

## ESSAY

### A 2020 AGENDA FOR RE-INVIGORATED ANTITRUST ENFORCEMENT: FOUR BIG IDEAS

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#### INTRODUCTION

In an essay published in the mid-1960s, historian Richard Hofstadter posed a question that was as simple as it was profound: What happened to the antitrust movement in America?<sup>1</sup> Hofstadter observed that Americans had lost their zeal for antitrust and that antitrust enforcement had become

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<sup>1</sup> RICHARD HOFSTADTER, *What Happened to the Antitrust Movement?*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 188 (1st ed. 1965).

unmoored from its trust-busting roots. Ironically, the antitrust enforcement scene that Hofstadter lamented a half-century ago would appear robust compared to antitrust enforcement today. Accordingly, Hofstadter's question is perhaps even more relevant now than it was fifty-five years ago.

Antitrust in America stands at a crossroads. As Professor Herbert Hovenkamp has observed “[a]ntitrust in the United States today is caught between its pursuit of technical rules designed to define and implement defensible economic goals, and increasingly political calls for a new antitrust ‘movement.’”<sup>2</sup> The Supreme Court once exalted the antitrust laws, in general, and the Sherman Act, in particular, as the “Magna Carta of free enterprise,” but judicial construction has narrowed their reach significantly over the past forty years.<sup>3</sup> Technical rules have triumphed over more traditional goals, sociopolitical freedom and cabining the power of big business.<sup>4</sup> The prevailing view today is that antitrust laws should be implemented to maximize consumer welfare.<sup>5</sup> The consumer welfare model in turn relies heavily on Chicago School economic theory with its emphasis on efficiency, self-correcting markets populated by rational, self-interested participants, administrable rules and minimalist intervention. Specifically, the model posits that market power is not sustainable because entry will counteract any price rises resulting from the exercise of that market power.<sup>6</sup> Not surprisingly, the current antitrust public enforcement scene reflects that minimalist approach. Although the agencies still pursue cartels with gusto, they rarely challenge mergers or single firm conduct, including refusals to deal and exclusionary behavior by dominant firms.<sup>7</sup>

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<sup>2</sup> Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, 94 NOTRE DAME L. REV. 583, 583 (2018).

<sup>3</sup> *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

<sup>4</sup> Hovenkamp, *supra* note 2, at 585.

<sup>5</sup> See ROBERT H. BORK, *THE ANTITRUST PARADOX* 81 (1978).

<sup>6</sup> Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15 (1984).

<sup>7</sup> See Victor Reklaitis, *Senate Panel Grills Justice Department and FTC Chiefs over Their Antitrust Probes into Big Tech*, MARKETWATCH (Sept. 17, 2019, 4:36 PM) (quoting *Oversight of the Enforcement of Antitrust Laws: Hearing Before the Subcomm. on Antitrust, Competition Policy, and Consumer Rights of the S. Comm. on the Judiciary*, 116th Cong. (2019) (statement of Sen. Richard Blumenthal, Member, S. Comm. on the Judiciary)) (“The fact that you’re coming here without any specifics, I think, reinforces the impression that federal antitrust enforcement is an empty suit. Call it a culture of capitulation. What the public sees is a façade with respect to Big Tech, and no immediate prospect of urgency[.]”), [https://www.marketwatch.com/story/senate-panels-antitrust-hearing-could-deliver-hints-on-governments-probes-into-big-tech-2019-09-17?mod=victor-reklaitis\\_seemore/](https://www.marketwatch.com/story/senate-panels-antitrust-hearing-could-deliver-hints-on-governments-probes-into-big-tech-2019-09-17?mod=victor-reklaitis_seemore/) [<https://perma.cc/B462-4M2U>]. *But see* FTC v. Qualcomm, 411 F. Supp. 3d 658, 668 (N.D. Cal. 2019) (denying Qualcomm’s

Enforcers have tolerated behemoths in high tech, big data, retailing, telecommunications, and entertainment with the expectation that size will generate efficiencies and foster innovation. Paradoxically, “the antitrust laws, which were rooted in deep suspicion of concentrated private power, now often promote it.”<sup>8</sup>

Critics of the consumer welfare model argue that its narrative is flawed and that “it is bad history, bad policy and bad law to exclude certain political values in interpreting the antitrust laws.”<sup>9</sup> As Professor Tim Wu has observed, the courts’ “overindulgence” in Chicago School theory has “enfeebled” antitrust law.<sup>10</sup> Moreover, Chicago School theory has largely failed to deliver what it has promised. Size alone does not necessarily generate efficiencies or foster innovation. Nor do markets necessarily self-correct in the real world, as opposed to in the Chicago School model; market power may in fact prove durable as experiences with Standard Oil, Microsoft, and Alcoa demonstrate.<sup>11</sup> The result may lead to higher prices and lagging innovation for a sustained period of time. Even where market power has created efficiencies that have led to lower consumer prices, it may, at the same time, have depressed wages, constrained individual economic freedom and limited consumer choice.<sup>12</sup> Under this view, the existence of market power alone may create entry barriers, discourage investment or impede innovation. Accordingly, the current enforcement agency focus on conduct in Section 2 cases is too narrow; the appropriate inquiry is whether the conduct impairs the competitive process. This approach has been pejoratively and dismissively labelled “hipster antitrust” by its detractors, who argue that it advocates a return to enforcement policies that protect small, inefficient businesses at the expense of consumers.<sup>13</sup> In fact, critics of the Chicago School,

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motion to dismiss an antitrust suit brought by the FTC).

<sup>8</sup> David Streitfeld, *Amazon’s Antitrust Antagonist Has a Breakthrough Idea*, N.Y. TIMES, (Sept. 7, 2018), <https://www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.html> [<https://perma.cc/WN4N-3WEF>].

<sup>9</sup> Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979).

<sup>10</sup> TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE GILDED AGE* 17 (2018).

<sup>11</sup> Jonathan B. Baker, *Taking the Error Out of “Error Cost” Analysis: What’s Wrong with Antitrust’s Right*, 80 ANTITRUST L.J. 1, 10 n.39 (2015); see also WU, *supra* note 10, at 121 (noting the durability and growing dominance of Google, Facebook, Ebay, and Amazon).

<sup>12</sup> See Lina M. Khan, *The Ideological Roots of America’s Market Power Problem*, 127 YALE L.J.F. 960, 961 (2018).

<sup>13</sup> See Joshua D. Wright, Elyse Dorsey, Jonathan Klick & Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*,

however denominated, simply seek to return antitrust enforcement to its historic roots—“constraining the accumulation of unchecked private power and preserving economic liberty.”<sup>14</sup>

A second problem with the current state of affairs is that antitrust law has grown overly complicated. In part, this is due to sophisticated marketplaces that have evolved in the twenty-first century and in part due to ever increasing reliance on economic assumptions and economic principles by courts and enforcers in evaluating and resolving antitrust disputes. The Horizontal Merger Guidelines provide an apt example. The Guidelines are heavily steeped in economic theory and require expert economists to translate. As a result, merger law has become largely inaccessible to the general public, as well as to large segments of the bench and bar, the very constituencies that the Guidelines were intended to inform. Third, increased reliance on economics, however, is only one source of the growing complexity of antitrust law. As the national economy has shifted away from manufacturing and into high tech, equitable remedies in monopolization cases have become difficult to fashion and costly to enforce. Damages, especially in multiparty, multidistrict, industry-wide cases, remain difficult to calculate and to apportion. Fourth, the inherently complicated nature of antitrust disputes has led some courts, fearful of decisional error and the resulting false positives that could stymie procompetitive conduct, simply not to intervene in certain cases. This Essay presents four proposals designed to address the foregoing concerns and promote a revival of antitrust enforcement in the United States.

## I

### SINGLE FIRM CONDUCT

Section 2 of the Sherman Act,<sup>15</sup> which prohibits monopolization, attempted monopolization, and conspiracy to monopolize, is no longer an effective tool to discipline single-firm behavior. Once the centerpiece of the antitrust movement and the embodiment of agrarian opposition to bigness, Section 2 has become a paper tiger. I suggest that the decline of Section 2 may be explained by: (1) judicial hostility to monopolization cases, especially in the wake of *Trinko*; (2) difficulties in fashioning remedies in monopolization cases;

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51 ARIZ. ST. L.J. 293, 295–96 (2019).

<sup>14</sup> WU, *supra* note 10, at 17.

<sup>15</sup> 15 U.S.C. § 2 (2012).

and (3) paucity of enforcement activities by federal agencies.

A. *Trinko*

The Supreme Court's 2004 decision in *Trinko* effectively defanged Section 2 as a weapon to police dominant firms.<sup>16</sup> In that case, Verizon did not, and could not, deny that it had dragged its feet in providing interconnect services to AT&T and other prospective entrants into the local phone markets in the northeast as mandated by the Telecommunications Act of 1996 (TCA).<sup>17</sup>

Indeed, Verizon had already paid regulatory fines of \$10 million to the New York Public Service Commission and \$3 million to the Federal Communications Commission for noncompliance.<sup>18</sup> The questions before the Court were whether Verizon's violation of TCA requirements was itself a violation of Section 2 or whether apart from the TCA transgressions, Verizon's conduct constituted monopolization.

Writing for the majority, Justice Scalia undertook a broad re-examination of Section 2 legal standards. That exercise was simply unnecessary. *Trinko*, as a prospective AT&T customer, probably lacked standing to sue; AT&T, the target of Verizon's bad conduct, was directly hurt by Verizon's refusal to deal and in a better position to sue than *Trinko*.<sup>19</sup> Justice Scalia, determined to reach the merits of the case, elided over the standing issue.

The *Trinko* opinion rewrites the century-old Section 2 narrative. Historically, courts have viewed dominant firms with suspicion. In *Alcoa*, Judge Learned Hand stated that "[m]any people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; [and] immunity from competition is a narcotic[.]"<sup>20</sup> On the other hand, "rivalry is a stimulant to industrial progress."<sup>21</sup> Subsequently, in *Northern Pacific*, the Supreme Court opined that the Sherman Act "rests on the premise that unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation

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<sup>16</sup> *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 505–11 (2004).

<sup>17</sup> 47 U.S.C. § 251 (2012).

<sup>18</sup> *Trinko*, 540 U.S. at 403–04.

<sup>19</sup> *Id.* at 416–17 (Stevens, J., concurring).

<sup>20</sup> *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945).

<sup>21</sup> *Id.*

of our democratic political and social institutions.”<sup>22</sup> Monopolies, on the other hand, raise prices, lower output, create disincentives to innovate or to pursue efficient production measures, retard investment, hinder entrepreneurship, and limit individual economic freedom.<sup>23</sup>

Justice Scalia, however, paints a much rosier picture of the monopolist. From his perspective, the monopolist is at worst a benign, but more likely a positive, force in the marketplace. He states that “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>24</sup> This view, that the lure of monopoly profits—not rivalry—is what spurs innovation and economic growth, is clearly at odds with the Court’s earlier decision in *Northern Pacific*.

*Trinko* further emphasizes that the mere possession of monopoly power does not violate Section 2; only where the dominant firm engages in unlawful *conduct* to enhance or maintain its market power is the Section 2 threshold crossed.<sup>25</sup> Justice Scalia then dismisses the notion that Verizon’s conduct—its refusal to deal with AT&T—was unlawful. He states that the forced dealing mandated by the TCA (1) dulls investment by monopolists; (2) forces courts to act as central planners, a role to which they are ill-suited; and (3) may facilitate collusion, the “supreme evil” of antitrust.<sup>26</sup> With silky smooth sleight of hand and without citation to precedent, Justice Scalia thereby establishes a hierarchy of antitrust violations in which monopolistic conduct is not as reprehensible as cartel behavior.

The conduct standard, however, ignores the harms that market power by itself can inflict on the competitive process by creating entry barriers, discouraging investment, and impeding innovation.<sup>27</sup> Google and Amazon were able to amass

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<sup>22</sup> *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

<sup>23</sup> *See Khan*, *supra* note 12, at 961.

<sup>24</sup> *Trinko*, 540 U.S. at 407.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 407–08.

<sup>27</sup> *See Khan*, *supra* note 12, at 961; *see also* Monopolization Deterrence Act of 2019, S. 2237, 116th Cong., 1st Sess. § 2(a)(6) (2019) (“[T]he exercise of market power tends to lessen the rate of innovation, slow the growth of productivity, and increase economic inequality in the directly affected markets and economy—

substantial market power without facing antitrust scrutiny by keeping prices low and offering free services.<sup>28</sup> In addition, “Big Tech’s sweeping patents, standard platforms, fleets of lawyers to litigate against potential rivals, and armies of lobbyists have created formidable barriers to new entrants.”<sup>29</sup> Network effects have further entrenched their dominant position. That market power is dangerous because it “can be utilized with lightning speed” leaving “the fortunes of the people . . . dependent on the whim or caprice . . . of a few self-appointed [companies].”<sup>30</sup>

Justice Scalia does not stop there and instead goes on to put a new spin on existing precedent on monopolistic refusals to deal. He marginalizes the holding for the plaintiff in *Aspen*<sup>31</sup> as “at or near the outer boundary of § 2 liability,” that is, *sui generis*.<sup>32</sup> Although Justice Scalia acknowledges that lower courts have embraced the essential facilities doctrine, he pointedly refuses to give the Court’s imprimatur to that doctrine.<sup>33</sup> In a footnote, Justice Scalia—in the face of the Court’s clearly contrary holding in *Eastman Kodak Co. v. Image Technical Services, Inc.*<sup>34</sup>—questions whether monopoly leveraging is an antitrust offense separate and apart from attempted monopolization.<sup>35</sup>

Finally, Justice Scalia questions the competence of the federal judges to correctly decide monopolization cases. He observes that “applying the requirements of § 2 ‘can be difficult’”<sup>36</sup> and that identifying exclusionary conduct “would surely be a daunting task for a generalist antitrust court.”<sup>37</sup> Anticipating error by lower courts, Justice Scalia argues that any “[m]istaken inferences and the resulting false

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wide.”).

<sup>28</sup> See Derek Thompson, *America’s Monopoly Problem*, ATLANTIC (October 2016), <https://www.theatlantic.com/magazine/archive/2016/10/americas-monopoly-problem/497549/> [<https://perma.cc/EED9-X82E>].

<sup>29</sup> See Robert Reich, *The Monopolization of America: The Biggest Economic Problem You’re Hearing Almost Nothing About*, SALON (May 13, 2018), [https://www.salon.com/2018/05/13/the-monopolization-of-america-the-biggest-economic-problem-you-are-hearing-almost-nothing-about\\_partner/](https://www.salon.com/2018/05/13/the-monopolization-of-america-the-biggest-economic-problem-you-are-hearing-almost-nothing-about_partner/) [<https://perma.cc/897B-5HLU>].

<sup>30</sup> See *United States v. Columbia Steel Co.*, 334 U.S. 495, 536 (1948) (Douglas, J., dissenting).

<sup>31</sup> *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

<sup>32</sup> *Trinko*, 540 U.S. at 409.

<sup>33</sup> *Id.* at 410–11.

<sup>34</sup> 504 U.S. 451 (1992).

<sup>35</sup> *Trinko*, 540 U.S. at 415 n.4.

<sup>36</sup> *Id.* at 414 (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001)).

<sup>37</sup> *Id.*

condemnations ‘are especially costly, because they chill the very conduct the antitrust laws are designed to protect.’<sup>38</sup> In other words, where an issue of liability is difficult, the courts should err on the side of nonintervention. Apart from the problem of false positives, Justice Scalia states that antitrust violations based on monopolistic refusals to deal may be “beyond the practical ability of a judicial tribunal to control” because “[a]n antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations.”<sup>39</sup>

In sum, *Trinko* has set a high bar for successful prosecution of single firm conduct. The odds are stacked heavily against plaintiffs in Section 2 cases. Indeed, in *LinkLine*, post-*Trinko*, the Supreme Court observed that antitrust liability from purely unilateral conduct would be “rare.”<sup>40</sup>

#### B. Underinclusiveness

The *Trinko* ruling has played a pivotal role in the decline of Section 2, but it would be a mistake to hold *Trinko* alone accountable for the current dormant state of monopolization law. Long before *Trinko*, the Supreme Court fashioned underinclusive rules in determining Section 2 liability. Predatory pricing is a prime example. Until the 1970s, the legal rules on predatory pricing were in a state of confusion. Courts sometimes focused on the intent of the alleged predator to undersell its rival in order to gain market share. This approach, however, ignored the fact that price competition by its very nature generates winners and losers and that it was perfectly natural for a competing seller to try to outperform its rivals. Professors Areeda and Turner recognized this conundrum and developed an objective, cost-based test for predatory pricing.<sup>41</sup> Sales at prices below the seller’s marginal cost were illegal per se; sales at prices above the seller’s marginal costs were per se lawful.<sup>42</sup> Courts began to embrace this objective standard.<sup>43</sup> However, in *A.A. Poultry*, Judge

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<sup>38</sup> *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

<sup>39</sup> *Id.* at 414–15.

<sup>40</sup> *Pac. Bell Tel. Co. v. LinkLine Commc’ns, Inc.*, 555 U.S. 438, 448 (2009).

<sup>41</sup> Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 698–99 (1975).

<sup>42</sup> *Id.* at 713–16.

<sup>43</sup> See, e.g., *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983) (“But ‘intent to harm’ without more offers too vague a standard in a world where executives may think no further than ‘Let’s get more business’ . . .”).



Easterbrook, recognizing the cost and complexity of accumulating and sorting out cost data, suggested a safe harbor for defendants engaged in below cost pricing—where there was no proof of a dangerous probability that the alleged predators would recoup their early losses by extracting monopoly rents once their rivals exited the field.<sup>44</sup>

In *Brooke Group*, the Supreme Court married the Areeda/Turner and Easterbrook concepts and held that to prove predatory pricing, plaintiff must show that (1) the price charged was below a reasonable measure of defendant's costs; and (2) there was a dangerous probability of recouping losses in below cost sales through long-run monopoly rents.<sup>45</sup>

The *Brooke Group* profit-sacrifice approach may work well in run-of-the-mill predatory pricing cases, where a seller seeks to recoup its early losses on below cost sales through monopoly profits once the rival is eliminated; but it fails to capture more sophisticated forms of predatory behavior. For example, in the *American Airlines* case, American, faced with new competition from low-cost carriers on regional routes, responded to the competitive threat by matching the low fares of the upstart carriers and by increasing the number of flights on the regional routes in play.<sup>46</sup> American's fare reductions and additional services effectively robbed the upstart carriers of any competitive advantages, and they eventually ceased competing with American for regional routes. Once competition from low-cost carriers disappeared, American raised fares and reduced service to previous levels.<sup>47</sup> The Tenth Circuit ruled that absent proof of airfares set below cost by American, the government's predation suit failed.<sup>48</sup> Yet, it is hard to comprehend how American's behavior in adding flights and lowering fares to meet the competitive threat posed by new entrants and then reverting to prior policies once that threat disappeared can be viewed as "procompetitive" or "beneficial to consumers."

Similarly, the profit-sacrifice test seems underinclusive in cases involving bundled discounts, specifically, in cases where a single-product producer is excluded through a bundled-rebate program offered by a multiple-product producer that

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<sup>44</sup> A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1401 (7th Cir. 1989).

<sup>45</sup> *Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 224 (1993).

<sup>46</sup> *United States v. AMR Corp.*, 335 F.3d 1109, 1112–13 (10th Cir. 2003).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1111.

conditions its rebates on multiple purchases across different product lines.<sup>49</sup>

Proponents of more aggressive enforcement of Section 2 cases have argued that in single-firm refusal-to-deal cases, a dominant firm may violate Section 2 where it has effectively raised its rival's cost of doing business.<sup>50</sup> While some courts have agreed with this approach, the cases post-*Trinko* have been largely unyielding. As now-Justice Gorsuch ruled in *Novell, Inc. v. Microsoft Corp.*:<sup>51</sup>

Indeed, in almost *any* case where a monopolist first shares and then withdraws its property—as in *Aspen* and *Trinko*—the dominant firm might be said to raise the rival's costs of doing business by forcing it to forgo reliance on the monopolist's facilities or intellectual property and compete on its own. That's the whole reason why competitors sue for refusals to deal—because they now have to incur costs associated with doing business another firm previously helped subsidize. Yet neither *Trinko* nor *Aspen Skiing* suggested this is enough to evade their profit sacrifice test, and we refuse to do so either. Whether one chooses to call a monopolist's refusal to deal with a rival an act or omission, interference or withdrawal of assistance, the substance is the same and it must be analyzed under the traditional test we have outlined.

This shouldn't be (mis)taken as suggesting raising rivals' costs theories play no role in antitrust. It is to say only and much more modestly that they do not displace *Aspen* and *Trinko*'s profit sacrifice test in the narrow world of refusal to deal cases, whether one wants to conceive of those cases as involving acts or omissions. *Aspen* and *Trinko*'s more demanding inquiry applies in this particular arena because—as we have already explained—the law views with an especially wary eye claims that competition and consumers benefit from collusion between rivals, and it views doubtfully too the ability of courts to identify “the proper price, quantity, and other terms” associated with compelled sharing.<sup>52</sup>

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<sup>49</sup> See, e.g., *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1062 (3d Cir. 1978) (explaining that a single-product manufacturer would have to offer up to a 35% rebate in order to compete with a multiple-product manufacturer's 3% discount).

<sup>50</sup> See Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209, 218 (1986).

<sup>51</sup> 731 F.3d 1064 (10th Cir. 2013).

<sup>52</sup> *Id.* at 1079 (emphasis in original).

### C. Remedy

#### 1. *Remedy Limitations*

Even in those cases where liability is found, effective monopolization enforcement is hampered by limitations on Section 2 remedies. This is especially true in cases involving exclusionary conduct, where the remedy sought is equitable in nature. Equitable relief in monopolization cases is of two types: (1) conduct relief; and (2) structural relief. These two types of relief are essentially self-defining. Conduct relief is directed at the monopolist's future behavior and may include, *inter alia*, pricing restrictions, mandatory licensing and nondiscriminatory dealing provisions. Structural relief is addressed to the make-up of the product market at issue and may entail dissolution of the monopoly.<sup>53</sup>

Conduct relief might be analogized to drug therapy.<sup>54</sup> As such, it is less invasive than structural relief. However, it requires ongoing, and potentially costly judicial monitoring; and does little to ensure long term de-concentration of the market by unseating the entrenched monopolist. Structural relief, on the other hand, may be viewed as akin to radical surgery.<sup>55</sup> Initially, it is more disruptive than conduct remedies, but it offers better odds of jump-starting competition and promoting a competitive market in the long-term. Generally, structural decrees require less monitoring than conduct decrees; but, in the end, they may prove unnecessary or simply fail to stimulate competition.<sup>56</sup>

The *Microsoft* case presented starkly the question of which remedy would be appropriate in monopolization cases.<sup>57</sup> Following Judge Penfield Jackson's findings of multiple Section 2 violations, the government opted for structural relief and proposed breaking Microsoft into two entities: an operating systems company and an applications company.<sup>58</sup>

<sup>53</sup> See generally Edward D. Cavanagh, *Antitrust Remedies Revisited*, 84 OR. L. REV. 147, 188–92 (2005) (comparing conduct remedies and structural remedies).

<sup>54</sup> See R. Craig Romaine & Steven C. Salop, *Slap Their Wrists? Tie Their Hands? Slice Them Into Pieces?: Alternative Remedies for Monopolization in the Microsoft Case*, 13 ANTITRUST 15, 17 (1999) (exploring economist F.M. Scherer's analogy that conduct remedies are like drug therapy, and structural remedies are like radical surgery).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000), *aff'd in part, rev'd in part, remanded in part*, 253 F.3d 34 (D.C. Cir. 2000).

<sup>58</sup> See ANDREW I. GAVIL & HARRY FIRST, *THE MICROSOFT ANTITRUST CASES* 244–

The government's stance was controversial. There was no template for structural relief in cases involving high-tech entities. Indeed, the last time that the Supreme Court ordered dissolution of an entity in a Section 2 case was in *Grinnell*,<sup>59</sup> some thirty years prior and in a brick-and-mortar context. In addition, some critics argued that breaking up Microsoft as proposed would not foster future competition but would simply create two monopolies.<sup>60</sup>

Nevertheless, without even scheduling a hearing, Judge Jackson agreed with the government and ordered that Microsoft be broken up.<sup>61</sup> Without delving into the merits, the D.C. Circuit summarily reversed the dissolution order, principally because Judge Jackson failed to conduct a hearing on the remedies issue, and also disqualified Judge Jackson for breaches of the Judicial Canons of Ethics.<sup>62</sup> On remand before the newly assigned Judge Colleen Kollar-Kotelly, a fresh litigation team from the recently elected George W. Bush Administration opted not to pursue structural relief but instead negotiated a settlement with Microsoft. The new settlement was limited to conduct, and it included compulsory licensing and the elimination of barriers to entry into the middleware and operating systems.<sup>63</sup>

Whether the remedies in *Microsoft* were ultimately successful is a matter of ongoing debate. Critics of the decree note, correctly, that Microsoft remains entrenched as a dominant firm in the operating systems market.<sup>64</sup> Proponents of the decree, including Judge Kollar-Kotelly, note that the decree did eliminate barriers to entry into operating systems and browsers.<sup>65</sup> They view the decree as a vehicle for promoting entry, not a tool to restructure the market by diminishing Microsoft's market share.

Still, after years of litigation and millions of dollars expended in attorneys' fees and court time, the markets at issue in *Microsoft* are pretty much the same as they were before litigation had been commenced. *Microsoft* serves to underscore

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46 (2014).

<sup>59</sup> *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

<sup>60</sup> See Nicholas Economides, *The Real Losers in the Microsoft Anti-Trust Case*, STERNBUSINESS 19, 21 (Spring/Summer 2000).

<sup>61</sup> See GAVIL & FIRST, *supra* note 58, at 116.

<sup>62</sup> *Microsoft*, 253 F.3d at 46.

<sup>63</sup> See GAVIL & FIRST, *supra* note 58, at 117-23.

<sup>64</sup> *Id.* at 249.

<sup>65</sup> *Id.* at 248-49.

the limitations of conduct remedies in monopolization cases.<sup>66</sup> It also calls into question the desirability of courts using regulatory decrees to oversee the behavior of firms that have violated the antitrust laws. *Trinko*, decided shortly after the *Microsoft* decree was entered, urged courts to avoid fashioning remedies that would “require continuing supervision of a highly detailed decree”<sup>67</sup> and concluded that a “problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.”<sup>68</sup>

From an enforcement prospective, *Trinko*’s invitation for judicial abstention is troubling enough. Even more troubling, however, is the rare—and very public—dispute between the DOJ and FTC that has erupted in the Ninth Circuit following a trial court ruling in *FTC v. Qualcomm Inc.*<sup>69</sup> imposing injunctive relief on the defendant. Filing a Statement of Interest in the Circuit Court, the DOJ argued that the injunctive relief imposed on the defendant by the trial court was overly broad and presented a risk to national security and urged additional hearings below.<sup>70</sup> Rejecting these arguments, the FTC urged that the relief was warranted by the trial record and that no additional hearings were needed.<sup>71</sup> Little can be accomplished in prosecuting monopolization where the federal regulators do not speak with one voice.

## 2. EU Remedies

By contrast, EU regulators have in recent years enjoyed greater success in reining in dominant firms than their American counterparts. The EU has had in place for over fifty years a sophisticated antitrust regime. Its prohibition of abuse of dominance parallels the prohibitions of monopolization under Section 2 of the Sherman Act.<sup>72</sup> One significant

<sup>66</sup> *Id.*

<sup>67</sup> *Trinko*, 540 U.S. at 415.

<sup>68</sup> *Id.* (alternation in original) (quoting Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 853 (1989)).

<sup>69</sup> *FTC v. Qualcomm Inc.*, 411 F. Supp. 3d 658, 668 (N.D. Cal. 2019).

<sup>70</sup> United States’ Statement of Interest Concerning Qualcomm’s Motion for Partial Stay of Injunction Pending Appeal, at 9–12, *FTC v. Qualcomm Inc.*, 411 F. Supp. 3d 658 (9th Cir. 2019) (No. 19-16122).

<sup>71</sup> [Corrected] Opposition of the Federal Trade Commission to Motion for Partial Stay Pending Appeal, at 12–13, 20–24, *FTC v. Qualcomm Inc.*, 411 F. Supp. 3d 658 (9th Cir. 2019) (No. 19-16122).

<sup>72</sup> Treaty on the Functioning of the European Union, art. 102, June 7, 2016, 2016 O.J. (C 202) 89 (“Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited . . .”).

difference, however, is that “abuse of dominance” prohibits “exploitative behavior by dominant firms” and is not limited to acts creating monopoly.<sup>73</sup> In part, this difference may be explained by a broader view of the goals of competition policy in the EU. For example, in EU predatory pricing cases, a firm may be held liable for abuse of dominance even without proof of a likelihood of recoupment.<sup>74</sup> In addition, the EU recognizes a broad duty to deal with rivals.<sup>75</sup> In the United States on the other hand, absent purpose to create or maintain a monopoly, a dominant firm has no obligation to deal.<sup>76</sup> This safe harbor is subject to two exceptions: a firm has a duty where (1) it is an essential facility; and (2) where it is it terminates a previously profitable relationship without a procompetitive justification.<sup>77</sup> In contrast, the EU in a 2004 action found that Microsoft had abused its dominance by refusing to provide workgroup server software rivals full interoperability information to connect with Windows.<sup>78</sup> The European Commission entered a decree (1) fining Microsoft \$605 million; (2) imposing conduct remedies requiring (a) unbundling of Windows Media Player and (b) provision of information on interoperability of Microsoft operating systems; and (3) injunctive relief.<sup>79</sup>

The difference between the EU and U.S. decrees underscores the difference in remedial powers available to the two regimes. Unlike in criminal antitrust cases,<sup>80</sup> the United States lacks legislative authority to impose fines in civil antitrust cases. Yet, civil fines provide distinct advantages over equitable remedies. First, as long as fines are set high enough so that they are not mere licenses for wrongdoing, they serve to deter bad behavior.<sup>81</sup> Second, fines are relatively easy to administer and do not require detailed judicial oversight of

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<sup>73</sup> See ELEANOR FOX & DANIEL CRANE, GLOBAL ISSUES IN ANTITRUST AND COMPETITION LAW 95 (2010).

<sup>74</sup> See Case C-62/86, AKZO Chemie BV v. Comm’n, 1991 E.C.R. I-3466, 3472-73 (declaring that under EU law, selling products at an unprofitably low price to eliminate a competitor is an unlawful abusive practice).

<sup>75</sup> See Case T-201/04, Microsoft Corp. v. Comm’n, 2007 E.C.R. II-3607 (stating that “a refusal to supply on the part of a dominant undertaking may constitute an abuse of a dominant position within the meaning of Article 82 EC”).

<sup>76</sup> *Trinko*, 540 U.S. at 407-08.

<sup>77</sup> See *id.* at 408-11.

<sup>78</sup> GAVIL & FIRST, *supra* note 58, at 249.

<sup>79</sup> *Id.*

<sup>80</sup> See, e.g., 15 U.S.C. § 1 (2012) (permitting fines up to \$1,000,000 against convicted individuals and \$10,000,000 against convicted corporations).

<sup>81</sup> See GAVIL & FIRST, *supra* note 58, at 274.

private business behavior.<sup>82</sup> In particular, civil fines eliminate any future litigation that detailed conduct decrees inevitably generate over ambiguities in language and changed circumstances.<sup>83</sup> Third, fines can be used as a carrot in conjunction with conduct relief to bring about compliance with behavior decrees.<sup>84</sup> Failure to comply with the behavior decree would subject the recalcitrant firm to significant fines, as Microsoft has learned.<sup>85</sup> Fourth, the power to fine would vitiate any argument that a particular problem is irremediable by the courts.

Notwithstanding the potential benefits of adding civil fines to the antitrust remedies scheme in cases of public enforcement, the Antitrust Modernization Commission (AMC) concluded that the enforcement agencies did not need this expanded authority, noting the DOJ’s “reservations” that introduction of civil fines would blur the line between criminal and civil enforcement.<sup>86</sup> Nor did the AMC perceive significant gaps in the current level of enforcement by private plaintiffs through treble damage suits.

However, this negative perception of civil penalties may be changing. The Senate is currently considering the Monopolization Deterrence Act of 2019, which would authorize substantial civil fines in monopolization cases in actions brought by the DOJ and FTC.<sup>87</sup> The bill is intended to give enforcement agencies “an additional enforcement tool to craft remedies for individual violations that are effective to deter future unlawful conduct and proportionate to the gravity of the violation.”<sup>88</sup> The bill is necessary because available civil remedies “have not proven sufficient, on their own, to deter anticompetitive exclusionary conduct[.]”<sup>89</sup>

### 3. *Next Steps*

#### Enactment of the Monopolization Deterrence Act of 2019

<sup>82</sup> *Id.* at 274–75.

<sup>83</sup> *Id.* at 275.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 263 (pointing out that the EC fined Microsoft a total of \$2.433 billion—four times the amount that Microsoft had been initially fined for abuse of dominance—for failure to comply with the EC conduct decree).

<sup>86</sup> REPORT AND RECOMMENDATIONS, ANTITRUST MODERNIZATION COMMISSION 285 (2007), <https://www.ncbfaa.org/images/ncbfaa/PDFs/amcreport.pdf> [<https://perma.cc/3MC2-4MT2>] [hereinafter AMC REPORT].

<sup>87</sup> Monopolization Deterrence Act of 2019, S. 2237, 116th Cong., 1st Sess. (2019).

<sup>88</sup> *Id.* § 2(b)(2).

<sup>89</sup> *Id.* § 2(a)(7).

would be an important first step toward more effective enforcement in single firm conduct cases. Civil penalties would serve a deterrent function and help minimize enforcement costs. Civil penalties could also complement conduct remedies by incentivizing compliance with conduct decrees.<sup>90</sup> In addition, Section 2 should be amended to prohibit monopoly where dominance itself interferes with the competitive process by, for example, creating barriers to entry or impeding innovation. This would shift the focus away from a pure *conduct* approach and focus on harm to the competitive *process*. The legislation should also prohibit exploitative acts by dominant firms, even if those acts do not create monopoly.

Apart from legislation, Section 2 enforcement might be enhanced by more vocal advocacy for public enforcement by consumers and market participants.<sup>91</sup> This appears to be happening now as Google's rivals line up to assist government probes of Google and possibly other Silicon Valley giants.<sup>92</sup>

## II

### DAMAGE ALLOCATION: INDIRECT PURCHASER SUITS

As pressing as the need to revive Section 2 enforcement is, the need for Congress and the courts to address the uncertainties and confusion regarding damage allocation that have evolved in the wake of *Illinois Brick*<sup>93</sup> and *ARC America*<sup>94</sup> is even more critical. *Illinois Brick* held that only one who purchases directly from an antitrust violator, and not others in the chain of distribution (indirect purchasers), is injured “in [its] business or property” under the federal antitrust laws.<sup>95</sup> Subsequently, *ARC America* held that, notwithstanding *Illinois Brick*, under principles of federalism, indirect purchasers suits brought in federal courts under state laws allowing indirect purchasers to sue must be entertained by federal courts.<sup>96</sup> The

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<sup>90</sup> Harry First, *The Case for Antitrust Civil Penalties*, 76 ANTITRUST L.J. 127, 152–53 (2009).

<sup>91</sup> See Steven Overly & Margaret Harding McGill, *FTC Went to Silicon Valley to Solicit Antitrust Complaints*, POLITICO (June 7, 2019, 2:32 PM), <https://www.politico.com/story/2019/06/07/ftc-tech-scrutiny-silicon-valley-1511310> [<https://perma.cc/RDV4-3HFV>].

<sup>92</sup> See Ryan Tracy & Valentina Pop, *Google's Enemies Gear Up to Make Antitrust Case*, WALL ST. J. (June 24, 2019, 4:18 PM), <https://www.wsj.com/articles/googles-enemies-gear-up-to-make-antitrust-case-11561368601> [<https://perma.cc/G56H-KKLX>].

<sup>93</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

<sup>94</sup> *California v. ARC America Corp.*, 490 U.S. 93 (1989).

<sup>95</sup> *Illinois Brick*, 431 U.S. at 729, 734–35.

<sup>96</sup> *ARC America*, 490 U.S. at 101–03.



upshot of *ARC America* is that in construing state antitrust law, federal courts must now perform the very same tasks of damage allocation between direct and indirect purchasers that *Illinois Brick* ruled federal courts could not do under the federal antitrust laws. Yet, *ARC America* provided no guidance on (1) how federal courts could award damages under state law to indirect purchasers; (2) possible inconsistent judgments; and (3) the practical difficulties identified in *Illinois Brick*, including tracing overcharges and the risk of imposing multiple liability on antitrust defendants.

#### A. The Prequel: *Hanover Shoe*

In *Hanover Shoe*,<sup>97</sup> defendant manufacturer of shoe equipment argued that the plaintiff purchaser of shoe equipment was not injured by defendant's acts of monopolization because plaintiff had passed on any monopolistic overcharges that it had incurred to its customers—wholesalers, retail shoe outlets, and consumers. The Supreme Court rejected the so-called passing-on defense, concluding that tracing overcharges through the chain of distribution would unduly complicate antitrust litigation and significantly impair the deterrent function of the treble damages remedy.<sup>98</sup> The Court ruled that the first purchaser is entitled to 100% of any overcharges incurred and that the courts will not inquire as to whether any overcharges have been passed on to customers further along in the chain of distribution.<sup>99</sup>

#### B. *Illinois Brick*

In *Illinois Brick*, the Court faced the mirror image of the issue presented in *Hanover Shoe*. Plaintiffs were ultimate purchasers to whom unlawful overcharges had allegedly been passed on by intermediaries in the distribution chain.<sup>100</sup> Could these plaintiffs offer proof that overcharges had been passed on to them through the chain of distribution and thus caused them cognizable antitrust injury? Whereas *Hanover Shoe* dealt largely with the question of deterrence, *Illinois Brick* involved both deterrence and compensation issues. Plaintiffs in *Illinois Brick* argued that to deny indirect purchaser recovery would

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<sup>97</sup> *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 487–88 (1968).

<sup>98</sup> *Id.* at 494.

<sup>99</sup> *Id.* at 489.

<sup>100</sup> *Illinois Brick*, 431 U.S. at 726.

severely undermine the compensation function of the treble damages remedy.<sup>101</sup>

Nevertheless, the Supreme Court ruled that the same factors that dictated the outcome in *Hanover Shoe* would bar recovery by indirect purchaser plaintiffs.<sup>102</sup> That outcome raised eyebrows in the antitrust bar because only one year prior to *Illinois Brick*, Congress had enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which authorized state attorneys general to sue *parens patriae* on behalf of consumers who are natural persons and who had price-fixing claims.<sup>103</sup> Congress, however, declined to overrule *Illinois Brick*.

### C. *ARC America*

Although federal law denied indirect purchasers an antitrust remedy, many states had antitrust statutes that permitted indirect purchaser suits, and state-based claims by indirect purchasers found their way into federal court via the Class Action Fairness Act, diversity jurisdiction, or as supplemental claims. As noted above,<sup>104</sup> *ARC America* held that “antitrust federalism” required that federal courts entertain these cases, notwithstanding the bright line rule of *Illinois Brick*. In so holding, the Court skirted a key conceptual problem: Given the holding in *Hanover Shoe* that under federal law, the first purchaser suffers 100% of the injury from any overcharges by defendant, how can a federal court then permit damages to be awarded by the same defendant to indirect purchasers suing under state law?

Accordingly, these state law indirect purchaser claims raise significant issues as to the fact of damage, the amount of damage, and possible duplicative recovery. Federal courts have addressed these issues in two contexts: (1) class certification; and (2) measure of damages on the merits.<sup>105</sup> With respect to class certification, indirect purchasers must prove “a reasonable method for determining on a class-wide basis whether and to what extent [the] overcharge was passed on to each of the [indirect purchasers] at all levels of the

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<sup>101</sup> *Id.* at 733.

<sup>102</sup> *Id.* at 729.

<sup>103</sup> 15 U.S.C. § 15c (2012); *Illinois Brick*, 431 U.S. at 756–58 (Brennan, J., dissenting)

<sup>104</sup> See *supra* note 95 and accompanying text.

<sup>105</sup> See ABA ANTITRUST SECTION, INDIRECT PURCHASER LITIGATION HANDBOOK 154–60 (2d ed. 2016).

distribution chain.”<sup>106</sup> In determining the actual damages to the indirect purchasers, courts allow plaintiffs to make a reasonable estimate of actual damages incurred based on economic evidence, including the before and after test, correlation between retail prices and manufacturer’s prices over time and regression analysis.<sup>107</sup> Plaintiffs, however, may not offer proof that is the product of speculation or guesswork.<sup>108</sup> Yet, case law on what constitutes a reasonable estimate, as opposed to speculation, is sparse. In large part, this is due to the fact that the vast majority of indirect purchaser suits are settled prior to judgment.<sup>109</sup> Indirect purchaser plaintiffs and the defense bar seemed to have found a *modus vivendi* with this reasonable estimate approach.

Courts will approve these settlements where they are fair, reasonable, and adequate, without significant inquiry as to how passed-on damages were measured.<sup>110</sup> In deciding indirect purchaser damages issues, courts have not gone beyond these general guideposts; the law on measuring indirect purchaser damages remains unacceptably fuzzy.

#### D. The AMC Approach

The indirect purchaser suit was one of the few areas in which the AMC proposed significant changes. Substantively, the AMC recommended that both *Illinois Brick* and *Hanover Shoe* be overruled and that both direct and indirect purchasers be permitted to recover the full amount of damages suffered.<sup>111</sup> Total damages awarded could not exceed the total overcharges incurred by direct purchaser.

The AMC recognized that overruling *Hanover Shoe* and *Illinois Brick* was only the first step in providing indirect purchasers with a viable antitrust right of action. Concerns about potential multiple liability for defendants and inconsistent judgments also needed to be addressed, and to that end the AMC proposed several procedural reforms: (1) removing indirect purchasers claims to federal court;

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<sup>106</sup> *Id.* at 156 (quoting *In re Methionine Antitrust Litig.*, 204 F.R.D. 161, 164 (N.D. Cal. 2001)).

<sup>107</sup> *Id.* at 177–87.

<sup>108</sup> *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).

<sup>109</sup> ABA ANTITRUST SECTION, *supra* note 105, at 45–46 (“[M]ost direct purchaser price-fixing cases that generate indirect purchaser lawsuits are settled, resulting in settlement of the indirect purchaser cases.”).

<sup>110</sup> *Id.* at 281–82 (listing the factors that courts consider in evaluating settlements, which do not include any analyses of passed-on overcharges).

<sup>111</sup> AMC REPORT, *supra* note 86, at 267.

(2) consolidating all direct and indirect purchaser claims into one federal action for both trial and pretrial purposes; and (3) allowing for class certification of direct purchaser claims, regardless of whether those overcharges were alleged passed on to their customers.<sup>112</sup> Obviously, this approach would require legislative action; to date, Congress has not acted on the AMC proposal.

Unfortunately, the AMC proposal did not address tracing issues, a principal concern of the Court in *Illinois Brick*, and would thus leave the calculation of indirect purchaser damages to a case by case adjudication “based upon economic theory, data sources, and statistical techniques.”<sup>113</sup> This approach, as Professors Areeda and Hovenkamp observe, overlooks the “practical problems of measurement that cannot be denied or ignored,” even if “the economics is quite clear in principle.”<sup>114</sup>

Nevertheless, Areeda and Hovenkamp do not view these practical problems of allocating damages insurmountable. First, they argue that damages to direct purchasers should not be measured by overcharges. Areeda and Hovenkamp posit that (1) direct purchasers pass on all or most of their overcharges; and (2) their real harm stems from loss of sales volume due to their higher prices.<sup>115</sup> Accordingly, lost profits, not overcharges, is the most appropriate measure for direct purchaser damages.<sup>116</sup> Second, indirect purchasers are injured by the overcharges passed on to them.<sup>117</sup> Their damages can be measured by the price actually paid less the price that would have prevailed in a competitive market. This approach, Areeda and Hovenkamp urge, avoids duplicative recoveries and provides the “economically most accurate solution.”<sup>118</sup> This framework for allocating damages is not perfect; but then, under *Story Parchment* any allocation does not have to be perfect, only reasonable.<sup>119</sup>

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<sup>112</sup> *Id.*

<sup>113</sup> *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603, 615 (N.D. Cal. 2009) (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 521 (S.D.N.Y. 1996)).

<sup>114</sup> IIA PHILLIP E. AREEDA, HERBERT HOVENKAMP, ROGER D. BLAIR & CHRISTINE PIETTE DURRANCE, *ANTITRUST LAW*, para. 396, at 459 (4th ed. 2013) [hereinafter AREEDA & HOVENKAMP].

<sup>115</sup> *Id.* para. 346, at 220–22.

<sup>116</sup> *Id.* at 221.

<sup>117</sup> *Id.* at 221–23.

<sup>118</sup> *Id.* para. 339, at 137.

<sup>119</sup> *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).

## E. A Judicial Resolution?

The rule of *Illinois Brick* has stood firm since 1977. The Supreme Court, however, may now be ready and willing to re-examine that holding. On oral argument in *Apple Inc. v. Pepper*,<sup>120</sup> several Justices questioned whether the *Illinois Brick* rule should be re-examined.<sup>121</sup> In *Pepper*, the issue was whether the purchaser of an app created by a third-party developer and sold to the buyer through the Apple App Store was a direct purchaser from Apple and therefore entitled to recover monopolistic overcharges allegedly imposed by Apple.<sup>122</sup> The critical issue was whether Apple or the app developer was the actual seller. Neither party challenged the *Illinois Brick* direct purchaser rule, although an amicus brief filed on behalf of certain state attorneys general argued that the Court should overrule *Illinois Brick*.<sup>123</sup> Despite the invitations of several Justices, the parties declined to engage on the issue.<sup>124</sup> The Court ultimately followed *Illinois Brick*, and ruled that Pepper was a direct purchaser and entitled to recover.<sup>125</sup> Nevertheless, the Court appears poised to re-examine *Illinois Brick*. Citing the Areeda and Hovenkamp analysis discussed above, the Court suggested that claims by direct and indirect purchasers would not be “dueling claims to a ‘common fund.’”<sup>126</sup> Ironically, the resolution of the *Illinois Brick* dilemma may ultimately come from the Court that created the problem in the first instance.

Judicial overruling of *Illinois Brick* may be an important first step toward restoring order and rationality to treble damage litigation, but it will not remedy all of the ills associated with indirect purchaser suits. Only if Congress acts to implement procedural reforms along the lines proposed by the AMC—allowing all plaintiffs and all defendants in any given case to be heard before one federal judge for trial and pretrial purposes—would concerns about multiple recoveries and inconsistent judgments in indirect purchaser cases be effectively addressed. Absent congressional action, we are left with the imperfect and unsatisfying status quo.

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<sup>120</sup> 139 S. Ct. 1514 (2019).

<sup>121</sup> See Transcript of Oral Argument at 16, 17, 23, 40, 49, *Apple, Inc. v. Pepper*, 139 S. Ct. 1514 (2019) (No. 17-204) (Nov. 26, 2018).

<sup>122</sup> Brief for Texas, Iowa, and 29 other States as Amici Curiae in Support of Respondents, *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019) (No. 17-204).

<sup>123</sup> See *Pepper*, 139 S. Ct. at 1518.

<sup>124</sup> See AREEDA & HOVENKAMP, *supra* note 114, at para. 339, 137.

<sup>125</sup> See *Pepper*, 139 S. Ct. at 1518.

<sup>126</sup> *Id.* at 1525.

### III MERGERS

The treatment of mergers has always been problematic under the antitrust laws. The Sherman Act did not specifically address mergers. That oversight was corrected in 1914 with enactment of Section 7 of the Clayton Act which prohibited any merger where the effect of that merger “may be substantially to lessen competition, or to tend to create a monopoly . . . in any line of commerce . . . in any section of the country.”<sup>127</sup> Section 7 as initially enacted, however, contained a significant loophole; it addressed only mergers effectuated by acquisitions of stock but not mergers brought about by asset acquisition. That loophole was closed with the passage of the Celler-Kefauver Amendment in 1950, which, in turn, gave rise to the modern era of merger enforcement.<sup>128</sup>

#### A. Merger Law Before the Guidelines

The Supreme Court decisions in the 1960s were quite hostile to mergers. Merger analysis focused principally on market structure and trends toward concentration in a given market. The Court in that era turned a deaf ear to any claims of efficiency. Indeed, in *Brown Shoe*, the Court condemned the Brown Shoe-Kinney merger in part because the merger would allow Kinney retail stores to acquire shoes manufactured by Brown Shoe more cheaply than rivals would, thereby giving the merged entity an “unfair” competitive advantage over rivals.<sup>129</sup> In other words, the merger was condemned because it would create a more efficient entity. In the 1966 *Von’s Grocery* decision, the Court struck down a merger between two retail grocery chains whose combined market share would have been roughly 8% because, the Court reasoned, the merger demonstrated a trend toward concentration in the retail grocery business.<sup>130</sup> In reality, the putative merger showed the decline of Mom and Pop grocery stores and the rise of supermarkets, rather than evidence of widespread consolidation in the southern California grocery business.<sup>131</sup> In any event, after *Von’s*, horizontal mergers became de facto

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<sup>127</sup> 15 U.S.C. § 18 (2012).

<sup>128</sup> Celler-Kefauver Act of December 29, 1950, ch. 1184, 64 Stat. 1125 (codified as amended at 15 U.S.C. § 18).

<sup>129</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

<sup>130</sup> *United States v. Von’s Grocery Co.*, 384 U.S. 270, 272–74 (1966).

<sup>131</sup> *Id.* at 288 (Stewart, J. dissenting) (“Section 7 was never intended by Congress for use by the Court as a charter to roll back the supermarket revolution.”)

per se illegal.<sup>132</sup> Dissenting in *Von*'s, Justice Potter Stewart famously observed that “[t]he sole consistency that I can find is that in litigation under § 7, the Government always wins.”<sup>133</sup>

## B. The Guidelines Era

Two events fundamentally changed the manner in which mergers are analyzed by the government and how disputes over the legality of mergers are resolved: the enactment of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR)<sup>134</sup> and the promulgation of the Merger Guidelines by the Department of Justice in 1982.<sup>135</sup>

### 1. HSR

HSR required merging entities to notify both the DOJ and the FTC of their intent to merge and barred the entities from effectuating the merger for thirty days from the date of filing their notice with the agencies.<sup>136</sup> The aim of HSR is to give the enforcement agencies an opportunity to assess the likely competitive effects of a merger prior to consummation.<sup>137</sup> If the government objects to aspects of the merger, the parties may be able to negotiate a resolution to the problems perceived by the government; and the merger can move forward. If the government's objections cannot be resolved by the parties, the government may then sue in federal court to enjoin the merger.

However, these injunctive suits are rare. The vast majority of merger transactions are approved by the government. Even where the government raises objections to a merger, the parties generally settle their differences without litigation. Very few merger cases find their way into the court system. The bottom line is that virtually all of the action in merger practice is in the administrative arena. The Supreme Court has not decided a substantive merger matter since the *General Dynamics*<sup>138</sup> case in 1974. The absence of judicial involvement in mergers has had a serious downside. The litigation process clarifies the law

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<sup>132</sup> *Id.* at 283.

<sup>133</sup> *Id.* at 301.

<sup>134</sup> Hart-Scott-Rodino Antitrust Improvement Act of 1976, Pub. L. No. 94-435, § 201, 90 Stat. 1383 (codified as amended at 15 U.S.C. §18(a) (2012)).

<sup>135</sup> Dep't of Justice Antitrust Div. Merger Guidelines, 47 Fed. Reg. 28,493 (1982), as reprinted in 71 CALIF. L. REV. 649 (1983) [hereinafter 1982 Merger Guidelines].

<sup>136</sup> 15 U.S.C. § 18a.

<sup>137</sup> See S. REP. NO. 94-803, at 61 (1976).

<sup>138</sup> *United States v. Gen. Dynamics Corp.*, 415 U.S. 486 (1974).

and allows the law to evolve with certainty and predictability.<sup>139</sup> It also makes the law more accessible to the public because judicial proceedings are open and their results publicly reported, whereas the administrative model leaves the public largely in the dark.<sup>140</sup>

## 2. 1982 Merger Guidelines

The 1982 Merger Guidelines were promulgated to provide transparency in the merger review process. Since 1982, they have been updated periodically and remain the government's principle vehicle for assessing mergers. The Guidelines were designed to: (1) reduce any uncertainty surrounding the evaluation of mergers by providing a step-by-step roadmap to merger review; and (2) bring merger enforcement policies of the 1960s in line with subsequent developments in antitrust law and economics.<sup>141</sup> The underlying philosophy of the Guidelines was that mergers should be allowed unless likely anticompetitive effects can be proven. The Guidelines presented an economically rigorous stepwise economic analysis of merger transactions that was far more merger-friendly than the existing Supreme Court precedent. In assessing mergers at the Hart-Scott phase, the agencies rely on the Guidelines, not Supreme Court cases. It is safe to say that many mergers that would have run afoul of Supreme Court law would now pass muster under the Guidelines. Clearly, the administrative system for merger review that has evolved in the wake of Hart-Scott and the Guidelines has expedited merger assessment and relieved the courts of a potentially significant burden.

Nevertheless, life under the Guidelines has been far from perfect. First, at least prior to 2010, the agencies in practice frequently did not apply the Guidelines as written. Perhaps the most striking example of the gaps between agency practice and the Guidelines as written is the DOJ's resolution of the Sirius/XM merger.<sup>142</sup> Sirius and XM, the only two suppliers of

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<sup>139</sup> Stephen Calkins, *In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture*, 72 ST. JOHN'S L. REV. 1, 23, 40 (1998).

<sup>140</sup> See Wu, *supra* note 10, at 130 (decrying the lack of public debate over mergers and stating that "the idea that the public or its representatives be kept in the dark [on merger review] is hard to support").

<sup>141</sup> William F. Baxter, *Responding to the Reaction: The Draftsman's View*, 71 CALIF. L. REV. 618, 618 (1983) (discussing the Department of Justice's goals in updating the Merger Guidelines).

<sup>142</sup> See *Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc.*, DEPT OF JUST. (Mar. 14, 2008), <http://www.justice.gov/opa>



satellite radio services, agreed to merge.<sup>143</sup> From one perspective, this would be a merger to monopoly; where there were once two competitors in the field, there would now be a single provider of satellite radio services.<sup>144</sup> Yet, the Antitrust Division opted not to challenge the merger.<sup>145</sup> Rejecting this common sense approach, the Antitrust Division defined the market much more broadly to include traditional AM/FM radio, HD radio, MP3 players, and audio offerings delivered through wireless devices.<sup>146</sup>

In its closing memorandum, the Antitrust Division stated that any anticompetitive concerns would be outweighed by the efficiencies created by the merger and by the new technologies that would likely emerge to compete with satellite radio.<sup>147</sup> Nevertheless, the Antitrust Division conceded that “it was not possible to estimate the magnitude of the efficiencies with precision due to the lack of evidentiary support provided by XM and Sirius.”<sup>148</sup> Indeed, the only efficiencies relied on by the Antitrust Division were “likely variable cost savings,” which it deemed “substantial” but could not quantify.<sup>149</sup> The Merger Guidelines provide that the “greater the potential adverse effect of a merger . . . the greater must be [the] cognizable efficiencies” to offset any anticompetitive effects of the merger.<sup>150</sup> It is hard to imagine a transaction having a greater adverse impact on competition than a merger to monopoly, which, by definition, eliminates *all* competition. The Guidelines further provide that where “the potential adverse competitive effect of a merger is likely to be particularly large, extraordinarily great cognizable efficiencies would be necessary.”<sup>151</sup> A government prediction of a substantial—though unquantified—cost saving hardly qualifies as an extraordinarily great efficiency sufficient to outweigh the probable competitive harms of a merger to monopoly.

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/pr/2008/March/08\_at\_226.html [https://perma.cc/ZGW6-SFC9] [hereinafter DOJ Closing Statement on XM-Sirius Merger].

<sup>143</sup> See Philip Shenon, *Justice Dept. Approves XM Merger with Sirius*, N.Y. TIMES (Mar. 25, 2008), <https://www.nytimes.com/2008/03/25/business/25radio.html> [https://perma.cc/63KR-CL8T].

<sup>144</sup> *Id.*

<sup>145</sup> See DOJ Closing Statement on XM-Sirius, *supra* note 142.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> See U.S. DEPT OF JUSTICE, 1997 MERGER GUIDELINES, § 4, <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11251.pdf> [https://perma.cc/G3SC-98Q6].

<sup>151</sup> *Id.*

Similarly, the government often did not follow the Guidelines' presumptions on the likely impact of mergers within specified concentration levels. The Guidelines were amended in 2010 to make them reflect how the agencies actually analyzed mergers.<sup>152</sup> Prior to the 2010 revisions to the Guidelines, a market with a post-merger HHI of 1,000 or less was deemed unconcentrated, and any merger in that range would be in a safe harbor, not subject to challenge. On the other hand, mergers in the 1,000 to 1,800 HHI range would be subject to challenge where changes in concentration levels (the "delta") are large but not where they are small. Finally, where the post-merger HHI exceeded 1,800, a challenge would be likely if the delta exceeded 100.<sup>153</sup>

More fundamentally, the stepwise approach set forth in the Guidelines often caused analysis and debate over the merits of the merger to get bogged down on technical issues like market definition, instead of focusing on the real concerns—anticompetitive effects. The 2010 Guidelines ameliorated the foregoing problems to a great extent by eschewing the stepwise approach of the original Guidelines and focusing the inquiry on competitive effects of the merger from the outset.<sup>154</sup>

Although the 2010 Guidelines may more accurately reflect the actual merger analysis undertaken by the agencies than did the earlier version of the Guidelines, problems remain. First, the Guidelines are unduly complicated and require an expert economist to decipher. Merger review under the Guidelines turns on analysis of a myriad of economic concepts, including HMT, HHI, GUPPIs, SSNIPs, and diversion ratios—concepts that are foreign to most corporate executives, lawyers, and judges. Second, while their tools may well be helpful in assessing the potential competitive effects of a merger, they can also "obfuscate and overcomplicate matters

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<sup>152</sup> See U.S. DEP'T. OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), <http://ftc.gov/US/2010/08/100819/hmq.pdf> [https://perma.cc/S58E-G6BW].

<sup>153</sup> See 1982 Merger Guidelines, *supra* note 135, at 656–57.

<sup>154</sup> See Deborah A. Garza, *Market Definition, The New Horizontal Merger Guidelines and the Long March Away from Structural Presumptions*, ANTITRUST SOURCE, Oct. 2010, at 2–3, <https://www.cov.com/-/media/files/corporate/publications/2010/10/market-definition-the-new-horizontal-merger-guidelines-and-the-long-march-away-from-structural.pdf> [https://perma.cc/U95P-9Z4B] (citing FED. TRADE COMM'N, HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996–2007, tbls. 3.1–3.6 (2008), [https://www.ftc.gov/sites/default/files/documents/reports\\_annual/horizontal-merger-investigation-data-fiscal-years-1996-2007/081201hsrmergerdata\\_0.pdf](https://www.ftc.gov/sites/default/files/documents/reports_annual/horizontal-merger-investigation-data-fiscal-years-1996-2007/081201hsrmergerdata_0.pdf) [https://perma.cc/DB3S-KU3F]).

over the course of a case” and add “a heavy dose of terminological clutter into the merger review process.”<sup>155</sup> In addition, the economic analysis that has become routine under the Guidelines is expensive for the parties and burdensome for both the parties and courts.

Nor will the Antitrust Division’s decision to submit its challenge to the Novelis Inc./Aleris Corporation merger to binding arbitration serve to simplify merger analysis.<sup>156</sup> If anything, the focus on complex economic analysis will intensify in proceedings before specialist arbitrators as opposed to generalist judges. Moreover, because arbitration is a private proceeding and not a matter of public record before the United States District Court, the arbitrators’ decision would lack precedential value in the federal courts; and opportunities for growth in the law would be foregone. Merger law would become even more inaccessible to the public.

However, a 2013 study by economist John Kwoka strongly suggests that merger analysis need not be as complex nor as costly as it has become.<sup>157</sup> Kwoka reviewed data on FTC merger enforcement actions from 1996 through 2011. He concluded that the likelihood of the FTC’s challenging a merger turned principally on two factors: concentration and likelihood of entry.<sup>158</sup> Thus in markets having ten or more effective competitors, there were zero enforcement actions.<sup>159</sup> As the number of competitors declined, FTC challenges became more likely: 35% where a market went from six to five competitors; 89% in three to two mergers, and 98% in merges to monopoly.<sup>160</sup>

Entry is also an important factor.<sup>161</sup> In the forty-five cases where entry was deemed to be “easy,” there were no

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<sup>155</sup> See Edward D. Cavanagh, *Antitrust Law and Economic Theory: Finding a Balance*, 45 LOY. U. CHI. L.J. 123, 155 (2013) (citing Shepard Goldfein & Neal R. Stoll, *Back to Basics: The (Over) Use of Economic Models in Antitrust*, N.Y. L.J. (Sept. 12, 2012), <https://advance.lexis.com/api/permalink/ecbe0fe1-b418-4d0c-bec8-99cf9489ac42/?context=1000516> [<https://perma.cc/UQ7H-PDN2>]).

<sup>156</sup> Press Release, U.S. Dep’t of Justice Antitrust Div., Justice Department Sues to Block Novelis’s Acquisition of Aleris (Sept. 4, 2019), <https://www.justice.gov/opa/pr/justice-department-sues-block-noveliss-acquisition-aleris-1> [<https://perma.cc/96GT-9PKQ>].

<sup>157</sup> See generally John E. Kwoka, Jr., *Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes*, 78 ANTITRUST L. J. 619, 619 (2013) (discussing empirical results of a merger control study).

<sup>158</sup> *Id.* at 624–25.

<sup>159</sup> *Id.* at 624 tbl.3.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 625.

challenges.<sup>162</sup> However, in those cases where entry was viewed as “difficult,” enforcement actions ensued in 80% of the investigations.<sup>163</sup> In addition, the data indicate that enforcement actions are more likely the greater the HHI, the higher the delta and the lower the number of significant competitors in the field.<sup>164</sup>

Kwoka’s insights could be useful in constructing a simplified matrix for merger analysis. For example, (1) mergers involving more than ten firms would be in a safe harbor; (2) mergers to monopoly would be per se unlawful; (3) mergers resulting in ten to six firms would be presumptively lawful, with the burden on the challenger to prove likely anticompetitive effects; and (4) mergers resulting in five to two firms would be presumptively unlawful, with the burden on the defendant to prove that the transaction is unlikely to have anticompetitive effects.

#### IV ERROR COST

Lastly, and perhaps most importantly, the antitrust bar needs to convince courts that in deciding antitrust cases, judges (1) should be less concerned about the probability of error in their decision and more concerned about deciding cases correctly; and (2) should decide cases based on the factual record and not on presumed set of facts based on Chicago School economics, as often happens on motions to dismiss or for summary judgment.

##### A. Error Cost Analysis and Its Shortcomings

Error cost analysis is an approach to decision making in antitrust under which antitrust outcomes turn on whether such outcomes minimize total social costs.<sup>165</sup> The error cost approach originated in the 1970s,<sup>166</sup> although it is most closely associated with Frank Easterbrook’s 1984 article, *The Limits of Antitrust*.<sup>167</sup> The pertinent social costs of erroneous decisions are “false positives” and “false negatives.”<sup>168</sup> False positives refer to decisions that find violations where the conduct in

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> See Baker, *supra* note 11, at 5–6.

<sup>166</sup> See Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213, 222–25 (1979).

<sup>167</sup> See Easterbrook, *supra* note 6, at 1.

<sup>168</sup> See Baker, *supra* note 11, at 5.

question does not harm competition.<sup>169</sup> False negatives refer to decisions that find no violations where the conduct in question actually harms competition.<sup>170</sup> Decisional error is not the only concern when discussing false positives and false negatives. Where conduct is wrongly condemned, the decision may deter behavior that is actually procompetitive and beneficial to consumers.<sup>171</sup> On the other hand, failure to properly condemn anticompetitive conduct encourages similar anticompetitive conduct by others and thus undermines the deterrent function of antitrust enforcement.<sup>172</sup>

In theory, courts should be concerned about avoiding all error, whether that error gives rise to false positives or false negatives. Some antitrust scholars, notably Easterbrook, have argued forcefully that concerns about false positives trump concerns about false negatives.<sup>173</sup> In other words, error in condemning conduct that is procompetitive is much more serious than error in failing to condemn conduct that is anticompetitive. Easterbrook justifies this approach on three grounds. First, the high costs of searching out anticompetitive conduct in a generally competitive market outweigh the benefits of pursuing and prosecuting that conduct.<sup>174</sup> Accordingly:

When most examples of a category of conduct are competitive, the rules of litigation should be “stacked” so that they do not ensnare many of these practices just to make sure that the few anticompetitive ones are caught. When most examples of a practice are procompetitive or neutral, the rules should have the same structure (although the opposite slant) as those that apply when almost all examples are anticompetitive.<sup>175</sup>

In other words, restrictive practices commonly used in a competitive market cannot effectively harm competition and are not cost-effective to pursue.

Second, Easterbrook argues that because markets are self-correcting, markets can remedy the ill-effects of false negatives more readily than the judiciary can correct the harmful effects of false positives.<sup>176</sup> He argues that once the Supreme Court

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 5–6.

<sup>172</sup> *Id.* at 6.

<sup>173</sup> See Easterbrook, *supra* note 6, at 14–15.

<sup>174</sup> *Id.* at 15.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

wrongfully condemns a certain kind of conduct, it is likely to remain condemned, notwithstanding its competitive benefits.<sup>177</sup> On the other hand, because high profits attract entry, competitive forces in the marketplace are likely to more quickly dissipate the anticompetitive effects of the conduct that erroneously escapes prosecution.<sup>178</sup>

Third, in many cases the costs of false negatives are small, while the costs of false positives are high. A monopolistic practice creates losses to the extent it actually leads to a reduction in output.<sup>179</sup> On the other hand, a procompetitive practice may reduce the cost of production of each unit made.<sup>180</sup> Easterbrook maintains the system should prefer the error in tolerating monopoly conduct—creating losses over only part of the range of output—to the error in condemning beneficial conduct—creating losses over the whole range of outputs.<sup>181</sup>

Following Easterbrook's lead, Justice Scalia utilizes the error cost framework in dismissing the *Trinko* complaint. Citing *Microsoft*, Justice Scalia reasons that since "the means of illicit exclusion, like the means of legitimate competition, are myriad," determination of whether single firm conduct violates Section 2 "can be difficult."<sup>182</sup> Indeed, that task may be especially "daunting" for a generalist judge.<sup>183</sup> Noting that "mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect'";<sup>184</sup> Justice Scalia states that "[t]he cost of false positive counsels against undue expansion of §2 liability."<sup>185</sup> Apart from the concerns about false positives, Justice Scalia observes that some conduct "may be . . . 'beyond the practical ability of a judicial tribunal to control.'"<sup>186</sup> Nor should courts be put in the position of a regulatory agency, tasked with the responsibility of day-to-day oversight of a business, a job for which antitrust courts are ill-

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 15–16.

<sup>180</sup> *Id.* at 16.

<sup>181</sup> *Id.* at 16.

<sup>182</sup> *Trinko*, 540 U.S. at 414.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* (citation omitted) (quoting *Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)).

suited.<sup>187</sup>

Subsequently, in *LinkLine*,<sup>188</sup> *Billing*,<sup>189</sup> and *Twombly*,<sup>190</sup> the Court has echoed the concerns expressed in *Trinko* regarding false positives. The Antitrust Division—for a time—also embraced the error cost framework in its 2008 report on single firm conduct.<sup>191</sup> More recently, the Assistant Attorney General in charge of the Antitrust Division openly questioned the ability of generalist judges and lay jurors to sift through complex evidence and to achieve good results in antitrust cases.<sup>192</sup> To address these concerns, he has proposed specialized antitrust courts and arbitration to resolve antitrust disputes.<sup>193</sup> This is not just wishful thinking; the government has taken steps to put these proposals into action by agreeing to arbitration in the Novelis Inc./Aleris Corporation merger.<sup>194</sup>

Unfortunately, the error cost framework is itself riddled with error. First, the fundamental assumption that false positives matter a lot and false negatives matter little is indefensible. The linchpin of this argument is that markets are self-correcting and that unprosecuted monopolistic behavior will be foiled by entry of new competitors. False positives, on the other hand, cannot be undone in a flash. Rather, appellate intervention is needed, and that process

<sup>187</sup> *Id.* at 415.

<sup>188</sup> *Pac. Bell Tel. Co. v. LinkLine Commc'ns, Inc.*, 555 U.S. 438, 459 (2009) (Breyer, J., concurring) (“When a regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits.”).

<sup>189</sup> *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 282 (2007) (“And the threat of antitrust mistakes, i.e., results that stray outside the narrow bounds that plaintiffs seek to set, means that underwriters must act in ways that will avoid not simply conduct that the securities law forbids (and will likely continue to forbid), but also a wide range of joint conduct that the securities law permits or encourages (but which they fear could lead to an antitrust lawsuit and the risk of treble damages).”).

<sup>190</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007).

<sup>191</sup> U.S. DEPT OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 15–18 (2008) (adopting error cost framework in section 2), [www.justice.gov/atr/public/reports/236681.pdf](http://www.justice.gov/atr/public/reports/236681.pdf) [<https://perma.cc/EV3Z-3V2S>] (later withdrawn by Press Release, U.S. Dep’t of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), [www.justice.gov/atr/public/press\\_releases/2009/245710.pdf](http://www.justice.gov/atr/public/press_releases/2009/245710.pdf) [<https://perma.cc/DU7V-WJWA>]).

<sup>192</sup> Makan Delrahim, Assistant Att’y Gen., U.S. Dep’t of Justice Antitrust Div., “Special, So Special”: Specialist Decision-Makers in, and the Efficient Disposition of, Antitrust Cases, Remarks at the 7th Annual Bill Kovacic Antitrust Salon (Sept. 9, 2019), <https://www.justice.gov/opa/speech/file/1201301/download> [<https://perma.cc/JQL4-GSHH>].

<sup>193</sup> *Id.*

<sup>194</sup> See *supra* note 156 and accompanying text.

takes time during which lower court decisions invoking errant decisions can do much harm to the consumer. However, in the real world, markets do not easily self-correct. As Professor Baker has observed, “there is little reason to believe that entry addresses the problem of market power so frequently, effectively, and quickly as to warrant dismissal of concerns regarding false negatives.”<sup>195</sup> Monopolies may in fact prove durable, as *Microsoft* and *Alcoa* demonstrate.<sup>196</sup>

Second, while it is true that single firm conduct may give rise to difficult questions of legality under Section 2 of the Sherman Act, that fact alone is not persuasive argument for nonintervention by federal courts. Many areas of law in addition to antitrust present complicated issues, e.g., patents, securities, RICO, bankruptcy, and international trade. Nevertheless, courts hear and determine cases in these areas all the time. Antitrust is no different. Courts are in the business of dispute resolution. Courts may indeed err from time to time, but appellate courts exist, in part, to correct error. More importantly, in enacting the Sherman Act, Congress decided that the courts will be the ultimate arbiters concerning what conduct is or is not lawful. Section 2 is at the core of antitrust law. Judicial withdrawal from cases because they are difficult would seriously undermine the deterrent value of the Sherman Act.

Third, the fact that certain questionable conduct is prevalent in an otherwise competitive marketplace does not immunize that conduct from judicial scrutiny under the Sherman Act. Where an actor in a competitive setting imposes restrictive practices, those restraints may well foster competition. However, that says nothing regarding how that restraint will be utilized, once antitrust scrutiny has been withdrawn. As Professor Jonathan Baker has noted:

Studies in which all observations of the competitive effects of a practice come from settings in which antitrust rules constrain the ways in which firms employ that practice supply no information about the ways that firms would employ that practice in the absence of those rules. Hence, such studies cannot support proposals that antitrust should discard rules prohibiting that practice.<sup>197</sup>

Fourth, the assertion that courts cannot control the costs of private litigation is manifestly incorrect. In *Twombly*, the

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<sup>195</sup> Baker, *supra* note 11, at 10.

<sup>196</sup> *Id.* at 10 n.39.

<sup>197</sup> *Id.* at 20.



Supreme Court addressed concerns about the high cost of private antitrust litigation by redefining what constitutes a sufficient pleading under Rule 8(a)(2) and thereby raising the bar for plaintiffs to defeat a motion to dismiss under Rule 12(b)(6). The Court ruled that to survive a motion to dismiss, a complaint must be plausible, that is, the complaint must contain “enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct].”<sup>198</sup> The Court thus assigned district judges the task of gatekeepers to make sure that only plausible claims would be allowed to proceed to discovery.<sup>199</sup> In so ruling, the Court admonished trial courts to be sensitive to the high cost of discovery in private antitrust cases and to not permit “a plaintiff with a largely groundless claim . . . to take up the time of a number of other people, with the right to do so representing an in terrorem increment of settlement value.”<sup>200</sup> Complaints that fail the plausibility test should be dismissed “at the point of minimum expenditure of time and money by the parties and the court,” that is, on a Rule 12(b)(6) motion.<sup>201</sup>

In so ruling, the Court reasoned that remedies short of dismissal were inadequate. The Court emphasized that reductions in discovery costs through “careful case management” would not work because, citing Judge Easterbrook, discovery is controlled by the parties and the court can do little about that.<sup>202</sup> That is simply not so. It was not so in 2007 when *Twombly* was decided, nor was it true at the time of the Easterbrook article published in 1989. The 1983 Amendments armed the court with significant powers to rein in discovery.<sup>203</sup> In 1993, those discovery-policing powers were expanded to place specific presumptive numerical limitations on interrogatories and depositions.<sup>204</sup> In 2000, courts were authorized to place time limitations on

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<sup>198</sup> *Twombly*, 550 U.S. at 556.

<sup>199</sup> *Id.* at 557–58.

<sup>200</sup> *Id.* at 558 (internal quotation marks omitted).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 559.

<sup>203</sup> *See, e.g.*, FED. R. CIV. P. 16 (1983) (making it clear that the court’s managerial power extended to the discovery phase of the case and that failure to participate meaningfully in pretrial conferences would lead to mandatory sanctions; FED. R. CIV. P. 26(g) (imposing mandatory sanctions for discovery that was harassing and not proportional to the needs of the case).

<sup>204</sup> *See, e.g.*, FED. R. CIV. P. 30(a) (1993) (presumptive limit of ten depositions per side; FED. R. CIV. P. 33(a)(1) (1993) (presumptive limit of twenty-five interrogatories).

depositions.<sup>205</sup>

In addition, the court may limit discovery that is unreasonably cumulative or duplicative or more efficiently obtained through some other source.<sup>206</sup> Moreover, through protective orders issued under Rule 26(c),<sup>207</sup> the court “may make any order that justice requires to protect from annoyance, embarrassment, oppression, or undue burden or expense.”<sup>208</sup> As the late Charles Alan Wright observed, the breadth of Rule 26(c) “emphasizes the complete control that the court has over the discovery process.”<sup>209</sup> It may well be that discovery in private antitrust cases has been and remains unduly expensive, but that is not because federal judges lack the power to control costs. It is simply that that power is not being exercised. Courts should not ignore the fact that “antitrust discovery can be expensive,”<sup>210</sup> but high discovery costs alone do not justify dismissal of antitrust claims. The preferable approach to containing discovery costs is to invoke the tools available under the Federal Rules of Civil Procedure, not outright dismissal.

#### B. Deciding Cases on the Factual Record

Few antitrust cases ever reach trial. If cases are not settled, they are typically disposed of by motion to dismiss<sup>211</sup> or by motion for summary judgment.<sup>212</sup> In contrast to a motion for summary judgment—where the entire pretrial record is before the court—only the complaint is properly before the court on a motion to dismiss. Nevertheless, in *Trinko* and *Twombly*, both of which involved motions to dismiss, the Supreme Court looked to information outside the complaint to support its rulings to dismiss the complaint in each case. For example, in *Trinko*, the Court, invoking economic theory, concluded that it was rational for Bell Atlantic to deny AT&T access to its infrastructure because to allow a rival to interconnect “may lessen the incentive for the monopolist, the rival, or both, to invest in those economically beneficial

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<sup>205</sup> See, e.g., FED. R. CIV. P. 30(d)(1) (2000) (presumptive limit of one seven-hour day for each deposition).

<sup>206</sup> FED. R. CIV. P. 26(6)(2)(c)(ii).

<sup>207</sup> FED. R. CIV. P. 26(c).

<sup>208</sup> CHARLES ALAN WRIGHT & MARY KAY KANE, THE LAW OF FEDERAL COURTS, § 83 at 542 (8th ed. 2017).

<sup>209</sup> *Id.* at 545.

<sup>210</sup> See *Twombly*, 550 U.S. at 558.

<sup>211</sup> FED. R. CIV. P. 12(b)(6).

<sup>212</sup> FED. R. CIV. P. 56.

facilities.”<sup>213</sup> Subsequently, in *Twombly*, the Court concluded that it was “only natural” for the local service providers—former monopolists—to resist the TCA mandate that Bell Atlantic and others to make their infrastructure available to AT&T and others so that these other firms could compete with incumbent local carriers.<sup>214</sup> Further, the Court in *Twombly* found that “an obvious alternative explanation” of defendants’ conduct was that “monopolists were sitting tight expecting their neighbors to do the same” and that the erstwhile monopolists “would see their best interests in keeping to their own turf.”<sup>215</sup>

The Court’s foray outside the record for “facts” in *Trinko* and *Twombly* is troublesome for a number of reasons. First, and most fundamentally, under Rule 12(b)(6) the Court may not look beyond the complaint in deciding a motion to dismiss. Second, on a motion to dismiss, all properly pleaded facts are deemed true; the Court may not engage in fact-finding. Yet, that is precisely what the Court did in concluding that the defendants’ “sitting tight”<sup>216</sup> was an “obvious alternative explanation” to plaintiffs’ conspiracy scenario.<sup>217</sup> Third, by engaging in fact-finding at the motion to dismiss stage, the Court usurped the trial function and effectively undermined the fundamental goal of the Federal Rules of Civil Procedure that a meritorious litigant have its day in court.<sup>218</sup> Fourth, the Court’s uncritical use of neoclassical economy theory to fill in interstitially the factual record on a motion to dismiss is problematic. Neoclassical theory is just that—theory, not fact. Nor is the neoclassical model universally accepted. Rather, it has come under attack, most recently by adherents to behavioral economics, which focuses on what people actually do, not how they are presumed to act.<sup>219</sup> By relying on assumptions of neoclassical economics at the motion to dismiss stage, the Court has further usurped the role of the trial judge and the jury.

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<sup>213</sup> *Trinko*, 540 U.S. at 408.

<sup>214</sup> *Twombly*, 550 U.S. at 566.

<sup>215</sup> *Id.* at 568.

<sup>216</sup> *Id.* at 547.

<sup>217</sup> *Id.* at 568.

<sup>218</sup> FED R. CIV. P. 1.

<sup>219</sup> See Amanda P. Reeves, *Behavioral Antitrust: Unanswered Questions on the Horizon*, ANTITRUST SOURCE, June 2010, at 1–4, <https://pdfs.semanticscholar.org/2b8c/f861dc55a46ea507761a46c4a83b4e851f69.pdf> [<https://perma.cc/9SYY-WVJK>].

## CONCLUSION

The current antitrust enforcement scene is bleak. Courts seem to have lost sight of Congress's goals in acting the Sherman Act. Fearful of decisional error and overly reliant on economic theory, courts have developed a complicated antitrust jurisprudence that is hostile to antitrust enforcement, especially in the monopolization realm. The proposals herein can provide meaningful checks on the economic power wielded by dominant firms and simplify enforcement, thereby restoring antitrust as an effective vehicle for protecting both consumer welfare as well as the competitive process.