AMERICAN ANTITRUST INSTITUTE

ANTITRUST, DOMINANT FIRMS, AND PUBLIC POLICY PROBLEMS:

A FRAMEWORK FOR MAXIMIZING SUCCESS BY MINIMIZING UNCERTAINTY

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I. INTRODUCTION

This White Paper develops a framework that policymakers can use to assess the benefits of existing antitrust law in combatting complex public policy problems involving dominant firms. Such problems often have economic, social, and political dimensions that call upon government to craft creative solutions using a variety of available tools. The available tools often include not only antitrust law, but economic and/or social regulation, intellectual property law, labor and trade policy, tax law, and other mechanisms that work together to achieve socially desirable outcomes. It is up to policymakers to choose the right tools and apply them in proper proportions.

For example, policymakers in the digital technology sector have been working to strike the right balance in addressing economic, social, and political concerns involving the role of large, dominant platforms and aggregators. We also see the evolution of multifaceted problems involving dominant firms in the food and agriculture sector, where there is growing concern over bottlenecks and fragility in the global food supply chain, in the energy sector, in the ongoing transition from fossil fuels to renewables, and elsewhere in the U.S. economy. But in the robust debate that often accompanies complex public policy problems involving dominant firms, advocates and policymakers sometimes struggle to understand the risks and benefits of relying primarily or exclusively on antitrust solutions.

Part of the challenge is that antitrust law has evolved to embrace high levels of technical complexity, rendering it impenetrable to many of the non-expert policymakers who seek to deploy it as part of a broader strategy. Particularly as evidence of rising economic concentration has accumulated, both at aggregate levels and in specific U.S. sectors and markets, confusion over antitrust law's capabilities has sometimes bred unrealistic expectations that the law can serve as a panacea. Yet, juxtaposed with the dearth of major merger and monopolization actions in spite of such evidence, it has also bred skepticism of the law's efficacy and suspicion that it is ideologically captured. What has been missing is a framework for policymakers to make practical assessments as to the strengths and weaknesses of an antitrust-focused approach to solving public policy problems.

This White Paper fills this gap. It provides policymakers with a framework for assessing potential outcomes when antitrust law is deployed to address public policy problems involving dominant firms. It assists policymakers in assessing the likelihood of achieving desirable solutions and understanding where other tools also should be brought to bear to help them achieve their goals in the near term.

As of this writing, several proposals to reform the antitrust laws have been introduced and discussed. Beneficial reforms that better address dominant-firm behavior can come, first and foremost, through the common-law evolution of antitrust doctrine in the courts. When antitrust enforcers, whether public or private, have the fortitude to bring novel,

pathbreaking merger and monopolization actions that are economically sound and within the broad scope of antitrust law's protections, valuable new precedent often follows and expands the law's capabilities. However, the process of common-law reform is notoriously slow.

Less frequently, but just as importantly, beneficial reforms also can come from administrative rulemakings or Congressional legislation. With sensible substantive and procedural changes through rulemaking or legislation, and in the hands of skilled, dedicated enforcers, antitrust law's capabilities likely could be significantly increased in the near term. Of course, with ill-conceived reforms, and in the wrong hands, retrenchment also is possible. Several reforms may now be in the offing, but their nature, timeline, and ultimate prospects remain unknown.

Accordingly, this White Paper considers the prospects of antitrust solutions to major public policy problems under current legal doctrine. In particular, it examines the prospects of beneficial antitrust enforcement in light of the law's current doctrinal goal of protecting the welfare effects that arise from commercial competition. The commercial competitive process is believed to create and increase pressure on businesses to charge lower prices, sell more products, buy more inputs, and pay higher wages ("price/output effects"), as well as to innovate and bolster the quality, variety, service, and choice associated with their offerings ("non-price effects"). The paper develops a framework for policymakers to assess whether and how antitrust litigation that increases this pressure and its effects can be useful in solving current public policy problems.

"Complex public policy problems that require complex solutions often demand that policymakers identify the proper role of antitrust law within a portfolio of available legal and regulatory tools."

The framework is based on five key variables that affect degrees of uncertainty associated with obtaining litigation-based antitrust relief that protects or restores competition. Section II of the White Paper provides background on the need for such a framework and the two primary forms of litigation-based antitrust relief that can be useful to policymakers: deterrence and equitable remedial orders. Sections III and IV examine key areas of antitrust law from which uncertainty variables can be derived, including core areas of agreement and disagreement, respectively, regarding antitrust law's underlying policy goals as articulated by the U.S. Supreme Court. Section V identifies and explains the five variables, based on this analysis. Section VI turns to the question of how policymakers can use the five variables to assess degrees of uncertainty in obtaining deterrent and remedial relief through antitrust litigation. Section VII concludes.

II. ANTITRUST LAW, DOMINANT FIRMS, PUBLIC POLICY PROBLEMS, AND UNCERTAINTY

During the last decade, the efficacy of U.S. antitrust law has come under heavy scrutiny in light of growing evidence that market power is on the rise in the U.S. economy.[1] Studies show, for example, that cartels and monopolies have demonstrated increased durability over time and that economy-wide lobbying and rent-seeking activities are on the rise.[2] Exclusionary practices have been permitted despite leading to higher prices and reduced output, and cartel prosecutions persist despite seemingly strong criminal and civil deterrents.[3] Moreover, rival firms are now typically owned by common institutional investors that have little incentive to encourage competition.[4]

Other measures show that concentration has been increasing at aggregate levels and in relevant product and labor markets.[5] Economy-wide indicators of economic dynamism such as levels of business investment, the profit share of gross domestic product, the rate of start-ups, and the closeness of the gap in accounting profitability between the most and least profitable firms, are in decline.[6] It comes as no surprise then that firms' surplus wealth and average price-cost margins also have been increasing and mergers have been systematically accompanied by increased price-cost margins.[7]

Although none of these findings are decisive individually, leading scholars believe that, collectively, they make a "compelling case" that "the exercise of market power has been widening for decades—extending to more markets, increasing in importance within markets, or both."[8] And, this has been occurring "[i]n spite of the depth of antitrust norms, precedents, and institutions."[9]

> *What has been missing is a framework for policymakers to make practical assessments of an 'antitrust approach' to solving public policy problems.*

Against this backdrop, policymakers have focused intently on the political and economic power wielded by large, dominant firms. For example, the Majority Staff of the Antitrust Subcommittee of the Senate Judiciary Committee recently conducted a multi-year investigation of dominant firms in the digital technology sector, which included seven evidentiary hearings and culminated in a 450-page report. The report described the firms as "the kinds of monopolies we last saw in the era of oil barons and railroad tycoons"[10] and concluded that their "power must be reined in and subject to appropriate oversight and enforcement" or "[o]ur economy and democracy are at stake."[11]

The antitrust laws' prohibitions on monopolization and anticompetitive mergers under the Sherman and Clayton Acts are widely recognized as key policy levers in combating the political and economic power of dominant firms. In a litigation context, the laws are potentially helpful to policymakers in two primary ways. First, antitrust lawsuits can deter socially undesirable dominant-firm behavior. Under existing law, deterrence is possible when plaintiffs can make plausible evidentiary allegations suggesting that the dominant firm's behavior produces an anticompetitive effect. Under Supreme Court law, claims supported by plausible evidentiary allegations of an anticompetitive effect are permitted to proceed past the preliminary stages of antitrust litigation.[12] Such claims have deterrence value, even if they are ultimately unsuccessful, because they impose meaningful litigation costs on defendants and help alert judges, legislators, regulators, other businesses, and the public to the defendant's socially undesirable behavior.[13]

Second, antitrust lawsuits can generate remedies that restore lost competition. Remedies may be possible based on plausible evidentiary allegations alone, because remedies sometimes can be achieved by voluntary settlement. However, remedies often require plaintiffs to prevail at subsequent stages of litigation by successfully supporting and proving their allegations, including at summary judgment and trial. Such remedies also require judges to fashion equitable orders that effectively restore the competition that has been lost as a result of the challenged conduct or merger, often by mandating divestiture of assets or lines of business.

> *"During the last decade, the efficacy of U.S. antitrust law has come under heavy scrutiny in light of growing evidence that market power is on the rise in the U.S. economy."*

Policymakers who can assess degrees of uncertainty in obtaining desirable deterrent and remedial relief through antitrust litigation can go a long way toward assessing the desirability of an antitrust approach to solving public policy problems, because they can develop reasonable expectations regarding antitrust solutions. The approach has important limitations, however. Most notably, antitrust litigation, particularly in the domain of monopolization and merger law, involves high baseline levels of uncertainty. Because the federal antitrust statutes are written in broad, constitution-like language that provides only vague guidance, the vast network of rules that govern specific commercial behaviors in the U.S. economy emanate principally from precedential court opinions.[14] And, like any system of common law rules, antitrust law's boundaries and capabilities, especially at the margins, can be murky and inconsistent.

Unpredictability also follows from the fact that the law's boundaries and capabilities are perennially in flux, insofar as they remain susceptible to new interpretations by individual judges from case to case. Individual judges in both federal and state courts differ

considerably in their familiarity and facility with the economic concepts undergirding antitrust law, as well as in their confidence and willingness to look past novel factual settings or nontraditional manifestations of competitive harm that superficially may appear unique but are in fact well grounded in familiar economic realities. Policymakers seeking to assess the desirability of an antitrust-focused approach therefore must accept that high baseline levels of uncertainty, whether with regard to obtaining deterrence or a remedy, are inevitable.

Nevertheless, some categories of antitrust claims generate more uncertainty than others, which allows for practical, albeit imperfect assessments of an antitrust approach to solving public policy problems. As the White Paper details in the next section, an appreciation for the key differences emerges from an understanding of the key areas of philosophical agreement and disagreement in antitrust law. These key areas are instructive because they disproportionately tend to shape the litigation arguments that are put before the judges who delimit the law's boundaries and capabilities from case to case.

Since the late 1970s, the key areas of agreement and disagreement in antitrust law have coalesced around the U.S. Supreme Court's stated goal in applying the law, which is "to encourage competitive markets to promote consumer welfare."[15] Many experts attribute this goal to the current "paradox of substantial market power with robust antitrust."[16] However, the goal's two components have attracted different kinds of scrutiny. On the one hand, there has been remarkable consensus, and almost no dispute, that antitrust law should continue to "encourage competitive markets," at least in some fashion.[17] On the other hand, there has been contentious public debate, and recent Congressional hearings, on whether antitrust law should continue to "promote consumer welfare" as that term has been defined and re-defined, and understood and misunderstand, over the last several decades.[18] Agreement that antitrust law should somehow protect and promote "competition," and disagreement over whether and how it should promote "consumer welfare," arguably are modern antitrust law's defining features.

This White Paper does not delimit the benefits that expansive, economically sound antitrust cases litigated before knowledgeable judges are capable of realizing for the good of the U.S. economy. It does not attempt to resolve current philosophical divides or specify the contours of effective legislative or administrative reforms, although it can inform them. Rather, the White Paper provides a pragmatic analysis that identifies several variables that policymakers can use to assess degrees of uncertainty in obtaining antitrust relief. It should be understood as drawing lessons from a descriptive rather than a normative account of existing law.

Sections III and IV explain how key areas of agreement and disagreement in antitrust law inform variables that can be used to assess degrees of uncertainty in obtaining antitrust relief. Section III focuses on the central area of agreement: the well-accepted idea that "the policy unequivocally laid down by the [antitrust laws] is competition."[19] Section IV focuses on three areas of disagreement: (1) whether consumer welfare is better served

by stimulating economic growth or protecting consumers' property rights, (2) whether the consumer-welfare goal is served by protecting competition throughout the supply chain or only by protecting competition at the end of the supply chain, and (3) whether antitrust law protects only the final, end-purchasers in a supply chain or also protects the other trading partners of firms with market power.

III. GUIDANCE FROM THE ROUGH "COMPETITION" CONSENSUS

For better or worse, "[t]he heart of our national economic policy long has been faith in the value of competition."[20] Moreover, the Supreme Court has stated unequivocally that the antitrust laws are "aimed at preserving free and unfettered competition as the rule of trade."[21] However, as Judge Bork explained in his infamous book, The Antitrust Paradox, confusion in antitrust law can arise "from the ambiguity of the word 'competition'" and "[t]he fact that judges, like the rest of us, have used the word to mean very different things."[22]

A. A SHARED VIEW THAT ANTITRUST LAW PROTECTS AN AMBIGUOUS CONCEPT

Judge Bork believed "competition" could have any of five different meanings that deserved to be sorted out. It could be defined, (1) as "the process of rivalry"; (2) as "the absence of restraint over one person's or firm's economic activities by any other person or firm"; (3) as "that state of the market 'in which the individual buyer or seller does not influence the price by his purchase or sales'"; (4) as "the existence of fragmented industries and markets"; or (5) as "any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs."[23]

Although Judge Bork preferred the fifth definition over the others, the Supreme Court has largely adopted a hybrid approach in conceptualizing "competition." In the Court's articulation, Congress adopted competition as the rule of trade "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."[24]

For policymakers, the implications of the modern Court's adoption of this implied Congressional choice are threefold. First, the focus on "competitive forces" implicates "the process of rivalry" among commercial market participants, which "is the means by which a competitively structured industry creates and confers its benefits."[25] Second, the focus on "yield" suggests the law does not view commercial rivalry "as an end in itself,"[26] but rather protects the competitive process as a means to the desirable ends that such rivalry is believed to generate.[27] Third, the focus on "unrestrained interactions" implies that the antitrust laws' approach to protecting the competitive process and its yield is to cultivate only a market "environment"—that is, the laws promote free and open markets

but do not prescribe any particular industrial outcome or structure for U.S. industry.[28] With these observations in mind, policymakers should recognize that the antitrust laws' commitment to competition and the competitive process poses risks in relying on the laws as a policy tool. First, antitrust enforcement promotes competition even where market failure threatens to prevent competition from living up to the premise on which the laws are based. Second, antitrust enforcement promotes competition even where competition causes harm to vulnerable members of society that policymakers may desire to protect. Each of these risks affects degrees of uncertainty that policymakers should consider in assessing the prospect of achieving deterrent and remedial relief under antitrust law, and particularly of achieving relief they would consider *desirable*.

> *"Policymakers who can assess degrees of uncertainty in obtaining deterrent and remedial relief through antitrust litigation can go a long way toward assessing antitrust law's usefulness, because they can understand how much confidence they should place in antitrust solutions."*

B. THE RISK THAT COMPETITION FAILS AND THE RISK THAT IT SUCCEEDS

The first risk follows from the fact that competition cannot always be trusted to deliver material progress and can even threaten to work against it. One example is where the competitive process undergoes long pauses, or effectively ends, with one firm or a very few firms "winning" the market, which is common, for example, in markets characterized by strong network effects. U.S. antitrust law distinguishes between monopoly obtained by foreclosing competitors and monopoly obtained by a "superior product, business acumen, or historic accident,"[29] notwithstanding that they are economically indistinguishable in their capacity to inflict injury on consumers and other market participants.[30] The law refuses to punish monopoly caused by competition itself on grounds that "the successful competitor, having been urged to compete, must not be turned upon when he wins."[31]

Even in markets that feature many competitors, and which have not been overwhelmed by a single dominant firm, competition sometimes still can fail to deliver material progress or, under certain conditions, even actively undermine it. For example, markets for information-based products can be susceptible, to varying degrees, to information asymmetries that may lead to market failure. When sellers compete on quality and consumers lack the ability to evaluate quality, "there may be a considerable opportunity for sellers to provide low-quality goods" and "competition may not be a viable response."[32] Buyers in these markets who lack the necessary information to make a welfare-enhancing choice are not helped, and could even be hurt, by the presence of competing offerings.

The correlation between competition and quality can break down readily in the context of "experience goods," whose quality consumers cannot know until after they have

been purchased and consumed, and "credence goods," whose quality consumers cannot evaluate at all, even after the fact.[33] In a so-called "lemons market" for used cars, to take an example of an experience good, the result of competition is that "dishonest dealers tend to drive honest dealers from the market."[34] Without regulatory interventions in the form of so-called "lemon laws," economists have shown that competition would lead sellers with higher-quality used cars to exit the market because they cannot earn higher profits from their higher costs.[35] And, as used-car customers adjust their expectations to anticipate lower-quality inventory, the process repeats itself, until competition results in only the lowest quality used cars remaining in the market.[36]

Credence goods, meanwhile, present "the most problems for a well-functioning market."[37] And of particular significance in the modern era of pervasive, information-based digital products, "information itself will often be a credence good."[38] Online review sites and search engines offer good examples. When a user searches TripAdvisor for information about a travel destination, or Google to compare the features of home appliances, the user may not know—even after performing the search—whether she received high-quality results, or even whether the results were well-controlled for fraud.[39] In these circumstances, the competitive process threatens to break down because "consumers lack the information to know whether switching is a good idea, *i.e.*, whether it will give them access to better information."[40]

> *"Policymakers should recognize that the antitrust laws' commitment to competition and the competitive process poses risks in relying on the laws as a policy tool."*

The beneficial effects of competition also can fall prey to market imperfections when one group of market participants is susceptible to behavioral manipulations by another. For example, in certain kinds of markets such as payday lending and high-interest credit cards, firms sometimes compete not by providing superior prices or quality, but rather by attempting to most effectively exploit their customers' psychological biases and imperfect willpower, inducing them to make commercial decisions that are against their objective or subjective personal and financial interests.[41] Without consumer protection and other similar laws, increased competition in such markets tends to lead to increased exploitation, making consumers (and other market participants) worse off.[42]

Firms can also use the credence-good qualities of information to "compete" using naked deception. Knowing and willful false statements can be profitable when they are not easily detectable, which is often true in "[t]echnical, scientific, or other professional fields" where such statements have been shown "most likely to be believed."[43] Microsoft, for example, was repeatedly accused over a span of decades of making false and fraudulent "'vaporware'" announcements.[44] Vaporware is a "marketing ploy of preannouncing [software] products that do not exist at the time of the announcement

and may never come into existence in anything like their described form," in order to dupe users into waiting in vain for upgrades that are not forthcoming.[45] The purpose of vaporware announcements is nakedly deceptive—they serve only to discourage users from switching to innovative rival software products, without providing any benefits in return. Far from increasing consumer welfare or material progress, such competition via deception raises consumers' search costs, raises rivals' transaction costs, induces consumers to purchase wrong or inferior products, and generally distorts markets and misallocates current and future economic resources.[46]

Finally, there is a second risk not that competition will fall prey to a type of market failure, but rather that competition will succeed. Even absent problematic market imperfections, the beneficial competition that successfully delivers material progress to consumers and firms' other trading partners itself produces "losers" in addition to "winners." For example, consumers can be victims of lawful competition when competition results in natural monopoly or oligopoly. Absent regulation, the law allows such consumers to be exploited by the monopoly for the maximum possible profit.[47] Likewise, workers' jobs, and even their basic ability to subsist, can be casualties of firm competition to innovate technologically or develop new business models that reduce their production costs.[48] And, small businesses can be put into bankruptcy or destroyed when their rivals achieve technological advancements or economies of scale that they cannot share or match.[49]

Many individuals and businesses thus endure significant hardship and suffering as a byproduct of the lawful competition that antitrust law encourages. Indeed, the most vulnerable consumers, workers, and small businesses, which society otherwise has a strong interest in protecting, sometimes can be as prone to injuries when competition is unrestrained as when it is restrained. And the Supreme Court has made clear that the antitrust laws afford no remedies for the often substantial injuries caused by competition itself.[50]

IV. HIDDEN GUIDANCE IN UNRESOLVED DEBATES: THE PRACTICAL REALITIES OF AN ANTITRUST LAW THAT PROMOTES CONSUMER WELFARE

While it may be unsurprising that the central area of philosophical agreement in antitrust law can provide policymakers a certain kind of useful guidance, so too can the central areas of philosophical disagreement. Ongoing debates over the consumer-welfare aspect of antitrust law's articulated goal can be instructive notwithstanding that they remain unresolved. For purposes of assessing antitrust law's utility as a policy tool, the debates need only be understood for their practical implications as to how antitrust cases are currently brought, litigated, and adjudicated. And the well-supported descriptive claims made by advocates on various sides of the consumer-welfare debates reveal several salient facts and practical realities.

Even in markets that feature many competitors, and have not been overwhelmed by a single dominant firm, competition sometimes still can fail to deliver material progress or, under certain conditions, even actively undermine it.

A. STIMULATING ECONOMIC GROWTH VS. PROTECTING PROPERTY RIGHTS: WHICH BETTER SERVES CONSUMER WELFARE?

One major source of uncertainty in antitrust case law, and major line of disagreement among antitrust experts and litigants, focuses on which kinds of legal protections promote consumer welfare. The disagreement centers on whether consumer welfare is served by an antitrust law devoted exclusively to stimulating economic efficiency, or by an antitrust law that also prevents forced wealth transfers to powerful firms that possess market power. Under the former view, antitrust law is devoted exclusively to economic growth. It properly condemns a powerful firm's conduct only if the conduct causes a net decrease in the sum of the welfare of all market participants, counting both sellers and buyers.[51] On this view, a powerful firm's conduct is excused whenever it is, on net, efficient, meaning it would allow the firm to produce the same level of output using fewer resources, or a higher level of output using the same resources.[52]

Proponents of this view—that antitrust law should be devoted exclusively to promoting economic efficiency and aggregate growth—believe courts should put aside the question of who captures the surplus generated by efficient firm behavior. Even if the surplus is captured by a firm with market power at the expense of a vulnerable consumer, they would maintain that the consumer is better off because the proverbial pie is made larger, notwithstanding that the consumer may get a smaller slice. Thus, a fiction is believed to be warranted whereby consumers who are made worse off by certain business practices are said to be made better off insofar as the practices would increase society's overall wealth.[53]

Conversely, proponents of the alternative view—that antitrust law prohibits forced wealth transfers to firms with market power—believe antitrust law is intended to prevent the misappropriation of wealth in addition to promoting overall economic growth. They would view the Sherman Act as "a type of consumer protection statute" that prevents a species of "extortion," in which consumers are forced to pay more than the competitive price (or sacrifice the non-price benefits of a bargain) to firms with market power.[54] Antitrust law, on this view, properly condemns conduct by firms with market power when the conduct forces a wealth transfer in the form of a net decrease in the welfare of the consumers with whom the firm trades, irrespective of any benefits captured by the firm itself or the firm's rivals, distributors, or suppliers.[55]

On this view, antitrust law cannot avoid asking who captures the surplus generated from efficiency gains by firms with market power. Challengeable conduct by firms with market

power should be excused only if it grows the pie *and* the added benefits are "passed through" to consumers (or other trading partners).[56] Consumers are believed to be better off when they are protected from forced wealth transfers to firms with market power, even if it means that society's overall wealth may not grow at the rate that it otherwise might.

Proponents of the view that antitrust law should focus single-mindedly on promoting efficiency maintain that the case law is consistent with their view. They point out that Supreme Court case law, dating back to *Continental T. V., Inc. v. GTE Sylvania Inc.* in 1977, can be construed as consistently prioritizing allocative efficiency concerns over other values.[57] However, proponents of the alternative view—that antitrust law protects against forced wealth transfers to firms with market power—note that the case law is consistent with their view as well. They note that courts impose liability upon a determination that conduct harms consumers without regard to whether the conduct is net efficient from the perspective of the firm with market power or other market participants.[58] The upshot is that the "efficiency vs. wealth transfer" debate rarely is determinative in litigated cases.[59]

> *"For purposes of assessing antitrust law's utility as a policy tool, the debates over the goals of antitrust need only be understood for their practical implications as to how antitrust cases are currently brought, litigated, and adjudicated."*

B. PRICE EFFECTS VS. NON-PRICE EFFECTS: WHAT IS "HARM" TO CONSUMER WELFARE?

A second major source of uncertainty, and second line of disagreement among antitrust experts and litigants, involves a dispute over the scope of protection afforded by antitrust law. This dispute centers on whether antitrust violations can be proven only through evidence of measurable price increases and output reductions or also through evidence of unquantified reductions in the non-price dimensions of competition.

The view that the United States has a price-focused antitrust law is typically supported on either normative or descriptive grounds. The normative view is that antitrust law should or must focus on price to maintain analytical coherence. The descriptive view, which is taken by some who disagree with the normative claim, point to enforcement trends suggesting that this view has nonetheless prevailed. In other words, the descriptive view is that successful antitrust cases, for better or worse, disproportionately tend to be based on allegations of price/output effects.

The normative view is typically defended on grounds that inferences of harm from qualitative rather than quantitative evidence risk "false positives," i.e. imposing liability for conduct that, on net, benefits consumers.[60] Proponents of this view do not necessarily dispute that firms compete along non-price dimensions or that the non-price effects of firm behavior can harm consumer welfare. Rather, they argue that, absent quantitative,

empirical evidence demonstrating a negative effect on price (or output), it is too difficult to distinguish between harmful and beneficial competitive effects of any kind.[61] They maintain that fictions are warranted whereby the costs of false positives from over-enforcement can be safely assumed to outweigh the costs of false negatives from under-enforcement, and that consumers are better off by being made to suffer difficult-to-measure harms than by risking imprecise attempts to deter or remedy them.[62] These fictions build upon the fiction discussed in the preceding section—that consumers can be presumed to be better off when society's overall wealth is increased, even if the wealth is captured by firms with market power at consumers' expense.

The descriptive view is typically defended on grounds that modern evidentiary standards have evolved in accordance with the normative view. Proponents of the descriptive view often posit that "any conduct not readily linked to price or output effects would escape scrutiny," and that the antitrust laws are often ineffectual because they can be interpreted, paradoxically, to require quantitative empirical proof of unquantifiable effects.[63] Many argue, accordingly, in favor of reforms or regulatory alternatives to antitrust law that would address the proof problems associated with difficult-to-measure welfare degradations. They seek changes that make it easier to prevent conduct that diminishes entry and innovation incentives of entrepreneurial firms and fosters "undemocratic" market structures (i.e. markets characterized by more concentration, less choice, less variety, and less diversity and vibrancy).[64] They maintain that current legal protections for these values are no more than lip service to the extent they require quantitative evidence that is categorically unavailable.[65]

Others take an alternative view, rejecting both the normative and descriptive claims and maintaining that antitrust law does in fact police against harms to the non-price benefits of competition in addition to the price/output benefits. Proponents of this view can point to numerous instances where conduct causing anticompetitive non-price effects in fact has been successfully prosecuted or remedied using existing antitrust law.[66] Notably, however, proponents sometimes offer this evidence in support of mutually exclusive conclusions. Some maintain that the law's clear capacity to police non-price effects, and evidence that enforcers sometimes do so successfully, should serve to validate status quo enforcement levels.[67] They reason that the law's broad reach, and an absence of direct, quantitative, empirical evidence of rising market power in many relevant antitrust markets in the United States, shows that current enforcement levels cannot be increased without risking false positives, which would wrongly punish beneficial firm behavior. Therefore, they argue, the status quo should be maintained.[68]

Other adherents to the view that the antitrust laws are flexible and can reach non-price harms in addition to price harms argue that the aforementioned collective, circumstantial evidence of a rise in market power over several decades, despite the law's clear flexibility and reach, should serve to condemn status quo enforcement levels.[69] They argue that antitrust law's demonstrated ability to prevent and remedy non-price harms, coupled with frequent inaction by enforcers and courts notwithstanding compelling circumstantial evidence of rising market power, should be understood to reveal current failings in antitrust law as rooted in faulty error-cost analysis embedded in case law rather than any fundamental conceptual shortcomings or inflexibility.[70]

C. END-PURCHASER WELFARE VS. TRADING-PARTNER WELFARE: WHO COUNTS AS A "CONSUMER"?

The third major source of uncertainty, and third line of disagreement among antitrust experts and litigants, involves a dispute over who merits antitrust law's protections. The dispute centers on whether antitrust law protects only the final, end-purchasers in a supply chain, who buy products in output markets, or also protects the other trading partners of firms with market power, who buy or sell products in input markets and may also benefit from the competitive process. Like the view that antitrust law is price-focused, the view that antitrust law recognizes only one protected class of final, end-consumers is alternately supported on normative and descriptive grounds.

> *"A major source of uncertainty in antitrust case law, and major line of disagreement among antitrust experts and litigants, focuses on which kinds of legal protections promote consumer welfare."*

Proponents of the normative argument maintain that an antitrust law focused exclusively on the welfare interests of final, end-consumers helps "frame a coherent body of substantive rules."[71] They maintain that, if it is accepted that the goal of the law is to protect people and businesses in the middle of the supply chain in addition to those at the end, then "a conflict in values arises" that "always turns out to mean that there are some cases in which protection of inefficient firms or the subsidization of small firms should overrule considerations of efficient resource allocation through the free market."[72] They argue that such 'subsidies' improperly create "a tax upon consumers for the benefit of producers—a tax not levied by Congress."[73] And, accordingly, antitrust law should only impose liability when harm to end-consumers can be clearly identified.[74]

The descriptive argument is that, for better or worse, the supporters of the normative claim have carried the day. Proponents of the descriptive argument note that the antitrust enforcement agencies, as a practical matter, have disproportionately focused attention and resources on output markets to the exclusion of input markets, notwithstanding that monopsony causes the same economic harm as monopoly.[75] For example, apparently no merger has ever been successfully challenged on the basis of anticompetitive labor market effects, despite clear risk factors of competitive harm in labor markets.[76] Moreover, in evaluating claims by businesses in the middle of the supply chain, antitrust authorities have sometimes neglected to properly distinguish between harm to competition in input markets and claimed efficiencies in related output markets.[77]

As with the "price-effects vs. non-price effects" debate, some reject both the descriptive and the normative claims in favor of an alternative view. Proponents of this alternative view—which maintains that antitrust law protects more than just end-consumers—reject the normative claim on grounds that analytical incoherence does not necessarily follow whenever antitrust law protects the other participants in a supply chain who benefit from

A major dispute centers on whether antitrust violations can be proven only through measurable price increases and output reductions, or they can also be proven through unquantified reductions in the non-price dimensions of competition.

the same kinds of welfare effects that end-consumers enjoy as a result of the competitive process.[78] They argue that a conflict in values, and the protection of inefficient firms at consumers' expense, can be safely avoided with proper precautions.[79] Although courts clearly accept "consumer welfare" as the goal of modern antitrust law, proponents of this more comprehensive view of antitrust law's protections believe the term should be properly understood as a shorthand for the broader concept protecting "trading parties on the other side of the market."[80] Sellers who are on the other side of the market from competing buyers, and intermediate businesses that are on the other side of the market from competing input suppliers, are entitled to the same benefits from competition as end-consumers and enjoy antitrust protection accordingly.

Proponents of this more comprehensive view of antitrust law's protections reject the descriptive claim by pointing to numerous examples where courts, including the Supreme Court, have used antitrust law to punish both monopsony abuses against suppliers and monopoly abuses against intermediate businesses, without regard to whether any economic injuries are passed through to end-consumers.[81] Indeed, courts routinely find firms with market power liable for such abuses even where it is clear that the challenged conduct does *not* pose a threat to end-consumers.[82] Thus, these proponents posit that the "'antitrust policy of maximizing consumer welfare is really a policy of maximizing everyone's welfare'"—that is, everyone who benefits from the competitive process in the same manner as consumers, through superior price and non-price terms of trade.[83]

However, there are still further disagreements. Among those that take the more comprehensive view of antitrust law's protections, views differ as to how far the law should go in accommodating the difficulty that can arise in distinguishing beneficial from harmful effects against suppliers and businesses when quantitative empirical evidence is unavailable.[84] Some take a more relaxed approach to comprehensive protection, arguing that antitrust law, to ensure that efficient behavior is never improperly punished, should require proof of an output reduction as a condition for imposing antitrust liability.[85] They argue that "buyers and sellers have in common … that both are injured by output reductions," but "[t]he impact of the consumer welfare principle on small firms is complex … and requires close analysis of individual cases."[86]

Without output reduction as a guidepost, those who take the relaxed approach worry that antitrust law would become inconsistent in the manner feared by proponents of an exclusive focus on end-consumers. The concern is that enforcers and courts would not know, from case to case, whether a finding of liability would cause consumers to

sacrifice for the good of small businesses or small businesses to sacrifice for the good of consumers.[87] They fear that accepting anything short of a demonstrable output reduction as proof of an anticompetitive effect would put judges in the untenable position of "trading off values for which there is no uncontroversial conversion rate."[88]

Others take a more aggressive approach to comprehensive protection. They argue that an output-reduction requirement would not meet current needs to marshal a proportional antitrust response to current evidence of rising market power. They argue that requiring proof of an output reduction, measured quantitatively, would be under-inclusive. It would overlook the vast majority of injuries to competition that manifest in unquantified, non-price effects. Such injuries typically are reflected not in countable units of output, but rather in qualitative measures that defy mathematical precision, including certain reductions in quality, choice, variety, and upstream investment or innovation incentives, as well as the "externalizing of a firm's costs to society."[89]

Consequently, some argue that the showing of a demonstrable output reduction should be relaxed when the federal government is the plaintiff, and that only the *threat* of an output reduction should be required in these circumstances.[90] Others propose that Congress or the Federal Trade Commission should establish presumptions or rules for when certain kinds of conduct are likely to impose hard-to-measure injuries against a consumer, purchaser, supplier, or other market participant at the hands of a firm with market power. Presumptions or rules arguably can be used to help the legal system filter the category of probably-harmful practices out of the economy when quantitative, empirical evidence of a price increase or output reduction is likely to be unavailable.[91] Similar kinds of presumptions currently are used in certain merger cases and foreclosure cases.[92]

V. FIVE VARIABLES FOR ASSESSING UNCERTAINTY IN OBTAINING ANTITRUST RELIEF

The analysis in Sections III and IV gives rise to five key variables that policymakers can use to assess degrees of uncertainty in obtaining antitrust relief to address public policy problems. The first two variables arise from antitrust law's commitment to protecting and promoting competition, discussed in Section III. Both of these variables address the risk that competition may not serve policymakers' goals in addressing a given public policy problem.

1. **THE THREAT OF MARKET FAILURE.** When competition occurs within the context of a market failure, it may exacerbate a given public policy problem rather than cure it. Because antitrust law is premised on "faith" in the value of competition,[93] it does not incorporate the risk that competition will produce undesirable consequences. Policymakers therefore should recognize that to the extent competition may occur within the context of market failure, they should consider using accompanying, complementary regulation in addition to antitrust law.[94]

Our analysis gives rise to five key variables that policymakers can use to assess degrees of uncertainty in obtaining antitrust relief to address public policy problems.

2. **THE WELFARE TRADEOFFS CAUSED BY LAWFUL COMPETITION.** Antitrust enforcement almost invariably leads to welfare tradeoffs even when it succeeds in its goal of protecting and promoting the competitive process and the social benefits it yields. Policymakers therefore should recognize that other tools necessarily will have to be brought to bear if their particular goal is to protect vulnerable constituencies from injury. When consumers, workers or small businesses suffer injuries caused by competition itself, antitrust law provides no relief.

The remaining three variables arise from disagreements over antitrust law's commitment to promoting consumer welfare. The third variable arises from the "stimulating economic growth vs. protecting property rights" debate; the fourth from the "price effects vs. non-price effects" debate; and the fifth from the "end-purchaser welfare vs. trading-partner welfare" debate.

3. **THE DETECTABILITY OF A WEALTH TRANSFER.** From the fact that the "efficiency vs. wealth transfer" debate rarely is determinative in litigated cases, we can infer that conduct that forces a wealth transfer to a firm with market power, but that creates a net *improvement* in measurable efficiency, does not typically appear in published court opinions.[95] The implication is that proof of a forced wealth transfer to a firm with market power is likely sufficient for a plaintiff to survive the preliminary stages of litigation, but the conduct also may have to be inefficient for the plaintiff to prevail at later stages of litigation. Policymakers therefore should recognize that evidence of a forced wealth transfer likely is capable of leading to both deterrent and remedial relief, but that it is likely *sufficient* to achieve only deterrent relief. Depending on the given judge's understanding of antitrust law's goals, precedent in the given jurisdiction, and the unique facts, there is a risk that conduct may also need to be inefficient for the plaintiff to be able to obtain remedial relief.

4. **THE NATURE OF EVIDENTIARY ALLEGATIONS OF AN ANTICOMPETITIVE EFFECT.** The numerous examples cited by defenders of antitrust law's flexibility and reach clearly demonstrate that non-price harms to competition are prosecutable and punishable. However, the proof problems that are associated with unquantified, non-price harms suggest that plaintiffs relying solely on allegations of such harms may have comparatively more difficulty in persuading fact finders.[96] Policymakers therefore should recognize that allegations of unquantified, non-price harm to competition likely are capable of leading to both deterrent and remedial relief, but that such

allegations, standing alone, may be *sufficient* to achieve only deterrent relief. Depending on the given judge's understanding of antitrust law's goals, precedent in the given jurisdiction, and the unique facts, there is a risk that allegations of unquantified, non-price harms may have to be accompanied by evidence of quantified, price/output harms to be sufficient to achieve remedial relief.[97]

5. **THE COMPATIBILITY OF ANY "INCOMMENSURABLE" COMPETITIVE EFFECTS.** The many instances where antitrust law has succeeded in punishing both monopsony abuses against suppliers and monopoly abuses against intermediate businesses, without regard to whether any economic injuries are passed through to end-consumers, show that viable antitrust claims can be made based on harm to any person or business. However, when upstream claimants challenge conduct that produces both non-price effects and price/output effects, and the non-price effects cannot be converted into quantifiable units of measurement that are commensurable with the price/output effects, judges will struggle when the evidence shows a harmful effect on one dimension of competition but a beneficial effect on the other. Policymakers therefore should recognize that harm to upstream claimants can support both deterrent and remedial relief, but that such allegations, standing alone, may be *sufficient* to achieve only deterrent relief. If the challenged conduct produces both non-price and price/output effects and the former are quantifiable, or the two kinds of effects are aligned (i.e. both harmful), then remedial relief likely is available as well. However, if the non-price effects are unquantified, and the two kinds of effects diverge (i.e. one is harmful and the other is beneficial), then the availability of remedial relief is less certain.

VI. IMPLICATIONS OF UNCERTAINTY VARIABLES FOR DETERRENT AND REMEDIAL RELIEF

The five uncertainty variables identified in the previous section can help policymakers assess the prospects of successfully achieving both deterrent and remedial relief through antitrust litigation. Where levels of uncertainty are comparatively low, policymakers can trust that the prospect of successful relief is comparatively high. Where levels of uncertainty are comparatively high, policymakers should recognize that the prospect of successful relief will turn heavily on the judge, jurisdiction, and unique facts. Accordingly, policymakers should strongly consider supplementary or alternative policy tools to address the given problem, if they wish to address the problem proactively.

A. UNCERTAINTY VARIABLES AFFECTING DETERRENCE

The first, second, and third uncertainty variables have important implications for policymakers in assessing whether antitrust litigation should be expected to have a desirable deterrent effect. In considering the first and second variables—the threat of market failure and the likelihood of welfare tradeoffs—policymakers should recognize that uncertainty increases or decreases depending on whether the competitive process

can be trusted to serve policymakers' goals in addressing the given problem. If there is a risk that increased competition would exacerbate rather than cure the given problem owing to market failure, or that lawful competition threatens injuries to vulnerable classes that policymakers are seeking to single out for protection, then deterring anticompetitive conduct by initiating antitrust litigation often will have little value. However, if neither of these risks are present, then initiating antitrust litigation is comparatively more promising.

In considering the third variable—the detectability of a wealth transfer—policymakers should recognize that uncertainty increases or decreases depending on whether a forced wealth transfer can be observed and therefore proven. Deterrent relief may be altogether unavailable if, notwithstanding any evidence of diminished rivalry, evidentiary support of a forced wealth transfer is lacking or the wealth transfer cannot be causally linked to the challenged conduct. However, if the plaintiff is able to make sufficiently plausible evidentiary allegations of a forced wealth transfer owing to a harmful non-price or price/output effect, then deterrence is otherwise feasible because such cases should survive the preliminary stages of litigation, including a motion to dismiss.[98]

> *"Where levels of uncertainty are low, policymakers can trust that the prospect of successful relief is high. And where levels of uncertainty are high, policymakers should recognize that the prospect of successful relief will turn heavily on the judge, jurisdiction, and unuque facts."*

B. UNCERTAINTY VARIABLES AFFECTING REMEDIES

All five uncertainty variables have important implications for policymakers in assessing whether antitrust litigation should be expected to lead to a desirable, court-imposed remedy. The first three variables contribute to remedial uncertainty for the same reasons they contribute to deterrence uncertainty. If deterrence does not serve policymakers' needs, a remedy should not be expected to do so either. And if the absence of a discernible forced wealth transfer casts doubt on a plaintiff's ability to survive the preliminary stages of litigation, it obviously casts doubt on the plaintiff's ability to survive the later stages of litigation as well.

The fourth variable—the nature of evidentiary allegations of an anticompetitive effect—and the fifth variable—the compatibility of any "incommensurable" competitive effects—provide additional guidance. In considering the fourth variable, policymakers should recognize that uncertainty increases or decreases depending on whether claims are premised on unquantified non-price effects. Uncertainty increases if claims are premised *solely* on unquantified, harmful non-price effects and decreases if claims are premised on quantified, harmful price/output effects, or both. Claims of non-price and price/output

harms can each have trouble surviving the later stages of litigation and thereby generating a remedy because of proof problems owing to the absence of "but-for-world" evidence—that is, evidence of the hypothetical market outcome if the challenged conduct had not occurred.

But, claims premised solely on unquantified non-price effects lead to comparatively more litigation uncertainty because they depend on the given judge's understanding of antitrust law's goals, precedent in the given jurisdiction, and the unique facts. Part of the challenge is that consumers' idiosyncratic preferences and perceptions may exacerbate the proof problems. For example, one consumer may believe the quality of a given product is high while another consumer may believe the quality of the same product is low. In contrast, the price the two consumers were charged is usually more easily established as an objective rather than a subjective evidentiary fact.

> *"The antitrust laws' complexity has generated confusion over what antitrust enforcement reasonably can be expected to accomplish under existing legal doctrine."*

In considering the fifth variable, policymakers should recognize that many forms of challenged conduct generate *both* non-price effects and price/output effects, instead of only one or the other. And when non-price effects cannot be converted into quantifiable units of measurement, the two kinds of effects are necessarily incommensurable. Uncertainty in obtaining a remedy increases or decreases depending on whether any incommensurable effects align or diverge. If they align, meaning the challenged conduct produces both kinds of effects, and both effects are harmful, then judges will have less difficulty in crafting a remedy, and uncertainty is comparatively lower. If they diverge, meaning conduct has a harmful effect on one dimension of competition but a beneficial effect on the other, judges will have more difficulty crafting a remedy, and uncertainty is comparatively higher.

For example, suppose Amazon began to automatically feature a given proprietary product and automatically obscure rival products in its online marketplace, notwithstanding that the proprietary product is both inferior to and more expensive than the rival products. If the rivals have no distribution alternatives, then the conduct would be expected to cause a harmful non-price effect by dampening the rivals' incentives to invest in further product development that benefits consumers. Because Amazon will feature its own product even if the rivals' products are superior, the rivals have no means of recouping any further investments.

At the same time, the conduct also would be expected to cause harmful price and output effects. Insofar as consumers are coerced into purchasing the inferior product in this example, they necessarily will pay more for, and buy less of, the product than if they

were afforded the chance to purchase the superior product. Thus, in this hypothetical, the non-price effects and price/output effects are aligned. Policymakers should assume that antitrust law likely can provide a remedy so long as the plaintiff can satisfy the other elements of its claim.

However, suppose Instagram were to design its mobile app by employing principles of addiction science that manipulate users into spending excessive amounts of time on the platform and have the effect of excluding rival applications. Here, the price/output effects and non-price effects of the design choice threaten to diverge. An addiction-driven product design likely would cause output to increase, with users spending significantly more time on the platform than they otherwise would. But, the same properties likely would cause the quality of the user's experience to decline. Psychology studies show that users who become manipulated by addictive software designs become distracted from personal and professional obligations, agitated, and anxious from over-use. The price and non-price effects of the addictive design choice thus appear to run in opposite directions: the quantitative output effect appears to be positive but the effect on quality, at least for many users, appears to be negative. If conduct produces divergent, incommensurable competitive effects, policymakers should recognize that antitrust enforcers and courts may struggle to craft an effective remedy, even if such a case could survive summary judgment and trial.

VII. CONCLUSION

Complex public policy problems that require complex solutions often demand that policymakers identify the proper role of antitrust law within a portfolio of available legal and regulatory tools. However, the antitrust laws' complexity has generated confusion over the promise and perils of relying on existing legal doctrine to help solve public policy problems. This White Paper has provided a framework for policymakers to assess the desirability of an antitrust approach in light of a given policymaker's own unique goals. By examining the prospect of deterrent or remedial relief through the lens of five key uncertainty variables, policymakers can gain a practical, albeit imperfect understanding of what the existing law should be expected to accomplish and whether other legal or regulatory tools also should be brought to bear.

REFERENCES

[1] Jonathan Baker, The Antitrust Paradigm 12–25 (2019) (citing and discussing over 100 studies chronicling eight indicators of rising market power).

[2] *See id.*

[3] *See id.*

[4] *See id.*

[5] *See id.*

[6] *See id.*

[7] *See id.*

[8] *Id.* at 13–14; *see also* Herbert Hovenkamp, *Antitrust's Borderline* 22 (U of Penn., Inst. for Law & Econ. Research Paper, No. 20-44, Aug. 11, 2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3656702.

[9] Baker, *supra* note 1, at 13.

[10] Majority Staff, H. Comm. on the Judiciary, 116th Cong., Investigation of Competition in Digital Markets: Report and Recommendations 6 (Comm. Print 2020) [hereinafter "House Majority Staff Report"].

[11] *Id.* at 7.

[12] *See Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007); *see also* Douglas H. Ginsburg, *Balancing Unquantified Harms and Benefits in Antitrust Cases Under the Consumer Welfare Standard*, 3 Colum. Bus. L. Rev. 824, 827 (2019) ("non-price effects may be difficult or impossible to quantify" but "[t]he temptation to ignore the qualitative must be resisted").

[13] *See* Tim Wu, *Tech Dominance and the Policeman at the Elbow, in* After the Digital Tornado 81, 84 (Kevin Werbach ed., 2020) ("[A] pending monopolization case, which focuses on exclusionary and anticompetitive acts and scrutinizes efforts to dominate industries, may affect firm conduct in recognizable ways."); *id.* at 83 (arguing that "the IBM lawsuit and trial, despite never reaching a verdict, actually catalyzed numerous transformational developments key to the growth and innovation of computing industries"); *see also* Albert A. Foer, *The Politics of Antitrust in the United States: Public Choice and Public Choices*, 62 U. PITT. L. REV. 475, 496 (2001) ("As a generalization, the success of a case is secondary to the larger policy questions of: (1) what is the overall policy objective? (2) Are there better ways to achieve the objective? And, (3) what are the costs and benefits of bringing a case? As referee for the level playing field, the antitrust enforcer throws a flag not to win a case but to uphold the rule of law.").

[14] The FTC adjudicates disputes administratively, but its final actions are subject to federal judicial review under the Administrative Procedures Act. See 5 U.S.C. § 704.

[15] *FTC v. Actavis, Inc.*, 570 U.S. 136, 161 (2013); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 539 (2013) ("'[T]he principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively.'") (quoting 1 P. Areeda & H. Hovenkamp, Antitrust Law ¶ 100, p. 4 (3d ed. 2006); *see also Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2303 (2018) ("The antitrust laws were enacted for the protection of competition….") (internal quotation omitted); *NYNEX Corp. v. Discon, Inc., 525 U.S.* 128, 135 (1998) (antitrust law protects against harms "to the competitive process, i.e., to competition itself."); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 107, (1984) ("'Congress designed the Sherman Act as a 'consumer welfare prescription.'") (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)).

[16] Baker, *supra* note 1, at 25. In the waning months of the Trump Administration, the Department of Justice and Federal Trade Commission, along with numerous state attorneys' general, filed major monopolization cases against Google and Facebook—arguably the most important such cases in over two decades.

[17] *Compare, e.g., The Consumer Welfare Standard in Antitrust: Outdated or Harbor in a Sea of Doubt?, Hearing Before the S. Judiciary Subcomm. on Antitrust, Competition and Consumer Rights*, 115th Cong. 2 (2017) [hereinafter "*Senate Consumer Welfare Hearing*"] (statement of Abbot B. Lipsky, Jr., Antonin Scalia Law School, George Mason Univ.) ("There can be no serious question that the central operational mechanism of the antitrust laws is to maintain a vigorous competitive process as the organizing principle for our market economy."); *id.* at 14 (statement of Barry C. Lynn, Exec. Dir., Open Markets Inst.) (it was the "will of Congress and the American People" to "achieve a vision of how to organize competition within our society); *id.* at 4 (statement of Diana Moss, President, Am. Antitrust Inst.) ("antitrust is the tip of the spear in preserving a competitive economy"); *id.* at 2 (statement of Carl Shapiro, Prof. of Bus. and Econ., U. Cal. Berkeley, Haas School of Business) ("*In my view, the proper goal of antitrust is straightforward: to promote competition*.") (emphasis in original); *id.* at 3 (statement of Joshua D. Wright, Univ. Prof., Antonin Scalia Law School, George Mason Univ.) ("antitrust law and antitrust enforcement institutions" should "calibrate their missions to serve their purpose of protecting competition.").

[18] *See generally id.*

[19] *N. Pac. Ry. Co. v United States*, 356 U.S. 1, 4 (1958); *compare, e.g.*, Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 Antitrust L.J. 713, 713 (2014) ("My thesis … is that the rule of reason focuses solely on how a challenged restraint affects the competitive process."), *with* Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 Cornell L. Rev. 1140, 1154 (1981) ("competition as process" is antitrust law's "overarching" and "unified" idea); *see also* Douglas H. Ginsburg, *Bork's "Legislative Intent" and the Courts*, 79 Antitrust L.J. 941, 947 (2014) (emphasizing that Supreme Court has declared the purpose of antitrust law to be "'the protection of *competition*, not competitors'") (emphasis in original).

[20] *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951).

[21] *N. Pac. Ry. Co. v United States*, 356 U.S. 1, 4 (1958).

[22] Robert Bork, The Antitrust Paradox 58 (1978).

[23] *Id.* at 58–61.

[24] *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 104 n.27 (1984) (quoting *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 4–5, 78 (1958)).

[25] Bork, *supra* note 22, at 58; Fox, *The Modernization of Antitrust*, *supra* note 19, at 1158 (competitive process "focuses upon rivalrous interaction").

[26] Bork, *supra* note 22, at 58.

[27] *See id.* at 57 (Sherman Act does not adopt "[a] policy of rivalry for its own sake" because it "outlaws not the condition of monopoly but only the process of monopolizing"); *see also* Fox, *The Modernization of Antitrust*, *supra* note 19, at 1158 (focus on competitive process "assumes that the process protected is likely to produce the best result for consumers"); *but see* Robert H. Lande & Richard O. Zerbe, Jr., *The Sherman Act Is a No-Fault Monopolization Statute: A Textualist Demonstration*, 70 AM. U. L. REV. 497 (2020) (arguing that Congress designed Section 2 of the Sherman Act to sanction all monopolies regardless of whether the firm engaged in anticompetitive conduct).

[28] Fox, *The Modernization of Antitrust*, *supra* note 19, at 1158 (preservation of competitive process contemplates "interaction among numerous firms in 'free and open' markets and protect[ing] access and opportunity of firms without market power").

[29] *United States v. Grinnell Corp.*, 384 U.S. 563, 770–71 (1966).

[30] *See* Lande & Zerbe, *supra* note 27, at 547–56 (2020) (describing economic harm caused by monopoly irrespective of conduct element).

[31] *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945).

[32] Mark R. Patterson, Antitrust Law in the New Economy 56 (2017) (distinguishing among "credence," "experience" and "search" goods); Ariel Ezrachi & Maurice E. Stucke, *The Curious Case of Competition and Quality*, 3 J. *Antitrust Enf.* 227 (2015) (same).

[33] Patterson, *supra* note 32, at 55; Ezrachi & Stucke, *supra* note 32.

[34] George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. Econ. 488, 489 (1970).

[35] *See id.*

[36] *Id.*

[37] Patterson, *supra* note 32, at 55.

[38] *Id.* at 55–56.

[39] *Id.* at 55.

[40] *Id.* at 56.

[41] Maurice E. Stucke, *Is Competition Always Good?*, 1 J. Antitrust Enf. 162, 175–76 (2013) (discussing example of credit card company targeting low-income customers by offering free credit cards with high penalty fees, because customers tend to be overly optimistic about their ability to avoid penalties).

[42] *See* Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 Antitrust L.J. 713, 733–34 (1997).

[43] Harry S. Gerla, *Federal Antitrust Law and the Flow of Consumer Information*, 42 Syracuse L. Rev. 1029, 1089 (1991); *see also* Robert Prentice, *Vaporware: Imaginary High-Tech Products and Real Antitrust Liability in a Post-Chicago World*, 57 Ohio St. L.J. 1163 (1996) (describing market freeze caused by fraudulent announcements of new software updates that discouraged users from switching to innovative rival products).

[44] Prentice, *supra* note 43, at 1163; *see id.* at 1178–1185 (chronicling numerous accusations from 1977-1996).

[45] *See id.* at 1163.

[46] Maurice E. Stucke, *When a Monopolist Deceives*, 76 Antitrust L.J. 823, 824–25 (2010); *see also* Arthur C. Pigou, The Economics of Welfare pt. II ch. IX § 17 (4th ed. 1932) ("As a rule . . . the social net product of any dose of resources invested in a deceptive activity is negative.").

[47] *See* Lande & Zerbe, *supra* note 27; Marina Lao, *No Fault Digital Platform Monopolization*, 61 W&M L. Rev. 755, 781–83 (2020).

[48] *See* Ioana Marinescu & Herbert J. Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 4 Indiana L.J. 1031, 1032 (2019) (distinguishing between efficient reduction in transaction costs and monopsonistic price suppression).

[49] *See* Howard A. Shelanksi, *Information, Innovation, and Competition Policy for the Internet*, 161 U. Penn. L. Rev. 1663, 1694 (2013) ("[I] nnovation itself excludes rivals by leaving them behind or by shutting them out of complementary product relationships, yet that innovation can still improve social welfare.").

[50] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (disallowing claim by bowling alley injured by increased competition and holding that to have antitrust standing plaintiffs must allege injuries "of the type the antitrust laws were intended to *prevent*") (emphasis added).

[51] *See* Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 Loy. Consumer L. Rev. 336, 336 (2010); Bork, *supra* note 22, at 91 (1978).

[52] *See* F.M. Scherer & David Ross, Industrial Market Structure and Economic Performance 130 (3d ed. 1990).

[53] *Compare, e.g.*, Bork, *supra* note 22, at 7 ("Business efficiency necessarily benefits consumers by lowering costs of goods and services or by increasing the value of the product or service offered."), *with* Salop, *supra* note 51, at 336–37 ("Efficiency benefits count … but only if there is evidence that enough of the efficiency benefits pass through to consumers so that consumers (i.e., the buyers), would directly benefit on balance from the conduct.").

[54] Robert H. Lande, *Proving the Obvious: The Antitrust Laws Were Passed to Protect Consumers (Not Just to Increase Efficiency)*, 50 Hastings L.J. 959, 961–62 (1999).

[55] Salop, *supra* note 51, at 336–37. Disagreements over who counts as a "consumer" are discussed *infra* in Section IV.C.

[56] *See id.*; *see also* U.S. Dep't of Just. & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10, at 34 (2010) ("[T]he Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies. The greater the potential adverse competitive effect of a merger, … the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market.").

[57] *See* Douglas H. Ginsburg, *Judge Bork, Consumer Welfare, and Antitrust Law*, 31 Harv. J.L. & Pub. Pol'y 449, 453 (2008) (arguing that Supreme Court has "emphasiz[ed] allocative efficiency over other values" and thereby "implicitly endorsed Bork's thesis").

[58] *See, e.g.* Salop, *supra* note 52, at 339–342 (noting that merger case law credits efficiencies only if they are passed on to consumers, that horizontal restraints case law looks to impact on prices and output to establish an anticompetitive effect, and that predatory pricing law allows below-cost pricing that increases consumer surplus notwithstanding that it diminishes producer surplus); *see also* Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 Fordham L. Rev. 2471, 2472 (2013) ("The consumer welfare principle must therefore be counted as 'distributive' to the extent that it produces outcomes that shift wealth or resources in favor of consumers even though an alternative outcome would produce greater total wealth."); John B. Kirkwood & Robert Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 N.D. L. REV. 191 (2008) (courts "do not mention producers' surplus; they do not compare gains in producers' surplus with reductions in consumers' surplus; and they do not ask whether increases in productive efficiency outweigh losses in allocative efficiency").

[59] *See* Hovenkamp, *Implementing Antitrust's Welfare Goals*, *supra* note 59, at 2474; *but see* Kenneth Heyer, *Consumer Welfare and the Legacy of Robert Bork*, 57 J.L. & Econ. S19, S31 (2014) (agreeing with Hovenkamp but observing that this could be a function of case selection and litigation strategy).

[60] *See, e.g.*, Frank Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 36 (1984) (arguing that it is "vacuous" to consider non-price restraints independent of price restraints and advocating that certain suits be automatically dismissed "[i]f the effect on price is uncertain"); *see also* John Harkrider, *Proving Anticompetitive Impact: Moving Past Merger Guidelines Presumptions*, 2005 Colum. Bus. L. Rev. 317 (2005) (arguing that merger presumptions should be abandoned "because they are not supported by sufficient empirical evidence"); Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 Ariz. L. Rev. 609, 653 (2005) (arguing that documentary evidence implicating business executives should be discounted because "taking their words and actions at face value" could result in a failure "to distinguish between actual and merely aspirational" antitrust violations).

[61] Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. Comp. Law & Econ. 153, 172 (2009) ("A proper application of error-cost principles would deter intervention in [single-firm cases involving innovation harm] until empirical evidence could be amassed and assessed."); Easterbrook, *supra* note 62, at 33 ("The antitrust laws are designed to prevent reductions in output and the associated higher prices"); *see also* Thomas B. Nachbar, *The Antitrust Constitution*, 99 Iowa L. Rev. 57, 64 (2013) (arguing that a "major benefit of a singular focus on efficiency is its compatibility with the kind of balancing called for by the rule of reason. Any restraint can be broken down into a number of effects, and economics renders those effects perfectly commensurable, and hence balanceable."); *but see* Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 Vanderbilt L. Rev. 1, 4 (2016).

[62] *See* Manne & Wright, *supra* note 61.

[63] Kevin Caves & Hal Singer, *When the Econometrician Shrugged: Identifying and Plugging Gaps in the Consumer Welfare Standard*, 26 Geo. Mason L. Rev. 395, 407, n.49 (2018); Lao, *supra* note 47, at 773 ("In practice, however, because nonprice effects are unquantifiable and often unmeasurable, proof is very difficult to establish."); *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) (describing recurring "underlying proof problem" in cases alleging non-price harm); *see also* Eleanor Fox, *What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 70 Antitrust L.J. 371, 374 (2002) ("Debate over the concept of competitive harm can be disguised as a debate over proof. . . . If, upon the plaintiff's satisfying its prima facie case, one can infer a reasonable likelihood of output limitation …, then the problem is about proof. But if the plaintiff can make a prima facie case by proving facts that do not support such an inference, the problem is about concept."). Importantly, certain evidence of non-price effects can be quantified, in which case the non-price evidence becomes commensurable with price/output evidence. *See* Allensworth, *supra* note 61, at 8. However, other evidence of non-price effects is unquantifiable and therefore incommensurable. *See id.* at 4; Ginsburg, *Balancing Unquantified Harms and Benefits*, *supra* note 12, at 827 ("Admittedly, cases with non-price effects present a greater challenge for enforcers and courts because the non-price effects can be difficult or impossible to quantify."). Unquantifiable and incommensurable non-price competitive harms pose many of the greatest challenges for effective application of antitrust law in the digital technology sector. *See infra* Section IV (discussing Variable 5).

[64] *See, e.g.*, Caves & Singer, *supra* note 63, at 416 (proposing anti-discrimination tribunals to address innovation harms); House Majority Staff Report, *supra* note 10, at 379 (proposing structural separations and line of business restrictions to combat spreading concentration); Harry First & Eleanor M. Fox, *We Need Rules to Rein In Big Tech* 4 (NYU School of Law, Working Paper No. 20-46, Oct. 2020) (proposing administrative rulemakings to combat unfair methods of competition against third parties operating on platforms). Of course, competition sometimes results in lawful monopoly, in which case it does not deliver these non-price benefits that reform advocates seek to protect. *See infra* Section IV (discussing Variable 2); *see also* American Antitrust Institute, *Repeal of Network Neutrality Eliminates Important Antitrust-Regulation Partnership, Deprives Competition and Consumers of Needed Safeguards* (2017) (arguing for a complementary approach to antitrust enforcement and network neutrality regulation in combating innovation-based harms in the telecom industry), *available at* https://www.antitrustinstitute.org/wp-content/uploads/2018/08/AAI_Net-Neutrality-Repeal-Comm_F.pdf.

[65] Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 Antitrust L.J. 175, 192 (2007) (citing and discussing eight cases where non-price harm to competition was not redressed); *see also* Timothy J. Muris, GTE Sylvania *and the Empirical Foundations of Antitrust*, 68 Antitrust L.J. 899, 902 (2000) (explaining how "empirical evidence (or the lack thereof) has had a great impact on antitrust" in light of *Sylvania* Court's "demonstrable economic effect" language).

[66] Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get, Luncheon Keynote Address at George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads? (Feb. 15, 2019) (citing merger, tying, and resale price maintenance cases involving quality harms, 54 merger challenges involving innovation harms, and Section 7 and Section 2 challenges alleging monopsony abuses); *Senate Consumer Welfare Hearing*, *supra* note 17, at 6–7 (statement of Diana Moss) (citing cases alleging quality, innovation, or monopsony-based harms involving hospitals, physician practices, video content and distribution, semiconductor equipment, crop-planting technology, oilfield services and equipment, beef and pork packing, health insurance, nursing, and high-tech employment); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) (imposing liability for innovation-based harms and noting that a defendant sometimes "is made to suffer the uncertain consequences of its own undesirable conduct").

[67] *See*, *e.g.*, John M. Yun, *Does Antitrust Have Digital Blind Spots?*, 72 S.C. L. Rev. 305, 356 (2020) (arguing that "current antitrust law and enforcement" provides more reliability "for fostering innovation and economic progress than do the alternatives being proposed by its critics"); Joshua D. Wright & Jan D. Rybnicek, *A Time for Choosing: The Conservative Case Against Weaponizing Antitrust*, Nat'l Affairs (Fall 2020), https://nationalaffairs.com/time-choosing-conservative-case-against-weaponizing-antitrust (asserting, in the same article, that "[m]odern antitrust law—and its consumer welfare standard" is "more than capable of protecting competition in the digital economy" and also that "[i]t is difficult to find an area of law where the conservative legal movement [has] enjoyed as much success").

[68] *See*, *e.g.*, Joshua D. Wright, *Towards a Better Understanding of Concentration: Measuring Merger Policy Effectiveness* 3, 19, Note Submitted to the Organisation for Economic Co-operation and Development (Sept. 25, 2020) (If "current empirical evidence" cannot "identify a causal relationship" between "intensity of antitrust policy on the one hand and economic performance on the other," then "the fundamental question presented by the current debate—should merger policy be tightened or relaxed from current levels—is premature.").

[69] *See* American Antitrust Institute, The State of Antitrust Enforcement and Competition Policy in the U.S. 2–3, 38 (April 14, 2020) [hereinafter "AAI State of Enforcement Report"] (chronicling cumulative impact of measurable declines in merger, cartel, and monopolization enforcement over decades and concluding that "[c]hange in the way the U.S. promotes competition and protects the market system is therefore badly needed.").

[70] *See*, *e.g.*, Comments of the American Antitrust Institute, House Judiciary Committee Investigation into Competition in Digital Markets (April 17, 2020) (arguing that a "culture of excessive caution" has led agencies and courts "to be too deferential to theoretical efficiencies claims, too averse to the risk of 'false positives,' and too dismissive of the risk of 'false negatives'" but that "[m]any of the most substantial roadblocks" could be overcome by more a vigorous enforcement approach, political support, and legal reform in certain areas of case law), *available at* https://www.antitrustinstitute.org/wp-content/uploads/2020/04/HJC_AAI-Comments_4.17.20.pdf; *see also* Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 Antitrust L.J. 1, 2 (2015) ("[T]oday's antitrust conservatives ... systematically overstate the incidence and significance of false positives, understate the incidence and significance of false negatives, and understate the net benefits of various rules by overstating their costs. Collectively, these errors inappropriately tilt the application of a neutral economic tool, decision theory, against antitrust intervention.").

[71] Bork, *supra* note 22, at 50.

[72] *Id.* at 50, 56.

[73] *Id.* at 56.

[74] For a strident defense of this view, *see Fishman v. Estate of Wirtz*, 807 F.2d 520, 563–75 (7th Cir. 1986) (Easterbrook, J., dissenting); *see also* Fox, *What is Harm to Competition?*, *supra* note 63, at 373 (explaining that "antitrust minimalists or political libertarians" acknowledge "only two possibilities: reprehending conduct that limits output, and protecting competitors from competition."); Lao, *supra* note 46, at 783 ("Under the narrow, orthodox, Chicago-School interpretation championed by Robert Bork, consumer welfare is almost synonymous with allocative efficiency, and, thus, only practices that artificially restrict output are deemed to harm consumers.").

[75] Caves & Singer, *supra* note 63, at 414; Marshall Steinbaum, *Antitrust, The Gig Economy, and Labor Market Power,* 82 L. & Contemporary Probs. 45, 53 (2019); *see also* Marinescu & Hovenkamp, *supra* note 48, at 1032 (observing that "very few litigated cases have applied the merger law to buyers.").

[76] *See* Marinescu & Hovenkamp, *supra* note 48, at 1033 ("To the best of our knowledge no court has ever condemned a merger because of its anticompetitive effects in labor markets."); Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 Harv. L. Rev. 536, 570 (2018) ("[A]ntitrust litigation based on anticompetitive behavior by employers in labor markets has historically been quite rare, and mostly involved narrow and idiosyncratic settings like sports leagues.").

[77] *See In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1268 (9th Cir. 2020) (Smith, J., Concurring) (discussing examples); *see also* Randy M. Stutz, *Mr. Magoo at the Drive Through: The Right Antitrust Lens for Labor-Market Restraints in Franchise Settings, in* Albert A. Foer: A Consumer Voice in the Antitrust Arena 193, 216–19 (Nicolas Charbit & Sonia Ahmad eds., 2020) (arguing for firm adherence to prohibition on balancing competitive effects across different relevant markets).

[78] Hovenkamp, *Antitrust's Borderline*, *supra* note 8, at 4 (arguing that "[t]he consumer welfare principle in antitrust is best understood as pursuing maximum output consistent with sustainable competition" and observing that "if the output of toasters increases, consumers benefit from the lower prices. Labor benefits because more toaster production increases the demand for labor. Retailers, suppliers of electric components, shipping companies, taxing authorities and virtually everyone with a stake in the production of toasters benefits as well."); Gregory J. Werden, *Competition, Consumer Welfare, and the Sherman Act*, 9 Sedona Conf. J. 87, 91 (2008). ("[A] narrow definition of the term is irreconcilable with the Supreme Court's repeated admonition that the Sherman Act 'does not confine its protections to consumers, or to purchasers, or to competitors, or to sellers.... The Act is comprehensive in its coverage, protecting all or who are made victims of the forbidden practices by whomever they may be perpetrated.'" (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)).

[79] *See supra* note 78; *see also* C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 Yale L.J. 2078, 2079 ("We show that economic reasoning and case law support the conclusion that lost upstream competition is an actionable harm to the competitive process.").

[80] Herbert J. Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 Yale L.J. 1996, 2001 & n.14 (2018) ("These trading parties may be final consumers or businesses purchasing intermediate goods. They also may be suppliers such as workers or farmers who are harmed by the loss of competition when two large buyers merge.").

[81] *See supra* notes 58, 78; *see also Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019) ("A retailer who is both a monopolist and a monopsonist may be liable to different classes of plaintiffs—both to downstream consumers and to upstream suppliers—when the retailer's unlawful conduct affects both the downstream and upstream markets."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985); *Associated Gen. Contractors v. Carpenters*, 459 U.S. 519 (1983); *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982); *Mandeville Island Farms*, 334 U.S. 219.

[82] *See* Randy M. Stutz, *Mr. Magoo at the Drive Through: The Right Antitrust Lens for Labor-Market Restraints in Franchise Settings,* 196–200, *in* Albert A. Foer: A Consumer Voice in the Antitrust Arena (Nicolas Charbit & Sonia Ahmad eds., 2020) (citing and discussing examples); Hemphill & Rose, *supra* note 79; Werden, *supra* note 78, at 92; *see also* Hon. Richard D. Cudahy & Alan Devlin, *Anticompetitive Effect*, 95 Minn. L. Rev. 59, 80–88 (2010).

[83] Werden, *supra* note 78, at 96 (quoting Herbert Hovenkamp, Federal Antitrust Policy 77 (3d ed. 2005)).

[84] *See* Fox, *What is Harm to Competition?*, *supra* note 63, at 372 ("Different understandings of 'anticompetitive' in different jurisdictions may lead to different outcomes in the analysis of mergers and dominant firm conduct that may be exclusionary but do not necessarily change the shapes of the triangles and rectangles [of economists' diagrams], at least not in knowable ways."); *see also id.* at 379 (comparing reasoning in Judge Wood's opinion in *Toys "R" Us, Inc v. FTC* to Justice Scalia's reasoning in *Business Elecs. Corp. v. Sharp Elecs. Corp.*).

[85] *See* Herbert Hovenkamp, *Antitrust's Borderline*, *supra* note 8, at 5; BORK, *supra* note 22, at 123 ("Antitrust must content itself with the identification of attempts to restrict output and let all other decisions, right or wrong, be made by the millions of private decision centers that make up the American economy.").

[86] Herbert Hovenkamp, *Antitrust's Borderline*, *supra* note 8, at 3.

[87] Herbert Hovenkamp, *Distributive Justice and Consumer Welfare in Antitrust* 2 (Faculty Scholarship at Penn. Law, Aug. 11, 2013), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2870&context=faculty_scholarship (if antitrust law tried to ensure the viability of small businesses, "in doing so it might have to weigh the rights of these small businesses against those of consumers, who ultimately pay the price of inefficiency.").

[88] Allensworth, *supra* note 61, at 9. Professor Allensworth makes a compelling case that commensurability in antitrust law is a myth, including in cases premised on alleged output effects. She notes that value judgments are often unavoidable in weighing procompetitive and anticompetitive effects. *See generally id.*

[89] Warren Grimes, *Buyer Power and Retail Gatekeeper Power: Protecting Competition and the Atomistic Seller*, 72 Antitrust L.J. 563, 569 (2005); Diana L. Moss & C. Robert Taylor, *Short Ends of the Stick: The Plight of Growers and Consumers in Concentrated Agricultural Supply Chains*, 2014 Wis. L. Rev. 337, 359 (2014) (discussing effects of consolidation on agricultural supply chain fragility); Alex Marthews & Catherine Tucker, Privacy Policy and Competition, Brookings Inst. 25–26 (2019) (discussing difficulty of measuring privacy harms); Thomas J. Horton, *Efficiencies and Antitrust Reconsidered: An Evolutionary Perspective*, 60 Antitrust Bull. 168, 178 (2015) (diversity); Neil W. Averitt & Robert H.

Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 Antitrust L.J., 175, 186 (2007) (choice/variety). Certain non-price effects are susceptible of measurement, however. *See*, *e.g.*, Giulio Federico, Fiona Scott Morton & Carl Shapiro, *Antitrust and Innovation: Welcoming and Protecting Disruption, in* Innovation Policy and the Economy 20 125, 132 (Josh Lerner & Scott Stern eds., 2019) (discussing measurement of unilateral innovation effects of mergers using innovation diversion ratios); *see also* Marthews & Tucker *supra*, at 25–26 (discussing efforts to quantify privacy outcomes by extrapolating from empirical data on identity thefts and data breaches).

[90] *See* Herbert Hovenkamp, *Antitrust Harm and Causation* 51–52 (Jan. 31, 2021) (noting that Clayton Act's "causation requirement is diluted by the language 'where the effect may be,' indicating that certainty is not a requirement."), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3771399; *see also* Fox, *What is Harm to Competition?*, *supra* note 63, at 387 ("[I[t is clear from the [Microsoft] court's description of each set of exclusionary acts … that output limitation and the resulting consumer harm … was not a necessary condition for characterization of conduct as anticompetitive"); Franklin M. Fisher & Daniel L. Rubinfeld, *Misconception, Misdirection, and Mistakes, in* Did Microsoft Harm Consumers? Two Opposing Views 87, 88 (2000) ("If a showing of present consumer harm were required, no predator could be stopped until after the campaign was over, when it might well be too late to avoid substantial consumer harm. Fortunately the legal standard is otherwise ….").

[91] *See* Andrew I. Gavil & Steven C. Salop, *Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis: Revitalizing the Rule of Reason for Exclusionary Conduct*, 168 U. Pa. L. Rev. 2107, 2114, 2134–37(2020) (presumptions play essential role in application of rule of reason); Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. Davis L. Rev. 1375, 1483–87 (2009) (more presumptions would make the rule of reason more consistent with rule-of-law principles); *cf.* First & Fox, *supra* note 64, at 4 (arguing for ex ante FTC rulemakings that would "shift the burden to the platform" for conduct "that appear[]s on its face to be offensive and inefficient" because otherwise "the litigation process will be too long and too uncertain, and will proceed under jurisprudence that is too indulgent to incumbents.").

[92] Presumptions are used in merger law because direct price and output evidence necessarily is unavailable when merger cases are litigated prior to consummation and threaten future injuries. *See United States v. Philadelphia National Bank*, 374 U.S. 321 (1963); *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001). A presumption of sorts also is used in attempted monopolization cases and certain monopoly maintenance cases. Baker, *supra* note 1, at 142. In the former, intent to monopolize coupled with a "dangerous probability of success" is sufficient to shift the burden to defendants to defend their behavior for the same reason as in merger cases—the harmful conduct may not yet have occurred. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993). In the latter, "substantial foreclosure" serves as the touchstone of liability because output effects are not discernible when a pre-existing monopoly prevents existing high prices from decreasing and existing low levels of output from increasing. *See* Steven C. Salop, T*he First Principles Approach to Antitrust, Kodak, and Antitrust at the Millenium*, 68 Antitrust L.J. 187, (2000) (discussing five analytical traps that result from failing to account for an incumbent monopolist).

[93] *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951) (emphasis added).

[94] It may be that increased competition through antitrust enforcement is effective, but only when it is complemented by supporting laws or regulations that can correct for the risk that competition may be ineffectual or could even cause perverse results. *See supra* note 64.

[95] Examples of such conduct are discussed *infra* in Section IV.B; *see also* Randy M. Stutz, Antitrust Law and Dominant-Firm Behavior in the Digital Technology Sector: Toward an Actionable Agenda for Policymakers __, Am. Antitrust Inst. (2021) (discussing Amazon self-preferencing conduct shown to increase demand and reduce shipping costs but to stifle and discourage entry, growth, and innovation by rivals on the platform).

[96] *But see Microsoft Corp.*, 253 F.3d at 79 (noting that, under existing law, firms can be made to suffer the uncertain consequences of their own undesirable conduct).

[97] *But see* Fox, *What is Harm to Competition?*, *supra* note 63, at 375 (observing a de facto "steam valve" in U.S. antitrust law that gives "lip service to the output limitation standard but creativity in its use," particularly in the law of exclusionary restraints where "the steam valve allows protection against unjustified but not necessarily output-limiting exclusions, in the name of output limitation").

[98] *See supra* Section II (discussing costs and scrutiny associated with cases that survive preliminary stages of litigation).