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Antitrust House Judiciary Committee Antitrust Subcommittee Testimony

## Executive Summary

### *The Importance of Economic Analysis and Antitrust Common Law*

Consumer welfare works as the method of analysis for antitrust law. Despite critiques that caricature consumer welfare as trapped in a simplistic early-1970s framework of “Chicago School” economics, consumer welfare is flexible to changes in economic thinking.

### *Fairness in Antitrust*

If antitrust eschews an economic basis for its decision-making, then it changes the framework of antitrust law and policy. A new non-economics approach for decision-making would include some sort of ‘fairness’ consideration that takes the place of economics. What is “fair” is often indeterminate and highly subjective.

### *Antitrust instrumentalization*

Issues of economic analysis and fairness are particularly important because antitrust regulation and intervention can be misused in ways that promote lack of fairness and lack of competition on the merits. Public interest (non-economic) standards are particularly prone to such abuse.

### *Antitrust and “Tech”*

All the different types of technological innovation and different business models for platform-related tech mean that because not all tech is the same, the antitrust issues that emerge for particular firms will look different depending on the particular market dynamics and facts. Some of the areas of greatest antitrust scrutiny are among the most competitive markets, whereas some of the areas that have avoided significant antitrust scrutiny may be areas of more significant antitrust concern.

### *Bipartisan support for economic analysis in antitrust*

Chairman Cicilline has repeatedly mentioned the importance of a bipartisan approach to this hearing. Bipartisan support for antitrust based on economic analysis is longstanding.

### *Republican and Democratic administrations have agreed for decades on the basic analysis of cases based on economic evidence and guided by economic analysis*

Much of US antitrust enforcement from the 1950s and 1960s is problematic by today’s standards.

### *Courts have expressly embraced economic analysis*

Where the economic models and academic discourse have some amount of agreement, the case law has moved in the direction of the economic consensus to overturn established doctrines. This allows for antitrust to evolve the substantive law into particular doctrines based upon new knowledge so that theory aligns theories with empirical knowledge. As economic knowledge changes, the courts recalibrate.

### *Antitrust Non-Price Enforcement*

Claims by populists that antitrust does not deal with non-price issues are contradicted by, perhaps because populists have forgotten what was billed as “the case of the 20th century”, *Microsoft*. This was a good case to bring then and remains a good type of case to bring today. However, antitrust’s ability to address non-price issues has a much longer history.

*Antitrust history offers an example of what political antitrust can do (badly)*

The courts protect antitrust from political intervention and statutory overreach that would hurt consumers. There is a natural experiment that tests what antitrust would look like with a different set of goals, which until recently diverged fundamentally from the Chicago School approach found in Sherman and Clayton Act jurisprudence. Enforcement of the Robinson-Patman Act can teach us about what a more populist antitrust would entail.

*Merger thresholds are adequate*

The antitrust authorities see most of the important cases. The reason for the current calibration of merger notification thresholds is that too low a threshold would mean that the agencies would be overwhelmed by notifications of mergers that have no anti-competitive effect. This would require the agencies to divert resources away from investigating actual anticompetitive conduct. The current framework is able to strike the right balance of notification thresholds that capture the deals most likely to cause anti-competitive conduct.

*Agencies, guided by economic analysis, do a good job given the overall uncertainty of addressing mergers*

It is easy to critique the agencies on particular cases in hindsight but agencies do the best that they can given the information that they have available at that time. The US agencies make mistakes of both over- and under-enforcement – there are particular deals that should have been blocked and other deals that should have been cleared. However, overall, their record is impressive and the entire antitrust system does not need to be blown up and reengineered.

*Are tech acquisitions different for start ups?*

Though it is possible that a particular transaction might create competition problems, the solution is to address specific deals with a sufficient factual record. To wholesale attack an entire business model that has been the primary form of exit for entrepreneurs not merely in platform-based tech but in biotech and other R&D intensive industries across the supply chain would create economy-wide problems.

*How should we think about vertical mergers?*

The institutional choice best suited to develop such an approach comes from courts and antitrust agencies through Vertical Merger Guidelines to signal the factors for those vertical mergers that are higher risk. A new legislative approach is likely to be too overbroad and would overwhelm antitrust agencies’ resources with investigations and eventually challenges that discourage innovation and reduce consumer welfare.

*Agencies should not be duplicative of investigations into the same companies*

It is troubling if one of the US antitrust agencies is duplicating an investigation already brought by its sister agency. Such a situation creates potential due process concerns as the same conduct may lead to concurrent investigations and disparate outcomes.

*Agencies should invest in more tech knowledge*

Because data analytics requires significant quantitative resources, the natural place to house such a unit in both antitrust agencies is in their respective economics units – the DOJ Antitrust Economic Analysis Group and the FTC Bureau of Economics. There are potential synergies across a number of industries where the agencies would benefit, not merely in the study of “Big Tech.”

*Agencies need to better understand the value of different types of platforms*

The antitrust agencies have focused their attention on a narrow set of platforms. They require more resources to understand the larger set of tech ecosystems not merely limited to Big Tech platforms. Platforms are transforming the entire supply chain across many industries and digital transformation more broadly understood is an area worthy of deeper exploration.

*More money invested in competition advocacy*

The advocacy budget of the antitrust agencies is tiny, and the lack of a sufficient budget hurts the agencies in their mission to ensure that they promote innovation through pro-competitive rules across different parts of government.

My name is D. Daniel Sokol. I am a Professor of Law at the University of Florida Levin College of Law. This semester, I am an Exchange Professor at the University of Florida Herbert Wertheim College of Engineering. I co-organize our university-wide Competition Policy Initiative, and I serve as a member of our Department of Economics Robert F. Lanzillotti Public Policy Research Center. Part time, I serve as Senior Advisor at White & Case LLP. My comments are my own and do not reflect the views of White & Case, any of its attorneys, or its clients. My testimony is entirely my own and is based on a number of articles that I have written about antitrust, its goals, institutional structure, and its interface with technology.

## **Introduction**

Much of the competition policy discussion today centers around goals of antitrust. Until recently, the only antitrust goals discussed in the US were economic ones. Anyone who thought otherwise was on the fringe and often discounted both academically and within policy circles. Yet today, the goals of antitrust once again have become the subject of debate due to a concatenation of events. Growing populism on both the left and right in the United States and globally; a number of studies showing increased income inequality and increased concentration; digital transformations across industries that disrupt traditional ways of organizing economic activity and life more generally; trends towards protectionism and economic sovereignty; and the lingering effects of the Great Recession in some countries all have caused people in policy settings, some antitrust authorities, and some scholars to question whether an economics-based goal focused on effects to consumer and competition (which for shorthand I call the “consumer welfare” standard) is relevant and whether competition can be used to achieve particular results.

### *The Importance of Economic Analysis and Antitrust Common Law*

Consumer welfare works as the method of analysis for antitrust law. Despite critiques that caricature consumer welfare as trapped in a simplistic early-1970s framework of “Chicago School” economics, consumer welfare is flexible to changes in economic thinking. Simply put, it is flexible because it meets the evolving needs of consumers. As the U.S. Supreme Court stated in 2015, “We have therefore felt relatively free to revise our legal analysis as economic understanding evolves and ... to reverse antitrust precedents that misperceived a practice’s competitive consequences.”<sup>1</sup>

Since 1950, the basic statutory scheme of antitrust has remained constant.<sup>2</sup> This is true despite the fact that the primary enabling statute, the Sherman Act, is relatively short and vague. The reason for this is that Congress intended the one-sentence enactments of Section 1 and Section 2 to be

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<sup>1</sup> *Kimble v. Marvel*, 135 S. Ct. 2401, 2412-13 (2015). See also *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (overturning per se standard to rule of reason for vertical restraints; vertical restraints per se rule. It also noted that a per se rule “hinders competition and consumer welfare because manufacturers are forced to engage in second-best alternatives and because consumers are required to shoulder the increased expense of the inferior practices.”).

<sup>2</sup> Though it has been tweaked with the introduction of Hart-Scott-Rodino (HSR) premerger notification and increased criminal penalties for antitrust violations.

shaped through a common law method by the experience of courts over time.<sup>3</sup> As a result, antitrust analysis in the United States judges' objective interpretation, rather than by a complex statutory scheme shapes antitrust law and policy.

To understand the use of economic analysis and why it works in an antitrust context, we must first begin with an understanding of the nature of antitrust law and how antitrust law works. Antitrust law's general case-by-case application created a common-law-like development for antitrust case law. Yet, antitrust common law development is dissimilar to many other fields of law in that stare decisis by design plays a much smaller role in antitrust.<sup>4</sup> As I will discuss, this means that courts are flexible to take existing antitrust doctrine and apply it to existing and new settings as changes in economic analysis inform the courts. Thus, by design, antitrust law doctrines can shift as the understanding of certain economic theories become more established and developed.

Changes in economics lead to different legal presumptions. When shifts occur in economic understanding, this may lead to a reevaluation of the legal presumption to incorporate the ways that certain behavior may require a more nuanced treatment under a fact based rule of reason analysis.<sup>5</sup> The Supreme Court made this clear in *Leegin*.<sup>6</sup>

### *Fairness in Antitrust*

If antitrust eschews an economic basis for its decision-making, then it changes the framework of antitrust law and policy. A new non-economics approach for decision-making would include some sort of 'fairness' consideration that takes the place of economics. What is "fair" is often indeterminate and highly subjective. For those of us who are parents of more than one child and/or who have siblings of our own, we know people often understand what is fair as those situations that benefit themselves, whereas what is unfair would be those situations that benefit someone else. It provides agencies with a high degree of discretion and can create significant lack of legal certainty for business as to when a certain practice will be considered fair or not, as well as introduce the possibility for enforcers to use politics to drive outcomes.

Because economic analysis allows for more precision than fairness does, it is important to highlight examples that show how economic analysis has shifted over time in ways that both promote enforcement and limit enforcement. All too often, the populist narratives of antitrust overlook such changes in economic thinking, where new theories and approaches can be applied

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<sup>3</sup> Congress "expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988)). See also *Northwest Airlines, Inc. v. Transport Workers Union*, 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.")

<sup>4</sup> D. Daniel Sokol, *Rethinking the Efficiency of the Common Law*, 95 NOTRE DAME L. REV. 795 (2019).

<sup>5</sup> William Breit, *Resale Price Maintenance: What Do Economists Know and When Did They Know It?*, 147 J. INSTITUTIONAL & THEORETICAL ECON. 72 (1991).

<sup>6</sup> *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

to new settings. This is because populist narratives aim to achieve a certain outcome rather than an application of economic facts in particular cases to the law.<sup>7</sup>

Economic analysis of antitrust law has dominated the United States since the 1970s. Robert Pitofsky wrote an important article in 1979 where he chastised antitrust scholars for “persuading the courts to adopt an exclusively economic approach to antitrust questions.”<sup>8</sup> He argued that “[i]t is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws.”<sup>9</sup> However, when Pitofsky chaired the FTC in the 1990s, he did not adopt a populist agenda or embrace multiple goals as in his earlier writing. Rather, he continued with the economic framework that prior Republican and Democratic administrations established. Pitofsky’s tenure as FTC Chairman is seen by many as a “golden age” of antitrust and one of great continuity.<sup>10</sup> Nor is Professor Pitofsky alone in reworking his criticisms within an economics framework and abandoning a more populist approach to antitrust. The vast majority of academics who have provided testimony for this hearing do so within an economic analysis framework.

### *Antitrust instrumentalization*

Issues of economic analysis and fairness are particularly important because antitrust regulation and intervention can be misused in ways that promote lack of fairness and lack of competition on the merits. Private firms may seek to use government-brought antitrust action strategically to punish rivals that are more efficient. This strategy allows a firm to use government investigation as a way to raise rivals’ costs.<sup>11</sup> Even worse, incumbents may target new successful competitive business models by lobbying for antitrust enforcement, rather than focusing on competition on the merits. Properly viewed, antitrust is about competition not competitors.

Although it does seem that most federal enforcement is primarily motivated by an attempt to reach the so-called “public good” (not always actually in the public interest but instead serving special interests) based on efficiency concerns, antitrust enforcers often fixate on bringing ‘big’ cases against well-known firms. This plays into the motivations of competitor firms to use government antitrust enforcement for private ends. These big cases are high-profile cases because government enforcers bring them against large firms that will receive maximum exposure. GM, IBM, breakfast cereal manufacturers, and Google are just some examples of the most high profile cases that DOJ and FTC have investigated that led nowhere.<sup>12</sup> There are also instances where agencies persecute companies or are willing to pursue novel theories in high stakes cases, rather than laying the groundwork with better cases that are less high profile as the

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<sup>7</sup> See e.g., TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2019); FRANKLIN FOER, *WORLD WITHOUT MIND: THE EXISTENTIAL THREAT OF BIG TECH* (2017); and BARRY C. LYNN, *CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION* (2010).

<sup>8</sup> Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979).

<sup>9</sup> Id.

<sup>10</sup> Tim Muris & Bob Pitofsky, *More than Law Enforcement: The FTC’s Many Tools - a Conversation with Tim Muris and Bob Pitofsky*, 72 ANTITRUST L.J. 773 (2005).

<sup>11</sup> William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247, 250 (1985); D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. CAL. L. REV. 689 (2012).

<sup>12</sup> William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903 (2009).

Justice Department's enforcement in *Otter Tail Power Co. v. United States*.<sup>13</sup> This case involved a small electric utility and a refusal to deal. The case laid the foundation for many important subsequent refusal to deal cases. It illustrates that antitrust authorities should go after the best cases rather than cases that bring big headlines but are weaker.

The impact of publicity involved with high-profile cases cannot be underestimated. Antitrust enforcers may be prone to initiate such cases, even if these do not constitute the best use of agency resources, because of media scrutiny, political pressure, or lobbying by influential incumbents. If enforcers have a bias to fixate on the big cases, competitor firms will play to this bias.<sup>14</sup> That the government abandoned many of these big cases because they were not good cases (often after a change in administration when the political benefits have already been reaped) suggests that the push for the big case presents opportunities for competitors to exploit antitrust enforcers. In this set of circumstances, public choice concerns are likely to be more pronounced relative to other antitrust cases. These public choice concerns on the part of antitrust authorities allow for the strategic use of antitrust by competitor firms who may misuse antitrust for personal gain at the expense of consumers.

### *Antitrust and "Tech"*

Much focus in recent years by Congress, Presidential candidates, and the agencies themselves focus on issues of "tech". Perhaps this is understandable at a human level, given the success of many often American-based companies to grow rapidly in the tech sector. "Tech" is not an issue limited merely to a handful of consumer-facing companies that have been the focus of recent antitrust scrutiny. I put tech in quotes because technological innovation and the shift to platforms is transforming much of the economy. This includes industries as diverse as heavy machinery, fintech, agtech, insurance, logistics, consumer goods, and health care, among others.<sup>15</sup> Of course, there are also large parts of the economy that are R&D intensive that would consider themselves tech even if they are not platform tech. Perhaps most importantly, B2B is more than half the revenues of B2C overall<sup>16</sup> (let alone the part that constitutes Big Tech) and yet the fixation has been on a handful of companies while overlooking the larger competitive landscape that is shaping markets.

All the different types of technological innovation and different business models for platform-related tech mean that because not all tech is the same, the antitrust issues that emerge for particular firms will look different depending on the particular market dynamics and facts. Some of the areas of greatest antitrust scrutiny are among the most competitive markets, whereas some of the areas that have avoided significant antitrust scrutiny may be areas of more significant antitrust concern.

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<sup>13</sup> 410 U.S. 366 (1973).

<sup>14</sup> See e.g., <https://www.wsj.com/articles/a-grassroots-campaign-to-take-down-amazon-is-funded-by-amazons-biggest-rivals-11568989838>; <https://www.wsj.com/articles/oracles-man-in-washington-fans-the-flames-against-rival-tech-giants-11581615873>.

<sup>15</sup> Geoff Parker, Marshall Van Alstyne, Sangeet Choudary, *Platform Revolution* (2016).

<sup>16</sup> Ruomeng Cui et al., *Wholesale Price Discrimination in Global Sourcing*, [ ] MANUFACTURING & SERV. OPER. MGMT. [ ] (forthcoming) ("the B2B market is double the size of the B2C market in both domestic and global markets").



The diversity of tech overall suggests a few critical insights. These insights build upon antitrust's institutional strength as a law of general application. First, "tech" should not be subject to special rules (though for protectionist reasons, a number of European jurisdictions are taking this approach).<sup>17</sup> To do so would be an extreme departure from the current antitrust system. Antitrust is a flexible system that has and can continue to respond to changes in economic thinking. At the same time, the court-made rules under American antitrust's common law approach should continue to yield predictable rules for which businesses can comply. Second, tech is far more heterogeneous in character than the press or political debate would imply. Third, antitrust requires predictable and effective rules that protect consumers and promote innovation and risk taking. The current institutional design of antitrust and the development of antitrust case law promotes such an approach. This institutional design has been long-standing across both Republican and Democratic administrations. Antitrust can and will adjust to particular facts and business realities when there is anti-competitive harm. However, antitrust must balance intervention with non-intervention when the facts and case law do not merit such an approach.

### **1. The adequacy of existing statutory law and case law to address anti-competitive conduct**

#### *Bipartisan support for economic analysis in antitrust*

Chairman Cicilline has repeatedly mentioned the importance of a bipartisan approach to this hearing. Bipartisan support for antitrust based on economic analysis is longstanding. A rigorous and bipartisan Antitrust Modernization Commission (AMC) met beginning in 2004 and concluded its work in 2007. The AMC final report, which confronted similar issues as this Committee's investigation.<sup>18</sup>

After careful deliberation, the AMC concluded on "new economy" issues:

"1. There is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features. 2. In industries in which innovation, intellectual property, and technological change are central features, just as in other industries, antitrust enforcers should carefully consider market dynamics in assessing competitive effects and should ensure proper attention to economic and other characteristics of particular industries that may, depending on the facts at issue, have an important bearing on a valid antitrust analysis."<sup>19</sup>

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<sup>17</sup> For an understanding of the follow of such an approach in the United States, see Christine S. Wilson, Remembering Regulatory Misadventures: Taking a Page from Edmund Burke to Inform Our Approach to Big Tech, Address at the British Institute of International and Comparative Law, London, U.K., June 28, 2019, available at <https://www.ftc.gov/public-statements/2019/06/remembering-regulatory-misadventures-taking-page-edmund-burke-inform-our>.

<sup>18</sup> ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 1 (2007), available at [http://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf).

<sup>19</sup> Id. at 9.

The AMC, with 18 hearings over 13 days, with testimony by 120 witnesses overall (from a wide variety of backgrounds and perspectives) did not suggest changes to the structure of antitrust law with regard to the tech industry. This was the right approach then and it remains the right approach today. Antitrust has been effective in bringing tech related cases including platform tech related cases.

The guiding principle for modern antitrust is that the side with the better evidence wins before the agencies and in court. This is the basis for democratic legitimacy. Whether private plaintiffs or government enforcers or big companies, everyone gets a fair hearing before the courts.

An antitrust system that makes economic analysis of competitive effects the sole method for analyzing consumer harm removes political factors from the analysis, shifting discretion away from decision-makers who might be captured by interest groups or pursue political objectives. Antitrust is not an effective mechanism for these sorts of fairness trade-offs. Other areas of regulation are better suited to addressing such trade-offs than antitrust. Rather, embracing antitrust economics promotes greater predictability and outcomes that are less likely to be hijacked by overtly political concerns not based on competition economics, which allows for better predictability in antitrust and a narrow focus on what antitrust does best—promote consumer welfare.

As big as the industrial-policy or fairness problem is in traditional antitrust cases, its impact is even more pronounced in case law and agency action in the dynamic economic setting—particularly in fast-moving markets where intervention tends to reduce consumer welfare even more. These markets are typified by rapid technological change and innovation, including the lower barriers of new entrants that leap-frog incumbents. The innovation can be in new products, services, or platforms. And, because high-tech markets change rapidly, market power may be transient. In the high-tech setting, agencies must be particularly careful when analyzing the market and the facts to ensure that merger control does not reduce firms' incentives to innovate or chill other investment decisions that would otherwise lead to enhanced innovation.

The bipartisan AMC, with a full complement of experts in the field, understood this. So too have our generalist courts and antitrust agencies, with leadership appointed with the advice and consent of Congress.

*Republican and Democratic administrations have agreed for decades on the basic analysis of cases based on economic evidence and guided by economic analysis*

Much of US antitrust enforcement from the 1950s and 1960s is problematic by today's standards. Worse than that, consumers were hurt by rules that protected less efficient and less innovative businesses and practices. Back then, big was bad, merger efficiencies were ignored, exclusive sales territories were illegal, rules for refusals to deal were tightened, intellectual property was subject to the nine no-nos, and the Robinson-Patman Act was aggressively enforced. In all of these cases, industrial policy that favored inefficient competitors was both a fundamental part of case law and government-enforcement priorities.

A number of the changes to antitrust began in the late 1970s but they continued in the antitrust enforcement priorities of both Republican and Democratic administrations since that time.<sup>20</sup> There have been fierce arguments as to particular cases brought or not brought (such as Whirlpool/Maytag and Sirius/XM) but these arguments have been on the margins – overall there has been consistency across administrations.

*Courts have expressly embraced economic analysis*

Where the economic models and academic discourse have some amount of agreement, the case law has moved in the direction of the economic consensus to overturn established doctrines.<sup>21</sup> Procedural rules likewise have changed in antitrust jurisprudence to comport with a more economic-based approach and safeguard its application, such that the procedural screens have been tightened to prevent many non-meritorious cases from being heard by judges on the substance.<sup>22</sup> Courts have been helped with the rise of economists in agencies to help case teams and with more economic analysis by parties in bringing and defending cases. While particular business practices pose some anticompetitive risk (which would lead to inefficient outcomes), the rule of reason<sup>23</sup> opens up these general theories to fact-specific inquiry in cases to address the potential benefits and harms of certain conduct on a case-by-case basis. This allows for antitrust to evolve the substantive law into particular doctrines based upon new knowledge so that theory aligns theories with empirical knowledge. As economic knowledge changes, the courts recalibrate.

In practice, the singular goal of efficiency has dealt with questions of equity in antitrust (such as income redistribution or job creation) differently since 1977. An economic based approach means that antitrust has not dealt directly with these issues. Rather, other mechanisms in government are better at undertaking such trade-offs, such as tax policy.<sup>24</sup> Sometimes there is overlap in antitrust of this larger view of antitrust and fairness but other times it is in tension. In the traditional case, equity can be served when antitrust fights price-fixing cartels such as for school milk, which is provided to students from low-income families.<sup>25</sup> In such a case, a price-fixing cartel that illegally raises the price of milk above the competitive level also hurts low-income consumers disproportionately. However, one can imagine a situation in which the

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<sup>20</sup> Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983); William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. Econ. Persp. 43, 58 (2000); Vivek Ghosal, *Regime Shift in Antitrust Laws, Economics, and Enforcement*, 7 J. COMPETITION L. & ECON. 733 (2011).

<sup>21</sup> William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43, 58 (2000).

<sup>22</sup> See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–58 (2007); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–90 (1986); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 111 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486–87 (1977).

<sup>23</sup> Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 83 (2018) (“Courts evaluate most antitrust claims under a “rule of reason,” which requires the plaintiff to plead and prove that defendants with market power have engaged in anticompetitive conduct. To conclude that a practice is ‘reasonable’ means that it survives antitrust scrutiny. This is in contrast to antitrust’s ‘per se’ rule, in which power generally need not be proven and anticompetitive effects are largely inferred from the conduct itself.”)

<sup>24</sup> See 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 110, at 98–99 (3d ed. 2006); Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT’L J. INDUS. ORG. 714, 717 (2018).

<sup>25</sup> See Robert H. Porter & J. Douglas Zona, *Ohio School Milk Markets: An Analysis of Bidding*, 30 RAND J. ECON. 263 (1999).

victims of the price fixing are wealthy, such as the price fixing cartel between Christie's and Sotheby's.<sup>26</sup> In that case, the enforcement against the cartel creates increased economic inequality by favoring the wealthy. Preventing price-fixing could also run contrary to other policy goals, such as how cases to address artificially high tobacco prices could increase cigarette consumption.<sup>27</sup> Overall, an economic-based approach removed the political discretion of multiple goals.<sup>28</sup> Antitrust has expressly abandoned equity and other non-competition concerns as part of its analysis for an application of economic analysis.

Understanding economic analysis and antitrust's institutional structure of judge-made law explains why antitrust has evolved. Antitrust has a common law like approach to its jurisprudence. This is why a systemic shock based on populist legislation will not be effective at changing antitrust as much as pushing good cases in court based on changes in economic thinking. Antitrust is primarily federal law. But antitrust "common law" functions somewhat differently than other fields. Antitrust's enabling legislation allows for common law-like development.<sup>29</sup> In practice, statutes such as the Sherman Act enjoy a certain rank akin to constitutional common law.<sup>30</sup> Thus, the courts play an important role in the fabric of antitrust because the congressional intent behind our antitrust law was to provide broad, flexible statutes that courts should interpret consistent with the best economic analysis at the time.

The Supreme Court offered an early articulation of this constitution-like principle to the Sherman Act in *Appalachian Coals, Inc. v. United States*.<sup>31</sup> There, the Court stated, "As a charter of [economic] freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions."<sup>32</sup> This framework changes how the Supreme Court views antitrust jurisprudence. Traditional stare decisis typically means that the Supreme Court is reluctant to overrule its precedent. Antitrust works differently.

Unlike other areas of law, economic advances shape the rethinking of antitrust rules. Since the 1970s, the Supreme Court has stepped in to revise antitrust law, narrowing or overruling precedents based on the current understanding of economics -- shaped by real-world, empirical

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<sup>26</sup> See Press Release, U.S. Dep't of Justice, Former Chairmen of Sotheby's and Christie's Auction Houses Indicted in International Price-Fixing Conspiracy (May 2, 2001), available at <http://www.usdoj.gov/opa/pr/2001/May/199at.htm>.

<sup>27</sup> <https://www.latimes.com/archives/la-xpm-2000-feb-09-fi-62512-story.html>.

<sup>28</sup> See Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1703-04 (1986) ("Goals based on something other than efficiency (or its close proxy consumers' welfare) really call on judges to redistribute income."); see also Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1160 (2008).

<sup>29</sup> HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY 228-29 (1955) ("[I]n adopting the standard of the common law Congress expected the courts not only to apply a set of somewhat vague doctrines but also in doing so to make use of that 'certain technique of judicial reasoning' characteristic of common law courts." (quoting ALBERT M. KALES, CONTRACTS AND COMBINATIONS IN RESTRAINT OF TRADE 106 (1918)). See also *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988) (Congress "expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.")). *Northwest Airlines, Inc. v. Transport Workers Union*, 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.").

<sup>30</sup> Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1473 (2000).

<sup>31</sup> 288 U.S. 344 (1933).

<sup>32</sup> *Id.* at 359-60.

experience.<sup>33</sup> As such, stare decisis does not have the same meaning in antitrust as it does in other fields, as precedent matters less than changes in economic thinking.

The Supreme Court has explained that antitrust precedent is less important than precedent in other fields. For example, in *State Oil Co. v. Khan*, a case that removed the per se designation for maximum resale price maintenance, the Court explained:

[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress “expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition.” ... [The] Court ... reconsider[s] its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question.<sup>34</sup>

This view of antitrust as a variation of common law has taken hold even in recent cases. As the Court stated in 2015 in *Kimble v. Marvel Entertainment, LLC*, “[w]e have therefore felt relatively free to revise our legal analysis as economic understanding evolves and ... to reverse antitrust precedents that misperceived a practice’s competitive consequences.”<sup>35</sup> This explicit incorporation of economic analysis—and the resulting limitation of traditional stare decisis in antitrust common law—makes antitrust unique among substantive areas of law. Indeed, the Supreme Court treats antitrust differently with regard to statutory changes relative to other areas of law. In *State Oil*, the Court noted, “the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act.”<sup>36</sup> The Court’s language is notable with regard to new legislation to alter antitrust.

### *Antitrust Primer*

The critical issue is that antitrust law and economics must take care to distinguish between activity that is pro-competitive versus activity that is anti-competitive. This is not always as easy as it seems. Indeed, it is difficult for agencies or courts to be able to discern the differences among pro- and anticompetitive behavior. As the DC Circuit stated in *Microsoft*:

Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge for

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<sup>33</sup> *Bumet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–07 (1932) (“Stare decisis is not . . . [an] inexorable command. . . . Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . [E]ven where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.” (Brandeis, J., dissenting) (emphasis added) (footnotes omitted)). See also *Continental T.V. Inc. v. GTE Sylvania*, 433 U.S. 36, 48-49 (1977) (overturning the rule of the *Schwinn* case: “Although *Schwinn* is supported by the principle of stare decisis, we are convinced that the need for clarification of the law in this area justifies reconsideration. . . . *Schwinn* has been the subject of continuing controversy and confusion . . . In our view, the experience of the past 10 years should be brought to bear on this subject of considerable commercial significance.”).

<sup>34</sup> Barak Orbach, *Antitrust Stare Decisis*, Antitrust Source, Oct. 2015, at 1, 5.

<sup>35</sup> *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2412–13 (2015)

<sup>36</sup> 522 U.S. at 20.

an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it.<sup>37</sup>

Nevertheless, there are some guideposts in both case law and economics that help with this analysis. The *Microsoft* court quoted Justice Douglas writing for the Supreme Court in *Grinnell*: “Section 2 of the Sherman Act makes it unlawful for a firm to monopolize. 15 U.S.C. § 2. The offense of monopolization 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. *United States v. Grinnell Corp.*, 384 U.S. 563, (1966).”<sup>38</sup>

The Supreme Court has reinforced this same approach. As the Supreme Court held in *Linkline*, “possessing monopoly power and charging monopoly prices does not violate Section 2.”<sup>39</sup> In short, having a monopoly is not itself a violation; monopoly is not a status offense under the Sherman Act. Critics of the existing approach also lose sight of the fact that a firm that gains a “monopoly market share” through Justice Douglas’s oft quoted phrase from *Grinnell* of “as a consequence of superior product [or] business acumen...” have committed no offense against the Sherman Act. After all consumers gain from superior products and will flock to them. Rather, a firm must behave like a bad monopolist – by committing illegal exclusionary acts in achieving a monopoly market share.

Market dynamics also play an important role. In *Brooke Group*, a case involving predatory pricing, the Court stated, “[W]here the market is highly diffuse and competitive, or where new entry is easy, or the defendant lacks adequate excess capacity to absorb the market shares of his rivals and cannot quickly create or purchase new capacity—summary disposition of the case is appropriate.”<sup>40</sup> Similarly, on the limits of predatory pricing, the Court created a rule that was relatively easy to administer. “The [district] court then concluded that respondent could make no such showing of predatory pricing because, given petitioner’s market share and the ease of entry into the market, petitioner was in no position to exercise market power.”<sup>41</sup>

Platform governance is something that has received significant attention. How and when a platform must aid its competitors has been questioned. In this setting, the Supreme Court has held that duties to deal have limits.<sup>42</sup> Further, firms without a duty to deal have no duty to operate under conditions that “rivals find commercially advantageous.”<sup>43</sup>

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<sup>37</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001).

<sup>38</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 50 (2001). *TRINKO* has the same proposition.

<sup>39</sup> *Linkline*, 555 US 438, 447-48 (2009).

<sup>40</sup> *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 US 209, 226 (1993).

<sup>41</sup> *Atl. Richfield Co. v. USA Petrol. Co.*, 495 U.S. 328, 333 (1990).

<sup>42</sup> *Trinko* explains, “Finally, we do not believe that traditional antitrust principles justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors.” *Trinko* also notes, at 408 “However, [t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.” (quoting *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985)). Thus, there is still opportunity to win such cases by a plaintiff. The plaintiff just needs the right facts.

<sup>43</sup> *Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc.*, 555 U.S. 438, 450 (2009). See also *Mylan Pharms., Inc. v. Warner Chilcott Pub. Ltd. Co. (Doryx)*, 2015 U.S. Dist. Lexis 50026 (E.D. Pa. Apr. 16, 2015), *aff’d* 838 F.3d 421 (3d Cir.

Additional guideposts help shape case law and enforcement in ways that are necessary to help consumers. Market power is not illegal, if the product is superior. *Grinnell* explains that possessing monopoly power is not an antitrust violation if the monopoly results “as a consequence of a superior product, business acumen, or historic accident.”<sup>44</sup> Nor does big mean bad. Rather, there must first be anti-competitive conduct<sup>45</sup> and that anticompetitive conduct must be found to eliminate competition.<sup>46</sup>

These guideposts strike a balance for conduct cases of attacking conduct when such conduct is anti-competitive but allowing for conduct that is pro-competitive.

Specific to tech related issues, not only has antitrust been able to address them, it continues to do so. While there is very little Supreme Court case law that expressly discusses platforms as such, *American Express* makes one point worth noting, which is that courts need to consider all sides of the market under the rule of reason.<sup>47</sup> The so-called evidence of harm in this case, the Court found, was not really so, given the failure to assess both sides and consider the overall effect/purpose.

While some expressed concern that *American Express* signaled the end of enforcement against tech platforms, this case has not prevented the agencies from bringing further cases. In its *Surescripts* litigation, the FTC has brought a case against a large health information company for exclusionary conduct by raising prices, squelching innovation, and eliminating potential rivals through its exclusivity policies.<sup>48</sup> The case is ongoing and has survived a motion to dismiss. This appears to be a good case on the facts and shows that antitrust continues to be an effective tool against dominant tech platforms that abuse antitrust law.

### *Antitrust Non-Price Enforcement*

Claims by populists that antitrust does not deal with non-price issues are contradicted by, perhaps because populists have forgotten what was billed as “the case of the 20th century”, *Microsoft*. This was a good case to bring then and remains a good type of case to bring today. At the district court level, the DOJ and states alleged a number violations of the Sherman Act: (1) unlawful exclusive dealing arrangements in violation of s 1; (2) unlawful tying of IE to Windows 95 and Windows 98 in violation of s 1; (3) unlawful maintenance of a monopoly in the

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2016) (“Defendants have no duty to facilitate [Plaintiff]’s business plan by keeping older versions of branded [pharmaceutical drugs] on the market.”).

<sup>44</sup> *United States v. Grinnell Corp.* 384 U.S. 563, 570-71 (1966)

<sup>45</sup> *Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (“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.”) See also *Trinko*, at 407 (“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.”)

<sup>46</sup> “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. [A]nticompetitive conduct is ‘conduct without a legitimate business purpose that makes sense only because it eliminates competition.’” *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 124 (2d Cir. 2007) (quoting *Morris Commc’ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1295 (11th Cir. 2004)).”

<sup>47</sup> *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

<sup>48</sup> *FTC v. Surescripts, LLC.*, 2020 WL 264147 (D.D.C. 2020).

PC operating system market in violation of s 2; and (4) unlawful attempted monopolization of the internet browser market in violation of s 2, as well as state level claims. On appeal, the DC Circuit upheld the findings of fact but did not find that all of Microsoft's conduct violated Section 2 and the court was adverse to the Section 1 tying claim and remanded the case to the district court. Microsoft ultimately entered into a consent decree with the DOJ and a number of state attorneys general.<sup>49</sup>

Microsoft was and is an online platform. One side of the market was free. The prior case law that was most supportive of the government's case was a platform case of a different sort – *Lorain Journal*,<sup>50</sup> a case involving newspapers, which are free or nearly free for consumers and funded mostly by advertising. This again shows that antitrust can and does apply old doctrines to new economic realities.<sup>51</sup>

However, antitrust's ability to address non-price issues has a much longer history. Some of those who want to suggest a fundamental change to the antitrust system that has had bipartisan support for 40 years and to return to some of antitrust's more populist roots call themselves Neo-Brandeisian. A number of such populist activists claim that modern antitrust cannot address non-price issues. Perhaps they forget that however, Brandeis himself understood non-price competition as he advocated for rule of reason treatment for minimum resale price maintenance (RPM) instead of treatment based on per se illegality.<sup>52</sup>

RPM is a vertical restraint under which a manufacturer or other supplier sells its product to a distributor on the condition that the product not be resold to retailers below some specified minimum price. The use of RPM incentivizes promotional services (non-price competition). Other vertical restraints also have many non-price features.<sup>53</sup> Similarly, antitrust has addressed issues of innovation for more than a century.<sup>54</sup>

*Injecting political trade-offs into antitrust (such as a public interest standard/industrial policy) can have negative repercussions*

The discussion about the inclusion (or not) of non-economic goals in antitrust is similar to the choice of goals in economic regulation generally. There may be other areas of economic regulation in which non-economic factors legitimately may be included as part of the goal. Regulation frequently seeks to address issues relating to externalities, health and safety,

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<sup>49</sup> Modified Final Judgment at 1, *United States v. Microsoft Corp.*, No. 98-1232 (D.D.C. Sept. 7, 2006), 2006 U.S. Dist. LEXIS 76862, at \*4 (amending the United States's and settling states' final judgment entered on Nov. 12, 2002).

<sup>50</sup> *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

<sup>51</sup> It is not merely law that can recalibrate to new settings but economics as well. See Carl Shapiro & Hal Varian, *Information Rules: A Strategic Guide to the Network Economy* (1998).

<sup>52</sup> Louis D. Brandeis, *On Maintaining Maker's Prices*, in *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* 125 (Osmond K. Fraenkel ed., 1935); *Nomination of Louis D. Brandeis: Hearings Before the Subcomm. of the Comm. on the Judiciary U.S.S., on the Nomination of Louis D. Brandeis to be an Assoc. Justice of the Supreme Court of the U.S., 64th Cong.* 1035 (1916).

<sup>53</sup> For an overview of the empirical literature see Francine Lafontaine & Margaret Slade, *Franchising and Exclusive Distribution: Adaptation and Antitrust*, in *OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS*, Vol. 2 (Roger D. Blair & D. Daniel Sokol eds. 2014).

<sup>54</sup> *United States v. Am. Can Co.*, 230 F. 859, 901–04 (D. Md. 1916).



industrial policy, distributive justice, or financial stability among others.<sup>55</sup> At times, some of the goals are prone to risk of capture by special interests and present problems that are familiar within the public choice literature.<sup>56</sup> These other regulatory goals are not considered in an industrial organization antitrust analysis, nor do I think that they should be.

For a start, public choice theory helps to explain how sector regulators are likely to be captured by special interests. The interests that affect sector regulators (which typically use a “public interest” standard that includes industrial policy concerns) are more concentrated than those in antitrust. Public interest sector regulators are therefore more likely to be captured than antitrust enforcers who enforce laws across a variety of industries. In this sense, the sector regulators are more likely to be captured and will behave more politically than antitrust agencies.<sup>57</sup>

Interest groups generally have an advantage in influencing policy for two reasons. First, there are informational costs to political participation. Information costs limit the ability of individuals to participate effectively in the legislative process. Such costs for information can be significant, especially when the benefit is small for an individual consumer.<sup>58</sup> Because information itself is a public good, markets are suboptimal at generating information

The second participation cost is the cost of political mobilization. Once interests are properly identified, political forces must be mobilized to fight for legislation. This creates free-rider problems for public goods such as laws of general societal benefit, like antitrust.<sup>59</sup>

Each individual has an incentive to shirk in their organizational responsibility because someone else can do their work for them. This makes majority groups unlikely to be as effective as smaller groups with lower organizational costs. Smaller groups have a specific issue in mind and can focus resources on that issue. These informational and organizational costs make it possible for a well-organized interest group to push for legislation that will benefit the group instead of society. Because of lower informational and organizational participation costs, these groups tend to be effective in their rent seeking.

Successful rent seeking in the antitrust context occurs when a special interest group achieves immunities from antitrust. Alternatively, it serves to create costs for efficient firms by inefficient competitors who lobby the government in order to seek the intervention. The more successful

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<sup>55</sup> W. KIP VISCUSI ET AL., *ECONOMICS OF REGULATION AND ANTITRUST* (4th ed. 2005); Barak Orbach, *What Is Regulation?*, 30 *YALE J. ON REG. ONLINE* 1 (2012), <http://yale-jreg.org/what-is-regulation/>.

<sup>56</sup> See Fred S. McChesney et al., *Competition Policy in Public Choice Perspective*, in *OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS*, VOL. 1 (providing an analysis of domestic public choice issues); D. Daniel Sokol, *Explaining the Importance of Public Choice for Law*, 109 *Mich. L. Rev.* 1029, 1041–48 (2011) (providing an overview of international antitrust public choice issues).

<sup>57</sup> James C. Cooper et al., *Theory and Practice of Competition Advocacy at the FTC*, 72 *ANTITRUST L.J.* 1091 (2005).

<sup>58</sup> George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3, 11 (1971); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 *J.L. & ECON.* 211 (1976).

<sup>59</sup> MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 14-16, 21 (2d ed. 1971); INT’L COMPETITION NETWORK, *ANTITRUST ENFORCEMENT IN REGULATED SECTORS WORKING GROUP, SUBGROUP 1: LIMITS AND CONSTRAINTS FACING ANTITRUST AUTHORITIES INTERVENING IN REGULATED SECTORS* (2004).

such tactics are, the more incentives inefficient firms have to seek to shape government policy to be receptive to their needs.

Changing the consumer welfare standard would make antitrust look like sector regulation, which is often rife with capture by special interest groups, as the Robinson Patman Act illustrates. In regulated industries with a public interest standard, firms may try to curry favor with the government to raise barriers to prevent new entry or to raise rivals' costs.<sup>60</sup> Antitrust, with its consumer welfare standard, and the use of generalized courts are more efficient than regulatory agencies because generalized courts are less likely to pursue regulatory gaming strategies.<sup>61</sup> It is precisely because antitrust does not embrace “public interest” goals that the capture of antitrust by special interest groups is less prevalent than in regulated industries.

Overall, economic analysis allows for a truly fair system—one that is decided by facts and real economic effects—not merely one side complaining in a more politically effective way than the other as to what is fair. Professor Froeb and his coauthors summarize the shift and why a more technocratic approach is better:

Forty years ago ... inference was primitive, drawn mainly from the Structure-Conduct-Performance paradigm, and supported mainly by cross industry regressions of price or profit on industry concentration. In antitrust trials, it was not uncommon for opposing experts to opine about the effects of a merger based on little in the way of economic theory or empirical evidence, and without offering any mapping from either to their opinions. Economic analysis now occupies a central role in antitrust enforcement and credible expert opinions are derived from theoretical and empirical models.<sup>62</sup>

This insight explains that it is consumer welfare that offers democratic legitimacy. Cases come down to facts—and analysis to explain these facts—rather than to a popularity contest. The transition to greater economic analysis in cases was a result of an organizational shift that gave equal weight to economists in U.S. antitrust agencies as to the lawyers. When the economists have a say in working through cases, they can rethink economic models based on facts to better represent reality, whether using static or dynamic models.

*Bad doctrine due to political goals can have contagion effects not merely to a single firm but to an entire innovation ecosystem*

Antitrust is concerned about innovation, even by monopolists. In that context, it is important to understand that platforms' innovations not only have first order benefits in terms of better quality (or lower quality-adjusted prices) but also second order effects in that they enable efficiencies and product improvements for all downstream business users of the platform, bettering their

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<sup>60</sup> This can take the form of creating pricing schemes to appeal to political allies or paying employees inflated salaries to mobilize a constituency that would be highly interested in influencing government. Richard A. Posner, *The Effects of Deregulation on Competition: The Experience of the United States*, 23 *FORDHAM INT'L L.J.* 7, 10 (2000). In a European context, see Mathew Heim & Catarina Mideos, *Protecting competition or protecting (some) competitors: A European debate*, *Concurrences* N° 2-2019.

<sup>61</sup> Stacey L. Dogan & Mark A. Lemley, *Antitrust Law and Regulatory Gaming*, 87 *TEX. L. REV.* 685 (2009).

<sup>62</sup> Luke M. Froeb et al., *Economics at the Antitrust Division: 2017–2018*, 53 *REV. INDUS. ORG.* 637, 638 (2018).

offerings to consumers as well. In that world, we need to be especially careful about turning the enforcement dial and capturing more false positives, etc. i.e., error cost analysis should account for the downstream costs as well as benefits.<sup>63</sup> Thus, spillover effects downstream matter and need to be part of the calculus in deciding if, and when, to enforce along with potential remedies.

Understanding the platform ecosystem is important. As network effects become increasingly salient, value creation shifts from inside (vertical integration) to outside (open orchestration). The reason is simply that network effects cannot scale as easily inside a firm as outside a firm. Value creation from demand economies of scale is therefore fundamentally different from value creation from supply economies of scale.

Platforms must manage the contributions of third parties to encourage these third parties to develop on behalf of the platform. Platforms must manage a loosely affiliated ecosystem to create highly valuable products and services. Hence, antitrust should be concerned about destroying these knowledge spillovers and the ability of platforms to conduct successful orchestration.

There are two particularly important antitrust implications for purposes of the House investigation. The first is that enforcement interventions while creating competition should not disrupt the value-creating mechanisms of open orchestration. Thus breaking up companies or unduly restricting efficient business models (such as offering low prices or that are engaged in self-preferencing) are bad ideas as you get less value from orchestrating smaller communities. The second is that platforms naturally intervene to correct market failures on-platform (third party interactions they orchestrate).<sup>64</sup>

*Antitrust history offers an example of what political antitrust can do (badly)*

The courts protect antitrust from political intervention and statutory overreach that would hurt consumers. There is a natural experiment that tests what antitrust would look like with a different set of goals, which until recently diverged fundamentally from the Chicago School approach found in Sherman and Clayton Act jurisprudence. Enforcement of the Robinson-Patman Act can teach us about what a more populist antitrust would entail.

Unlike the other antitrust statutes, the Robinson-Patman Act was expressly protectionist in its drafting.<sup>65</sup> Further, its negative economic effect on efficiency is unambiguous.<sup>66</sup> A review of Robinson-Patman doctrinal shifts and scholarship suggests what economic analysis in the courts did well in shifting an inefficient rule that hurt consumers, particularly poor ones.

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<sup>63</sup> Ben Mermelstein et al., *Internal versus External Growth in Industries with Scale Economies: A Computational Model of Optimal Merger Policy*, 128 J. POL. ECON. 301 (2020); Brett Hollenbeck, *Horizontal mergers and innovation in concentrated industries*, 18 QUANT. MRKTNG. & ECON. 1 (2020).

<sup>64</sup> Geoffrey Parker et al., *Platform Ecosystems: How Developers Invert the Firm*, 41 MGMT. INFO. SYST. QUART. 255 (2017); Geoffrey Parker & Marshall Van Alstyne, *Innovation, Openness & Platform Control*, 64 MGMT. SCI. 2973 (2018).

<sup>65</sup> D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 GEO. WASH. L. REV. 2064 (2015).

<sup>66</sup> ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 312–25 (2007), govinfo.library.unt.edu/amc/report\_recommendation/amc\_final\_report.pdf [http://perma.cc/EAB5-VXL8].

Academics have attacked the Robinson-Patman Act for decades because of the unambiguous harm to consumers that its enforcement has created.<sup>67</sup> Thus, on consumer welfare grounds the Act is an abomination. In this sense, both antitrust enforcers on the left and the right had a shared vision of the Act—the economics were disastrous. Nevertheless, the Robinson-Patman Act has been shrouded in “democratic” values. The origin of the Robinson-Patman Act was based on protection of small retailers from larger, more efficient competitors (large buyers). The Great Atlantic & Pacific Tea Company grocery chain – A&P – was the “chain store menace.” Originally titled the “Wholesale Grocer’s Protection Act,” there were no multiple purposes to the Act akin to the Sherman Act, such that one could reasonably claim any sort of efficiency rationale for Robinson-Patman. Rather, the Act, which acted to prevent certain forms of price discrimination, was protectionism of a special interest under the guise of “fairness.”

Because Robinson-Patman originally served to stymie the growth of the largest supermarket, the result is that the trade-off was regressive—those vulnerable consumers who needed lower prices were the ones most hurt by choosing a “fair” approach to antitrust to protect small stores.<sup>68</sup>

This anti-bigness bias was pronounced in decades of Robinson-Patman jurisprudence in which large companies were punished merely for using buyer size to offer price reductions. Much of FTC enforcement in the 1950s and 1960s focused on Robinson-Patman violations. Overall, because of a favorably worded statute that required no showing of market power, plaintiffs often won these cases. But the Supreme Court slowly chipped away at the pro-plaintiff case law by requiring antitrust injury and a showing of consumer welfare loss even though nothing in the statute required either.

Change to Robinson-Patman jurisprudence happened gradually. It included a unilateral declaration over 40 years ago by DOJ that it would not enforce the Robinson-Patman Act because the Act had a “deleterious impact on competition.”<sup>69</sup> Similarly, the FTC noted that the Act was protectionist.<sup>70</sup> In *Great Atlantic & Pacific Tea Co. v. FTC*, the Supreme Court began to rein in Robinson-Patman enforcement so that it did not have “open conflict with the purposes of other antitrust legislation.”<sup>71</sup> Further, the Court applied the Sherman Act antitrust injury concept to the Act to limit the number of Robinson-Patman cases.<sup>72</sup> In *Brooke Group*, the Court read in a consumer welfare goal to Robinson-Patman.<sup>73</sup>

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<sup>67</sup> Kenneth G. Elzinga & Thomas F. Hogarty, *Utah Pie and the Consequences of Robinson-Patman*, 21 J.L. & ECON. 427 (1978); Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 ANTITRUST L.J. 125 (2000); Timothy Muris & Jonathan E. Nuechterlein, *Antitrust in the Internet Era: The Legacy of United States v. A&P*, 54 REV. INDUST. ORG. 651 (2019).

<sup>68</sup> See *id.*

<sup>69</sup> DEP’T OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT 250 (1977). No doubt the subsequent non-enforcement of the Robinson-Patman Act has enabled the growth of large mass merchandisers, category killers (office superstores, chain drug stores, etc.), and club stores – all of which have brought savings to consumers.

<sup>70</sup> Recent Efforts to Amend or Repeal the Robinson-Patman Act—Part 2: Hearing Before the Ad Hoc Subcomm. on Antitrust, the Robinson-Patman Act & Related Matters of the H. Comm. on Small Bus., 94th Cong. 141 (1975) (statement of Frederic M. Scherer, Director, Bureau of Econ., Fed. Trade Comm’n).

<sup>71</sup> 440 U.S. 69, 80 (1979).

<sup>72</sup> *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981)

<sup>73</sup> *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993).

Robinson-Patman created some of the more problematic decisions in antitrust history in the sense that they hurt consumers.<sup>74</sup> Those consumers who benefit the most from low prices—the poor—bore the brunt of higher food prices.<sup>75</sup> To the extent that there was a trade-off that supported smaller and inefficient competitors, such competitors benefited over from the most vulnerable members of society. Worse, during this period the government enforced Robinson-Patman criminally.<sup>76</sup> Thus, a low-cost food that benefited consumers could potentially land the manufacturer in jail. Such is the perverse effect of “political” antitrust, and the use of competition law to address non-competition goals.

Returning to this approach of picking winners and losers that favor special interests in the current digital economy would be similarly disastrous. Many digital platforms have introduced low (or no) cost products and services, driving down prices in how consumers shop, connect with loved ones, research health issues, apply for jobs, and much more. These platforms have also provided similar benefits to small businesses, publishers, and advertisers, who can now reach global audiences that they could not reach in the past. Disrupting these business models to support inefficient incumbents (many of whom are still owned by billionaires) would result in higher cost services (e.g., paywalls) that impact the most vulnerable who rely on a free and open Internet.

## **2. The adequacy of existing statutory law and case law to address anti-competitive transactions**

### *Merger thresholds are adequate*

The antitrust authorities see most of the important cases. The reason for the current calibration of merger notification thresholds is that too low a threshold would mean that the agencies would be overwhelmed by notifications of mergers that have no anti-competitive effect. This would require the agencies to divert resources away from investigating actual anticompetitive conduct. The current framework is able to strike the right balance of notification thresholds that capture the deals most likely to cause anti-competitive conduct.<sup>77</sup>

Similarly, as the International Competition Network, the network of the world’s antitrust agencies explains:

Notification thresholds should screen out transactions that are unlikely to result in appreciable competitive effects in a given jurisdiction, thus avoiding unnecessary transaction costs as well as the commitment of competition agency resources without any corresponding enforcement benefit. This rationale emphasizes that with an efficient and effective merger review regime, appropriate thresholds limit the expenditure of public and private resources in connection with the notification and review of mergers that are unlikely to raise any competition concerns, while

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<sup>74</sup> Roger D. Blair & Christina DePasquale, “*Antitrust’s Least Glorious Hour*”: *The Robinson-Patman Act*, 57 J.L. & ECON. S201, S213 (2014).

<sup>75</sup> ANTITRUST MODERNIZATION COMM’N, at 322–25.

<sup>76</sup> D. Daniel Sokol, *Reinvigorating Criminal Antitrust?*, 60 WM. & MARY L. REV. 1545 (2019).

<sup>77</sup> Compare two strands of thought on this topic: Thomas G. Wollmann, *Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act*, 1 AMER. ECON. REV.: INSIGHTS 77 (2019) and John Mayo & Jeff Macher, “The Evolution of Merger Enforcement Intensity: What do the Data Show?” (working paper 2019).

minimizing the costs to society of mergers that have anti-competitive effects but escape review.<sup>78</sup>

To be sure, the antitrust agencies should and do remain vigilant against tech deals with anti-competitive concerns. They bring cases against such deals, and even when they agencies approve such deals, they may put conditions on deals to ensure that competition will remain vigorous.<sup>79</sup> Typically, the system works. The agencies regularly revisit thinking on mergers to address if they have identified appropriate theories of harm and can match facts to such theories.

*Agencies, guided by economic analysis, do a good job given the overall uncertainty of addressing mergers*

It is easy to critique the agencies on particular cases in hindsight but agencies do the best that they can given the information that they have available at that time. On a regular basis, I am impressed by the ability of the leadership and staff at both agencies to bring cases, the hard work and dedication of our government enforcers, and the ability of enforcers to move case law as the economic knowledge changes. Our antitrust enforcers are dedicated to their antitrust mission and do their jobs quite well most of the time. When I have disagreements as to particular cases, this does not imply that the system needs to be changed, much the same way that I do not call our players or coaches “failures” on any of our University of Florida sports teams. The US agencies make mistakes of both over- and under-enforcement – there are particular deals that should have been blocked and other deals that should have been cleared. However, overall, their record is impressive, and the entire antitrust system does not need to be blown up and reengineered.

Let me provide some examples where the agencies have brought good cases but needed to rework the economic analysis, as well as cases where later economic analysis shows that the agencies made some erroneous challenges.

The consumer welfare standard works as long as the right consumers are identified. The ability of existing law to be used in the context of new theories in a critical area of the economy such as healthcare suggests that antitrust law is well equipped to do the same in the context of tech related antitrust. New economic learning can be applied in ways that lead to successful antitrust enforcement. This does not require a change in law. Rather, it requires an understanding of how the economics have changed and to match economic facts and economic theories to legal theories of harm.

As the Federal Trade Commission (“FTC”) recognized after a string of unsuccessful attempts to block hospital mergers in the 1990s, the methodology used to evaluate expected outcomes must be appropriately matched to the market if it is to be effective. In earlier merger reviews, the

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<sup>78</sup> International Competition Network, Setting Notification Thresholds for Merger Review ICN Merger Notification and Procedures Subgroup, Report to the ICN Annual Conference Kyoto, Japan April 2008 at 4, available at <https://centrocedec.files.wordpress.com/2015/07/setting-notification-thresholds-for-merger-review-2008.pdf>.

<sup>79</sup> See FED. TRADE COMM’N, THE FTC’S MERGER REMEDIES 2006-2012: A REPORT OF THE BUREAU OF COMPETITION AND ECONOMICS (2017).

merging parties adopted from manufacturing industries an Elzinga-Hogarty (“E-H”) analysis of inflows and outflows to identify broad “relevant” geographic markets.

If there were substantial inflows and outflows of goods across geographies, so the E-H logic went, then it would be easy for customers to switch to different sellers if the merging suppliers attempted to raise prices. However, the E-H approach had been developed to describe the flow of manufactured goods into and out of a region, not the flow of people seeking health care services.<sup>80</sup> By assuming that the distribution of patients could be modeled based on theories and methodologies established for manufactured goods in evaluating market concentration, the economics applied in these matters missed a crucial economic point – namely, that just because some individual patients were willing to travel long distances for specific hospital services, it did not imply that other patients would be willing to travel further if prices at the merging hospitals increased.

Eventually, a different model was proposed in hospital mergers that accounted for this two-stage model of competition, where hospitals first negotiate with insurers, and only subsequently compete for patients. When the FTC started examining hospitals’ ability to exercise market power over insurers, instead of focusing only on the end “consumer” (the patients), the FTC found that it was able to model competitive effects more accurately and construct arguments that reflected market structure and dynamics more effectively. The FTC went onto a more effective won-loss record for healthcare mergers in the courts. Overall, this enforcement record regarding hospital mergers (including where hospitals make arguments relating to innovation related efficiencies) is a strong record.

Another example is when the U.S. District Court for the District of Columbia rejected a proposed merger between Staples and Office Depot, two office supply “superstores,” when the results from a natural experiment justified a narrower market definition. At the time, Staples and Office Depot together controlled a mere 5.5 percent of the office products market based on sales data from any type of retail outlet. In a traditional assessment of market concentration, that level would be below the threshold under the Horizontal Merger Guidelines that would justify a request to block the merger. However, upon closer examination, the FTC identified data and outcomes that suggested that a narrower market definition was warranted. Specifically, the FTC evaluated real-world market data related to pricing in sub-segments of retail outlets.

Yet, sometimes the agencies get the economic analysis wrong. In 2000, the second-largest baby food manufacturer in the United States, H.J. Heinz, agreed to acquire Milnot Holding Corp., the parent of the third-largest baby food manufacturer, Beech-Nut. At the time, the U.S. market was dominated by Gerber, which claimed a 71-72 percent share. Heinz and Beech-Nut each claimed about 13 percent. In its evaluation of the proposed merger, the FTC focused its arguments around the number of post-merger competitors, citing the circumstance that the proposed merger would reduce the number of meaningful competitors from three to two. Heinz and Beech-Nut countered by arguing that Gerber, in fact, was the dominant player, and neither of the other two firms by itself provided meaningful competitive constraints to Gerber. The parties presented evidence that the only way to introduce a viable competitor to Gerber would be to take advantage

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<sup>80</sup> Kenneth Elzinga & Anthony Swisher, *Limits of the Elzinga-Hogarty Test in Hospital Mergers: The Evanston Case*, 18 *ITN* L.J. ECON. BUS. 133 (2011).

of the cost savings and economies of scale of a merged firm. Thus, instead of representing a 3-to-2 merger, the transaction actually would move the industry from a near-monopoly to something closer to a duopoly.

The D.C. Circuit reversed a finding that allowed the merger based on an efficiencies rationale, thereby rejecting the proponents' position and blocking the merger. One might say that this was a close case as the district court had found for the merging parties while the appeals court found for the government. However, within a few years the FTC's own analysis showed that, while continuing to operate independently, Heinz's market share sank to a negligible 2 percent and Beech-Nut's declined to 11 or 12 percent. At the same time, Gerber increased its already dominant share, despite raising its prices. In fact, by 2008 Gerber had nearly doubled the price difference it enjoyed over Beech-Nut, increasing from a difference of 32 cents for 16 ounces of baby food in 2000 to a difference of 61 cents by 2008. Despite this increase, Gerber was able to further expand its leading position in the marketplace. The FTC's decision to block the Heinz/Beech-Nut merger did not help to maintain the market structure the FTC sought to protect, and the number of national mainstream baby food competitors fell from three to two as a result. Moreover, the decision prevented Heinz and Beech-Nut from potentially achieving sufficient economies of scale to develop into a substantial competitor to Gerber based on both cost and quality factors.<sup>81</sup>

#### *Are tech acquisitions different for start ups?*

I may be the only law professor in the United States who teaches both antitrust and law and entrepreneurship (structuring venture capital and how law shapes high tech growth firms from founding to exit). Predicting future champions among tech companies is not easy. If it were, law and entrepreneurship would not be defined as a distinct field because of the inherent uncertainty of such investments.

Entrepreneurship is complicated and exit strategies vary. But a structural approach that would ban vertical deals by larger companies would hurt innovation.<sup>82</sup> What makes entrepreneurship unique is that it involves high risk.<sup>83</sup> Venture capitalists (VCs) have a portfolio of investments to reduce risk because any one investment is not likely to yield big returns. This is important given the limited time frame (typically ten years) in which the capital needs to be returned at the end of the fund. As such, VCs do not make money on over half of their investments.<sup>84</sup> Corporate venture capital (CVC) invests in a portfolio of companies for similar reasons.<sup>85</sup> To protect themselves from entrepreneurial holdup, VCs create a series of legal mechanisms (negative covenants) to ensure some control even when they lack voting control.

Even the best VCs and CVCs have trouble picking winners and losers. Just because a larger firm acquires a start-up does not mean that the best technologies, people, and ideas can be

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<sup>81</sup> Viola Chen, *The Evolution of the Baby Food Industry, 2000-2008*, 6 J. COMPETITION L. & ECON. 423, 441 (2010).

<sup>82</sup> D. Daniel Sokol, *Vertical Mergers and Entrepreneurial Exit*, 70 FLA. L. REV. 1357 (2018).

<sup>83</sup> William R. Kerr et al., *Entrepreneurship as Experimentation*, J. ECON. PERSP., Summer 2014, at 25, 25-26

<sup>84</sup> Michael Ewens et al., *Cost of Experimentation and the Evolution of Venture Capital*, 128 J. FIN. ECON. 422, 423 (2018) (describing this as a "spray and pray" strategy).

<sup>85</sup> See Will Drover et al., *A Review and Road Map of Entrepreneurial Equity Financing Research: Venture Capital, Corporate Venture Capital, Angel Investment, Crowdfunding, and Accelerators*, 43 J. MGMT. 1820 (2017).



implemented to capture value from the acquisition.<sup>86</sup> It is the very intangibility of the formula for success that ensures that we can identify success only with hindsight. Though it is possible that a particular transaction might create competition problems, the solution is to address specific deals with a sufficient factual record. To wholesale attack an entire business model that has been the primary form of exit for entrepreneurs not merely in platform-based tech but in biotech and other R&D intensive industries across the supply chain would create economy-wide problems. When certain avenues for firm exit, such as vertical acquisition by larger firms, are closed off via limits to acquisition because of an overly stringent antitrust regime, it hurts the entrepreneurial ecosystem. Entrepreneurs would be chilled from creating start-ups if they could not easily create a liquidity event to extract financial rewards from their investment.<sup>87</sup>

### *How should we think about vertical mergers?*

Optimal policy requires a set of rules that courts and agencies can use to evaluate a merger, including whether the antitrust agencies go to court to block a vertical deal, to threaten themselves to block such a deal, to allow a deal with a consent, or to allow a deal without any conditions. This is why vertical merger policy is a question of inference, whether for technology specific deals or more generally. The important question is if by inference, as a matter of optimal policy, should we believe that vertical mergers are more (or less) likely to lead to potential anticompetitive effects? Next, how do we create a set of legal rules that support this inference? For policy, the question should be what sort of inference should we use—one that presumptively favors or disfavors vertical mergers?

Based on a synthesis of the empirical scholarship and the broader concerns of creating regulatory/antitrust barriers to exit by founders and venture capitalists, an inference of a more lenient vertical merger policy relative to that of horizontal mergers should be favored. To be sure, there will be some vertical mergers that are potentially anticompetitive, including those in the area of technology.<sup>88</sup> There are some cases that should be blocked in court, others that the parties will drop based on the threat of court proceedings, or that can be conditionally approved via consent orders. Other cases have no competitive harm and should not be challenged. Nor do consents that do not work mean that action cannot be taken in the future. Recently DOJ

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<sup>86</sup> See Russell W. Coff, *How Buyers Cope with Uncertainty when Acquiring Firms in Knowledge-Intensive Industries: Caveat Emptor*, 10 *ORG. SCI.* 144 (1999).

<sup>87</sup> D. Daniel Sokol, *Vertical Mergers and Entrepreneurial Exit*, 70 *FLA. L. REV.* 1357 (2018).

<sup>88</sup> See, e.g., William P. Rogers on, *Economic Theories of Harm Raised by the Proposed Comcast/TWC Transaction (2015)*, in *THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY* (John E. Kwoka, Jr. and Lawrence J. White eds., 7th ed. 2018); Russell Pittman & Yan Li, *AT&T and T-Mobile: Economies as an Antitrust Defense Applied*, 9 *J. COMPETITION. L. & ECON.* 49 (2013); Thomas Wolman, *How to Get Away With Merger: Stealth Consolidation and its Real Effects on US Healthcare*, 1 *AMER. ECON. REV.: INSIGHTS* 77, 90 (2019) (finding that “Healthcare deals are over-represented, which are of particular concern since the sector accounts for a large, increasing share of public spending, was already highly concentrated at the time of the amendment, and is home to research showing market power impacts not just price but quality of care. There is recent evidence of this among hospitals as well as dialysis centers, both of which appear in panel A, and growing interest in post-acute care services...” (internal citations omitted)). For a review of successful vertical merger consents, see *FED. TRADE COMM’N, THE FTC’S MERGER REMEDIES 2006-2012: A REPORT OF THE BUREAU OF COMPETITION AND ECONOMICS* 7 (2017).

extended and modified its consent decree in *Ticketmaster/Live Nation* based upon its investigation and empirical review of how the merging parties did not live up to their consent.<sup>89</sup>

The best way to address such mergers is on a case-by-case basis that is fact-specific, consistent with current law and policy.<sup>90</sup> The institutional choice best suited to develop such an approach comes from courts and antitrust agencies through Vertical Merger Guidelines to signal the factors for those vertical mergers that are higher risk. A new legislative approach is likely to be too overbroad and would overwhelm antitrust agencies' resources with investigations and eventually challenges that discourage innovation and reduce consumer welfare.<sup>91</sup>

Finally, structural rules like bans based on size or by industry are bad for consumers. Over the last 50 or so years, the overwhelming weight of economic evidence has increasingly shown that vertical integration – whether by merger or otherwise – is typically procompetitive. Most sectoral regulations banning vertical integration have been discarded over time because such restrictions hurt consumers.<sup>92</sup> Vertical mergers tend to be less problematic than horizontal mergers because of elimination of double marginalization, the reduction of transaction costs, potential improved innovation, among other possibilities, as I discuss below.<sup>93</sup> Professor Salinger, when he headed the Bureau of Economics at the FTC, explained the reality of the complexities and ambiguities of vertical mergers from a practical perspective as opposed to the theoretical perspective:

In evaluating vertical mergers, we must never forget that the economics of vertical relationships is fundamentally different from the economics of horizontal relationships. Two rivals generally have a mutual incentive to increase their prices. A company and either its supplier or distributor generally have a mutual incentive to lower their prices. We should never lose sight of that basic distinction. . . . If we focus too much on theoretical exceptions to the general rule—and there is a real risk of doing so simply because they are intellectually

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<sup>89</sup> <https://t.co/zCs5BJqVP4?amp=1>.

<sup>90</sup> *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 194 (D.D.C. 2018) (“To sum up, the Court accepts that vertical mergers ‘are not invariably innocuous,’ but instead can generate competitive harm ‘[i]n certain circumstances.’ The case at hand therefore turns on whether, notwithstanding the proposed merger’s conceded procompetitive effects, the Government has met its burden of proof of establishing, through ‘case-specific evidence,’ that the merger of AT&T and Time Warner, at this time and in this remarkably dynamic industry, is likely to substantially lessen competition in the manner it predicts.” (citations omitted) (alteration in original) upheld *United States v. AT&T, Inc.* 916 F.3d 1029, (D.C. Cir., 2019); IVA PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 1000a, at 137 (3d ed. 2009) (“[T]he basic economic reason for limiting horizontal mergers is well-founded and rather generally accepted: horizontal mergers increase market concentration, and high market concentration can substantially lessen competition among rivals, particularly with respect to price. Unfortunately, there is no comparable theoretical basis for dealing with vertical mergers.”).

<sup>91</sup> For a similar synthesis regarding horizontal mergers, see Hillary Greene & D. Daniel Sokol, *Judicial Treatment of the Antitrust Treatise*, 100 IOWA L. REV. 2039 (2015).

<sup>92</sup> Christine S. Wilson, *Remembering Regulatory Misadventures: Taking a Page from Edmund Burke to Inform Our Approach to Big Tech*, Address at the British Institute of International and Comparative Law, London, U.K., June 28, 2019, available at <https://www.ftc.gov/public-statements/2019/06/remembering-regulatory-misadventures-taking-page-edmund-burke-inform-our>.

<sup>93</sup> For a literature review, see Michael Salinger, *Vertical Mergers*, in *OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS*, VOL. 1 (Roger D. Blair & D. Daniel Sokol eds., 2014).

more interesting—then we will get the emphasis wrong. The basic dilemma in vertical merger policy is how to identify the presumably small number of vertical mergers that might be harmful to competition.<sup>94</sup>

Changing antitrust law that would ban the acquisition of smaller firms by larger ones would be shortsighted.

Large firms use acquisitions to fuel their own innovation. Innovation is critical for firms because greater innovation leads to improved financial returns. The race to innovate is particularly important in technology related industries where there is rapid change in and for the market. When firms reach a certain size and level of complexity, they tend to be less nimble with product innovation. Rather, the strength of larger firms lies in process innovation because of familiarity and repetition of routines and processes that reduce both search costs and information costs related to the transfer of knowledge.

To help innovate, larger firms acquire smaller firms to utilize the technology that the target firm possesses. A number of reasons explain this strategy of acquisition vis-à-vis internal growth. This includes lower entry barriers via acquisition, acquisition of intellectual property and research and development (R&D) that can be used strategically, knowledge, economies of scale and scope, and the ability to exert greater control rights through vertical integration via merger rather than via contract.

An additional reason to acquire a smaller tech-related start-up is what we might think of as “out of market efficiencies,” though viewed from a resource-based management perspective, in which a firm’s competitive advantage is based on the bundle of its resources (assets and capabilities) to create value. For example, larger firms may acquire small firms because by doing so, they can buy STEM professionals to grow their organization. Through these “acqui-hires”, these STEM professionals can be redeployed across a number of different units within a larger organization or can be the core of new innovative teams. Similarly, the work on dynamic capabilities suggests a number of different avenues, including the various internal processes and routines of a firm and a firm’s internal organizational structure that allow it to utilize its intangible assets. Firms are able to use dynamic capabilities to adapt to different business environments and to shape these environments through innovation and learning.

Finally, for many vertical acquisitions, there are also benefits associated with the continued development of the acquired firm’s technologies. For instance, the acquired service may lack sufficient resources to survive in the long-term, such as an adequate strategy to generate revenue. Companies with established business models can provide such support, such as connecting the acquired service with its own popular advertising network.<sup>95</sup> In other cases, new services may face attacks from incumbent interests that it could not survive on its own.<sup>96</sup> Frequently, the acquired service survives for consumers to continue to use because of the acquisition,

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<sup>94</sup> Michael A. Salinger, Dir. of Bureau of Econ., Remarks at the Association of Competition Economics Seminar on Non-Horizontal Mergers: Is it live or is it Memorex? Models of Vertical Mergers and Antitrust Enforcement 1–2 (Sept. 7, 2005), <http://www.ftc.gov/speeches/salinger/050927isitlive.pdf> [<https://perma.cc/P6PS-46TE>].

<sup>95</sup> <https://www.investopedia.com/articles/personal-finance/030915/how-instagram-makes-money.asp>.

<sup>96</sup> <https://www.cnbc.com/2020/02/12/sequoia-vc-says-google-was-the-savior-for-youtube-at-antitrust-forum.html>.

distinguishing these deals from “killer acquisitions” where the acquired technology may be deprecated.

### **3. Whether the institutional structure of antitrust enforcement and agency resources are sufficient**

I am agnostic as to whether there should be one or multiple agencies for antitrust. If I were to design an antitrust system from scratch, I doubt that it would have two agencies. However, our antitrust history is path dependent and our two agencies work relatively well together.

*Agencies should not be duplicative of investigations into the same companies*

Due process is paramount to the US constitutional system, which follows from a common law tradition of and is enshrined in the 5<sup>th</sup> Amendment. I am troubled if an agency is duplicating an investigation already brought by its sister agency. Such a situation creates potential due process concerns as the same conduct may lead to concurrent investigations and disparate outcomes. Of course, such a system also creates unnecessary redundancies in duplicative work and leads to legal and business uncertainty.

*Agencies should invest in more tech knowledge*

If you cannot understand the law without understanding the economics, it is also the case that you cannot understand the economics without understanding the underlying technology. If economic models do not appreciate issues such as technological barriers to entry or how platforms work (to give just two examples), the models will be off and the findings from incorrect models will lead to mistaken conclusions both for theory and empirical work. In this vein, the UK’s Competition Market Authority is a leader globally in creating a distinct data science unit to better understand this reality. The unit is comprised of data scientists, data engineers, behavioral insights practitioners and now some data and technology insight advisers.

Because data analytics requires significant quantitative resources, the natural place to house such a unit in both antitrust agencies is in their respective economics units – the DOJ Antitrust Economic Analysis Group and the FTC Bureau of Economics. There are potential synergies across a number of industries where the agencies would benefit, not merely in the study of “Big Tech.” The purpose of creating a data science unit is to allow for cross pollination of work across industries as distinct from just digital task forces. This is necessary because the entire economy is moving to digitization, machine learning and AI and each industry presents distinct challenges. The House subcommittee has focused exclusively on Big Tech and not the broader antitrust issues in an increasingly changing economy. In having a narrow focus, this subcommittee potentially is missing out on potential significant anti-competitive activity elsewhere in the economy.

*Agencies need to better understand the value of different types of platforms*

The antitrust agencies have focused their attention on a narrow set of platforms. They require more resources to understand the larger set of tech ecosystems not merely limited to Big Tech

platforms. Platforms are transforming the entire supply chain across many industries and digital transformation more broadly understood is an area worthy of deeper exploration.

Within platforms and their ecosystems, the agencies require funding to understand better each type of tech ecosystem. I applaud the agencies for an increased number of workshops to understand better tech. To bring good cases, you first need to understand the economic landscape and appreciate the dynamics of competition in a particular industry or ecosystem. Sometimes bringing hearings leads to filing of important cases. The FTC's healthcare enforcement in the 2000s was based on new learning from hearings, such as the *Evanston* case.

Likewise, hearings may lead to no action because there is not an appropriate case to bring. Soon after the Obama election, DOJ Antitrust had a series of hearings on competition in agriculture. It did not bring a Section 2 case and not because it was not looking to bring such a case. Rather, the facts on the ground did not suggest a good case. All too often we only give credit to agencies for prosecuting big cases and not for choosing to drop bad cases or to bring cases against smaller profile firms where there is clear harm rather than high profile firms.<sup>97</sup>

#### *More money invested in competition advocacy*

The advocacy budget of the antitrust agencies is tiny, and the lack of a sufficient budget hurts the agencies in their mission to ensure that they promote innovation through pro-competitive rules across different parts of government.

Competition advocacy is the process through which an agency produces speeches, testimony, and reports to increase transparency in the legislative process. Antitrust agencies use competition advocacy to influence legislation and regulation in an effort to limit their potential anticompetitive effects. This process provides a more accurate estimate of the costs of regulation for the general public.

Competition advocacy thereby reduces the participation costs of complex legislation and also overcomes the public choice problem of legislative capture. Competition advocacy may be a cheaper solution than enforcement of antitrust laws in comparing resources expended to results achieved. Increased transparency and interest in antitrust issues may force politicians to focus on competition.

Competition advocacy allows an antitrust agency to influence the mechanisms and dynamics of government regulation. In some situations, the intervention may be prior to the enactment of a law or regulation. Competition advocacy as a tool to fight unjustified government restraints is particularly important in the early stages of government economic policies because of policy-choice path dependence. Through advocacy, antitrust agencies may intervene in law and regulation-making processes ex ante, when the cost of participation in the process to create a procompetitive result is lower. Advocacy helps to overcome legislative and administrative agency failure to create procompetitive rules of play.

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<sup>97</sup> William E. Kovacic & David A. Hyman, *Consume or Invest: What Do/Should Agency Leaders Maximize?*, 91 WASH. L. REV. 295 (2016).

## Conclusion

Antitrust works well because it is technocratic in that a singular (but flexible within its economics) goal is administrable institutionally. To introduce the world of political imperfections into a technical process that examines markets would create further distortions affecting consumers. Antitrust does well dealing with antitrust problems. To the extent that there are other related problems, the right answer is not to create an antitrust that lacks democratic accountability (because antitrust becomes regulation via the backdoor, often to protect special interests) and exceeds its mandate of the past forty years.

By design, courts are effective and flexible in their application of antitrust. New legislation should not be introduced that hurts US consumers. That is, there are legitimate business practices that allow firms to reduce price, improve quality, and increase innovation. These practices should be encouraged. Antitrust intervention makes sense only when anti-competitive harms are clear and remedies are workable. By intervening when the conduct may be pro-competitive threatens innovation and consumers. Some proposals for new legislation would instead hurt consumers and innovation. Our own antitrust past, such as the Robinson-Patman Act, shows the folly of such regressive legislative interventions.

Antitrust has an effective mix of tools to address anti-competitive conduct against firms in technology driven markets that may abuse the antitrust laws. Our antitrust agencies need to bring good cases based on the factual record to do so. I have confidence in our antitrust agencies' abilities in this regard.