rights, including dignity.[49] The nation's Deputy Justice Dikgang Moseneke observed that the "achievement of equality" is the "bedrock" of the country's "constitutional architecture" and "commits [South African] society to 'improve the quality of life of all citizens and free the potential of each person.'"[50] Equality is, thus, embedded as an imperative value consideration in all South African law, including competition law and policy.[51]

South Africa's Competition Act of 1998 explicitly acknowledged that Black South Africans were previously completely excluded "by positive law" from participating in the formal economy."[52] To redress its racist history, two of the statute's "Purposes" include: "(e) to ensure that small and medium-sized businesses have an equitable opportunity to participate in the economy;" and "(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons." [53] The Act thus sets "inclusiveness" as a guiding principle, which in antitrust law translates into a "vigilant" commitment to "lowering barriers, opening markets, and trusting in the not-yet-imagined contributions of outsiders to increase innovation."[54] Guided by this principle, South African competition policy has created a "space" where "efficiency and equity meet."[55]

In 2017, President Zuma recognized that the Act's promise of economic transformation had been unmet and urged amendment of the statute to reinforce its equality and inclusion mandate. [56] According to Zuma, this mandate could be achieved by, *inter alia*, empowering competition authorities to conduct market inquiries into whether the policy had resulted

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49 Eleanor Fox, *South Africa, Competition Law and Equality: Restoring Equity by Antitrust in a Land Where Markets Were Brutally Skewed*, CPI Antitrust Chron., Dec. 9, 2019, at 2.

50 *Id.* at 2 (quoting *Minister of Finance v. Van Heerden* (CCT 63/03) [2004] ZACC 3, 2004 (6) SA 121 (CC), paras 22-23 (S. Afr.)).

51 *Id.*

52 *Id.*

53 *Id.* (quoting South Africa's Competition Act of 1998).

54 *Id.* at 5.

55 *Id.*

56 *Id.* (citing President Jacob Zuma, 2017 State of the Nation Address).

in new players entering in the economy, Black South African participation opportunities, and more dynamic, competitive, and inclusive markets.[57]

Zuma's recommendations were adopted and the Act amended to arm enforcers with remedies targeting structural obstacles, focusing on "*[m]arkets plagued by* over-concentration and *untransformed ownership*" that acted as "primary structural impediments to market entry and ownership by Black South Africans" and other historically disadvantaged persons.[58] The reforms largely addressed: (1) abuses by dominant firms; (2) exemptions for anti-competitive agreements and practices; (3) mergers; (4) market inquiries/investigations into distortions in competition, which included assessments of harmful effects on small and medium businesses and historically disadvantaged persons ("HDPs"); and (5) granting greater institutional powers to the Minister and Executive.[59]

As a consequence, the amendments would prevent dominant firms from imposing excessive prices and shifted the burden of proof to defendants to prove that prices were reasonable after a showing by plaintiffs that the price was excessive.[60] Competition authorities also must consider equality and inclusion goals in clearing mergers and taking other enforcement action.[61] Even a competitive merger may only be approved on the condition that the parties agree to offer shares in the deal or partnerships in a joint venture, or significant worker retraining and entrepreneurial capacity-building, to historically disadvantaged persons.[62]

A prime example is the 2011 *Walmart/Massmart* case. There, the large supermarket merger threatened the survival of small South African suppliers, who feared displacement by Walmart's global supply chain. A South African court ordered that Walmart invest 200 million Rands (U.S. $13 million) on top of Massmart's 40 million Rands (U.S. $2.6 million) on capacity training for small suppliers so that they, too, could enter the global supply market. The program generated jobs and local procurement for Black South Africans and other historically disadvantaged groups.[63]

More recently, in June 2021, the South African Competition Commission blocked the proposed acquisition of Burger King South Africa by a private equity fund, ECP Africa, because the merger would have led to a significant reduction in the shares of HDPs—from over 68 percent to zero percent.[64] The Commission denied the transaction on "substantial public interest grounds," as the merged entity would result in "no ownership by HDPs

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57 *Id.*

58 *Id.* (quoting Background Note issued by the Minister of Economic Development, May 25, 2017) (emphasis in original).

59 *Id.* at 3.

60 *Id.* at 7.

61 *Id.*

62 *Id.*

63 *Id.*

64 *South African Competition Commission Blocks Burger King Acquisition*, Competition Pol'y Int'l (June 1, 2021), https://www.competitionpolicyinternational.com/south-african-competition-commission-blocks-burger-king-acquisition.

and workers."[65] The authority reasoned that the merger would have a "substantial negative effect on the promotion of greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons in firms in the market as contemplated in section 12A(3)(e) of the Competition Act." [66] Enforcement, in this instance, gave to equity.

B. EU and Canada

Beyond South Africa, the European Union, at least in principle, similarly embeds equity goals into its competition policy. For example, Article 8 of Treaty on the Functioning of the European Union ("TFEU") provides: "In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women."[67] And Article 10 of the TFEU requires that, "[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."[68] Indeed, all EU institutions must therefore consider the overarching anti-discrimination and pro-equality principles when making policy in all areas, including in competition policy.

The Canadian Competition Bureau ("CCB") has also begun considering equity principles in its competition policy and enforcement. In 2018, the CCB embarked on an analysis of the relationship between gender and other identify factors (such as race, sexual orientation, and other factors) and competition.[69] The agency partnered with the Organisation for Economic Co-operation and Development to spearhead research projects to provide data, research, and evidence for gender-inclusive competition across enforcement, regulation, and policy.[70] The agency's objective is to reduce gender-based and other forms of inequality at the systemic level through government policy, including competition.[71] Specifically, the CCB would "consider gender and other identify factors during case prioritization, product market definition, and when developing remedies."[72] It would also factor in its enforcement policy whether there are disparate effects on women or other identity group flowing from the alleged anticompetitive conduct.[73]

The above examples may serve as models, particularly South Africa's competition regime, for anti-racist competition policies in developed countries like the United States.

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65 *Id.*

66 *Id.*

67 Consolidated Version of the Treaty on the Functioning of the European Union art. 8, May 9, 2008, 2008 O.J. (C115) 47.

68 *Id.*

69 Nadia Vassos & Ellen Creighton, *The Competition Bureau's Journey Towards Inclusive Competition*, Competition Pol'y Int'l (Apr. 26, 2021), https://www.competitionpolicyinternational.com/the-competition-bureaus-journey-towards-inclusive-competition.

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.*

IV. IS THE FUTURE OF U.S. ANTITRUST LAW AND POLICY ANTI-RACIST?

The United States is at the cusp of what could be significant reforms to the nation's antitrust and competition laws. In 2021, the Biden/Harris Administration has issued various executive orders and appointed progressives to key agency posts with the express goal of eradicating wealth inequality and structural racism, including through competition policy. And major antitrust reforms have been making their way through the U.S. House of Representatives and the Senate with rare bipartisan support to scale back market power and competitive conduct both political parties believe have given certain firms, specifically in Big Tech, too much power, resulting in less competition.

According to some commentators, these reforms, if passed, combined with executive cooperation, may have the potential to mitigate some of the racialized competitive effects Slaughter and other critics argue have resulted from the last forty years of modern antitrust jurisprudence and enforcement.

A. Biden's Executive Orders

President Biden has made eradicating systemic racism a central pillar of his administration. On his first day in office, Biden issued "Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government" ("Racial Equity EO"), which explicitly recognized that "[e]ntrenched disparities in our laws and public policies" have "exacerbated inequities," including "systemic racism."[74] The Racial Equity EO sought to advance racial equity and support for underserved communities, and directed a "whole-of-government equity" approach that would require "embedding fairness" in the "policies and programs" across all federal agencies.[75] By doing so, President Biden has made racial equity a value consideration for all federal policy, akin to equality as an imperative value consideration in all South African law post-apartheid.

Notably, the Racial Equity EO establishes an Equitable Data Working Group, co-chaired by the Chief Statistician of the United States and the United States Chief Technology Officer whose members include several of the President's top economic advisors.[76] Observers view this data gathering initiative as positive news for minority-owned business owners and underserved communities, which studies show suffered disproportionately during the first wave of the pandemic, as 41 percent of Black-owned businesses closed compared to 22 percent of all businesses.[77] Indeed, as Slaughter has argued in her call for anti-racist antitrust enforcement, data collected and analyzed by this Working Group could assist the federal government in better understanding communities

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74 Exec. Order No. 13985, 86 Fed. Reg. 7,009 (Jan. 25, 2021).

75 *Id.*

76 *Id.*

77 Rhett Buttle, *Three Things President Biden's Executive Order On Racial Equity Means For Small Business*, Forbes, Feb. 15, 2021, https://www.forbes.com/sites/rhettbuttle/2021/02/15/three-things-president-bidens-executive-order-on-racial-equity-means-for-small-business.

of color and craft policy solutions, including competition policy, that may yield more equitable outcomes for all communities and small businesses.[78]

Biden renewed his "whole-of-government effort" on July 9, 2021 when he signed the sweeping "Executive Order on Promoting Competition in the American Economy" (the "Competition EO"), which directed and encouraged several federal agencies to advance 72 competition principles in various economic sectors.[79] The Competition EO directly addressed perceived harms by prioritizing measures to "address overconcentration, monopolization, and unfair competition in the American economy" that have allowed "racial . . . inequality" to "widen[]," among other things.[80] The order directed its prescriptions at key economic sectors, including: "labor markets, agricultural markets, Internet platform industries, healthcare markets (including insurance, hospital, and prescription drug markets), repair markets, and United States markets directly affected by foreign cartel activity."[81] Commentators have identified some of these sectors as areas where lax antitrust enforcement, or lack thereof, has produced disparate impacts on communities and consumers of color, which have exacerbated and perpetuated structural in systemic racism.[82] Focusing on these areas would therefore aid in addressing structural racial inequities in the economy through policy and enforcement.

Because Biden's executive orders are directives and not self-executing, however, the Department of Justice's Antitrust Division, FTC, and other federal agencies will need to determine whether and how to implement the President's recommendations in enforcement policy.

B. Federal Antitrust Enforcers

The President's interim appointment of Slaughter as Acting FTC Chairwoman may have signaled early on that the Biden/Harris Administration intended to activate a racial equity agenda at the structural level. Indeed, in her first speech as Acting Chairwoman, Slaughter declared that she intended to follow an "[a]ggressive" approach to enforcement, "including bold and innovative use of FTC's existing authority" to address all types of anticompetitive harm, including racial inequality.[83]

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78 *Id.*

79 Exec. Order No. 14036, 86 Fed. Reg. 36,987 (July 9, 2021).

80 *Id.* at 36,987, 36,990.

81 *Id.* at 36,988.

82 *E.g.*, Nicol Turner Lee & Caitlin Chin, *The Debate on Antitrust Reform Should Incorporate Racial Equity*, Brookings, July 8, 2021, https://www.brookings.edu/blog/techtank/2021/07/08/the-debate-on-antitrust-reform-should-incorporate-racial-equity (finding that the "lack of competition in the online search industry not only eliminates consumers' options to choose a different, less-biased search engine," effectively "put[ing] companies in a power powerful position to exacerbate historical racial inequalities"); Taylor, *supra* note 40 (describing the disparate burden of increasing healthcare costs on African American families).

83 *Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power: Hearing Before the Subcomm. on Antitrust, Com. & Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. (2021) (prepared statement of Rebecca Kelly Slaughter, Acting Chairwoman of Fed. Trade Comm'n), *available at* https://www.ftc.gov/system/files/documents/public_statements/1588320/p180101_prepared_statement_of_ftc_acting_chairwoman_slaughter.pdf.

In June 2021, however, President Biden picked known progressive and fierce critic of the conservative antitrust jurisprudence of the past 40 years, Lina Khan, in a surprise nomination as FTC Chairperson. Like her current colleague Slaughter has as FTC Commissioner and later as the agency's Acting Chairwoman, Khan had previously advocated "using antitrust laws aggressively to challenge aggregations of economic and political power,"[84] and argued for reinvigorating antitrust enforcement to mitigate economic inequality specifically.[85] But while not directly addressing the connection between antitrust enforcement and racial equity others have observed, Khan has long supported reorienting antitrust law "away from the efficiency focus," *i.e.*, the consumer welfare standard, to "revers[e] the dramatic rise in economic inequality" produced by increasing "market power"—which, as others have argued, disproportionately affects communities of color.[86]

Although some have hailed Khan's appointment as "transformative" and marking "the beginning of the end for a 40-year failed [antitrust] regime,"[87] the FTC is an independent agency that requires a majority vote by a five-member commission, including two Republicans, Noah Phillips and Christine Wilson, who may limit Khan's ability to advance a progressive, pro-equity agenda. And critically, both federal antitrust agencies will likely continue to be constrained by decades of antitrust laws created by a relatively conservative federal judiciary that will ultimately determine the legality of the challenged conduct or transactions. As a consequence, supporting legislation may ultimately be required before agencies can take actions or adopt policies that may more directly or explicitly consider racial equity in enforcement.

C. U.S. Congressional Proposals

Earlier this year, Senator Amy Klobuchar (D-MN)—who chairs the Senate's Subcommittee on Competition Policy, Antitrust and Consumer Rights—opined that increasing market power and concentration, and decades of court rulings and lax regulation by agency enforcers, have been key contributors to the monopoly problem, particularly in "Big Tech."[88]

In February 2021, Klobuchar unveiled sweeping new legislation, the Competition and Antitrust Law Enforcement Reform Act ("COLERA"), which is premised on the assumptions that the "presence of market power [] in the United States [is growing and is resulting in] increase[d] economic inequality, with particularly damaging effects on

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84 Sindhu Sundar, *Biden's Likely FTC Nom Shows Continued Antitrust Focus*, Yahoo! (Mar. 10, 2021), https://www.yahoo.com/now/biden-likely-ftc-nom-shows-223425563.html (quoting Stanford Law School professor Doug Melamed).

85 Khan & Vaheesan, *supra* note 10.

86 *Id.*

87 Asher Schecter, *What Does Lina Khan's FTC Nomination Mean For the Future of Antitrust?*, ProMarket (Mar. 10, 2021), https://promarket.org/2021/03/10/biden-lina-khan-ftc-antitrust-enforcement-new-brandeis (quoting Fordham law professor Zephyr Teachout, a prominent fellow proponent of transforming antitrust law and policy).

88 Kelly Anne Smith & Benjamin Curry, *Sen. Klobuchar's Antitrust Reform Targets Big Tech*, Forbes Advisor (Mar. 15, 2021), https://www.forbes.com/advisor/investing/big-tech-antitrust-reform.

historically-disadvantaged communities."[89] Notably, Klobuchar's bill aims to "deviate from the consumer welfare standard"[90] and undo some of the decades of antitrust jurisprudence that many argue has led to a monopolization crisis in the U.S. economy, which, in turn, has exacerbated racial inequality.

Klobuchar's anti-monopoly bill seeks to address the "major monopoly problem"[91] and "sav[e] capitalism and build[] an economy that works for all Americans"[92] by, *inter alia*, making it harder for dominant firms to clear mergers and acquisitions and engage in exclusionary conduct that would disadvantage competitors or inhibit their ability to compete in free markets. These legislative measures are reminiscent of federal government policies adopted during the New Deal era, which saw an "expansion of anti-monopoly laws" that ramped up antitrust enforcement in ways that benefitted independent businesses, including Black-owned businesses.[93] Indeed, one observer noted that the "new fair trade laws" of the New Deal, like the Robinson-Patman Act of 1936 and Miller-Tydings Act of 1937, combined with "anti-chain store measures passed in twenty-seven states," in fact served to constrain market concentration and led to a 31-percent increase of Black-owned retail stores and 14.5-percent increase of Black employees hired by them.[94] In its present configuration, COLERA could similarly have the potential to reverse some of the racialized effects on communities of color that have been attributed to under-enforcement of antitrust laws in the past 40 years. Indeed, according to one observer, "[p]assing [COLERA] and ending the tyranny of the consumer in antitrust cases would further end the stigma of using competition policy to attack racial injustice."[95]

Other measures in the U.S. House of Representatives similarly seek to address anticompetitive conduct through antitrust reform that some argue could have positive competitive implications for communities of color. In June 2021, for example, the House Judiciary Committee, voted to advance six landmark antitrust bills, which, if passed, would decrease anticompetitive practices in the tech industry, but also, according to some commentators, have the potential to advance racial equity by expanding the parameters of competition that currently disadvantage marginalized communities.[96]

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89 Press Release, Sen. Amy Klobuchar, Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement (Feb. 4, 2021), https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement. This bill was co-sponsored by Judiciary Subcommittee on Antitrust and Commerce Committee members Richard Blumenthal (D-CT), Cory Booker (D-NJ), Ed Markey (D-MA), and Brian Schatz (D-HI). *Id.*

90 Singer, *supra* note 2.

91 Grace Gedye, *Kobluchar: "Monopolies Hurt Everyone*," Washington Monthly (May 7, 2021), https://washingtonmonthly.com/2021/05/07/klobuchar-monopolies-hurt-everyone/.

92 Marcy Gordon, *Battling bigness: Congress eyes action against monopolies*, AP News (Mar. 19, 2021), https://apnews.com/article/publishing-health-coronavirus-pandemic-book-publishing-airlines-383681c569b18262df1d95baf65484a4.

93 Brian Feldman, *The Decline of Black Business*, Washington Monthly (Mar./Apr./May 2017), https://washingtonmonthly.com/magazine/marchaprilmay-2017/the-decline-of-black-business/.

94 *Id.*

95 Singer, *supra* note 2.

96 Lee & Chin, *supra* note 82.

For example, they argue that increased funding for federal antitrust enforcers through the Merger Filing Fee Modernization Act, would facilitate more agency challenges in conduct cases involving anticompetitive behavior that disproportionately directly or indirectly harms marginalized communities.[97] Another House bill, the Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act, could potentially give users greater flexibility to switch away from platforms with allegedly biased or discriminatory algorithmic outcomes—*i.e.*, because the demographic data gathered on these platforms arguably can reinforce entrenched bias regarding age, gender, sexual orientation, or race through "proxy variables" such as zip code, education, interests, and purchase history.

Due to the perceived potential benefits for marginalized communities, supporters of the pending House bills have called upon Congress to consider racial equity as a competition concern given the ways that the "values" of antitrust and civil rights law "intertwine"—namely, where "[m]arket dominance can effectively put companies in a powerful position to exacerbate historical racial inequalities."[98] Notably, they argue, the bills' co-sponsors expressed a need for antitrust reform to "consider how antitrust affects certain values, including quality, privacy, . . . censored speech"[99]—demonstrating that antitrust laws, as Slaughter has illustrated, indeed are not (and need not be expected to be) value-neutral. But unlike Klobuchar's COLERA, which explicitly acknowledges addressing economic inequality, particularly of "historically-disadvantaged communities," as a purpose of the bill, the House bills do not include racial equity as a value consideration for their passage.

While anti-monopoly sentiment and reining in market power are experiencing bipartisan support at the moment, the Senate is split 50-50 between Republicans and Democrats, who enjoy a one-vote margin with Vice President Kamala Harris's tie-breaking vote. Given the obvious potential for gridlock, any significant antitrust reform, particularly those that "look[] beyond impact of big-company market dominance on consumer prices to its broader effects on industries, employees and communities,"[100] such

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97 *Id*. The other House bills include the Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act, American Innovation and Choice Online Act, Platform Competition and Opportunity Act, and Ending Platform Monopolies Act. *Id*.

98 Lee & Chin, *supra* note 82. *See also* Feldman, *supra* note 93 (arguing that the "story of how the struggle for civil rights intertwined and intersected historically with the struggle against monopoly provides a lesson for the future"). In fact, the relationship between "anti-monopolism" and racial equity was clear to civil rights activists early on. For example, in 1928, W.E.B. Du Bois wrote: "To ask the individual colored man . . . to sell meat, shoes, candy, books, cigars, clothes or fruit in competition with the chain store, is to ask him to commit slow but almost inevitable economic suicide." Feldman, *supra* note 93. An article published in 1932 by the Associate Negro Press and the National Negro Business League, in cooperation with the U.S. Department of Commerce, noted that "'an embarrassing problem confronts the 70,000 or more Negro-owned individual enterprises in the U.S. today[:] . . . Big Business, which so perceptively handicaps the small industrial business in which category Negro enterprise unquestionably belongs." *Id*. Indeed, understanding this connection, Black civil rights leaders battling segregation continued to advocate for anti-monopoly laws well into the 1940s. *Id*.

99 *Id*.

100 Mary Gordon, *Battling bigness: Congress eyes action against monopolies*, AP News, Mar. 19, 2021, https://apnews.com/article/publishing-health-coronavirus-pandemic-book-publishing-airlines-383681c569b18262df1d95baf65484a4.

as the purported racialized effects on communities of color, will require compromise by Democrats who need at least ten Republicans to support passing new antitrust law.

V. CONCLUSION

The rare alignment across the executive and legislative branches may, indeed, signal a significant shift in antitrust policy and enforcement with potential benefits for communities and consumers of color. But it remains an open question of whether efforts to achieve racial equity will be limited absent significant legislative reforms given the current state of the law and the configuration of the federal judiciary.

Given the polarized political climate and delicate balance in Congress, legislative efforts to undermine the consumer welfare standard, for example, which some partly blame for exacerbating and perpetuating systemic racism, are likely to fail. Indeed, Republican lawmakers have "denounc[ed]" Democrats whom they accuse of "seeking to use antitrust law not to promote competition but to advance social or environmental goals,"[101] *e.g.*, racial justice. Accordingly, efforts to combat systemic racism will likely be limited to creative use of the existing antitrust enforcement toolbox with its attendant risk in federal courts.

In the meantime, given the unsettled state of enforcement, companies whose proposed transactions and business practices will be reviewed by the antitrust agencies during the next four years should expect to face questions and information requests that seek to determine how diverse communities—particularly communities of color—have been or will be impacted. Firms should also expect that issues that once were seen as procompetitive efficiencies (*i.e.,* lower production costs through lower labor costs) may be scrutinized more carefully and viewed with greater skepticism, if not deemed potentially harmful.

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101 *Id.*

ON BEING A TRANSWOMAN LAWYER...

By Danielle Joy Healey[1]

I am a Senior Principal at Fish & Richardson P.C. where I specialize in intellectual property and related antitrust law. I am highly ranked in Chambers, Best Lawyers in America, Texas Super Lawyers, yada, yada, yada.... [2] As a practical matter, however, those accolades are drowned out by the only label that has mattered since I transitioned in 2017: "transgender woman". Reflecting on my past life compared to my present circumstance, I realize now that being a white man gave me privilege I did not understand until I wasn't one. And being a transgender woman puts me at the opposite end of the spectrum, something I never could have appreciated until I became one.

I have learned that true allyship and support is when someone with privilege is willing to take a risk by disrupting the status quo. I am grateful to my firm because it was one of the first large firms in Texas to publically embrace a transgender woman lawyer. If you have followed the news recently out of Texas you know that embracing a transgender woman in this place and time is risky business. Yet I know that even with this acceptance by my firm, that allyship has not been shared by the legal industry or even some courts, so that "transgender woman" label still dominates my practice. Today in Texas, this label is especially hard on me and other transpeople.

As a man, I always had business. As a partner at Weil, Gotshal & Manges, in the peak of the patent litigation boom in the early and mid-2000s, I was working as much as 300 hours a month and spending almost all my time on the road, in depositions and in court. By 2007, I was spending about two calendar days per month at home. In 2008, I was asked to open Fish & Richardson P.C.'s Houston Office. Ultimately two of my partners and I, several associates, three paralegals, and our administrative assistants were in Fish & Richardson P.C.'s new Houston office that fall. Even after I cut back my hours in 2010 to work on myself and try other things (I wrote a book, a screenplay and made a movie in my family's hometown in Sicily[3]), I had business.

But there was a difficult issue that I had lived with since I was a kid. When I was four years-old I asked my mom when my penis would fall off and I would become a girl. My mom said never, you are a boy. It was 1964. More than thirty years before the internet, and even a few years before the summer of 1968. As a four-year-old, I could not understand what was happening to me. My mother, and society, had no words, no frame of reference for the question I had asked.

I grew up with a secret life. Even as a young child, I felt compelled to dress in my sister's clothes. I loved to play with my girl cousins. I asked my mom for a swimsuit with a top. I desperately wanted to be Mary Richards on the Mary Tyler Moore Show, although I would have been happy to settle for Rhoda Morganstern. I prayed every night for God to make me a girl, this was my singular wish every Christmas eve, and I was genuinely disappointed when I woke up each Christmas morning still a boy.

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2 https://www.fr.com/team/dj-healey/.

3 http://leavesofthetreethemovie.com/.

By age thirteen, I realized I was a boy and would have to live with it. I needed to suppress this "girl thing" – I tried but never really could. Through high school, college and law school, I spent time alone, hiding, dressing as a girl, reading girl's books and magazines. No one knew my secret shame. After I got to college, I tried to research my problem in the large libraries available to me at Brown University, but found pretty much nothing. I concluded I was a freak, sick. The only one with my problem.

As a young lawyer, I clerked for a federal district judge, and the law clerks and several of the courthouse staff became my "tribe" – we did a lot of fun things together. I became life-long best friends with the woman who was my senior law clerk. Yet even though I had this close friend and was part of this wonderful group, I lacked a life partner, and had resigned myself to being single. I had accepted that "my problem" would separate me from other people.

Unexpectedly, I was fortunate enough to meet a woman who loved me and whom I loved. We married at age 30, I travelled extensively and she came with me everywhere for the first five years of our marriage. At age 35, we had our first daughter, and at age 38 our second daughter. My career was sky-rocketing during the explosion in patent litigation that began in the mid-1990s. During this time, I had been able to largely suppress my cross-dressing and female conduct, but these feelings continued to haunt me. With a wonderful family and a strong career, ***I needed to find a cure***.

Throughout my search for a cure, working was a wonderful way to cope: I genuinely loved practicing law, the more I worked the more money I made, and the more I filled my head with work, the less room there was for "my problem". I was working 2500 or more hours a year since the mid-1990s. I missed at least two years of my kids' lives travelling, in trials, depositions and constantly focused on work. Yet even with the love of a wonderful woman and two great kids, a booming practice, and industry accolades, I still saw myself as a freak.

When I searched for information about myself and for others like myself, prior to the internet, the path led to pornography stores – mixed in with the racks of glossy sex magazines, there were a couple of crudely printed books – more like pamphlets – and newsletters with bad writing and grainy photos by other "cross-dressers". The fact I could only find information in grungy pornography stores reinforced my feelings that I was a freak. With the advent of the internet, I saw for the first time there were others like me, but the internet was a creepy place back then, and early on the sites that catered to transgender issues were more the pornographic than informational, so I took no comfort in this knowledge.

By age 44, I was overwhelmed. I went to spend time in Los Angeles for a week of intense therapy. Despite having numerous therapists and psychiatrists before, for the first time I told another human being about my real problem – who I was. This was liberating in a way: I had broken out of the prison of my mind and admitted out loud what I was feeling, had always felt. At the end of the week, the psychologist told me that since I had felt that I was female from age 4, and had been to therapists and psychiatrists, taken medication, had tried to wish it away and pray it away, it was finally time to accept that my feelings are not going to change. I am female at my core, in my heart and in my head.

By accepting my issues, I was finally able to start dealing with them. ***I did not want to transition.*** But I wanted to find a way to get some peace sometimes. What I mean is that, for me, there was nearly always background chatter in my brain questioning my gender, I thought about it constantly, uncontrollably, causing me a lot of stress. This noise only quieted when I was presenting female. In fact, two months after I transitioned full-time, I suddenly realized the noise had stopped.

My coping involved spending time with my close female friends as a female. I talked to my wife about it. She did not like it, ***not at all***, but she did not want to consider what might happen if I did not have a safe outlet for my feelings. Looking back, I was naïve thinking I could be both a man and a woman: I used to travel with two suitcases; one for day, and one for my true self when not working. In addition to visits with my girlfriends, I went to Silicon Valley a lot, and joined dinner groups with other professionals who were likewise trying to "manage". At one dinner, after a few minutes of conversation, I found the gal on my right and the one on my left were both lawyers, and we all three worked for the same large corporate client. My secret life was decidedly unglamorous: I was a middle-aged woman in dowdy clothes, having dinner in mediocre places with other professional ladies, or going to the occasional show or shopping trip with my girlfriends.

Fast-forward: By 2017, I could no longer cope. I had to transition. I don't know why, but I had this feeling that if I did not transition, I would not live much longer, as if my lifeforce would escape from me somehow. My therapist said she had been surprised that I was able to cope with my situation for over a decade. The conversation with my wife was the hardest in my life. I had never been more depressed than when I inflicted that pain on her, I thought maybe it would have been better just to let my head explode and be done with it. I went back to Los Angeles for several weeks to work on my transition.

I told my firm. The firm was supportive, but this was an entirely new problem for them – and one for which there was little or no precedent in big law. They assigned a senior administrator to help me and the firm work through the issues of transition. Shortly before I was to leave L.A. to return to Houston, the administrator asked me if we should have a press release ready. Having been in L.A. long enough to deceive myself about what things would be like in Texas, I said no, why would anyone be interested or care. Perhaps because she lived in Boston, she agreed. Turns out, we were both wrong.

The people in my office were very supportive and kind. Some of them had worked with me at different firms for over twenty years. My long-term administrative assistant had to have known. She never said anything, but she had been discretely putting the boxes and catalogues delivered from Lane Bryant or Woman Within in my office for years. Another woman who had worked with me for years told me I finally looked like the person I was meant to be, and that she had never seen me really happy as a man. The day after I returned from my transition, I went to meet with a client, the client was a woman who had helped mentor me through my transition, so it was a good day. The next day I spoke at the annual State Bar of Texas Advanced Patent Law Seminar, and that is when the storm broke loose. Needless to say, as a well-known lawyer in my field, my arrival on stage with well-coifed hair, pretty make-up, and a pastel suit, caused quite a stir. I was splashed across the Texas Lawyer's website the next morning, with (luckily) the one cute photo on my Facebook page and an article that supported me in living my truth.

In fact, I received over 300 positive messages from colleagues, friends and other lawyers supporting me in what had been the most difficult decision of my life. There were more positive articles about me in the local and industry press. In the first few weeks, even months, I thought things were going to work out – until they didn't. It was not the lack of support from my firm or collegaues that caused issues. It was something larger. The label of "transgender woman" in Texas carried with it a tremendous stigma, that has only grown worse over time.

One of my long-term clients gave me tremendous support, I was leading a large patent litigation in Chicago for it, and there was no question that I would continue in that role. But things were not going to be all roses: Shortly after I came out in 2017, a client I had done significant work for in recent years fired me – but then reluctantly had me work for a few months longer on pending matters at my replacements' requests. This work wrapped up by mid-2018. My Chicago case settled about the same time. By the end of 2018, I was out of work, and had not been hired or asked to work on anything new other than a few one-off or limited projects – a record dry-spell for me for sure. For the first time in my career, I was scrapping for billable hours and lucky if I could scrounge up 20 or 30 hours of billable work in a month. I recall driving in my car with my wife and she asked me if I had thought post-transition things would get so hard, I told her I had thought about it, but after the support I had gotten at first, I was surprised I could not get hourly work. My wife told me she had expected me to lose my business, she reminded me that in Texas the establishment was against me, regardless of how many people I knew who supported me.

The problems went beyond specific client relationships. For the first time I was facing discrimination: I was assisting with a case in Texas state court in 2017 and 2018. The case was hotly contested, there were frequent hearings. At each hearing I attended, we lost. Most cases are like basketball games, each team goes back and forth putting points on the board. In this case, we had a "tea party" Republican judge. And the only hearing where we got some traction was one I could not attend. In late 2018 the case settled. In a twist of fate, and a blast of karma, in November 2018, the Democrats swept Harris County and all the Republican judges up for election lost to their Democratic challengers – the "tea party" judge was replaced by a gay man in January 2019.

That said, I did have success in federal courts. In 2017, I argued my first appeal to the Federal Circuit as a woman and won. In 2018, I was hired to do another appeal – this time in the Fifth Circuit. The client told me he had tremendous respect for me as a lawyer and was confident in my abilities, but that he would likely have someone else do the oral argument because he was concerned about how conservative Fifth Circuit Judges would react to a transgender woman. Ultimately, he did not have anyone else to argue, I offered to do it for free, so I got my second argument post-transition. I won this case too. I am 2-0 in U.S Courts of Appeals as a transgender woman.

Despite these wins, as 2018 dragged on, hourly work remained elusive even though I felt I was everywhere giving speeches and presentations.[4] I made pitches that I thought had gone very well, but nothing. Still, nature hates a vacuum, and it filled my practice with *pro bono* advocacy. I was busy, but not generating revenue. I realized people with no

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4 I did get some work from colleagues and even from firm clients that tried to help me out, but while this felt good, it did not provide many hours.

money are not as picky about their lawyers as people with money, so by summer of 2019, I retooled for contingency work. It took me an enormous amount of unbilled time, but by 2020, I had contingency cases on file.

I also became an advocate for my community. I took on *pro bono* cases for LGBT people, and became a "go to" lawyer for transgender people in Texas. I got an emergency call about a transwoman facing deportation to Honduras, which would have been a death sentence. I visited her in detention the next day, and within 60 days had secured asylum for her. I had worked on an amicus brief for the National LGBTQ bar in a case filed to stop the City of Houston from making payments for spousal benefits to same-sex couples. I had worked with Lamba Legal on remand from their *en banc* 7th Circuit win in *Hively v. Ivy Tech,*[5] the first court to hold sexual orientation was protected under Title VII's provisions against sex discrimination. My firm supported these efforts, and I am grateful for it.

In early 2021, I had a break-through. A lawyer I was working with in a Bar group arranged for me to be hired hourly on a new patent infringement case to be filed in Houston. My first new hourly patent case in years. I was over the moon when I filed it, but then crashed hard back to earth when I saw it had been assigned to a federal judge in Houston who was openly anti-transgender.[6] Worse, the judge had recently been admonished in a Fifth Circuit opinion for giving a suit by a female professor against her former University the back of the hand, dismissing it at the case management conference.[7] I was crushed, after all this time and work, I finally got hired hourly and now I would have to pass the case off to one of my colleagues. I had known this judge since 1986, and had tried two cases in his court as a man, but I knew as a transgender woman I could not appear in front of him.

Sadly, when this incident occurred, I realized that even though my experiences with the federal judiciary post-transition had been very good – and very successful, there was more than one anti-transgender federal judge to contend with in Texas. For example, a President Trump appointee to the Fifth Circuit, who formerly represented parties against Gavin Grimm in his landmark case for transgender students' rights, wrote a long opinion on why it was not appropriate to use female pronouns when referring to a transgender woman litigant.[8] Another Judge appointed by President Trump went out of his way in *dictum* in another case to denigrate transgender rights,[9] and that judge likewise was

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5 853 F.3d 339 (7th Cir. 2017) (en banc)

6 Dorothy Atkins, *Trans VA Worker Calls for Judge's Recusal In Bias Suit*, Law360, Apr. 24, 2017, https://www.law360.com/articles/916616/trans-va-worker-calls-for-judge-s-recusal-in-bias-suit

7 Alison Frankel, *Houston judge Lynn Hughes is pulled off another case as 5th Circuit revives prof's discrimination claim*, Reuters (February 1, 2021), https://www.reuters.com/article/legal-us-otc-hughes/houston-judge-lynn-hughes-is-pulled-off-another-case-as-5th-circuit-revives-profs-discrimination-claim-idUSKBN2A13T3.

8 Debra Cassen Weiss, *5th Circuit denies transgender prisoner's request to use female pronouns, change court records*, ABA Journal, Jan. 22, 2020, https://www.abajournal.com/news/article/5th-circuit-denies-transgender-prisoners-request-to-use-female-pronouns-change-court-records.

9 Joanna L. Grossman and Grant Hayden, *Holy Dictum: Federal Judge Rejects Protection Against Transgender Discrimination in "Elegant Aside"*, Verdict, Feb. 26, 2019, https://verdict.justia.com/2019/02/26/holy-dictum-federal-judge-rejects-protection-against-transgender-discrimination-in-elegant-aside.

dismissive of a transgender litigant in another case.[10] The Fifth Circuit also refused to recuse a trial judge (also appointed by President Trump) in the Northern District of Texas in a case by a transgender woman based on his known transgender views and prior work as a lawyer against transgender rights.[11] This anti-transgender bias is not representative of the Federal Judiciary in Texas or the Fifth Circuit as a whole, I have received wonderful support from colleagues on the bench, and done well in motion practice and appeals, but it is still undeniable that a random case assignment caused me problems because of who I am.

I had actually been involved in a minor controversy in the spring of 2020, when a University of Texas Law Review, the Texas Review of Law and Policy ("TROLP") published an issue with three offensive anti-LGBTQ articles. One article advocated "conversion therapy" for LGBTQ people – a practice condemned by major health professional organizations and banned in 18 states because it can drive "patients" to deep depression (or worse).[12] Another argued for banning transgender women from female restrooms as a women's rights issue.[13] The third article does not cite a single judicial opinion in its 283 footnotes, as it argues against transgender people in society.[14] Because this "hate speech" was printed in one of the law school's official publications, the articles can be accessed via its webpage. I was asked by an LGBTQ student group to help convince the law school to disavow this hate speech. The law school would not do so, maybe it was because of academic freedom, or maybe because the advisory board of TROLP included Texas Governor Abbott, Senator Ted Cruz, The Chief Justice of the Texas Supreme Court, Nathan Hecht, and several U.S. Fifth Circuit and recent appointees to the federal district courts.[15]

During the regular session of the 2021 Texas legislature and what is now the second special session, I have spent many hours researching and drafting position papers in opposition to anti-LGBTQ legislation, including bills to prohibit transgirls from playing on women's sports teams. I wish this was an anomaly, but anti-LGBTQ bills, and anti-transgender bills especially, have been a constant in each legislative session since 2017, when the Governor and Lt. Governor pressed for a "bathroom bill" that would bar transwomen from using the female restroom. The summer of 2021 has so far included

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10 *See also* Maxwell S. Kennerly, *The Fifth Circuit Abandons The Rule Of Law To Spite A Transgender Inmate*, Litigation and Trial Blog (March 31, 2019), https://www.litigationandtrial.com/2019/03/articles/attorney/transgender-inmate/.

11 Alison Frankel, *Transgender plaintiff asks 5th Circuit to review Trump appointee's refusal to recuse*, Reuters, Dec. 16, 2019, https://www.reuters.com/article/us-otc-recuse/transgender-plaintiff-asks-5th-circuit-to-review-trump-appointees-refusal-to-recuse-idUSKBN1YK23Z; *see also* Opinion on Merits Appeal, *Jackson v. Valdez*, No. 20-10344 (5th Cir. Mar. 29, 2021), withdrawn and replaced by Opinion, *Jackson v. Valdez*, No. 20-10344 (5th Cir. May 18, 2021). It is also worth noting that this Judge is on the board of advisors for TROLP.

12 Emilie Kao & Monica G. Burke, *Masterpiece Cakeshop and Authentic Pluralism in a Post-Obergefell World*, 24 Tex. Rev. L. & Pol. 97 (2019).

13 Kevin Stuart & DeAnn Barta Stuart, *Behind Closed Doors: Public Restrooms and the Fight for Women's Equality*, 24 Tex. Rev. L. & Pol. 1 (2019).

14 Ryan T. Anderson, *Neither Androgyny Nor Stereotypes: Sex Differences and the Difference They Make*, Tex. Rev. L. & Pol. 211 (2019).

15 I wrote an editorial published in the Daily Texan simply to make a record somewhere that these articles were nothing more than hate speech. Danielle Healey, *An Objection to anti-LGBTQ hate speech*, Daily Texan Online, Apr. 28, 2021, https://thedailytexan.com/2020/04/28/an-objection-to-anti-lgbtq-hate-speech/.

two special legislative sessions called by Governor Abbott on key conservative priorities – "election integrity" and transgirls in sports. Nonetheless, two candidates have announced they will challenge Governor Abbott in the Republican primary in March 2022 because he is too "liberal" and fails to protect "Texas values". Coincidentally, perhaps, shortly after his second primary opponent announced in July 2021, Governor Abbott had the agency responsible for child services declare certain types of medical care for transkids to be child abuse.[16] I dread that the level of anti-transgender rancor is likely to build to a fever pitch by the primary.

I also really started confronting some hard issues as a litigator: Would my presence hurt my client in front of a conservative juror? You may have read about Waco, Texas now having about 20 percent of new patent cases in the U.S. The second biggest employer in Waco is Baylor University, which is home to the conservative Baptist George W. Truett Seminary.[17] Baylor does not consider same-sex marriage or transgender identity to be valid.[18]

Waco is not just in the Bible-Belt, but it is also heavily Republican. The 2020 Texas Republican party platform explicitly says, "We oppose all efforts to validate transgender identity".[19] Some of the counties around Waco were carried by the Republicans in 2020, by nearly a 90 percent margin.[20] The Southern Baptist Church has a large following in Waco, and its public position is, "we oppose all cultural efforts to validate claims to transgender identity."[21] The Judges in the Waco Division are terrific people and wonderful

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16 Eric Coulehan, "In response to Abbott inquiry, Texas DFPS says gender-affirming surgery is child abuse", KTSM.com, Aug. 11, 2021, https://www.ktsm.com/news/texas/in-response-to-abbott-inquiry-texas-dfps-says-sex-reassignment-surgery-for-youths-is-child-abuse/.

17 Baylor University Media and Public Relations, *Baylor University's George W. Truett Theological Seminary is an orthodox, evangelical school in the historic Baptist tradition that equips God-called people for gospel ministry in and alongside Christ's Church by the power of the Holy Spirit*, Aug. 19, 2021, https://www.baylor.edu/mediacommunications/news.php?action=story&story=219068.

18 Baylor University, Student Policies and Procedures, Statement on Human Sexuality, https://www.baylor.edu/risk/doc.php/343044.pdf ("Baylor University welcomes all students into a safe and supportive environment in which to discuss and learn about a variety of issues, including those of human sexuality. The University affirms the biblical understanding of sexuality as a gift from God. Christian churches across the ages and around the world have affirmed purity in singleness and fidelity in marriage between a man and a woman as the biblical norm. Temptations to deviate from this norm include both heterosexual sex outside of marriage and homosexual behavior. It is thus expected that Baylor students will not participate in advocacy groups which promote understandings of sexuality that are contrary to biblical teaching.").

19 Republican Party of Texas, Report of 2020 Platform and Resolutions Committee 23, Item 246, https://www.texasgop.org/platform/. Item 248 explicitly condones conversion therapy, which has been outlawed in 18 states and is explicitly condemned by the medical community. *Id.* at Item 248.

20 Jackee Coe, *Map Shows how Texas counties voted in 2020 presidential election*, El Paso Times, Nov. 11, 2020, https://www.elpasotimes.com/story/news/politics/2020/11/11/map-shows-how-texas-counties-voted-biden-trump-2020-election/6241745002/.

21 SBC, *On Transgender Identity*, June 1, 2014, https://www.sbc.net/resource-library/resolutions/on-transgender-identity/.

judges, but I am concerned about whether I can appear in front of a jury there without negative fall-out to my client.[22]

Even though I am lucky to be surrounded by supportive colleagues, family and friends, I have had a couple of problems in public life. After speaking at a patent law seminar in Texas in 2018, I was using the ladies room. A man came storming in after me, because apparently his daughter told him there was a man dressed as a woman in one of the stalls. After that, in Texas, I won't use a restroom when there are kids around. I took to doing open mic stand-up comedy in 2019, and it seemed that almost every time I showed up at an open mic, anti-transgender jokes would follow. My daughter came with me to an open mic one night, and she was both scared and appalled after this happened. I persist in doing these events because I enjoy them, and I feel it is important to show people what a transgender person is like in real life – besides, those impromptu transgender jokes inevitably are poorly thought-out and bomb. Still I know my wife worries anytime I go to do an open mic. Prior to my transition I had been a practicing Catholic, giving generously to the Church, but when I went to a friend's funeral mass shortly after my transition, I got a lot of hugs, but I also got some very ugly looks: That was the last time I set foot in a Catholic church.

Yet, these issues are not all specific to my life in Texas. Even in liberal Massachusetts, where voters supported a transgender rights law by a 2 to 1 margin, there were still nearly 1 million voters who cast their ballots against my rights.[23] And why is anyone voting on my rights anyway? What's up with that? Sadly, in Houston, the opposite result had been reached in a 2015 election to repeal a city ordinance that included protection for transgender rights.[24] In that election, 61 percent of the voters cast their ballots to repeal a law that protected transgender people.[25]

When I was a young lawyer, I was fortunate enough to work on a large trial with a well-known, successful trial lawyer. He told me that a jury trial is an exercise in exploiting other people's prejudices. If jury trials are about exploiting prejudice, then am I going to be able to go in front of a jury for a client again?

The facts that I am now confronting are that anti-transgender policies seem to have become a litmus test for Texas Republicans. The Texas Republican Party has in fact

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22 Other than Austin, Dallas, El Paso, Houston, the Rio Grande Valley and San Antonio, the Republicans won Texas in 2020 with a margin of 52.1 to 46.5 percent in the presidential race, and 53.5 to 43.9 percent in the U.S. Senate race. *See* https://www.politico.com/2020-election/results/texas/ (last accessed August 21, 2021).

23 *Massachusetts Ballot questions, 3 - Gender Identity Rights*, The Boston Globe, Nov. 8, 2018, https://apps.bostonglobe.com/elections/2018/MA/race/?raceID=24875.

24 This was the Houston Equal Rights Ordinance, known as "HERO".

25 *Cumulative Report – Official - Harris County – General and Special Elections – November 5, 2015*, https://www.harrisvotes.com/HISTORY/20151103/cumulative/cumulative_9.jpg.

pressed for three special sessions to attack transgender rights.[26] Although not part of the National Republican Platform, and certainly not leveraged by every Republican politician, the party has mobilized powerful people and groups against transpeople, not just in Texas, but other places as well. The propaganda is that we are mentally ill or "faking it" for some unknown advantage – but being transgender is a life of disadvantages and no one would transition unless they had no other choice.

Given my experience, what about the legal industry's "diversity and inclusion" movement? This movement has definitely benefited me in that it has meant I have kept a seat at the table – although in a meeting I attended shortly after I transitioned, somehow I got shuffled to the end of the table.... If a firm is determined to achieve diversity it can spend the money to hire diverse people and to implement initiatives to get diversity. But even with substantial investments in diversity, real inclusion requires more than money, ***it requires disruption***. I cannot appreciate how other groups feel they have been impacted, but for transpeople in forward-thinking companies and national law firms, I think we feel that at best we have achieved toleration, perhaps, as in my firm, an acceptance of our situations. But internal acceptance is not the same as inclusion in the external business of a company or a firm. Where many organizations falter in our industry and other industries is that they count on inclusion following diversity, as if by some algorithm a certain number of diverse people will be included in meaningful roles. But there is nothing natural about inclusion – if it were normal behavior it would not be an issue—so it takes work.

Lawyers have a terrible paranoia that each case could be the last case, and this makes work and staffing a "zero-sum" game. And, frankly, a team that has had success in the past likely sees no reason to switch things up to include anyone new in the future. Moreover, some clients have cultural bias, and they may implicitly or explicitly signal to their firms that certain types of diverse lawyers are not welcome in their offices (or on their cases). But where opportunity is foreclosed by external forces, firms need to leverage their client base to create inclusion elsewhere. The fact is I still see in Texas that the majority of teams on patent cases are all male and all white – firms should be asking their team leaders, why? ***Inclusion is hard.*** It requires risk-taking – of a kind that lawyers prefer to avoid: perhaps lawyers think inclusion in Texas is tough and that is just the way it is – perhaps, but "it" won't ever change until someone changes "it".

Inclusion can benefit our clients, whether they realize it or not: For example, juries are not made up exclusively of middle-aged white men, typically the opposite is true. Transgender people have a unique perspective on people that can be useful in any scenario. They might know and appreciate what it means to be privileged and how it impacts thinking, while they likely also know what it means to have no privilege, and how that impacts thinking. Further, transgender people have a unique ability to understand at a deep level

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26 This occurred in 2017 with the Texas Bathroom Bill, which was killed at the end of the special session by procedural measures. D. Montgomery and M. Fernandez, *Texas Bathroom Bill Dies Again, Raising Republican Acrimony*, NY Times, Aug. 16, 2017, https://www.nytimes.com/2017/08/16/us/politics/texas-bathroom-bill-dies-again-raising-republican-acrimony.html. Bills to deny transgirls the right to participate in womens' sports were introduced in the first special session in 2021, which failed for lack of a quorum when Democrats protecting voter legislation fled to Washington, D.C., but is back on in the second special session. Senate Bill 2, of the 87th Legislature, Second Special Session.

how men and women perceive and feel things differently: This is a result of 2 things: 1) being "in the room" at different times in our lives with the guys or the girls; and 2) the fact that to successfully hide we had to learn how to blend, before and after transition, so we spent time studying how each sex does things, rather than just naturally doing them.

Realistically the focus of D&I is on other groups with a more public history of oppression and exclusion, and that are bigger, where more good can be done faster. If you put all the transpeople in big law in a room it would not be a crowded room – so maybe toleration, with a dollop of acceptance – is the best we can hope for today. But the out transgender lawyers are just the tip of an iceberg of trans, queer, and even gay lawyers who are deeply closeted and are suffering. I regularly get calls from closeted transpeople – or passable transpeople who are in "stealth mode" – both groups suffer by having to live a secret. One issue for D&I is to encourage people to live their authentic life – to be who they are – abandon their secrets. Many LGBTQ people – and I dare say the great majority of transgender people – in law live with the secret for fear of losing their practices: I don't blame them.[27]

What do I miss most about being a man? Pockets. That is really it, maybe comfortable shoes, although cute shoes are more important sometimes (often times!) than comfortable shoes. And, yes, I do miss my "white male power pack", not just at work, but in everything in life. (The "before and after" stories I could tell!) I did not realize how much privilege I had enjoyed in my life. But do I regret transition? No. The constant gnawing at my soul, the buzzing in the back of my head, the ever-present discomfort, are gone. I still have stress, and problems, but in the past, while there were things that brought me joy (mainly my family), today I live in joy. Joy is, in fact, my chosen middle name. And what of the future, I don't know, though I am in L.A. again this summer, and the headlines back home in Texas are scary….

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27 Consider for example, there are about 100,000 lawyers in the Texas Bar, statistically, roughly four to six thousand or so would likely be gay, and about 500-900 transgender. I doubt there are four to six thousand out-gay lawyers in Texas, and *at most* there are *maybe* a dozen out transgender women lawyers. This means a lot of people are living in fear and distress.

THE ANTITRUST AND UNFAIR COMPETITION LAW SECTION

The Antitrust and Unfair Competition Section was established in 1981 for the purpose of furthering the knowledge of its members in federal and state antitrust and unfair competition law. The focus of the Section is on litigation, counseling, compliance, and government enforcement.

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The Section has the following standing committees in which the Section members are urged to participate:

- Diversity
- Education
- Publications
- Treatise

JOURNAL

The Section publishes Competition, a periodic journal. Members who wish to author articles or assist with publications are encouraged to contact the Editor-in-Chief.

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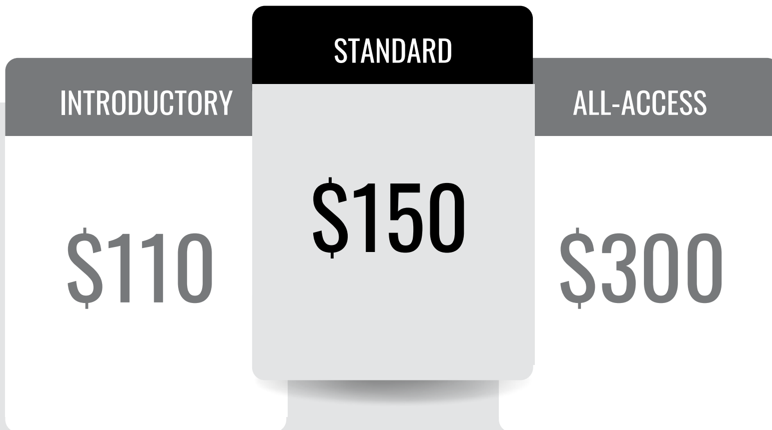

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