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ANTITRUST AND UNFAIR COMPETITION LAW

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ANTITRUST RESTORATION FROM CALIFORNIA ANCHORED BY A NEW MONOPOLIZATION SYNTHESIS

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California is past due for an anti-monopoly law. With federal antitrust legislation stalled and monopolization cases slowly wending through the courts, the Law Revision Commission has begun considering how to amend the Cartwright Act to prohibit antitrust violations committed by a single firm. The attention is well deserved: Many U.S. markets are now effectively controlled by a company or small set of companies.

The new law should adopt specific principles and presumptions, rather than remaining vague like the Sherman Act.[1] Monopolization standards have become "not just vague but vacuous"[2]—a description that is "hard to disagree with."[3] An FTC official told *The New Yorker*: "You really have to be an expert, or hire an expert attorney, if you feel like one of these companies is acting inappropriately. The law only works when it is simple enough for the little guy to bring an action on their own."[4]

The increased acknowledgment of excessive concentration creates an opportunity to codify earlier, twentieth-century approaches to monopoly power, market definition, and remedies.[5] California's business code and common law already can be applied to curtail market dominance and exclusionary conduct,[6] which may explain why no legislation followed the California Supreme Court's holding in 1988 that the Cartwright Act's ban on trusts does not extend to single-firm conduct.[7] As that very decision shows, however, California's competition laws are distinct from (and in certain cases may reach further than) federal law.[8] But neither state nor federal law has proved capable of holding back the tide of consolidation.[9]

I. OVERCONCENTRATION

More than three-quarters of U.S. industries became more concentrated between 1997 and 2012, as measured by the Herfindahl-Hirschman index.[10] Across industries the average increase in concentration was ninety percent,[11] and between 1985 and 2017 the annual number of completed mergers rose from 2,308 to 15,361.[12] A single firm or duopoly now controls many more markets than before.[13] A 2019 study of fifty-four economic sectors confirmed this trend with "startling numbers"—the top four firms in each sector substantially controlled it,[14] and the top two firms in most major U.S. sectors have gained share since 2000.[15]

Regulators stood by as conglomerates and leading businesses in the post-internet economy acquired fledgling firms that might otherwise have competed.[16] The second Bush administration did not bring a single monopolization case. The increasingly concentrated economic power, including in markets controlled from California, has prompted calls for reform.[17]

Stricter scrutiny of dominant firms is warranted, at a minimum, to the extent more of these markets and services concern a public interest.[18] At a more basic level, today's highly centralized industries and platforms betray a central promise of the Sherman Act: "Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets" but "resolved these competing considerations in favor of decentralization."[19] Although "grudging acceptance of concentration" was "no part of th[is] bargain," by 1990 it had become the norm.[20] From the standpoint of an ordinary consumer, a generation of monopoly and oligopoly control of major markets has coincided with financial instability, lost privacy, skewed distribution of wealth and income, regulatory capture by lobbyists, and other adverse effects such as prices climbing even higher than warranted by inflated costs.[21]

II. DEMISE OF LAW AND ECONOMICS

Before the law-and-economics movement, the conventional antitrust wisdom was "the commonplace conclusion that significantly increased concentration means diminished competition and the extraction of monopoly profits[.]"[22] But in the late 1970s, with deregulation on the rise and libertarian views gaining influence, the U.S. Supreme Court endorsed the Chicago school,[23] ushering in an era of deference to corporate interests,[24] a lasting trend marked by far greater reluctance to intervene in the economy to bust up big companies. A hands-off approach toward deals serving to combine markets and limit their participants[25] continued in the new millennium, reinforced by *Trinko*[26] and other precedents. Doctrinally, this shift prioritized efficiencies from economies of scale and treated low consumer prices as an antitrust North Star, displacing economic control as the central concern.[27] Far from being limited to pricing considerations, however, antitrust law is intended to promote the "end that the people . . . might not be dominated by vast combinations and monopolies, having *power* to advance their own selfish ends, regardless of the general interests and welfare[.]"[28] Evaluating pricing power also seems illogical for corporations that do not earn revenue from charges paid by consumers.

The spell cast by law and economics can confuse and intimidate[29] while obscuring basic fallacies like the assumptions that economies of scale will benefit consumers indefinitely without bloat;[30] that conglomerates will keep innovating at the same pace without a realistic threat to their business lines;[31] that "ultra-rational, profit-seeking monopolists . . . would generally leave themselves completely vulnerable to competitive attack."[32] The verdict of history, Senator Klobuchar wrote, leaves the Chicago school "discredited. Instead of promised 'efficiencies,' we got monopoly power, higher prices, lower wages for workers, and runaway income inequality."[33] An extensive study found that over three-quarters of recent mergers led to price increases across all products offered by the merged entity, with the average increase being over 10 percent, and that on average, product quality as well as research and development declined post-merger.[34]

III. FOCUS ON ENTRENCHED POWER INSTEAD OF CONDUCT

Monopolization came to be defined with "two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[35] Courts have focused on the "superior" and "acumen" exceptions without fully accounting for the "growth or development" phrase.[36] Once a monopoly has been acquired, it has *already* grown and developed. It is then being maintained—with an intrinsic advantage—and whether it was gained through anticompetitive methods does not change

its ongoing detriment.[37] Describing Alcoa, Judge Hand could "think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret 'exclusion' as limited to maneuvers not honestly industrial, but actuated solely by a desire to prevent competition, can such a course . . . be deemed not 'exclusionary.' So to limit it would in our judgment emasculate the Act."[38]

A durable monopoly presents more danger to the public than a newly acquired one.[39] Although a newer entrant may soon lose share, entrenchment of an incumbent inhibits the "growth or development" of a business gaining share.[40] A monopolist's continued grip on a market is itself a sign that competing firms have not been able to enter.[41] For this reason, antitrust enforcers in the U.K. target monopolists in reference to their persistence.[42] Professors Turner and Areeda, the original authors of the leading antitrust treatise, proposed a law allowing the government to break up a durable monopoly, regardless of its business practices.[43] The Nobel laureate economist Oliver Williamson took for granted that undue concentration causes social and economic ills: "the existence of a dominant firm, *whatever its origin*, commonly results in resource mis-allocation."[44] The current state of affairs bears out this earlier understanding that persistence of a monopoly tends to deprive citizens of better goods or services and more choices[45] (including, these days, to keep your private information private).[46]

A monopoly, once acquired, should be presumed illegal for similar reasons: control of markets by a dominant actor limits the development of beneficial processes or offerings and creates harmful imbalances[47]—the same serious harms that justify the treble damages remedy.[48] If a new entrant cannot realistically emerge, the natural effect is an easing of the competitive pressures and discipline that spark wider progress.[49] The realistic understanding, moreover, has long been that "having a single seller in a particular market . . . lead[s] unavoidably to . . . sharp practices" that contravene public policy.[50]

The U.S. Supreme Court therefore held that "monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under [federal law] even though it remains unexercised."[51] Further, "[i]t is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful."[52] Instead, because "monopoly and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade," "*[u]ndoubtedly*, the words 'to monopolize' . . . reach *every* act bringing about the prohibited results."[53] Hence a plaintiff who has proved the defendant's monopoly power in a relevant market need only show "anticompetitive behavior *capable* of contributing to monopoly[.]"[54] These principles, which have faded, are ripe for restoration in the Business and Professions Code.

Section 2 of the Sherman Act would not preempt a California law that removes or reduces scrutiny of an alleged monopolist's conduct. Federal preemption analysis examines congressional or regulatory text[55] and there is no mention of exclusionary conduct in section 2.[56] The U.S. Supreme Court already ruled that because "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies," state antitrust law may provide relief "in addition to" that available under federal law.[57] A robust anti-monopoly law also would not discriminate against out-of-state businesses in violation of the dormant Commerce Clause.[58]

A burden-shifting framework modeled on the antitrust rule of reason can allow an alleged monopolist to defend by showing the absence of anticompetitive effects in the market or that it holds a natural monopoly.[59] A presumption of illegality upon a showing of monopoly power in a well-defined market is more rigorous and would be much easier to apply than the opaque standards now being applied in section 2 cases.[60] Without dispelling the incentive to earn shorter-term monopoly profits,[61]

this sharpened approach would facilitate challenges to powerful firms and motivate more companies to compete on the merits instead of looking to acquire nascent rivals.[62]

IV. DEFINING REALISTIC MARKETS

California's anti-monopoly law can clarify market definition as well.[63] In antitrust litigation the first, critical question is what market is being presented.[64] Channels of demand, and to a lesser extent means of production, mark the zone of "meaningful competition"[65] in which "commodities reasonably interchangeable make up that 'part' of trade or commerce which [federal law] protects against monopoly power."[66] Importantly, the concept of a "reasonable" substitute for a product or service means that not every substitute will do.[67] If Netflix raises its monthly charge to $100, some people will quit Netflix and buy more video games—but that hardly makes video games a substitute for video streaming services. Instead, when goods or services compete against "imperfectly interchangeable substitutes, prices may be *somewhat* supracompetitive within limits determined by the degree of effective interchangeability" and it would "not be correct" to find "no market power and no supracompetitive price."[68] So, to occupy the same market two products must be "close" substitutes.[69]

Relaxing this inquiry, however, courts and agencies have defined markets too broadly, allowing a merely material degree of interchangeability to preclude the existence of a relevant market in need of competition.[70] Firms thus withstood charges of monopoly power or were never challenged based on the assumption that an unrealistically large range of substitutes or geographic areas made up the market.[71] The proper inquiry situates economic evidence like supply or pricing projections within the context of other evidence, such as industry views and behavior, public opinion, and historical business trends,[72] and applies common sense in determining whether products are true substitutes.[73] This more equitable approach recognizes as well that markets may include cognizable submarkets—the mini-dolls within the Russian doll.[74] Under this approach, "[t]he central question is whether buyers perceive of other products as substitutes, as evidenced by whether prices and sales volume of the purported substitutes have reacted to each other in the past."[75]

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In addition to making these doctrinal clarifications, the new law could promote enforcement by breaking the taboos that have built up around profits and divestiture in antitrust cases.

V. PROFITS REFLECT POWER

When a firm substantially controls a market, and entry barriers or other exclusionary conditions make competition infeasible, the firm can maximize its profits by raising prices and cutting costs.[76] Given these incentives, the U.K.'s antitrust enforcer noted, "one of the key drivers for competition policy is a belief that excessive concentration in markets can lead to excessive monopoly profits."[77] Yet U.S. antitrust law has drifted away from a common-sense consideration of an alleged monopolist's profit margins as evidence of its strength.

This change in outlook partly resulted from the attention lavished on the *Aspen Skiing* exception to the free-market rule that a company has no duty to deal with any other company.[78] Courts applying *Aspen Skiing* ask whether the defendant acted to sacrifice short-term profits, reflecting a motive to exclude other companies from the marketplace.[79] But focusing on intent rather than effects misses the defining characteristic of the offense,[80] and the conduct element should be minimized, for the reasons explained above.[81]

An alleged monopolist's power is properly analyzed in part by reference to the profits it has gained, not simply the profits it may have given up to elbow out competitors.[82] In fact "there is no better evidence of power" than sustained high profits because "factors like a new innovation or a recent demand surge cannot explain" the margins.[83] Outsized profits, as compared with those historically prevalent in the market, thus support an inference of power.

VI. STRUCTURAL RELIEF TO DISPERSE POWER

The new law should also authorize courts to consider dissolution or divestiture remedies upon finding a violation. Breaking apart a company may have unforeseen effects and may not be the best remedial option in particular cases.[84] Be that as it may, for this structural relief to be off the table, as it has been lately, represents an aberration in the history of antitrust.[85] The court's duty is "to prescribe relief which will terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure . . . there remain no practices likely to result in" future monopolization.[86] This makes it hard to disagree with the view that public policy should "generally come down on the side of competition and interoperability that can open markets to new competitors rather than conduct-related regulation that entrenches incumbents and makes it harder for newcomers to compete. That means favoring antitrust enforcement that demands structural separation, or at least imposes nondiscrimination rules on self-dealing[.]"[87]

Nimbler, more focused businesses carved from a larger firm can add compounding value and stimulate the introduction of beneficial technologies. After Standard Oil was split into thirty-four parts, their value doubled within a year and kept growing exponentially.[88] The early 1980s breakup of AT&T cleared the way for the answering machine and the modem to enter American homes.[89] Google would not likely have become the default internet search engine had the Justice Department not checked Microsoft's power.[90] And while the FTC's 1975 compulsory divestiture of Xerox copier patents now seems like a "previously undiscovered ancient culture," the decree "seems to have done quite a bit of good, by breaking up a 'killer patent portfolio' that threatened to insulate Xerox from competition, not for seventeen years, but forever, bringing with it the sluggish unimaginativeness long thought characteristic of a monopoly."[91]

Large firms themselves spin off divisions to become more efficient,[92] and once new corporate arrangements have been established, courts need not engage in time-consuming monitoring, for which they are ill equipped.[93] Though sometimes maligned as trying to do the impossible by "unscrambling eggs,"[94] breaking up a dominant firm may be more akin to the temporarily messy task of separating egg whites from yolks: Most big companies are already organized into distinct divisions or integrated vertically.[95]

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The present antitrust moment is California's to meet. The new law should establish a presumption of illegality upon a showing that the defendant holds monopoly power in a relevant product market within the state. The court should apply common sense[96] and look at historical facts—particularly consumer behavior, industry presuppositions, profit levels, and market-share trajectory—when analyzing the elements of monopoly power and market definition.[97] The defendant may prevail by showing the necessity or clear desirability of single-firm control or the absence of anticompetitive effects. Its conduct should not be an element of the offense because the continuing existence of a monopoly tends to harm public welfare, irrespective of how it was acquired or is being maintained. Finally, the law should empower the court to divest a monopolist's business divisions or assets, a traditionally effective remedy.

The authorities cited throughout this Comment demonstrate these principles of trade regulation are all well founded.[98] To best assist with dislodging the current overconcentration, the Legislature should enact them.

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1. *See* United States v. U.S. Gypsum Co., 438 U.S. 422, 439 (1978). At an April 2023 conference, U.S. Circuit Judge Diane P. Wood said she was "very worried about

the length of time it takes to fix the underenforcement error" and opined that new "quick look" or similar antitrust rules "would help." Khushita Vasant, *US judge says underenforcement of antitrust laws worrisome*, MLex (Apr. 22, 2023), https://content.mlex.com/#/content/1465904?referrer=email_dailycontentset&dailyId=69fc606ac9f2460eb8cc8737c4475922&paddleid=202&paddleaois=2000.

2. Einer Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 253, 255 (2003).

3. Thomas E. Kauper, *Section Two of the Sherman Act: The Search for Standards*, 93 Geo. L.J. 1623, 1625 (2005); *see also* Jonathan Sallet, *Antitrust Reform: A Litigation Perspective*, A.B.A. Antitrust, Spring 2022, at 17 (remarking that "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.").

4. Charles Duhigg, *The Unstoppable Machine*, The New Yorker, Oct. 21, 2019, at 57.

5. California's leadership in this legislative reform effort carries an echo of history, as "the first state antitrust laws came primarily in the South and West, and those regions led both in criticism of the trusts and in demands for legislation to curb them." Samuel P. Hays, The Response to Industrialism 137 (1957).

6. Burdell v. Grandi, 152 Cal. 376, 383 (1907) (common law); Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 179–80 (1999) (UCL); In re Nat. Gas Anti-Trust Cases, Cases I, II, III, & IV, Nos. 4221, 4224, 4226, 4228, 2002 WL 31570296, at *3 (Cal. Super. Ct. Oct. 16, 2002) (holding that monopolization and attempted monopolization violate public policy and are forbidden at common law); *see also* James v. Marinship Corp., 25 Cal. 2d 721, 732 (1944) (recognizing duty of a monopolist to charge only reasonable rates); Leach v. Drummond Med. Grp., Inc., 144 Cal. App. 3d 362, 374 (1983) (reinstating complaint alleging breach of "common law duty of a monopoly to treat all patrons without discrimination").

7. State of Cal. *ex rel.* Van de Kamp v. Texaco, Inc., 46 Cal. 3d 1147 (1988). The Cartwright Act prohibits trusts, defined as "a combination of capital, skill or acts by two or more persons for any of" several specified purposes that are illegal because they interfere with free trade. Cal. Bus. & Prof. Code § 16720.

8. *See* Cianci v. Superior Court, 40 Cal. 3d 903, 919 (1985) (Cartwright Act "was designed not to narrow the scope of the Sherman Act but to broaden it."); Cal. Bus. & Prof. Code § 16600 (prohibition of nonsolicitation agreements has no federal counterpart); ABC Int'l Traders, Inc. v. Matsushita Elec. Corp., 14 Cal. 4th 1247, 1262 (1997) (Unfair Practices Act "reflect[s] a Legislative concern not only with the maintenance of competition, but with the maintenance of 'fair and honest competition.' ").

9. *See, e.g.*, John Kwoka & Tommaso Valletti, *Unscrambling the eggs: breaking up consummated mergers and dominant firms*, 30 Indus. & Corp. Change 1286 (2021), https://academic.oup.com/icc/article/30/5/1286/6360491?searchresult=1 (arguing "it is clear that competition policy has been no obstacle to the rise of dominant firms . . . . The well-documented results of these trends are increasing market concentration, entrenched dominance, diminished competition and entry, and harm to consumers and businesses alike."); Herbert Hovenkamp, *Selling Antitrust*, 73 Hastings L.J. 1621, 1628 (2022) (recognizing "the amount of monopoly in the economy has been increasing steadily since the 1980s.").

10. Gustavo Grullon *et al.*, *Are US Industries Becoming More Concentrated?*, 23 Rev. Fin. 697 (2017).

11. *Id.*

12. Adil Abdela & Marshall Steinbaum, *The United States Has a Market Concentration Problem*, Roosevelt Inst. (2018), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-US-market-concentration-problem-brief-201809.pdf; *see also* Amy Klobuchar, Antitrust: Taking on Monopoly Power From the Gilded Age to the Digital Age 301 (2021) (arguing that "[t]oday, the problems of monopoly power and corporate consolidation are even worse than they once were because the size of corporations is exponentially larger.").

13. *See, e.g.*, Jonathan B. Baker, *Market Power in the U.S. Economy Today*, Wash. Ctr. For Equitable Growth (2017), https://equitablegrowth.org/market-power-in-the-u-s-economy-today/; Thomas Philippon, *The Economics and Politics of Market Concentration*, The Reporter, Dec. 4, 2019, https://www.nber.org/reporter/2019number4/economics-and-politics-market-concentration; Herbert Hovenkamp, *Antitrust Error Costs*, 24 U. Pa. J. Bus. L. 293, 348 (2022) (there is "solid, differentiated evidence of increasing market power in the economy on both the output and the input sides.").

14. *See America's Concentration Crisis*, Open Mkts. Inst., https://concentrationcrisis.openmarketsinstitute.org/; Sally Hubbard, *Monopolies are killing the American Dream. We must keep them in check*, CNN, July 2, 2019, https://

www.cnn.com/2019/07/01/perspectives/monopolies-candidates-antitrust/index.html.

15. *See* Emily Stewart, *America's Monopoly Problem, in One Chart*, Vox, Nov. 26, 2018, https://www.vox.com/2018/11/26/18112651/monopoly-open-markets-institute-report-concentration; David Leonhardt, *The Monopolization of America: In one industry after another, big companies have become more dominant over the past 15 years, new data show*, N.Y. Times, Nov. 25, 2018, https://www.nytimes.com/2018/11/25/opinion/monopolies-in-the-us.html; Derek Thompson, *America's Monopoly Problem: How Big Business Jammed the Wheels of Innovation*, The Atlantic, Oct. 2016 https://www.theatlantic.com/magazine/archive/2016/10/americas-monopoly-problem/497549/ (reporting that "[i]n almost every sector of the economy—including manufacturing, construction, retail, and the entire service sector—the big companies are getting bigger. The share of all businesses that are new firms, meanwhile, has fallen by 50 percent since 1978."); *see also infra* note 34.

16. *See* Staff of Subcomm. on Antitrust, Comm., and Admin. Law of the Comm. on the Judiciary of the H.R., 117th Cong., Investigations of Competition in Digital Markets: Majority Staff Report and Recommendations 343–55 (Comm. Print 2020), https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf.

17. *See*, *e.g.*, Matt Stoller, Goliath: The 100-Year War Between Monopoly Power and Democracy xiv (2019) ("You probably have a phone made by one of two companies. You likely bank at one of four giant banks . . . . You connect with friends with either Facebook, WhatsApp, or Instagram . . . . You get your internet through Comcast or AT&T. Data about your thoughts goes into a database owned by Google, what you buy into Amazon or Walmart, and what you owe into Experian or Equifax. You live in a world structured by concentrated corporate power."); Ganesh Sitaraman, The Great Democracy: How to Fix Our Politics, Unrig the Economy, and Unite America 130–31 (2019) ("Four airlines now control 80 percent of the market. Three drug stores control 99 percent. Four beef companies control 85 percent. The Fortune 100 now makes up nearly 50 percent of GDP."); Susan Crawford, Captive Audience: The Telecom Industry and Monopoly Power in the New Gilded Age 10 (2013) (with AT&T and Verizon dominating wireless access, and Comcast and Time Warner dominating high-speed wired internet access, "consumers are paying more in the United States than people in other countries do—for less speedy service.").

18. *See* Hon. Matthew O. Tobriner & Hon. Joseph R. Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 Cal. L. Rev. 1247 (1967) (discussing doctrine regarding contracts and firms "affected with the public interest"); *see also* Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 98–101 & nn. 9–16 (1963); Cal. Antitrust and Unfair Comp. Law § 6.04[C] (Belinda S. Lee ed., 2022).

19. Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).

20. David Millon, *The Sherman Act and the Balance of Power*, 61 S. Cal. L. Rev. 1219, 1290 (1988) (noting Reagan-era collapse of "normative assumptions of the Sherman Act, grounded ultimately in eighteenth century ideas about the importance of balanced economic power in a democratic society").

21. *See* Isabella M. Weber & Evan Wasner, *Sellers' Inflation, Profits and Conflict: Why Can Large Firms Hike Prices in an Emergency?* (Econ. Dept., Working Paper Series 343, No. 2023-2, 2023), https://scholarworks.umass.edu/econ_workingpaper/343/; Lindsay Owens, *I Listened In on Big Business. It's Profiting From Inflation, and You're Paying for It*, N.Y. Times, May 5, 2022, https://www.nytimes.com/2022/05/05/opinion/us-companies-inflation.html; Stacy Mitchell, *The Real Reason Your Groceries Are Getting So Expensive*, N.Y. Times, May 29, 2023, https://www.nytimes.com/2023/05/29/opinion/inflation-groceries-pricing-walmart.html.

22. Donald Turner, Assistant Atty. Gen., Antitrust Div., U.S. Dep't of Just., Address Before the Fifth Conference of the National Industrial Conference Board 10 (Mar. 3, 1966), https://www.justice.gov/atr/speech/file/1236966/download. Issues relating to oligopoly, also addressed by Professor Turner, among other commentators, are important but outside the scope of this Comment. *See* Donald F. Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 Harv. L. Rev. 1207, 1225–31 (1969); *see also supra* notes 10–15.

23. In 1978 the Court recognized "the distinct possibility of overdeterrence; salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure[.]" *U.S. Gypsum*, *supra* note 1, at 441–42 (citing, *inter alia*, R. Bork, The Antitrust Paradox 78 (1978)). The next year, citing only Judge Bork, the Court opined that floor debates "suggest that Congress designed the Sherman Act as a 'consumer welfare prescription.' " Reiter v. Sonotone Corp., 442

U.S. 330, 343 (1979) (citing Bork, *supra*, at 66). That account is incomplete, however: Senator Sherman said the bill in part responded to concern over growing "inequality of condition, of wealth, and opportunity" and aimed to stop a private firm from gaining prerogatives "inconsistent with our form of government . . . . If we would not submit to an emperor we should not submit to an autocrat of trade[.]" 21 Cong. Rec. 2457, 2460 (1890) (speech of Sen. John Sherman to U.S. Senate); *see infra* notes 28 and 49; Barak Orbach, *Antitrust Populism*, 14 N.Y.U. J.L. & Bus. 1, 20 (2017) ("Bork's interpretation of the legislative intent of the Sherman Act . . . is understood today as academic deceit or gross exaggeration.").

24. *See*, *e.g.*, Michael J. Graetz & Linda Greenhouse, The Burger Court and the Rise of the Judicial Right 242 (2016) ("[T]he Burger Court has often been characterized as pro-business.").

25. *See*, *e.g.*, Zephyr Teachout, Break 'Em Up: Recovering Our Freedom from Big Ag, Big Tech, and Big Money 210–11 (2020) ("[W]eak enforcement" followed 1982 overhaul of Justice Department merger guidelines).

26. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

27. The consumer welfare position generally holds that "[w]here concentrated production yields efficiencies that on balance exceed welfare loss caused by absence of competition, courts should not intervene. The argument has two interconnected elements. The first purports to define the conditions under which maximization of consumer welfare will occur and asserts that maximization is a desirable policy goal. The second element emphasizes that maximization can only occur if antitrust law is interpreted and applied without regard for other values that conflict with the efficiency norm. These might include concerns about the impact of concentrated production on other would-be participants in the market, or the effect of concentrated economic power on the political process." Millon, *supra* note 20, at 1221.

28. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 83–84 (1911) (Harlan, J., concurring in part and dissenting in part) (emphasis added); *see* United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945) ("*Alcoa*") (the Sherman Act was "not necessarily actuated by economic motives alone" but "in fact its purpose" is a preference for a "system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few."); Nat'l Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 695 (1978) (the axiom that open competition is "the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers."); Eleanor Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 Cornell L. Rev. 1140, 1182 (1981) (historically, antitrust law had four major goals: "(1) dispersion of economic power, (2) freedom and opportunity to compete on the merits, (3) satisfaction of consumers, and (4) protection of the competition process as market governor."); *see also infra* notes 45, 47, and 49.

29. *See*, *e.g.*, Patrick R. Ward, *Testing for Multisided Platform Effects in Antitrust Market Definition*, 84 U. Chi. L. Rev. 2059 (2017) (stating that the "process of defining the relevant market can be highly technical, thrusting on judges the task of reining in increasingly complex economic and statistical analyses."); Teachout, *supra* note 25, at 212 (noting that economists' "jargon is complicated" and their "claims to special knowledge make it hard for people to feel comfortable challenging them."); Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 Tex. L. Rev. 1247, 1270 (2011) (perceiving that "because the Justices misunderstand economic theory and data, they sometimes make errors in their economic analysis."); Ohio v. Am. Express Co., 138 S. Ct. 2274, 2295–96 (2018) (Breyer, J., dissenting) (opining that the majority had accepted "economic nonsense" by grouping complementary services within the same market in its decision relieving American Express of liability for restrictions in its agreements with merchants preventing them from asking customers to use another card) (quoting IIB Areeda & Hovenkamp, *Antitrust Law* ¶ 565a, at 431 (2d ed. 2002)).

30. *Cf.* Turner, *The Scope of Antitrust*, *supra* note 22, at 1211–12.

31. *Cf.* Crawford, *supra* note 17, at 260 (contending that incumbent cable companies like Comcast, on account of their market power, have "no incentive to upgrade their core network hardware to ensure that advanced fiber connections are available to every home throughout the country."); Hovenkamp, *Antitrust Error Costs*, *supra* note 13, at 347 & n.274 (citing "disturbing evidence that mergers are more likely to restrain innovation than to further it."); *infra* note 34.

32. Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age 113 (2018); *see* Barak Orbach, *Antitrust Populism*, 14

N.Y.U. J.L. & Bus. 1, 20 & n.78 (2017) (noting Chicago school fallacy that "anticompetitive conduct is largely self-correcting") (citing Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 329 (1984)); Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. Pa. L. Rev. 1843, 1852 (2020) (stating that "[t]he economic literature has come down solidly against the key early assumption of the Chicago thinkers that markets will self-correct.").

33. Klobuchar, *supra* note 12, at 300; *see also* Herbert Hovenkamp, *Worker Welfare and Antitrust*, 90 U. Chi. L. Rev. 511, 543 (2023) ("When a practice harms consumers by raising prices and reducing output, it harms labor as well."); Joseph E. Stiglitz, *America Has a Monopoly Problem—and It's Huge*, The Nation (Oct. 23, 2017), https://www.thenation.com/article/archive/america-has-a-monopoly-problem-and-its-huge/ (flagging the "increase in the market power and concentration of a few firms in industry after industry, leading to an increase in prices relative to costs (in mark-ups). This lowers the standard of living every bit as much as it lowers workers' wages.").

34. *See* Marc Jarsulic et al., Ctr. for Am. Progress, Reviving Antitrust: Why Our Economy Needs a Progressive Competition Policy 6–7 (June 2016), https://www.americanprogress.org/wp-content/uploads/sites/2/2016/06/RevivingAntitrust.pdf. These findings track Adam Smith's observation of monopolists who, "by keeping the market constantly understocked, by never fully supplying the effectual demand, sell their commodities much above the natural price." Adam Smith, The Wealth of Nations, vol. 1, bk. 1, ch. 7 (1776); *see also infra* notes 76 and 83.

35. United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966); *see also In re* Cipro Cases I & II, 61 Cal. 4th 116, 148 (2015). (Disclosure: the author was one of the attorneys for plaintiffs in *Cipro*.)

36. Defendants' *Grinnell* refrain that superior innovation and skill explain their market power is an example of doctrine "becom[ing] an obsession with lawyers as it does with preachers and politicians. It feeds on itself; hardens into clichés and blocks the arteries of thought. . . . The more passionately embraced the deadlier its kiss. As doctrines become crystallized . . . they sometimes cannot be dislodged until the lawyers themselves and their books are left behind by the transmutations of the social order." Leon Green, *Tort Law Public Law in Disguise*, 38 Tex. L. Rev. 257, 266 (1960).

37. *See* Turner, *The Scope of Antitrust*, *supra* note 22, at 1220; *infra* notes 49, 54, and 81.

38. *Alcoa*, *supra* note 28, at 431; *see* Gerald Gunther, Learned Hand: The Man and the Judge x (1994) (*Alcoa* opinion "established key principles of antitrust law."); *see also* Kauper, *supra* note 3, at 1625 ("It's hard to imagine monopoly conduct more exclusionary than charging a competitive price or achieving lower costs than one's rivals.").

39. *See* Turner, *The Scope of Antitrust*, *supra* note 22, at 1219–20; *see also* A.B.A., Monopolization and Dominance Handbook § III.B, at 48 n.13 (2d ed. 2021) (noting that commentators have suggested "between two and five years as a benchmark for durability.") (citing Thomas J. Klotz, *Monopoly Power: Use, Proof and Relationship to Anticompetitive Effects in Section 2 Cases* 10 & n.38 (FTC Working Paper Dec. 1, 2008), https://www.ftc.gov/system/files/documents/public_events/section-2-sherman-act-hearings-single-firm-conduct-related-competition/section2monopolypower.pdf).

40. *See* Robin C. Feldman & Mark A. Lemley, *Atomistic Antitrust*, 63 Wm. & Mary L. Rev. 1869, 1924 (2022) ("Traditional merger doctrine focused on the problem of entrenching existing monopolies and was therefore particularly restrictive of mergers in already concentrated markets."); William P. Rogerson & Howard Shelanski, *Antitrust Enforcement, Regulation, and Digital Platforms*, 168 U. Pa. L. Rev. 1911, 1913 (2020) ("[T]he same factors that cause the market to tip to a single provider might also increase barriers to entry for potential competitors."); David A. Balto & Ernest A. Nagata, *Proof of Competitive Effects in Monopolization Cases: A Response to Professor Muris*, 68 Antitrust L.J. 309, 322–23 (2000) ("Further, the more entrenched a monopolist becomes in a network market, the more difficult it will be for an entrant to overcome the entry barrier"); Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 Geo. Mason L. Rev. 617, 670 (1999) (advocating pursuit of "monopolization cases in markets where network-based barriers to entry make monopoly power more durable.").

41. Monopoly power itself means "the power to control prices or exclude competition." United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956) ("*Cellophane*"); *see* Am. Tobacco Co. v. United States, 328 U.S. 781, 797 (1946) (concluding that a firm holding over two-thirds of the market was a monopoly).

42. Wu, *supra* note 32, at 114.

43. *See* Herbert Hovenkamp, *The Rationalization of Antitrust*, 116 Harv. L. Rev. 917, 920 (2003).

44. Oliver E. Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, 85 Harv. L. Rev. 1512, 1514–15 (1972) (emphasis added). Professor Williamson acknowledged that market "dominance is often to be attributed to 'business acumen' or 'historic accident' " but concluded that, "rather than treat such dominance as exempt from the coverage of section 2, . . . frequently it should be regarded as an actionable manifestation of market failure" warranting "government intervention" whereby "[c]ontrived proof of anticompetitive conduct would . . . be made unnecessary in order to obtain relief." *Id.* at 1516. For "well as a monopoly may have behaved in the moral sense, its economic performance is inevitably suspect. The very absence of strong competitors implies that there cannot be an objective measuring rod . . . . What appears to the outsider to be a sensible, prudent . . . policy of the monopolist, may in fact reflect a lower scale of adventurousness and less intelligent risk-taking than would be the case if the enterprise were forced to respond to a stronger . . . challenge." United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 347 (D. Mass. 1953) (Wyzanski, J.), *aff'd per curiam*, 347 U.S. 521 (1954).

45. *See* Louis Brandeis, *Cutthroat Prices: The Competition That Kills*, Harper's Weekly, Nov. 15, 1913 (evoking how "organized capital secures the cooperation of the short-sighted unorganized consumer to his own undoing. Thoughtless or weak, he yields to the temptation of trifling immediate gain; and . . . becomes himself an instrument of monopoly"); *Alcoa*, *supra* note 28, at 428 (noting Congress acted in part "to put an end to great aggregations of capital because of the helplessness of the individual before them"); Letter from Harry S. Truman, U.S. President, to the Chairman of the House Judiciary Comm. on the Problem of Concentration of Economic Power (July 9, 1949) (stating "conviction that year in and year out, there is no more serious problem affecting our country and its free institutions than the distortions and abuses of our economic system which result when unenlightened free enterprise turns to monopoly," and emphasizing "the need for stronger powers and more active measures with which to wage the never-ending fight against monopoly"); *see also supra* note 28; *infra* notes 47 and 81.

46. *See* FTC v. Facebook, Inc., 581 F. Supp. 3d 34, 55 (D.D.C. 2022) (upholding monopolization claims asserting "decreased privacy and data protection"); Tejas N. Narechania, *Machine Learning as Natural Monopoly*, 107 Iowa L. Rev. 1543, 1553 n.39 (2022) (agreeing that "a monopolist in a data-intensive industry 'has the incentive to reduce its privacy protection below competitive levels and collect personal data above competitive levels' giving rise to privacy harms and deadweight losses") (quoting Maurice E. Stucke, *Should We Be Concerned About Data-opolies?*, 2 Geo. L. Tech. Rev. 275, 285–86, 302 (2018)).

47. Historically, American hostility toward monopolies has arisen from a fear of corruption undermining democracy itself, based on the realistic view that "[e]conomic power meant political power, and plutocracy meant the end of government for all the people." Millon, *supra* note 20, at 1219. The journalist Henry Demarest Lloyd quipped in 1881 that Standard Oil had "done everything with the Pennsylvania legislature, except refine it." Adam Winkler, We the Corporations: How American Businesses Won Their Civil Rights 171–72 (2018). Americans in the Progressive Era understood "massive economic concentration" as posing "a threat not just to a free and competitive marketplace but a threat to constitutional democracy." Sitaraman, *supra* note 17, at 130. Senator Kefauver said in 1950 that monopolistic mergers were resulting in "the people . . . losing power to direct their own economic welfare. When they lose the power to direct their economic welfare they also lose the means to direct their political welfare." 96 Cong. Rec. 16,452 (1950). Later, when law-and-economics concepts had started taking over, Professor Pitofsky warned "it is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws," articulating "a fear that excessive concentration of economic power will breed antidemocratic political pressures, and . . . reduc[e] the range within which private discretion by a few in the economic sphere controls the welfare of all." Robert Pitofsky, *The Political Content of Antitrust*, 127 U. Penn. L. Rev. 1051, 1051 (1979). By now it should be obvious that "[t]he larger the company, the better able it is to contribute to political candidates, lobby legislators and regulators, dominate trade associations, hold cities hostage for economic giveaways, and shape the law to favor their interests at the expense of everyone else." Sitaraman, *supra* note 17, at 131; *see also supra* notes 28 and 45; *infra* note 86.

48. *See*, *e.g.*, Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 151 (1987) (discussing intent behind Clayton Act and RICO treble damages—to combat "a serious national problem"); Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 139 (1968) (explaining "the law encourages . . . suit to further the overriding public policy in favor of competition."), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984).

49. *See United Shoe*, *supra* note 44, at 347 ("The dominance of any one enterprise inevitably unduly accentuates that enterprise's experience and views as to what is possible, practical, and desirable with respect to technological development, research, relations with producers, employees, and customers."); Edward D. Cavanagh, *A 2020 Agenda for Re-Invigorated Antitrust Enforcement: Four Big Ideas*, 105 Cornell L. Rev. Online 31, 55 (2020) (stressing "harms that market power by itself can inflict on the competitive process by creating entry barriers, discouraging investment, and impeding innovation."); *Brown Shoe*, *supra* note 19, at 316 (antitrust responds to the "fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose."); *see also supra* notes 28 and 45.

50. Thomas B. Nachbar, *Monopoly, Mercantilism, and the Politics of Regulation*, 91 Va. L. Rev. 1313, 1323 (2005).

51. United States v. Griffith, 334 U.S. 100, 107 (1948), *disapproved of on other grounds by Copperweld*, *supra* note 48.

52. *Am. Tobacco*, *supra* note 41, at 809.

53. *Standard Oil*, *supra* note 28, at 61 (emphasis added).

54. Areeda & Hovenkamp, *supra* note 29, ¶ 650c, at 69 (emphasis added); *see also* Lawrence A. Sullivan, Handbook of the Law of Antitrust § 34, at 96 (1977) (stating that the conduct element of the monopolization offense should be kept "to a minimum. If a firm possesses monopoly power rarely will it be impossible, given the benefit of hindsight, to point to some course of conduct which it deliberately embarked upon and which facilitated achievement of monopoly."); Thomas C. Cochran & William Miller, The Age of Enterprise: A Social History of Industrial America 171 (1961) (noting the Sherman Act forbids "any attempt at monopoly."); *infra* note 81.

55. *See* Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982).

56. *See* Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520 (2019) ("First is text: Section 2 of the Sherman Act makes it unlawful for any person to 'monopolize, or attempt to monopolize . . . .' ") (quoting 15 U.S.C. § 2).

57. California v. ARC Am. Corp., 490 U.S. 93, 102, 105 (1989).

58. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023).

59. *See* Sullivan, *supra* note 54, § 34, at 97 (*Grinnell*'s two-pronged definition of monopolization "leav[es] open the possibility that once power is established the burden will shift to the defendant to show that it was obtained in benign ways"); N. Gregory Mankiw, Principles of Economics 314 (5th ed. 2009) (toll bridge is a classic natural monopoly); *see also In re Cipro*, *supra* note 35, at 147 (describing the fluid nature of the antitrust rule of reason).

60. Although judges need clear and intelligible rules to guide deliberation, antitrust standards have become more convoluted since the mid-1960s, when a leading historian observed they had already become impenetrable to lay citizens. *See* Richard Hofstadter, *What Happened to the Antitrust Movement?*, The Paranoid Style in American Politics and Other Essays (1965); *supra* notes 2–4 & 29; *see also* Edward D. Cavanagh, *The Jury Trial in Antitrust Cases: An Anachronism?*, 40 Am. J. Trial Advoc. 1, 11 (2016) (remarking that "if antitrust issues are too complicated for a lay jury, then these same issues are probably too complicated for generalist judges."); G. Edward White, Tort Law in America: An Intellectual History 10 (1980) (noting detriment from "loss of certainty and predictability about substantive legal rights.").

61. *See* Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216, 1221 (10th Cir. 2009) (Gorsuch, J.) ("Allowing a business to reap the fruits of its investments . . . is what 'induces risk taking that produces innovation and economic growth.' ") (quoting *Trinko*, *supra* note 26, at 407); Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, 105 Cornell L. Rev. 1955, 2016 (2020) (arguing that "[i]f Amazon were split into several companies—say its cloud computing business, its Amazon-owned sales business, and a platform"—its CEO "would still own stakes in enormous companies" and "[i]t is hard to imagine future entrepreneurs would look to Bezos at that point and somehow be discouraged from following similar paths.") (footnote omitted); A.B.A., Monopolization and Dominance Handbook, *supra* note 39, § III.B, at 48 n.13 (citing commentary treating "between two and five years as a benchmark for durability.").

62. *See* United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 116 (1975) ("The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion—that is, by competing successfully rather than by arranging treaties with its competitors.").

63. *See* Feldman & Lemley, *supra* note 40, at 1932 (commenting that "[c]ourts have become hidebound

with market definition—for example, ignoring other evidence of market-power-like conduct that makes no sense without power and persistent evidence of prices in excess of marginal cost.").

64. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2158 (2021) ("Whether an antitrust violation exists necessarily depends on a careful analysis of market realities."); Louis Kaplow, *Why (Ever) Define Markets?*, 124 Harv. L. Rev. 437, 439 & n.2 (2010); Flovac, Inc. v. Airvac, Inc., 817 F.3d 849, 851 (1st Cir. 2016) ("That an antitrust case may turn on the definition of the relevant market is a common-sense proposition.").

65. United States v. Cont'l Can Co., 378 U.S. 441, 449 (1964); *see* Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 612 (1953) (recognizing relevant " 'market' defined by buyers' habits or mobility of demand").

66. *Grinnell*, *supra* note 35, at 571. "Or, in other words, the relevant market is composed of products that have reasonable interchangeability for the purpose for which they are produced." Exxon Corp. v. Superior Court, 51 Cal. App. 4th 1672, 1682 (1997); *see also Am. Express*, *supra* note 29, at 2299–2300 (Breyer, J., dissenting) (discussing "producer substitutes").

67. *See*, *e.g.*, *Times-Picayune*, *supra* note 65, at 613 n.31 ("For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn.").

68. *In re* Aggrenox Antitrust Litig., 199 F. Supp. 3d 662, 668 (D. Conn. 2016) (emphasis added).

69. *See* Fishman v. Est. of Wirtz, 807 F.2d 520, 531 (7th Cir. 1986) (holding that "[a] relevant market is comprised of those 'commodities reasonably interchangeable by consumers for the same purposes' " and that "[i]n making this determination, the trier must decide whether the product [1] is unique or [2] has close substitutes") (quoting *Cellophane*, *supra* note 41, at 395); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 219 n.4 (D.C. Cir. 1986) (noting "general truth that substitutes in a market often have a strong physical and functional relationship"); *see also* Areeda & Hovenkamp, *supra* note 29, ¶ 1142 (with respect to whether a putative merger is presumptively unlawful, " '[c]loseness' need not be so clear if it is increasing: it must be very clear if decreasing.").

70. *See* Albert A. Foer, *A Post-Chicago Hornbook on Antitrust*, A.B.A. Antitrust, Fall 2000, at 87 (observing that "[b]y the late 1980s . . . courts were more likely to accept broader market definitions that tended to preclude antitrust relief."); Hovenkamp, *Antitrust Error Costs*, *supra* note 13, at 348 (asserting that "the 'relevant market' of traditional antitrust analysis is becoming less important and its inaccuracies and other failures increasingly prominent."); Mark A. Lemley & Mark P. McKenna, *Is Pepsi Really a Substitute for Coke? Market Definition in Antitrust and IP*, 100 Geo. L.J. 2055, 2058 (2012) (opining that market definition analysis has "become too ossified, dependent on assumptions about competition that are static and presuppose homogeneous products that compete solely on price and quality.").

71. *See*, *e.g.*, Edward D. Cavanagh, *Antitrust Law and Economic Theory: Finding a Balance*, 45 Loy. U. Chi. L.J. 123, 150 (2013); Cavanagh, *A 2020 Agenda for Re-Invigorated Antitrust Enforcement*, *supra* note 49, at 55 (describing how the government permitted Sirius to merge with XM by situating satellite radio within a "mass-market retail channel" also including AM/FM radio, HD radio, MP3 players, and audio delivered through wireless telephones); It's My Party, Inc. v. Live Nation, Inc., 811 F.3d 676, 682 (4th Cir. 2016) (rejecting proposed market defined to include local amphitheaters with capacity of 8,000 or more, as stadiums, arenas, and other performance venues could not be excluded); Gulf States Reorg. Grp., Inc. v. Nucor Corp., 721 F.3d 1281, 1285–86 (11th Cir. 2013) (concluding product market encompassed pickled and oiled steel, as well as black hot rolled coil steel, on grounds that manufacturers could switch production); Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1377 (9th Cir. 1989) (citing lack of evidence of price differentials between "home center stores," which offered one-stop shopping and expert staff, and other retailers offering some of the same home improvement products).

72. *See* Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 482 (1992) (holding that "[t]he proper market definition . . . can be determined only after a factual inquiry into the 'commercial realities' faced by consumers.") (citation omitted); *Brown Shoe*, *supra* note 19, at 325 (directing courts faced with questions of market definition to examine various "practical indicia"); *Times-Picayune*, *supra* note 65, at 613 n.31 (emphasizing "the trade's own characterization of the products involved" for purposes of ascertaining the scope of meaningful competition).

73. *Cf.* FTC v. Sysco Corp., 113 F. Supp. 3d 1, 51 (D.D.C. 2015) (enjoining merger of nation's two largest broadline food-service distributors; invoking "common sense" to approve FTC expert's definition of local geographic markets); *infra* note 96.

74. *See Brown Shoe*, *supra* note 19, at 325 (holding that "within [a] broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes."); Newcal Indus., Inc. v. Ikon Off. Sol., 513 F.3d 1038, 1045 (9th Cir. 2008) ("[I]t is legally permissible to premise antitrust allegations on a submarket."); *cf.* Haagen-Dazs Co. v. Double Rainbow Gourmet Ice Creams, Inc., 895 F.2d 1417 (9th Cir. 1990) (unpublished) (declining to recognize a "super premium" ice cream submarket).

75. Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 Colum. L. Rev. 1805, 1834 (1990).

76. *See* A.B.A., Monopolization and Dominance Handbook, *supra* note 39, § II.B.1, at 14–15 (economic modeling shows that, with a monopolist's "profit-maximizing" activity, "[t]he resulting output level is below the competitive output level and the resulting price is above the competitive price"); *see also supra* note 34; *infra* note 83.

77. Competition and Mkts. Auth., The State of UK Competition Report (Apr. 2022), https://www.gov.uk/government/publications/state-of-uk-competition-report-2022/the-state-of-uk-competition-report-april-2022. Profits of U.S. companies have ballooned: "While the average [American] firm charged prices of around 25% above incremental cost in the 1980s, by 2014 the average mark-up had increased to 67%. This implies that the average economic margin approximately doubled during this time period (from around 20% to around 40%)." Tommaso M. Valletti & Hans Zenger, *Should Profit Margins Play a More Decisive Role in Merger Control? A Rejoinder to Jorge Padilla*, 9 J. of Eur. Comp. Law & Practice 336 (2018); *see also* Hovenkamp, *Antitrust Error Costs*, *supra* note 13, at 346–47 & nn. 266–71 (2022); Hovenkamp & Morton, *supra* note 32, at 1852 & n.43 (reporting that "[t]he profit share of the economy has risen from 2% to 14% over the last three decades."). Likewise, *The Economist* commented that "[p]rofits have risen in most rich countries over the past ten years but the increase has been biggest for American firms. Coupled with an increasing concentration of ownership, this means the fruits of economic growth are being hoarded." *Too much of a good thing: Profits are too high. America needs a giant dose of competition*, The Economist, Mar. 26, 2016, http://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needsgiant-dose-competition-too-much-good-thing.

78. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985); *Eastman Kodak*, *supra* note 72; *Trinko*, *supra* note 26; Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438 (2009).

79. *See*, *e.g.*, Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 454–59 (7th Cir. 2020); *Four Corners Nephrology*, *supra* note 61, at 1224–25.

80. *See Griffith*, *supra* note 51, at 105 (specific intent is unnecessary; "[i]t is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements.").

81. *See supra* notes 37–62 and accompanying text; *see also* Robert H. Lande & Richard O. Zerbe, *The Sherman Act Is a No-Fault Monopolization Statute: A Textualist Demonstration*, 70 Am. U. L. Rev. 497 (2020); Kauper, *supra* note 3, at 1624 (Section 2's "conduct standard remains of little utility in specific cases."); Teachout, *supra* note 25, at 214–15 (referring to "an impossible hurdle, a fact-intensive examination of any given conduct that determines only whether that conduct in good or bad for consumer prices."); Cavanagh, *A 2020 Agenda for Re-Invigorated Antitrust Enforcement*, *supra* note 49, at 36 (conduct element "ignores the harms that market power by itself can inflict on the competitive process by creating entry barriers, discouraging investment, and impeding innovation.").

82. *See* Hovenkamp, *Antitrust Error Costs*, *supra* note 13, at 346 (commending "recently developed approaches that measure market power more directly and at the individual firm level as a function of price/cost margins.").

83. Sullivan, *supra* note 54, § 27, at 85; *see* Areeda & Hovenkamp, *supra* note 29, ¶ 516b, at 116 (describing "excess returns" that "are monopoly profits because the innovator without rival producers has power over supply and price."); FTC v. Actavis, Inc., 570 U.S. 136, 157 (2013) (referring to "higher-than-competitive profits—a strong indication of market power."); Turner, *The Scope of Antitrust*, *supra* note 22, at 1215 (discussing studies that point to "a correlation between seller concentration and excess profits beyond what would appear to be accounted for by special circumstances like windfalls or rewards to innovation."); *see also supra* notes 34 and 76.

84. Areeda & Hovenkamp, *supra* note 29, ¶ 630, at 45–46 (stating that for a court to "break up a firm that has attained its position by internal growth is a difficult and risky enterprise," and advising judges to "be aware of significant limitations on their ability to do this in a way that (1) really breaks up the monopoly rather than simply dividing it among multiple firms;

and (2) is calculated to produce social gains exceeding social costs.").

85. The U.S. Supreme Court explained that "[d]ivestiture or dissolution has traditionally been the remedy for Sherman Act violations . . . and it is reasonable to think immediately of the same remedy when s 7 of the Clayton Act . . . is involved. Of the very few litigated s 7 cases which have been reported, most decreed divestiture as a matter of course. Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of s 7 has been found." United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 329–31 (1961) (footnotes omitted); *cf.* Van Loo, *supra* note 61, at 1958 (arguing that current "administrative resistance to breakups is overlooked in conversations about reforming antitrust, but it poses an existential problem.").

86. United States v. United Shoe Mach. Corp., 391 U.S. 244, 250 (1968). The U.S. Supreme Court mandated divestiture in over forty twentieth-century antitrust cases. *See* E. Thomas Sullivan, *The Jurisprudence of Antitrust Divestiture: The Path Less Traveled*, 86 Minn. L. Rev. 565, 568–69 & n.15 (2002). Politician Cordell Hull believed that "[i]f government attempted to oversee instead of break up monopolies, soon Americans would find monopolies overseeing the state." Stoller, *supra* note 17, at 123. Present-day scholars agree. *See*, *e.g.*, Sitaraman, *supra* note 17, at 128 (opining that, "[w]hen any corporation has so much power that it can capture politics and defy regulation, it threatens democracy itself. Economic democracy therefore requires breaking up monopolies"); Teachout, *supra* note 25, at 216 (proposing divestiture rules as "bulwarks against self-dealing and . . . the temptations that occur when one entity owns two unrelated companies and may want to use power in one area to engage in unfair business practices in another"); Kwoka & Valletti, *supra* note 9, at 1287 (arguing that "where the essential competitive problem with a company is its structure, in the sense that its anticompetitive behavior flows inexorably from that structure and is otherwise difficult if not impossible to prevent, it follows that the necessary solution likely lies in altering that structure"); *see also supra* note 47.

87. Mark A. Lemley, *The Contradictions of Antitrust Challenges to Platforms*, A.B.A. Antitrust, Fall 2021, at 22, 26 (citing Lina M. Khan, *The Separation of Platforms and Commerce*, 119 Colum. L. Rev. 973, 1036, 1063 (2019)); *see also* Kwoka & Valletti, *supra* note 9, at 1289 (noting E.U. preference for structural antitrust remedies because they are easier to implement and don't require medium or long-term monitoring).

88. *See* Wu, *supra* note 32, at 67–68; *see also* Van Loo, *supra* note 61, at 1974 (reporting that "[e]ven critics of the breakup agree that the oil industry and the divested pieces of Standard Oil thrived").

89. *See* Wu, *supra* note 32, at 96–97; *see also* Van Loo, *supra* note 61, at 1976 (noting that "the breakup of AT&T . . . by all accounts was followed by innovation, lower prices, and considerable competition"); Hovenkamp, *Selling Antitrust*, *supra* note 9, at 1629–30 (stating that the AT&T breakup succeeded "because it insisted on interoperability and thus preserved nearly all of the beneficial network effects of a unitary phone system.").

90. *See* Wu, *supra* note 32, at 100.

91. Willard K. Tom, *The 1975 Xerox Consent Decree: Ancient Artifacts and Current Tensions*, 68 Antitrust L.J. 967, 967–68 (2001). A recent study of U.S. and E.U. forced divestitures concluded that "most" resulted in "structurally more competitive markets and stronger competition. Strikingly, there seem to be no examples where breaking up such firms has been attempted but failed in the sense that they were attempted but literally could not be done . . . . Nor are there obvious examples where break ups were in fact accomplished but the result was that market competition was harmed." Kwoka & Valletti, *supra* note 9, at 1299.

92. *See* Denise Hearn, *Corporations break themselves up all the time. So why shouldn't regulators break up Big Tech?*, Fortune, Aug. 25, 2022, https://fortune.com/2022/08/25/corporations-break-regulators-up-big-tech-ftc-sec-meta-alphabet-amazon-tech-denise-hearn/ (describing General Electric's 2022 breakup into "GE Aerospace, GE Vernova, and GE Healthcare" and how "[a] few months earlier, cereal manufacturer Kellogg Co. announced it would also be splitting itself into three companies—for cereals, snacks, and plant-based foods. Just a few years ago, Dow Chemical and DuPont merged, but with the plan of reorganizing and then spinning off three separate companies: Dow for commodity chemicals, DuPont for specialty chemicals, and Corteva for agricultural chemicals."); Van Loo, *supra* note 61, at 1959, 1982–90 (highlighting "Fox's sale of its 20th Century Fox production arm for $71 billion to Disney, eBay's spinoff of PayPal, and Hewlett-Packard's decision to split itself down the middle to create two of the one hundred largest U.S. companies."); Mihir A. Desai, *Why Big Tech should break itself apart*, Wash. Post, Feb. 20, 2023, https://www.washingtonpost.com/opinions/2023/02/20/big-tech-meta-google-amazon/ (noting investor "fear that multidivisional businesses become bloated bureaucracies where each division

is underperforming and hiring the right employees is challenging, with resources poorly allocated.").

93. *See Alston*, *supra* note 64, at 2163 (recognizing that a court " 'is unlikely to be an effective day-to-day enforcer' of a detailed [antitrust] decree, able to keep pace with changing market dynamics alongside a busy docket") (quoting *Trinko*, *supra* note 26, at 415); Cavanagh, *A 2020 Agenda for Re-Invigorated Antitrust Enforcement*, *supra* note 49, at 41 (noting that the government settled the *Microsoft* litigation for "[c]onduct relief" in the form of compulsory licensing, a remedy requiring "ongoing, and potentially costly judicial monitoring" which nevertheless "does little to ensure long term de-concentration of the market by unseating the entrenched monopolist" and which "might be analogized to drug therapy . . . less invasive than structural relief" which, by contrast, "may be viewed as akin to radical surgery. Initially, it is more disruptive than conduct remedies, but it offers better odds of jump-starting competition and promoting a competitive market in the long-term.").

94. *See*, *e.g.*, William J. Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 Antitrust L.J. 825, 830 (1997) (asserting that "[o]nce a merger takes place and the firms' operations are integrated, it can be very difficult, or impossible, to unscramble the eggs and reconstruct a viable, divestable group of assets"); Consol. Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 261 (2d Cir. 1989); United States v. Microsoft Corp., 253 F.3d 34, 80 (D.C. Cir. 2001) (vacating "radical structural relief").

95. *See* Kwoka & Valletti, *supra* note 9, at 1293–1300; House Judiciary Committee Report, *supra* note 16, at 321–22.

96. *Cf.* Union Oil Co. of Cal. v. City of Los Angeles, 79 Cal. App. 4th 383, 391 (2000) (mandating refund of local taxes plaintiff had paid; rejecting city's proffered market definition as overly narrow based on "common sense"); *supra* note 73.

97. *See* Klotz, *supra* note 39; *Brown Shoe*, *supra* note 19, at 325 ("practical indicia" for defining a submarket include "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.").

98. All the way back in 1614, Sir Edwin Sandys compared eradicating monopolies to periodically weeding a garden, now badly overgrown. *See* Nachbar, *supra* note 50, at 1345 n.148. American courts in the nineteenth century "clearly imbibed the historical resentment against monopoly power." Kermit L. Hall, The Magic Mirror: Law in American History 236 (1989). Jefferson, writing to Madison, criticized the unamended Constitution for leaving out a "restriction against monopolies." Letter from T. Jefferson to J. Madison (Dec. 20, 1787). Lord Coke acted decisively against monopolies, putting them "first on the [parliamentary] agenda." Catherine Drinker Bowen, The Lion and the Throne 417–18, 435 (1956). Public sentiment against monopoly power remains; many continue to "belie[ve] that great . . . consolidations are inherently undesirable" and that "possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy." *Alcoa*, *supra* note 28, at 427–28.