William & Mary Business Law Review

Volume 14 (2022-2023)
Issue 3

Article 4

4-2023

Impediments to Renewed and Reinvigorated Antitrust Enforcement

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IMPEDIMENTS TO RENEWED AND REINVIGORATED ANTITRUST ENFORCEMENT

EDWARD D. CAVANAGH*

ABSTRACT

Antitrust Division head Jonathan Kanter recently proclaimed that "the era of lax enforcement is over, and the new era of vigorous and effective antitrust law enforcement has begun." Federal enforcers have indeed been active; the DOJ has sued Google in two separate actions, and the FTC has brought an action against Facebook.

While bringing these cases is an important first step to achieving a more robust antitrust enforcement regime, a significant obstacle to an antitrust renaissance remains—overcoming the strong gravitational pull of Chicago School theory that has dominated antitrust thought for the past half-century. Chicago School principles have not kept pace with a business world that has evolved from a brick-and-mortar economy into the digital age. Chicago School thought has grown increasingly less relevant in addressing twenty-first century antitrust issues. A second obstacle to an antitrust renaissance is the Rule of Reason as currently construed by the courts. Plaintiffs almost never win Rule of Reason cases. Until courts construe the Rule of Reason in a manner that is truly party-neutral, the cards will remain stacked against antitrust plaintiffs.

To succeed in restoring antitrust to its proper role in our economy, antitrust enforcers must:

1. *Refocus the courts on the historic and fundamental role of the antitrust laws to protect competition and not simply to assure allocative efficiency;*
2. *Persuade courts that, contrary to* Trinko *and its progeny, monopoly in and of itself may pose a threat to competition;*

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3. *Convince courts that dominant firms can exclude rivals by using above-cost pricing strategies, thereby rendering the cost-based approach to predation enunciated in* Brooke Group *woefully underinclusive; and*
4. *Demonstrate to the courts that the Rule of Reason as implemented by the courts is neither administrable nor party-neutral and develop a construction of the Rule Reason that is fair to all parties.*

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INTRODUCTION

Assessing the current state of antitrust, Jonathan Kanter, head of the Department of Justice Antitrust Division, recently struck an optimistic note, proclaiming that "the era of lax enforcement is over, and the new era of vigorous and effective antitrust law enforcement has begun."[1] This new era of aggressive enforcement is exemplified by the Justice Department's actions against Google and the FTC's proceeding against Facebook.[2] Kanter has also announced that the Antitrust Division is now committed to litigating cases to conclusion, rather than settling, in order to allow antitrust law to develop in the courts.[3]

While bringing and litigating high-profile cases is an important step forward for robust antitrust enforcement, "[t]here is much to be done if antitrust enforcement is to escape the gravitational pull of the Chicago School and the inertial drag of complex civil litigation."[4] For nearly half a century, the Chicago School's neoclassical economic principles have dominated antitrust thought among academics, practitioners, and, most importantly, judges.[5] Chicago School theory has provided the framework for jurisprudence that, over the last half-century, has curtailed antitrust protections, redefined antitrust objectives, aided and abetted increasing concentration in numerous markets, and become

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[1] Jonathan Kanter, Ass't Att'y General, *Antitrust Enforcement: The Road to Recovery*, U.S. DEP'T OF JUST. ANTITRUST DIV. (Apr. 21, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler [https://perma.cc/S3WP-ZYXB].

[2] Press Release, U.S. Dep't of Just., Justice Department Sues Monopolist Google For Violating Antitrust Laws (Oct. 20, 2020), https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws [https://perma.cc/EQ3S-8GPE]; Press Release, F.T.C., FTC Sues Facebook for Illegal Monopolization (Dec. 9, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization [https://perma.cc/3VHW-AEV6].

[3] Kanter, *supra* note 1.

[4] Jonathan Sallet, *Antitrust Reform: A Litigation Perspective*, 36 ANTITRUST, 14, 21 (2022).

[5] *See* George L. Priest, *The Abiding Influence of the Antitrust Paradox*, 31 HARV. J.L. & PUB. POL'Y 455, 456–61 (2008) ("the Supreme Court . . . beginning in the late 1970s, drew principally from Judge Bork's book[,] [*the Antitrust Paradox*] [,] both for guidance and support of its new consumer welfare basis for antitrust doctrine.").

increasingly hostile to private treble damages actions.[6] Once on the fringes, Chicago School theory went mainstream with the publication of Robert Bork's *Antitrust Paradox* in 1978.[7] In that book, Bork proclaimed, with scant support in the Sherman Act's legislative history,[8] "the only legitimate goal of antitrust is the maximization of consumer welfare."[9] The consumer welfare model relies heavily on Chicago School theory, notably the goal of efficiency, the existence of self-correcting markets in which participants behave rationally and act in their own self-interest, the presence of judicially administrable rules, and minimal intervention by enforcers and the courts.[10] The Chicago School theory further posits that a dominant firm's exercise of monopoly power cannot be sustained over time because monopoly prices will attract new entrants whose presence in the marketplace would thwart any further efforts by a dominant firm to reap monopoly rents.[11] In recent years, courts and antitrust enforcers have accepted this reasoning, tolerating giant firms in high-tech, big data, retailing, communications, and entertainment, hoping that size will create efficiencies and facilitate innovation.[12]

Although widely accepted by antitrust scholars,[13] public and private enforcers,[14] and the courts,[15] the Chicago School model has not been without its detractors.[16] Criticizing the Chicago

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[6] Sandeep Vaheesan, *The Twilight of the Technocrats' Monopoly on Antitrust?*, 127 YALE L.J.F. 980, 980, 983–84 (2018).

[7] *See* Priest, *supra* note 5. *See generally* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

[8] *See* Vaheesan, *supra* note 6, at 991.

[9] BORK, *supra* note 7, at 7. *But see* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 720–21 (2017); HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 39–42 (2005) (criticizing the consumer welfare standard).

[10] *See* BORK, *supra* note 7, at 7–9, 81–83, 120–21.

[11] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15 (1984).

[12] *See* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE GILDED AGE 115–18 (2018).

[13] Camden Hutchinson, *Law and Economics Scholarship and Supreme Court Antitrust Jurisprudence, 1950–2010,* 21 LEWIS & CLARK L. REV. 145, 161, 189 (2017).

[14] WU, *supra* note 12, at 117–18.

[15] *See* Priest, *supra* note 5, at 457–58, 461.

[16] *See* Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979); Kanter, *supra* note 1.

School's focus on economic efficiency to the exclusion of all other values, the late Robert Pitofsky, former chair of the FTC, argued that "it is bad history, bad policy and bad law to exclude certain political values in interpreting the antitrust laws."[17] Others have observed that by overindulging Chicago School theory, "the [outlier] antitrust community [has] lost its North Star,"[18] focusing

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[17] Pitofsky *supra* note 16, at 1051. Pitofsky then offered a further explanation:

> By "political values," I mean, first, a fear that excessive concentration of economic power will breed antidemocratic political pressures, and second, a desire to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all. A third and overriding political concern is that if the free-market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs.

Id.

[18] Kanter, *supra* note 1.

> Yet somewhere along the way, the antitrust community lost its North Star. Over time, antitrust enforcement turned into a mathematical exercise focused on measuring welfare tradeoffs rather than trusting in the benefits of competition. We took up the impossible challenge of quantifying often unquantifiable welfare effects and speculative efficiencies down to the last decimal point. On the basis of those calculations and projections, the antitrust community took it upon themselves to decide who should win and lose rather than allowing competition and competitive markets to govern that determination.
>
> The problem is that standards about measuring welfare tradeoffs turn antitrust into a narrow technical exercise that overlooks the realities of our economy. Antitrust law is about so much more. To paraphrase the Supreme Court in *Northern Pacific*, antitrust promotes material progress, quality, and innovation, "at the same time" that it supports our democracy and preserves a society of choice and opportunity. Antitrust helps make us both prosperous *and* free.
>
> We usually cannot measure and quantify all of those values. But we can promote them the way Congress intended—by protecting competition and the competitive process.
>
> Instead, however, for years scholars and pundits have expended enormous energy debating the meaning of words that do not appear in the statute: the ephemeral "consumer welfare

on welfare effects and unquantifiable efficiencies instead of preserving competition and the competitive process.[19] Judicial fealty to Chicago School theory has "enfeebled" the antitrust laws.[20] More importantly, real-world experience is at odds with certain premises underlying the Chicago School model. For example, there is little credible evidence from the marketplace to support the notion that size alone fosters efficiencies and facilitates innovation. To the contrary, as firms grow more dominant, prices rise, and innovation lags.[21]

Nor do markets necessarily self-correct to prevent a dominant firm from exercising power over price and output.[22] Entry does not automatically thwart monopoly pricing,[23] and, as experiences with dominant firms such as Standard Oil, Alcoa, Microsoft, and Google have shown, market power can indeed be durable.[24] Even when size has led to efficiencies and lower consumer prices,[25] there may nevertheless be other negative spillover effects, including lower wages, loss of economic freedom, and limitations on consumer choice.[26] Thus, size alone may create barriers to entry and discourage innovation.[27] Similarly, recent economic research has shown that dominant firms can profitably exclude rivals while still pricing above cost, thereby calling into question

> standard." By my count, 831 academic articles have been written invoking the consumer welfare standard, with more than 200 since 2020. It is the academic gift that keeps on giving.

Id.

[19] *Id.*

[20] WU, *supra* note 12, at 17.

[21] *See* JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY 165–68 (2019).

[22] Sallet, *supra* note 4, at 15; Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. REV. 1843, 1870–71 (2020).

[23] Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1, 10 (2015).

[24] *Id.* at 10 n.39; *see also* WU, *supra* note 12, at 121 (noting the staying power and growing dominance of Google, Facebook, eBay, and Amazon).

[25] Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 225 (1985).

[26] *See* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J.F. 960, 961 (2018).

[27] *Id.* at 975.

the wisdom of *Brooke Group* and is progeny.[28] The Chicago School theory, developed some sixty years ago,[29] is showing its age. As the business world has evolved from a brick-and-mortar economy into the digital age,[30] Chicago School theory has not kept pace. Chicago School principles have grown increasingly less relevant in addressing twenty-first-century antitrust issues.[31] In short, the consumer welfare model has given rise to a false antitrust narrative; and ironically, the antitrust laws, which were rooted in deep suspicion of concentrated private power, now promote it.[32]

The gravitational pull of Chicago School theory is indeed powerful,[33] but that is not the only obstacle to a more robust antitrust enforcement regime. A second major obstacle is the inability of courts to apply the Rule of Reason, the governing standard for Sherman Act claims,[34] in a manner that is fair, consistent, and party-neutral.[35] The fact is that plaintiffs almost never win Rule of Reason cases.[36] As discussed below,[37] this is in part due to inconsistencies among courts in the Rule's application and in part due to the length, complexity, and cost of today's antitrust litigation. Simply put, the litigation cards are stacked in favor of antitrust defendants.[38] The courts need to rethink the Rule of Reason and apply it as a party-neutral standard.

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[28] *See* BAKER, *supra* note 21, at 147 n.143, 148 n.144.

[29] Hovenkamp & Morton, *supra* note 22, at 1844.

[30] Jennifer Smith, *Logistics Providers See E-Commerce Momentum Continuing Post-Pandemic*, WALL ST. J. (June 9, 2021, 3:28 PM), https://www.wsj.com/articles/logistics-providers-see-e-commerce-momentum-continuing-post-pandemic-11623266882 [https://perma.cc/AG3D-3NV6].

[31] *See* Khan, *supra* note 9, at 744, 779–80.

[32] *See* 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].

[33] Sallet, *supra* note 4, at 21.

[34] *See* Michael A. Carrier, *The Four-Step Rule of Reason*, 33 ANTITRUST 50, 50 (2019).

[35] Sallet, *supra* note 4, at 17.

[36] *See* Carrier, *supra* note 34, at 50–51.

[37] *See infra* Part IV.

[38] Gabe Feldman, *The Demise of the Rule of Reason*, 24 LEWIS & CLARK L. REV. 951, 960, 974 (2020).

In sum, renewed and vigorous enforcement efforts will not alone bring about an antitrust renaissance. Antitrust enforcers need to do some heavy lifting to persuade courts to look beyond Chicago School principles in deciding cases. To succeed in restoring antitrust to its proper role in our economy, antitrust enforcers must

1. Refocus the courts on the historic and fundamental role of the antitrust laws to protect competition and not simply to assure allocative efficiency;
2. Persuade courts that, contrary to *Trinko* and its progeny, monopoly in and of itself may pose a threat to competition;
3. Convince courts that dominant firms can exclude rivals by using above-cost pricing strategies, thereby rendering the cost-based approach to predation enunciated in *Brooke Group* woefully underinclusive; and
4. Demonstrate to the courts that the Rule of Reason as implemented by the courts is neither administrable nor party-neutral and develop a construction of the Rule of Reason that is fair to all parties.

I. Focus the Courts on the True Goal of Antitrust: Preservation of Competition

Any effort to reinvigorate antitrust enforcement cannot succeed without clearly defining the goals of antitrust. To do that, we must answer two interrelated questions: (1) What are the antitrust designed to do?; and (2) Whom do the antitrust laws protect?

A. Goal of Antitrust: Preservation of Competition or Consumer Welfare?

It would seem anomalous that after 130 years the question of the purpose of the antitrust laws remains hotly debated.[39] Neither the Sherman Act nor its legislative history shines much light on that question.[40] From the passage of the Sherman Act in

[39] *See* Wu, *supra* note 12, at 31–32.
[40] *Id.* at 31.

1890 until the ascendancy of the Chicago School in the 1970s, courts generally viewed the goal of the antitrust laws as protecting the competitive process.[41] In *Northern Pacific Railway Co. v. United States*,[42] the Supreme Court per Justice Black stated:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.[43]

In other words, competition means rivalry.[44]

Bork and his Chicago School compatriots had a different take on the goal of the antitrust laws.[45] In their view, antitrust laws must be construed so as to maximize consumer welfare.[46] That term, however, is somewhat misleading. Bork was not advocating a consumer-centric antitrust policy; rather, he saw consumer welfare as synonymous with allocative efficiency.[47] Whereas *Northern Pacific* saw competition as rivalry, Bork saw competition as efficiency.[48] This distinction is critical. An efficient firm that becomes dominant because of its efficiency is not restrained by rivals and is thus able to impose monopoly prices on its buyers—a scenario that is certainly not in the consumer interest.[49]

Equally important is the question of what should be taken into account in measuring consumer welfare. Is it just the welfare of consumers? Or is it the welfare of buyers or sellers together

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[41] *See* Barack Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253, 2270–72 (2013).

[42] 356 U.S. 1 (1958).

[43] *Id.* at 4.

[44] *Id.* at 4.

[45] *See* Paul H. Brietzke, *Robert Bork: The Antitrust Paradox: A Policy at War With Itself*, 13 VAL. U.L. REV. 403, 409 (1979).

[46] *See* BORK, *supra* note 7, at 7.

[47] *Id.* at 98; *see* Orbach, *supra* note 41, at 2255.

[48] *See* Brietzke, *supra* note 45, at 412; N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

[49] *See* Brietzke, *supra* note 45, at 412.

(total welfare standard)?[50] This question remains a matter of debate, but Congress appears to have had in mind the protection of consumers, not consumers *and* sellers.[51]

Whatever its breadth, the Supreme Court, in *Reiter v. Sonotone Corp.*,[52] endorsed the consumer welfare standard.[53] Since that time, the consumer welfare standard has gained widespread acceptance in the antitrust community.[54] More recently, however, progressives who favor greater antitrust intervention have pushed back against the consumer welfare standard.[55] First, the term "consumer welfare" cannot be found in the Sherman Act, its legislative history, or in the common law of trade regulation.[56] Second, "[c]alculating welfare effects is difficult in non-dynamic markets and is increasingly impossible in today's multi-sided, cross-subsidized and dynamic markets."[57] Assessing allocative efficiencies is a highly technical and quite expensive exercise and one that neither judges nor enforcers are capable of doing.[58] Even if courts were able to measure efficiencies and determine that these efficiencies led to lower consumer prices, the net result may have also been depressed wages, constrained economic freedom, and limited consumer choice.[59]

On the other hand, unlike welfare effects, the existence and intensity of rivalry among sellers and the impact of that rivalry on the competitive process are generally easier to assess.[60] The antitrust laws were designed to uphold the competitive process

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[50] *See* Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 473 (2012).

[51] *See* Hovenkamp, *supra* note 25, at 250.

[52] 442 U.S. 330 (1979).

[53] *Id.* at 343–44 ("Congress designed the Sherman Act 'as a consumer welfare prescription'") (citing BORK, *supra* note 7, at 66).

[54] *See* Phil Gramm and Christine Wilson, *The New Progressives Fight Against Consumer Welfare*, WALL ST. J. (Apr. 3, 2022, 5:05 PM), https://www.wsj.com/articles/the-new-progressives-fight-against-consumer-welfare-deregulating-antitrust-enforcement-economy-bipartisan-11649017074?mod=hp_opin_pos_2 [https://perma.cc/CN6W-RZHC].

[55] *Id.*

[56] Kanter, *supra* note 1.

[57] *Id.*

[58] *Id.*

[59] *See* Khan, *supra* note 26, at 961.

[60] *Id.* at 973.

in free markets.[61] The role of the courts is to assure that the process is fair, not to put a thumb on the scale in favor of one party or the other.[62]

B. Antitrust Laws Do *Protect Competitors*

The notion that the antitrust laws were intended to protect competition, not competitors, has long been accepted as received wisdom from the Chicago School.[63] It is a corollary to Robert Bork's declaration, based on a selective reading of the legislative history of the Sherman Act,[64] that the sole goal of the antitrust laws is to maximize consumer welfare.[65] In Bork's view, the protection of competitors is at odds with maximizing consumer welfare; and the antitrust laws should not shield firms from the rough and tumble of competition and thereby protect the survival of inefficient companies at the expense of consumers.[66] Accordingly, competitor complaints about a rival's conduct are suspect, likely motivated by the fear of competition, and hence uncredible.[67]

However, a closer look at the phrase's etymology and real-world experience reveals that it is nothing more than an empty slogan that is devoid of meaning and does not accurately reflect how the antitrust laws function.

1. Etymology

The phrase "[a]ntitrust laws protect competition, not competitors" is frequently used today as an argument for immunizing exclusionary behavior by monopolists on the ground that the

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[61] *Id.* at 967–68; Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1437 (7th Cir. 1986).

[62] *See* Kanter, *supra* note 1 ("Our job is to ensure a fair game, not to choose who wins.").

[63] *See* Frank H. Easterbook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1160 (1982).

[64] *See* Vaheesan, *supra* note 6, at 991.

[65] *See* Brietzke, *supra* note 45, at 408.

[66] BORK, *supra* note 7, at 54–56.

[67] *See* Edward A. Snyder & Thomas E. Kauper, *Misuse of Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551 (1991) ("Cases filed by competitors may be particularly harmful, as firms may sue to prevent their rivals from realizing efficiencies through mergers and other contractual arrangements, to restrain aggressive pricing, or merely to burden rivals with litigation costs").

excluded rivals are inefficient.[68] Yet, the phrase was never intended to shield monopolists from Sherman Act liability.[69] It was first uttered by the Supreme Court in the *Brown Shoe*[70] case some sixty years ago. There, the Court struck down the merger of two leading shoe retailers, Brown Shoe and Kinney.[71] The Court reasoned that in enacting the Clayton Act, Congress intended "to promote *competition* through the protection of viable, small, locally owned business."[72] The Court concluded the legislative goal of promoting competition, in this case, meant preserving the opportunity of small companies to compete.[73] Thus, the phrase was initially used by the Court to support aggressive antitrust enforcement, not to express utter indifference to the plight of competitors.[74]

Over a decade later, on the eve of the Supreme Court's 1977 decision in *Brunswick*,[75] Professor Phillip Areeda published an article[76] that "recast the philosophy of *Brown Shoe* from what previously had been seen to be a position of acute concern for the well-being of individual firms to a position of indifference to their fate."[77] The Supreme Court in *Brunswick*, citing Areeda with approval and invoking the phrase that "the antitrust laws protect competition not competitors,"[78] denied recovery to the plaintiffs whose bowling alley operations had suffered financial losses as a result of a rival's unlawful merger because plaintiffs—competitors of the defendant—had incurred losses due to enhanced competition, not from that which would make defendant's conduct unlawful.[79] Other courts followed suit,

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[68] *See* Brown Shoe Co. v. U.S., 370 U.S. 294, 320 (1962).

[69] *Id.*

[70] *Id.* at 344.

[71] *Id.* at 346.

[72] *Id.* at 344 (emphasis added).

[73] *Id.*

[74] *Id.*

[75] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

[76] Phillip Areeda, *Antitrust Violations without Damage Recoveries*, 89 HARV. L. REV. 1127 (1976).

[77] Thomas S. Horton, *Unraveling the Chicago/Harvard Antitrust Double Helix: Applying Evolutionary Theory to Guard Competitors and Revive Antitrust Jury Trials*, 41 U. BALT. L. REV. 615, 631 (2012).

[78] *Brunswick*, 429 U.S. at 487 n.11.

[79] *Id.*

and competitors have transformed from a class deserving protection under the antitrust laws to a class whose fate was of no concern to antitrust courts.[80] In the wake of *Brunswick*, the phrase was "twisted and distorted from its original benign legal use [in *Brown Shoe*] into a dangerous indifference to the welfare of competitors and a strong bias in favor of dominant firms and predatory conduct."[81]

2. Real-World Experience

In addition, the antitrust laws do, in fact, protect competitors;[82] it is simply wrong to maintain otherwise. As a matter of logic, the antitrust laws *must* protect competitors because "without competitors, there would be no competition."[83] Antitrust cases protecting competitors abound. Rivals injured by group boycotts,[84] tying,[85] monopolistic exclusion,[86] and predatory pricing[87] have been recognized by the courts as victims of antitrust violations. Predatory pricing is an especially good example of how antitrust laws protect competitors. Predatory pricing is condemned under antitrust laws because the defendant has competed unfairly by, for example, selling below its cost.[88] Rivals who have lost sales because of the defendant's unfair sales practices are thus victims

[80] Phillip Areeda, *Antitrust Violations without Damage Recoveries*, 89 HARV. L. REV. 1127, 1135 (1976).

[81] Horton, *supra* note 77, at 620.

[82] *Id.* at 622.

[83] *See Assistant Attorney General Jonathan Kanter Delivers Remarks at New York City Bar Association's Milton Handler Lecture*, U.S. DEP'T OF JUST. (May 18, 2022) (citing Hearing on Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power, Before the H. Subcomm. on Antitrust, Commercial, and Administrative Law, 117th Cong. (2021) (statement of Hon. Diane P. Wood)), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association [https://perma.cc/8KYX-RDM3].

[84] *See* Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 210 (1959).

[85] *See* Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 464–65 (1992), N. Pac. Ry. Co. v. United States, 356 U.S. 1, 3 (1958) ("[It is] unreasonable *per se* to foreclose competitors from any substantial market.").

[86] *See* U.S. v. Dentsply Int'l, Inc. 399 F. 3d 181, 189 (3d Cir. 2005).

[87] *See* Standard Oil Co. v. United States, 221 U.S. 1, 42–43 (1911); Spirit Airlines v. Northwest Airlines, 431 F.3d 917, 921 (6th Cir. 2005).

[88] *See* Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224 (1993).

of predatory pricing, not the consumers.[89] Indeed, consumers *benefit* from below-cost pricing by predators.[90] Still, the courts have held that the short-term benefit to consumers does not trump the long-term deficit to competition caused by predatory behavior.[91]

This is not to suggest that the antitrust laws should be read to keep inefficient competitors afloat. A seller cannot sue under antitrust law every time a rival gains sales by lowering prices, innovating, or adding new services.[92] For example, a mom-and-pop liquor store that cannot match the lower prices of the liquor supermarket up the street and then goes out of business has no claim under the antitrust laws simply because consumers decided to patronize the lower-priced liquor supermarket. What the foregoing does suggest, however, is that any rule or precept that would categorically preclude competitors from suing under antitrust law is wrong.[93] That argument is built on a foundation of sand; it erroneously assumes the interests of consumers and the interests of competitors are always at odds.[94] This is not necessarily the case; the interests of consumers and competitors may be coextensive.[95] For example, where a monopolist raises its rival's cost in an effort to exclude that rival from the field, the consumer, whose costs are likely to rise, is also hurt.[96] Clearly, Congress, when enacting the Sherman Act to preserve competition, was concerned with the fate of competitors as well as the fate of consumers.[97] Yet, Congress has not, at any time in the last half-century, sought to rewrite antitrust laws to exclude competitors as a protected class.[98]

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[89] *Id.*

[90] *See* Atlantic Richfield Co., v. USA Petroleum Co., 495 U.S. 328, 340 (1990) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.").

[91] *Id.*

[92] *See id.* at 337–38.

[93] *See id.* at 338.

[94] *See id.* at 340.

[95] *See* U.S. v. Dentsply Int'l, Inc. 399 F. 3d 181, 193–96 (3d Cir. 2005).

[96] *Id.*

[97] Courts do refer to the Sherman Act as a consumer welfare prescription, but not to the exclusion of other values, most notably, the preservation of competition. *See* Kanter, *supra* note 1, n.1 and cases cited therein at n.6.

[98] *See id.*

The simple fact is that sometimes antitrust courts protect the interests of competitors, and sometimes they do not.[99] In some cases the process of determining under what set of facts competitors may sue and when they are precluded from suit may be difficult.[100] Here, *Brunswick* is instructive.[101] As the Court, in *Cargill, Inc. v. Montfort of Colorado, Inc.*[102] observed: "*Brunswick* [held] that the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws."[103] Whether the injury to a rival is the result of lawful competition or the result of the defendant's unlawful exclusionary behavior is a question for the court based on the factual record in that particular case.[104] Further, this is the kind of question that antitrust courts routinely address and have repeatedly demonstrated that they are capable of answering.[105]

II. SINGLE-FIRM CONDUCT

The gravitational pull of Chicago School thought is perhaps strongest today in cases involving single firm conduct under Section 2 of the Sherman Act.[106] The Supreme Court's decision in *Trinko,* a straightforward Chicago School analysis of a monopolistic refusal to deal by Verizon,[107] has rendered ineffectual efforts to rein in abusive conduct by dominant firms.[108] More importantly, Justice Scalia's opinion rewrites the Section 2 narrative.[109] Once viewed with suspicion,[110] the monopolist, in Scalia's view, should

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[99] *See id.*

[100] *See id.*

[101] *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477–78 (1977).

[102] 479 U.S. 104 (1986).

[103] *Id.* at 116.

[104] *See id.* at 109, 128.

[105] *Supra* Introduction.

[106] *See* Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408, 415 (2004).

[107] *Id.* at 408–10.

[108] *Id.* at 408; *see* Edward D. Cavanagh, Trinko*: A Kinder, Gentler Approach to Dominant Firms Under the Antitrust Laws?*, 59 ME. L. REV. 112, 127–28 (2007).

[109] *Trinko,* 540 U.S. at 401, 407, 414.

[110] *See* J. Gregory Sidak, *How Does the Experience of U.S. Telecommunications Regulation Inform the Forced Sharing of Intellectual Property Rights Under Global Competition Law?*, CRITERION ECONOMICS, 1, 3 (May 17, 2012),

now be seen as a positive (or, at worst, a benign) force in the marketplace.[111] Scalia wrote that:

> [t]he 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.[112]

Rather than a pariah, the monopolist is now cast as a key player in the competitive process.[113]

A. Traditional View of Monopoly

Trinko marks a radical departure from the traditional view of the monopolist.[114] As discussed above,[115] the courts, historically, have viewed free market competition—not monopoly—as the driver of prosperity, economic growth, and innovation, a position underscored in *Northern Pacific*.[116] In *Alcoa,*[117] Learned Hand did not mince words in praising competition and disparaging monopolies. Whereas "rivalry is a stimulant to industrial progress," he observed, by contrast, that "[m]any people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; [and] immunity from completion is a *narcotic.*"[118] Far from being an "important element" of the free market system, the monopolist was a negative force and persona non grata.[119]

B. Trinko

Trinko grew out the 1984 settlement of government's monopolization case against AT&T.[120] Under that settlement, AT&T,

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https://www.criterioneconomics.com/docs/sidak-telecom-and-ipr1.pdf [https://perma.cc/73C8-34QC].

[111] *Trinko,* 540 U.S. at 401, 407, 414–15.

[112] *Id.* at 407.

[113] *See id.*

[114] See *id.* at 408, 410.

[115] *Supra* Sections I.A–B.

[116] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 11, 14 (1958).

[117] United States v. Aluminum Co. of Am., 148 F. 2d 416 (2d Cir. 1945).

[118] *Id.* at 427 (emphasis added).

[119] *Trinko,* 540 U.S. 398, 407.

[120] *See id.* at 401; Sidak, *supra* note 110, at 6–7.

inter alia, agreed to divest its ownership of local telephone services.[121] The decree established seven regional Bell operating companies (RBOCs) (later reduced to four as a result of mergers).[122] The RBOCs were granted monopolies in their local phone service areas, but were not permitted to offer long distance services.[123] That changed in 1996 with the enactment of the Telecommunication Act of 1996 (TCA).[124] Among other things, the TCA (1) opened the local markets for phone services to competition and thus ended the monopolies for the RBOCs; and (2) required the RBOCs to make their facilities available for interconnection by new entrants into local phone service.[125] The TCA also allowed RBOCs to offer long distance services.[126]

Verizon did not comply with the TCA mandates and admittedly dragged its feet in providing interconnection services to AT&T and other potential entrants into the local phone services market.[127] Verizon paid the price for its intransigence, was fined $10 million by the New York Public Service Commission, and agreed to pay a $3 million fine to the Federal Communications Commission.[128] Thereafter, Trinko, an AT&T customer, sued Verizon, alleging that its failure to comply with the TCA mandates violated Section 2 of the Sherman Act.[129]

The majority, per Justice Scalia, took a deep dive into the substantive law of monopolization.[130] As a threshold matter, the Court's foray into the merits was both unnecessary and inappropriate.[131] Trinko, a customer of AT&T, lacked standing to sue.[132] AT&T, which was the target of Verizon's refusal to deal, suffered injury proximately caused by Verizon's delays in providing

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[121] Sidak, *supra* note 110, at 6.

[122] *See id.* at 7; Johannes M. Bauer et al., *The State of Telecom: Realities, Regulation, Restructuring*, 2003 MICH. ST. DCL L. REV. 531, 550 (2003).

[123] Sidak, *supra* note 110, at 7.

[124] Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.); *Trinko*, 540 U.S. at 401–02.

[125] *See generally* 47 U.S.C. §§ 251, 252.

[126] 47 U.S.C. § 251.

[127] *Trinko*, 540 U.S. at 402–03.

[128] *Id.* at 403–04.

[129] *Id.* at 404–05.

[130] *Id.* at 405.

[131] *Id.* at 417–18 (Stevens, J. concurring).

[132] *Id.* at 416 n. 5.

interconnect services and was in the best position to sue Verizon.[133] Trinko's injuries, by contrast, were only derivative of AT&T's injuries and hence insufficient to confer standing.[134] Nevertheless, determined to reach the merits, the majority glossed over the standing issue.[135] The Court was on a mission to revisit and reinterpret Section 2 of the Sherman Act.[136]

In its decision, the *Trinko* court ignored Judge Hand's admonitions about the dangers that monopoly posed to competition.[137] Instead, Scalia offered a much more flattering portrait of the monopolist, depicting the monopolist not as a threat to free markets but rather as a catalyst whose risk-taking leads to innovation and economic growth.[138] Thus, *Trinko* was clearly at odds with the Court's prior holding in *Northern Pacific* that competition—not monopoly—fuels economic growth.[139]

Consistent with this new narrative of monopoly as a key element in the free market system, the Court rejected the plaintiffs' case for Section 2 liability point by point.[140] First, the Court concluded that violation of the TCA's forced sharing provisions did not itself create a claim for relief under Section 2 of the Sherman Act, noting that TCA expressly preserved the right to sue under the antitrust laws.[141] Second, the Court ruled that Verizon's refusal to deal with AT&T did not violate traditional Section 2 standards.[142] The Court then stressed the distinction between monopoly and monopolization.[143] Monopoly itself was not unlawful.[144] Section 2 liability attaches only when the monopolist engages in bad conduct in order to create or maintain a monopoly position.[145] The Court further observed that, under *Colgate*,[146] a trader—even a monopolist—is free to decide with

[133] *Id.* at 417 (Stevens, J. concurring).
[134] *Id.* at 417 (Stevens, J. concurring).
[135] *Id.* at 416 (Stevens, J. concurring).
[136] *Id.* at 401.
[137] *Id.* at 408–15; *see supra* Section I.A.
[138] *Id.* at 407.
[139] *See supra* notes 42–43 and accompanying text.
[140] *Trinko,* 540 U.S. at 406–15.
[141] *Id.* at 406–07.
[142] *Id.* at 410.
[143] *Id.* at 415.
[144] *Id.*
[145] *Id.* at 407.
[146] United States v. Colgate & Co., 250 U.S. 300 (1919).

whom it will deal and with whom it will not deal.[147] Curiously, in so ruling, the court soft-pedaled the all-important caveat in *Colgate* that a trader's refusal to deal is lawful only so long as the refusal is not in furtherance of a scheme to create or maintain a monopoly.[148] Yet, that appears to be precisely what Verizon was doing.[149]

Not only did the Court find Verizon's conduct lawful under antitrust laws,[150] it also suggested that the TCA's forced sharing mandate may itself be anti-competitive. The court reasoned (with no record support) that, under the TCA, a dominant firm, such as Verizon, would have little incentive to invest in new facilities to improve its products if it would then have to share those new facilities with a rival, such as AT&T.[151] In addition, administering any forced sharing requirement would thrust federal judges in the role of central planners, a role to which judges simply are not well-suited.[152] Worse, the forced sharing mandate might foster collusion among competitors, the "supreme evil" under the Sherman Act.[153] The Court did not elaborate on its categorization of conspiracy as the "supreme evil" in antitrust.[154] Nor is the statement supported by case law or otherwise.[155] It seems clear, however, that the Court is less concerned about single firm conduct than collusion cases arising under Section 1.[156]

Third, the Court found that Verizon's conduct did not fall within the type of cases where refusals to deal by a dominant firm have been condemned under Section 2 by the courts.[157] The Court emphasized that those cases are few and far between and proceeded to marginalize the leading case of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[158] as "at or near the outer boundary of [Section] 2 liability."[159] The Court did not stop there. It proceeded to question the viability of the essential facilities doctrine,

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[147] *Trinko,* 540 U.S. at 408.
[148] *Id.* at 408.
[149] *Id.* at 409.
[150] *Id.* at 415–16.
[151] *Id.* 407–08.
[152] *Id.* at 408.
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *See id.*
[157] *Id.* at 408–09.
[158] 472 U.S. 585 (1985).
[159] *Trinko*, 540 U.S. at 409.

notwithstanding the universal acceptance of that doctrine at the Circuit level, noting that the Supreme Court had never given its imprimatur to that concept and would not do so in this case.[160] In a footnote, the Court also questioned whether monopolistic leveraging, condemned by the Court in *Eastman Kodak Co. v. Image Technical Services, Inc.*,[161] constituted a cognizable claim under Section 2 of the Sherman Act.[162] The attack on *Kodak* is especially significant in light of the fact that it is one of the few cases where antitrust plaintiffs succeeded in the Supreme Court during the Chicago School era.[163]

Fourth, the Court declined to recognize any new exception to Section 2 liability that would condemn Verizon's conduct.[164] The Court cited the extensive regulatory apparatus governing public utilities and found that the regulatory response had been adequate, pointing out that Verizon had paid substantial fines to the New York Public Service Commission and the FCC.[165] Given that successful regulatory action, the Court opined that the "slight benefits" of antitrust intervention were outweighed by the costs of enforcement.[166] In particular, the Court expressed concern about the high costs of false positives.[167] It noted that application of Section 2 principles "can be difficult" for generalist judges and that erroneous decisions may chill the very pro-competitive behavior that Section 2 was intended to protect.[168] In so holding, the Court underscored the difficulties that generalist judges might encounter in evaluating the "incessant, complex, and constantly changing interaction of competitive and incumbent [Local Exchange Carriers] implementing the sharing and interconnection obligations."[169] The Court further observed that "conduct consisting of anticompetitive violations of [the TCA] may be . . . 'beyond the practical ability of a judicial tribunal to control,'" and in any

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[160] *Id.* at 411.
[161] 504 U.S. 451, 498 (1992) (Scalia, J., dissenting).
[162] *Trinko*, 540 U.S. at 415, n.4.
[163] *Kodak*, 504 U.S. 451, 486 (1985).
[164] *Trinko,* 540 U.S. at 411.
[165] *Id.* at 412–13.
[166] *Id.* at 414.
[167] *Id.*
[168] *Id.*
[169] *Id.*

event would be impractical because "effective remediation" would necessitate "continuing supervision of a highly detailed decree."[170]

In one fell swoop, the Court in *Trinko* rendered Section 2 toothless.[171] In so doing, the Court reiterated most of the Chicago School themes to support its ruling in favor of Verizon: minimalist intervention, self-correcting markets, concern about false positives, error costs, efficiency concerns, high enforcement costs, suspicion of private treble damage actions, and the inability of courts to create and enforce administrable standards to remedy the perceived wrongs.[172] *Trinko* set a high bar for plaintiffs bringing monopolization cases.[173] Indeed, in *LinkLine*,[174] decided five years after *Trinko*, the Court suggested that antitrust liability stemming from single firm conduct would be "rare."[175]

In the wake of *Trinko*, courts and antitrust enforcers have tolerated outsized firms in the high-tech, big data, retailing, telecommunications, and entertainment industries on the theory that size will create efficiencies and encourage innovation.[176] The focus on efficiencies is misguided; the question in monopolization cases is whether the dominant firm's conduct impairs competition.[177] Even if efficiencies were a proper focus, in the real world, as opposed to the economist's hypothetical model, size does not necessarily guarantee that efficiencies will follow.[178] Size may very well generate cost-savings,[179] but the laser-like focus on efficiencies is too narrow and ignores tangible harms to consumers, such as depressed wages, loss of economic freedom, and limited consumer choice.[180] The focus on efficiencies also ignores harms to the competitive process that size alone can

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[170] *Id.* at 415.

[171] *Id.* at 415–16.

[172] *Id* at 414–16.

[173] *See id.* at 407.

[174] Pac. Bell Tel. Co. v. LinkLine Commc'ns, Inc., 555 U.S. 438 (2009).

[175] *Id*. at 448.

[176] *See, e.g.*, Khan, *supra* note 9, at 716 (detailing Amazon's the authorities lack of enforcement with Amazon due to supposed benefits).

[177] *See* Vaheesan, *supra* note 6, at 993.

[178] *See infra* notes 180–81 and accompanying text.

[179] Shannon Nunn, *Big Businesses Push Down Prices, and Perhaps Wages*, WALL ST. J. (Sept. 26, 2018, 6:51 AM), https://www.wsj.com/articles/big-businesses-push-down-prices-and-perhaps-wages-1537959063 [https://perma.cc/UB6W-YJWW].

[180] *See* Khan, *supra* note 26, at 961.

inflict, including erecting barriers to entry through patents, standardized platforms, and aggressive litigation posture to challenge new entrants, discouraging investment, and impeding innovation.[181] As noted above,[182] contrary to Chicago School theory, entry does not necessarily dissipate market power; in the real world, market power can become entrenched.[183] More recently, Amazon has grown exponentially,[184] offering customers low prices and free services, all the while flying under enforcement radar.[185] Now a behemoth in the marketplace,[186] Amazon is able to wield its power free of competitive restraints due to its size alone, leaving the public at its mercy.[187] The Amazon experience underscores the wisdom of Justice Douglas, who, dissenting in *Columbia Steel*,[188] observed that market power is dangerous because it "can be utilized with lightning speed," leaving "the fortunes of people . . . dependent on the whim or caprice . . . of a few self-appointed [companies]."[189] Ironically, "[the] antitrust laws, which were rooted in deep suspicion of concentrated private power, now often promote it."[190]

Nevertheless, the courts are not powerless to deal with the would-be Amazons and would-be Googles, who stealthily seek to dominate a market. In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,[191] the Supreme Court made clear that Section 2 empowers the courts to intervene to stop abusive conduct in its incipiency.[192] The Court observed that:

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[181] Ohio Attorney General, *The Effects of Monopolies are No Laughing Matter*, COMPETITION MATTERS (Oct. 26, 2020), https://www.ohioattorneygeneral.gov/Media/Newsletters/Competition-Matters/October-2020/The-Effects-of-Monopolies-are-No-Laughing-Matter [https://perma.cc/425F-A63B].

[182] *See supra* note 24 and accompanying text.

[183] *Id.*

[184] Lauren Thomas & Courtney Reagan, *Watch out, retailers. This is just how big Amazon is becoming*, CNBC (July 13, 2018, 2:40 PM), https://www.cnbc.com/2018/07/12/amazon-to-take-almost-50-percent-of-us-e-commerce-market-by-years-end.html [https://perma.cc/PD66-BGDC].

[185] Khan, *supra* note 9, at 716.

[186] Thomas & Reagan, *supra* note 184.

[187] Khan, *supra* note 9, at 716.

[188] United States v. Columbia Steel Co., 334 U.S. 495, 534 (1948) (Douglas, J. dissenting).

[189] *Id.* at 536.

[190] Streitfeld, *supra* note 32.

[191] 359 U.S. 207 (1959).

[192] *Id.* at 210–11.

> Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations "which 'tend to create a monopoly,'" whether "the tendency is a creeping one" or "one that proceeds at full gallop."[193]

Overcoming judicial hostility to monopolization cases in the wake of *Trinko* presents a monumental challenge to both public and private antitrust enforcers.[194] To turn the tide and rein in monopolists, enforcers must: (1) view the mandate of Section 2 as preserving competition, rather than simply creating efficiencies, (2) *convincingly demonstrate to courts* that Chicago School theory does not square with real-world market behavior, (3) focus the courts on the record facts as opposed to Chicago School assumptions about market behavior generally, and (4) demonstrate persuasively to the courts that size alone can impair the competitive process.[195]

III. Predatory Conduct

The defendant-friendly legal standards governing predatory pricing and other forms of predation in the marketplace present a second significant example of how the gravitational effects of Chicago school theory impair renewed efforts by public and private enforcers to remedy abusive conduct by dominant firms.[196] In *Brooke Group*, the Supreme Court enunciated a bright-line, two-step test to make out a predatory pricing claim: (1) the defendant's prices are below an appropriate measure of its costs, and (2) there was a dangerous probability of the defendant recouping its investment in below-cost prices, that is, the defendant had a reasonable expectation of recovering in monopoly profits more than the losses incurred through its below-cost pricing.[197] The Court acknowledged that "[t]hese prerequisites to recovery

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[193] *Id*. at 213–14 (quoting International Salt Co. v. United States, 332 U.S. 392, 396).

[194] *See supra* notes 173–75 and accompanying text.

[195] Kanter, *supra* note 1; Sallet, *supra* note 4, at 15; *see supra* notes 180–81 and accompanying text.

[196] *See infra* notes 198, 201 and accompanying text.

[197] Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224 (1993).

are not easy to establish"[198] but justified its strenuous test based on its conclusion that (1) predatory pricing schemes are rare and even more rarely successful, and (2) the cost of an erroneous finding of liability is high,[199] noting that price cuts to increase business often represent "the very essence of competition" and mistaken condemnation of price cutting activity would chill the very conduct that the Sherman Act meant to protect.[200] In the same vein, the Court went on to suggest that above-cost predatory pricing schemes may be "beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting."[201]

The bright line enunciated in *Brooke Group* brought a fair measure of clarity and predictability to predatory pricing cases but at a very steep price.[202] In line with Chicago School theory, the *Brooke Group* standard is deliberately underinclusive.[203] The so-called profit sacrifice test[204] that the Court championed works well in garden-variety predatory pricing cases where the deep-pocket dominant firm seeks to bleed its rivals dry by selling at a loss to drive rivals from the field and then raising prices to monopoly levels once all rivals have thrown in the towel.[205] However, *Brooke Group* fails to address more sophisticated forms of exclusionary behavior, including non-price-based predation, such as predatory innovation and product change and conduct that raises a rival's costs.[206]

A. What Is Predatory Behavior?

Predatory behavior is best understood as an abuse of dominance or bullying behavior by a dominant firm.[207] Predatory conduct has been condemned by the courts in cases dating back

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[198] *Id.* at 226.
[199] *Id.* at 227–28, 230.
[200] *Id.* at 226.
[201] *Id.* at 223.
[202] *Id.*
[203] *Id.*
[204] *See* Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1077 (10th Cir. 2013) (referencing the profit sacrifice test).
[205] *See Brooke Group*, 509 U.S. at 212.
[206] *Id.* (discussing only traditional predatory pricing).
[207] *See* Khan, *supra* note 9, at 722.

to *Standard Oil*.[208] Indeed, Standard Oil in the late nineteenth century led the league in predatory behavior, utilizing a laundry list of bullying tactics, including sales below cost to eliminate rivals, effectuating mergers in order to keep oil supplies off the market, forcing rivals to join its monopolization scheme or face destruction, and demanding (and receiving) secret rebates from the railroads.[209] Still, the kinds of egregious behavior engaged in by Standard Oil are rare today.[210] *Brooke Group* may well have been correct in its observation that it is frequently difficult to differentiate lawful competitive conduct from unlawful predatory behavior,[211] especially since price-cutting is a well-recognized and widely utilized strategy to win customers over from rivals.[212] For example, suppose Budweiser, in order to win sales and market share from rival Coors, lowers its price by 10% and successfully increases its market share at the expense of Coors. Is this predatory conduct? Decisions of the courts on this question were confusing and inconsistent, often relying on subjective evidence that a dominant firm initiated price cuts to gain market share at the expense of rivals.[213] Beginning in the 1970s, two developments laid the foundation for the decision in *Brooke Group*.[214] First, concerned that the contemporary predatory pricing case law was both confusing and, at the same time, condemning legitimate competitive behavior, Harvard Professors Phillip Areeda and Donald Turner published a law review article designed to clarify the legality of pricing under the Sherman Act.[215] They proposed a straightforward, objective bright-line cost-based rule: prices above marginal cost were per se lawful, but prices below marginal cost

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[208] 221 U.S. 1, 45 (1911).

[209] *Id.* at 32–33.

[210] *See* Khan, *supra* note 9, at 723 (detailing legislation passed following *Standard Oil* to prevent similar behavior).

[211] Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993).

[212] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986) ("cutting prices in order to increase business is often the very essence of competition").

[213] *See*, *e.g.*, Transamerica Computer Co. v. IBM Corp., 698 F.2d 1377, 1382 (9th Cir. 1983) (holding prices above cost may be unlawful upon a clear and convincing showing of predatory intent).

[214] *See infra* notes 215, 218–19 and accompanying text.

[215] Phillip Areeda & Donald Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 698–99 (1975).

were per se illegal.[216] The Areeda-Turner cost-based approach to predatory pricing gained a following in the lower courts.[217] Second, in an influential law review article,[218] then-Professor Frank Easterbrook argued forcefully that the risk of false positives was particularly high in predatory pricing cases and that judicial intervention in such cases should be minimal.[219]

Later, now-Judge Easterbrook added a wrinkle to the Areeda-Turner test in *A.A. Poultry Farms*.[220] Noting the cost and time needed to assemble cost data under the Areeda-Turner test, Judge Easterbrook proposed a short-cut and asked whether there was a dangerous probability of successful recoupment of the profits sacrificed by below-cost pricing policies.[221] If not, the defendant could be exonerated from the need for a detailed inquiry into cost and pricing data.[222] The Supreme Court later wed the cost-based objective standard proposed by Areeda and Turner with Judge Easterbrook's recoupment concept to develop the *Brooke Group* test.[223]

B. How Brooke Group *Misses the Mark*

The *Brooke Group* decision misses the mark in three important respects. First, instead of coming to grips with predatory pricing behavior, the Court simply assumes away the problem.[224] Second, post–*Brooke Group* economic research has shown that predatory pricing may indeed be a rational business strategy and that the predator may recoup its losses either from the market in which it has incurred deficits or from other markets in which it is dominant.[225] Third, *Brooke Group's* intentionally

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[216] *Id.* at 713–16.

[217] ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENT 286–95 (8th ed. 2017).

[218] *See generally* Frank Easterbook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV 263, 264–65 (1981).

[219] *Id.* at 322–24.

[220] A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1401 (7th Cir. 1989).

[221] *Id.*

[222] *Id.*

[223] Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224 (1993).

[224] *See infra* notes 227–33 and accompanying text.

[225] *See infra* notes 234–41 and accompanying text.

underinclusive standard fails to capture above-cost exclusionary and non-price predatory behavior.[226]

1. Assuming Away Predatory Pricing

The base premise of *Brooke Group*, that predatory pricing is an irrational and hence implausible business strategy, is rooted in its earlier ruling in *Matsushita*[227]: that "there is consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful."[228] However, neither *Brooke Group* nor *Matsushita* offers any support for that proposition.[229] The mere fact that certain conduct may be risky or irrational does not mean that the conduct does not—or will not—occur.[230] For example, prisons are full of risk-takers who have acted irrationally.[231]

The Court in *Brooke Group* further assumed that judges generally lack the ability to distinguish between competition on the merits and predatory behavior and, therefore, should err on the side of non-intervention:

> As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting.[232]

The suggestion that antitrust courts lack the ability to distinguish between lawful and unlawful conduct that may exclude rivals is especially troubling. Indeed, antitrust courts are called on to—and do—make such distinctions all the time.[233]

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[226] *See infra* notes 242–53 and accompanying text.

[227] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986).

[228] *Id*.

[229] *See generally Matsushita*, 475 U.S. at 589–91 and Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226–27 (1993).

[230] Romeo Vitelli, *Why We Take Risks*, PSYCHOLOGY TODAY (Dec. 29, 2014), https://www.psychologytoday.com/us/blog/media-spotlight/201412/why-we-take-risks [https://perma.cc/3868-D23A].

[231] Easterbrook, *supra* note 218, at 282 n.42.

[232] Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 223 (1993).

[233] *See, e.g.*, *Matsushita*, 475 U.S. at 589–91 and *Brooke Grp.*, 509 U.S. at 226–27.

2. *Post–*Brooke Group *Economic Insights*

Economic research after the 1993 decision in *Brooke Group*, calls into question two basic tenets of the Court's rationale: (1) that predatory pricing is an irrational strategy and (2) that short-term losses from below-cost pricing will rarely be recouped in the long term.[234]

a. Recoupment

A firm that is dominant in multiple markets may target a new entrant in a single market by meeting the entrant's competitive foray with aggressively low prices.[235] As a result, the dominant firm develops a predatory reputation that, in turn, discourages entry into other markets, thereby allowing the dominant firm to remain profitable in those other markets and to protect its dominant position in the market challenged by the new entrant.[236]

Furthermore, recent economic research also suggests that predatory pricing may be a rational strategy even when the recoupment comes from the same market in which short-term losses have been incurred.[237] For example, when the target of the predation, due to capital market imperfections, does not have the same access to funds as the predator. In that scenario, the deep-pocket predator may well be able to wait out the target as the target slowly bleeds.[238]

Third, competitors of the dominant firm can be harmed even where the dominant firm is pricing above its costs, as long as the dominant firm's prices are sufficiently low to make it difficult for any rival to turn a profit.[239]

b. Plausible Business Strategy

Precisely because recoupment is feasible in the foregoing scenarios,[240] predatory pricing can no longer be viewed as an

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[234] *Brooke Grp.*, 509 U.S. at 243.

[235] *See* BAKER, *supra* note 21, at 145–47.

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] *Id.* at 147–49.

[240] *See supra* notes 235–37 and accompanying text.

implausible business strategy. The above-cost safe harbor erected in *Brooke Group* and intended to avert false positives can no longer be justified. Nor is the safe harbor an effective vehicle for deterring predation. The safe harbor approach focuses the court's attention on cost data when the real question is whether the defendant has engaged in exclusionary conduct designed to maintain or enhance its dominant position.[241]

3. Above-Cost Predation

The Sixth Circuit decision in *Spirit Airlines, Inc. v. Northwest Airlines Inc.*[242] presents an example of how even above-cost pricing can be anti-competitive. Spirit was a discount carrier[243] that challenged Northwest, the dominant carrier operating out of Detroit,[244] on the Detroit-Philadelphia and Detroit-Boston routes with heavily discounted fares.[245] With its lower fares, Spirit was able to grab market share from Northwest on both of these routes.[246] Northwest's response was to meet (and sometimes beat) Spirit's lower fares and to add more flights to Philadelphia and Boston.[247] Within a year, Spirit was forced to abandon both the Philadelphia and Boston routes.[248] Northwest then raised its fares "to a multiple of seven from prices during Spirit's presence."[249] In addition, "[a]fter Spirit's exit, Northwest also dropped flights notwithstanding the increased customer demand of 'price sensitive travelers' for those routes."[250] In denying summary judgment, the Sixth Circuit concluded that the "trier of fact could reasonably find that Northwest recouped any losses from its predatory pricing *quickly* after Spirit left these routes."[251] The Sixth Circuit further ruled that even if Northwest's prices exceeded an appropriate measure of cost, a jury could, after considering the market

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[241] *Id.* at 148–49.
[242] 431 F.3d 917, 937 (6th Cir. 2005).
[243] *Id.* at 921–23.
[244] *Id.* at 923.
[245] *Id.*
[246] *Id.*
[247] *Id.* at 923–24.
[248] *Id.* at 924.
[249] *Id.* at 950.
[250] *Id.* at 951.
[251] *Id.* at 950 (emphasis added).

structure, find that Northwest's deep discounting and expansion of capacity in response to Spirit's entry injured competition.[252] Moreover, it is hard to see how Northwest's actions promoted either competition or the welfare of consumers—indeed, Northwest acted as a quintessential bully in driving Spirit from the field.[253]

4. Raising Rivals' Costs

A dominant firm also engages in non-price predation by raising rivals' costs to exclude them from the field.[254] Take, for example, a dominant manufacturer that seeks to maintain its position of dominance by excluding rivals from entering the field. The dominant firm does so by entering into exclusive dealing arrangements with its distributors.[255] If the dominant firm succeeds in tying up most distributors in the field or even the biggest distributors, rivals will face difficulty getting their goods into the stream of commerce.[256] Because they are largely foreclosed from existing distribution channels due to the dominant firm's exclusivity arrangements, the rivals will be forced to set up their own distribution networks at significant costs that are likely to reduce their profits or eliminate the rivals' profitability entirely.[257] The injury to competition is clear, but the courts have resisted claims based on raising rivals' cost.[258] As then-Judge Gorsuch stated in *Novell, Inc. v. Microsoft Corp*[259]:

> 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

[252] *Id.* at 953.
[253] *Id.* at 952–53.
[254] Novell, Inc. v. Microsoft Corp, 731 F.3d 1064, 1079 (10th Cir. 2013).
[255] *Id.* at 1072–73.
[256] *Id.*
[257] *See e.g.,* United States v. Dentsply Int'l, Inc. 399 F. 3d 181, 190 (3d Cir. 2005).
[258] *See Novell, Inc.*, 731 F.3d at 1079.
[259] *Id.*

> 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 omission. *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.[260]

In short, under the Gorsuch formulation, a dominant firm that has excluded a rival by raising that rivals' cost of doing business escapes Section 2 liability unless plaintiff can prove that the dominant firm incurred losses in the short term in order to reap monopoly rents in the long term.[261]

5. Predatory Innovation

Predatory innovation is the alteration of a product by a dominant firm to produce a "new" product with the intent to exclude rivals from the field or discourage new entrants and thereby further entrench its dominant position while at the same time providing little or no consumer benefit.[262] Antitrust courts have been wary of predatory innovation claims for several reasons. First, innovation is the engine that drives economic growth and prosperity.[263] Courts are reluctant to second-guess

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[260] *Id.* at 1079 (emphasis in original).

[261] *Id.* at 1075.

[262] Thibault Schrepel, *Predatory Innovation: The Definite Need for Legal Recognition*, 21 SCIEN. AND TECHN. L. REV. 21, 22 (2018).

[263] *See* Ronan Harty, Interview with FTC Chairwoman Edith Ramirez, THE THRESHOLD (ABA Section of Antitrust Law Mergers & Acquisitions Committee News.), Spring 2014, at 3, https://www.ftc.gov/system/files/documents/public_statements/294181/140326thresholdspringissue_0.pdf [https://perma.cc/F2QM-F467].

business decisions by corporate managers regarding how, or whether, a product should be redesigned and how that redesigned product should be marketed to the public,[264] lest judicial decisions on these questions chill new product introduction and hinder economic growth.[265]

Second, innovation aside, a firm, even a dominant firm, should be free to redesign or improve its product as it deems fit.[266] After all, it is the firm—not the courts—that produces the product and takes all the risks with respect to that product.[267] Moreover, an integrated seller is free to introduce new products simultaneously.[268] In *Berkey*, for example, the Second Circuit rejected Berkey's claim that it had lost pocket camera sales due to Kodak's simultaneous introduction of a smaller, redesigned pocket camera and a new film format.[269] If Berkey lost camera sales because the new Kodak film spurred sales on the redesigned Kodak cameras, it was because consumers perceived value in the new film.[270]

Third, the line between lawful innovation and predatory innovation may be difficult to draw.[271] The task of distinguishing lawful innovation from predatory innovation is especially difficult in today's high-tech marketplace.[272] The courts have largely decided these cases with a thumb on the scale in favor of defendants.[273] In the 1970s and 1980s, IBM faced a series of lawsuits by peripheral equipment manufacturers whose products plugged into IBM mainframe computers and competed with

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[264] *See, e.g.*, United States v. Microsoft Corp., 147 F.3d 935, 948 (D.C. Cir. 1998); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d. 263, 286 (2d Cir 1979) ("The attempt to develop superior products is, as we have explained, an essential element of lawful competition. Kodak could not have violated §2 merely by introducing the 110 camera with an improved film").

[265] *See, e.g.*, *Microsoft Corp.*, 147 F.3d at 948.

[266] *Berkey Photo, Inc.*, 603 F.2d at 287.

[267] *Id.* at 281.

[268] *Id.* at 283.

[269] *Id.* at 282.

[270] *Id.* at 287.

[271] *See* Allied Orthopedic Appliances, Inc. v. Tyco Health Care Grp., 592 F.3d 991, 1000 (1975) ("There are no criteria that the courts can use to calculate the 'right' amount of innovation.").

[272] *See id.*

[273] *See id.*

IBM peripheral equipment.[274] This compatibility enabled rival peripheral equipment manufacturers to win sales away from IBM.[275] Thereafter, IBM introduced a redesigned mainframe that featured a new plug interface, and the peripheral equipment manufactured by rivals was no longer plug-compatible with the new IBM mainframes.[276] Rival peripheral equipment manufacturers sued, alleging that the redesigned mainframes did not significantly advance the state of the art and that IBM had done little more than redesign the mainframe's plug interface, thereby excluding rivals from the peripheral equipment market.[277] IBM, at both the trial level and in the appellate courts, was successful in all of these cases.[278] The consensus that emerged among the courts was that where a new or redesigned product "improves performance, lowers price, or achieves significant consumer acceptance by noncoercive means," the new or redesigned product does not run afoul of Section 2.[279]

Those courts that have deferred to the business decision made by companies facing claims of predatory innovation have cast a blind eye toward anti-competitive effects.[280] Delineating between lawful innovation and unlawful predatory innovation may well be difficult, but that is not a reason for antitrust courts to abstain from addressing the issue of whether innovation is real or just a pretext for reaping monopoly profits.[281] The Ninth Circuit has opted for a bright-line rule, holding that any improvement to the product would avoid Section 2 liability:

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[274] *See, e.g.*, Transamerica Computer Co. v. Int'l Bus. Machines Corp., 698 F.2d 1377, 1380 (9th Cir. 1983); California Computer Prods. v. Int'l Bus. Machines Corp., 615 F.2d 727, 731 (9th Cir. 1979); Telex Corp. v. Int'l Bus. Machines Corp, 510 F.2d 894, 899 (10th Cir. 1975).

[275] *See California Computer Prods.*, 615 F.2d at 731.

[276] *See Transamerica Computer Co.*, 698 F.2d at 1280–81.

[277] *See id.* at 1281.

[278] *See Transamerica Computer Co.*, 698 F.2d at 1380, 1389; *California Computer Prods.,* at 731, 756; *Telex Corp.*, 510 F.2d at 898, 933.

[279] 1 AMERICAN BAR ASSOCIATION, ANTITRUST LAW DEVELOPMENTS 280 (Darren S. Tucker et al. eds., 8th ed. 2017).

[280] *See generally Trans America Computer Co.*, 698 F.2d at 1384–86; *California Computer Prods.*, 615 F.2d at 742–43; *Telex Corp.*, 510 F.2d at 902.

[281] Allied Orthopedic Appliances, Inc. v. Tyco Health Care Grp., 592 F.3d 991, 1000 (1975).

> There is no room in this analysis for balancing the benefits or worth of a product improvement against its anticompetitive effects. If a monopolist's design change is an improvement, it is "necessarily tolerated by the antitrust laws," unless the monopolist abuses or leverages its monopoly power in some other way when introducing the product.[282]

In *Microsoft*,[283] on the other hand, the D.C. Circuit addressed the predatory innovation issue head on. The government alleged, and the trial court found, that Microsoft had integrated its web browser, Internet Explorer (IE), into the Windows operating system in order to reduce Netscape's share of the browser market.[284] Among other things, the integration of IE into Windows (a) removed IE from the Add/Remove Program Utility; (b) made it difficult to use Windows 98 with Navigator by overriding user choice of a browser other than IE as a default browser; and (c) commingled browser and non-browser code by placing code specific to web browsing in the same files that provided operating system functions.[285]

The D.C. Circuit concluded that all three of these product changes by Microsoft had had anti-competitive effects.[286] The Court rejected Microsoft's proffered defenses for the first and third changes—removal of IE from the Add/Remove Program Utility and commingling browser and non-browser code—and found Microsoft liable on these claims.[287] However, with respect to the second set of changes—the overriding of user choice of a default browser in certain circumstances—the Court accepted Microsoft's explanation that it had valid technical reasons for the override and declined to find antitrust liability for that aspect of product redesign.[288]

Similarly, in *Bard*,[289] the Federal Circuit faced head-on claims of predatory innovation. That case involved surgical replacement pins for biopsy guns manufactured by Bard.[290] The

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[282] *Id.*

[283] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir 2000).

[284] *Id.* at 64–66.

[285] *Id.*

[286] 253 F.3d at 66.

[287] 253 F.3d at 66–67.

[288] *Id.*

[289] C.R. Bard, Inc. v. M3 Systems, Inc., 157 F.3d 1340 (Fed. Cir. 1998).

[290] *Id.* at 1346.

biopsy gun enabled doctors to perform non-invasive biopsies by "shooting" a surgical pin into the patient.[291] Rivals then began selling replacement pins for Bard's biopsy guns, and Bard's replacement pin sales declined.[292] Bard then redesigned its gun so that pins manufactured by rivals no longer worked with Bard's guns.[293] Plaintiffs established that Bard's redesign offered no real benefit to consumers and, at the same time, excluded rivals.[294] The evidence adduced at trial further demonstrated that Bard officials knew that the redesigned biopsy gun offered no real benefit to consumers and that the changes made were intended to exclude rivals in replacement pins.[295] The Federal Circuit upheld the judgment for the plaintiffs.[296]

A third line of cases involves so-called product hopping.[297] Actavis was the manufacturer of a patented drug to treat Alzheimer's disease.[298] Patients took the drug twice a day.[299] As its patent was about to expire, and facing imminent generic competition, Actavis (1) introduced what it termed a new and improved patented version of the drug that required dosing only once a day and (2) simultaneously withdrew the twice-a-day version of the drug.[300] Plaintiff, the state of New York as relator, argued that Actavis forced patients into a once-a-day regimen with the new form of the drug and thereby effectively eliminated competition from generics who could offer only a twice-a-day regimen, thereby violating Section 2 of the Sherman Act.[301] Once patients were converted to one pill daily, there was no going back.[302] The Second Circuit held that New York had stated a claim for monopolization on these facts.[303]

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[291] *Id.*
[292] *Id.* at 1347.
[293] *Id.* at 1378.
[294] *Id.* at 1382.
[295] *Id.*
[296] *Id.*
[297] New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638, 643 (2d Cir. 2015).
[298] *Id.* at 642.
[299] *Id.*
[300] *Id.* at 646–47.
[301] *See id.* at 656.
[302] *See id.*
[303] *See id.* at 659.

The issue of predatory innovation remains a hot topic.[304] Apple faces claims that its redesign of the Apple Watch excluded makers of apps that enabled the watch to perform heart monitoring functions.[305] Keurig faces claims that it has violated Section 2 by designing its coffee makers to accept only Keurig coffee pods and to reject generic pods manufactured by rivals.[306] In these and similar cases, it is crucial that the courts follow the lead of *Microsoft* and analyze the pros and cons of any product change rather than simply taking the manufacturer at its word that its product has been improved.[307] Still, plaintiffs have had little success in prosecuting predatory innovation claims.[308]

IV. THE RULE OF REASON

A fourth impediment to reinvigorated antitrust enforcement is not directly connected to Chicago School theory; rather, it is the application of the Rule of Reason by today's federal courts. The problem with the Rule of Reason is twofold. First, the Rule of Reason is not party-neutral; by its very nature, the rule favors defendants.[309] Second, the application of the rule by the courts has been erratic and unpredictable.[310] As one commentator observed, the Rule of Reason "has degenerated into a muddled and

[304] *See* Schrepel, *supra* note 262, at 23–24.

[305] *See* AliveCor, Inc. v. Apple Inc., 592 F. Supp. 3d 904, 919 (N.D. Cal. 2022) (Plaintiff plausibly alleged that "Apple made changes to the heart rate algorithm that made it effectively impossible for third parties to inform a user when to take an ECG.").

[306] *See In re* Keurig Green Mountain Single-Serve Coffee Antitrust Litig., 383 F. Supp. 3d 187, 215 (S.D.N.Y. 2019).

[307] *See* United States v. Microsoft Corp., 253 F.3d 34, 66–67 (D.C. Cir 2000).

[308] Joseph Gregory Sidak, *Debunking Predatory Innovation*, 83 COLUM. L. REV. 1121, 1146 (1983).

[309] *See* Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 739 (2012) ("Even when a comprehensive rule of reason is required in closer cases, courts are likely to apply a very structured and demanding framework that largely favors defendants."); *see also* Edward D. Cavanagh, *The Rule of Reason Re-Examined*, 67 THE BUS. LAW. 435, 450 (2012) (contending that the "added cost factor" of the rule of reason "favors defendants, who typically have deeper pockets and greater staying power than plaintiffs.").

[310] *See* Terry Calvani, *Some Thoughts on the Rule of Reason*, 6 EURO. COMP. L. REV. 201, 201–02 (2001).

incoherent guessing game, with courts applying disparate and convoluted versions of the test that are inconsistent across and within circuits and are untethered from the basic goals of antitrust law."[311] The confusing and inconsistent application of the Rule of Reason by the courts has rendered the already arduous task of plaintiffs winning an antitrust suit even more onerous.[312]

A. Origins

For over a century, the Rule of Reason has been the legal standard against which alleged violations of Section 1 of the Sherman Act are measured.[313] Under the Rule of Reason, only unreasonable restraints of trade violate Section 1.[314] The Rule of Reason is a judicial construct, limiting the broad language of Section 1 that prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade."[315] Initially, the Supreme Court in *United States v. Trans-Missouri Freight Ass'n*[316] construed the language of Section 1 literally, suggesting that *any* contractual restraint would run afoul of Section 1.[317] Some fourteen years later, the Court in *Standard Oil*[318] walked back the broad prohibitions in *Trans-Missouri* and held that only unreasonable restraints of trade violate Section 1.[319] *Standard Oil* not only limited the universe of conduct violating Section 1, it also related the standards for illegality under the Sherman Act to common law standards for restraints of trade in a way that made sense.[320] However, *Standard Oil* provided no guidance to the lower courts on how the Rule of Reason should be applied.[321]

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[311] Gabe Feldman, *The Demise of the Rule of Reason*, 24 LEWIS & CLARK L. REV. 951, 951 (2020).

[312] *See* Feldman, *supra* note 311, at 953–54.

[313] *See* Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 VAND. L. REV. 1753, 1753–54 (1994).

[314] *See id.* at 1771–72.

[315] 15 U.S.C.A. § 1 (West 2004).

[316] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 325–26 (1897).

[317] *See id.* at 312.

[318] Standard Oil Co. v. United States, 221 U.S. 1, 59–60 (1911).

[319] *See id.* at 88–90.

[320] *See id.* at 58–59.

[321] *See id.* at 66–67.

B. A Brief History of the Rule of Reason

1. Chicago Board of Trade

In *Chicago Board of Trade*,[322] the Court considered a price-fixing case against the Chicago Board of Trade, a commodities exchange, in which the United States alleged that an exchange rule that froze bidding on certain categories of grain for nineteen hours a day violated Section 1 of the Sherman Act.[323] The Supreme Court, with Justice Brandeis writing for the majority, explained the test for legality under the Rule of Reason that federal courts should implement:

> [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.[324]

In short, the courts must first determine whether the conduct in question restrains trade and, if so, proceed to weigh the procompetitive benefits of any restraint against its anti-competitive effects and determine whether the net effects are beneficial, rendering the conduct lawful or if the net effects are anti-competitive, rendering it illegal.[325] Brandeis' elegant prose, however, provided

[322] Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).
[323] *Id.* at 235–36.
[324] *Id.* at 238.
[325] *See id.* at 238–39.

little guidance to the lower courts.[326] For example, he says nothing of how the broad principles set forth in *Chicago Board of Trade* should be applied by the courts in day-to-day antitrust litigation. He does not identify the kinds of benefits that count or pro-competitive justifications, nor does he provide any guidance to weigh pro-competitive benefits against anti-competitive effects.[327] For this reason, the *Chicago Board of Trade* decision has been brutally and convincingly criticized.[328] Judge Easterbrook has slammed the Brandeis formulation as "empty,"[329] noting that "when everything is relevant, nothing is dispositive."[330]

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[326] ABA ANTITRUST SECTION, MONOGRAPH NO. 23, THE RULE OF REASON 6 (1999).

[327] *See Chicago Bd. of Trade*, 246 U.S. at 238–39.

[328] *See* BORK, *supra* note 7, at 42, 44 (criticizing Brandeis for "advocating a deviant [R]ule of [R]eason," for concluding that the Rule's restraints were pro-competitive without any record support, and for his failure to be "explicit about what his approach would mean for the law generally"); Easterbrook, *supra* note 11, at 11–12; ABA ANTITRUST SECTION, *supra* note 326, at 5 ("Commentators have long criticized the breadth of Brandeis' statement in *Board of Trade* as 'legitimiz[ing] the 'big case' in antitrust."); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 255 (3d ed. 2005) ("Justice Brandeis' statement of the [R]ule of [R]eason . . . has been one of the most damaging in the annals of antitrust" in that it "has suggested to many courts . . . [that] nearly everything is relevant."); Peter C. Carstensen, *The Content of the Hollow Core of Antitrust*: *The* Chicago Board of Trade *Case and the Meaning of the "Rule of Reason" in Restraint of Trade Analysis*, 15 RES. L. & ECON. 1, 4 (1992) ("[O]pen-ended listing of possibly relevant factors is hardly illuminating as to their analytic inter-relationship, nor does it inform a decision maker of what weights to ascribe to different factual conclusions.").

[329] Easterbrook, *supra* note 11, at 11–12. Easterbrook further asserted:

> Of course judges cannot do what such open-ended formulas require. When everything is relevant, nothing is dispositive. Any one factor might or might not outweigh another, or all of the others, in the factfinder's contemplation. The formulation offers no help to businesses planning their conduct. Faced with a list of such imponderables, lawyers must engage in ceaseless discovery. (They might find something bearing on a factor, and the factor might be dispositive.) The high the states firms are willing spend on discovery and litigation. The marginal week of discovery or trial just might mean saving a few millions or tens of millions of dollars. Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the Rule of Reason.

Id. at 12–13 (footnotes omitted).

[330] *See id.* at 12.

2. *The Per Se Era*

Given the amorphous and inconclusive nature of the Rule of Reason articulated by Brandeis,[331] lower courts, unsurprisingly, began to look for short-cuts in applying the Rule of Reason and soon found that the ponderous *Chicago Board of Trade* exercise was not necessary in every case.[332] For example, in cases involving horizontal price-fixing,[333] horizontal market divisions,[334] or concerted refusals to deal,[335] the courts have held that competitive harms were so severe, and competitive benefits so remote, that the conduct could be condemned on its face without a detailed factual analysis.[336]

Moreover, the consensus view of the courts through the 1960s was that, in antitrust cases, judges were of limited utility in examining difficult economic problems and would have particular difficulties in weighing the destruction of one sector of the economy against the promotion of competition in another.[337] The courts also recognized that "[p]er se rules always contain a degree of arbitrariness,"[338] but nevertheless are "justified on the assumption that the gains from imposition of the [per se] rule will far outweigh the losses and that significant administrative advantages will result."[339] As one court has put it, "the potential competitive harm plus the administrative cost of determining in what particular situations the practice may be harmful must far

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[331] *See Chicago Bd. of Trade*, 246 U.S. at 238.

[332] *See infra* notes 333–36 and accompanying text.

[333] *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223–24 (1940).

[334] *See* Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49–50 (1990); United States v. Topco Assocs., 405 U.S. 596, 607–08 (1972).

[335] Klor's Inc. v. Broadway-Hale Stores, 359 U.S. 207, 210–13 (1959).

[336] *See id.*

[337] *See Topco*, 405 U.S. at 609–10 ("[T]he fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated per se rules.").

[338] Associated Radio Serv. Co. v. Page Airways, Inc., 414 F. Supp. 1088, 1093 (N.D. Tex. 1976).

[339] *Id.*

outweigh the benefits that may result."[340] Judges accordingly favored per se rules because they obviated the need for courts to "ramble through the wilds of economic theory."[341] Indeed, the 1960s saw an expansion of per se jurisprudence, with per se rules applied where the economic analysis would be complicated, even though the conduct in question would not invariably be anticompetitive.[342] Thus, in *Albrecht,* maximum resale price maintenance was condemned out of hand.[343] In *Schwinn,*[344] vertically imposed territorial restraints were held per se illegal where the seller parts with title, dominion, and risk.[345]

3. The Move Away From Per Se Rules

However, the 1960s' expansion of per se jurisprudence came to an abrupt halt a decade later as courts became more comfortable with engaging in economic analysis in antitrust cases.[346] The speed and degree to which antitrust courts leaned into economic theory was astonishing.[347] In 1977, just five years after the Supreme Court in *Topco* underscored the limitations of federal courts parsing complex economic issues, the Court did an about-face in *Sylvania*.[348] Embracing Sylvania's economic justifications for the imposition of location clauses on its dealers, the Court overruled the *Schwinn* case, which was decided a decade earlier, and held that the vertically imposed territorial restraints should not be condemned out of hand but rather must be adjudged on a case by case basis.[349] The *Sylvania* decision was a

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[340] United States v. Container Corp., 393 U.S. 333, 341 (1969) (Marshall, J., dissenting).

[341] *Topco*, 405 U.S. at 609, n.10.

[342] Thomas A. Piraino, Jr., *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. CAL. L. REV. 685, 692–93 (1991).

[343] Albrecht v. Herald Co., 390 U.S. 145, 153 (1968).

[344] United States v. Arnold Schwinn & Co., 388 U.S. 365, 381–82 (1967).

[345] *Id.* at 382.

[346] *See* George L. Priest, *Bork's Strategy and the Influence of the Chicago School on Modern Antitrust Law*, 57 J.L. & ECON. S1 (2014).

[347] Edward D. Cavanagh, *Antitrust Law and Economic Theory: Finding a Balance*, 45 LOY. U. CHI. L.J 123, 128 (2013).

[348] Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57 (1977).

[349] *Id.* at 57–58.

game-changer and a trend-setter.[350] In the twinkling of an eye, antitrust courts began to delve into complex economic issues, and the per se rule began to play a more limited role in antitrust jurisprudence.[351] Indeed, by the mid-1980s, the Supreme Court in *Sharp*[352] opined that:

> There is a presumption in favor of a rule-of-reason standard; that departure from that standard must be justified by demonstrable economic effect, such as the facilitation of cartelizing, rather than formalistic distinctions; that interbrand competition is the primary concern of the antitrust laws; and that rules in this area should be formulated with a view towards protecting the doctrine of *GTE Sylvania*.[353]

It follows that the per se analysis in antitrust cases should be confined to a narrow band of cases that involve horizontal restraints that affect price or output and that the Rule of Reason is the preferred mode for analyzing all other antitrust issues.[354]

4. Quick Look?

At the same time the Supreme Court was (re)embracing the Rule of Reason, it also made it clear that not every case under Section 1 required the full-blown analysis set forth in *Chicago Board of Trade*.[355] In a series of decisions culminating in *California Dental Association v. FTC*,[356] the Court acknowledged that some anti-competitive conduct, although falling outside the narrow confines of per se illegality,[357] nonetheless has such anticompetitive potential that absent proof of pro-competitive benefits, it can be condemned on a "quick look" without a detailed assessment of the market.[358] Thus, in *National Society of Profession*

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[350] Maxwell M. Blecher, *The Impact of* GTE Sylvania *on Antitrust Jurisprudence*, 60 ANTITRUST L.J. 17, 21 n.15 (1991).
[351] *Id.*
[352] Bus. Elec. Corp. v. Sharp Elec. Corp. 485 U.S. 717, 726 (1988).
[353] *Id.*
[354] *Id.* at 720.
[355] Chicago Bd. of Trade v. United States, 246 U.S. 231, 239–41 (1918).
[356] California Dental Association v. FTC, 526 U.S. 756 (1999).
[357] *Id.* at 778.
[358] *Id.* at 780–81.

Engineers,[359] the Court concluded that a prohibition on competitive bidding on engineering projects, while not price-fixing as such, could be condemned without a full-blown market analysis.[360] Similarly, in *NCAA*[361] (ban on member schools from negotiating television rights for college football games) and *Indiana Federation of Dentists*[362] (agreement among member dentists to boycott insurance company data requests), the Court condemned the defendants' conduct on a truncated Rule of Reason analysis. As one Circuit Court colorfully noted, quick look may be used where the restraints in question "bear close family resemblance" to price-fixing.[363] Notably, none of the foregoing Supreme Court cases made specific reference to "quick look" or to "truncated [R]ule of [R]eason analysis."[364] Not until *California Dental* in 1999 did the Supreme Court specifically address the concept of quick look.[365]

Although recognizing quick look in principle,[366] the Court in *California Dental* spoke only in generalities. The Court acknowledged that there are no bright lines separating per se restraints from those restraints that require a more detailed analysis.[367] Since "there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anti-competitive effect and those that call for a more detailed treatment,"[368] courts must engage in "an enquiry meet for the case, looking to the circumstances, details, and logic of the restraint."[369]

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[359] *See generally* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978).

[360] *Id.* at 692–93.

[361] NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 104–06 (1984) (NCAA television plan "has significant potential for anticompetitive effects" and the "anticompetitive consequences of this arrangement are apparent").

[362] FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 458 (1986) (proof that defendant's boycott had "limit[ed] consumer choice by impeding the 'ordinary give and take of the marketplace'" obviated the need for a detailed market inquiry).

[363] Polygram Holding, Inc. v. FTC, 416 F.3d 29, 37 (2005).

[364] *See* California Dental Association v. FTC, 526 U.S. 756, 763 (1999).

[365] *Id.* at 759.

[366] *Id.* at 770 (*NCAA, IFD*, and *NSPE* "formed the basis for what has come to be called abbreviated or 'quick look' analysis under the rule of reason").

[367] *Id.* at 779 ("[t]he truth is that our categories of analysis of anticompetitive effect are far less fixed than terms line 'per se', 'quick look' and '[R]ule of [R]eason' tend to make them appear").

[368] *Id.* at 780–81.

[369] *Id.* at 781.

The Court in *California Dental* determined that the conduct at issue, an agreed-upon ban on false discount advertising and false claims of quality of care, was not a candidate for quick look but rather called for a full-blown analysis under the Rule of Reason.[370]

After *California Dental*, the fervor for quick look analysis cooled considerably.[371] The Supreme Court declined to apply quick look in *Leegin*[372] and *Actavis*[373] and has essentially left the development of quick look to the lower courts.[374] However, the lower courts have perhaps sensed a lukewarm attitude at the Supreme Court level and thus have done little to flesh out the parameters of the doctrine.[375]

5. Less Restrictive Alternative

Another element of the Rule of Reason analysis is whether the defendants could have achieved the purported pro-competitive benefits by less restrictive means.[376] The less restrictive alternative conception to Sherman Act analysis predates balancing test

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[370] *Id.* at 779–81.

[371] Edward D. Cavanagh, *Whatever Happened to Quick Look?* 26 U. MIAMI BUS. L. REV. 39, 40 (2017)

[372] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 898–99 (2007) (although declining to rule resale price maintenance presumptively unlawful, the court acknowledged that a detailed [Chicago Board of Trade] inquiry may not be necessary in all cases and that as courts gain experience with resale price maintenance cases, they can "devise rules over time for offering proof, or even presumptions, where justified, to make the rule of reason a fair and efficient way to prohibit anti-competitive restraints and to promote pro-competitive ones.").

[373] FTC v. Actavis, Inc. 570 U.S. 136, 159–60 (2013) ("As in other areas of law, trial courts can structure antitrust litigation so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and on the other, consideration of every possible facto theory irrespective of the minimal light it may shed on the basic question—that of presence of significant unjustified anticompetitive consequences . . . . We therefore leave to the lower courts the structuring of the present rule-of-reason antitrust litigation.") (internal citations omitted).

[374] *See Leegin*, 551 U.S. at 898–99.

[375] Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 121–22 (2018).

[376] *See generally* C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927 (2016).

of *Chicago Board of Trade*. The concept has its roots in *Addyston Pipe*,[377] wherein then-Judge Taft drew a hard line dividing naked restraints of trade and ancillary restraints of trade.[378] Naked restraints of trade are those that served no competitive purpose and would enrich only the participants, and thus, they could be condemned as out of hand without further analysis.[379] Ancillary restraints are those restraints that promote, and are necessary for, the success of a lawful transaction,[380] such as where the seller of a business agrees as a condition of the sale not to compete with the buyer for a specified period of time.[381] Ancillary restraints are upheld where reasonably necessary to enable the underlying transaction to succeed.[382]

However, the ancillary restraint concept receded in the wake of the balancing approach enunciated in *Chicago Board of Trade* and remained dormant for decades thereafter.[383] It received new life in Justice Steven's dissenting opinion in *Broad Music Inc.* (*BMI*).[384] The *BMI* majority held that ASCAP's blanket license agreements did not constitute horizontal price-fixing and should not be condemned as per se unlawful;[385] rather, they should be adjudged under the Rule of Reason.[386] Dissenting, Justice Stevens agreed that per se condemnation of blanket licenses would be inappropriate but further argued that the blanket licensing practices of ASCAP and BMI should nevertheless be condemned under the Rule of Reason.[387] Stevens reasoned that the blanket license was not necessary to the success of the ASCAP and BMI enterprise, noting that the District Court findings disclose no reason why music performing rights "could not

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[377] United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898).

[378] *Id.* at 282–83.

[379] *Id* at 281.

[380] *Id.* at 282–83.

[381] *Id.* at 282.

[382] F. Enrique Gonzalez Diaz, *The Notion of Ancillary Restraints under EC Competition Law*, 19 FORDHAM INT'L L.J. 951, 955 (1996).

[383] *See* Cavanagh, *supra* note 309, at 448.

[384] Broad. Music Inc. v. CBS, Inc., 441 U.S. 1 (1979).

[385] *Id.* at 23–24.

[386] *Id.*

[387] *Id.* at 26 (Stevens, J. dissenting).

be negotiated on a per-composition or per-use basis," both of which would confer "more limited—and thus less restrictive—licenses."[388]

Subsequent to *BMI*, courts have incorporated the less restrictive alternative concept into the Rule of Reason analysis.[389] In many cases, the less restrictive alternative test serves as a short-cut that Professor Scott Hemphill has suggested can relieve the "anxiety about balancing."[390] As discussed above,[391] balancing pro-competitive benefits against anti-competitive effects is a difficult task and also a task for which federal judges are not necessarily well-suited.[392] Judges have only "limited capacity" to assess the net effects of certain conduct.[393] Quantifying benefits and anti-competitive effects is especially difficult in exclusionary conduct cases where the plaintiff claims harm to innovation.[394] Where the plaintiff can show that the claimed pro-competitive benefits could have been achieved by less restrictive means, the court can condemn the conduct without the need to proceed to the balancing stage.[395] On the other hand, if the plaintiff cannot establish that its proposed alternative is more effective than the restraint in question, the court must then proceed to the balancing stage.[396]

The less restrictive alternative test is widely accepted by the lower courts.[397] The Supreme Court has yet to decide a case based on whether or not the plaintiff had established that benefits claimed by the defendant could have been achieved by less

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[388] *Id.* at 33.

[389] *E.g.*, Kreuzer v. Am. Acad. of Periodontology, 735 F.2d 1479, 1494–95 (D.C. Cir. 1984) (concluding where evidence supports "asserted justification," "it must be shown that the means chosen to achieve that end are the least restrictive available"); Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1413 (9th Cir. 1991) (stating if defendant "offer[s] evidence of pro-competitive effects . . . . plaintiff, driven to this point, must then try to show that any legitimate objectives can be achieved in a substantially less restrictive manner").

[390] Hemphill, *supra* note 376, at 929.

[391] *See supra* note 326 and accompanying text.

[392] Hemphill, *supra* note 376, at 929.

[393] *Id.* at 947.

[394] *Id.* at 949.

[395] *Id.* at 929.

[396] *Id.* at 929–31.

[397] *Id.* at 929.

restrictive means.[398] However, in *Ohio v. American Express Co.*[399] the Court appears to have accepted the concept,[400] although its discussion of a less restrictive alternative must be considered dicta because the Court's holding turned on the plaintiff's failure to establish an anti-competitive effect.[401]

In the typical formulation by lower courts, the less restrictive alternative issue is considered as the penultimate step—just before balancing—in the Rule of Reason analysis.[402] However, in the *O'Bannon*[403] case, the Ninth Circuit appears to have veered off course and treated the less restrictive alternative issue as the *final* step in the process; that is, the court eliminated the balancing process.[404] Worse, in its brief discussion of less restrictive alternative, the Court in *American Express*[405] appears to have endorsed the *O'Bannon* approach of doing away with balancing.[406] Eliminating balancing is inconsistent not only with the Rule of Reason itself, but also with broad antitrust principles that always take account of pro-competitive benefits and anti-competitive effects.[407] An antirust plaintiff should not lose a case simply because it could not prove that defendant could have

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[398] *Id.* at 940.

[399] 138 S. Ct. 2274 (2018).

[400] *Id* at 2284. The Court stated:

> To determine whether a restraint violates the rule of reason, the parties agree that a three-step, burden-shifting framework applies. Under this frame-work, the plaintiff has the initial burden to prove that he challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market . . . . If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint . . . . If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.

Id.

[401] *Id.* at 2290.

[402] *See* Carrier, *supra* note 34, at 50–51.

[403] O'Bannon v. NCAA, 802 F. 3d 1049 (9th Cir. 2015).

[404] *Id.* at 1074.

[405] *American Express*, 138 S. Ct. at 2284.

[406] *Id.*

[407] Carrier, *supra* note 34, at 53–54.

achieved beneficial outcomes by less restrictive means.[408] The result in *O'Bannon* is to tilt the antitrust playing field even more in favor of defendants.[409]

6. Modern Approach

In *Chicago Board of Trade*, Brandeis stressed that mere proof that conduct gives rise to anti-competitive effects is not sufficient for condemnation under the Sherman Act.[410] Rather, the defendant must be given the opportunity to come forward with proof of pro-competitive benefits, and unless the anti-competitive effects outweigh the pro-competitive benefits, the conduct in question would not run afoul of the Sherman Act.[411] In implementing the Rule of Reason, modern courts generally utilize a multi-step process[412]:

a. Plaintiff bears the initial burden of proving that defendant has engaged in anti-competitive conduct causing injury to the plaintiff.
b. The burden then shifts to the defendant to come forward with pro-competitive justification for its conduct.
c. Assuming the defendant adduces evidence of pro-competitive benefits, the burden then shifts back to the plaintiff to show that either the purported pro-competitive benefits are pretextual or could be achieved by a less restrictive alternative.
d. If the court finds that the pro-competitive benefit could have been achieved by a less restrictive alternative, it will find defendant's conduct unlawful.
e. If plaintiff cannot establish a less restrictive alternative, then the court must weigh the anti-competitive effects against the pro-competitive benefits.[413]

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[408] *Id.* at 53.

[409] *Id.* at 52–53.

[410] Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

[411] *Id.*

[412] Herbert Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J.L & BUS. 369, 371 (2016).

[413] *Id.*

C. Shortcomings of the Modern Rule of Reason

1. Inconclusiveness

The broad, open-ended inquiry into market facts espoused by *Chicago Board of Trade* is a recipe for disaster. As discussed above, the Court provided no guidance as to what market information matters and how much it matters.[414] In particular, the exercise does not distinguish between naked restraints of trade, which serve no competitive purpose, and ancillary restraints of trade necessary to effectuate a lawful agreement.[415] The Achilles heel of this exercise is in the last step—the balancing.[416] How *does* a court actually balance anti-competitive effects against pro-competitive benefits? Although cases discuss the need to balance, the Supreme Court has never actually engaged in a balancing exercise.[417] The reality is that it is nearly impossible to weigh anti-competitive effects against pro-competitive benefits.[418] To do so, the court must quantify both the anti-competitive effects and the pro-competitive benefits. Quantification, in turn, means that courts must find a common denominator so that judges can make meaningful decisions by comparing apples to apples.[419] However, more often than not, the balancing exercise in the real-world courtroom involves comparing apples to oranges.[420] As Professor Hovenkamp has observed:

> [a]t best, 'balancing [patent rights against prohibitions of the Sherman Act] depends on a complex mixture of soft economics and even ideological judgments about the effectiveness and appropriate domain of the patent system against concerns about promoting competition. A Ninth Circuit case considering a liquor price posting provision declared that the court must balance the state's interest in promoting temperance with the federal interest in promoting competition. It is a little like balancing pride and prejudice, or harmony and ecstasy."[421]

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[414] *See supra* notes 21–32 and accompanying text.

[415] *See* Hovenkamp, *supra* note 412, at 371; United States v. Addyston Pipe & Steel Co., 85 F. 271, 282–83 (6th Cir. 1898).

[416] *See* Hemphill, *supra* note 376, at 929.

[417] *See id*. at 929.

[418] *Id.*

[419] Hovenkamp, *supra* note 412, at 373.

[420] *Id*. at 373–74.

[421] *Id*. at 374.

The difficulties in balancing are further exacerbated by the adversarial nature of antitrust proceedings.[422] Each side retains expert witnesses who paint vastly different pictures of the conduct in question.[423] Plaintiff's experts may argue that defendant's conduct is anti-competitive without any pro-competitive benefits.[424] Defendant's expert may contend that defendant's conduct is not only not anti-competitive but also beneficial to competition.[425] Accordingly, neither expert is likely to be of much assistance to a court seeking to quantify anti-competitive effects and pro-competitive benefits.[426] In addition, the ability of judges to grasp the workings of various industries may vary significantly from court, further complicating the balancing task.[427] In short, balancing anti-competitive effects against pro-competitive benefits is not a straightforward exercise that is likely to produce consistent and predictable outcomes.[428]

However, not all commentators view the balancing requirement as the Achilles heel of the Rule of Reason protocol set forth in *Chicago Board of Trade*.[429] Based on extensive study of all Rule of Reason cases decided from 1977 to 1999[430] and an updated study covering Rule of Reason cases decided during the next decade,[431] Professor Michael Carrier concluded that "the rule of reason is far less amorphous than commonly believed."[432] Carrier's data show that in the 1977–1999 period only four percent of cases reached the balancing stage[433] and from 1999 to 2009, that number dropped to only two percent.[434] The data further show that the vast majority of Rule of Reason cases are dismissed at the first stage of the analysis because plaintiffs have failed to establish

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422 *See* Hemphill, *supra* note 376, at 948.

423 *See id.*

424 *Id.*

425 *Id.*

426 *Id.*

427 *Id.* at 947.

428 *Id.*

429 Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV.1265, 1267–68 (1999).

430 *See id.* at 1265.

431 Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON. L. REV. 827, 828 (2009).

432 *Id.* at 827, 837.

433 Carrier, *supra* note 429, at 1267, 1269.

434 Carrier, *supra* note 431, at 828.

anti-competitive effect.[435] Thus, for Carrier, to decry the "kitchen sink" approach of *Chicago Board of Trade* is to miss the mark.[436]

Still, even if rarely used, balancing in Carrier's view remains a key element of the Rule of Reason framework "in history, policy, and necessity"[437] and criticizes the ruling in *O'Bannon* and *AMEX* for ignoring the balancing step.[438] Even if a plaintiff cannot show a less restrictive alternative, it should not be denied the opportunity to show that, or balance, anti-competitive effects outweigh pro-competitive benefits.[439]

2. Process Problems

The exercise envisioned by *Chicago Board of Trade* is also unwieldy. It opens up the trial record to vast amounts of evidence.[440] Defendants seeking to justify their conduct have a special incentive to seek and adduce voluminous data supporting their behavior.[441] Similarly, plaintiffs, wanting all avenues of inquiry to remain open, seek broad discovery.[442] Discovery costs are likely to soar.[443] Higher discovery costs also lead to lengthier and more expensive trials.

In addition, the analysis is an ex post exercise.[444] Acts are judged *after* they have taken place.[445] There is no traffic light to market participants signaling the legality of their actions.[446] Lack of guidance leads to uncertainty, and uncertainty adds to risk. As a result, a risk-averse market participant may forgo market behavior that is ultimately beneficial.[447]

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[435] *See* Carrier, *supra* note 34, at 51 ("In fact, the courts dispose of the vast majority of cases at the first stage because the plaintiff cannot show an anti-competitive effect.").

[436] *Id.* at 50.

[437] *Id.* at 54.

[438] *Id.* at 52–53.

[439] *Id.* at 54.

[440] *See* Cavanagh, *supra* note 309, at 450.

[441] *See id.* at 450.

[442] *Id.*

[443] *Id.*

[444] *Id.* at 445.

[445] *Id.*

[446] *Id.*

[447] *See* Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1384, 1418 (2009).

3. Confusion and Diversion of the Court's Attention

The broad, open-ended inquiry into market facts espoused by *Chicago Board of Trade* may also serve to divert the court's attention from the issues and confuse the antitrust analysis, thereby leading to bad results.[448] The fact-bound exercise in *Chicago Board of Trade* focuses on anti-competitive effects, rather than anti-competitive conduct.[449] To succeed under the Rule of Reason, the defendants must show that the challenged anti-competitive conduct gave rise to beneficial economic effects.[450] Yet, courts under the Rule of Reason have erroneously upheld purported pro-competitive benefits that bore no relation to the restraint in question.[451] For example, in *Chicago Board of Trade* itself, the Court identified nine pro-competitive benefits related to the Board's "call rule" that included a provision that would freeze buyers' bids for nearly twenty hours every day.[452] However, even a cursory glance at the identified pro-competitive benefits reveals the "benefits" in question bore no relation to the restraint at issue.[453]

To pass muster under the Rule of Reason, the alleged anti-competitive conduct must benefit competition.[454] The courts have long held that social and political benefits are not cognizable under the Rule of Reason.[455] Nevertheless, the Third Circuit in *Brown University*[456] held that an agreement among Ivy League colleges to offer comparable financial aid packages to any student who has applied to multiple Ivy League institutions, could be upheld under the Rule of Reason because it created the socio-political benefit of a more diverse classroom and learning experience.[457] Similarly, in *Epic v. Apple*, the district court ruled that Apple's price and output restraints were justified under the Rule

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[448] *See* Cavanagh, *supra* note 309, at 436.

[449] *See* Carrier, *supra* note 429, at 1267.

[450] *See* Stucke, *supra* note 447, at 1385.

[451] *See* Cavanagh, *supra* note 309, at 447.

[452] *See Chicago Bd. of Trade*, 246 U.S. at 237, 240–41.

[453] *See* Cavanagh, *supra* note 309, at 447.

[454] *See* Nat'l Soc. Of Prof'l Eng'rs v. United States, 435 U.S. 679, 691, 695 (rejecting defense that restrictions on competitive bidding would enhance public safety and welfare).

[455] *Id.* at 695.

[456] *See* United States v. Brown University, 5 F.3d 658, 677 (3d Cir. 1993).

[457] *Id.*

of Reason because they served to protect the privacy of iPhone users.[458] In short, the freewheeling mode of analysis set forth in *Chicago Board of Trade* invites error.[459]

4. Asymmetric Effects of the Rule of Reason

All of the foregoing factors serve to stack the deck against antitrust plaintiffs.[460] Deep-pocket defendants can strategically use discovery to bleed plaintiffs dry during the pretrial phase, long before the trial itself.[461] Even where plaintiffs have adequate resources, the cost of antitrust litigation in a Rule of Reason case is enormous; and that cost alone may deter meritorious litigants from suing.[462] The cost and length of antitrust cases may also color judicial attitudes toward any given action.[463] Faced with a complex antitrust case and the prospect of a lengthy and expensive trial that in the end would require a complicated balancing exercise, a court acting outside its comfort zone may seek to pass the Rule of Reason altogether by granting a motion to dismiss or a motion for summary judgment.[464] Indeed, the Supreme Court in *Twombly*,[465] casting a suspicious eye on private treble damages actions, encourages trial courts to dismiss insubstantial cases at the threshold, prior to discovery and its attendant high costs.[466]

More importantly, the fact is that plaintiffs rarely win antitrust cases under the Rule of Reason.[467] This is not to suggest that antitrust plaintiffs are never successful. Over the years, these have been occasionally victorious, lately in student-athlete

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[458] *See* Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 1038 (N.D. Cal. 2021).

[459] *See* Cavanagh, *supra* note 309, at 437.

[460] *Id.* at 445.

[461] *Id.* at 450.

[462] *See id.*

[463] *See* James L. Gibson, *From Simplicity to Complexity: The Development of Theory in The Study of Judicial Behavior*, 5 POLITICAL BEHAVIOR 7, 32 (1983).

[464] *See* Cavanagh, *supra* note 309, at 464.

[465] *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558 (2007) ("So, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'").

[466] *See id.*

[467] *See* Carrier, *supra* note 431, at 830.

cases.[468] But these victories have been few and far between and amount to a few grains of sand amid a beach dominated by judgments for the defendants.[469] The reality is that the Rule of Reason, as currently implemented, is not party-neutral.[470]

D. Evening the Odds: Recalibrating the Rule of Reason

This Essay has identified the shortcomings of the Rule of Reason as applied by modern antitrust courts. Unless steps are taken to revamp the Rule of Reason analysis, antitrust plaintiffs will continue to be at a disadvantage, even if there is significant uptick in enforcement.[471] To level the antitrust playing field, I propose the following tweaks to the Rule of Reason analysis:

1. Any pro-competitive justification proffered by an antitrust defendant must be grounded in facts. Justifications based solely on economic theory—as opposed to facts—should be treated as pretext.[472]
2. The more egregious the conduct in question, the greater the pro-competitive justifications must be. While the competitive harm is severe and the justification weak, the justification should be treated as a pretext.[473]
3. If the defendant comes forward with any valid competitive justifications, the next issue is whether the pro-competitive benefits cited by the defendant could have been achieved by a less restrictive alternative. On that issue, *defendant*, not the plaintiff, should bear the burden of persuasion. Defendant's failure to prove that the pro-competitive benefits cited could not be achieve in a less restrictive away means judgment for the plaintiff.[474]

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[468] *See e.g.*, National Collegiate Athletic Assn. v. Alston, 141 S. Ct. 2141, 2145 (2021) (NCAA regulations may not restrict education-related benefits).
[469] *See* Carrier, *supra* note 431, at 830.
[470] *See* Cavanagh, *supra* note 309, at 450.
[471] *See* Carrier, *supra* note 431, at 830.
[472] *See* Stucke, *supra* note 447, at 1427.
[473] *See id.* at 1401.
[474] *See* Cavanagh, *supra* note 309, at 467.

4. If defendant does come forward with proof that cited pro-competitive benefits could be attained only by the restraints in question, the court then proceeds to the final step in the analysis—balancing. However, in balancing, the question that the court should address is whether the cited pro-competitive benefit *significantly* the anti-competitive effects. This new standard will ease the court's anxiety in conducting the balancing exercise.[475]

Conclusion

The first step toward achieving renewed and more robust antitrust enforcement is for public and private antitrust enforcers to bring cases. The second step is for those enforcers to persuade the courts to abandon the "simplistic theories that have underpinned antitrust law for decades"[476] and to focus the courts on the fundamental goals of antitrust law—to protect the competitive process. The proposals herein are modest first steps toward that goal.

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[475] *See id.*
[476] *See* Vaheesan, *supra* note 6, at 980.