

Antitrust Reform: A Litigation Perspective

BY JONATHAN SALLET

STANDING IN FRONT OF A JUDGE OR panel of judges in open court is recognizably different than offering policy prescriptions about the danger of monopolies in a speech or op-ed. Preparing to have every assumption and assertion closely examined in public and in real time tends to further concentrate the mind. That is the promise of litigation—to parse carefully the metes and bounds of truth. Pending cases are winnable and will, I believe, be won

But the present-day perils of litigation for antitrust enforcers are plain. Three have an individual and intertwined impact on governmental actions: (i) the creation of legal doctrine, which is to say legal requirements placed on antitrust enforcers designed to make it harder for them to win cases - an exercise that too often represents ideology masquerading as empiricism, (ii) unfocused inquiries that breed confusion and/or complexity, thus adding unnecessary issues on which antitrust enforcers must expend limited resources to prevail, and (iii) the potential for defendants to construct a de facto defense out of the length of time needed to litigate a significant enforcement action. Collectively, these trends have made it too hard for antitrust enforcers to succeed, as illustrated by *Brooke Group*,¹ *Verizon v. Trinko*,² and *Ohio v. American Express Co.*,³ each of which is discussed below.

The promise and perils of litigation are today fundamental to the ability of antitrust to do a better job in the face of stubbornly-held market power.⁴ Important calls for reform have been premised on public policy analysis⁵ and economic learning.⁶ But although the judicial system plays a critical role in the administration—indeed the formulation—of antitrust, less emphasis has been placed on the day-to-day demands of litigation.

In other words, much has been said about antitrust reform; more should be said about the process of winning antitrust cases and succeeding in appellate review. Because of the trends that create litigation perils, the present circumstances are coming uncomfortably close to requiring antitrust enforcers to anticipate and bear the burden of addressing any potential defense just to proceed to full consideration of the merits.

Part I briefly reviews the systematic judicial creation of unnecessary burdens on antitrust enforcement, including those sparked by the Chicago School contention that overenforcement is more dangerous than underenforcement, an erroneous view that must be erased.

Part II suggests approaches for comprehensive reform, including a proposed way that federal and state antitrust enforcers can work together to confront unreasonable litigation burdens. Victory in some cases is no answer; systemic reform is needed to avoid losses that should not occur, the use of resources that should not need to be expended, and the concomitant injury if meritorious actions are not brought to court.

Ideally, new learnings would emerge from shared experience, scholarly thinking, and litigation analysis (before and after the fact). Think of it as the on-going composition of a Brandeis brief for the 21st Century, mustering the stuff of which better antitrust enforcement can be made. That effort would provide the judiciary a framework in which to better analyze and then banish the cumulative unnecessary burdens on antitrust enforcement. That work would inform on-going litigation and could culminate in a set of litigation guidelines that would provide assistance in specific cases much in the way that the horizontal merger guidelines have supplied courts with a framework for analysis. And, of course, such cooperation would symbolize the commitment of federal and state antitrust enforcers to work together comprehensively.

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The Excessive Burdening of Antitrust Enforcement

This section presents three intertwined trends that unnecessarily burden antitrust enforcement. Each has been addressed individually, particularly the impact of the Chicago School, but the focus here is on their combined impact. Consider this as hypothetical: In a Section 2 monopolization case, a court erroneously rules that the government must fail if it does not demonstrate that the defendant's conduct makes no economic sense (Chicago School doctrine), compounds the error by further ruling that, in any event, application of Section 2 requires the government to rebut any claimed competitive benefits in markets that have nothing to do with the market allegedly monopolized (unfocused and unnecessary inquiries), and then, even if the government prevails on liability, casts a skeptical eye at remedies on the ill-considered basis that the case took a long time to litigate (treating the time of litigation as if it could operate as a *de facto* defense). The burden is cumulative because each error would force the government to expend scarce resources knocking down one strawman after another, while it risks failure if it fails to clear every hurdle. And the risk is asymmetric—tossing more extraneous issues in the path of enforcement additionally benefits defendants that are better resourced. Because unnecessary burdens have a cumulative impact, their removal requires concerted and comprehensive action.

Ideology Posing as Empiricism: The Use of Legal Doctrine. I use the term “legal doctrine” to describe how courts misapply legal reasoning to require antitrust enforcers to prove more than is necessary to demonstrate competitive harm.

Consider this straightforward trilogy:

First, that monopoly is essentially good for competition. As Justice Scalia famously expounded in *Trinko*: “The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.”⁷ Why? Because, as Frank Easterbrook, contended: “Monopoly is self-destructive. Monopoly prices eventually attract entry.”⁸

Second, Easterbrook transformed that erroneous economic thesis⁹ into a rule of law. Easterbrook contended that the risk of overenforcement is greater than the risk of underenforcement.¹⁰ And “the Supreme Court has effectively written Easterbrook’s principal conclusion about error costs into antitrust jurisprudence.”¹¹ This was a critical turn because it put a thumb on the scale by assuming a fact not in evidence, namely that “entry will dull market power with sufficient frequency, to sufficient extent, and with sufficient speed, that false positives are systematically less costly than false negatives.”¹²

But even so, there was one more critical step, translating the general assertion that false positives are more dangerous than false negatives into the affirmative goal of making antitrust enforcement more difficult or, as Greg Werden wrote in 2006: “it is essential that plaintiffs be forced to carry a significant burden.”¹³ By 2020, Werden himself concluded

that the mark had been overshot. Writing to the House Judiciary Committee’s Antitrust Subcommittee, Werden noted that since the mid-1970s courts “ha[d] consistently ratcheted up the burdens placed on antitrust plaintiffs” but, “they have gone too far.”¹⁴

In fact, the Easterbrook hypothesis is both simple and simply wrong: “[e]conomic theory and evidence developed over the last forty years strongly support the reversed premise” from Easterbrook’s view of transient, easily-defeated monopolies, demonstrating that “it is economically naïve to assume that markets will naturally tend toward competition.”¹⁵ Market power can be quite durable; indeed “the same factors that cause the market to tip to a single provider might also increase barriers to entry for potential competitors.”¹⁶ One commentator has said plainly with reference to monopolization offenses, “I am not aware of any empirical evidence that Section 2 enforcement (either in general or in some particular manifestation) has ever actually caused harm by creating bad deterrence that outweighs its benefits.”¹⁷ Yet, the overhang of the Chicago School trilogy continues to place unwarranted barriers in the face of antitrust enforcement. Three are worthy of emphasis.

Doctrine That Bans or Skews Fact-Finding: The Chicago School has fostered doctrinal rulings that replace fact in all (or virtually all) relevant circumstances. Thus, for example, in *Brooke Group*, the Supreme Court not only rejected a predatory pricing claim, it went on to emphasize “the general implausibility of predatory pricing,”¹⁸ citing back to an earlier decision asserting “that predatory pricing schemes are rarely tried, and even more rarely successful.”¹⁹ It is not surprising that in the years after the decision in *Brooke Group*, no predatory pricing case succeeded in obtaining a judgment for plaintiffs in federal court,²⁰ despite the fact that economic research has identified a number of examples of successful predatory pricing.²¹

Doctrine That Ignores Facts. Appellate review of district court fact findings is said to be confined to determining whether the district court’s conclusions are “clearly erroneous,” a deferential standard.²² Indeed, “[w]here there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.”²³ But the Supreme Court has replaced district court factfinding with doctrinal pronouncements without concluding that the “clearly erroneous” standard has been met.

The Supreme Court’s decision in *Amex* is perhaps the leading example of judicial overreach that unnecessarily burdens antitrust enforcement²⁴ and, as such, has already been subject to substantial criticism,²⁵ with a focus on its erroneous ruling on market definition.²⁶

But that was not the only instance where the Court unnecessarily complicated the ability of antitrust enforcers to remedy anticompetitive conduct. For example, the district court accepted the government’s allegations that Amex imposed “anti-steering” requirements that prevented merchants from providing consumers truthful information

about alternative credit cards.²⁷ But the Court's analysis artificially emphasized the provision of rewards by American Express to its "wealthier cardholders who spend more money"²⁸ at the expense of other consumers who actually paid more as a result,²⁹ thus issuing an invitation for firms to use revenue obtained through anti-competitive means to buy off their own customers. Short-term pay-offs to selected consumers do not replace the long-term benefits of competition, and, even more importantly, reduction of competition "does not count as a competitive benefit, even if it is passed through [as savings] to downstream purchasers."³⁰

Similarly, the *Amex* Court shrugged off the district court's finding of harm by placing weight on the notion that credit card usage had grown between 2008-2013, in order to show that output increased,³¹ without employing a "but-for" analysis that asks what else might have caused growth in credit card usage and whether growth might have been even greater in the absence of the challenged conduct.

Dicta as A Way of Formulating Doctrine: When courts opine on issues not before them, the risk of error is excessively high. Thus, part of the problem is the use of expansive dicta that tilts the playing field against antitrust enforcement. For these purposes, consider "dicta" to be "any portion of the opinion that is inessential to the outcome" and note that, given the Article III prohibition on advisory opinions, "[d]icta is, at bottom, a form of advisory opinion for future cases."³² That limitation is not a matter of formalism. As Justice Frankfurter wrote:

Such opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests, we have consistently refused to give.³³

Trinko, *Amex* and *Brooke Group* are chockful of dicta damaging to antitrust enforcement.

The question before the Court in *Trinko* asked "whether a complaint alleging breach of the incumbent's duty under the 1996 [Telecommunications] Act to share its network with competitors states a claim under §2 of the Sherman Act."³⁴ All that was essential for the Court to justify its result was the conclusion that the mere allegation of a violation of sectoral regulation does not by itself state a violation of the Sherman Act.³⁵ Instead, the Court provided an extended and highly restrictive analysis of antitrust law, proposing new standards for assessing "refusals to deal," extolling the virtues of monopoly power and casting doubt on judicial competence in language that was not necessary to its holding and which has been read to be more sweeping than the actual and unusual circumstances of that case.³⁶ And along the way, it laid the basis for the notion that regulatory oversight can bar antitrust enforcement—another issue that was expressly not before the Court.³⁷ Although widely relied upon, the

broad generalizations about monopoly behavior and judicial competence in *Trinko* are unnecessary to its decision of the question presented and therefore should not be treated as barriers to further, and better, understanding of anticompetitive conduct.

The *Amex* Court clearly demonstrated the problem with the use of expansive dicta when it opined that market definition is needed in vertical restraint cases,³⁸ in a footnote and in defiance of the long-established principle that evidence of direct competitive effects removes the need to define a relevant market. The Court thus offered a view that should not be applied to rob courts of the ability to look at direct evidence of harm in vertical restraint cases. This misstep precisely demonstrates Frankfurter's admonition quoted above—the use of market definition in vertical-restraint cases was not squarely presented to the Court³⁹ and thus lacked "that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument."⁴⁰ Again, prudence suggests that antitrust enforcers should be free to demonstrate why direct competitive effects would obviate the need for market definition in specific future cases.

The *Amex* Court also offered its own version of a three-part rule of reason analysis while failing to note the possibility that antitrust enforcers are free to demonstrate that any legitimate competitive benefits are nonetheless outweighed by the extent of competitive harm.⁴¹ The statement was obviously dicta because the Court had ruled that the government failed even to establish a *prima facie* case,⁴² and should not in any event be read to reject past Supreme Court precedent⁴³ nor to survive the Supreme Court's subsequent emphasis on the need for rule of reason analysis to determine "whether a challenged restraint harms competition."⁴⁴

Similarly, *Brooke Group's* sweeping characterization of predatory pricing, discussed above, "was contingent upon the particular market structure at issues, the Court's highly unusual review of the evidence, and its reliance on a selective reading of the academic literature," which together "suggest that *Brooke Group's* skeptical dicta should be confined to the factual context of that case."⁴⁵

These types of doctrinal error, alone and together, paint a vivid portrait of novel requirements placed on antitrust enforcers while facts and basic notions of antitrust analysis, like the refusal in *Amex* to consider the circumstances of a "but for" market, are ignored.

The Fog of Law: Unnecessary Confusion and Complexity. As we have seen, Chicago-School-fueled legal doctrine can banish or curb the government's ability to present evidence of competitive harm. At the opposite end of the spectrum are circumstances in which lack of focus yields confusion and unwarranted complexity, both the foes of effective antitrust enforcement. This is not a recent phenomenon. In May 1911, the Supreme Court handed down *Standard Oil v. United States*,⁴⁶ which ordered the breakup of America's most famous trust. But when Louis Brandeis read

the Court's opinion he was dismayed. Given the result, why? Because the Supreme Court articulated a rule of reason standard that Brandeis saw as empowering unfettered judicial discretion that could, in turn, thwart antitrust enforcement. This was not a theoretical concern. Brandeis lived in the aftermath of *Lochner v. New York*, where the Supreme Court voided state employment laws based on its view of social philosophy.⁴⁷ Indeed his so-called Brandeis brief,⁴⁸ was constructed precisely to demonstrate the error of such doctrine.

The risk of confusion and needless complexity is asymmetrical, favoring defendants that can toss issue after issue in the path of antitrust enforcers, who bear the ultimate burden of persuasion. The failure to separate wheat from chaff has a disproportionate impact on the government when “[c]ertain evidence may not be reasonably available or will be unreliable because it (i) too often signals an erroneous conclusion, or (ii) is too likely subject to confusion, misinterpretation, or bias by the trial judge or jury.”⁴⁹ For example, “a defendant with substantial power has higher stakes in an exclusionary conduct case,” which can lead it to engage in tactics that can “raise plaintiffs’ litigation costs, and further tilt outcomes” including the proffering of additional evidence that can confuse and cause unnecessary complexity.⁵⁰ The potential for courts to avoid these challenges through the application of a “quick look” test⁵¹ has gone largely unfulfilled.⁵²

Thus, it is not surprising that antitrust enforcement has struggled where courts do not have a helpful lens through which to understand the relative importance of conflicting advocacy.⁵³ Although the rule of reason or similar analysis under Section 2 has been employed well in specific contexts, significant causes of unnecessary confusion and complexity continue to be seen in (i) the continued use of the consumer welfare test, (ii) the reluctance of courts to recognize when antitrust enforcers can make a presumptive showing of competitive harm, (iii) the creation of unnecessary burdens in the path of demonstrating harm to competition, (iv) the misunderstanding of what the defendant must show once a *prima facie* case has been established, and (v) judicial reluctance to implement the remedy historically touted as the most effective, namely divestiture.

First, when Robert Bork created the consumer welfare standard, his approach was simple. If the advantages from a horizontal merger accruing to the owners of the monopoly, including increased profits, exceeds the higher prices paid by consumers,⁵⁴ then “consumer” welfare is improved. But the owners of monopoly are not “consumers” in any ordinary sense of the term and this approach inevitably fuels the trends toward income inequality—dominant in the U.S. economy for the last 40+ years while eroding the economic opportunity that antitrust is designed to preserve.

This “consumer”-named approach is really a total welfare standard and, although it has not been adopted in original Borkian form, the closely-connected view has emerged that antitrust courts should balance out-of-market benefits

against in-market harm (which is to say the markets pled by the government). But to do that would overly-complicate litigation, requiring antitrust enforcers to play a game of legalistic whack-a-mole, batting down claims of benefits in far-flung markets in an essentially futile attempt to trace general equilibrium effects across the economy.

The appropriate standard should be to ask, as did the D.C. Circuit in *United States v. Microsoft*, whether conduct has harmed the competitive process.⁵⁵ As one federal appellate court has explained, “the antitrust laws are concerned with the competitive process, and their application does not depend in each particular case upon the ultimate demonstrable consumer effect. A healthy and unimpaired competitive process is presumed to be in the consumer interest.”⁵⁶ That is why, for example, monopsony harm to upstream sellers is harm to competition.

Second, where the Supreme Court had the opportunity to eliminate confusion by recognizing a presumption of competitive harm, it failed to do so. In *FTC v. Actavis*, the Supreme Court rightly ruled that so-called reverse payments can harm competition,⁵⁷ but the practical impact of that ruling was simultaneously weakened by the Court’s rejection of the FTC’s view that it should be able to make out a rebuttable presumption of harm by simply showing that the patentholder-defendant had paid generic drug-plaintiffs to delay their competitive entry. A rebuttable presumption would have placed on the parties to such an agreement (and defendants in the FTC action) the burden of producing evidence that the payment was for some purpose other than delay.

In rejecting a rebuttable presumption, the Court noted that it might be possible to provide a “convincing justification” for the payment.⁵⁸ But it failed to recognize that the convincing should be done by the defendant, which has both incentive and an informational advantage in proffering an explanation. Moreover, the Court should have indicated what evidence would be sufficient to rebut the presumption. The existence of a rebuttable presumption would place the burden of explaining the agreement where it properly belongs, on the parties who made the deal. Creation of a rebuttable presumption in *Actavis* would have sent the right signal to the lower courts to consider other, appropriate presumptions.

The structural presumption used in horizontal mergers exemplifies the way rebuttable presumptions work—antitrust enforcers can make out a *prima facie* case based on evidence of market structure alone.⁵⁹ In recent years, a series of important proposals have been made identifying additional presumptions that can be employed,⁶⁰ including the paper by Nancy Rose and Carl Shapiro in this issue of *Antitrust*, which, *inter alia*, calls for strengthening the statutory presumption and expressly applying it to labor markets.⁶¹ As a group these proposals offer insight into circumstances that should require the defendant to put on a defense without the antitrust enforcers demonstrating competitive harm.

Consider the use of an exclusive contract by a dominant firm. The facts of *McWane, Inc. v. FTC* are illustrative.⁶² McWane was the monopoly producer of domestic pipe fittings. When a competitor entered its market, McWane responded by telling its distributors, that “unless they bought all of their domestic fittings from McWane, they would lose their rebates and be cut off from purchases for 12 weeks.”⁶³ It is axiomatic under current law that exclusive dealing can sometimes be pro-competitive and sometimes anticompetitive but, as the *McWane* court put it:

[E]xclusive dealing arrangements are not per se unlawful, but [] can run afoul of the antitrust laws when used by a dominant firm to maintain its monopoly. Of particular relevance to this case, an exclusive dealing agreement can be harmful when it allows a monopolist to maintain its monopoly power by raising rivals’ costs sufficiently to prevent them from growing into effective competitors.⁶⁴

Under prevailing caselaw, antitrust enforcers bear the burden of going first, which they should be able to meet by demonstrating either actual or probable anticompetitive harm. But even that showing of probable harm may be a needless step where the dominance of the defendant is the core factor suggesting that exclusive dealing will have the impact of foreclosing competition. In these circumstances, a rebuttable presumption would require the defendant to demonstrate why prohibiting its distributors from doing business with its rivals does *not* harm competition after the government establishes that a monopolist is using such exclusive agreements.

In the merger context, four noted antitrust economists have offered a presumption that is similarly based on the existence of dominant market power. They suggest that a rebuttable presumption would exist “[i]f a dominant platform acquires a firm with a substantial probability of entering in competition with it absent the merger, or if that dominant platform company acquires a competitor in an adjacent market.”⁶⁵ This approach applies “where network effects and economies of scale would be expected to raise barriers to entry, and thus endow a dominant platform with substantial market power” which can occur if a downstream firm acquires an upstream input supplier that might enter the downstream market.⁶⁶

Third, antitrust enforcers face the continuing threat that they will be required to supply greater quantification of harm than is reasonable, as the Department of Justice learned in the vertical merger case of *United States v. AT&T*.⁶⁷

Consider the circumstances in which antitrust enforcers assess the importance of potential and/or nascent competition. Where potential or nascent competition is important, either in a merger or conduct case, “it can be difficult for governmental or private plaintiffs to prove that nascent or potential rivals are a competitive threat, even when that is in fact the case, simply because these firms, lack a track record showing what they can do.”⁶⁸ But monopolies are not free “to squash nascent, albeit unproven, competitors at will.”⁶⁹

Thus, as two commentators have written, “[t]he proper approach does not require proving...that successful entry in the ‘but-for’ world by the excluded innovator would necessarily or probably have occurred.”⁷⁰ A better approach should be to focus on the potential negative impact on innovation that itself poses serious (but not certain) threats to incumbent market power.⁷¹ For example, the *Microsoft* court expressly recognized that in a monopoly maintenance case liability can rest on the conclusion that the defendant’s conduct “reasonably appear[s] capable of making a significant contribution to . . . maintaining monopoly power.”⁷² Going beyond that by “imposing a requirement of evidence of actual harm would move the needle from reasonable probability closer to a standard of near-certainty more typically associated with criminal prosecution” thus wrongly increasing the burden placed on antitrust enforcer.⁷³

Fourth, courts should take care to appropriately define the duty of a defendant when the government establishes a *prima facie* case (whether by rebuttable presumption or otherwise); for example, merger guidelines have and should provide such guidance.⁷⁴

Current caselaw has been described as requiring the defendant “to show some justification for the restraint.”⁷⁵ Federal and state antitrust enforcers should explain why use of that standard would be wrong. Recent commentary explains that “a defendant should not be able to simply invoke the specter of procompetitive benefits without demonstrating that such benefits exist and *are of sufficient magnitude to overcome the harms proven by the plaintiff*.”⁷⁶ In fact, the federal agencies once imposed a requirement in horizontal merger investigations that the merging parties overcome the statutory presumption by a showing of clear and convincing evidence.⁷⁷ Circumstances in which the existence of market power itself is a key factor in understanding the impact of conduct (such as with exclusive contracts) would be a good candidate for a heightened defense requirement. At a minimum, the strength of a *prima facie* case (established through a rebuttable presumption or otherwise) logically “affects the defendant’s evidentiary burden to rebut evidence or presumption of harm.”

Fifth, doubt has been cast on the efficacy of divestiture—the remedy generally viewed as the first choice when antitrust enforcers have successfully challenged a consummated merger or monopolistic conduct. A great deal of antitrust commentary focuses on the liability stage, which is, after all, essential to antitrust enforcement. But restoration of competition requires an effective remedy that will “terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future.”⁷⁸ Moreover, divestiture sends the signal that antitrust is not just a slap on the wrist, almost a cost of doing business, and thus bolsters its deterrent effect. Indeed, divestiture is typically described as the preferred option because, as the Supreme Court explained “[i]t is simple, relatively easy to administer, and

sure.”⁷⁹ Conduct remedies can be very important⁸⁰, but can also flounder,⁸¹ and, where employed, “must be adequate to address identified risks, must be able to be monitored by the Antitrust Division or a court, and must be capable of being effectively enforced in a timely manner.”⁸² One important use of conduct remedies is to aid structural remedies.⁸³

The Supreme Court has strongly endorsed the use of divestiture; employing that structural remedy in more than forty cases between 1911 and 1990.⁸⁴ Divestitures were critical in well-known cases that ran from *Standard Oil*⁸⁵ to *United States v. AT&T*.⁸⁶ And the Supreme Court expressly recognized that the remedy must fit the wrong, explaining that “[i]f the Court concludes that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief, the Government cannot be denied the latter remedy because economic hardship, however severe, may result.”⁸⁷

Nonetheless, the use of divestiture has been subject to the Chicago-School attack⁸⁸ that is articulated as a “scrambled eggs” doctrine challenging the ability of courts to separate assets and order divestiture.⁸⁹ But, if one might be forgiven, that reasoning puts the eggs before the chicken. The scrambled eggs doctrine not only ignores the Supreme Court’s history of and rationale for upholding divestitures, it treats liability as if it were dependent on remedies rather than the reverse.⁹⁰ The selection of remedies is not, however, some kind of get-out-of-jail-free card for a monopolist that has been found to have violated the law. Rather, the duty of the court is to choose the best available remedies.

The Duration of Litigation Should Never Be Treated As A Quasi-Defense

The mere duration of litigation can further magnify the burdens placed on antitrust enforcers. As then-FTC Commissioner Thomas Rosch observed in 2010, litigation involving “fast-moving, high-tech markets” does “not fit snugly into the drawn out litigation process that we have in the U.S.”⁹¹ Or, as one antitrust lawyer described it more colorfully, “[t]he problem with these cases is that they sometimes get to trial at the start of the next geological period.”⁹²

In fact, the time needed to bring a case to trial may benefit defendants in consummated merger or conduct cases. A company that has maintained a monopoly through illegal conduct has no obvious financial incentive to reach a quick resolution. Moreover, if remedies merely stop but fail to undo the impact of anti-competitive conduct, such a defendant might even find itself better off the longer the litigation lasts even if it ultimately loses the case.

That complicated litigation takes time should not add to the effective burdens that antitrust enforcers must bear. Where a defendant argues that market conditions have changed during the pendency of litigation a court should consider whether (i) illegal conduct of some form continues (perhaps made more effective by earlier improper conduct), (ii) past harmful conduct provided a continuing improper

advantage, and/or (iii) the threat of harmful conduct continues. In any event, the length of litigation should never justify abandonment of the restoration of competition. Remedies are needed to ensure that artificial market advantage is erased, not just stopped.

Of course, rebuttable presumptions of the kind described above can help speed the process. But antitrust enforcers should look for additional solutions, such as seeking preliminary injunctions where harm will continue to accrue in the time that litigation is pending.⁹³ A preliminary injunction could get to the heart of the matter quickly, limit the continuing harm from past misconduct and streamline the merits litigation. For example, the State of New York obtained a preliminary injunction barring a drug manufacturer from withdrawing a prescription drug from the market pursuant to a product hop.⁹⁴ Preliminary injunctions have also been obtained in Section 2 cases where new harm is threatened with regard to tying,⁹⁵ an interlocking set of impending contracts⁹⁶ or threatened cancellation of a private plaintiff’s business account.⁹⁷

There are obvious questions about this approach—a shorter timeline might make any delay in obtaining discovery even more harmful to governmental plaintiffs and an interim remedy to stop new harm must be framed so that a court understands that its temporary assistance does not erase the continuing effects of past harm and thus does not undercut the need for broader permanent relief. For that reason, interim relief might be considered in cases in which challenged contractual practices or commercial courses of dealing are becoming more restrictive, are being implemented through additional parties, or are being extended for longer periods of time. Imagine, for example, a hypothetical based on the facts of *McWane* where a preliminary injunction could stop the use, extension and expansion of exclusive dealing agreements while leaving for final judgment whether the totality of conduct justifies structural separation of the defendant’s upstream and downstream operations.

Strengthening Antitrust Enforcement

Federal and state antitrust enforcers can work together to redress the continuing impact of the three intertwined, unjustified threats to antitrust enforcement. The approach must be comprehensive because, like barnacles on a ship’s hull, some of the increased burdens may seem small by themselves, but their impact on antitrust enforcement comes from their combined scope and mass.

Creating A Brandeis Brief for the 21st Century. As Colorado Attorney General Phil Weiser has explained, the challenge for antitrust today is “to demonstrate concrete factual situations that call for a re-assessment of legal standards now tilted to guard against the risk of over-enforcement while undervaluing the real harm caused by under-enforcement.”⁹⁸

My proposal is that federal and state antitrust enforcers work together to lay the practical foundation for defeating the different forms of threats to enforcement detailed here. The problem is that, in the heat of complex litigation,

arguments can assume a certain relativistic quality—even the most insupportable of contentions is just “one side of the story”. But the truth is not the average of all possible arguments and pointillism is a weapon of the defense. Today, it is the particular duty of antitrust enforcers to work together to provide the appropriate structure through which to assess harm to competition.

A good example of learning through litigation analysis comes from the FTC’s approach to hospital mergers. Faced with a string of judicial defeats, the FTC methodically created and successfully deployed new methodologies to restore the ability of antitrust enforcers to demonstrate anticompetitive harm. After seven successive losses, the FTC conducted merger retrospectives,⁹⁹ considered how best to demonstrate harm, and was able to prevail in the *Evanston Northwestern* case.¹⁰⁰

Fundamentally, the goal of the federal-state effort is to compile practical experience, scholarly learning and litigation analysis to explain how antitrust enforcement can best succeed. Of particular importance are explanations of how the agencies during investigations will determine whether pro-competitive benefits are pretextual, whether claimed pro-competitive benefits can be gained without the challenged conduct or whether conduct does more anticompetitive harm than good in the pled markets. Over time, the living collection of content that emerges for use in case-by-case analysis could be molded into a set of litigation guidelines.

Stronger Merger Guidelines: All harm from mergers is horizontal, only the mechanism of harm differs between, say, an anticompetitive horizontal and an anticompetitive vertical merger. Significant issues to confront include (i) toughening the horizontal market-concentration measures,¹⁰¹ and placing greater emphasis on the change in the level of market concentration that would result,¹⁰² especially in light of evidence that the likelihood of achieving meaningful efficiencies has been overstated,¹⁰³ (ii) ensuring the effective use of the upward pricing pressure analysis presented in the 2010 Horizontal Merger Guidelines, which can provide direct evidence of competitive harm,¹⁰⁴ (iii) preventing the anticompetitive acquisition of potential or nascent competitors,¹⁰⁵ (iv) changing the treatment of the doctrine of the elimination of double marginalization to ensure that antitrust enforcers never bear the initial burden of disproving claimed vertical efficiencies,¹⁰⁶ (v) refining the analysis of coordination to account for economic learning about purposive and non-purposive coordination¹⁰⁷ and, perhaps most importantly of all, (vi) demonstrating that the antitrust enforcers need not quantify the magnitude of or predict precisely which available route of anticompetitive conduct a merged corporation might in the future choose.

At the same time, care must be taken not to suggest that general economic principles are confined to only some sectors. In announcing a public process to revisit the agencies’ merger guidelines, the federal antitrust agencies asked for comment on “unique characteristics of digital markets.”¹⁰⁸

But the examples cited in that announcement are not unique to digital markets. First, as even the erroneous *Amex* decision illustrates, multi-sided business models populate other sectors. Second, “zero-price products” should not be referred to as such where, for example, consumers barter data for services, and, in any event can arise in other industries.¹⁰⁹ Third, the aggregation of data is important in the world of technology but data is also important in other industries, such as health care.¹¹⁰ The danger is that denoting “unique” characteristics of some industries will provide other industries a claim that those “unique” characteristics do not, by definition, apply to their conduct.

Remedies. As part of, or adjunct to, these forms of guidance, the agencies should lay out their view of remedies, with cogent explanations on what it takes in common circumstances to stop, erase and deter anticompetitive conduct. A focus on structural remedies is important, as is an understanding of the circumstances in which conduct remedies are most likely to be successful. As resources permit, antitrust enforcers should muster evidence of the effectiveness (or lack) of past remedies to support their remedial requests in specific cases.

Case Selection: In exercising prosecutorial discretion, antitrust enforcers must, of course, challenge the biggest threats to competition. Beyond that, antitrust enforcers need to be strategic in selecting the cases they bring, focusing not on the most newsworthy, but those with the greatest potential to advance the law. The DOJ’s recent merger challenge to Random House Penguin’s proposed acquisition of Simon & Shuster is a good example, simultaneously demonstrating the nature of monopsony harm and challenging a 5-to-4 merger (an important step in and of itself in an era when the federal antitrust agencies have tended to focus on 2-1 or 3-2 mergers).¹¹¹ In addition, each successful case provides a solid basis for both fleshing out the law of effective remedies and deterring other harmful conduct. For example, antitrust enforcers should lay the groundwork for the reversal of the following rulings, by the Supreme Court or Congress, but should also work to limit their harm to antitrust enforcement in the meantime:

- *Brooke Group* does not extend to pricing strategies like loyalty discounts; its dicta about the requirements of recoupment should be limited to the market structure and theory of recoupment in that case and courts should not substitute skepticism about the likelihood of predatory pricing for the facts at hand.¹¹²
- *Trinko*’s analysis of circumstances in which a defendant refuses to enter into a voluntary course of dealing with another firm is not relevant to circumstances where the defendant imposes exclusionary restrictions into a voluntary course of dealing. *Trinko* did not reject *Otter Tail*’s¹¹³ recognition of circumstances in which competition is harmed by withholding services.¹¹⁴ Its expansive dicta should not be given decisional significance.

- *American Express*: Of course, the Court’s market-definition ruling should not be extended but courts should also understand that they are not bound by dicta and commentary, including the notion that market definition is needed even in the face of direct evidence of market power.

Conclusion

There is much to be done if antitrust enforcement is to escape the gravitational pull of the Chicago School and the inertial drag of complex civil litigation. This paper offers a diagnosis of those challenges and thoughts on solutions.

Resources are unbalanced, and not in favor of stronger antitrust outcomes. That is why antitrust enforcers should build the strongest possible alliance in favor of antitrust enforcement. Of course, Congress should supply greater financial resources to the federal antitrust agencies. But we also need to pioneer the most effective alliance of federal and state antitrust enforcers, especially in an age in which state enforcement has not just supported federal efforts but challenged anticompetitive conduct by itself.

At the same time, we need serious, creative thinking about how to move forward. Of late there has been an attempt to categorize pro-enforcement advocates into various groups—with an emphasis on their differences. In my work as an antitrust enforcer, such labels are meaningless. The value of a law review article, economic paper, technical analysis or policy proposal comes from the power of its ideas, the clarity of its analysis and its ability to be implemented, and it is those ideas first and foremost, that are essential.

Finally, antitrust enforcement must demonstrate its adherence to the rule of law. If antitrust turns into a political contest, then the disproportionate political resources of the largest private interests, sometimes fueled by monopoly rents, may well carry the day. If antitrust enforcers view themselves as on the same side as some firms and against others then the fundamental purpose of antitrust will be lost—to serve the public, not any private interest—and antitrust enforcement will be seen as a favor to some, not a benefit to all. The rule of law, as the Attorney General has said, is “the very foundation of democracy,”¹¹⁵ and effective antitrust, as Louis Brandeis told us, is necessary to “maintain democratic conditions in America.”¹¹⁶ That is the big job that lies ahead. ■

¹ *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

² *Verizon Comm. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004).

³ 138 S. Ct. 2274 (2018).

⁴ JONATHAN B. BAKER, *THE ANTITRUST PARADIGM* 11-31 (2019) (describing factors that have led to increased market power). Legislative solutions are beyond the scope of this article.

⁵ See e.g., TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018).

⁶ See e.g., Jonathan B. Baker et al., *Joint Response to the House Judiciary on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets* 9 (Apr. 2020).

⁷ *Trinko*, 540 U.S. at 407.

⁸ Frank H. Easterbrook, *The Limits of Antitrust*, 63 *TEX. L. REV.* 1, 2 (1984). Easterbrook did note that “this long run may be a long time coming, with loss to society in the interim.” *Id.*

⁹ See, e.g. BAKER, *THE ANTITRUST PARADIGM*, *supra* note 4 at 84–85.

¹⁰ See Easterbrook, *supra* note 8 at 2–4.

¹¹ Joshua D. Wright & Murat C. Mungan, *The Easterbrook Theorem: An Application to Digital Markets*, 130 *YALE L.J. F.* 622, 625 (2020-2021); see also *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)

¹² BAKER, *THE ANTITRUST PARADIGM*, *supra* note 4 at 82.

¹³ See Gregory J. Werden, *Identifying Exclusionary Conduct under Section 2: The «No Economic Sense» Test*, 73 *ANTITRUST L.J.* 413 (2006). This view, arguing in favor of the “no economic sense” test, expressly followed from the view that “the administration of section 2 must guard against ‘false positive’ determinations that conduct is exclusionary because such determinations chill innovation and risk taking from which consumers benefit greatly.” *Id.*; see also 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, 2111–2 (2020) (noting that the emphasis on false positives “translated into a call for higher evidentiary burden on plaintiffs in cases alleging exclusionary conduct”).

¹⁴ Gregory J. Werden, *Views on Antitrust Issues Relating to the Digital Marketplace*, Submitted to the Subcommittee on Antitrust, Commercial and Administrative Law at 3 (April 10, 2020). Mr. Werden specifically criticized the Supreme Court decision in *Ohio v. American Express*, as an example of “courts now reject[ing] sound theories supported by substantial evidence.” *Id.*

¹⁵ Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 160 *U. PA. L. REV.* 1843, 1871–72 (2020); Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, *ANTITRUST*, see Summer 2021, at 37.

¹⁶ William P. Rogerson & Howard Shelanski, *Antitrust Enforcement, Regulation, and Digital Platforms*, 168 *U. PA. L. REV.* 1911, 1913 (2020).

¹⁷ Daniel Francis, *Making Sense of Monopolization: Antitrust and the Digital Economy at 60 ANTITRUST L.J.*(forthcoming).

¹⁸ 509 U.S. at 227.

¹⁹ *Matsushita*, 475 U.S. at 589.

²⁰ See C. Scott Hemphill & Philip J. Weiser, *Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing*, 127 *YALE L.J.* 2048, 2062 (2018) (as of 2017).

²¹ Fiona Scott Morton, *Modern U.S. antitrust theory and evidence amid rising concerns of market power and its effects: An overview of recent academic literature*, Washington Center for Equitable Growth, at 22–23 (2019) available at [Modern U.S. antitrust theory and evidence amid rising concerns of market power and its effects—Equitable Growth](https://www.equitablegrowth.org/wp-content/uploads/2019/07/Modern-U.S.-antitrust-theory-and-evidence-amid-rising-concerns-of-market-power-and-its-effects-Equitable-Growth-2019.pdf) (“[I]n this century, there has been a steady flow of theory and empirical research on predation that demonstrates it is not sufficiently rare or difficult that it should be exempt from enforcement.”)

²² *Zenith Radio Corp., v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

²³ *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985).

²⁴ See Steven Salop et al., *Rebuilding Platform Antitrust: Moving on from Ohio v. American Express*, 1 & n1. (2021), <https://scholarship.law.georgetown.edu/facpub/2414/> (describing *American Express* as “what may be the worst antitrust decision in many decades”).

²⁵ See e.g., Herbert Hovenkamp, *Platforms and the Rule of Reason: The American Express Case*, 2019 *COLUM. BUS. L. REV.* 35, 88 (2019) (“One danger of the Amex decision is its signal that neither close economic analysis nor careful examination of the record is necessary to apply antitrust law under the rule of reason.”); Michael L. Katz & A. Douglas Melamed, *Competition Law as Common Law: American Express and the Evolution of Antitrust*, 168 *U. PA. L. REV.* 2061, 2085 (2000) (“[T]he Court adopted a sweeping legal rule and based that rule on its highly imperfect understanding of the economic literature.”)

- ²⁶ See Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 *YALE L.J.* 2142, 2154 (2018)(explaining why the concept of a transaction platform does not describe a properly defined product market).
- ²⁷ *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 165 (E.D.N.Y. 2015) (reversed).
- ²⁸ *Am. Express Co.*, 138 S. Ct. at 2288.
- ²⁹ *Id.* at 2302 (Breyer J., dissenting)(“In particular, merchants generally spread the costs of credit-card acceptance across all their customers (whatever payment method they may use), while the benefits of card use go only to the cardholders.”).
- ³⁰ C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 *YALE J.* 2078, 2082.
- ³¹ *Am. Express Co.*, 138 S. Ct. at 2288.
- ³² Ryan S Killian, *Dicta and the Rule of Law*, 2013 *PEPP. L. REV.* 1, 8–9 (2013).
- ³³ *U.S. v. Freuhauf*, 365 U.S. 146, 157 (1961).
- ³⁴ *Trinko*, 540 U.S. at 401.
- ³⁵ *Id.* (The 1996 Act “does not create new claims that go beyond existing antitrust standards”).
- ³⁶ See Howard A. Shelanski, *The Case for Rebalancing Antitrust Regulation*, 109 *MICH. L. REV.* 683, 695 (2011).
- ³⁷ *Trinko*, 540 U.S. at 412; see *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007).
- ³⁸ *Am. Express Co.*, 138 S. Ct. at n.7 (citing Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 *ANTITRUST L.J.* 135, 160 (1984)).
- ³⁹ Petition for Writ of Certiorari, *Ohio v. Am. Express* (2017)(The question presented is: “Under the “rule of reason,” did the Government’s showing that Amex’s anti-steering provisions stifled price competition on the merchant side of the credit-card platform suffice to prove anticompetitive effects and thereby shift to Amex the burden of establishing any procompetitive benefits from the provisions?”).
- ⁴⁰ *Freuhauf*, 365 U.S. at 157. American Express’s version of the question presented similarly focused on whether the government had met its burden of establishing harm.
- ⁴¹ *Am. Express Co.*, 138 S. Ct. at 2284 ; *but see id.*, at 2290–91 (Breyer, J. dissenting).
- ⁴² *Am. Express Co.*, 138 S. Ct. at 2290. (“the plaintiffs have not satisfied the first step of the rule of reason.”)
- ⁴³ *Nat’l Soc’y Prof’l Eng’rs v. United States*, 435 U.S. 679, 691 (1978) (“[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition.”).
- ⁴⁴ *NCAA v. Alston*, 141 S. Ct. 2141, 2160 (2021).
- ⁴⁵ Hemphill & Weiser, *Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing*, *supra* note 20 at 2059.
- ⁴⁶ 221 U.S. 1 (1911).
- ⁴⁷ 198 U.S. 45, 54 (1905)(Holmes., J. dissenting).
- ⁴⁸ Jonathan Sallet, *Louis Brandeis: A Man For This Season*, 16 *COLO. TECH. L. J.* 365, 386 (2018) (“By 1916, of course, Brandeis had invented the ‘Brandeis brief’ precisely as a means of distinguishing *Lochner*.”).
- ⁴⁹ Gavil & Salop, *Probability, Presumptions and Evidentiary Burdens*, *supra* note 13 at 2122.
- ⁵⁰ *Id.* at 2127.
- ⁵¹ *Cal. Dental Ass’n v. FTC*, 526 U.S. 752, 770 (1999)(instructing courts to apply “quick look” analysis where “an observer with even a rudimentary understanding of economics could conclude that the arrangement would have an anticompetitive effect on customers and markets.”).
- ⁵² Edward Cavanagh, *Whatever Happened to Quick Look?*, 26 *MIAMI BUS. L. REV.* 29, 54 (2017)(“*Cal Dental* must be viewed as a lost opportunity”).
- ⁵³ Michael Carrier, *The Four-Step Rule of Reason*, *ANTITRUST*, Spring 2019, at 51 (“Between 1999 and 2009, courts dismissed 97 percent of cases at the first stage, reaching the balancing stage in only 2 percent of cases.”); Alan J. Meese, *In Praise of All or Nothing Dichotomous Categories: Why Antitrust Law Should Reject the Quick Look*, 104 *Geo. L.J.* 835, 855 (2016)(“Plaintiffs almost never prevail in a full-blown rule of reason case.”).
- ⁵⁴ See Nancy L. Rose & Jonathan Sallet, *The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting it Right*, 168 *U. PA. L. REV.* 1941, 1952 (2020). Bork, like Oliver Williamson who originated the economic analysis that Bork characterized, did not consider the dead-weight loss that comes from consumers who do not pay the higher post-merger loss – an impact likely, of course, to fall on lower-income consumers. *Id.* at 1950–51.
- ⁵⁵ *United States v. Microsoft*, 253 F.3d 34, 58 (D.C. Cir. 2001)(“[T]o be condemned as exclusionary, a monopolist’s act must have an ‘anticompetitive effect.’ That is, it must harm the competitive process and thereby harm consumers.”). Carl Shapiro has articulated the standard in this way: “A business practice is judged to be anticompetitive if it harms trading parties on the other side of the market as a result of disrupting the competitive process.” Carl Shapiro, *Fixing Antitrust: What Went Wrong and How to Fix It*, *ANTITRUST*, Summer 2021, at 38.
- ⁵⁶ *Fishman v. Wirtz*, 807 F.2d 520, 53 (7th Cir. 1986).
- ⁵⁷ 570 U.S. 136, 158 (2013).
- ⁵⁸ *Id.* at 159.
- ⁵⁹ See Hebert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 *YALE L.J.* 1996, 2000 (2018).
- ⁶⁰ See e.g., Steven C. Salop & Fiona Scott Morton, *The 2010 HMGs Ten Years Later: Where Do We Go From Here?* 58 *REV. OF INDUS. ORG.* 81, 86–87 (2021); Carl Shapiro, *Fixing Antitrust: What Went Wrong and How to Fix It*, *supra* note 55 at 39–40; Gavil & Salop, *Probability, Presumptions and Evidentiary Burdens*, *supra* note 13 at 2134–37; Jonathan B. Baker, Nancy L. Rose, Steven C. Salop & Fiona Scott Morton, *Five Principles for Vertical Enforcement Policy*, 33 *ANTITRUST*, Summer 2019, at 16–17.
- ⁶¹ Nancy L. Rose & Carl Shapiro, *What’s Next for the Horizontal Merger Guidelines*, *ANTITRUST*, Spring 2022, at 5, 9–10.
- ⁶² 783 F.3d 814 (11th Cir. 2015).
- ⁶³ *Id.* at 819.
- ⁶⁴ *Id.* at 832.
- ⁶⁵ Baker, et al., *Five Principles for Vertical Enforcement Policy*, *supra* note 60 at 17.
- ⁶⁶ *Id.*
- ⁶⁷ Carl Shapiro, *Vertical Mergers and Input Foreclosure Lessons from the AT&T/Time Warner Case*, 59 *REV. OF INDUS. ORG.*, 303, 330 (2021) (“I am concerned that proper enforcement will be crippled if the agencies are required by the courts to quantify net harm to downstream customers in order to establish their prima facie case. We can see from the AT&T/Time Warner case that such an approach would give the merging parties little or no incentive to engage honestly with the necessary economic modeling.”)
- ⁶⁸ Jonathan B. Baker, *Protecting and Fostering Online Platform Competition: The Role of Antitrust Law*, 17 *J.L. & ECON.* 493, 499 (2021)
- ⁶⁹ *United States v. Microsoft Corp.*, 253 F.3d at 79.
- ⁷⁰ C. Scott Hemphill & Tim Wu, *Nascent Competitors*, *U. PA. L. REV.* 1879, 1881 (2020).
- ⁷¹ *Id.* at 1890–91.
- ⁷² *United States v. Microsoft Corp.*, 253 F. 3d 34, at 79 (D.C. Cir. 2001).
- ⁷³ Gavil & Salop, *Probability, Presumptions and Evidentiary Burdens*, *supra* note 13 at 2133; See *Cal. Dental Ass’n v. FTC*, 526 U.S. 752, at 779 (1999).
- ⁷⁴ Rose & Shapiro, *What’s Next for the Horizontal Merger Guidelines*, *supra* note 61 at 7–8.
- ⁷⁵ Herbert Hovenkamp, *Antitrust Balancing*, 12 *N.Y.U. J.L. & Bus.* 369, 371 (2016).
- ⁷⁶ See Steven C. Salop et al., *supra* note 24 at 32 (emphasis in original).
- ⁷⁷ U.S. Dep’t of Justice & Federal Trade Comm’n, *Horizontal Merger Guidelines* at n. 53 (1982), <https://www.justice.gov/archives/atr/1982-merger-guidelines>.
- ⁷⁸ *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 250 (1968); see also *Cal. Dental Ass’n*, 526 U.S. at 779–81.

- ⁷⁹ United States v. E.I. du Pont de Nemours & Co., 366 U.S. 330-31 (1961).
- ⁸⁰ United States v. AT&T Co., 552 F. Supp. 131 (D.D.C. 1982), *affirmed* Maryland v. United States, 460 U.S. 1001 (1983).
- ⁸¹ John Kwoka & Tommaso Valletti, *Scrambled Eggs and Paralyzed Policy: Breaking Up Consummated Mergers and Dominant Firms* 10–11, (Nov. 24, 2020), <https://ssrn.com/abstract=3736613> (describing the Live Nation-Ticketmaster decree and issues concerning its enforcement).
- ⁸² Jon Sallet, *The Interesting Case of the Vertical Merger* at 11, (Nov. 17, 2016), <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-jon-sallet-antitrust-division-delivers-remarks-american..>
- ⁸³ AT&T Co., 552 F. Supp. (describing the break-up of regional Bell operating companies and conduct remedies like line-of-business restrictions).
- ⁸⁴ E. Thomas Sullivan, *The Jurisprudence of Antitrust Divestiture: The Path Less Traveled*, 86 MINN. L. REV. 565, 568–69 & n.15 (2002).
- ⁸⁵ 221 U.S. at 1 (1911).
- ⁸⁶ 552 F. Supp. 131.
- ⁸⁷ United States v. El du Pont Nemours & Co., 366 U.S. 316, 327 (1961).
- ⁸⁸ Rory Van Loo, *In Defense of Breakups: Administering a “Radical” Remedy*, CORNELL L. REV. 1562, 1569 (2020) (“Much of the intellectual foundations of oppositions to breakups come from the Chicago School.”).
- ⁸⁹ See e.g., *Sonesta Int’l Hotels Corp. v. Wellington Assocs.*, 483 F.2d 247, 250 (2d Cir. 1973) (“[O]nce the tender offer has been consummated it becomes difficult, and sometimes virtually impossible, for a court to ‘unscramble the eggs.’”).
- ⁹⁰ In *Microsoft*, the D.C. Circuit affirmed a liability finding while remanding the selection of remedies for a separate proceeding, which rightly put the horse before the cart (or chicken before the egg). 253 F.3d at 80 (affirming the conclusion that Microsoft unlawfully engaged in monopoly maintenance while indicating that certain Microsoft contentions “go to questions of remedy, not liability”).
- ⁹¹ J. Thomas Rosch, *Intel, Apple, Google, Microsoft, and Facebook: Observations on Antitrust and the High-Tech Sector* at 4, (November 18, 2010), <https://www.ftc.gov/public-statements/2010/11/intel-apple-google-microsoft-and-facebook-observations-antitrust-and-high>.
- ⁹² Richard Parker, *The Chair’s Showcase: The Future of Antitrust*, ANTITRUST 4, 26 (suggesting the use of a Section 2 “rocket docket” and/or interim relief in monopolization cases).
- ⁹³ See *United States v. Ingersoll-Rand Co.*, 320 F.2d 509, 524 (3d Cir. 1963) (where preliminary injunction was sought, no need to show irreparable injury “and the government is “not required to demonstrate the precise way in which violations of the law might result in injury to the public interest.”).
- ⁹⁴ *New York v. Actavis PLC*, 787 F.3d 638, 654-56, 660-61(2d Cir. 2015).
- ⁹⁵ *Collins Inkjet Corp., v. Eastman Kodak Co.*, 781 F.3d 264, 280 (6th Cir. 2015) *cert. dismissed* 136 S. Ct. 498 (2015).
- ⁹⁶ *Philadelphia World Hockey Club, Inc., v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 514 (E.D. Pa. 1972).
- ⁹⁷ *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725, 726 (3d Cir. 1962).
- ⁹⁸ Philip J. Weiser, *Meeting The Antitrust Moment*, at 10–11, <https://coag.gov/app/uploads/2021/02/Meeting-this-Antitrust-Moment.pdf>.
- ⁹⁹ Timothy J. Muris, *Everything Old is New Again: Health Care and Competition in the 21st Century* at 18 (2002), available at <https://www.ftc.gov/enforcement/cases-proceedings/0110234/evanston-northwestern-healthcare-corporation-enh-medical-group>. See also Deborah L. Feinstein, *To Know Where You’re Going, Look Where You’ve Been* 14, AAI Healthcare Roundtable: Competition and Healthcare – Enforcement and Policy Priorities (Feb. 22, 2017), <https://www.ftc.gov/public-statements/2017/02/known-where-youre-going-look-where-youve-been>. Deborah L. Feinstein, *To Know Where You’re Going, Look Where You’ve Been* at 14 (2017), available at https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/state_aggs_final_vmg_comments.pdf; see Proposed Conclusions of Law of the United States at 53, *United States v. AT&T et al.*, No. 1:17-cv-02511-RJL (D.D.C. May 5, 2018), available at <https://www.justice.gov/atr/case-document/file/1061066/download> (“Thus, if the United States bore the burden on efficiencies, ‘the efficiencies defense might well swallow the whole of Section 7 of the Clayton Act because management would be able to present large efficiencies based on its own judgment and the Court would be hard pressed to find otherwise.’”).
- ¹⁰⁰ *Evanston Northwestern Healthcare Corp.*, FTC Docket No. 9315 (Feb. 10, 2004) (complaint), <https://www.ftc.gov/sites/default/files/documents/cases/2004/02/040210emhcomplaint.pdf><https://www.ftc.gov/enforcement/cases-proceedings/0110234/evanston-northwestern-healthcare-corporation-enh-medical-group>. See also Deborah L. Feinstein, *To Know Where You’re Going, Look Where You’ve Been* 14, AAI Healthcare Roundtable: Competition and Healthcare – Enforcement and Policy Priorities (Feb. 22, 2017), <https://www.ftc.gov/public-statements/2017/02/known-where-youre-going-look-where-youve-been>. Deborah L. Feinstein, *To Know Where You’re Going, Look Where You’ve Been* at 14 (2017), available at https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/state_aggs_final_vmg_comments.pdf; see Proposed Conclusions of Law of the United States at 53, *United States v. AT&T et al.*, No. 1:17-cv-02511-RJL (D.D.C. May 5, 2018), available at <https://www.justice.gov/atr/case-document/file/1061066/download> (“Thus, if the United States bore the burden on efficiencies, ‘the efficiencies defense might well swallow the whole of Section 7 of the Clayton Act because management would be able to present large efficiencies based on its own judgment and the Court would be hard pressed to find otherwise.’”).
- ¹⁰¹ See Rose & Shapiro, *What’s Next for the Horizontal Merger Guidelines*, *supra* note 61 at 6–7.
- ¹⁰² *Id.*; see also Volker Nocke and Michael Whinston, *Concentration Screens for Horizontal Mergers* (NBER Working Paper No. 297533, July 2020) (forthcoming, *American Economic Review*).
- ¹⁰³ Rose & Sallet, *Dichotomous Treatment of Efficiencies*, *supra* note 54 at 1961-1967.
- ¹⁰⁴ Rose & Shapiro, *What’s Next for the Horizontal Merger Guidelines*, *supra* note 61 at 7 & n. 34.
- ¹⁰⁵ Hemphill & Wu, *Nascent Competitors*, *supra* note 72.
- ¹⁰⁶ U.S. Dep’t of Justice & the Fed. Trade Comm’n, *Comments of States Attorneys General* at 21-22 (Feb. 26, 2020), available at https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/state_aggs_final_vmg_comments.pdf; see Proposed Conclusions of Law of the United States at 53, *United States v. AT&T et al.*, No. 1:17-cv-02511-RJL (D.D.C. May 5, 2018), available at <https://www.justice.gov/atr/case-document/file/1061066/download> (“Thus, if the United States bore the burden on efficiencies, ‘the efficiencies defense might well swallow the whole of Section 7 of the Clayton Act because management would be able to present large efficiencies based on its own judgment and the Court would be hard pressed to find otherwise.’”).
- ¹⁰⁷ See Jonathan B. Baker & Joseph Farrell, *Oligopoly Coordination, Economic Analysis, and the Prophylactic Role of Horizontal Merger Enforcement*, 168 U. PA. L. REV. 1985 (2020); see also Joseph Farrell & Jonathan B. Baker, *Natural Oligopoly Responses, Repeated Games, and Coordinated Effects in Merger Analysis: A Perspective and Research Agenda*, 58 R. OF INDUS. ORG. 103 (2021).
- ¹⁰⁸ Federal Trade Comm’n, *Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers* (Jan. 18, 2022), <https://www.ftc.gov/news-events/press-releases/2022/01/ftc-and-justice-department-seek-to-strengthen-enforcement-against-illegal-mergers>.
- ¹⁰⁹ John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149, 192 (2015)(discussing radio mergers that can harm consumers by “increasing attention costs (and restricting output) to listeners by, for example, increasing the amount of airtime devoted to advertisements.”); *id.*, at 193 (“ignoring the potential harms that can occur in zero-price markets is incorrect as a matter of antitrust policy.”)
- ¹¹⁰ *United States v. UnitedHealthCare Group, Inc.* (February 24, 2022) (alleging that a proposed vertical acquisition would provide access to competitively-sensitive information).
- ¹¹¹ Rose & Sallet, *Dichotomous Treatment of Efficiencies*, *supra* note 54 at 1971-2 & n. 134.
- ¹¹² See C. Scott Hemphill & Philip J. Weiser, *Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing*, n. 20 127 YALE L.J. 2048 (2018).
- ¹¹³ *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) .
- ¹¹⁴ *Trinko*, 540 U.S. at 410 (“[I]n *Otter Tail Power Co. v. United States*, . . . , another case relied upon by respondent, the defendant was already in the business of providing a service to certain customers (power transmission over its network), and refused to provide the same service to certain other customers.”).
- ¹¹⁵ Maureen Chowdury et al., *AG nominee Merrick Garland: Rule of law is the very foundation of democracy*, CNN (Jan. 7, 2021), https://www.cnn.com/politics/live-news/washington-dc-election-riots/h_e8826b131727c9b0df2ed67bbf81c43.
- ¹¹⁶ *United States Steel Corporation: Hearings Before the House Comm. on Investigation of United States Steel Corporation*, 62nd Cong. 2862 (1912) (Statement of Mr. Louis D. Brandeis).