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ABA SPRING MEETING 2022:
"CAN ANTITRUST REPAIR THE WORLD? SHOULD IT?"
Antitrust Law Should Continue to Focus on Competition and Consumer Welfare, While Accommodating Some Non-Traditional Goals

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I. Introduction

Can and should antitrust law repair the world? The answer should be "no" on both fronts, with an important caveat that there is still room to improve the antitrust status quo. If repairing the world through antitrust means that we should re-imagine our current enforcement regime and its goals entirely, such dramatic changes would likely harm the economy without reliably producing the promised social benefits. Antitrust law is a poor weapon, for example, for attacking unilateral price increases, mainly due to the difficulty of isolating truly illegitimate price raises and the risk of punishing pro-competitive conduct. Antitrust law would also be ill-advised as a method of preventing economically efficient concentration in favor of promoting smaller businesses. With that said, a competition-focused antitrust regime is still plenty flexible. Antitrust can be an effective tool for addressing labor market concentration, preventing hiring conspiracies (including racial discrimination), and for recognizing the benefits of such things as the global fight against climate change, or pandemic prevention and response efforts.

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II. History

The issue of antitrust law's reach is important to frame in its proper historical context, especially because it is not a new question. Quite the opposite, it might be antitrust's oldest question: what is the scope of the conduct for which antitrust law should prohibit? The statutory language of the Sherman Act is infamously vague. Sherman Act § 1 prohibits every "contract, combination …, or conspiracy, in restraint of trade or commerce," and Sherman Act § 2 makes it unlawful to "monopolize" or "attempt to monopolize … any part of the trade or commerce."[2] The legislative history offers little additional insight as to the meaning of this language. Areeda and Hovenkamp's treatise concludes, after reviewing the Congressional record of legislative debates, that "[t]he legislative history of the Sherman Act does not point consistently in any single direction, particularly on the all-important questions of protection of consumers versus protection of competitors and the role that economic efficiency should play in antitrust analysis."[3] Several potential applications for the Sherman Act emerged in its early years: to curtail monopoly power, to protect and promote competition, and to help small businesses better compete against their larger counterparts. For example, the Supreme Court, in its first attempt at interpreting the Sherman Act in 1897, noted the goal of protecting "small dealers and worthy men."[4]

Despite the Sherman Act's vague directives, courts interpreting the law quickly arrived at an understanding that it outlawed agreements between head-to-head competitors to fix prices. In 1898, then-Judge William Howard Taft wrote that where "the sole object of both parties in making the contract [is to] … enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint."[5] This principle was further solidified in *United States v. Trenton Potteries Co.,* 273 U.S. 392 (1927), which held that a price-fixing conspiracy could not be justified by pointing to the reasonableness of the price set – agreements between rivals to set prices were illegal, period. In the same period, *United States v. United States Steel Corp*., 251 U.S. 417 (1920)

[2] 15 U.S.C. §§ 1-2.

[3] PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶103c (4th & 5th eds., 2021).

[4] United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 323 (1897).

[5] United States v. Addyston Pipe & Steel Co., 85 F. 271, 282-83 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

made clear that size alone was not a violation, *IBM v. United States*, 298 U.S. 131 (1936), outlawed certain tying arrangements, and *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) expanded the breadth of the rule against price-fixing, using the phrase per se illegal for the first time. But beyond that, the scope and purposes of the law continued to be largely unclear, notwithstanding efforts at clarity in the 1914 Clayton Act and the expansion of antitrust to price discrimination 1936 Robinson-Patman Act.

Following World War II and lasting through the early 1970s, antitrust law became heavily focused on preventing market concentration. Judge Learned Hand wrote, in his famous 1945 *Alcoa* opinion, that one of the purposes of antitrust law was to "perpetuate and preserve … an organization of industry in small units" based on a belief that "great industrial consolidations are inherently undesirable, regardless of their economic results."[6] By 1948, antitrust had entered a new period of much stricter enforcement, bolstered by several major antitrust Supreme Court decisions such as *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), and *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948), and later the passage of the Celler–Kefauver Act in 1950, which amended the Clayton Act to extend merger review to non-horizontal acquisitions and which reflected a congressional desire to strengthen anti-merger enforcement considerably. The Supreme Court would later explain that the Celler–Kefauver Act was motivated primarily by "a fear of what was considered to be a rising tide of economic concentration in the American economy."[7]

In merger law, the courts began to rely on bright-line market structure changes and trends toward concentration to establish a presumption of illegality. The Supreme Court held, in *Philadelphia Nat'l Bank,* that a merger which results in the combined firm obtaining a market share greater

[6] United States v. Aluminum Co. of America, 148 F.2d 416, 428-49 (2d Cir. 1945). This approach reflected the work of the Temporary National Economic Committee, which sat from 1938 to 1941 and took a hard and unfavorable look at market concentration. https://www.archives.gov/research/guide-fed-records/groups/144.html.

[7] Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962).

than 30 percent establishes a prima facie case for prohibiting the merger under Clayton Act § 7.[8] In some instances, courts prohibited mergers between firms with single-digit market shares.[9] Merger enforcement had become so heavily skewed against businesses that in 1966 Justice Potter Stewart wrote, after reviewing the merger case law, that the "sole consistency that I can find is that in litigation under § 7, the Government always wins."[10]

This era also saw the Supreme Court attempt to inject needed clarity into non-merger conduct by expanding the scope of per se prohibitions dramatically, especially in types of vertical restraints now recognized as benign. The Supreme Court extended per se analysis, for example, to vertical territorial restraints in *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967), and to maximum resale price maintenance in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).[11] Per se rules made potentially efficient transactions riskier because it meant courts were generally unwilling to credit economic efficiencies when analyzing restraints among even non-competitors, leading firms to shy away from arrangements that may have been pro-competitive.[12] *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967) bemoaned a falling price structure, causing legitimate doubts about how large firms could be allowed to compete at all – and was one of a series of decisions favoring competitors over competition, despite the Supreme Court's earlier pronouncement to the contrary.[13] The interventionist movement came to something of a

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[8] United States v. Philadelphia Nat'l Bank, 374 US 321, 364-65 (1963) ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.").

[9] *See, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270, 272-73 (1966).

[10] *Id*. at 301 (Stewart, J., dissenting).

[11] *Arnold Schwinn* was overruled ten years later by Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). *Albrecht* was overruled nearly three decades later by State Oil Co. v. Khan, 522 U.S. 3 (1997).

[12] *See generally* Benjamin Klein, *Competitive Resale Price Maintenance in the Absence of Free Riding*, 76 ANTITRUST L.J. 431 (2009); Kenneth Elzinga & David Mills, *Leegin and Procompetitive Resale Price Maintenance*, 55 ANTITRUST BULL. 349 (2010).

[13] *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

crescendo in 1969's *Neal Report*,[14] which called for a regime of "no-fault" monopolization – i.e., the condemnation of a firm for its size alone, no matter how it got there.

In the wake of this expansion of intervention, there was a widespread concern in the business community that the very strict U.S. antitrust rules were causing the U.S. to lose ground in the increasingly global economy. In 1974, during a two-day conference sponsored by Columbia University at the Airlie House in Virginia, some of the leading economists of the time presented papers and debated about the impact of industrial concentration and the effect of U.S. antitrust rules on the economy generally. This Airlie House Conference, and the resulting book that followed,[15] was a major spark helping ignite what became an economic revolution in antitrust law, and elevated the once-thought fringe ideas of the conservative "Chicago School" to the mainstream.[16] The conference challenged the popular assumption at the time that concentration should be condemned as necessarily leading to higher prices and less innovation, relying on work from Harold Demsetz and others. This Chicago School approach gained increasing acceptance in academia and the courts, starting with the *Sylvania* decision in 1977,[17] and took off even further with Robert Bork's seminal book *The Antitrust Paradox* in 1978.[18]

We need not detail the ensuing paradigm shift to ground antitrust analysis in economic principles, a well-worn topic among the antitrust bar. Suffice to say that the Chicago School revolution opened the gates for courts to permit a broader range of business conduct which would have likely been condemned under the prior standards. Among the most critical reforms was the Supreme

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14 REPORT OF THE WHITE HOUSE TASK FORCE ON ANTITRUST POLICY (May 27, 1969), originally published at 115 CONG. REC. 11, 13890.

15 *See* INDUSTRIAL CONCENTRATION: THE NEW LEARNING (Harvey Goldschmid et al., eds., 1974).

16 *See* ANDREW GAVIL, *et al*., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 488 (3d ed. 2017) (describing the Airlie House Conference as a "catalyzing event" for the Chicago School).

17 Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

18 Federal judges were invited to courses at the University of Miami on Chicago School principles, gratis. Many attended. *The Antitrust Paradox* and a number of other Chicago School papers and books made up the curriculum. Mr. Jacobson attended the parallel course given to lawyers at UCLA.

Court's 1977 decision in *Brunswick*, holding (this time with teeth) that the antitrust laws do in fact protect competition, not competitors.[19]

It is worth noting, however, that although *The Antitrust Paradox* claimed to apply a *consumer* welfare standard, Bork had actually proposed a "total welfare" standard in which gains to competitors and producers count as welfare enhancements, even if consumers are harmed.[20] When the Supreme Court wrote that the antitrust laws were a "consumer welfare prescription" in 1979, citing Bork, it was unclear whether the Court was recognizing this difference.[21] Gradually, however, in both the academy and the courts, a true consumer welfare standard was adopted, which has prevailed since then.[22]

In recent years, a new era of progressive antitrust scholars and politicians has emerged. The Chicago School's basic tenets first came under fire from a self-described "post-Chicago School" economic wave which criticized a perceived status quo naivety regarding threats from vertical integration, among other things.[23] The post-Chicago scholars pursued a regime of true consumer welfare, under efficiencies and other cost savings were cognizable only to the extent they lowered prices to consumers.

Most recently, a "Neo-Brandeisian" antitrust academy has gained some popularity, aided by noteworthy publications from Lina Khan fully rejecting not only the Chicago School excesses, but the consumer welfare approach as well, as overly permissive.[24] This newest era is characterized by calls to return to antitrust's so-called roots as an effort to combat the private concentration of

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19 Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977).

20 *See* Kenneth Heyer, *Consumer Welfare and the Legacy of Robert Bork*, J. L. & ECON. Vol. 57, at S20 (2014).

21 Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

22 The catalyst in this regard was the rejection of Chicago School orthodoxy in Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992).

23 *See* Michael Riordan & Steven Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L.J. 513 (1995).

24 *See* Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710 (2017); Lina Khan, *The New Brandeis Movement: America' s Antimonopoly Debate*, J. EUROPEAN COMP. L. AND PRACTICE, VOL. 9, NO. 3 (2018), https://academic.oup.com/jeclap/article/9/3/131/4915966.

power. Tim Wu, writing on behalf of a group of progressive antitrust scholars at a 2019 conference, memorialized some tenets of the Neo-Brandeisian movement with *The Utah Statement*: "The simple premise of anti-monopoly revival is that concentrated private power has become a menace, a barrier to widespread prosperity, and an indefensible division of the spoils of progress and economic security that yields human flourishing."[25] Advocates call for a an effective overruling of *U.S. Steel*; breakup of successful firms; punishing unilateral price increases; rejection of the consumer welfare as antitrust' s main goal; a return to structural presumption analysis of the 50s and 60s; overruling a number of more recent cases such as *Trinko*, *Brooke Group*, and *linkLine*, and returning to a regime where antitrust protects competitors over consumers.[26]

The U.S. antitrust regime that prevailed from the 1990s to 2016 led, or at least did not deter from, many of the great innovations that we now take for granted. Think about the everyday consumer experience just thirty years ago, and earlier. Were people carrying mobile phones? Were they searching and finding what they need instantly on the Internet? Could they find whatever they were looking to buy and have it delivered the next day? What we know is that these vast innovations happened. What we do not know is whether they would have happened had antitrust rules been what some are urging now.

III. What Antitrust Can't Do (Well)

With this history in mind, we acknowledge there are a number of things that many people might want antitrust to do, but for which antitrust is especially poorly suited.

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[25] *See* Tim Wu *et al.*, *The Utah Statement: Reviving Antimonopoly Traditions for the Era of Big Tech*, OneZero/Medium (Nov. 18, 2019), https://onezero.medium.com/the-utah-statement-reviving-antimonopoly-traditions-for-the-era-of-big-tech-e6be198012d7.

[26] *See id.*; *see also* "Investigation of Competition in Digital Markets," Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee of the Judiciary (2020).

Addressing Unilateral Price Increases

Antitrust laws have done a historically poor job, and will likely continue to be ill-suited, at preventing unilateral price increases. Most countries' antitrust laws address non-collusive conduct through statutes prohibiting monopolization, such as Section 2 of the Sherman Act in the U.S. Anti-monopolization laws have generally been interpreted by courts to require two elements: (1) a firm must have monopoly power in a relevant market; and (2) it must have engaged in anticompetitive activity, i.e. must do something sufficiently bad to actual or potential competitors. In practice, this two-step "big + bad" requirement means that enforcers must prove a firm holds a significant share of a market and has taken willful action to perpetuate its monopoly "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[27] Because of these requirements, monopolization cases are relatively rare. However, Section 2 of the Sherman Act could be arguably be expanded through court interpretations to prohibit and punish any instance when a large company raises its prices suddenly. Why not?

The answer is because monopolization law rightfully requires harm to the competitive process itself, and not all price increases harm competition. This principle is elaborated in U.S. law in *Trinko*, in which the Supreme Court wrote that a monopolist charging a monopoly price is not anticompetitive on its own – to the contrary, the Court treated the ability to charge high prices as a feature of a healthy market economy; the reward for a firm that obtains its monopoly power on the merits through better business acumen.[28] The Supreme Court also supported this principle in *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998), in which a local provider of telephone services was alleged to have engaged in monopolization by fraudulently contracting for more expensive telephone switching services and thus charging its customers higher prices. The Court

[27] *See* United States v. Grinnell Corp., 384 U.S. 56, 570-71 (1966).

[28] *See* Verizon Comm's Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.").

reasoned that, despite the defendant's conduct having "hurt consumer[s] by raising telephone service rates," the plaintiff's Sherman Act claims must demonstrate that the price-increasing deceptive conduct caused the acquisition of monopoly power, rather than merely allowed the exercise of already-acquired monopoly power.[29] The Court made clear that the Sherman Act prohibits conduct facilitating the acquisition or retention of monopoly power by actions that reduce competition, but also *permits* the exercise of lawfully obtained monopoly market power.

The Court applied this principle directly in *Pac. Bell Tel. Co. v. linkLine Comm's*, 555 U.S. 438 (2009), where re-sellers of retail digital subscriber line (DSL) services alleged that their suppliers, rival incumbent telephone companies who also owned and controlled the infrastructure for DSL, monopolized the regional DSL market via a "price squeeze" by charging such a high wholesale price for DSL access that the retailers could not compete effectively with the incumbents. The Court held that the "price squeeze" claims were not cognizable under Section 2 because, absent a duty to deal or evidence of predatory pricing, a dominant firm has no obligation to maintain its rivals' profit margins by offering access to its infrastructure, let alone an obligation to offer access at sufficiently low prices.[30]

The main problem with using antitrust law to prevent price increases by large firms in concentrated markets is the difficulty for a court (or an agency) to apply consistent standards. If we treat such behavior as potential monopolization, it places antitrust enforcers in the position of distinguishing anti-competitive pricing decisions from lawful ones – not to mention the difficult problem of determining what prices are too high in light of such things as demand shifts and cost increases. At what point does a price become anticompetitive? This problem was recognized in both *Trinko* and *linkLine*, with the Court's repeated acknowledgement that any other rule would make antitrust enforcement a matter of economic central planning for which courts are ill-suited.[31]

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[29] 525 U.S. 128, 136 (1998); *see also* Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008).

[30] *linkLine*, 555 U.S. at 452 (2009).

[31] *See id*. at 452-53; *Trinko*, 540 U.S. at 408 (2004).

Trinko and its progeny uphold the important proposition that businesses can exploit the competitive advantages which they earned legitimately. Further, a business does not owe a general duty to help its competitors, even if it has a monopoly market share. These important tenets keep antitrust law tied to the consumer welfare standard – a monopolization violation requires harm to the competitive process itself, beyond simply charging high prices. If *Trinko* were overruled, which multiple antitrust advocates have recommended,[32] Section 2 risks deteriorating into a functionally un-administrable statute. Companies will be unable to reliably predict what they could and could not do under monopolization laws. Antitrust-risk averse companies will be disincentivized from engaging in aggressive competition.

Thus, antitrust is not the best or even a good tool to address unilateral price increases. But, to say that antitrust can't repair it doesn't mean the problem is beyond repair. State price-gouging laws can be an effective method of preventing suspicious, sudden sharp price increases. Currently, 39 U.S. states plus the District of Columbia have price-gouging laws that make it illegal for a business to raise prices under certain conditions,[33] such as by raising prices by an amount which grossly exceeds the average price during the 30 days immediately prior to a declaration of a state of emergency.[34] The effectiveness of these statutes will depend on the language of the law and the precise pricing thresholds set therein. Price-gouging statutes are a better tool in principle, compared to monopolization statutes, for addressing harmful unilateral price increases. They apply to firms whether monopolists or not, avoid the messy need to define a market and assess market power, and do not require re-writing foundational competition law principles.

Protecting Small Business from More Efficient Competitors

Antitrust laws are an especially poor tool for preventing "bigness" in of itself – primarily because doing so requires broadening the antitrust standards to attack concentration due to scale economies, sacrificing welfare-enhancing efficiencies. As courts have long held, undue market

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[32] *See supra* notes 24-26.

[33] *See* NAT'L CONFERENCE OF STATE LEGISLATURES, *Price Gouging State Statutes* (May 17, 2021), https://www.ncsl.org/research/financial-services-and-commerce/price-gouging-state-statutes.aspx.

[34] *See, e.g.*, Fla. Stat. § 501.160 (2021).

concentration should be unlawful if obtained by way of exclusionary conduct harming competition. Antitrust law has sought in the past to go farther by attempting to preserve de-concentrated markets regardless of efficiencies, but doing so risks higher costs and prices, reduced innovation, and (as history teaches us) will fail in the end anyway.

Protecting small businesses because they are small leads to sacrificing economic efficiency for an unclear trade-off. What social gains are bestowed in return for protecting smaller businesses? Small businesses would benefit, for example, by a rule that allowed them to fix prices. Favoring competitors over the competitive process cannot be squared with the past 50 years of sound, consensus-based antitrust enforcement.

This road has been traveled before – and has led to inane court decisions causing higher prices for goods. Take, for example, *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), in which the Supreme Court ultimately condemned a new market entrant lowering its price to compete with an entrenched firm. Utah Pie, a local bakery with over 60 percent share in the Salt Lake City frozen pie market, sued Continental, a large national bakery chain that had recently entered the Salt Lake City market and priced its frozen pies much lower than it did in other parts of the country. Utah Pie's market share quickly fell below 50 percent, and although it was still operating profitably and growing in sales volume, it brought suit against Continental for geographic price discrimination and predatory pricing.[35] The Court held that Utah Pie produced sufficient evidence to sustain the jury verdict against Continental at trial court by showing that Continental had acted with anticompetitive intent, evidenced by the "drastically declining pricing structure" of the market and "radical price cuts."[36] *Utah Pie* is a classic example of antitrust gone wrong, demonstrating the economic trade-off that can follow from prohibiting the leveraging of scale economies to aggressively cut prices. When a large successful firm can take advantage of its

[35] *See* 386 U.S. at 705. The predation claim was considered under § 2(a) of the Robinson-Patman Act, a competition law for which the standard of competitive injury "is of the same general character as the injury inflicted by predatory pricing schemes actionable under Section 2 of the Sherman Act." Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221 (1993).

[36] 386 U.S. at 702-3 & n.14.

size, efficiency, and economies of scale to cut prices or develop new innovative products, consumers benefit.

A less drastic reform, short of an open policy preference for small business per se but still harmful to consumers, might instead simply call for a more European treatment of anti-monopoly standards, which can tend to favor small businesses under certain circumstances. For instance, the abuse of dominance standard is a meaningful European departure from its U.S. counterpart by broadening the scope of conduct considered unlawful under European parallel monopolization requirements.[37] To be clear, the difference should not be exaggerated – in the *Intel* case, the 2017 European Court of Justice decision clarified the role of economically efficient conduct by a dominant firm in an analysis of rebate schemes, holding that the dominant firm can overcome a presumption of illegality with evidence that the conduct was not capable of restricting competition.[38] But the bar for a monopolization violation under TFEU Article 102 is undoubtedly lower than in the U.S., and the primary practical difference is in Europe's willingness to condemn a broader range of practices by large firms that make their products better and benefit consumers, but also could make it more difficult for smaller businesses to compete.[39] The European Commission denies it, but the Commission's work demonstrates an unflagging effort at protecting competitors over consumers.

Unfortunately, the evidence indicates that Europe's economy lags in innovation compared to the United States. America is home to the most innovative companies, dominates the list of the most valuable publicly traded tech companies by market capitalization, and has fostered a thriving

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[37] See Case 27/76, United Brands v. Commission, 1978 E.C.R. 207, ¶235 (Feb. 14, 1978) (establishing that a firm abused its dominant position by charging a price that was "excessive in relation to the economic value of the product supplied."); Case C-52/09, Konkurrensverket v. TeliaSonera Sverige AB, ECLI:EU:C:2010:483 (Feb. 17, 2011) (finding a firm abused its dominant position via a "margin squeeze" in which it, as a dominant upstream supplier, charged a price to distributors that was too high for them to compete effectively downstream).

[38] Case C-413/14 P, Intel Corp. v. Commission, ECLI:EU:C:2017:632 (Sept. 6, 2017).

[39] *See* Gregory J. Werden and Luke M. Froeb, *Antitrust and Tech: Europe and the United States Differ, and It Matters* (August 26, 2019), https://ssrn.com/abstract=3442798; Maria Coppola & Renato Nazzini, *The European and U.S. Approaches to Antitrust and Tech: Setting the Record Straight - A Reply to Gregory J. Werden and Luke M. Froeb's Antitrust and Tech: Europe and the United States Differ, and It Matters*, COMP. POL'Y INT'L, at 11 (May 2020), https://www.ftc.gov/system/files/attachments/key-speeches-presentations/europe-column-may-2020-full.pdf.

venture capital market fueling startup creation.[40] Seventy-five percent of the companies that have been listed as the most innovative companies in the world over the last 14 years have been American.[41] In 2020, U.S. companies represented 25 of the top 50 innovative companies, while only 14 of 50 companies were European-based, the highest ranking at 21 (Siemens).[42] Despite being roughly the same size as Europe's, the American economy has many more "unicorn" firms valued at $1B or more, spends far more in research and development, and outperformed the European Union in GDP growth from 1980 to 2018.[43]

The innovation disparity between U.S. and Europe is clear. Although the cause of this innovation disparity is multi-faceted and complex, Europe's competition policy is at least a contributing factor. The U.S. to date has more successfully developed an economy of innovation across a variety of metrics. It should come as no surprise that Europe's stricter antitrust scrutiny against dominant firms is partially to blame.

IV. How Can (and Should) Antitrust Law Improve?

Labor. Antitrust law has been historically deficient in recognizing labor market monopsony effects, for no good reason.[44] Even though the Supreme Court applied the Sherman Act to labor markets in 1926,[45] and economic scholarship has provided theoretical support at least since 1933 when the term "monopsony" was coined, still only a handful of monopsony-related cases have

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[40] *See generally* Jan Rybnicek, *Innovation in the United States and Europe*, in THE GAI REPORT ON THE DIGITAL ECONOMY, GLOBAL ANTITRUST INSTITUTE (2020), https://gaidigitalreport.com/2020/08/25/innovation-in-the-united-states-and-europe/.

[41] *Id*. at 452.

[42] *Id*.

[43] *Id*. at 455-56, 460.

[44] Several of the early cases under the Sherman Act were actually brought *against* labor, prosecuting union organizers for conspiracy in restraint of trade. *E.g.,* United States v. Debs, 64 F. 724 (C.C.N.D. Ill. 1894). Section 6 of the Clayton Act, 15 U.S.C. § 17, largely exempted labor from such attacks.

[45] *See* Anderson v. Shipowners Ass'n, 272 U.S. 359 (1926) (case involving a cartel of ship owners who fixed the wages of sailors).

ever been brought.[46] The market for hiring workers can be suppressed by agreement between rivals, reducing output in a manner parallel to product markets: "[e]mployers that are labor monopsonists push down wages by limiting their employment of workers who are willing and able to work for them. Not only do workers suffer; so does the economy generally because fewer employed workers mean less economic output."[47] Neither antitrust law nor theory justifies a different treatment for the agreements between competitors to fix wages, compared to agreements to fix prices.

Thankfully, antitrust has finally started to apply its analytical framework to labor market issues, in what can be described as a quiet antitrust revolution emerging out of the shadow of the Neo-Brandeisian movement. Antitrust enforcers in the U.S. have pursued several important efforts in recent years proving that labor market effects deserve a place both with analysis of mergers and anticompetitive conspiracies. In merger law, remedies can be tailored to address the negative impact of consolidation of employers. For instance, FTC's 2021 consent approving DaVita's proposed acquisition of the University of Utah Health's dialysis clinics required remedies to address the potential limiting of nephrologists available to work at dialysis clinics.[48] Although the process leading to the consent was troubling, the order is potentially effective, containing provisions that prohibit the merging parties from enforcing pre-existing non-compete agreements contained in the nephrologists' contracts. The order also contains an anti-no-poach provision that prevents DaVita from entering into any agreement that would restrict competitors from soliciting DaVita's employees. In conspiracy law, U.S. agencies have recently rejuvenated labor market enforcement by pursuing criminal indictments for no-poach agreements among competitors. In 2016, the DOJ Antitrust Division and the Federal Trade Commission issued joint guidance warning that labor market colluders would face criminal penalties.[49] The DOJ has since

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[46] *See* Eric A. Posner, *The Rise of the Labor-Antitrust Movement,* COMP. POL'Y INT'L (Nov. 29, 2021).

[47] *Id.*

[48] *See* FED. TRADE COMM'N, Press Release, *FTC Imposes Strict Limits on DaVita, Inc.'s Future Mergers Following Proposed Acquisition of Utah Dialysis Clinics* (Oct. 25, 2021), https://www.ftc.gov/news-events/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following.

[49] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (2016), https://www.justice.gov/atr/file/903511/download.

launched several criminal investigations and brought three criminal indictments. These investigations demonstrate that our antitrust analytical toolkit can be effectively applied labor monopsony issues – such enforcement efforts should be applauded and embraced across the globe.

Racial justice. There is also a potential important place here for antitrust as a tool to promote racial justice. Consider the recent lawsuit filed against the National Football League by Brian Flores, alleging racist hiring practices by NFL owners against minority head coaching candidates.[50] Though not an antitrust lawsuit, the complaint's allegations detail the NFL's history of open "gentlemen's agreements" among team owners in the 1930s and 40s to ban Black players entirely.[51] To the extent such agreements exist today, both in the U.S. and across the world, they are good targets for prosecution under antitrust conspiracy laws. Wherever evidence suggests that rivals have agreed to limit the pool of candidates they are willing to consider, antitrust scrutiny should follow.

Broader recognition of efficiencies. A further area for antitrust improvement can be made in using prosecutorial discretion to not pursue antitrust cases for benign collusive behavior while recognizing a potentially broader set of cognizable efficiencies. Specifically, we propose recognizing efficiencies in two areas in which the U.S. has some experience: coordination among rivals regarding climate impact, and coordination regarding pandemic responses. There may well be others.

Antitrust law can benefit greatly from taking the easy step of issuing a formal policy to not prosecute measures to counter climate change under antitrust laws, even in cases of coordination among head-to-head competitors. In 2019, the DOJ opened an investigation against an effort by four top car-makers to coordinate on vehicle emissions standards under California law. After facing criticism for being a politically motivated investigation, including the Governor of

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[50] *See* Complaint, *Flores v. NFL*, No. 1:22-cv-00871 (S.D.N.Y. Feb. 1, 2022), https://www.wigdorlaw.com/wp-content/uploads/2022/02/Complaint-against-National-Football-League-et-al-Filed.pdf.

[51] *Id*. at 12-13.

California claiming that the effort was a "sham" and a "P.R. stunt" by the Trump Administration, the DOJ's investigation was dropped entirely less than one year later.[52] If there had been spillover effects – collusion extending beyond emission controls – that would be different. But where the sole aim of an agreement among rivals is to aid the environment, antitrust law should be cheering.

But simply exercising enforcement discretion is not enough – the threat of potential litigation can chill coordination on non-price social goals that would be competitively benign. Earlier this year it was reported that the Net Zero Insurance Alliance, a group of the world's largest insurers, purposely limited the scope of its climate-change collaboration to avoid risking violations of antitrust rules: a proposed commitment to exit coal insurance was scrapped following advice from antitrust attorneys.[53] If efforts like this are the be encouraged, as they should be, enforcement agencies need to release official guidance re-assuring the business community that targeted joint ventures regarding climate change goals will not be met with criminal antitrust lawsuits. And, very importantly, legitimate efforts to combat climate change and environmental harms should be considered a cognizable efficiency, to be balanced against any perceived anticompetitive effects.

In a similar vein, antitrust can also aid measures to respond to public health crises. In the wake of the COVID-19 pandemic, the DOJ issued a series of emergency business review letters granting antitrust exemptions for certain pandemic-related coordination efforts. These exemptions included approval for collaboration among makers of personal-protective equipment to increase manufacturing and distribution,[54] approval for efforts by drug-makers to exchange information

[52] Coral Davenport, *Justice Department Drops Antitrust Probe Against Automakers That Sided With California on Emissions*, THE NEW YORK TIMES (Feb. 7, 2020), https://www.nytimes.com/2020/02/07/climate/trump-california-automakers-antitrust.html.

[53] Alistair Marsh, *Net-Zero Insurers Uncover New Climate Adversary in Antitrust Law*, BLOOMBERG (Jan. 19, 2022).

[54] U.S. DEP'T OF JUSTICE, McKesson Corporation, Owens & Minor, Inc., Cardinal Health, Inc., Medline Industries, Inc., and Henry Schein, Inc. Business Review Request Pursuant to COVID-19 Expedited Procedure (Apr. 4, 2020), https://www.justice.gov/atr/page/file/1266511/download.

on the production of monoclonal antibodies,[55] and approval for collaboration to dispose of excess unusable livestock caused by supply chain shocks to meat-packing plants.[56] In all three instances, the DOJ approved the effort within one week of receiving the request, cutting down a process that normally takes months. Although business review letter exemptions are rarely issued, only apply to the single case at hand, and do not technically guarantee antitrust immunity – they are still extremely effective. And, as recently demonstrated with the COVID-19 pandemic, the business review letter process can be drastically streamlined. Antitrust enforcers should take heed of the important and effective role ad-hoc carve-outs played during the COVID-19 pandemic, and embrace similar action when needed in the future.

V. Conclusion

Antitrust usually operates at its best when it allows courts to engage in nuanced, case-by-case analysis of conduct which harms the competitive process. Such careful analysis is diminished when antitrust is focused on unilateral pricing decisions, market concentration in of itself, and favoring "small dealers and worthy men." Using antitrust to repair these problems risks ignoring the wisdom of more than 130 years of common-law-like court development of monopolization doctrines. When antitrust efforts stretch monopolization standards to condemn otherwise economically efficient actions by dominant firms, people can suffer as a result from higher prices, inconsistent enforcement, and a less innovative economy writ large.

On the other hand, keeping antitrust law under the umbrella of competition does not mean confining oneself to a strict Chicago School approach. And neither does a competition-focused antitrust regime necessarily rule out consideration of non-economic goals. Current antitrust laws can and should be enforced creatively to address a wide range of competition-related concerns. Antitrust law should embrace application to labor market monopsony issues, a quiet but

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[55] U.S. DEP'T OF JUSTICE, Eli Lilly and Company, AbCellera Biologics, Amgen, AstraZeneca, Genentech, and GSK Expedited Business Review Request Pursuant to COVID-19 Expedited Procedure (July 23, 2020), https://www.justice.gov/atr/page/file/1297161/download.

[56] U.S. DEP'T OF JUSTICE, *National Pork Producers Council Business Review Request Pursuant to COVID-19 Expedited Procedure* (May 15, 2020), https://www.justice.gov/atr/page/file/1276981/download.

potentially monumental enforcement development that has gained traction over the past ten years. We should recognize antitrust's potential significant role in preventing hiring conspiracies, especially in service of preventing racial discrimination. Competition laws are capable of balancing a potential broad range of efficiencies, and can even recognize limited carve-outs for conduct which promotes the public good. The great consensus on antitrust that prevailed from the 1990s until about 2016 allowed U.S. companies to grow and create enormous benefits for consumers. We should not abandon it lightly.