CALIFORNIA LAWYERS ASSOCIATION

COMPETITION

ANTITRUST AND UNFAIR COMPETITION LAW

INSIDE THIS ISSUE

SHOULD CALIFORNIA ADOPT REVISIONS PROPOSED BY CONGRESS AND THE NEW YORK STATE LEGISLATURE TO ADDRESS SINGLEFIRM CONDUCT?
By Susannah Torpey, Brandon Annette and Quinlan Cummings

UPDATING THE CARTWRIGHT ACT FOR THE TWENTY-FIRST CENTURY: ALLOWING ANTITRUST CLAIMS FOR UNILATERAL CONDUCT
By Joshua P. Davis and Julie A. Pollock

ANTITRUST RESTORATION FROM CALIFORNIA ANCHORED BY A NEW MONOPOLIZATION SYNTHESIS
By Jordan Elias

CALIFORNIA SHOULD AMEND THE CARTWRIGHT ACT TO ADDRESS SINGLE-FIRM MONOPOLIZATION
By Kendall MacVey and Wendy Y. Wang

TECHNOLOGICAL MONOPOLIES, INNOVATION, AND THE PERSONAL FREEDOM TO FORM BUSINESSES: LIKE OIL AND WATER?
By Christopher K.L. Young

THE ADAPTABLE ANTITRUST LAWS
By Lin W. Kahn, David C. Kiernan, Alyxandra Vernon, Maya Baumer

133 YEARS YOUNG: SHERMAN ACT SECTION TWO KEEPS UP WITH BIG TECH
By Madhu Pocha and Patrick Jones

OVER-PRESCRIPTION IS BAD MEDICINE: THE CASE AGAINST A KNEE-JERK REVISION OF ANTITRUST INJURY
By Beatriz Mejia, Dee Bansal, Alexander J. Kasner

WHY HAS CALIFORNIA WAITED SO LONG TO ENACT ITS OWN MERGER REVIEW LAW?
By Abiel Garcia

COMPETITION BEYOND RIVALRY: ADAPTING ANTITRUST MERGER REVIEW TO ADDRESS MARKET REALTIES
By Ausra O. Deluard

THE RISKS OF REQUIRING CALIFORNIA-SPECIFIC MERGER APPROVALS
By Sarah Melanson and Megan Yeates

RESTRICTIONS ON WORKER MOBILITY AND THE NEED FOR STRONGER POLICIES ON ANTICOMPETITIVE EMPLOYMENT CONTRACT PROVISIONS
By Donald J. Polden

DORMANT COMMERCE CLAUSE: A POTENTIAL BRAKE ON STATE ANTITRUST LEGISLATION
By Shira Liu

VOLUME 33 | NUMBER 1 SPRING 2023

TABLE OF CONTENTS

3

MESSAGE FROM THE ADVISORS

By Cheryl Lee Johnson and Geoffrey T. Holtz

6

MESSAGE FROM THE EDITOR

By Anupama K. Reddy

10

EXECUTIVE COMMITTEE

12

SHOULD CALIFORNIA ADOPT REVISIONS PROPOSED BY CONGRESS AND THE NEW YORK STATE LEGISLATURE TO ADDRESS SINGLE-FIRM CONDUCT?

By Susannah Torpey, Brandon Annette and Quinlan Cummings

24

UPDATING THE CARTWRIGHT ACT FOR THE TWENTY-FIRST CENTURY: ALLOWING ANTITRUST CLAIMS FOR UNILATERAL CONDUCT

By Joshua P. Davis and Julie A. Pollock

34

ANTITRUST RESTORATION FROM CALIFORNIA ANCHORED BY A NEW MONOPOLIZATION SYNTHESIS

By Jordan Elias

49

CALIFORNIA SHOULD AMEND THE CARTWRIGHT ACT TO ADDRESS SINGLE-FIRM MONOPOLIZATION

By Kendall MacVey and Wendy Y. Wang

59

TECHNOLOGICAL MONOPOLIES, INNOVATION, AND THE PERSONAL FREEDOM TO FORM BUSINESSES: LIKE OIL AND WATER?

By Christopher K.L. Young

69

THE ADAPTABLE ANTITRUST LAWS

By Lin W. Kahn, David C. Kiernan, Alyxandra Vernon, Maya Baumer

83

133 YEARS YOUNG: SHERMAN ACT SECTION TWO KEEPS UP WITH BIG TECH

By Madhu Pocha and Patrick Jones

89

OVER-PRESCRIPTION IS BAD MEDICINE: THE CASE AGAINST A KNEE-JERK REVISION OF ANTITRUST INJURY

By Beatriz Mejia, Dee Bansal, Alexander J. Kasner

99

WHY HAS CALIFORNIA WAITED SO LONG TO ENACT ITS OWN MERGER REVIEW LAW?

By Abiel Garcia

108

COMPETITION BEYOND RIVALRY: ADAPTING ANTITRUST MERGER REVIEW TO ADDRESS MARKET REALTIES

By Ausra O. Deluard

117

THE RISKS OF REQUIRING CALIFORNIA-SPECIFIC MERGER APPROVALS

By Sarah Melanson and Megan Yeates

128

RESTRICTIONS ON WORKER MOBILITY AND THE NEED FOR STRONGER POLICIES ON ANTICOMPETITIVE EMPLOYMENT CONTRACT PROVISIONS

By Donald J. Polden

148

DORMANT COMMERCE CLAUSE: A POTENTIAL BRAKE ON STATE ANTITRUST LEGISLATION

By Shira Liu

MESSAGE FROM THE ADVISORS

By Cheryl Lee Johnson and Geoffrey T. Holtz[1]

This Spring 2023 issue of the Antitrust and UCL Section's Competition Journal is inspired by and dedicated to the study of potential antitrust reforms directed by the California Legislature's Assembly Concurrent Resolution (ACR) No. 95.[2] ACR 95 draws on a body of studies and growing concerns about increasing market power concentration and the need for legislative action and reform. One of the sponsors of the bill, Assembly member Wick remarked that:

> "the accumulation of power among California's tech giants is snowballing, and 20th Century antitrust laws are ill equipped to take on these monopolies. As we emerge from the pandemic, we need to do all we can do to allow small businesses to compete, and make sure that such a great deal of power doesn't fall into so few hands. As our country's largest economy and hub of innovation, it's critical that California join Congress and other state governments in their efforts to revamp antitrust laws."

The California Law Revision Commission, created in 1953, is tasked with the continuing substantive review of California statutory and decisional law to make recommendations to the Legislature for needed reforms. Under ACR 95, the Legislature directed the California Law Revision Commission to study and report back on three antitrust topics:

1. Whether the law should be revised to outlaw monopolies by single companies as outlawed by Section 2 of the Sherman Act
2. Whether the law should be revised in the context of technology companies so that analysis of antitrust injury in that setting reflects competitive benefits such as innovation and permitting the personal freedom of individuals to start their own businesses and not solely whether such monopolies act to raise prices;

3. Whether the law should be revised in any other fashion such as approvals for mergers and acquisitions and any limitation of existing statutory exemptions to the state's antitrust laws.

To assist in the performance of the ACR 95 task, the Commission assembled seven working groups with some of the leading academics and experts on antitrust issues and some of the states leading antitrust practitioners to study the topics.

In this issue of *Competition*, our contributors discuss some of the key considerations the Commission should address when assessing the topics assigned by the legislature. California is uniquely situated among the states to explore these issues. California's $3.6 trillion economy would be the fifth largest in the world if it were a separate country. It is the incubator and home to a significant number of the world's largest and most innovative technology companies, and its technology industry is an enormous contributor to the state's economic growth and success. California is thus well-positioned to take a leading role in addressing anti-competitive conduct. But one of the reasons our state has attracted technology visionaries for decades is that it has attractive policies, such as the freedom for employees to move to or start competing ventures, that have allowed companies to innovate and thrive here. Legislative proposals need to be carefully scrutinized to assess whether they will further competition and innovation or stifle it. And, of course, there already exists a body of federal antitrust law that is available as a tool for state regulators to target anti-competitive conduct, so attention should be paid to whether new legislation will fill critical regulatory gaps in existing state or federal law or simply add a duplicative layer of red tape and increased costs that will drive businesses to other states.

This issue of *Competition* addresses some of the broad issues under consideration by the Commission and the balancing of these competing interests, including:

- Is new legislation needed to broaden oversight over single-firm monopolization conduct under state law beyond that available under the current Cartwright Act and Unfair Competition Law? Section 2 of the Sherman Act is available to address such conduct, but are there critical deficiencies in that legal regime that state law should fill?
- Should California adopt a merger review regime with its own HSR-style filing and approval processes? What standards should apply that would be different from, and preferable to, the existing federal laws governing mergers that would justify the added costs and burdens to both businesses and state regulators?
- Are there victims of anti-competitive conduct that are denied remedies under current California and federal competition laws whose identities and injuries could be readily determined, warranting an expansion of the antitrust standing requirements? If so, does the answer lie in revisions to the substantive law or procedural rules, and how should state law be expanded to allow for appropriate remedies without unduly burdening

businesses with excessive litigation over conduct that is not, in fact, anti-competitive or with duplicative judgments?

The Commission's work is in its early stages, and we welcome and urge members of the California antitrust bar to stay apprised of its efforts and to participate in its processes to ensure that California's antitrust laws address the needs of our modern technological world and strike the proper balance to further healthy competition while keeping anti-competitive conduct in check.

---

1. Cheryl Johnson, formerly with the office of the California Attorney General, and Geoffrey Holtz, a partner with Morgan Lewis & Bockius LLP, are advisors to the Executive Committee of the Antitrust and Unfair Competition Law Section, and serve as the liaisons between the Committee and the California Law Revision Commission.

2. Available at https://openstates.org/ca/bills/20212022/ACR95.

MESSAGE FROM THE EDITOR

By Anupama K. Reddy[1]

In this edition of *Competition*, we showcase articles from an impressive line-up of antitrust thought leaders who share their views on the topics the California Law Review Commission (CLRC) is currently studying. Broadly, the CLRC is evaluating whether the Cartwright Act should be revised: to outlaw monopolies by single companies; in the context of technology companies; or in any other fashion.

This volume is organized by topic, starting off with four articles that discuss whether California law should be revised to outlaw monopolies by single companies. We then move into a robust discussion on the second topic—whether the Cartwright Act should be revised in the context of technology companies—in the next four articles. The third section includes five articles that cover a range of other ways it might be suitable to amend (or not amend) specific provisions of the Cartwright Act, including merger regulation and restrictive employment contracts.

SHOULD THE CARTWRIGHT ACT BE REVISED TO OUTLAW MONOPOLIES BY SINGLE COMPANIES?

To provide necessary context, **Susannah Torpey**, **Brandon Annettee** and **Quinlan Cummings** detail New York's Senate Bill S933A, CALERA, European antitrust standards, and other developments in monopoly regulation to help the CLRC make informed recommendations regarding potential revisions to California antitrust law addressing single-firm conduct. They caution that while the legislature has an opportunity to update the Cartwright Act, it must think carefully about the extent to which it wants to diverge from existing standards into novel, but perhaps justified, revisions to the antitrust laws.

We then hear from **Joshua Davis** and **Julie Pollock** who propose that California chart its own course in regulating unilateral anticompetitive conduct. The authors

highlight that California's doctrine already diverges from federal law in some important ways, including, for example, by permitting indirect purchasers to recover damages and by condemning vertical price restraints as *per se* unlawful. They suggest that time may have come for California to broaden its scope from concerted conduct to unilateral anticompetitive behavior.

Next, **Jordan Elias** comments on why California is overdue for its new anti-monopoly law. The author suggests that rather than focusing on the conduct of a firm, 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 author goes on to offer suggestions around how courts should review such cases, and what remedial tools should be made available to courts.

We then hear from **Kendall MacVey** and **Wendy Wang**, who survey the legislative history of the Cartwright Act, relevant caselaw, earlier legislative attempts to prohibit conducts and agreements leading to monopolies, and the growing concerns over monopolies. They argue that California should amend the Cartwright Act to address single-firm monopolization. The authors caution that while recent press coverage has focused on Big Tech and large national companies, the California legislature should not lose sight of monopolization in regional, geographic markets that are unique to California.

SHOULD THE CARTWRIGHT ACT BE REVISED IN THE CONTEXT OF TECHNOLOGY COMPANIES?

Christopher Young, kicks off the discussion with a view that California's antitrust laws should be stiffened to account for single-firm conduct by large technology firms. The author notes that advances in AI and large language models represent a potential new inflection point for competition: an opportunity for the Cartwright Act to be sharpened to address digital markets without necessitating any balancing of procompetitive benefits.

This piece is followed by **Lin Kahn**, **David Kiernan**, **Alyxandra Vernon**, and **Maya Baumer**'s article. The authors examine the role of innovation in case law and enforcement actions, and assess whether the antitrust statutes should be revised to provide *ex ante* rules for digital markets to account for harm to innovation. Their analysis shows that the existing Rule of Reason framework protects innovation benefits. They conclude that dismantling the current approach–where courts apply a case-by-case, non-sector specific framework–and imposing new *ex ante* rules at this juncture for technology companies is unnecessary and would risk harming the vigorous competition the antitrust laws were enacted to protect.

Next, we hear from **Madhu Pocha** and **Patrick Jones** about why the state should not revise its antitrust laws to ban single-firm monopolization. The authors believe Section 2—which can be enforced by the California Attorney General, private individuals and businesses in California—will likely be enough to address any reasonable monopolization concerns regarding Big Tech platforms. They go on to

argue that Section 2 is robust and flexible enough to proscribe conduct that stifles competition, including conduct by Big Tech firms. And that adopting a broader prohibition on unilateral firm conduct would introduce uncertainty into the marketplace and potentially stifle the very competition it is intended to promote.

We then hear from **Beatriz Mejia**, **Dee Bansal**, and **Alexander J. Kasner**, who contend that more regulation is unnecessary, counterproductive, and introduces uncertainty into California competition law. They caution that the legislature should be careful to both guard against a myopic understanding of antitrust injury and create liability that only applies to one industry or type of business. Instead, in their view, there is far more promise in continuing to refine the application of the existing antitrust laws to the challenges of new industries such as technology markets and digital platforms.

SHOULD THE CARTWRIGHT ACT BE REVISED IN ANY OTHER MANNER?

Abiel Garcia, starts us off with the first piece on a California specific merger regulation. The author maintains that California should adopt its own state law equivalent to the HSR Act or Section 7 of the Clayton Act—one that empowers the California Attorney General to review and challenge mergers, while also granting California citizens the right to challenge mergers. In the author's view, the lack of a state-law equivalent hinders California's ability to promote innovation while protecting its citizens from abuses of market power and higher prices.

Next, **Ausra Deluard**, writes an informative piece about adapting antitrust merger review to address market realities. The article begins with the history of antitrust merger policy and a discussion of the merger review reform currently underway. It then presents an examination of the current approaches to merger review and additional factors that one may consider for an enhanced assessment of whether a transaction would substantially lessen competition in today's economy. The author concludes that legal error takes a long time to course correct while concerns with underenforcement can be addressed by challenging consummated transactions with evidence of actual anticompetitive effects.

Sarah Melanson and **Megan Yeates** then shine a light on merger control, which requires a delicate balance between protecting competition and enabling welfare-enhancing transactions. This article submits that any form of state specific merger control regime in California would create significant public and private costs, including by increasing divergent outcomes and discouraging innovation, that would outweigh any potential benefits.

Rounding out this edition's slate of articles focused on unilateral conduct, Big Tech, and merger regulation is a comprehensive piece by **Don Polden** which suggests that California should reexamine its laws concerning restrictive provisions in employment contracts for their impacts on labor markets, job mobility, and wages. The author surveys recent California Supreme Court

holdings, and recommends that lawmakers provide clearer guardrails on restrictive covenants in employment relations and increase penalties for the use of certain restrictive provisions.

As the state legislature considers expanding the reach of state antitrust laws, **Shira Liu**'s article cautions that they should do so with an awareness of potential dormant Commerce Clause challenges. While federal antitrust laws do not preempt state antitrust laws, that does not give states unlimited authority to expand their antitrust laws. When drafting an antitrust law that extends beyond the reach of federal antitrust law, the author offers helpful suggestions for the drafters to consider.

I hope you enjoy reading this volume as much as we have enjoyed stitching it together. For the past year, it has been my honor to serve as Editor-in-Chief of *Competition*. This edition of *Competition* would not have been possible without the many individuals who invested their time soliciting and refining the terrific range of articles being published here. My special thanks to Dana Cook Milligan and Jessica Leal for serving on the editorial board and for their help in the production of this issue. I would also like to thank our excellent Standing Committee, composed of brilliant legal minds and economists: Beatriz Mejia, Dillon Kellerman, Hitesh Makhija, Kerry Klein, Margaret Webb, and Stephen McIntyre, for their indispensable contribution and support.

It is worth noting that this Volume is rich in diversity of thought. The authorship includes attorneys, academics, students and ex-enforcers; those in plaintiffs' firms, defense firms, and private industry; seasoned practitioners, attorneys from traditionally underrepresented groups, and early career attorneys. The standing committee was also constituted intentionally with attorneys and economists from both sides of the bench to create a balanced volume.

Finally, I congratulate Jessica Leal, who will be serving as Editor-in-Chief of *Competition* in the coming year. I look forward to reading Volume 35.

---

1. Anupama Reddy is Associate Competition Counsel at Google Inc. She serves on the Executive Committee of the California Lawyers Association Antitrust and Unfair Competition Section, and is Editor in Chief of *Competition*.

EXECUTIVE COMMITTEE

OFFICERS

CHAIR

Dominique-Chatale Alepin
Beaverton, OR

SECRETARY AND CO-VICE CHAIR

Belinda Lee
San Francisco

TREASURER AND CO-VICE CHAIR

Jonathan Levine
Emeryville

IMMEDIATE PAST CHAIR

David M. Goldstein
San Francisco

MEMBERS

Lee Brand
San Francisco

Jiamie Chen
New York

Dana Cook-Milligan
San Francisco

James Dallal
Burlingame

Jennifer Elkayam
Manhattan Beach

Caeli Higney
San Francisco

Jessica Leal
Washington, D.C.

Malinda Lee
Los Angeles

Shira Liu
Irvine

Betsy Manifold
San Diego

Anupama Reddy
San Francisco

Aaron Sheanin
San Francisco

Christina Tusan
Los Angeles

Steven Vieux
San Francisco

Chris Wheeler
San Francisco

Kevin Yeh
San Francisco

CLA BOARD OF REPRESENTATIVES

Jill M. Manning
San Francisco

NLS LIAISON

Anthony Leon
San Francisco

CALIFORNIA LAWYERS ASSOCIATION STAFF

SECTION MANAGER

Gladys Valentine
Sacramento

EDITOR IN CHIEF

Anupama K. Reddy

STANDING COMMITTEE

Dana Cook-Milligan

Jessica Leal

Dillon Kellerman

Kerry Klein

Stephen McIntyre

Hitesh Makhija

Beatriz Mejia

Margaret Webb

SHOULD CALIFORNIA ADOPT REVISIONS PROPOSED BY CONGRESS AND THE NEW YORK STATE LEGISLATURE TO ADDRESS SINGLE-FIRM CONDUCT?

By Susannah Torpey, Brandon Annette and Quinlan Cummings[1]

California's primary antitrust statute, the Cartwright Act, prohibits any contract combination or conspiracy in restraint of trade or commerce, mirroring language codified in federal law.[2] However, the Cartwright Act is silent on single-firm monopolies, a direct departure from its federal law counterpart, the Sherman Act. Section 2 of the Sherman Act ("Section 2") addresses such monopolies by making it unlawful to "monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations."[3] The Cartwright Act, by contrast, only outlaws "trusts," defined by the statute as concerted action by "two or more persons" to restrain trade.[4] Thus, the Cartwright Act does not reach unilateral conduct that restrains competition.[5] As such, anticompetitive conduct that has been successfully prosecuted under Section 2, such as predatory pricing,[6] patent misuse,[7] anticompetitive product redesign,[8] and refusals to deal,[9] is not proscribed by the Cartwright Act.[10]

California is not alone in limiting antitrust proscription to concerted conduct. For example, New York's little Sherman Act, the Donnelly Act, currently does not reach unilateral conduct. However, the recent New York State Senate Bill S933A looks to Section 2 and European abuse-of-dominance standards for guidance on prohibiting predatory and exclusionary conduct by dominant single firms. Further, while federal law on its face bans exclusionary conduct by monopolists under Section 2, critics have argued that Section 2 of the Sherman Act itself has been under-enforced and is ineffective at holding monopolists accountable for anticompetitive conduct over the past two decades.[11] In part to combat this issue, Senator Amy Klobuchar (D-MN) introduced the federal Competition and Antitrust Law Enforcement Reform Act of 2021 ("CALERA"), which endorses a European framework while focusing on increasing merger standards as a means of preventing the formation of monopolies indirectly.

Having taken note of these developments, the California Law Revision Commission ("CLRC") is studying whether California law should be revised to prohibit exclusionary conduct to acquire or maintain a monopoly. The CLRC has requested commentary and opinions on the topic from members of the antitrust community. Accordingly, Sections I and II of this article detail New York's Senate Bill S933A, CALERA, European antitrust standards, and other developments in monopoly regulation to help the CLRC make informed decisions regarding potential revisions to California antitrust law addressing single-firm conduct. Section III addresses arguments the CLRC should consider in deciding how and whether to implement a prohibition on single-firm conduct in California.

I. NEW YORK'S TWENTY-FIRST CENTURY ANTITRUST ACT

The Donnelly Act, New York State's antitrust statute, does not prohibit unilateral anticompetitive conduct by monopolists; instead, like the Cartwright Act, it prohibits concerted anticompetitive behavior. In early 2021, the New York legislature proposed The Twenty-First Century Antitrust Act ("S933A") to address this issue.[12] S933A would establish (1) a claim for monopolization and (2) a "European-inspired" claim for abuse of a dominant position.

A. MONOPOLIZATION UNDER S933A: THE TWENTY-FIRST CENTURY ANTITRUST ACT

Section 2(a) of S933A would create "an express monopolization violation using substantially the same language as Section 2 of the Sherman Act."[13] Section 2(a) of S933A is almost identical to Section 2 of the Sherman Act, providing "[i]t shall be unlawful for any person or persons to monopolize, or attempt to monopolize . . . , or combine or conspire with any person or persons to monopolize . . . any business, trade, or commerce . . . in this state."[14]

Section 2(a) of S933A was introduced to "fill a gap in the current law, which has been interpreted to prohibit only multiparty anticompetitive conduct."[15] However, there is controversy regarding whether New York should follow federal law and prohibit anticompetitive single-firm conduct.[16] Critics of the bill contend that enforcement against single-firm conduct will be weak "[b]ecause the provision mimics federal law, . . . [and] courts construing the state counterpart will rely on existing federal case law authority," which has been ineffective in regulating single-firm conduct in this millennium.[17]

B. "ABUSE OF DOMINANCE" STANDARD

Whereas Section 2(a) of S933A intentionally mirrors federal law, Section 2(b) does not. In fact, Section 2(b) explores new territory for U.S. antitrust law altogether, by making it unlawful for "any person or persons with a dominant position in the conduct of business, trade, or commerce, in any labor market, or in the furnishing of any service in this state to abuse that dominant position."[18] The Sherman Act has no similar provision on abuse of dominance; nor does any state law, for that matter.[19] This abuse of dominance standard is "European-inspired"[20] and is based on Article 102 of the Treaty of the Functioning European Union ("Article 102"), which states that "[a]ny abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited."[21] Article 102 includes a broad prohibition against "exploitation" of market power, while Section 2 only reaches anticompetitive conduct that demonstrably harms the competitive process.[22] Thus, it is "easier to challenge . . . certain unilateral conduct such as predatory pricing, tying, and monopoly leveraging" under the abuse-of-dominance standard in European courts than under the Sherman Act in American courts.[23]

Section 2(b), like its European Union counterpart, does not explicitly define "dominant position" or what constitutes "abuse."[24] However, Section 2(b) makes clear that a relevant market need not be defined to prove abuse of dominance. It states that "[i]f direct evidence is sufficient to demonstrate that a person has a dominant position or has abused such a dominant position, no court shall require definition of a relevant market in order to . . . find that a claim has been stated."[25] As examples of "direct evidence" of a dominant position, Section 2(b) includes "[t]he

unilateral power to set prices, terms, conditions, or standards; [e]vidence that a person is not constrained by meaningful competitive pressures; and [] the use of non-compete clauses, no-poach agreements or the unilateral power to set wages."[26] This list draws clear inspiration from the Treaty of the Functioning European Union, which includes a similar non-exhaustive list of behaviors that might indicate "abuse of dominance."[27]

Article 102 also provides that "if a company has a market share of less than 40%, it is unlikely to be dominant."[28] Section 2(b) similarly allows for a presumption of non-dominance for a person or firm with a low market share of 40% for sellers and 30% for buyers.[29] This is in contrast to a showing of at least 50% market share to prove monopolistic conduct that has frequently been cited in cases involving the Sherman Act.[30]

Additionally, Section 2(b) gives significantly broader power to the New York Attorney General than does the current Donnelly Act. Under the proposed provision, the Attorney General would have rule-making power under the New York Administrative Procedure Act to issue rules to "carry out" Section 2(b).[31] The Attorney General must also be notified at least 60 days in advance of any merger that would result in the buyer owning more than $8 million in assets or voting securities of the target;[32] this is the first merger requirement of this nature under state antitrust law in the United States.[33]

Critics of Section 2(b) believe that its abuse-of-dominance standard may be too broad and undefined, and could deter procompetitive business conduct.[34] Critics also contend that the low threshold of market shares needed to demonstrate a dominant position under Section 2(b), 30%–40%, may harm small and new-to-market innovators by criminalizing their growing businesses.[35] They further argue that the relatively open definition of dominance could invite frivolous litigation against non-monopolistic conduct, which even if the courts dismissed, could bankrupt growing businesses.[36]

On the other side of the debate, supporters of Section 2(b) believe it is much-needed change to take on the emergence of "big tech"[37] and balance-out weak federal laws that have limited litigation against large technology companies over the past three decades.[38] Jay Himes, former Chief of the Antitrust Bureau of the Office of the Attorney General of the State of New York, testified before the New York State Senate that Section 2(b) is the most "important" portion of S933A because of how "out of touch Section 2 [of the Sherman Act] theory . . . is with the exercise of exclusionary and exploitive single-firm conduct in fact taking place in real world commerce today."[39] Himes noted that the abuse-of-dominance standard is able to address single-firm conduct—including the conduct of big tech—that is "largely beyond the coverage of U.S. antitrust law [including] monopoly leveraging, predatory pricing, margin squeezes, foreclosure of competitors through product pricing strategies, and even excessive pricing."[40]

II. COMPETITION AND ANTITRUST LAW ENFORCEMENT REFORM ACT

CALERA, introduced by Senator Amy Klobuchar in 2021, proposes sweeping reforms to federal antitrust law, aimed in part to combat and prevent the formation of monopolies through merger enforcement.[41] These federal reforms may be necessary to revitalize Section 2 as an effective enforcement tool, which has been a clear focus of the United States Department of Justice ("DOJ") in recent years.[42]

Among the changes proposed by CALERA are lowering the threshold for finding mergers unlawful, shifting the burden of proof onto merging parties to prove that a transaction would not materially harm competition, and, like S933A, removing the requirement that a plaintiff define a relevant market to establish an antitrust case.[43] The portions of the bill most impactful on single-firm conduct are (a) the removal of certain requirements to allege monopolization and (b) the European-inspired "appreciable risk" standard for approval of mergers.[44]

A. REMOVAL OF COURT-CREATED HURDLES TO PLEADING MONOPOLIZATION

CALERA proposes to remove several court-created hurdles to alleging specific types of monopolization claims. Significantly, CALERA removes the requirement that a plaintiff alleging an exclusionary refusal to deal show that the "defendant altered or terminated a prior course of dealing between the defendant and a person subject to the exclusionary conduct"—a requirement defendants have relied on to dismiss cases predicated on exclusionary refusals to deal.[45] The bill would similarly remove the requirement in predatory pricing cases to show (1) differential treatment in cases of exclusionary conduct, (2) that a defendant with significant market power is likely to recoup losses from below-cost pricing, (3) evidence of below-cost pricing, and (4) that the conduct in question makes no economic sense other than to harm competition.[46] Removing these court-created hurdles would fundamentally alter requirements for bringing several monopolization claims under federal law, and would remove significant barriers that currently exist for those prosecuting single-firm anticompetitive conduct.

Critics of CALERA have raised concerns that removing such requirements will allow a broad range of frivolous lawsuits that will chill procompetitive conduct and innovation in the market.[47] Critics further argue that CALERA will directly undermine and conflict with federal judicial precedent under the Sherman Act.[48]

Proponents of this bill urge instead that it is a necessary reform in the face of overly liberal Supreme Court precedent that has permitted anticompetitive conduct and consolidation of market power.[49] Senator Klobuchar remarked that the bill "send[s] courts a message about Congress's view of . . . the legislative history of landmark antitrust laws."[50] The removal of these hurdles would lower the burden to bring claims against monopolists for small business plaintiffs.

B. "APPRECIABLE RISK" STANDARD FOR MERGERS

Much like S933A, CALERA looks to European law for guidance on proposed antitrust reforms. In particular, CALERA would amend Section 7 of the Clayton Act to prevent any merger that "may . . . create an appreciable risk of materially lessening competition or tend to create a monopoly."[51] Article 102 is the clear precedent here, as it has a similar standard of assessing allegedly anticompetitive conduct by reference to whether the conduct is "capable of restricting competition."[52] As such, CALERA and Article 102 punish the mere *possibility* of harm to competition rather than actual harm, thus introducing a relatively low bar to lawsuits against alleged monopolists.[53] The CALERA reform is explicitly intended to establish a "structural presumption" that mergers that have an "appreciable risk" of harming competition are "a single firm controlling an outsized market share . . . presumptively prohibited under Section 7 of the Clayton Act."[54]

Critics argue that the European standard is too punitive for mergers and would stifle innovation. Consumer welfare can be supported when large technology companies buy small startups and their products because those small companies are simply too limited to grow their products. Thus, critics contend that the broad "appreciable risk" standard could capture even procompetitive benefits in its grasp.[55] Supporters, however, claim that the U.S. antitrust law "has lagged [behind] efforts [of]other developed countries, particularly when it comes to enforcement against the dominant digital platforms and other large corporations," and that the goal of the new merger standard is to stop single-firm monopolies in their inception.[56]

III. CALIFORNIA LAW REVISION CONSIDERATIONS

The CLRC was authorized by the California Legislature to study whether the Cartwright Act should be revised to prohibit exclusionary single-firm conduct, like Section 2 of the Sherman Act

and as proposed in S933A and CALERA.[57] At the outset, it is important to note that the intent of these changes is to lessen the burden on plaintiffs and government enforcers, and increase enforcement against monopolies.[58] The challenge will be to find an appropriately balanced law that is neither over-protective, such that it deters procompetitive conduct, nor too weak, such that it enables anticompetitive conduct. This Section will review in greater detail how S933A and CALERA could impact businesses and consumers, which may help inform the California Legislature.

A. THE EXPRESS-VIOLATION STANDARD OF THE TWENTY-FIRST CENTURY ANTITRUST ACT

As discussed in Section I(a), S933A proposed in New York would introduce an express violation against exclusionary single-firm monopoly conduct that mirrors the language of Section 2 of the Sherman Act.[59] Thus, this portion of the proposed New York law would match federal law. The reaction to this proposed change has been largely positive, and the New York City Bar has formally approved the addition "to the extent that it tracks Section 2 of the Sherman Act."[60] Several small-business associations in the state also support the addition of the express violation language, noting that "[a] nticompetitive conduct is often perpetrated by a single corporation . . . . But under the current law, the state can only punish conspiracies between multiple companies."[61]

However, because the proposed language in S933A so closely tracks the language of Section 2 of the Sherman Act, it means that the proposed law may be critiqued for having the same perceived shortcomings as Section 2 of the Sherman Act.[62] In particular, Section 2 has been criticized for being too weak, "unequipped to capture the architecture of market power in the modern economy," and allowing the rise of "big tech" and other de facto monopolies.[63] Additionally, a series of Supreme Court decisions on Section 2, including *Trinko* and *Brooke Group*, have been criticized for weakening the standard for Section 2 and enabling anticompetitive conduct. Thus, given the large presence of technology companies in California, the CLRC should carefully consider whether it benefits competition in California to adopt revisions to the Cartwright Act that simply mirror Sherman Act Section 2 and go no further.

B. THE ABUSE-OF-DOMINANCE STANDARD OF THE TWENTY-FIRST CENTURY ANTITRUST ACT

To address concerns regarding the weaknesses of Section 2 of the Sherman Act, and the similarly worded express violation standard in S933A, the drafters of S933A have introduced the abuse-of-dominance standard.[64] If approved, S933A will prohibit more extensive single-firm conduct than the Sherman Act does. This includes conduct that the Supreme Court has treated permissively under the Sherman Act, such as predatory pricing that does not meet the high bar established by the Supreme Court.[65] Further, S933A prohibits "refusing to deal with another person with the effect of unnecessarily excluding or handicapping actual or potential competitors" under its abuse-of-dominance standard.[66] This has been interpreted by the New York City Bar as an "extreme" version of the essential-facilities doctrine, which prohibits a monopolist's abuse of its position under limited circumstances if it owns an essential facility with no reasonable alternative and refuses to offer access to the facility.[67] Thus, the abuse-of-dominance provision "may impose a far more stringent standard of conduct for a non-monopolist than the standard federal antitrust law imposes for even an actual monopolist."[68]

Given the novelty of this provision in the United States, it has unsurprisingly attracted a great deal of debate. Proponents of the abuse-of-dominance standard argue that it is needed to reach harmful conduct that the Sherman Act typically does not, such as predatory pricing and margin squeezes.[69] Some coalitions of small businesses have argued that current antitrust laws have allowed large monopolistic corporations to dominate product markets and harm labor markets.[70] For example, some proponents of the provision argue that "corporations exercising monopsony [] power over

markets, including labor markets, can [suppress wages] at much lower levels of concentration than current antitrust precedent takes into consideration."[71] S933A, in contrast, clearly defines a threshold market share that constitutes abusive, dominant power in the market.[72] Proponents contend that the abuse-of-dominance standard will only impact businesses with a substantial position in the market (30% or higher) while offering much-needed protection to small competitors.[73] Small Business Rising, a coalition of 30 small businesses in New York, submitted a letter in support of Section 2(b), indicating that it enables the New York Attorney General and small businesses to bring lawsuits against larger businesses without needing "expensive economists and lawyers . . . . Instead, a dominant firm's wrongful conduct . . . will be enough to . . . expose them to punishment for their illegal monopolization."[74]

On the other hand, critics argue that the abuse-of-dominance standard is so broad it may prohibit procompetitive behavior or stifle innovation by small businesses. According to these critics, many standard, procompetitive business practices exercised by large firms, like price discounting, would be treated as per se violations under the proposed rules, undermining federal law.[75] Critics have argued that under the proposed language of the abuse-of-dominance standard, procompetitive single-firm conduct, such as offering market incentives like discounted prices, could be criminalized if the firm holds over 30% of the market.[76] Some critics further argue that innovation may also be punished under the abuse-of-dominance standard if "[a]ny business that creates a new product could be targeted because they are the 'first' and 'only' ones to do so."[77] Lawsuits could be lodged against small, innovative businesses within strong local markets.[78]

It is worth noting that the New York City Bar ("City Bar"), which endorsed the express-violation standard of S933A, recommended that the abuse-of-dominance provisions be "stricken in their entirety." The City Bar voiced concerns that the abuse-of-dominance position differs too substantially from existing federal law and precedent and will be confusing to enforce.[79] In particular, the City Bar took issue with the proposed language that "evidence of pro-competitive effects shall not be a defense to abuse of dominance."[80] This conflicts with federal antitrust law, which treats only extreme anticompetitive conduct, like price-fixing, as per se unlawful.[81] Critics additionally argue that removing consideration of procompetitive effects may actually protect competitors rather than innovators or consumers.[82] While the City Bar recommended that the abuse-of-dominance standard be dropped in its entirety, it suggested that if included, "language [should be] added to clarify that the intent is to protect competition, not competitors, and not to regulate prices," as well as "to make clear that abuse of dominant position is a lesser offense than monopolization."[83]

Taking cues from the City Bar, the CLRC may consider providing clear definitions for what constitutes "abuse" and "dominant position" to avoid penalizing procompetitive business practices to ensure that such definitions are more targeted to address "big tech" conduct concerns. For example, the CLRC might require at least a 50% market share to support monopolistic behavior. S933A has dropped the requirement that plaintiffs define the market, which could allow assertions of market dominance in artificially narrow markets. However, even under federal law, it is worth noting that some courts do not require the definition of a relevant market in monopolization cases where there are direct anticompetitive effects observable in a market, such as reduced output, higher prices, or decreased quality.[84] Thus, consistent with federal law, the CLRC may consider *not* requiring market definition where there is evidence of direct effects caused by anticompetitive conduct. Given the critiques of the abuse-of-dominance standard for vagueness, if adopted, the CLRC could reserve clearly defined powers for the California Attorney General to issue rules to enforce the standard as case law develops. Such rules could further be subject to bipartisan committee oversight.

The CLRC should also note that S933A allows for the recovery of treble damages and for plaintiffs

and the attorney general to recover fees and costs.[85] The absence of such provisions deters plaintiffs from bringing claims if they cannot bear the costs, which can be in the millions of dollars for economists alone over the several years a monopoly lawsuit may span. The CLRC should consider the effect these damages and fee-shifting provisions could have on enforcement.

C. REMOVAL OF PLEADING REQUIREMENTS TO ALLEGE MONOPOLIZATION UNDER CALERA

CALERA seeks to lessen the burden on plaintiffs bringing lawsuits against monopolies by removing several court-created prerequisites for certain claims, such as showing that a prior course of conduct was terminated in unilateral refusal-to-deal cases or proving a probability of recoupment in predatory-pricing cases. Removing these elements from monopoly claims would diverge from Supreme Court jurisprudence. For example, the *Brooke Group* decision held that predatory pricing does not violate the law unless the below-cost pricing may be recouped by a monopolist later in time—a requirement that CALERA now specifically removes.[86] Critics of CALERA argue that removing these prerequisites will chill procompetitive conduct in the market, including the technology sector, which is "dynamic" and needs flexibility to support innovation and mergers.[87] Critics contend that without these court-created requirements, "proving innocence can be impossible even when the defendants are in the right," causing critics to claim that many procompetitive businesses will be liable under CALERA for harmless actions.[88] Proponents of this bill argue that Supreme Court precedent has been far too lenient on monopolistic conduct and that the legislation is a necessary reform.[89] Proponents argue that the removal of court-created requirements is the removal of "tools [that] are often manipulated by defendants [] who can adjust their business arrangements so as to limit their exposure from liability . . . [and] these tools supply courts with pretexts for disposing of cases they dislike."[90]

Given the strong presence of technology companies of all sizes in California, the CLRC should think carefully about the effect that removing court-created prerequisites will have on rapidly innovating technology markets. It may make it harder for large companies to defend themselves against antitrust suits, to the benefit of smaller companies.

D. THE APPRECIABLE-RISK STANDARD UNDER CALERA

One of the most significant changes proposed by CALERA is the introduction of the appreciable-risk standard. This approach of prohibiting mergers that create "an appreciable risk of lessening competition" arguably offers a more stringent standard than the Clayton Act, which prohibits mergers that may "substantially lessen" competition.

However, the language has been criticized as being "confusing and garbled," and for potentially leading to large numbers of frivolous suits blocking procompetitive combinations.[91] The vagueness of the language may cause federal agencies to expend significant time and money on lawsuits to clarify the meaning of this standard in court. Supporters have argued that the appreciable-risk standard in CALERA would overturn federal precedent that has limited antitrust liability.[92] Members of Congress, however, have spoken out in opposition to changing any standard for mergers under CALERA, arguing instead that existing laws are adequate but that enforcement agencies need more resources to uphold current standards.[93] Thus, if the CLRC adopts an appreciable-risk standard, it may consider adding more-detailed definitions of what constitutes an "appreciable" risk.

IV. CONCLUSION

As the significant proposals captured in S933A and CALERA demonstrate, momentum has grown in favor of updating antitrust laws in the United States. As our economy changes rapidly and becomes increasingly digitalized, state and federal governments are taking notice and calling for changes to existing legislation. The CLRC has an opportunity to lead this conversation by updating the Cartwright Act and must think carefully about

whether and to what extent it wants to diverge from existing standards into novel, but perhaps justified, revisions to the antitrust laws.

---

1. Susannah Torpey serves as a litigation partner in the Winston & Strawn LLP New York office and is co-chair of the firm's Technology Antitrust Group; she has nearly 20 years of experience in representing Fortune 500 companies in complex antitrust class actions, international investigations, and high-tech competitor litigations. Brandon Annette is a senior associate in the Winston & Strawn LLP Los Angeles office who focuses his practice on antitrust and complex commercial litigation matters. Quinlan Cummings is a junior associate in the Winston & Strawn LLP New York office who focuses her practice on antitrust matters.
2. *See* Cal. Bus. & Prof. Code § 16720; 15 U.S.C. § 1.
3. 15 U.S.C. § 2.
4. *See* Cal. Bus. & Prof. Code § 16720.
5. *See generally* Gordon M. Cowan, *California's Single-Firm Monopoly Loophole*, 18 Cal W. L. Rev. 240 (1982).
6. *See Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vt.*, 845 F.2d 404, 407–09 (2d Cir. 1988), *aff'd*, 492 U.S. 257 (1989).
7. *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1208 (9th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998); *see also Walker Process Equip., Inc. v. Food Mach. Corp.*, 382 U.S. 172, 175–78 (1965) (finding illegal enforcement of a fraudulently obtained patent by a single firm).
8. *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 457 F. Supp. 404, 419 (S.D.N.Y. 1978), *rev'd*, 603 F.2d 263 (2d Cir. 1979).
9. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608-11 (1985).
10. *See* Cowan, *supra* note 5, at 240–43.
11. *The Twenty-First Century Antitrust Act (S.8700-A), Hearing on S.8700-A Before the S. Standing Comm. on Consumer Protection of the Leg. of the State of N.Y.*, 2019–2020 Reg. Sess. (N.Y. 2020) (written testimony of Jay L. Himes) [hereinafter Himes testimony], https://www.nysenate.gov/sites/default/files/jay_himes_written_testimony.pdf (raising concerns that there had not been a significant DOJ lawsuit under Section 2 since *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001)).
12. *See* N.Y. State Assem., *New York State Assembly Bill Tracker: S933A*, https://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=S00933&term=2021&Summary=Y&Actions=Y (last visited July 10, 2023) (showing that S933A passed the NY Senate and was delivered to Assembly on May 25, 2022).
13. *See* Himes Testimony, *supra* note 11, at 3.
14. *See* S933A, 2021–2022 Reg. Sess. § 2(a)–(b) (N.Y. 2021).
15. *See* N.Y. City Bar, *Report on Legislation by the Antitrust and Trade Regulation Committee* (June 2022), https://www.nysenate.gov/legislation/bills/2021/A1812 ("The legislature further finds and declares that unilateral actions which seek to create a monopoly or monopsony are as harmful as contracts or agreements of multiple parties to do the same and should be treated similarly under the law.").
16. *See id.* ("The City Bar notes that there has been extensive debate about the appropriate contours of competition law provisions relating to single-firm conduct . . . [and] there has been much debate about the wisdom of the U.S. Supreme Court's application of Sherman Act § 2."); Himes Testimony, *supra* note 11, at 10.
17. Himes Testimony, *supra* note 11, at 10; *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001).
18. *See* S933A, 2021–2022 Reg. Sess. § 2(b).
19. Himes Testimony, *supra* note 11, at 2–4, 10.
20. *See id.* at 2.
21. *See id.*; Consolidated Version of the Treaty on the Functioning of the European Union art. 102, 2012 O.J. (C 326) at 89 (formerly Article 82 TEC).
22. Perry Lange et al., *Developments in Antitrust Law: Keep an Eye on New York*, Program on Compliance and Enforcement (Mar. 16, 2021), https://wp.nyu.edu/compliance_enforcement/2021/03/16/developments-in-antitrust-law-keep-an-eye-on-new-york/#_ftn22.
23. *Id.*
24. *See* S933A, 2021–2022 Reg. Sess. § 2(b).
25. *Id.* at § (2)(b)(i)(3).
26. *Id.* at § (2)(b)(i)(2).
27. Consolidated Version of the Treaty on the Functioning of the European Union art. 102, 2012 O.J. (C 326) at 89 (including examples such as direct or indirect

imposition of unfair prices or trading conditions; limiting production, markets, or technical development to the prejudice of consumers; and unequal treatment of similar competitors).

28. Eur. Comm'n, *Procedures in Article 102 Investigations*, https://competition-policy.ec.europa.eu/antitrust/procedures/article-102-investigations_en (last visited July 11, 2023).

29. S933A, 2021–2022 Reg. Sess. § (2)(b)(i)(2).

30. *See United States v. U.S. Steel Corp.*, 251 U.S. 417, 444 (1920).

31. *See* S933A, 2021–2022 Reg. Sess. § (2)(c)(iii) ("Attorney general shall issue guidance on how it will interpret market shares and other relevant market conditions to achieve the purposes of paragraph (b) of this subdivision while taking into account the important role of small and medium-sized businesses in the state's economy").

32. *Id.* at § (2)(c)(ii).

33. *See* Lange et al., *supra* note 22.

34. *The Twenty-First Century Antitrust Act (S.8700):Hearing Before the N.Y. State Standing Comm. on Consumer Prot.*, 2019–2020 Reg. Sess. (N.Y. 2020) (oral testimony of Ken Polanksy and Lev Ginsburg) [hereinafter Pokanlsky & Ginsburg Statement], https://www.bcnys.org/news/testimony-new-york-state-senate-standing-committee-consumer-protection-twenty-first-century; TechNet, *Memorandum in Opposition Re: S8700, submitted to the State Standing Committee on Consumer Protection of the Legislature of the State of New York on The Twenty-First Century Antitrust Act (S.8700-A)* (Sept. 14, 2020), https://www.nysenate.gov/sites/default/files/technet_memo_in_opp.pdf (claiming the new abuse-of-dominance standard could have a chilling effect on emerging technology markets).

35. Polansky & Ginsburg Statement, *supra* note 34, at 3.

36. *Id.*

37. *See* Himes Testimony, *supra* note 11, at 5 ("European enforcers and private litigants have 'a more flexible tool than the Sherman Act to deal with the new problems posed by high tech/big data,' as well as those posed by dominant firms operating in the 'brick and mortar' economy. The United States has fallen behind Europe and other parts of the world in responding to single-firm conduct that significantly restricts effective competition.") (quoting Eleanor Fox, *Platforms, Power, and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.-Europe Divide*, 98 Neb. L. Rev. 297, 305–06 (2019)).

38. *See* Himes Testimony, *supra* note 11, at 9; *see also United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283–84 (6th Cir. 1898) (warning that the "relaxation of the rules for determining the unreasonableness of restraints of trade [would cause antitrust laws to] set sail on a sea of doubt"); U.S. Dep't of Justice, Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act (2008), https://www.justice.gov/sites/default/files/atr/legacy/2009/05/11/236681.pdf ("Competition and consumers are best served if section 2 standards are sound, clear, objective, effective, and administrable. After more than a century of evolution, section 2 standards have not entirely achieved these goals, and there has been a vigorous debate about the proper standards for evaluating unilateral conduct under section 2.").

39. *See* Himes Testimony, *supra* note 11, at 9–12 (Sept. 14, 2020).

40. *Id.* at 4.

41. Press Release, *Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement* (Feb. 4, 2021) [hereinafter Klobuchar Press Release], https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement; *see also* Staff of S. Comm. on Antitrust, Com., and Admin. Law of the Comm. on the Judiciary, H.R 117th Cong., Investigation of Digital Markets: Majority Staff Report and Recommendations, 390–93 (2020) [hereinafter House Judiciary Committee Report], https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

42. Jonathan Kanter, Assistant Attorney Gen., Dep't of Justice, Antitrust Div., *Keynote at the University of Chicago Stigler Center* (Apr. 21, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler (claiming "Section 2 was very near death" merely five years ago, with "no significant cases in nearly twenty years," and promising to "vigorously enforce Section 2"); Michael Acton, *US DOJ stands ready to bring criminal charges in Section 2 monopolization cases, Powers says*, MLex (Mar. 2, 2022), https://content.mlex.com/#/content/1363181 (detailing comments from the Deputy Assistant Attorney General for Criminal Enforcement that "market concentration and consolidation is not only a civil antitrust issue," and that if "a criminal charge

based on a Section 2 violation is warranted, then that's what we'll do").

43. *See* Competition and Antitrust Law Enforcement Reform Act (CALERA) of 2021, S. 225, 117th Cong. § (2)(b)(2)–(4)(b)(3) (2021).

44. *Id.*

45. *Id.* at § (26)(a)(e)(1); *see, e.g.*, *In re Adderall XR Antitrust Litig.*, 754 F.3d 128, 135 (2d Cir. 2014) (dismissing a refusal-to-deal claim where the defendant "did not terminate any prior course of dealing—let alone a 'presumably profitable one'") (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985)).

46. CALERA, S. 225, 117th Cong. § (26)(a)(e)(1)–(6).

47. *See, e.g.*, Samuel Bowman et al., *The Competition and Antitrust Law Enforcement Reform Act*, Int'l Cntr. L. & Econ.: TL; DR (Feb. 2021), https://laweconcenter.org/resources/tldr-the-competition-and-antitrust-law-enforcement-reform-act/; U.S. Chamber of Comm., *Competition & Antitrust Law Enforcement Reform Act (CALERA) Exclusionary Conduct*, https://www.uschamber.com/assets/archived/images/calera_u.s._chamber_analysis_-_exclusionary_conduct_-_final_.pdf (last visited July 10, 2023) ("But changes to antitrust law that would expand enforcement beyond the consumer welfare standard or create short-cuts to rule of reason analysis would harm consumers, our economy, incentives to innovate, and our global competitiveness.").

48. *See, e.g.*, Samuel Bowman et al., *supra* note 47 ("The bill would also explicitly overturn several cases that undermine much of modern antitrust. For example, it would throw out the Supreme Court's *Brooke Group* decision, which holds that below-cost "predatory" pricing doesn't harm consumers unless it's likely it can be recouped by the exercise of monopoly power.").

49. Eric A. Posner, *Senator Klobuchar's Bill Doesn't Go Far Enough*, promarket (Mar. 22, 2021), https://www.promarket.org/2021/03/22/senator-klobuchars-antitrust-bill-doesnt-go-far-enough/.

50. Opinion, *Want to Reform Antitrust? Amy Klobuchar Knows Where to Start.*, Wash. Post (Feb. 8, 2021), https://www.washingtonpost.com/opinions/want-to-reform-antitrust-amy-klobuchar-knows-where-to-start/2021/02/08/49131606-6a4e-11eb-ba56-d7e2c8defa31_story.html.

51. CALERA, S. 225, 117th Cong. § 13(b) (2021).

52. *See Intel Corp Inc. v. European Commission* (C-413/14 P); *Generics (UK) Ltd v. CMA*, ECLI:EU:C:2020:52 144–72.

53. *See* Joseph Coniglio, *All Things Are Possible with Antitrust—CALERA, Capability Standards, and Looking to Europe to Reinvigorate U.S. Antitrust Enforcement*, Competition Pol'y Int'l: North Am. Column (Apr. 4, 2021), https://www.competitionpolicyinternational.com/all-things-are-possible-with-antitrust-calera-capability-standards-and-looking-to-europe-to-reinvigorate-u-s-antitrust-enforcement/ (last visited July 11, 2023); Elisabeth Bogomolini, *Tackling Big Tech in the United States and the European Union—A Comparison of the DMA and the CALERA*, 54 NYU J. L. Int'l Pol. 235, 243–45 (2022) (comparing the similar approaches of EU legislation and CALERA in "tackling big tech," including "presumptions and burden shifting, the reduction of the importance of a specific market definition in the digital economy, and the strengthening of antitrust enforcement agencies in terms of increased mandate and finances").

54. House Judiciary Committee Report, *supra* note 41, at 332–33.

55. *See* U.S. Chamber of Comm., *Competition & Antitrust Law Enforcement Reform Act (CALERA) Exclusionary Conduct*, https://www.uschamber.com/assets/archived/images/calera_u.s._chamber_analysis_-_exclusionary_conduct_-_final_.pdf (last visited July 10, 2023) ("Accordingly, CALERA leaves in scope a wide range of conduct that might adversely impact a competitor, even where it arguably has procompetitive justifications. CALERA's aim is clearly to discredit and avoid consideration of procompetitive benefits that may arise from conduct that excludes competition.").

56. Klobuchar Press Release, *supra* note 41.

57. Cal. Law Revision Comm'n, *Antitrust Law–Study B-750*, http://www.clrc.ca.gov/B750.html (last visited July 10, 2023).

58. *See generally* Cal. Law Revision Comm'n, *Memorandum 2022-50 Antitrust Law: Introduction of Study* (Nov. 3, 2022), http://www.clrc.ca.gov/pub/2022/MM22-50.pdf (last visited July 10, 2023).

59. *See* S933A, 2021–2022 Reg. Sess. § 2(a)–(b) (N.Y. 2021).

60. N.Y. City Bar, *supra* note 15, at 2 ("[T]he City Bar recommends that to ensure the Bill tracks Section 2 of the Sherman Act, the words 'any business' and 'or the furnishing of any service' be stricken from the Bill.'").

61. *See* New Yorkers for a Fair Econ., *Why the 21st Century Antitrust Act is Critical for New York Small Business* (May 2022), http://www.economicliberties.us/wp-content/uploads/2022/05/NYFE-Paper-3.pdf; *see also* Small

Business Rising, *Memorandum in Support of the Twenty-First Century Antitrust Act* (May 9, 2022), https://www.smallbusinessrising.net/updates/small-business-groups-urge-new-york-assembly-to-pass-the-21st-century-antitrust-act.

62. *See, e.g.*, Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L. J. 710 (2017); Himes Testimony, *supra* note 11, at 9–12.

63. Khan, *supra* note 62, at 710.

64. *See* Himes Testimony, *supra* note 11, at 5–8.

65. *See id.* at 4 ("An abuse of dominance approach therefore is capable of prohibiting single-firm conduct that is largely beyond the coverage of U.S. antitrust law—such as monopoly leveraging, predatory pricing, margin squeezes, foreclosure of competitors through product pricing strategies, and even excessive pricing"); *see generally Brooke Group Ltd. v. Brown Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (ruling against predatory pricing claims, and requiring that plaintiff show defendant had a reasonable chance of recouping below-cost price).

66. S933A, 2021–2022 Reg. Sess. § 340 (2)(b)(ii) (N.Y. 2021).

67. N.Y. City Bar, *supra* note 15, at 5.

68. *Id.*

69. *See* Himes Testimony, *supra* note 11, at 5–8; New Yorkers for a Fair Econ., *Why the 21st Century Antitrust Act is Critical for New York Small Business* (May 2022), http://www.economicliberties.us/wpcontent/uploads/2022/05/NYFE-Paper-3.pdf.

70. *See* New Yorkers for a Fair Econ., *Memorandum in Support New York's "Twenty-First Century Antitrust Act" S933A (Gianaris) A1812A (Dinowitz)* (May 6, 2022), https://alignny.org/resource/memorandum-in-support-new-yorks-twenty-first-century-antitrust-act/.

71. *Id.* ("For decades, courts have undermined antitrust laws by re- and mis-interpreting them, making it too difficult to hold corporations accountable when they abuse their market power.").

72. *Id.* ("The thresholds defining dominance are a key feature of the [S9330], aiming to hold the largest corporations accountable for their anti-competitive behaviors, not small or medium-sized firms.").

73. *See* Himes Testimony, *supra* note 11, at 5–8.

74. Small Business Rising, *Memorandum in Support of the Twenty-First Century Antitrust Act* (May 9, 2022), https://www.smallbusinessrising.net/updates/small-business-groups-urge-new-york-assembly-to-pass-the-21st-century-antitrust-act; *see also* Press Release, Am. Econ. Liberties Project, *Economic Liberties Applauds Senate Committee Passage of NY Antitrust Reform Act* (Jan. 12, 202), https://www.economicliberties.us/press-release/economic-liberties-applauds-senate-committee-passage-of-ny-antitrust-reform/ ("The 21st Century Antitrust Act is a vital piece of legislation that will help New York address decades of corporate consolidation, empowering the state to protect workers and small businesses from the abusive practices of dominant corporations.").

75. *See* Lipskey et al., *Comment to the New York Senate Committee on Consumer Protection in Connection with Its Pending Consideration of the Twenty-First Century Antitrust Act (S.933)*, George Mason L. & Econ. Research Paper No. 21-12, 7 (June 4, 2021) ("It thereby creates a substantial likelihood of imposing excessive costs of administration and compliance and threatens to discourage the very type of competitive conduct that should be encouraged under antitrust standards.")

76. *See* Ashley Ranslow, Opinion, *Commentary: This legislation would hurt New York's small businesses*, Times Union (Apr. 25, 2022), https://www.timesunion.com/opinion/article/Commentary-This-legislation-would-hurt-New-17123520.php.

77. *See id.*; Greater Binghamton Chamber of Com., *Memorandum in Opposition to the 21st Century Antitrust Act* (2022), https://greaterbinghamtonchamber.com/memo-in-opposition-to-a-1812a-dinowitz-s-933a-gianaris-21st-century-antitrust-act.pdf.

78. Greater Binghamton Chamber of Com., *supra* note 77.

79. New York City Bar, *supra* note 15, at 2–3.

80. *Id.*

81. *Id.* at 5.

82. *Id.*

83. *Id.* at 5–6.

84. *See, e.g.*, *Broadcom v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007); Daniel A. Crane, *Market Power Without Market Definition*, Notre Dame L. Rev. 90, 31 (2014).

85. *See* S933A, 2021–2022 Reg. Sess. § 342-d (N.Y. 2021).

86. *See generally Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

87. Jennifer Huddleston, *Implications of the Competition and Antitrust Law Enforcement Reform Act*, American Action Forum (Feb. 10, 2021), https://www.americanactionforum.org/insight/implications-of-the-competition-and-antitrust-law-enforcement-reform-act/.

88. *See* Bowman et al., *supra* note 47; U.S. Chamber of Comm., *Competition & Antitrust Law Enforcement Reform Act (CALERA) Exclusionary Conduct*, https://www.uschamber.com/assets/archived/images/calera_u.s._chamber_analysis_-_exclusionary_conduct_-_final_.pdf (last visited July 10, 2023).

89. *See*, *e.g.*, Posner, *supra* note 49.

90. *Id.*

91. *See* U.S. Chamber of Comm., *Competition & Antitrust Law Enforcement Reform Act (CALERA) Exclusionary Conduct*, https://www.uschamber.com/assets/archived/images/calera_u.s._chamber_analysis_-_exclusionary_conduct_-_final_.pdf (last visited July 10, 2023).

92. *See* Posner *supra* note 49.

93. *See* Opinion, *Want to Reform Antitrust? Amy Klobuchar Knows Where to Start.*, Wash. Post (Feb. 8, 2021), https://www.washingtonpost.com/opinions/want-to-reform-antitrust-amy-klobuchar-knows-where-to-start/2021/02/08/49131606-6a4e-11eb-ba56-d7e2c8defa31_story.html.

UPDATING THE CARTWRIGHT ACT FOR THE TWENTY-FIRST CENTURY: ALLOWING ANTITRUST CLAIMS FOR UNILATERAL CONDUCT

By Joshua P. Davis and Julie A. Pollock[1]

I. INTRODUCTION

California has long been a leader in legal regulation. It sets its own standards for automobile emissions, for example, affecting how manufacturers design and build cars.[2] It is often at the forefront of consumer privacy regulation.[3] [4] That should be unsurprising. Our federalist system encourages states to act as "experimental social laboratories."[5]

Further, California has a particularly strong claim to adopt its own policies. If it were a nation unto itself, it would have ranked as the fifth largest economy in the world in 2022,[6] and it is trending toward fourth, behind only the rest of the United States, China, and Japan.[7] Its influence on the law, then, is not out of proportion with its economic influence.

That commensurate relationship applies particularly well to antitrust. As one of the largest economies in the world, California can play a natural role in regulating how market actors compete. The U.S. Supreme Court recognized over forty years ago—in a case in which California was a plaintiff—that states may adopt their own antitrust laws.[8] California has done so. Its doctrine varies in important ways from federal law, including, for example, by permitting indirect purchasers to recover damages[9] and by condemning vertical price restraints as per se unlawful.[10]

These two divergences between federal and California law exemplify two ways in which California can contribute to effective antitrust enforcement. California law can enhance compensation and deterrence for conduct that also violates federal antitrust law. Often, indirect purchasers—and end-user consumers in particular—bear the brunt of antitrust violations, but federal law rarely affords them a means to recover their losses. Further, the prospect of liability to indirect purchasers under California law—in addition to legal exposure to direct purchasers under federal law—can help to deter antitrust violations before they occur.

California law can also permit recovery when federal law would not. Vertical price restraints may inflate prices above competitive levels without sufficient countervailing procompetitive benefits. The costs and difficulties of prevailing under a rule of reason analysis, however, may mean that no one will file litigation challenging the price restraint or, if someone does, the litigation may fail when it should not.

This Article proposes that California chart its own course in an area it has not regulated to date: unilateral anticompetitive conduct. California's antitrust law, the Cartwright Act, applies to concerted conduct but not to unilateral anticompetitive behavior. In that way, it is narrower than federal antitrust law. The time may have come, however, for that to change.

II. OVERVIEW OF CARTWRIGHT ACT

California's primary antitrust statute is the Cartwright Act,[11] enacted in 1907 "as part of a wave of turn-of-the-century state and federal legislation intended to stem the power of monopolies and cartels."[12] In the period leading up to the law's passage, cartels operated openly in several key California industries—including lumber, baking, ice production, and electrical power—engaging in price fixing and other harmful concerted action.[13] Historic press reports indicate that Senator Cartwright introduced the legislation to combat the state's growing trust problem, at a time when existing common law prohibitions were thought to be ineffective.[14] In May of 1907, the L.A. Times reported that the anticipated collapse of the "lumber trust" would be the greatest triumph for the new state law.[15]

It was in this economic context that the Cartwright Act was enacted. The statute in large part resembles Section 1 of the Sherman Act,[16] outlawing a wide variety of anticompetitive conduct, including combinations or agreements to restrain trade, prevent competition, or fix prices.[17] However, a key difference between the Cartwright Act and federal antitrust law is their approach to unilateral conduct. California's Cartwright Act addresses anticompetitive conduct only if it is concerted. Federal antitrust law applies to anticompetitive conduct whether it is concerted or unilateral. This Essay suggests it is time for California to extend its antitrust laws to unilateral conduct.

Four historical developments since enactment of the Cartwright Act over a century ago are particularly relevant:

1. Microeconomics. The first is the influence of microeconomics on antitrust doctrine. One might plausibly call it a colonization in that microeconomic theory has come to dominate the doctrine.
2. Empirical Evidence. The second is the recognition (albeit only partial) that empirical evidence should drive microeconomic analysis in antitrust. California could play a leadership role in focusing on market realities—rather than theoretical assumptions—in regulating anticompetitive behavior.
3. Market Power. The third is the increase in recent decades in market power of dominant firms, including among the largest technology companies. Legislators, government regulators, small and medium-sized businesses, and private citizens are all coming to appreciate the economic—and other—harms that dominant firms can cause.
4. Forced Arbitration. The fourth is the U.S. Supreme Court's love affair with forced arbitration. The Court has read into the Federal Arbitration Act (the "FAA") a policy in favor of pre-dispute mandatory arbitration clauses that robs many plaintiffs of any meaningful ability to enforce their legal rights, including in antitrust cases.[18]

These historical trends all can provide justifications for California to build on its leadership in antitrust enforcement by prohibiting the unilateral abuse of market power.

Microeconomics. Beginning in the 1970s, scholars, judges, and scholar-judges[19] began to transform antitrust doctrine. It went from a general and somewhat vague prohibition on unfair competition in the market to a relatively structured set of rules promoting efficiency, as economists define it. The limitation of the Cartwright Act to concerted conduct could be understood—if perhaps only *ex post*—as an effort to focus on particularly harmful actions. We have learned in the more than hundred years since its enactment about the dangers of unilateral conduct. Dominant market actors can use anticompetitive means to generate and profit from market inefficiencies. Just as conspiracies can be harmful, so can be unilateral action.[20] It may take two to tango, but it doesn't take two to deliberately cause economic harms.

Empirical Evidence. For a long time, antitrust analyses assumed that most anticompetitive conduct is difficult to sustain and market power is difficult to acquire and maintain. To a significant extent, they still do. Recent empirical research, however, has shown that market power is common.[21] [22] Often, it can be detected through direct evidence of anticompetitive effects, including the exclusion of rivals, artificially suppressed output, and artificially inflated prices. This empirical evidence creates new opportunities for preventing and policing unilateral conduct that causes anticompetitive harms.

Market Power. Recent years have also witnessed a rise in market power in the United States and elsewhere. More than 75 percent of U.S. industries have become more concentrated in the past two decades.[23] Market concentration has been particularly striking in the large technology companies that constitute the so-called FAANG, that is, Facebook (now Meta), Amazon, Apple, Netflix, and Google (now Alphabet). They have attracted the ire of many Americans in part because of legitimate concerns about the anticompetitive harms they may cause (although also admittedly in part because of a perception in some quarters that they have political biases that they do not appear to possess).

Market concentration has increased with the growth of digital economies, and single technology companies often possess massive shares of digital markets. For instance, Google owns approximately 90% of the search engine market.[24] Amazon accounted for 74% of all e-commerce transactions in the United States in the first quarter of 2019.[25] Google and Facebook together took in 90% of new online advertising dollars in 2016.[26] Google and Apple together also own essentially the entire market for smart phone application platforms, with the iOS App Store accounting for 65% of app-based revenue in 2018, and Google Play Store accounting for approximately 36%.[27] This increase in market power by a handful of technology companies augments the risk of anticompetitive harms and, with it, the need for antitrust laws that regulate unilateral, anticompetitive conduct.

Moreover, there are some who have been calling for more vigorous merger enforcement as U.S. markets become more concentrated,[28] with notable mergers in the technology sector including Google's 2006 acquisition of YouTube, Facebook's 2012 acquisition of Instagram, and Microsoft's 2016 acquisition of LinkedIn.[29] Yet in California, where many large technology companies are headquartered, courts have largely eliminated the Cartwright Act's application to mergers.[30] The California Supreme Court determined more than three decades ago that a "combination" for the purposes of the Cartwright Act consists of two independent entities engaging in anticompetitive conduct, and thus does not include mergers.[31] The California Supreme Court stated that "the Attorney General's view that the Cartwright Act applies to mergers is not supported."[32] This decision has been affirmed by at least one court of appeals, which held that although federal law prohibits anticompetitive mergers, single-firm monopolization is not legally cognizable under the Cartwright Act.[33]

California is uniquely situated to play a leadership role in antitrust enforcement in the technology industry. The legislature could amend the Cartwright Act to provide for robust enforcement of all anticompetitive transactions, including affiliations and mergers. By allowing private plaintiffs and the California Attorney General to challenge anticompetitive mergers in both federal and state court, the state could develop its own jurisprudence governing consolidation and contend with problems that may not be adequately addressed by federal antitrust law, such as cross-market and vertical consolidation.[34]

Forced Arbitration. The importance of California regulating unilateral conduct is all the greater because of the Supreme Court's interpretation of the FAA.[35] On one hand, the Court has been keen to enforce arbitration clauses, and to find they bar class procedures, even if the result is that plaintiffs have no feasible way to vindicate their rights. On the other hand, the direct purchaser rule under federal antitrust law generally requires contractual privity for private litigants seeking damages. That combination means that the private litigants who are subject to onerous arbitration provisions may well be the only ones permitted to seek damages under federal antitrust law. In other words, forced arbitration often deprives direct purchasers of the ability to sue and yet the direct purchasers are the lone private parties permitted to seek damages.

California law could ameliorate this situation. While forced arbitration may prevent direct purchasers from challenging unilateral anticompetitive conduct in court, indirect purchasers may nonetheless be able to file claims for damages.

III. ANTITRUST LAW IS UNDERENFORCED

The historical developments that have occurred since the enactment of the Cartwright Act do not provide the only reason to expand the statute. In addition, substantial empirical evidence suggests that antitrust law in general is *underenforced*, a problem that would be addressed significantly, although likely insufficiently, by expanded enforcement in California.[36]

A significant body of research suggests that antitrust litigation results in *less recovery*, on average, than the actual harm antitrust violations cause, even though plaintiffs in antitrust cases may recover "treble"[37] damages, multiple plaintiffs may recover damages for the same conduct, and, in some instances, antitrust violators may be liable both civilly and criminally.

Many factors contribute to the underenforcement of antitrust law. First, procedural obstacles cause victims to recover less than single antitrust damages. Damages recovered through antitrust litigation often omit categories of harm caused by violations. Many violations are not discovered and, even if discovered, cannot be successfully proven, including because the violators have destroyed the evidence. Because of these factors, victims of antitrust violations rarely, if ever, recover compensation equal to the full harm they suffer.[38] By amending the Cartwright Act to address the improper acquisition or maintenance of monopoly power, the California legislature could address the underenforcement problem and expand avenues for recovery for plaintiffs who may bring claims only under state law, such as indirect purchasers seeking damages.

A. ACTUAL RECOVERIES RESULT IN LESS THAN SINGLE ANTITRUST DAMAGES

Empirical evidence suggests that antitrust litigation on average results in recovery of less than the benefits that antitrust violators receive.[39] In that way, according to standard microeconomic theory, corporations with market power have financial incentives to violate antitrust laws.[40]

Consider cartel cases involving horizontal price fixing. They would seem particularly susceptible to overenforcement—rather than underenforcement—as cartelists potentially face both civil and criminal liability. Moreover, the burden of proving a per se antitrust violation in a cartel case is relatively

modest compared to claims evaluated under the rule of reason. Finally, civil litigation may follow on the heels of criminal litigation and, quite possibly, guilty pleas. If so, defendants may lose on whether they violated the antitrust laws as a matter of issue preclusion. Yet even in cartel cases, the evidence shows that the financial penalties that corporations pay are almost always less than single antitrust damages.[41]

Litigation dynamics and procedural rules may in part explain this phenomenon.[42] Courts have made it progressively more difficult for antitrust plaintiffs to escape mandatory arbitration,[43] to survive motions to dismiss,[44] to get classes certified,[45] and to survive summary judgment.[46] For these and other reasons, on average—depending on how one measures—cartelists pay in total between about 19 to 66% of single antitrust damages in settlement of civil and criminal antitrust litigation.[47]

B. ANTITRUST DAMAGES DO NOT INCLUDE MUCH OF THE HARM CAUSED BY ANTITRUST VIOLATIONS.

There are many categories of harm that are generally not recoverable in antitrust litigation. While plaintiffs can be compensated for antitrust overcharges—*i.e.*, the amount above competitive pricing they paid because of the conspiracy—they suffer many other kinds of harm. First, they lose the use of the extra money they paid from the time of the purchase to the time of recovery, so-called "prejudgment interest." In this way, plaintiffs are forced in effect to give antitrust violators interest-free loans. Second, non-conspirator competitors often react to price inflation by raising their own prices, causing so-called umbrella effects. Plaintiffs rarely pursue or recover umbrella damages in antitrust cases.[48] Third, inflated prices discourage some purchasers from buying the good or service subject to the conspiracy, resulting in a so-called dead weight loss. Antitrust plaintiffs rarely, if ever, recover for deadweight loss.

Bob Lande has calculated that, for these and similar reasons, if a court were to award antitrust *treble* damages, that would amount roughly to *single* or at most one-and-a-half times actual harm.[49] It follows that if a court were to award—or the parties were to settle for—single antitrust damages, that would really amount only to about 33 to 50% of actual harm. These figures together suggest that antitrust violators paying significantly less than the damage they cause, creating—according to standard microeconomic analysis—suboptimal incentives to abide by the antitrust laws. Permitting additional antitrust claims under California law should, all else equal, move deterrence of antitrust violations closer to optimal levels.

C. VICTIMS OF ANTITRUST VIOLATIONS RECOVER LESS THAN THE HARM THEY SUFFER.

When we combine the analysis above, we see the potential for underenforcement of the antitrust laws. The analysis in Section A suggests that cartelists on average pay—and victims receive—between about 19 to 66% of single "antitrust" damages. The analysis in Section B indicates that single "antitrust" damages range from 33 to 50% of actual harm. Combining these points, we can infer that when defendants face litigation for an antitrust violation, they *on average* pay—and plaintiffs receive—between 7 and 33% of actual harm.[50]

D. MANY VICTIMS OF ANTITRUST VIOLATIONS NEVER RECOVER AT ALL.

Another reason the victims of antitrust victims may receive inadequate compensation—and antitrust violators face insufficient deterrence—is that antitrust violators escape detection. Further, antitrust enforcers—federal and state governments and the victims of antitrust violations—may discover insufficient evidence to initiate antitrust litigation, even if they discover what they believe is an antitrust violation.

The analysis above discusses cases in which antitrust violators were forced to pay, which will not always be the case. Taking this into consideration, there is

reason to believe that even in the easiest cases to prosecute—cartels subject to the per se standard—the total financial liability that antitrust violators incur—including government sanctions and private recoveries—is too low. John Connor and Bob Lande calculate that the total monetary sanctions in cartel cases are only 9 to 21% of what they should be to provide optimal deterrence of antitrust violations.[51] The overall analysis suggests that optimal levels of deterrence and compensation would best be achieved by increasing the total recovery of antitrust victims.

Expanding the Cartwright Act to include single-firm conduct would at least partially fix the problem of underenforcement. Increased enforcement under California law would expand judicial access for antitrust plaintiffs to whom federal laws do not apply, including indirect purchasers seeking recovery of damages.

IV. ANTITRUST ENFORCEMENT OF SINGLE FIRM CONDUCT MATTERS

Two potential criticisms of the proposal to permit claims based on unilateral conduct under the Cartwright Act are worth considering. The first is that private enforcement of the antitrust laws has no meaningful effect. The second is that even if some private enforcement is consequential, efforts to challenge unilateral conduct is not.

On the first point, an empirical study by Joshua Davis (one of the authors of this Article) and Rose Kohles shows that private enforcement through federal antitrust class actions from 2009 through 2021 have recovered just shy of $30 billion.[52] A separate study suggests that the deterrence effects of private enforcement may be greater than the deterrence effects of Department of Justice enforcement against price-fixing cartels.[53] So private enforcement may be suboptimal—whether taken on its own or in combination with public enforcement—but it is nonetheless valuable.

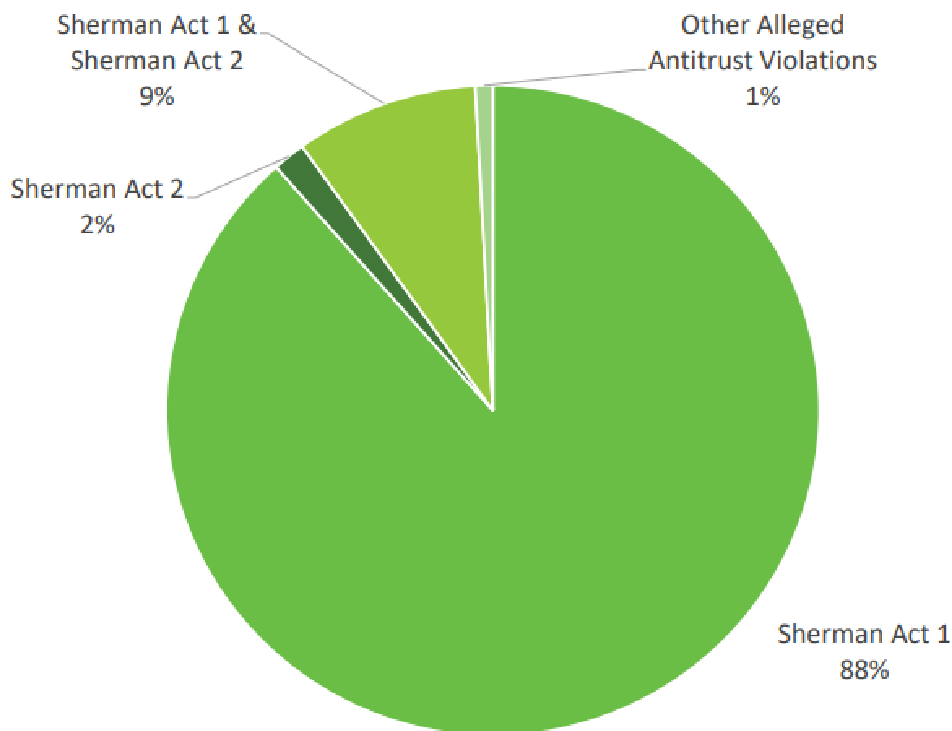
On the second point, private enforcement of antitrust laws proscribing anticompetitive unilateral conduct is both valuable and significant. Section 2 of the Sherman Act prohibits a single firm from illegally acquiring or maintaining monopoly power,[54] guarding against the use of monopoly to block competition or gain competitive advantage. The public policy concerns with monopoly power have been identified in early Sherman Act jurisprudence;[55] monopoly power can harm consumer welfare, causing higher prices, reduced output, poorer quality products or services, and, in many circumstances, reduced innovation.[56]

The principles underlying Section 2 enforcement serve important policy goals. Still, a common belief is that cases brought under Section 2 constitute an insignificant portion of antitrust recoveries in federal court, in part because of the perception that rule of reason cases so rarely succeed that they are not worth bringing.[57] While courts have deemed some Section 1 violations as unlawful per se, single firm monopoly conduct under Section 2 is evaluated under the rule of reason, a harder standard for plaintiffs.[58] In fact, some studies suggest there is little private enforcement under Section 2 of the Sherman Act,[59] but these analyses are easily misconstrued.[60]

It is true that the majority of antitrust recoveries in federal court are brought under Section 1 of the Sherman Act.[61] According to a study of private federal antitrust settlements between 2009 to 2021, approximately 90% of settlements occurred in cases brought under only Section 1, 2% of settlements occurred in cases brought under only Section 2, and 9% of settlements in actions pursuing both Section 1 and Section 2.[62] However, when looking at the total *amounts* recovered in private federal antitrust cases, the spread is more balanced. Section 1 claims accounted for $21.6 billion in recoveries, or 74%, Section 2 claims accounted for over $1 billion, or 4%, and cases involving both claims settled for approximately $6 billion, or 22%.[63] Consider the following figure from the Davis and Kohles analysis:[64]

Figure 13: **Settlements by Alleged Antitrust Violation**
2009 - 2021

Alleged Antitrust Violation	# of Settlements	% of Settlements	Aggregate Amount	% of Amount
Sherman Act 1	1,040	88%	$21,615,620,717	74%
Sherman Act 2	19	2%	$1,075,200,000	4%
Sherman Act 1 & Sherman Act 2	108	9%	$6,312,604,999	22%
Other Alleged Antitrust Violations	10	1%	$335,075,000	1%
Total	1,177		$29,338,500,716	100%



Private enforcement of antitrust claims under Section 2, then, constitutes a meaningful proportion of antitrust recoveries and serves important public policy goals. Expanding the Cartwright Act to include single-firm monopoly conduct would be meaningful too.

V. CONCLUSION

Over a century ago, California enacted legislation to address anticompetitive concerted conduct, but not anticompetitive unilateral conduct. A lot has changed since then. Economists have learned about potential harms from monopoly power. Financial behemoths have formed that were unimaginable in the early nineteenth century. A sophisticated structure has developed for adjudicating state and federal antitrust claims. The moment may be ripe for California to enact a private right of action under the Cartwright Act for the unilateral abuse of monopoly power. We think there is a strong argument that it should.

1. Joshua P. Davis is a Research Professor at UC College of the Law SF and a nationally recognized expert in antitrust, civil procedure and legal ethics. He is a Shareholder and head of the San Francisco Bay Area Office of Berger Montague PC. Julie A. Pollock is an Associate in the San Francisco Bay Area Office of Berger Montague PC.

2. *See* Peter Valdes-Dapena, *How California ended up in the zero-emissions driver's seat*, CNN Bus. (Sept. 6, 2022 6:34 PM), https://www.cnn.com/2022/09/06/business/california-emissions-regulations/index.html.

3. *See, e.g.*, Office of Gov. Gavin Newsome, *Governor Newsome Signs First-in-Nation Bill Protecting Children's Online Data Privacy* (Sept. 15, 2022), https://www.gov.ca.gov/2022/09/15/governor-newsom-signs-first-in-nation-bill-protecting-childrens-online-data-and-privacy/.

4. *See, e.g.*, State of California Dept. of Justice, *California Consumer Privacy Act (CCPA)* (May 10, 2023), https://oag.ca.gov/privacy/ccpa.

5. *Roth v. United States*, 354 U.S. 476, 505 (1957) (Harlan, J., dissenting).

6 *See* Press Release, Office of Gov. Gavin Newsome, *ICYMI: California Poised to Become World's* 4th *Biggest Economy* (Oct. 24, 2022), https://www.gov.ca.gov/2022/10/24/icymi-california-poised-to-become-worlds-4th-biggest-economy/

7. *Id.*

8. *California v. ARC Am. Corp.*, 490 U.S. 93 (1989).

9. *Id.*

10. *See, e.g.*, *Darush v. Revision LP*, No. 12-cv-10296, 2013 WL 1749539, at *6 (C.D. Cal. Apr. 10, 2013) (citing *Mailand v. Burckle*, 20 Cal. 3d 367, 377 (1978)).

11. Cal. Bus. & Prof. Code §§ 16700-16770.

12. *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 772 (2010) (citing John M. Landry & Kirk A. Hornbeck, *One Hundred Years in the Making: The Cartwright Act in Broad Outline*, 17(2), J. Antitrust and Unfair Competition Section St. Bar of Cal. 7 (2008)).

13. Landry & Hornbeck, *supra* note 12, at 7-8

14. *Id.*

15. *Id.* at 7 (citing *Trusts Go "Bust" In Just One Week*, L.A. Times (May 16, 1907)).

16. While the Cartwright Act resembles Section 1, judicial interpretation of the statute by California state courts has not always mirrored that of the Sherman Act. The California Supreme Court has held that the Cartwright Act was not *modeled* after the Sherman Act, and thus interpretation of the Sherman Act is influential but not probative of the Cartwright drafters' intent. Therefore, the breadth and range of the Cartwright Act has been viewed differently from that of the Sherman Act in many respects. *See Aryeh v. Canon Business Sols., Inc.*, 55 Cal. 4th 1185, 1195 (2013) ("Interpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was not modeled on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century." (citing *California ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147 (Cal. 1988)); *see also Cianci v. Superior Court*, 40 Cal. 3d 903, 920 (1985) ("[W]e have observed that the Cartwright act is broader in range and deeper in reach than the Sherman Act.")

17. *Pac. Gas & Elec.* Co. v. County of Stanislaus, 16 Cal.4th 1143, 1147 (1997).

18. *Am. Express v. Italian Colors*, 570 U.S. 228 (2013).

19. Robert Bork and Richard Posner are notable examples of influential scholar-judges.

20. *See, e.g.*, *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 52 (1911) (the "evils which led to the public outcry against monopolies" include "(1) [t]he power . . . to fix the price and thereby injury the public; (3) [t]he power . . . of enabling a limitation on production [sic]; and (3) [t]he danger of deterioration in quality of the monopolized article which it was deemed was the inevitable result of the monopolistic control over its production and sale").

21. Gustavo Grullon, et al., *Are U.S. Industries Becoming More Concentrated?*, 23 Rev. Fin. 697 (2019).

22. Philippon, Thomas, *The Economics and Politics of Market Concentration* (Dec. 2019), https://www.nber.org/reporter/2019number4/economics-and-politics-market-concentration.

23. *See* Grullon, *supra* note 21, at 698.

24. John M. Newman, *Antitrust in Digital Markets*, 72 Vand. Law Rev. 1497 (2019).

25 *Id.* at 1503.

26. Nitasha Tiku, *How to Curb Silicon Valley Power–Even with Weak Antitrust Laws*, WIRED (Jan 5. 2018 7:00 AM),

https://www.wired.com/story/how-to-curb-silicon-valley-power-even-with-weak-antitrust-laws/.

27. Nikolas Guggenberger, *Essential Platforms*, 24 Stan. Tech. L. Rev. 237 (2021).

28. *See, e.g.*, Claire Kelloway, *Farmers and Business Owners Testify to Harms of Lax Merger Policy* (Mar. 31, 2022), https://www.foodandpower.net/latest/ag-merger-hearings-3-22.

29. Carl Shapiro, *Antitrust in a Time of Populism*, 61 Int'l J. Indus. Org. 714 (2018).

30. *California ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147 (1988) (holding that the Cartwright Act does not regulate mergers).

31. *Id.* at 1168.

32. *Id.*

33. *Asahi Kasei Pharma Corp. v. CoTherix, Inc.*, 204 Cal. App. 4th 1, 4 (2012) (affirming summary adjudication for defendant).

34. Samuel M. Changet al., Cal. Healthcare Found., *Examining the Authority of California's Attorney General in Health Care Mergers*, (Apr. 2020), https://www.chcf.org/wp-content/uploads/2020/04/ExaminingAuthorityCAAttorneyGeneralHealthCareMergers.pdf.

35. Many commentators have criticized the Court's interpretation of the FAA. *See, e.g.*, Myriam Gilles, The Day Doctrine Died: Private Arbitration and the End of Law, 2016 U. ILL. L. REV. (2016). Nonetheless, it will remain the law of the land for the foreseeable future.

36. W. Bradley Wendel & Joshua P. Davis. *Complex Litigation Funding: Ethical Problem or Ethical Solution?*, 74 Hastings L.J. 1459 (2023).

37. Antitrust "treble" damages capture much less than three times the harm that an antitrust violation actually causes, as described in Section III.A.

38. John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less than Single Damages*, 100 Iowa L. Rev. 1997 (2015).

39. Bradley & Davis, *supra note* 36.

40. John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 Cardozo L. Rev. 437 (2012) (explaining that monetary sanctions even in cartel cases—the easiest antitrust cases to prosecute—are only 9 to 21% of what they should be for optimal deterrence).

41. Connor & Lande, *supra* note 38.

42. See generally Robert Klonoff, *The Decline of Class Actions*, 90 Wash. U. L. Rev. 729 (2013) (discussing ways in which courts have made prosecuting class actions more difficult).

43. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013).

44. *Bell Atlantic Corp., v. Twombly*, 550 U.S. 544 (2007).

45. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619 (D.C. Cir. 2019) (holding that class certification was inappropriate where 12.7% of absent class members were uninjured); *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018) (suggesting that class certification may be inappropriate if a class contains uninjured members and plaintiffs must rely on declarations or affidavits to determine which class members were injured); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316 n. 14 (3d Cir.2008); *but see Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022) (en banc) (holding that courts may certify classes containing uninjured members and approving practical approaches to establish common issues predominate for purposes of certification); *see also* Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 Geo. Mason L. Rev. 969 (2010) (explaining ways in which courts have made class certification more difficult, particularly in antitrust cases); Joshua P. Davis & Eric L. Cramer, *Of Vulnerable Monopolists?: Questionable Innovation in the Standard for Class Certification in Antitrust Cases*, 41 Rutgers L. Rev. 355 (2009) (explaining ways in which courts have made class certification more difficult, particularly in antitrust cases).

46. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

47. Connor & Lande, *supra* note 38 at 1998. The article focuses on settlement of antitrust cases. That is appropriate given that the vast majority of legal actions are resolved through settlement. *See, e.g.*, Marc Galanter & Angela M. Frozena, *A Grin without a Cat: The Continuing Decline & Displacement of Trials in American Courts*, 143 Daedalus 115 (2014).

48. *See, e.g., Mid-West Paper Prod. Co. v. Cont'l Group Inc.*, 596 F. 2d 573 (3rd. Cir. 1979) (denying standing to umbrella purchasers).

49. Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages*, 54 Ohio State L. J. 115 (1993).

50. The lower bound should be calculated by multiplying the lowest percentages—20% times 33%—and the higher bound by multiplying the highest percentages—67% times 50%. The results range from about 7 to 33%.

51. Connor & Lande, *supra* note 40.

52. Joshua P. Davis & Rose Kohles, Center for Liti. And Courts, Univ. L.S.F., 2021 Antitrust Annual Report: Class Actions in Federal Court, at 16.

53. Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 BYU L. Rev. 315; Robert H. Lande & Joshua P. Davis, *The Extraordinary Deterrence of Private Antitrust Enforcement: A Reply to Werden, Hammond, and Barnett*, 58 Antitrust L. Bull. 173 (2013).

54. 15 U.S.C. § 2.

55. *Standard Oil Co. v. United States*, 221 U.S. 1, 52 (1911) (the "evils which led to the public outcry against monopolies" include "(1) [t]he power . . . to fix the price and thereby injury the public; (3) [t]he power . . . of enabling a limitation on production [*sic*]; and (3) [t]he danger of deterioration in quality of the monopolized article which it was deemed was the inevitable result of the monopolistic control over its production and sale.").

56. Sherman Act Section 2 Joint Hearing: Welcome and Overview of Hearings Hr'g Tr. 25, June 20, 2006 (Barnett) (identifying as "a major harm of monopoly" the possibility that a monopolist may not feel pressure to innovate); Sherman Act Section 2 Joint Hearing: Refusals to Deal Panel Hr'g Tr. 55, July 18, 2006 (Salop) ("Monopolists have weaker innovation incentives than competitors."); Peter C. Carstensen, *False Positives in Identifying Liability for Exclusionary Conduct: Conceptual Error, Business Reality, and Aspen*, 2008 Wis. L. Rev. 295, 306 (2008) ("a monopolist has no incentive to support technological innovation that could undermine its dominant position in the market").

57. Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*. 36 Seattle Univ. L. Rev. 1269, 1290 (2012).

58. *See, e.g.*, C. Paul Rogers III, *The Incredible Shrinking Antitrust Law and the Antitrust Gap*, 52 U. Louis. L. Rev. 67 (2013); *see also* American Economic Liberties Project, *What You Need to Know About Section 2 of the Sherman Act* (Oct. 8, 2020), https://www.economicliberties.us/our-work/section2-explainer/.

59. Michael Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 Geo. Mason. L. Rev. 827, 828–29 (2009).

60. Professor Michael Carrier analyzed final judgments involving a rule of reason claim in federal court for a ten-year period from 1999 to 2009, and concluded that defendants won 221 or 222 cases. That result could be misleading because a very high percentage of cases settle before a final judgment, *See, e.g.*, Marc Galanter & Angela M. Frozena, *A Grin without a Cat: The Continuing Decline & Displacement of Trials in American Courts*, 143 Daedalus 115 (2014), and most judicial rulings are likely to be *final* if defendants win, but not if plaintiffs win. If a court *grants* a motion to dismiss or for summary judgment, a defendant may well obtain a favorable final judgment. In contrast, if a court *denies* a motion to dismiss or for summary judgment, ruling for plaintiffs, the litigation almost always continues. In the vast majority of cases, successful plaintiffs survive in court until they obtain a favorable settlement. They very rarely receive a final judgment in their favor. As a result, Professor Carrier's methodology eliminates almost every way plaintiffs would be expected to win. Professor Carrier is an excellent scholar, but on this one issue we think he has missed the mark.

61. Davis & Kohles, *supra* note 52, at 17.

62. Davis & Kohles, *supra* note 52, at 17.

63. Davis & Kohles, *supra* note 52, at 17.

64. Davis & Kohles, *supra* note 52, at 16.

ANTITRUST RESTORATION FROM CALIFORNIA ANCHORED BY A NEW MONOPOLIZATION SYNTHESIS

By Jordan Elias*

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]

* * *

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]

* * *

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.

---

* Partner, Girard Sharp LLP; J.D., Stanford Law School; B.A. *magna cum laude*, Yale College. Views and research are my own. In memory of David Brion Davis. Special thanks to Charles Reichmann for the constructive dialogue and Kyle Quackenbush and Jordan Isern for research support.

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.

CALIFORNIA SHOULD AMEND THE CARTWRIGHT ACT TO ADDRESS SINGLE-FIRM MONOPOLIZATION

By Kendall MacVey and Wendy Y. Wang[1]

Unlike Section 2 of the Sherman Act, the Cartwright Act, California's principal antitrust statute, does not explicitly prohibit monopolization or attempted monopolization.[2] Rather, with the exception of one provision prohibiting a condition on purchasers not to use a competitor's goods or services, the Cartwright Act is silent on monopolization.[3]

Enacted in 1907, the Cartwright Act made "trusts" unlawful, which are defined as "a combination of capital, skill or acts by two or more persons for" specific purposes.[4] California courts at various times have issued decisions that left open whether the Cartwright Act prohibits monopolization.

In 1978, for example, the First Appellate District Court of Appeal in *Lowell v. Mother's Cake & Cookie Co.* (1978) 79 Cal.App.3d 13, 23 held that the Cartwright Act prohibits monopolization as the Act "prohibits the combination of resources of two or more independent interests for the purpose of restraining commerce and preventing market competition." But in 1988, the California Supreme Court appeared to disagree, examining the legislative history of the Cartwright Act and concluding that the Legislature did not intend the term "combination" to include mergers.[5] Subsequent courts have interpreted that holding to mean that the Cartwright Act does not apply to single-firm monopolization.[6] Then in 2015, the California Supreme Court confirmed this interpretation:

> We begin with the proposition that agreements to establish or maintain a monopoly are restraints of trade made unlawful by the Cartwright Act. . . . Under general antitrust principles, a business may permissibly develop monopoly power, i.e., "the power to control prices or exclude competition" . . . , through the superiority of its product or business acumen. To acquire or maintain that power through agreement and combination with others, however, is quite a different matter.[7]

An exception to the Cartwright Act's exclusion of monopolization has formed insofar as the Cartwright Act does prohibit some monopolies obtained through agreements. An agreement between competitors to not compete or to divide up the territories or customers violates the Cartwright Act, for example.[8] But the Act does not appear to apply to

single-firm monopolization, including when obtained by mergers. In other words, anticompetitive effects from mergers that equal or exceed anticompetitive effects resulting from agreements among competitors are not currently addressed by the Cartwright Act.

Citing growing concerns over lack of competition, concentration of market power, and problematic monopolies, the California Legislature adopted Assembly Concurrent Resolution No. 95 in 2022 and approved the California Law Revision Commission to study, among other things, whether California law should be revised to outlaw single-firm monopolization.[9]

As California is poised to overtake Germany as the fourth largest economy in the world,[10] California needs its own law to address single-firm monopolization and catch up with the times. This article will examine the legislative history of the Cartwright Act and relevant caselaw, earlier legislative attempts to prohibit conducts and agreements leading to monopolies, the growing concerns over monopolies, the need for California to address monopolization, New York State's "Twenty-First Century Anti-Trust Act" and the "Competition and Antitrust Law Enforcement Reform Act of 2021" introduced in the United States Senate.

I. HISTORY OF THE CARTWRIGHT ACT AND *TEXACO*

California's antitrust laws differ from federal antitrust laws in that the Cartwright Act does not prohibit single-firm monopolization or attempted monopolization. Prior to 1988, numerous California courts, including the California Supreme Court, repeatedly held that the Cartwright Act "is patterned upon the federal Sherman Act" and "federal cases interpreting the Sherman Act are applicable with respect to the Cartwright Act."[11] The First Appellate District Court of Appeal even held that: "[t]hough not specifically listed [in the Cartwright Act], monopoly is a prohibited restraint of trade."[12]

However, in 1988, the California Supreme Court re-examined the legislative history of the Cartwright Act and concluded that the Act was not derived from the Sherman Act, but rather from other state laws.[13] In *State of California ex rel. Van de Kamp v. Texaco, Inc.* (*Texaco*) the California Attorney General sued under the Cartwright Act and the Unfair Practices Act to enjoin defendant Texaco, Inc., from acquiring California assets of Getty Oil Company (Getty) pursuant to a merger/acquisition agreement between the two companies.[14] Texaco entered into a consent order with the Federal Trade Commission (FTC) in July 10, 1984 wherein Texaco agreed to divest designated assets.[15] However, the California Attorney General was unsatisfied with the consent order and asserted that the merger might substantially lessen competition in the state market.[16]

The Attorney General contended that the Cartwright Act applied to mergers as a merger is a "combination of capital."[17] Defendants asserted that the word "combination" applies only to a situation in which separate and independent entities act in concert for a certain purpose and thereafter continue to maintain their separate identities and interests. Thus, a merger would not be a combination, because post-merger, the two merged entities would no longer maintain separate identities and interests.[18]

To help it interpret the statutory intent behind the word "combination," the California Supreme Court examined state and federal statutes and the body of caselaw interpreting those statutes when the Cartwright Act was adopted.[19]

The court then concluded that the Cartwright Act was patterned after an alternative bill to what ultimately became the Sherman Act.[20] Both bills were introduced to the U.S. Senate in 1888, and in the two years that the competing bills were pending in the Senate, several states enacted their own antitrust laws.[21] These new state antitrust laws generally fell into two categories: (1) the Kansas-Maine format, which made illegal "all arrangements, contracts, agreements, trusts *or combinations*" for certain improper purposes[22]; and (2) the Texas-Michigan format, which declared "trusts" illegal

and defined "trust" as a "*combination of* capital, skill or acts" for certain purposes.[23] Following the enactment of those state laws, many courts interpreted the term "combination" as not applying to a merger of two companies.[24] In response to this narrow interpretation of "combination," some states subsequently amended their antitrust laws to specifically address monopolies and mergers.[25]

The Cartwright Act was patterned after the Texas-Michigan format, which was modeled after a failed U.S. Senate Bill introduced in 1888 as an alternative to the eventually adopted Sherman Act. By the time California enacted the Cartwright Act in 1907, there was already a body of caselaw providing a narrow interpretation of "combination," but the California Legislature chose to pattern the state's antitrust laws on the *original* Texas-Michigan format without incorporating any subsequent anti-monopolization or anti-merger provisions that were adopted by other state legislatures, including Texas, prior to 1907.[26] Based on this history, the California Supreme Court concluded that, in adopting the Cartwright Act, the Legislature must have intended the prohibited trust to be "combination" by two separate, independent entities.[27]

While *Texaco* concerned a merger–not monopolization–subsequent courts have interpreted *Texaco* as holding that the Cartwright Act does not apply to single-firm monopolization.[28] Although conspiracies or agreements to establish or maintain a monopoly through "combinations" remains unlawful in California,[29] the reality is that the California Legislature has never incorporated language similar to Section 2 of the Sherman Act into the Cartwright Act. Until the Legislature makes it clear that it intends to prohibit monopolization or attempted monopolization, actions under the Cartwright Act against such conduct may be successful only if the defendants also run afoul of explicit provisions of the Act by engaging in a prohibited combination, such as engaging in "a horizontal allocation of markets with would-be competitors [by] dividing up territories or customers," or paying "its only potential competitor not to compete in return for a share of the profits that firm can obtain by being a monopolist."[30]

II. LEGISLATIVE ACTIONS FOLLOWING *TEXACO*

Following *Texaco*, the California Legislature considered at least three separate proposals to prohibit single-firm monopolization, but none of these proposals were enacted. Assembly Bill 671 (AB671), introduced in February 1989, would have forbidden "any person to monopolize, or attempt to monopolize, or to combine or conspire with any person to monopolize any part of trade or commerce."[31] This bill would have also permitted the California courts to divest assets acquired in a merger.[32] California Assembly approved this bill by a vote of 46 to 29. The bill was subsequently referred to the Senate Judiciary Committee, and despite four amendments the bill failed to garner enough votes to proceed out of committee.[33] According to a subsequent legislative analysis on a related bill, while the anti-monopoly provision in AB671 was not controversial, there were significant opposition to the merger and divestiture provisions.[34]

In February 2002, a bill was introduced in the Senate by State Senator Joseph Dunn to prohibit single-firm monopolization or attempted monopolization.[35] While the Senate passed this bill by a vote of 21 to 15, the Assembly did not adopt it.[36] Opponents to the bill were against "the state prohibition on monopoly," thought the bill "would run counter to an established U.S. Supreme Court decision, [and would] make California law different from federal law" because California law permits indirect purchaser lawsuits and this bill would allow such purchasers to bring actions for monopoly, and would "increase liability and litigation for businesses."[37]

State Senator Dunn introduced SB 1274 in 2006 to again prohibit monopolization in California.[38] SB 1274 defines the term "monopolize" to include "monopsonize."[39] This time the Senate rejected the bill by a vote of 14 to 19.[40]

These repeated failed proposals booster claims that the California Legislature does not intend to forbid single-firm monopolization.

III. GROWING CONCERNS OVER MONOPOLIZATION AS INDUSTRIES CONCENTRATE FURTHER

Since the 2007-2008 global financial crisis and subsequent series of financial scandals, there has been increasing concern about market concentration and anticompetitive conduct.[41] Even some aligned with the heritage of George Stigler, one of the key founders of the "Chicago School" on industrial organization economics, have raised concerns that market concentration and monopolization are becoming more problematic in the American economy.[42] This is a significant shift given the Chicago School's policy tradition of a hands-off approach toward antitrust enforcement that has been a dominant force in antitrust policy circles since the 1970s. This change in attitude in part may be attributed to the growing perception of inadequate antitrust enforcement in the face of changing market conditions in major industries.[43]

According to The Economist, two-thirds of the country's approximately 900 industries have become more concentrated since the 1990s.[44] "In regulated industries that don't face competition from imports—health care, airlines and telecommunications—prices are at least 50% higher than in other rich countries, and returns on capital are high."[45]

The technology industry in particular has been receiving a lot of attention and scrutiny. The big five platform technology companies (Alphabet, Amazon, Apple, Facebook, and Microsoft) have collectively purchased over 500 firms–often smaller competitors, have gathered customer data that could lock those customers into their products, and have exerted their market power vertically through the supply chain.[46] Luigi Zingales, head of the University of Chicago's George J. Stigler Center for the Study of the Economy and the State, expressed concerns that today's large technology companies are "unprecedented in nature" and that existing antitrust laws may be insufficient to address monopolization in technology companies.[47]

The increasing public perception of large technology companies wielding monopolistic power has not always translated to successful prosecution of perceived monopolization in the courtrooms. In September 2021, the District Court of the Northern District of California rejected Epic Game's allegations that Apple was engaging in an illegal monopoly, despite also finding that Apple had violated California's Unfair Competition Law by forcing developers into using Apple's payment processing service and forbidding developers from communicating lower prices on other platforms.[48] This failure to prosecute perceived monopolization, as well as other anticompetitive conducts and perceived procedural setbacks in antitrust lawsuits,[49] have contributed to the opinion that existing antitrust laws are insufficient or inadequate to address tech monopolies.[50]

Noting the inadequacy of existing laws in face of changing business landscape, some federal and state legislators have proposed bills to address those inadequacies. In 2021, both the U.S. House and the Senate introduced bills to update the federal antitrust statutes, and New York state senators also proposed new legislation to, among other things, prohibit monopsony and permit class action antitrust lawsuits.[51] None of these measures was adopted, but they are explicitly listed in California's Assembly Concurrent Resolution No. 95 as potential templates for California's own reform of its antitrust laws. As discussed below, these federal and state proposals have helpful language that California can incorporate, but the California Legislature first must decide it will prohibit single-firm monopolizations.

IV. CALIFORNIA'S INTEREST IN PROHIBITING SINGLE-FIRM MONOPOLIZATION

Earlier this year, California joined seven other states and the U.S. Department of Justice in a lawsuit charging Google with operating an unfair monopolizing scheme in markets for advertising technology.[52] In a statement regarding the lawsuit, California Attorney General Rob Bonta commented, "Poised to become the fourth largest economy in the

world, it is in California's best interest to ensure that creativity, innovation, and competition in technology are protected."[53] This lawsuit is one of the many efforts by the Attorney General in recent years to curtail anticompetitive behaviors in the technology industries by Facebook, Amazon, and Google.[54]

None of these efforts by the California Attorney General to curtail anticompetitive behaviors was based on a unilateral monopolization theory under the Cartwright Act. The lawsuit against Google was for violation of the Sherman Act.[55] The lawsuit against Amazon, brought in California state court in 2022, challenges Amazon's agreement with merchants that penalizes merchants if they offer products for a lower price off-Amazon, which California alleges is a violation of the Unfair Competition Law and the Cartwright Act.[56] These lawsuits highlight California's interest in prosecuting anticompetitive acts by large technology companies *and* the limits of the state's existing antitrust laws–namely, it primarily relies on the Sherman Act and federal enforcement to prosecute single-firm monopolization.

As the home of Silicon Valley where many technology companies are headquartered, some may argue California has an interest to ensure that firms with market power in California markets do not stifle competition and innovation, and ultimately increase prices for consumers. In other words, California is the home to many unique industries that the state has an economic interest in keeping competitive both for the sake of its economy and its constituents. But there are also other local geographic and product markets in California, perhaps not as glamorous or attention-getting. If any such local markets face the threat or actuality of single-firm monopolization, there is no tool under state law to remedy the situation. Even if single-firm conduct has much greater anticompetitive impacts than "combinations" that are already prohibited by the Cartwright Act, nothing can be done about these impacts under state law. This is a gaping hole that cannot be assumed will ever be filled in by discretionary federal antitrust enforcement or litigation under the Sherman Act or other federal antitrust statutes.[57]

California has been on the forefront of ensuring a pro-competitive legal structure with respect to employment and professional mobility. Specifically, Section 16600 of the California Business & Professions Code, with certain limited exceptions, prohibits contracts that restrain a person from engaging in any lawful profession, trade or business. Many attribute the formation of the Silicon Valley in California to this pro-competition law that is able to draw talent to California and promote competition for talent.[58] After creating one of the most pro-competition environments that permitted innovation in technology to flourish and develop into Silicon Valley, California should now catch up with the Sherman Act of 1890.

The courts have written out of the Cartwright Act any prohibition or remedy to address single-firm monopolization in California. Instead, the Cartwright Act is now limited to addressing combinations between existing firms. But if a single firm does monopolize a relevant market in California–thereby raising prices, stifling innovation, and reducing output–consumers, businesses and public entities have no remedy under state law to recover damages in state court no matter the magnitude of the injury.

Perhaps more remarkable is that currently, under the Cartwright Act, if a group of firms combine to form a single-firm monopoly in California at the expense of California consumers and businesses, little to nothing can be done under state law in state courts to recover damages. The legal rationale for this outcome is that the Cartwright Act only concerns combinations, and once there is only a post-combination single firm, there can be no combination. It is difficult to explain why a combination of firms that results in total monopolization by a *single* firm should be rewarded with antitrust immunity. Rather, this appears to be a situation that demands antitrust action, not antitrust nullification.[59]

It is also ultimately inexplicable why it makes sense for Californians to be able to use the Cartwright Act to address local price fixing and other cartel-type anticompetitive conduct but are to be barred from addressing equally harmful anticompetitive conduct by a *single* firm.

Nor can it be assumed that the federal antitrust laws, such as the Sherman Act, will fill this gap under the Cartwright Act. Markets and market injuries can be specifically, uniquely or entirely local. Federal antitrust law enforcers cannot be counted on in having the same interests and incentives to go after local problems that local consumers, businesses, and public entities have. Nor can it be assumed that federal courts automatically will have jurisdiction to address such local concerns.

What is the solution? The California Legislature should amend the Cartwright Act to prohibit single-firm monopolization or attempts to monopolize by reciting parallel language from Section 2 of the Sherman Act concerning monopolization. Adopting the language from Section 2 has the benefit of being able to use established caselaw concerning the interpretation of the Sherman Act to the amended Cartwright Act as an instructive guide. Such an amendment would fill a gaping hole in the Cartwright Act without opening up the prospect of an unpredictable body of law. In short, Sherman Act caselaw can provide guidance in addressing single-firm monopolization in local, California markets just as the Sherman Act continues to provide guidance in dealing with conduct such as horizontal price fixing and market divisions.

V. THE TWO BILLS SPECIFICALLY REFERENCED IN CALIFORNIA'S ASSEMBLY CONCURRENT RESOLUTION NO. 95

In authorizing the California Law Revision Commission to study whether to amend the Cartwright Act, the California Legislature specifically directed the Commission to review New York's proposed "Twenty-First Century Anti-Trust Act" and the "Competition and Antitrust Law Enforcement Reform Act of 2021" introduced in the U.S. Senate. Both the New York and federal bills go beyond merely prohibiting single-firm monopolization, and would make it easier to prosecute antitrust claims. While the California Legislature may consider adopting similar provisions in those bills, their failure to be adopted by the New York Assembly and U.S. Senate likely signals that reducing costs of prosecuting antitrust lawsuits or lowering the legal standard for what unlawful monopolization is remain controversial. Saddling a straight-forward bill prohibiting monopolization or monopsonization with these other provisions may make it more difficult for the California Legislature to amend the Cartwright Act.

A. NEW YORK'S "TWENTY-FIRST CENTURY ANTI-TRUST ACT"

New York's existing antitrust statute, known as the Donnelly Act, already prohibits contracts, agreements, arrangements, or combinations that establish or maintain a monopoly that restrains competition.[60] However, that statute, as it currently exists, suffers from the same constraint the Cartwright Act does in that it does not prohibit single entity monopoly from engaging in anticompetitive acts.[61]

Citing the need to "combat cartels, monopolies, and other anti-competitive business practices" and finding that "unilateral actions which seek to create a monopoly or monopsony are as harmful as contracts or agreements of multiple parties to do the same," several New York state senators introduced Senate Bill 933C to amend the Donnelly Act in January 2021.[62] SB 933C would have prohibited anticompetitive monopsonizing as well as monopolizing behaviors.[63] SB 933C also would make it unlawful for any person(s) "with a dominant position . . . to abuse that dominant position."[64] The bill set forth examples of direct and indirect evidence that can establish a "dominant position," including the unilateral power to set prices, terms, or conditions (direct evidence), or market share (indirect evidence). If a seller has a forty percent or greater share of a relevant market, the bill presumes

that the seller has a dominant position. The percentage drops to thirty percent for a buyer. The bill also eliminates the need to establish a relevant market if the dominant position is established by direct evidence. The bill also requires any company conducting business in New York that is subject to the reporting requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 to provide the same notice at the same time with the New York Attorney General.[65]

SB 933C also would have made it less cost prohibitive for private parties to prosecute antitrust claims. Specifically, it permitted class actions for damages recovery, and recovery of expert witnesses and consultants' fees and costs incurred by both the attorney general and private litigants if they prevailed in the lawsuit.[66]

Although New York Senate passed SB 933C, the bill died in Assembly in January 2022.[67] The New York Senate amended and passed the bill again in May 2022. The bill was referred to Assembly Committee on Economic Development. No floor vote was taken by the Assembly before the 2021-2022 legislative session ended.[68]

B. "COMPETITION AND ANTITRUST LAW ENFORCEMENT REFORM ACT OF 2021" INTRODUCED IN THE UNITED STATES SENATE

Having stated that the United States has "a major monopoly problem" and identifying technology and pharmaceutical industries as the ones with the biggest antitrust problems, U.S. Senator Amy Klobuchar introduced U.S. Senate Bill 225, known as the "Competition and Antitrust Law Enforcement Reform Act of 2021" on February 4, 2021.[69] The bill proposed many changes to the existing law, including lowering the legal standard for finding a merger or acquisition unlawful from "where the effect of the acquisition may be substantially to lessen competition" to "where the effect of the acquisition may be to create an appreciable risk of materially lessening." The bill would have also amended Section 7 of the Clayton Act to make mergers tending to create a monopsony unlawful to the same extent a monopoly would. For cases brought by the U.S. Department of Justice, FTC, or state attorneys general, courts "shall" determine that the legal standard for finding a merger or acquisition unlawful has been met if certain conditions are met, such as if the acquiring person has a market share of greater than fifty percent and the acquiring person has a reasonable probability of competing with the entities or assets it would control as a result of the acquisition. The bill also prohibited companies from engaging in "exclusionary conduct that presents an appreciable risk of harming competition." An appreciable risk is presumed if at least one party engaging in the exclusionary conduct has "significant market power" or over fifty percent of the market share. The bill also would have significantly increased monetary penalties for antitrust violations.[70]

Ultimately, the U.S. Senate did not vote on this bill. Senator Klobuchar has yet to introduce a similar bill in the new Congressional session.

VI. CONCLUSION

To protect competition within California and to promote innovations, California should amend the Cartwright Act to address single-firm conduct in a manner similar to Section 2 of the Sherman Act. Doing so will allow courts to rely on existing caselaw interpreting the Sherman Act in enforcing California's antitrust laws. However, as many lawmakers have pointed out, prosecuting antitrust cases against Big Tech companies under existing laws have proven to be challenging. Both the New York bill and the Competition and Antitrust Law Enforcement Reform Act sought to lower the threshold to prosecute unlawful monopoly and monopsony. The California Legislature may wish to consider updating the Cartwright Act with similar provisions proposed in the U.S. Senate and the New York Legislature. However, those bills were ultimately not adopted by Congress or the New York Assembly and combining the controversial provisions in those bills with a legislation prohibiting single-firm monopolization may make it more difficult for such bill to be adopted.

While recent press coverage has focused on Big Tech and large national companies, the California Legislature should not lose sight of monopolization in regional, geographic markets that are unique to California and might not receive national attention or otherwise be addressed by federal antitrust enforcement in federal courts. As California is poised to overtake Germany as the fourth largest economy in the world,[71] California needs its own law to address single-firm monopolization and catch up with the times.

---

1. Kendall MacVey is a partner and litigator with Best Best & Krieger LLP and also a professor of practice at the University of California Riverside School of Public Policy. He has served as chair of the Antitrust Section of the Los Angeles County Bar Association and as an attorney for the Federal Trade Commission where he did antitrust enforcement. Wendy Y. Wang is of counsel with Best Best & Krieger LLP and focuses on complex litigation. The views expressed herein are solely those of the authors, who are responsible for the content, and do not necessarily represent the views of Best Best & Krieger LLP or any institution.

2. Section 2 of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2.

3. See Cal. Bus. & Prof. Code, § 16727 ("It shall be unlawful for any person to lease or make a sale or contract for the sale of goods, merchandise, machinery, supplies, commodities for use within the State, or to fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, merchandise, machinery, supplies, commodities, or services of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition *or tend to create a monopoly in any line of trade or commerce in any section of the State*.") (emphasis added)).

4. *Id.* §§ 16720 & 16726.

5. *State of California ex rel. Van de Kamp v. Texaco, Inc.* 46 Cal.3d 1147, 1162-1163 (1988).

6. *Asahi Kasei Pharma Corp. v. CoTherix, Inc.* 204 Cal. App.4th 1, 8 (2012) ("The Cartwright Act bans combinations, but single firm monopolization is not cognizable under the Cartwright Act."); *Freeman v. San Diego Ass'n of Realtors* 77 Cal.App.4th 171, 202 (1999) (*Texaco* decided "that the Cartwright Act bans combinations but does not have any provisions parallel to Sherman Act section 2's anti-monopoly provisions.").

7. *In re Cipro Cases I & II* 61 Cal.4th 116, 148 (2015) (citations omitted).

8. *Id.*

9. Assem. Con. No. 95, 2021-22 Reg. Sess. (Cal. 2021).

10. Matthew A. Winkler, *California Poised to Overtake Germany as World's No. 4 Economy*, Bloomberg (Oct. 24, 2022), https://www.bloomberg.com/opinion/articles/2022-10-24/california-poised-to-overtake-germany-as-world-s-no-4-economy.

11. *Chicago Title Ins. Co. v. Great W. Fin. Corp.* 69 Cal.2d 305, 315 (1968); see also, *Marin Cnty. Bd. of Realtors, Inc. v. Palsson* 16 Cal.3d 920, 925 (1976) ("A long line of California cases has concluded that the Cartwright Act is patterned after the Sherman Act and both statutes have their roots in the common law. Consequently, federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act."); *R. E. Spriggs Co. v. Adolph Coors Co.* 37 Cal.App.3d 653, 659, fn. 5 (1974); *Sherman v. Mertz* Enters., 42 Cal. App.3d 769, 775–776 (1974).

12. *Lowell v. Mother's Cake & Cookie Co.* 79 Cal.App.3d 13, 23 (1978).

13. *State of California ex rel. Van de Kamp v. Texaco, Inc.* 46 Cal.3d 1147, 1164 (1988) (*Texaco*).

14. *Id. at* 1150–51.

15. *Id.* at pp. 1151-1152.

16. *Id.* at p. 1152.

17. *Id.* at pp. 1152-53; Cal. Bus. & Prof. Code, § 16720.

18. *Texaco*, 46 Cal. 3d at pp. 1152-53.

19. *Id.* at 1153-62.

20. *Id.* at 1153.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 1159.

25. *Id.* at 1159-60.

26. *Id.* at 1159-62.

27. *Id.* at 1162-63. It is worth noting that it appears counsel for Texaco sought an extension of the briefing schedule before the California Supreme Court because Hons. Rose Bird, Joseph Grodin, and Cruz Reynoso as California Supreme Court justices were facing a recall and Texaco counsel were hoping for a change in the line-up of justices. As a result of the recall, the make-up of the Court did change when the Texaco decision was ultimately issued by the Court. See Sec. 1.02(b) fn. 113, Calif. Lawyers Association, *California Antitrust and Unfair Competition Law* (Revised Edition 2022).

28. *Asahi Kasei Pharma Corp. v. CoTherix, Inc.* 204 Cal. App.4th 1, 8 (2012) ("The Cartwright Act bans combinations, but single firm monopolization is not cognizable under the Cartwright Act."); *Freeman v. San Diego Ass'n of Realtors* 77 Cal.App.4th 171, 202 (1999) (*Texaco* decided "that the Cartwright Act bans combinations but does not have any provisions parallel to Sherman Act section 2's anti-monopoly provisions.").

29. *In re Cipro Cases I & II* 61 Cal.4th 116, 148 (2015).

30. *Id.*

31. Assem. 671, 1989-90 Reg. Sess. (Cal. 1989) (as introduced Feb. 1989).

32. *Id.*

33. Assembly Final History, 1989-90 Leg. Reg. Sess. And 1989-90 First Extra. Sess., Vol. 1, at p. 541, available at https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/FinalHistory/1989/volumes/8990vol1_2ahr.PDF.

34. Assembly Committee on Business and Professions Analysis for 6/25/02 hearing on S.B. 1814, at p. 7, available at http://leginfo.ca.gov/pub/01-02/bill/sen/sb_1801-1850/sb_1814_cfa_20020623_193250_asm_comm.html.

35. S. 1814, 2001-02 Reg. Sess. (Cal. 2002) (as introduced Feb. 2002).

36. Legislative history available at http://leginfo.ca.gov/pub/01-02/bill/sen/sb_1801-1850/sb_1814_bill_20021130_history.html.

37. Assembly Committee on Business and Professions Analysis for 6/25/02 hearing on S.B. 1814, at p. 6, available at http://leginfo.ca.gov/pub/01-02/bill/sen/sb_1801-1850/sb_1814_cfa_20020623_193250_asm_comm.html.

38. S. 1274, 2005-06 Reg. Sess. (Cal. 2006) (as amended April 4, 2006).

39. *Id.*

40. Legislative history available at: http://leginfo.ca.gov/pub/05-06/bill/sen/sb_1251-1300/sb_1274_bill_20060601_history.html.

41. See Adena Friedman, *Ideas for Modernizing Capitalism*, The World in 2020, The Economist (Last visited June 24, 2023) https://worldin.economist.com/edition/2020/article/17512/ideas-modernising-capitalism; Alistair Gray. *Top Financier Warns on Anti-Business Sentiment*, Financial Times (Sept. 29, 2015), https://www.ft.com/content/f24a5b20-66a9-11e5-a57f-21b88f7d973f.

42. Daisuke Wakabayashi, *A Challenge to Big Tech and Antitrust Thinking in a Surprising Place*, N.Y. Times, (Sept. 15, 2019), https://www.nytimes.com/2019/09/15/technology/university-of-chicago-technology-antitrust.html; *Schumpeter: Crony capitalism*: *Bright minds in Chicago worry about the state of competition in America*, The Economist (Apr. 15, 2017). *See generally* antitrust articles at the Stigler Center's website, available at https://www.promarket.org/.

43. See The Economist, *supra* note 42. See also G. Grullon et al., *Are US Industries Becoming More Concentrated?*, 23(4) Rev. Fin. 697 (2019), https://academic.oup.com/rof/article/23/4/697/5477414.

44. See The Economist, *supra* note 42.

45. *Id.* Several economic studies utilizing different measures of concentration have found increasing concentration in the US to be associated with higher mark-ups, corporate profits, and reduced entry with potential negative effects to consumer welfare. *See, e.g.*, De Loeacker, J. Eeckhout, S. Mongey "Quantifying Market Power and Business Dynamics in the Macroeconomy," (May 2021); National Bureau of Economic Research Working Paper 28761 available at https://www.nber.org/papers/w28761; Council of Economic Advisers Issue Brief April 2016, "Benefits of Competition and Indicators of Market Power." For a thorough but less technical review by an economist who has conducted a number of studies on market concentration trends and their negative effects on consumers see T. Philippon, The Great Reversal—How America Gave Up on Free Markets (Harvard University Press 2019).

46. *Id.*

47. *See* Wakabayashi, *supra* note 42.

48. Rule 52 Order After Trial On The Merits, *Epic Games, Inc. v. Apple Inc.*, No. 4:20-cv-05640-YGR, (N.D. Cal. Sept. 10, 2021), https://cand.uscourts.gov/wp-content/uploads/cases-of-interest/epic-games-v-apple/Epic-v.-Apple-20-cv-05640-YGR-Dkt-812-Order.pdf.

49. Cat Zakrzewski, *Rulings in Facebook, Apple Antitrust Cases Show How Tough It Is to Define a Monopoly in the Age of Big Tech*, Wash. Post, (Sept. 10, 2021), https://www.washingtonpost.com/technology/2021/09/10/gonzale-zrogers-epic-apple-facebook-bigtech-monopoly/; *FTC v. Facebook, Inc.*, 560 F. Supp. 3d 1, (D.D.C. 2021),

50. *See* Zakrzewski, *supra* note 49.

51 *Id.*; S. 225, 117th Cong. (2021) (as introduced on February 4, 2021); S. 933C, 2021-22 Leg. Sess. (NY 2021) (as introduced on January 6, 2021).

52. Leah Nylen, *U.S. Sues Google, Calls for Breakup of Ad Technology 'Monopoly'*, L.A. Times, Jan. 24, 2023. https://www.latimes.com/business/story/2023-01-24/us-sues-google-ad-market-antitrust-fight

53. Press Release, Cal. Dep't of Just., "Attorney General Bonta Files Lawsuit Against Google for Monopolization of Ad Tech Markets," Jan. 24, 2023. https://oag.ca.gov/news/press-releases/attorney-general-bonta-files-lawsuit-against-google-monopolization-ad-tech

54. *Id.*

55. Complaint, ¶305, *United States of America v. Google LLC*, No. 1:23-cv-00108, (E.D. Va. Jan. 24, 2023), https://oag.ca.gov/system/files/attachments/press-docs/US%20v%20Google_Complaint%20-%20stamped.pdf ("Plaintiffs California, Colorado, Connecticut, New Jersey, New York, Rhode Island, Tennessee, and Virginia by and through their respective Attorneys General, bring this action pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, to prevent and restrain Google's violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.")

56. *See generally*, Complaint, *California v. Amazon.com, Inc.*, No. CGC-22-601826 (Cal. Super. Ct. Sept. 15, 2022), https://oag.ca.gov/system/files/attachments/press-docs/2022-09-14%20Redacted-California%20v.%20Amazon%20Complaint.pdf; *Order on Amazon's Demurrer to the Complaint*, *California v. Amazon.com, Inc.*, No. CGC-22-601826 (Cal. Super. Ct. Mar. 30, 2023), https://oag.ca.gov/system/files/attachments/press-docs/2023-03-30%20Order%20on%20Demurrer.pdf.

57. *See* The Economist, *supra* note 42 ("Over time the Chicago school's ideas became so influential that the courts and the two antitrust regulators, the Department of Justice (DoJ) and the Federal Trade Commission (FTC), adopted a far more favorable approach to big business."); See generally E. Thomas Sullivan, *The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition*, 64 Wash. U. L.Q. 997, 998 (1986) (the Reagan administration eased antitrust standards)

58. Larry Downes, *How Europe Can Create Its Own Silicon Valley*, Harv. Bus. Rev. (June 11, 2015), https://hbr.org/2015/06/how-europe-can-create-its-own-silicon-valley/.

59. It should be noted that a "single firm" can include parents and subsidiaries. It has been held that a corporation and subsidiaries it controls cannot conspire with each other. See, e.g., *In re Auto Antitrust Cases I & II*, 1 Cal. App. 5th, 155 (2016), citing *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752. 769-71 (1984).

60. N.Y. Gen. Bus. Law § 340.

61. *Commonwealth Elec. Inspection Servs., Inc. v. Town of Clarence*, 6 A.D.3d 1185, 1186 (N.Y. 2004) ("We note that the statutory term 'arrangement,' like the statutory terms 'contract,' 'agreement,' and 'combination,' refers to bilateral conduct and does not connote 'a one-sided practice'").

62. S. 933C, 2021-22 Leg. Sess. (NY 2021) (as introduced on January 6, 2021).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. https://www.nysenate.gov/legislation/bills/2021/S933.

68. *Id.* This bill does not appear to have been reintroduced in the 2023-2024 session.

69. S. 225, 117th Cong. (2021) (as introduced on February 4, 2021); Brian Fung, *Sen. Amy Klobuchar: 'We have a major monopoly problem'*, The Washington Post, March 5, 2019, available at https://www.washingtonpost.com/technology/2019/03/05/sen-amy-klobuchar-we-have-major-monopoly-problem/.

70. S. 225, 117th Congress 1st Session (U.S. Senate 2021) (as introduced on February 4, 2021).

71. *See* Winkler, *supra* note 10.

TECHNOLOGICAL MONOPOLIES, INNOVATION, AND THE PERSONAL FREEDOM TO FORM BUSINESSES: LIKE OIL AND WATER?

By Christopher K.L. Young[1]

I. INTRODUCTION

In 2022, the California legislature passed Assembly Concurrent Resolution No. 95 authorizing the California Law Revision Commission to study potential revisions to California's state antitrust law.[2] Among the topics the CLRC is studying is whether California's antitrust law should be revised in the context of technology companies such that analysis of antitrust injury in that setting reflects competitive benefits such as innovation and permitting the personal freedom of individuals to start their own businesses and not solely whether such monopolies act to raise prices.[3]

The Cartwright Act is California's primary state antitrust law. It was passed in 1907 and appeared to be an express attempt to rein in the cartels that were rampant in the state at that time.[4] The text of the Cartwright Act is reflective of the threats to competition that were prevalent at the time of its passing: given that cartels dominated industry, the Cartwright Act targeted multi-firm conduct and contained no explicit provision targeting single firm conduct analogous to Section 2 of the federal Sherman Act.[5] Now, over one hundred years later, California is again facing serious competition-related issues. Rather than multi-firm cartels, the threat now comes from single-firm conduct by large sprawling technology companies.[6] The largest technology firms are wielding their dominance to entrench their market power. Indeed, reports by federal legislative bodies such as the House Judiciary Committee have documented anticompetitive practices by technology companies such as acquiring nascent competitors and capitalizing on their role as gatekeepers to maintain their market power. The California antitrust laws should certainly be stiffened in response to the growing prevalence of these practices and, in particular, to account for single-firm conduct by large technology firms.

There are those, however, who say any such expansion of the Cartwright Act should account for the competitive benefits that these technology companies provide. They argue that these

companies provide procompetitive values—such as fostering innovation and individuals' freedom to start their own businesses—which should be considered when measuring single firm conduct, in addition to whether monopolies raise prices. That would, however, dilute any amendment seeking to strengthen California's antitrust laws by targeting single-firm conduct and would seem contrary to the original purposes of the Cartwright Act, which is to promote competition for not only consumers, but also for nascent competitors.[7]

It is first necessary to address three reasons why explicit consideration of procompetitive benefits of single-firm conduct is inconsistent with the purpose and goals of the Cartwright Act. First, courts interpreting the Cartwright Act already consider competitive benefits like innovation in antitrust analysis. Second, inclusion of procompetitive benefits in the law presupposes that the existing California antitrust laws do not suppress innovation and the personal freedom of individuals to start their own businesses. Third, it presumes that the contemporary Cartwright Act framework solely focuses on whether an allegedly anticompetitive practice affects price. Part I will address each of these presumptions and demonstrate why an explicit requirement to consider procompetitive benefits is unnecessary.

Second, it is highly unlikely that a nascent innovative firm would have the market power to behave anticompetitively in the first place. So any revision to the law should be careful not to integrate any provisions that may inadvertently give larger companies a way to inoculate their anticompetitive conduct. Indeed, it is not those persons whom the antitrust laws are concerned about; rather, it is the sprawling mega-corporations whose reach is practically boundless in the contemporary digital world. As revealed by the House Subcommittee on the Judiciary Subcommittee on Antitrust, Commercial and Administrative Law's Investigation of Competition in Digital Markets, many of the largest tech companies have engaged in strategies that include acquisition of putative competitors in their infancy in order to protect their market power. Further, these same companies often use their status as gatekeepers of walled gardens to collect data from competitors to then advantage their own products. Experience has shown that the consolidation of technology companies has led to a stifling of innovation and decreased incentives for those who otherwise may have started their own businesses to do so. Part II will highlight some examples of this.

Lastly, in light of the rapid growth of the largest technology companies, the Cartwright Act should be updated to be more stringent with respect to large technology companies without being hampered by consideration of purported procompetitive benefits. Technology has advanced many times over since the Cartwright Act was enacted in 1907. Emerging technologies such as AI, machine learning and large language models can mitigate collective action or coordination problems which limit the ability of human beings to maintain monopoly or supracompetitive prices. Anticompetitive single-firm conduct is possible at unprecedented speed and scale by taking advantage of these emergent technologies. Indeed, advances in algorithmic prices have already led to new and faster methods of anticompetitive multi-firm conduct. Advances in AIs and large language models and the concentration already occurring in that space also represent a potential new inflection point for competition. Part III will address why, as opposed to making the Cartwright Act more lax, it should rather be strengthened and sharpened to address the changing digital markets without necessitating any balancing of procompetitive benefits.

II. THE RIGHT QUESTIONS

The idea that any revision of the Cartwright Act must include consideration for procompetitive benefits rather than just anticompetitive harm may lead to conclusions unwarranted by the facts. First, antitrust analysis already takes procompetitive factors into account, so any revision of the Cartwright Act should strictly be more stringent rather than build in room to wiggle.[8] The Cartwright Act, like the Sherman Act, "has been interpreted

to permit by implication those restraints found to be reasonable."[9] Indeed, the Cartwright Act itself embeds a caveat that it is not meant to restrain procompetitive restraints: "It is not unlawful to enter into agreements or form associations or combinations, the purpose and *effect of which is to promote, encourage or increase competition in any trade or industry*, or which are in furtherance of trade."[10] Even presuming that single-firm conduct or market consolidation can lead to increased competition in innovation, that purported justification will be taken into account as the current analytical framework is constructed without any need to embed it formally into statute.[11]

The idea that market concentration can lead to innovation seems a bit counterintuitive. "[T]echnology markets are—in the end—just product markets,"[12] and it has long been recognized that markets with few rivals permit coordination either overtly or tacitly to achieve supracompetitive prices (and other anticompetitive effects including suppressed innovation).[13] In what instances therefore would otherwise anticompetitive behavior lead to increased innovation?

We start with the economic rationale as to why competition begets innovation with the necessary caveat that evaluation of procompetitive justifications is necessarily fact specific.[14] Anticompetitive conduct restricting supply can, for example, hypothetically lead to higher quality of service. This rationale in the technology context is fairly intuitive, however: competitors are incentivized to innovate and produce better products and services in order to attract more consumers. Small innovative firms can grow into larger ones, offering more competition at scale. Conversely, when markets are concentrated, larger firms may be able to leverage more funding to research and development which can lead to further innovation. But when large companies acquire the small innovative firm, that possibility could be eliminated. Indeed, there is evidence that this is precisely what is happening. Meta, Alphabet, Microsoft, and Apple have made more than 500 acquisitions since their founding.[15] And as described more fully below, evidence suggests that these mergers do not lead to the development of the acquired product, but rather stifle innovation. The evidence thus does not bear out baking in an additional consideration for procompetitive benefits with respect to technology companies.

Second, a proposal to include statutory consideration of procompetitive justifications in the context of technology companies suggests that the California antitrust laws as written does not adequately promote innovation or the personal freedom of individuals to start businesses in that same context. But this seems to be belied by the empirical number of startups with roots in California.[16] California, even with its relatively broad and rigorous antitrust regime, is still appealing to innovators and entrepreneurs. Indeed, California is routinely near the top of lists of total startup funding or per-capita startup funding.[17] As explained by the California Supreme Court, while certainly true that the "[a]ntitrust laws are designed primarily to aid the consumer," "[a]nother beneficiary of antitrust law is the competitor himself."[18] Thus, the antitrust laws at least as understood by the California Supreme Court exist not only to protect the consumer, but also the nascent competitor. Failing to regulate the monopolist can nip competitors in the bud, resulting in a less competitive environment. Ensuring that the antitrust laws are rigorously enforced, especially to mitigate market concentration, serves those goals as entrepreneurs would be competitors to the large tech companies and should receive protection from the largest tech companies.

Third, it has long been recognized that price is not the only metric through which competition can be harmed. Courts have long recognized other anticompetitive harms such as harms to innovation.[19] Amending the Cartwright Act to further protect competitive benefits *for technology* will only lead to the market dominance of select firms. The issue here is that companies "that once were scrappy, underdog startups that challenged the status quo have become the kinds of monopolies we last saw in the era of oil barons and railroad tycoons."[20] Thus, it would be inapposite and out of step with the

purpose of antitrust law to incorporate an explicit mandate to consider procompetitive justifications in the technology context in the Cartwright Act given that it would be a boon to the companies who enjoy market dominance.

III. THE NEED FOR CONSIDERATION OF PROCOMPETITIVE JUSTIFICATIONS IS BELIED BY EMPIRICAL FACTUAL EVIDENCE

In the single firm context, the acquisition of nascent competitors by large companies wielding significant market power can lead to anticompetitive conditions.[21] There is no real dispute that the dominant tech firms have engaged in numerous acquisitions. Facebook, Google, Amazon, Microsoft and Apple are engaged in a strategy of buying up nascent competitors.[22] The durability of these firms' market dominance harms consumers because it reduces the ability of consumers to obtain not only competitively priced goods or services, but also high quality, variety, and goods and services. [23] The current system of large companies swallowing up nascent competitors stifles rather than promulgates innovation, and so any revision of the Cartwright Act should take aim at these companies without any consideration for procompetitive benefits unsupported by evidence.[24]

In June 2019, the House Committee on the Judiciary initiated an investigation into the state of competition in online businesses. The committee collected evidence from Amazon, Apple, Facebook and Google, as well as third parties. The report's findings corroborated what many had already suspected. As described in the report, a significant part of the strategy of these large tech companies is to acquire nascent competitors in order to maintain their market power. For example, Mark Zuckerberg told Facebook's former Chief Financial Officer, "the purpose of acquiring nascent competitors like Instagram was to neutralize competitive threats and to maintain Facebook's position."[25] This statement is incredibly problematic because it evidences precisely the innovation stifling that antitrust laws seek to prevent, namely the snuffing out of potential competitors and innovative products before they have a chance to fully mature.[26]

As another example, Google acquired Waze in 2013.[27] Market competitors viewed Google and Waze as close competitors in the "highly concentrated" market for navigable digital map databases and turn-by-turn navigation applications.[28] Indeed, Waze was viewed "as the only firm meaningfully positioned to dislodge Google Maps . . . ." Noam Bardin, Wave's CEO had also stated that Waze was "the only reasonable competition" to Google Maps.[29] This led to the suggestion that Google was intending to acquire Waze in order to squash a potential competitor. Post-acquisition, the Google and Waze teams have remained separate and "Google has used Waze as an ads guinea pig." Bardin later wrote that "We could have probably grown faster and much more efficiently had we stayed independent" and that Google imposed constraints on Waze.[30]

It is certainly true that the dominance of Google, Amazon, Facebook, and Apple provides certain benefits to society. [31] But a significant cost has been levied on consumers because of the entrenched dominance of a select few firms.[32] The result is a dearth of innovation because these companies eliminate potential competitors who may beget better and more innovative products, and, even after acquisition, acquired products and services are left to wither on the vine rather than grow.

The largest tech firms enjoying monopoly power in their relevant markets have been engaged in a series of anticompetitive mergers.[33] They have done so by acquiring nascent competitors to discontinue their target's innovation projects and preempt future competition.[34] The impact of this catch, kill, or envelope strategy is product deterioration.[35] As is becoming more recognized, price is not the only metric that is indicative of monopoly power, so is the ability to erode consumer privacy without prompting a market response.[36] A platform's ability to abuse its consumers' privacy without suffering the loss of consumers is indicative of an anticompetitive

environment.[37] Because consumers suffer from decreased privacy protection coupled with the meteoric rise of misinformation, consumers bear the brunt of this unfettered anticompetitive behavior.[38] The effect of these mergers is that nascent tech companies are prevented from entering respective markets while entrenching the market power of the select few.[39]

Acquisitions of nascent competitors is not the only way the largest tech companies use their market power to favor themselves. Given that many of them are platforms, they are able to serve as gatekeepers of the platform for their own benefit. For example, Amazon enjoys entrenched market power in the U.S. online retail market. [40] Amazon has built its success in part by hamstringing small to medium size businesses who are forced to use Amazon or fold.[41] To put Amazon's market dominance into perspective, of the "2.3 million active third-party sellers on its marketplace worldwide . . .about 37 percent of them . . .rely on Amazon as their sole source of income. [42] Another disturbing reality with Amazon is that Amazon Web Services functions as the "critical infrastructure for many businesses with which Amazon competes."[43] Amazon, through its control of the "Buy Box," the window which is used for customers to purchase items when they search for products, is able to choose winners and losers.[44] Amazon does this through the enormous amounts of data it is able to collect through the Buy Box. Amazon also gives its own products favorable treatment relative to competing sellers through self-preferencing product placement on the Buy Box. The House Subcommittee Report describes examples of sellers who created new top-selling products whose ideas were copied by Amazon, which then offered a competing product under its private label and took over the Buy Box, making it impossible to compete.[45]

Amazon is not the only company that engages in self-preferencing. Apple too was described to engage in self-preferencing on the App Store through a practice known as "Sherlocking."[46] Apple dominates the mobile operating system market with its iOS system.[47] Apple uses its entrenched position "to create and enforce barriers to competition and discriminate against and exclude rivals while preferencing its own offerings."[48] For example, Apple engages in a strategy of misappropriating "competitively sensitive information and charging app developers supra-competitive prices within the App Store."[49] Developers have further alleged that Apple abuses its position as the provider of iOS and the operator of the App Store to collect competitively sensitive information about popular apps and then build competing apps or integrate popular functionality into iOS.[50]

Google likewise appears to self-preference its own services. Documents showed that Google "developed a multi-pronged strategy" which included: "(1) misappropriating third-party content; and (2) privileging Google's own services while demoting those of third parties."[51] For example, Google built a competing vertical search engine to compete with Yelp. When Yelp asked Google to remove its proprietary content from Google's competing service, Google responded the only way that was possible was to remove Yelp from Google's general results entirely. "Yelp relied so heavily on Google for user traffic that the company could not afford to be delisted-a fact that Google likely knew."[52]

As described above, it seems apparent that the largest technology companies have not been using their market power as incubators for innovation, but rather to eliminate nascent competitors. The empirical evidence does not seem to support the idea that while the Cartwright Act certainly needs to be strengthened to explicitly account for single-firm conduct, any temptation to consider innovation as a procompetitive defense should be approached with skepticism in order to ensure the largest companies do not use any such consideration to protect themselves from scrutiny.

IV. THE REVISION TO THE CARTWRIGHT ACT SHOULD ACCOUNT FOR NEW TECHNOLOGIES THAT FACILITATE ANTICOMPETITIVE CONDUCT

Beyond the empirical examples of a few of the largest firms wielding their outsized power to eliminate emerging competition, the growth and development of new technologies also creates the risk of new means of anticompetitive activity at a scale not possible before. The ability of firms to now coordinate and move at previously unheard of speed has already led to unprecedented concentration for the largest technology firms. [53] The influence of changing technology is shifting the landscape of competitive markets globally. While leaps in technology can be causes for celebration, they can also encourage and facilitate new means of anticompetitive behavior which the antitrust laws, as currently constructed, may be ill-equipped to face.

For example, artificial intelligence employing algorithmic pricing is one of these fast-developing new technologies.[54] While it is certainly true that the growth of AI offers many potential benefits, AI also creates new ways for firms to behave anticompetitively. On the one hand, AI may allow firms to respond immediately to changing market conditions or competitor pricing. On the other hand, AI may facilitate price-fixing arrangements at speeds not possible before and while mitigating coordination issues that make such schemes apt to fall apart when done in analog.

In the multi-firm context, algorithmic pricing and coordination may (and perhaps according to some, may have already) lead to a potential catastrophe for consumers.[55] A traditional agreement may be hard to prove when algorithms are involved because establishing communication between two independent actors may be impossible. It is a basic tenet of economics that members of a cartel all have an incentive to cheat because even pricing slightly under the agreed-upon price will increase the cheating firm's profits. Detecting a cheating firm's lower prices is critical for a cartel's survival. Algorithmic pricing can make detection of lower prices easier. Because "the digital world increasingly overcomes the limitations making it easier to reach agreements, monitor compliance, and apply immediate sanctions, the law will axiomatically capture fewer instances of coordination than it did before."[56]

Government regulators expressed concern about the anti-competitive implications of using algorithmic pricing. While serving as Chairperson of the Federal Trade Commission (FTC) Maureen Ohlhausen is quoted:

> Imagine a group of competitors sub-contracting their pricing decisions to a common, outside agent that provides algorithmic pricing services. Each firm communicates its pricing strategy to the vendor, and the vendor then programs its algorithm to reflect the firm's pricing strategy. But because the same outside vendor now has confidential price strategy information from multiple competitors, it can program its algorithm to maximize industry-wide pricing. In effect, the firms themselves don't directly share their pricing strategies, but that information still ends up in common hands, and that shared information is then used to maximize market-wide prices. Again, this is fairly familiar territory for antitrust lawyers, and we even have an old-fashioned term for it, the hub-and-spoke conspiracy. [57]

In the single-firm context, the development and implementation of machine learning and large language models also decrease transactional costs for businesses that deploy them. And the knowledge and skill required to build these models are also becoming concentrated in only a few firms. Broadly, large language models, which are a type of "AI's," ingest vast amounts of text in order to remember patterns and structures of the input in order to generate outputs in response to inputs.[58] These large language models then serve as the basis for new digital applications, many of which are being implemented by the largest tech companies.[59]

Although large language models offer new opportunities for innovation, they are also incredibly

resource intensive. They are hardware intensive, generally requiring multitudes of computers and servers; they require significant data specialization in order to collect and curate the massive data required to "train" these large language models; and they require the coding expertise necessary to create a user-friendly interface to access the large language model. This expertise can be costly, and represent significant barriers to entry in order to create and deploy a large language model. According to some estimates, it may cost $500 million for the hardware and another $500 million to train a model.[60]

Each of these categories of requisite investment also represent a point of potential market concentration. For example, because of the astronomical computational power required to host a large language model, very few companies can provide those services. Reportedly, up to 80-90% of early round venture capital is spent with the so-called "Big 3" cloud providers: Amazon Web Services, Google's Cloud Platform, and Microsoft's Azure.[61] Likewise, because large language models are only as good as the data used to train them, having access to real-time access to relevant data is important in order to ensure responses are accurate and not erroneous "hallucinations." Accordingly, many of the large tech monopolies have a head-start given their already extensive data-collection practices.[62] Furthermore, the knowledge and expertise necessary to create a large language model is extremely specialized and limited.

Indeed, the market concentration is already being borne out. According to a 2023 study performed by the Large European AI Models initiative, roughly 86% of large language models emerged from the private sector many from the same corporate players such as Google, Meta and Microsoft,[63] with 13% from the academic sector.[64] And given that AI appears to have strong network effects and economies of scale, e.g., a company with more infrastructure can host better models, better models attract better engineers, which then lead to better models and increased profits, this market concentration is likely to increase over time, not to mention, create a new walled garden for large technology companies to gatekeep.

Courts are already being confronted with antitrust cases involving these emergent technologies, at least in the conspiracy context. In *United States v. Topkins*¸ individuals reached an explicit agreement to use an algorithm to fix prices, i.e., they used an algorithm to facilitate their pre-arranged price fixing conspiracy.[65] The application of the law in that case is fairly clear—the ringleaders of the anticompetitive agreement made an agreement to use an algorithm to coordinate (i.e., fix) prices. But what if the role of the humans is more complex? What if, for example, an oligopoly adheres to an algorithm that reacts to changes in market conditions in real-time?

Further, while there has not yet been a case the author is aware of challenging the use of a large language model in a single-firm context, governmental regulators are already beginning to notice their potential anticompetitive effects.[66] Given the high barriers to entry and economies of scale, it seems like a challenge is on the horizon. It also is fair to say that the Cartwright Act is not equipped to deal with these complexities now and should be updated to account for it. **Conclusion**

California has already been and likely will continue to be a hotbed for innovation. Part of that success can be attributed to the Cartwright Act and its commitment to preserving competition. The law, however, must be tweaked and adjusted in response to ever changing technology, especially in light of actual empirical evidence. And the evidence we have seen indicates that the largest technology firms have been wielding their market power to stifle rather than facilitate innovation. Thus, the Cartwright Act should be strengthened to account for the rapid change in technology and the growing litany of anticompetitive single-firm conduct by the largest firms. Further, the impetus to consider procompetitive benefits in the technology context with respect to any update of the Cartwright Act would be unnecessary and perhaps even misguided. Given the growing risks of further developing technology, such as the ability of AI to employ

algorithmic pricing and thereby create new means to coordinate at ever-faster speeds, or to help concentrate market power even further, these large firms may become so entrenched that they make any meaningful competition even more difficult. To the extent innovation and the personal freedom of individuals to start their own businesses should be taken to account, it should be done so in favor of strengthening the antitrust laws against the largest companies who have been suppressing those goals.

---

1. With many thanks to Aaron Cera, then summer associate, soon-to-be post-bar law clerk. Christopher K.L. Young is a partner at Joseph Saveri Law Firm, LLP in San Francisco, CA. He is also active in the Antitrust Section of the American Bar Association and the Asian American Bar Association of the Greater Bay Area. The views expressed herein are solely those of the authors, and do not necessarily represent the views of their employers or any other association.

2. Assem. Con. Res. 95, 2021-22 Reg. Sess. Ch. 147 (Cal. 2022).

3. *Id.*

4. John M. Landry & Kirk A. Hornbeck, *One Hundred Years in the Making: the Cartwright Act in Broad Outline*, 17 J. Antitrust & Unfair Competition L. Section State Bar Cal. 7 (2008).

5. *See id.* at 7-8.

6. Indeed, the market dominance of large technology companies has not escaped scrutiny from governmental enforcers. *See*, *e.g.*, Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Nine Additional States Join Justice Department's Suit Against Google for Monopolizing Digital Advertising Technologies (Apr. 17, 2023), https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies..

7. *See*, *e.g.*, *Marin Cnty. Bd. Of Realtors*, *Inc. v. Palsson*, 16 Cal.3d 920, 935 (1976); *Flagship Theatres of Palm Desert*, *LLC v. Century Theatres*, *Inc.*, 55 Cal. App. 5th 381, 416 (2020) ("[T]he Cartwright Act's purpose is to 'to protect and promote competition *for the benefit of consumers*.'"); *see also* Landry, *supra* note 4.

8. California courts regularly apply rule of reason analysis in Cartwright Act cases, which broadly requires a balancing of procompetitive justifications with the anticompetitive conduct. *See*, *e.g.*, *Palsson*, 16 Cal.3d at 934-35 ("Under the rule of reason standard, pursuant to the salutary purposes of the antitrust law, we must analyze the economic effects of the board's practices and then consider possible justifications for the practices."); *Flagship Theatres*, 198 Cal. App. 4th at 1374 ("Under the rule of reason, the challenged conduct is unlawful only if its anticompetitive effects outweigh its procompetitive effects."); *see also In re Cipro Cases I & II*, 61 Cal. 4th 116, 146-47 (2015) ("To determine whether an agreement harms competition more than it helps, a court may consider 'the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption.'").

9. *Corwin v. Los Angeles Newspaper Serv. Bureau*, *Inc.*, 4 Cal. 3d 842, 853 (1971).

10. Cal. Bus. & Prof. Code § 16725 (emphasis added).

11. At least for cases under the quick look approach or the rule of reason, California courts have adhered to "the prevailing standard" "which measures whether the anticompetitive aspect of [the] restraint outweighs its procompetitive effects. *See*, *e.g.*, *Marsh v. Anesthesia Serv. Med. Grp.*, *Inc.*, 200 Cal. App. 4th 480, 495 (2011) (citing *Exxon Corp. v. Superior Court.*, 51 Cal. App. 4th 1672, 1681 (1997)); *see also In re Cipro Cases*, 61 Cal. 4th at 147.

12. Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 Antitrust J. 1, 39 (2007).

13. For example, the U.S. Department of Justice and Federal Trade Commission recognize in their Horizontal Merger Guidelines that mergers may diminish competition by enabling coordinated interaction as a result of increased market concentration. *See* Horizontal Merger Guidelines, § 7 (2010).

14. Indeed, courts have recognized that the weighing of procompetitive justifications and anticompetitive conduct is fact intensive and can be difficult to determine with certainty without sufficient discovery. *See*, *e.g.*, *In re Cipro*, 61 Cal. 4th at 146-47 ("To determine whether an agreement harms competition more than it helps, a court may consider 'the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption.'"); *see also Eddins v. Redstone*, 134 Cal. App. 4th 290, 303 (2005) ("Ambiguous evidence or inferences showing or implying conduct that is as consistent with permissible competition by independent actors as with unlawful conspiracy by colluding ones do not allow such a trier of fact so to find" (quoting *Aguilar v. Atl. Richfield Co.*, 25 Cal.4th 826, 303 (2001))); *Snow*

v. Align Tech., 586 F. Supp. 3d 972, 979 (N.D. Cal. 2022) (commenting in Cartwright Act case that the test of whether a restraint was "reasonably necessary" for a procompetitive agreement is an "inherently fact-specific inquiry that is difficult to determine with certainty at the motion to dismiss stage.")

15. Herbert Hovenkamp, *Prophylactic Merger Policy*, 70 Hastings L.J. 45, 71 (2018).

16. James Cook, *The Largest and Most Successful Startups*, Bus. Leader. (July 15, 2022) https://www.businessleader.co.uk/which-us-states-have-the-largest-and-most-successful-startups/.

17. See Joanna Glasner, *These U.S. States Have The Most Startup Investment For Their Size*, Crunchbase News, (Nov. 10, 2021) https://news.crunchbase.com/startups/states-per-capita-startup-investment-massachusetts-new-york-california/.

18. *Marin Cnty. Bd. Of Realtors, Inc. v. Palsson*, 16 Cal.3d 920, 935 (1976).

19. Joshua P. Davis & Anupama K. Reddy, *AI and Interdependent Pricing: Combination Without Conspiracy?*, 30 Competition: J. Antitrust, UCL & Privacy 1, 2- 3 (2020).

20. 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 1–2 (Comm. Print 2020), https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf [hereinafter House Judiciary Report].

21. Notably, regulating single firm conduct is a potential gap within the Cartwright Act. *See Asahi Kasei Pharma Corp. v. CoTherix, Inc.*, 204 Cal.App.4th 1, 9 (2012) (describing how "the provisions of the Cartwright Act could not be used to challenge mergers and acquisitions and found that 'the drafters of the Cartwright Act intended to make their law applicable only to situations in which the parties improperly collude and continue as separate, independent entities, and not to situations in which, by virtue of purchase and sale, or merger, one or more of the entities ceases to exist.'") (citing and quoting *California ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal.3d 1147, 1167 (1988)).

22. House Judiciary Report, *supra* note 20, at 1-2.

23. *Id.* at 99.

24. *Id.* at 107.

25 *Id.* at 125.

26. *Id.* at 2.

27. *Id.* at 197.

28. *Id.* at 199.

29. *Id.*

30. Paresh Dave, *Waze's ex-CEO Says App Could Have 'Grown Faster' Without Google*, Reuters, (Feb 18, 2021 5:04 PM) https://www.reuters.com/article/us-alphabet-google-waze/wazes-ex-ceo-says-app-could-have-grown-faster-without-google-idUSKBN2AJ02O

31. House Judiciary Report, *supra* note 20, at 2.

32. *Id.* at 110.

33. *Id.* at 111.

34. *Id.* at 8.

35. *Id.*

36. *Id.* at 51.

37. Privacy can be considered like any other economic metric, e.g., price, quantity, or quality. The ability to degrade privacy would in a competitive environment lead to the loss of consumers to a competitor with greater privacy protections. *See id.* at 51-52.

38. *Id.*

39. *Id.* at 113.

40. *Id.* at 9.

41. *Id.*

42. *Id.* at 9-10.

43. *Id.*

44. *Id.* at 209.

45. *Id.* at 234.

46. *Id.* at 306.

47. *Id.* at 234.

48. *Id* at 10.

49. *Id.* at 11.

50. *Id.* at 305-06.

51. *Id.* at 152.

52. *Id.* at 153.

53. *Id.* at 145; *see also* Davis & Reddy, *supra* note 19, at 16.

54 Michal S. Gal, *Algorithms As Illegal Agreements*, 34 Berkeley Tech. L.J. 67, 70 (2019).

55 House Judiciary Report, *supra* note 20, at 16.

56. Gal, *supra* note 54, at 117.

57. Maureen K. Ohlhausen, Acting Chairman, Fed. Trade Comm'n, Remarks at the Concurrences Antitrust in the Financial Sector Conference, *Should We Fear the Things That Go Beep In the Night? Some Initial Thoughts On the Intersection of Antitrust Law and Algorithmic Pricing 10* (May 23, 2017).

58. *See generally* Adrian Tan, *What are Large Language Models*, Machine Learning Mastery (May 19, 2023) https://machinelearningmastery.com/what-are-large-language-models/.

59. For example, many open-source models are based on LLaMA, which is an open-source large language model released by Meta. *See* Will Douglas Heaven, *The open-source AI boom is built on Big Tech's handouts. How long will it last?*, MIT Tech. Rev. (May 12, 2023), https://www.technologyreview.com/2023/05/12/1072950/open-source-ai-google-openai-eleuther-meta/.

60. *See AI may favor big tech incumbents*, Goldman Sachs (June 8, 2023), https://www.goldmansachs.com/intelligence/pages/ai-may-favor-big-tech-incumbents.html.

61. Matt Borstein et al, *Who Owns the Generative AI Platform?*, Andreesen Horowitz (Jan. 19, 2023) https://a16z.com/2023/01/19/who-owns-the-generative-ai-platform/

62. *See* House Judiciary Report, *supra*, note 20 at 32-35.

63. *See generally* Nathan Benaich & Ian Hogarth, State of AI Report 2022 (2022), https://www.stateof.ai/.

64. LEAM:AI, *Large AI Models for Germany - Feasibility Study* 56 (2023), https://leam.ai/wp-content/uploads/2023/05/LEAM-Feasibility-STudy.pdf.

65. Plea Agreement, *United States v. Topkins*, No. 3:15-cr-00201-WHO (N.D. Cal. Apr. 30, 2015).

66. *See, e.g.*, Press Release, Competition & Mkts. Auth., *CMA Launches Initial Review of Artificial Intelligence Models* (May 4, 2023), https://www.gov.uk/government/news/cma-launches-initial-review-of-artificial-intelligence-models.

THE ADAPTABLE ANTITRUST LAWS

By Lin W. Kahn, David C. Kiernan, Alyxandra Vernon, Maya Baumer[1]

Today, a loud chorus is calling for antitrust reform for digital markets and technology companies. The refrains are familiar: "big is bad"; "break them up"; "walled garden"; "killer acquisitions"; "platform self-preferencing." Critics decry what they view as the current antitrust framework's inordinate focus on price or output impacts as determining whether competition has been harmed. They argue that this standard fails to capture the nonprice effects of exclusionary conduct and mergers in digital markets, including harm to innovation, barriers to entry, and invasion of privacy. Prompted by such criticism, the California Legislature authorized the California Law Revision Commission[2] to study "[w]hether the law should be revised in the context of technology companies so that analysis of antitrust injury in that setting reflects competitive benefits such as innovation and permitting the personal freedom of individuals to start their own business and not solely whether such monopolies act to raise prices."[3]

This article focuses on one part of the debate: the role that innovation plays in today's antitrust jurisprudence. There is little dispute that protecting innovation is a central goal of the current antitrust laws. Despite this consensus, some argue that the law gives only "lip service" to this goal.[4] Below, we briefly describe the call for reform, then examine the role of innovation in the case law and enforcement actions, and finally analyze whether the antitrust statutes should be revised to provide *ex ante* rules for digital markets to account for harm to innovation.

As we show, courts and government regulators do more than give perfunctory attention to harm to innovation. Promoting innovation is often a key consideration in the analysis, especially in government enforcement actions. When antitrust challenges involving innovation harm fail, it is not because courts and regulators ignore impacts on innovation but because the factfinder found that the challenger failed to prove an anticompetitive impact or that countervailing procompetitive benefits outweighed such impact. The analysis in these cases shows that the existing Rule of Reason framework that has long been a hallmark of antitrust law protects innovation benefits. The process is also ongoing, as recent enforcement activity in digital markets has focused on alleged harms to innovation. These cases are working their way through the courts and their resolution will contribute to the further development of the standards in this area. The case-by-case, non-sector specific framework the courts will apply in these cases allows the law to adapt to changing circumstances, evolving economic theory, and accumulated experience. Dismantling this approach and imposing new *ex ante* rules at this juncture for technology companies is unnecessary and would risk harming the vigorous competition the antitrust laws were enacted to protect.

I. CALLS FOR REFORM

The primary target for advocates of reform is the consumer welfare standard that has been the bedrock of antitrust law for decades. Critics of the current system argue that a significant consequence of the consumer welfare standard has been to focus on consumer prices as the dominant metric of assessing competition.[5] As a result, the argument goes, the current framework "yield[s] almost no consideration of the 'dynamic' costs of monopoly, like stagnation or stalled innovation."[6] Critics argue that the consumer welfare standard has failed to stop "Big Tech" from locking in customers and using exclusionary conduct to block nascent competitive threats. They say this has led to a slew of harmful effects, including the concentration of power, higher prices, and declining innovation and quality. Proponents of reform argue that the consumer welfare standard is especially ill equipped for the digital economy with business models centered around zero-price markets, where anticompetitive conduct may not lead to immediate higher prices. And some posit that the best solution for dealing with entrenched technology companies is to revise the rules through adoption of *per se* or *ex ante* standards without requiring proof of anticompetitive effects in certain circumstances.

II. INNOVATION IN ANTITRUST ANALYSIS

There is little dispute that promoting and protecting innovation is a core purpose of the current antitrust laws. Areeda & Hovenkamp emphasize, "a dominant firm's restraints on the innovations of others go to the heart of antitrust policy."[7] Courts have recognized this time and again, noting that antitrust laws "safeguard the incentive to innovate"[8] and encourage "innovation, industry, and competition."[9] In fact, many have argued that innovation competition has likely produced considerably greater economic gains than the movement of markets toward greater price competition.[10] Thus, it is no surprise that harm to innovation has been an important element of monopolization and anticompetitive conduct challenges under Sections 1 and 2 of the Sherman Act,[11] as well as merger challenges under Section 7 of the Clayton Act.[12]

In particular, the concern over impediments to innovation has long been a central focus of antitrust analysis in technology markets, where innovation is a prime mode of competition. As the FTC recognizes, "[i]nnovation is a central aspect of rivalries among technology firms, and the markets are dynamic: new ideas topple formerly dominant technologies and consumers line up to buy products that are smaller, faster, and better."[13] For this reason, numerous technology cases over the years have addressed this concern under the existing antitrust framework.

A. INNOVATION IN MONOPOLIZATION CASES

Harm to innovation was front and center in *United States v. Microsoft Corp.*[14] The district court held that Microsoft illegally preserved a monopoly in the market for personal computing operating systems by preventing competitors from distributing their products.[15] Microsoft's Windows operating system held a significant share of the operating system market, but "middleware" products like Netscape Navigator browser threatened Microsoft's position. To combat this nascent threat, Microsoft pre-installed its own Internet browser on Windows and took steps to give its own browser an advantage over Navigator and other rival browsers.[16] The district court found that Microsoft's actions harmed consumers by "unjustifiably distorting competition" and that Microsoft's actions "hobbled a form of innovation that had shown the potential to depress the applications barrier to entry sufficiently to enable other firms to compete effectively against Microsoft."[17] The court added, "[m]ost harmful of all is the message that Microsoft's actions have conveyed to every enterprise with the potential to innovate in the computer industry," with the "ultimate result" being that "some innovations that would truly benefit consumers never occur for the sole reason that they do not coincide with Microsoft's self-interest."[18] The D.C. Circuit upheld most of the district court's conclusions and condemned Microsoft's practices—which were unrelated to short-term pricing—because they

threatened to raise entry barriers and thus reduced or delayed innovation.[19]

Similarly, the DOJ's suit against Mastercard and Visa in the 1990s was meant, in part, to protect innovation. The DOJ alleged the companies' policies preventing credit card issuers from issuing competing credit cards—like American Express or Discover cards—unreasonably restrained trade.[20] The DOJ alleged that the policies harmed consumers by "reducing competitive investments in the innovation, development, and marketing of improved network products and services, and by restraining the competitiveness of smaller networks."[21] The Second Circuit agreed and affirmed the district court's finding that "by enforcing . . . the exclusionary rule, [which] bar[s] their member banks from issuing Amex or Discover cards," MasterCard and Visa violated the Sherman Act.[22] Importantly, the DOJ showed "substantial adverse effects on competition" through nonprice harms like suppression of innovation.[23] The Second Circuit relied on trial testimony that "strongly indicated that price competition and innovation in services would be enhanced if four competitors, rather than only two, were able to compete . . . for issuing banks."[24] The court also endorsed the district court's finding that both defendants would "respond to . . . greater network competition by offering new and better products and services."[25] Ultimately, because both "product innovation and output" were "stunted by the challenged policies," the Second Circuit ruled that competition had been harmed.[26]

Innovation was also a key consideration in the FTC's suit against Intel, where the agency alleged that Intel used its market power to maintain a monopoly over the microprocessor market.[27] The FTC alleged that Intel denied certain customers access to technical information as a means of coercing those customers to grant Intel licenses to innovations developed and owned by those customers.[28] According to the complaint, "[a] natural and probable effect of Intel's conduct is to diminish the incentives of those [] customers—as well as other firms that are Intel customers or otherwise commercially dependent upon Intel—to develop new innovations relating to microprocessor technology."[29] Ultimately, the parties settled the dispute, with Intel agreeing to stop the challenged conduct.[30] The FTC's announcement of the settlement emphasized that the agency was focused on striking the right balance "between protecting the incentives of smaller rivals to innovate and unduly constricting a dominant firm's conduct of its business."[31]

Private plaintiffs have also sued on a theory of harm to innovation, particularly in cases involving alleged exclusionary conduct in connection with standard setting organizations. Standard-setting procedures can threaten innovation when they "impede progressiveness by excluding from the market firms who threaten their rivals with . . . innovations that consumers would prefer if given the opportunity."[32] For example, in *Wi-Lan, Inc. v. LG Elecs., Inc.*, a patent infringement case, defendant LG asserted a Sherman Act Section 2 counterclaim alleging that Wi-LAN's failure to disclose intellectual property rights in wireless technologies to standard setting organizations excluded viable alternative technologies.[33] On a motion for judgment on the pleadings, Wi-LAN argued that LG failed to adequately allege an antitrust injury, but the court disagreed, finding LG's allegation that the alleged conduct "chill[ed] competition to develop and sell innovative new [] products, resulting in increased prices and decreased quality and innovation in downstream product markets and complementary innovation markets" as sufficient.[34] Consistent with this ruling, decades ago, the Supreme Court recognized in *Allied Tube & Conduit Corp. v. Indian Head, Inc.* that manipulating the standard setting process "might impair competition in several ways," including not just by increasing prices but by "'depriv[ing] some consumers of a desired product [and] eliminat[ing] quality competition."[35]

Harm to innovation has been alleged in non-standard-setting private cases as well. For example, in *Lucasys, Inc. v. Power Plan, Inc.*, the court denied a motion to dismiss the plaintiff's claims that the defendant harmed innovation in the utility software market.[36] The court found that Lucasys had sufficiently alleged harm to competition because

Lucasys pled that PowerPlan's blocking of new products hampered innovation, reduced output, deprived consumers of choice, and raised prices.[37] Citing Areeda & Hovenkamp, the court noted that "'[r]estraints on innovation are very likely even more harmful than traditional price cartels, which [are] usually consider[ed] to be the most harmful anticompetitive practice.'"[38] As another example, in *Integraph Corp. v. Intel Corp.*, the district court found that Intel "attempted to leverage its monopoly power in the [] CPU market to prevent Intergraph from competing in the graphics subsystem and workstation markets."[39] The court found the conduct "reduce[d] competition in the markets in which Intergraph competes, depriving customers of alternative and improved technology in these markets, stifling innovation, reducing competition in price and quality, and impairing competition generally."[40]

On the flip side of the coin, protecting innovation is often considered when courts analyze a defendant's procompetitive justifications. For instance, courts have held that product design changes are not unreasonable under Section 2 of the Sherman Act if they are justified by legitimate product innovation.[41] The Ninth Circuit explained in *Allied Orthopedic Appliances, Inc. v. Tyco Health Care Grp. LP* that "[a] monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits, and any success it may achieve solely through 'the process of invention and innovation' is necessarily tolerated by the antitrust laws."[42] The court affirmed summary judgment for Tyco, holding that Tyco's design improvements on its pulse oximeters were product improvements and plaintiffs failed to present evidence that Tyco used its monopoly power to coerce adoption of the new product.[43] The Supreme Court has also repeatedly recognized that innovation can be a procompetitive justification in antitrust cases. In *Ohio v. American Express Co.*, the Court found "Amex's business model [] stimulated competitive innovations in the credit-card market, increasing the volume of transactions and improving the quality of the services."[44] And in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, the Court reasoned that "[t]he opportunity to charge monopoly prices . . . induces risk taking that produces innovation and economic growth."

B. INNOVATION IN MERGER CHALLENGES

Harms to innovation are also addressed under Section 7 of the Clayton Act, and are an important part of assessing mergers. The Horizontal Merger Guidelines mention innovation no less than twenty times.[45] Of particular interest, the Guidelines include a section titled "Innovation and Product Variety," which recognizes that "[c]ompetition often spurs firms to innovate"[46] and that a merger may harm innovation "by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger."[47] The Guidelines explain that diminished innovation could entail "reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products."[48]

As analyzed in *Merging Innovation into Antitrust Agency Enforcement of the Clayton Act*, the DOJ and FTC often invoke harm to innovation in their merger challenges.[49] For example, between 2004 and 2014, the FTC and DOJ challenged harms to innovation in 84 cases.[50] The authors of the article found that the agencies most often alleged harm to innovation in mergers involving "high research and development" because "harm to innovation from a merger and the potential for change in industry structure to promote innovation . . . [were] most likely to occur in industries" with high research and development intensity.[51]

Harm to innovation continues to be a cornerstone of merger enforcement today. Just in the last two years, the FTC and DOJ have brought several merger challenges focused on harm to innovation, especially in vertical mergers. Most recently, the FTC issued an order to unwind the vertical transaction between Illumina (a DNA sequencing provider) and GRAIL, Inc. (a maker of multi-cancer detection tests).[52] The Commission found that the deal would stifle innovation in the downstream market for cancer tests by giving Illumina the ability and incentive to foreclose or harm GRAIL's rivals.[53]

According to the Commission, Illumina could harm other test developers through "non-price means, such as by withholding or degrading access to supply, service, or new technologies."[54] This could, as the Commission found, "impede GRAIL's competitors' business and inhibit their R&D efforts."[55]

Similarly, in *Nvidia/Arm*, another vertical transaction, the FTC challenged Nvidia's proposed acquisition of Arm on the grounds that the acquisition would allegedly undermine and reduce competition, which would ultimately cause harm to "innovation" and "higher prices."[56] Nvidia, a developer and supplier of processor products for various applications, sought to acquire Arm, a developer and licenser of central processing unit designs and architectures ("Arm Processor Technology").[57] The FTC announced that the transaction would "give one of the largest chip companies control over the computing technology and designs that rival firms rely on to develop their own competing chips."[58] The complaint further alleged that the combined entity would have the ability and incentive to harm rivals and "prevent[] innovations in Arm Processor Technology that could lead to greater future competition against Nvidia."[59] The FTC maintained that the acquisition would likely lead to "substantial lessening of competition by eliminating innovations that Arm would have pursued but for a conflict with Nvidia's interests."[60] The parties abandoned the transaction shortly after the FTC filed the complaint.[61]

Likewise, in *Lockheed Martin/Aerojet*, yet another vertical transaction, the FTC challenged Lockheed's proposed acquisition of Aerojet on the grounds that the acquisition would harm innovation and quality.[62] Lockheed, a defense contractor, sought to acquire Aerojet, a supplier of several critical missile propulsion products.[63] The FTC alleged that the acquisition would "likely result in a decrease in certain research and development ('R&D') investment and innovation in the design, development, and production of missile propulsion systems."[64] Specifically, the FTC alleged:

> Today, Aerojet collaborates closely and shares innovative ideas with all its major customers, including, but not limited to, Lockheed, Raytheon, Boeing, and Northrop. Similarly, Aerojet invests its own resources in R&D to support competing propulsion concepts advanced by multiple prime contractors for a given missile program. Given Aerojet currently is generally agnostic as to which prime wins a given contract (provided Aerojet is the supplier for the winner), Aerojet invests in technologies that it expects will yield the most benefit to its propulsion business without regard to the identity of the prime contractor. Post-acquisition, however, a combined Lockheed-Aerojet will no longer possess the same incentives with respect to R&D. Post-acquisition, the combined firm will earn more if Lockheed wins the prime contract, and therefore, would have a diminished incentive to devote its resources toward otherwise beneficial, innovative R&D that would advantage Lockheed's rivals or diminish sales of competing Lockheed Relevant Products, ultimately inhibiting DoD's capability to defend the nation.[65]

The core of the FTC's concern was that the acquisition would "substantially lessen competition" by causing "less innovation," "increased barriers" to entry, and "lower quality product."[66] The parties terminated the agreement shortly after the challenge.[67]

C. "KILLER ACQUISITIONS"

Advocates for antitrust reform argue that the current laws are insufficient to stop firms from gaining or maintaining monopoly power through "killer acquisitions" of innovative, nascent startups done solely to discontinue the target's innovation projects.

Startup or nascent firms can play a vital role in competitive markets. They can be a key source of innovation, including "disruptive innovation." In certain circumstances, startups can help deconcentrate markets, force less efficient

incumbents to improve or exit, and play an important role in creating efficient markets.

For years, the DOJ and FTC have challenged vertical and horizontal transactions that involve nascent competitors and that threaten innovation competition, including where: (i) the merging firms were actual competitors, (ii) but for the merger, one firm would have faced competition from the target in the future, and (iii) both firms were working to develop products that would likely compete in the future.[68] Examples include:

- **Illumina/Pacific Biosciences.** In 2019, the FTC challenged the acquisition of an innovative biotech firm, Pacific Biosciences of California, by an incumbent, Illumina, as a violation of both Section 7 of the Clayton Act and Section 2 of the Sherman Act. The FTC alleged that Illumina's proposed acquisition would substantially lessen current and future competition in a market for next-generation DNA sequencing systems. While Pacific Biosciences and Illumina were not current competitors, the FTC alleged that absent the proposed acquisition, competition between Illumina and PacBio would increase substantially in the future. The parties abandoned their merger plans after the FTC filed its complaint.[69]
- **Visa Inc./Plaid Inc.** In 2020, the DOJ filed a lawsuit to stop the merger of Visa Inc. and Plaid Inc. The DOJ alleged that Visa was a monopolist in online debit and that it charged consumers and merchants billions of dollars in fees each year to process online payments. The DOJ also alleged that Plaid, a successful fintech firm, was developing an innovative payment platform that would challenge Visa's monopoly. According to the complaint, the transaction would have enabled Visa to eliminate Plaid, a competitive threat to its online debit business, before Plaid had a chance to succeed, thereby enhancing or maintaining its monopoly. The complaint also alleged that allowing the merger would "likely reduce quality, service, choice, and innovation."[70] Visa and Plaid ultimately decided to abandon the merger.[71]

The agencies have a number of other pending cases revolving around innovation that have yet to be decided. For example, in 2020, the FTC sued Meta for monopolization, alleging that the company illegally maintained its personal social networking monopoly through a years-long course of anticompetitive conduct in violation of Section 2 of the Sherman Act. The complaint alleges that Meta engaged in a systematic strategy of targeting nascent competitors—including its 2012 acquisition of up-and-coming rival Instagram, its 2014 acquisition of the mobile messaging app WhatsApp, and the imposition of anticompetitive conditions on software developers—to eliminate threats to its monopoly. The case is still pending.[72] The DOJ's 2020 case against Google alleging monopoly over search and search advertising is scheduled for trial in September 2023.[73] In January 2023, the DOJ filed another case against Google alleging monopoly over digital advertising technologies.[74]

III. RECENT GOVERNMENT LOSSES INVOLVING INNOVATION

The government has suffered a series of recent losses, including cases with allegations of harm to innovation. However, these losses stem from the government's failure to put forth sufficient evidence to meet their burden, not from a lack of legal theory based on harm to innovation.

In *UnitedHealth/Change Healthcare*, the DOJ alleged that a merger between United (a health insurer) and Change (a provider of key technologies for health insurers) would disadvantage rivals and result in higher costs, lower quality, and less innovative commercial health insurance for Americans.[75] The DOJ alleged that the transaction would give United control of Change's critical data highway, through which half of American's health insurance claims pass each year.[76] According to the complaint, the deal would give United the ability and incentive to misuse its rivals' competitively sensitive information for its own business purposes.[77] "Innovation competition

among health insurers would likely decline, because rival insurers would know that United could identify and appropriate the innovation through its access to the innovator's competitively sensitive edits," alleged the DOJ.[78] And "[t]his harm to innovation would reduce competition in the sale of commercial health insurance to national accounts and large group employers, resulting in less affordable or lower quality plans."[79]

The D.C. District Court denied the DOJ's request for preliminary injunction to block the merger.[80] The court recognized that the government's theory of competitive harm was that United's potential misuse of Change's claims data would reduce innovation.[81] The problem with the government's case was not its legal theory or that innovation harm was irrelevant to the antitrust analysis; rather, it was the lack of proof. The court found "the Government provided zero real-world evidence that rival payers are likely to reduce innovation."[82] The court observed that "[t]he Government did not call a single rival payer witness to offer corporate testimony that it would innovate less or compete less aggressively if the proposed merger goes through. . . . To the contrary, all the payer witnesses rejected the notion that the merger would harm innovation."[83] The sole support from the government on harm to innovation was its expert testimony, which the court found insufficient. "[A]ntitrust theory and speculation cannot trump facts; the Government must make its case on the basis of the record evidence relating to the market and its probable future."[84]

As another example, in *Meta/Within*, the FTC sought to enjoin Meta from acquiring Within, a software company that develops applications for VR devices.[85] The FTC alleged the acquisition may "yield multiple harmful outcomes, including less innovation, lower quality, higher prices, . . . and less consumer choice."[86] The FTC's core argument was that Meta wanted to buy Within rather than create its own VR fitness application, and that the VR fitness space would be more competitive without the acquisition.[87] A federal judge denied the FTC's attempt to block the acquisition, finding the FTC's argument that Meta would have entered the VR market "impermissibly speculative."[88]

Of course, not every alleged harm to innovation entitles plaintiffs to the relief sought. Where a private plaintiff or government enforcer fails to prove facts to support the claim of likely harm to innovation, a finding for defendants on such a claim is the right outcome. And, even if harm is found, the court must balance it against any procompetitive benefits from the conduct.[89]

IV. DO THE ANTITRUST LAWS NEED TO BE REVISED?

Some may argue that these government losses highlight the reality that impact on innovation—especially inchoate innovation years from market entry—can be difficult for tribunals to measure. "[T]he results of innovation are unexpected, sometimes radically so in the sense that the valuable result was not even within the range of what was intended."[90] The difficulty of measurement may depend on the stage of the innovation. Exclusion of completed innovation may present an easier case, while impact on prospective innovations is a much harder case.[91] This difficulty, however, is not unique to measuring innovation effects. While we have well-developed theories about market structure and the relationship between costs and prices, the economic or price impact of conduct is often uncertain and difficult to assess correctly *ex ante*. Indeed, antitrust cases focused solely on price effects have likewise failed because plaintiffs presented nothing more than "theories and speculation."[92] In other words, the problem of proof is not unique to cases involving innovation effects, and thus is not alone a reason to adopt a different approach for such cases.

The current antitrust jurisprudence has evolved through decades of case law, and will continue to evolve on a case-by-case basis as more digital markets cases are bought and as economic theories continue to develop. This common law approach takes time and can be criticized for being too slow for the fast pace of the digital economy. But this approach has significant benefits. It is adaptable to

new experiences and improved economic thinking. It is malleable, enabling courts to tailor rulings to a wide variety of facts. And it leaves room for case-by-case development and evolution of the law as circumstances change. Many have argued that "the antitrust statutes were written in broad terms," and that "learning over time can properly inform enforcement approaches."[93] The Supreme Court explained in *State Oil Co. v. Khan*:

> In the area of antitrust law, there is a competing interest, well represented in this Court's decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience. Thus, the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress "expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." . . . Accordingly, this Court has reconsidered its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question."[94]

Some reform advocates argue that the laws should be updated to impose blanket rules on certain conduct or mergers by certain market participants in certain industries. But such full-scale revisions may well end up harming the very thing they are trying to protect. The concept that over-deterrence may be antithetical to protecting the competitive process is often cited by courts. In *Trinko*, the court refused to extend exceptions to the right to refuse to deal, noting "[m]istaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'"[95] As several commentators have recognized, courts have properly adopted a bias in favor of false negatives (rather than false positives) on the rationale that procompetitive behavior erroneously condemned leads to the permanent loss of the benefits of the conduct, while anticompetitive conduct erroneously permitted may be temporary due to the market's self-correcting nature.[96] If anything, this rationale applies with more force to digital markets than to other sectors, given the rapid pace of technological change, which can quickly produce enormous new benefits while turning dominant firms into also-rans.

Take, for example, proposed legislation that bans "self-preferencing,"—*i.e.*, a vertically integrated platform giving its downstream products an advantage over those of third parties. "Self-preferencing" has become a loaded term; mere mention of it seems to invoke automatic condemnation. But self-preferencing refers to a wide range of scenarios, with varying justifications and competitive effects. On the one hand, it includes Microsoft's pre-installation of its own internet browser at the expense of Netscape Navigator, a form of self-preferencing found to be illegal in the particular circumstances in that case because the practice maintained Microsoft's monopoly in the operating system market. On the other hand, self-preferencing also includes situations where a company becomes vertically integrated to efficiently supply a more innovative, attractive product that benefits consumers. Such integration is often procompetitive.[97] Nor is self-preferencing unique in digital markets. Supermarkets, for example, have a long history of selling their own private label products by giving those products preferred shelf placement.[98] Some have argued that a big reason private label products exist, and are cheaper than branded products, is that self-preferencing allows retailers to spend less on other forms of marketing.[99] Retailers often place their products in preferred locations next to comparable branded products to encourage private-label purchases. As to all of this conduct—whether in digital markets or elsewhere—blanket rules are neither necessary nor desirable at this juncture. The Rule of Reason enables courts to invalidate self-preferencing when it is demonstrated to be anticompetitive (including when it stifles innovation), while permitting it in markets and circumstances where it promotes innovation and competition.

Banning acquisitions of nascent competitors also comes with risks. Acquisitions of small firms by

large firms can in many instances *enhance*, rather than deter, incentives for innovation.[100] Some innovations are radical and disruptive, and firms developing these innovations often intend to displace incumbent firms. Yet other innovations are incremental and build on the prior innovations of incumbent firms. For incremental innovators, the reason for innovation may be acquisition. In a recent Senate Judiciary Committee hearing, a serial entrepreneur testified that acquisitions "enable startup investors to reclaim their invested capital, realize any gains, and recycle their capital into the next generations of startups, fueling the ongoing process of innovation-led economic growth and job creation."[101] A recent study by the FTC demonstrates that an overwhelming majority of non-reportable acquisitions by large technology firms were less than ten years old and were likely startups.[102] This suggests that acquisition by an incumbent is an important exit strategy. Further, an incumbent's acquisition of a nascent competitor may enhance the merged firm's ability to fully develop, monetize, and/or distribute innovations. By enabling the startup to capture a higher share of the value of the innovation, acquisition by an incumbent may increase incentives to invest in innovation.

Finally, some have proposed shifting the burden of proof to the merging parties in certain merger challenges brought by the government. Rather than the government shouldering the burden to prove that a transaction may substantially lessen competition, the proposed reform imposes upon the merging parties the burden of proving the proposed transaction would not materially harm competition. This too raises significant issues. It can be difficult to prove a negative—*i.e.*, that a proposed merger would *not* harm competition. Further, presumptively banning every deal involving companies of a certain size would undoubtedly make procompetitive deals more costly. Not only would the merging parties bear the cost of making the new showing, but close calls may be decided in favor of the party without the burden. In sum, shifting the burden may deter benign or procompetitive transactions.

V. CONCLUSION

There is a long history of enforcers and private plaintiffs using current or prospective harm to innovation to support antitrust claims. As the agencies and private plaintiffs continue to pursue more innovation cases, the antitrust laws will continue to adapt to facts and improved economic thinking. This adaptation is at the heart of the antitrust laws, which evolve through a common law process "as circumstances change and learning grows."[103] This natural evolution should not be disrupted at this time.

---

1. Lin W. Kahn and David C. Kiernan are partners in the Antitrust and Competition Law Practice at Jones Day. Alyxandra Vernon is an associate in the New Lawyers Group at Jones Day. Maya Baumer is an associate in the Antitrust and Competition Law Practice at Jones Day. The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

2. The California Law Revision Commission was created in 1953 as the permanent successor to the Code Commission and given responsibility for the continuing substantive review of California statutory and decisional laws. The Commission studies the law and recommends legislation to make needed reforms.

3. http://www.clrc.ca.gov/B750.html.

4. *See, e.g.*, Tim Wu, *Taking Innovation Seriously: Antitrust Enforcement If Innovation Mattered Most*, 78 Antitrust L.J. 313 (2012) ("For decades now, experts and scholars have agreed that if maximizing consumer welfare is the point of antitrust law, then the protection and promotion of innovation should be an important and perhaps the paramount goal of antitrust enforcement. . . . Nearly everyone agrees with these points. But if a law is capable of giving lip service to an idea, it has often done just that. Far from becoming central to the law's mission, the use of the law to promote innovation has actually retreated."); Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 Yale. L.J. 710 (2017) ("[I]t is fair to say that a concern for innovation or non-price effects rarely animates or drives investigations or enforcement actions—especially outside of the merger context.").

5. *See, e.g.*, Lina M. Khan, Note, Amazon's Antitrust Paradox, 126 Yale. L.J. 710 (2017).

6. Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age 74 (2018), available at https://econ.utah.edu/antitrust-conference/session_material/Curse%20of%20the%20Bigness.pdf.

7. Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 704d.

8. *Verizon Commc'ns., Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004).

9. *FTC v. Qualcomm Inc.*, 969 F.3d 974, 988, 991 (9th Cir. 2020).

10. *See, e.g.*, Areeda & Hovenkamp, *supra* note 7 at ¶ 704d.

11. *See* Complaint ¶ 14, *Intel Corp.*, FTC Dkt. No. 9288 (June 8, 1998), https://www.ftc.gov/sites/default/files/documents/cases/1998/06/intelcmp_0.pdf (alleging that Intel's conduct diminished the incentives to innovate); Complaint ¶ 83, *United States v. Visa, Inc.*, No. 1:98-cv-07076 (S.D.N.Y. Oct. 7, 1998) (alleging that many products, services, and innovations that would have emerged in a competitive environment were never even considered by Visa and Mastercard).

12. Between 2004 and 2014, the DOJ and FTC challenged 250 mergers and alleged harm to innovation in 84 of them. *See* Richard J. Gilbert & Hillary Greene, *Merging Innovation into Antitrust Agency Enforcement of the Clayton Act*, 83 Geo. Wash. L. Rev. 1919, 1933 (2015); *see also, e.g.*, Complaint ¶ 6, *United States v. Halliburton Co.*, No. 1:16-cv-00233 (D. Del. Apr. 6, 2016) https://www.justice.gov/opa/file/838651/download (alleging that merger of two oilfield services companies would leave exploration and production companies with one fewer supplier driving innovation and development of new technologies); Complaint ¶¶ 57–58, *Otto Bock HealthCare N. Am., Inc.*, FTC Docket No. 9378 (Dec. 20, 2017), https://www.ftc.gov/system/files/documents/cases/otto_bock_part_3_complaint_redacted_public_version.pdf (alleging consummated merger reduced innovation competition in product features and functionality of microprocessor prosthetic knees).

13. *Competition in the Technology Marketplace*, FTC, https://www.ftc.gov/advice-guidance/competition-guidance/industry-guidance/competition-technology-marketplace (last visited Mar. 8, 2023).

14. 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

15. *Id.* at 58, 61, 67, 74.

16. *Id.* at 65.

17. *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 111 (D.D.C. 1999).

18. *Id.* at 112.

19. *See Microsoft Corp.*, 253 F.3d 34; *see also Rambus Inc. v. FTC*, 522 F.3d 456, 464 (D.C. Cir. 2008) (discussing *Microsoft Corp.*).

20. Complaint for Equitable Relief for Violations of 15 U.S.C. § 1, *United States v. Visa U.S.A.*, No. 98-cv-7076, 1998 WL 34279897 (S.D.N.Y. Oct. 7, 1998).

21. *Id.* ¶ 39; *see also id.* ¶ 73 (alleging that under the proposals, new MasterCard innovations would have been made available only to member banks that agreed to favor MasterCard over Visa); *id.* ¶ 83 ("The anticompetitive effects of duality exceed what can be readily observed because many products, services, and innovations that would have emerged in a competitive environment were never even considered by the associations or their managements. Nevertheless, there are several instances in which the controlling banks have restrained critical competitive initiatives developed by the managements of Visa and MasterCard.").

22. *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 234 (2d Cir. 2003).

23. *Id.* at 238, 241.

24. *Id.* at 240–41.

25. *Id.* at 241.

26. *Id.*; *see also id.* at 243 (agreeing with the district court that the procompetitive effects of the exclusionary rules did not outweigh the anticompetitive effects).

27. *See* Complaint, *Intel Corp.*, FTC Docket No. 9288 (June 8, 1998), https://www.ftc.gov/sites/default/files/documents/cases/1998/06/intelcmp_0.pdf.

28. *Id.* ¶ 13.

29. *Id.* ¶ 14.

30. Decision and Order, *Intel Corp.*, FTC Docket No. 9288 (Aug. 3, 1999), https://www.ftc.gov/sites/default/files/documents/cases/1999/08/intel.do__0.htm.

31. Press Release, Fed. Trade Comm'n, *FTC Accepts Settlement of Charges Against Intel*, FTC (Mar. 17, 1999), https://www.ftc.gov/news-events/news/press-

releases/1999/03/ftc-accepts-settlement-charges-against-intel.

32. *See* Areeda & Hovenkamp, *supra* note 7, at ¶¶ 2230a, 2220b3 (discussing that product exclusion by a standard-setting venture can cause harm to innovation when its "purpose or effect is to exclude from the market a product or process that consumers would prefer or that is cheaper to produce, but whose introduction would threaten the profits of firms making rival products").

33. 382 F.Supp.3d 1012, 1022 (S.D. Cal. 2019).

34. *Id.* at 1024; *see also Apple, Inc. v. Samsung Elecs. Co., Ltd.*, No. 11-CV-01846-LHK, 2011 WL 4948567, at *6 (N.D. Cal. Oct. 18, 2011) (Apple sufficiently pled antitrust injury through its allegations that Samsung's conduct in connection with standard setting organizations "chill[ed] competition to develop and sell innovative new UMTS-compliant products, resulting in increased prices and decreased quality and innovation."); Amended Consolidated Complaint ¶¶ 81, 85-86, *In re Apple iPod iTunes Antitrust Litigation*, Dkt. No. C-05-00037-JW(HRL), (N.D. Cal. filed Jan. 26, 2010)(alleging various harms to innovation as antitrust injuries).

35. 486 U.S. 492, 500 n.5 (1988). In *Allied Tube*, the plaintiff alleged that the manufacturers of steel conduit conspired to remove plastic conduit from the market by manipulating the standard-setting process. *Id.* at 496. There, the defendant's employees and agents had packed the standard-setting body and were instructed to blindly vote at a standards meeting against the plastic conduit. This effectively excluded plastic conduit from the market for an illegitimate and collusive reason. *Id.* at 496-97. *See also Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 310 (3d Cir. 2007) ("As the Supreme Court acknowledged in *Allied Tube*, and as administrative tribunals, law enforcement authorities, and some courts have recognized, conduct that undermines the procompetitive benefits of private standard setting may, at least in some circumstances, be deemed anticompetitive under antitrust law.").

36. 576 F. Supp. 3d 1331, 1340–41 (N.D. Ga. 2021).

37. *Id.* at 1352.

38. *Id.* at 1351 (quoting Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 704d at 234–35 (4th ed. 2015)).

39. 3 F. Supp. 2d 1255, 1272 (N.D. Ala. 1998), *vacated*, 195 F.3d 1346 (Fed. Cir. 1999).

40. *Id.* Note the decision was vacated on appeal because the Federal Circuit found that Intel and Integraph were not actually competitors.

41. *Allied Orthopedic Appliances, Inc. v. Tyco Health Care Grp. L.P.*, No. CV, 2008 WL 7346921, at *11 (C.D. Cal. July 9, 2008), *aff'd sub nom. Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991 (9th Cir. 2010)(citing to *Cal. Comp. Prod. Inc., v. IBM, Corp.*, 613 F.2d 727, 744 (9th Cir. 1979)).

42. 592. F.3d 991, 998 (9th Cir. 2010) (quotation marks and citation omitted).

43. *Id.* at 1002.

44. 138 S.Ct. 2274, 2282 (2018).

45. U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010), reprinted in 10 Trade Reg. Rep. (CCH) ¶ 13,100, § 4 http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf (including a section titled "Innovation and Product Variety," which states "[c]ompetition often spurs firms to innovate" and that a merger may harm innovation by "encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger," which could cause "longer-run effect[s]"). In 1995, the Justice Department issued antitrust guidelines for intellectual property licensing that emphasized a concern with competition to innovate. U.S. Dep't of Justice, Antitrust Guidelines for the Licensing of Intellectual Property § 3 (1995).

46. U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines (2010), at §§ 1, 6, 6.4, 10.

47. *Id.* § 6.4.

48. *Id.*

49. Gilbert & Greene, *supra* note 12 at 1932–43 ("[B]oth the DOJ and the FTC allege adverse innovation effects in a very large fraction of their respective merger challenges in high-R&D-intensity industries.").

50. *Id.* at 1933 (FTC alleged harm to innovation in 54 cases, whereas the DOJ alleged harm to innovation in 30 cases).

51. *Id.* at 1935.

52. Opinion of the Commission at 1–2, *Illumina, Inc.*, Docket No. 9401 (Mar. 31, 2023), https://

www.ftc.gov/system/files/ftc_gov/pdf/d09401commissionfinalopinion.pdf; *see also* Matthew Perlman, FTC Orders Illumina to Unwind Grail Deal, Law360 (Apr. 3, 2023), https://www.law360.com/articles/1592904/ftc-orders-illumina-to-unwind-grail-deal.

53. *Id.* at 40-41 (Mar. 31, 2023).

54. *Id.* at 44.

55. *Id.*

56. Complaint ¶¶ 21, 54, *Nvidia Corp.*, FTC Docket No. 9404 (Dec. 2, 2021) https://www.ftc.gov/system/files/documents/cases/d09404_part_3_complaint_public_version.pdf.

57. *Id.* ¶¶ 16, 17.

58. Press Release, Fed. Trade Comm'm, *FTC Sues to Block $40 Billion Semiconductor Chip Merger*, (December 2, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/12/ftc-sues-block-40-billion-semiconductor-chip-merger.

59. *See* Complaint ¶48, *Nvidia Corp.*, FTC Docket No. 9404 (Dec. 2, 2021) *see also id. ¶ 74 ("Consequently, the Proposed Acquisition is likely to result in a substantial lessening of competition in the DPU SmartNIC market leading to reduced innovation and more expensive or lower quality products.").*

60. *Id.* ¶ 114.

61. Press Release, Fed. Trade Comm'n, *Statement Regarding Termination of Nvidia Corp.'s Attempted Acquisition of Arm Ltd.*, FTC (Feb. 14, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/02/statement-regarding-termination-nvidia-corps-attempted-acquisition-arm-ltd ("Upon termination of the proposed transaction with Nvidia, Softbank and Arm announced plans for an initial public offering of Arm, citing forecasts of 'both record revenues and record profits for this year' and 'a very highly profitable and cash-generative business'" that will 'continue to innovate for our customers, which is what Arm has always done and we will do on an accelerating basis going forward.'").

62. Complaint, *Lockheed Martin Corp.*, FTC Docket No. 9405, ¶ 3 (Jan. 25, 2022), https://www.ftc.gov/system/files/documents/cases/d09405lockheedaerojetp3complaintpublic.pdf.

63. *Id.* ¶ 1.

64. *Id.* ¶ 13.

65. *Id.*; *see also id.* ¶ 14 ("Preventing such potential anticompetitive exchanges of information is necessary to maintain effective competition in the Relevant Markets to ensure that innovation, price, and/or performance for these important U.S. military systems is not negatively impacted.").

66. *Id.* ¶ 15.

67. Press Release, Fed. Trade Comm'n, *Statement Regarding Termination of Lockheed Martin Corporation's Attempted Acquisition of Aerojet Rocketdyne Holdings Inc.*, FTC (Feb. 15, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/02/statement-regarding-termination-lockheed-martin-corporations-attempted-acquisition-aerojet.

68. Org. for Econ. Co-Operation & Dev., Start-ups, Killer Acquisitions and Merger Control—Note by the United States 6 (June 11, 2020), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-killer_acquisiitions_us_submission.pdf.

69. *See Illumina, Inc.*, FTC Docket No. 9387 (complaint filed December 17, 2019 and parties jointly moved to dismiss on the grounds that the merger was terminated on January 3, 2020); *see also* Press Release, *Illumina and Pacific Biosciences Announce Termination of Merger Agreement* (Jan. 2, 2020), https://www.illumina.com/company/news-center/press-releases/press-release-details.html?newsid=eb4a5eba-6b7941fd-b932-b89e7cd1cceb.

70. *See* Complaint, *United States v. Visa Inc.*, No. 3:20-cv-07810 (N.D. Cal. Nov. 5, 2020), https://www.justice.gov/opa/press-release/file/1334726/download.

71. *See* Press Release, U.S. Dep't of Just., *Visa and Plaid Abandon Merger After Antitrust Division's Suit to Block*, (Jan. 12, 2021), https://www.justice.gov/opa/pr/visa-and-plaid-abandon-merger-after-antitrust-division-s-suit-block; *see also* Brent Kendall et al., *Visa Abandons Planned Acquisition of Plaid After DOJ Challenge*, The Wall Street Journal (Jan. 12, 2021), https://www.wsj.com/articles/visa-abandons-planned-acquisition-of-plaid-after-doj-challenge-11610486569.

72. *See* Complaint, *FTC v. Facebook, Inc.*, No. 1:20-cv-3590 (D.D.C. Jan. 13, 2021), https://www.ftc.gov/system/files/documents/cases/051_2021.01.21_revised_partially_redacted_complaint.pdf.

73. *See* Minute Order, *United States v. Google*, No. 1:20-cv-3010 (D.D.C. Dec. 18, 2020) ECF No. 80.

74. *United States v. Google*, No. 1:23-cv-0108 (E.D. Va. Jan. 24, 2023); *see* Press Release, U.S. Dep't of Just., *Justice Department Sues Google for Monopolizing Digital Advertising Technologies*, (Jan. 24, 2023), https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies; *see also* Lauren Feiner, *The DOJ's Antitrust Case Against Google is Ambitious But Risky*, CNBC (Jan. 27, 2023), https://www.cnbc.com/2023/01/27/dojs-antitrust-case-against-google-is-ambitious-but-risky.html.

75. Complaint, *United States v. UnitedHealth Grp. Inc.*, No. 22-cv-481, 2022 WL 576918 (D.D.C. Feb. 24, 2022).

76. Press Release, U.S. Dep't of Justice, *Justice Department Sues to Block UnitedHealth Group's Acquisition of Change Healthcare* (Feb. 24, 2022), https://www.justice.gov/opa/pr/justice-department-sues-block-unitedhealth-group-s-acquisition-change-healthcare.

77. *Id.* ¶ 11.

78. *Id.* ¶ 89.

79. *Id.*

80. *United States v. UnitedHealth Grp. Inc.*, __ F. Supp. 3d __, 2022 WL 4365867, at *1 (D.D.C. Sept. 21, 2022).

81. *Id.* at *24.

82. *Id.*

83. *Id.*

84. *Id.* at *25. The court also found that the government did not prove that any harm to innovation would be "substantial," as required by the Clayton Act. *Id.*

85. Press Release, Fed. Trade Comm'n, *FTC Seeks to Block Virtual Reality Giant Meta's Acquisition of Popular App Creator Within*, FTC (July 27, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-seeks-block-virtual-reality-giant-metas-acquisition-popular-app-creator-within.

86. Complaint, *FTC v. Meta Platforms, Inc.*, No. 3:22-cv-04325 (N.D. Cal. July 27, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/221%200040%20Meta%20Within%20TRO%20Complaint.pdf.

87. *Id.* ¶¶ 15, 139.

88. *FTC v. Meta Platforms, Inc.*, No. 5:22-cv-04325, 2023 WL 2346238, *27 (N.D. Cal. Feb. 3, 2023).

89. *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) ("[I]f the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.").

90. Areeda & Hovenkamp, *supra* note 7 at ¶ 704d.

91. *Id.*

92. *See, e.g.*, *City of Oakland v. Oakland Raiders*, 20 F.4th 441, 462 (9th Cir. 2021) (Bumatay, J., concurring) ("Oakland's price-fixing claim relies on speculation upon speculation to connect its injury to the NFL's entry rule.").

93. Leon B. Greenfield et al., *Antitrust Populism and the Consumer Welfare Standard: What Are We Actually Debating*, 83 Antitrust L.J. 393, 399 (2020).

94. 522 U.S. 3, 20–21 (1997) (quoting *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 688 (1978); *see also Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988) ("The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890."); *Leegin Creative Leather Prods. Inc. v. PSKS, Inc.*, 551 U.S. 877, 900 (2007), 551 U.S. at 900 (holding that *stare decisis* did not compel continued adherence to the per se rule against vertical price restraints in the face of "respected authorities in the economic literature," and the Department of Justice and Federal Trade Commission's experience evaluating vertical restraints).

95. *Law Offices of Curtis V. Trinko*, 540 U.S. at 414.

96. Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 William & Mary L. Rev. 75 (2010) https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3358&context=wmlr; *see also* Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. Comp. L. & Econ. 153, 167 (2010) ("Type 1 errors [false positives] are likely to be more costly than Type 2 errors because market forces offer place some constraints on the latter but no the former."), https://academic.oup.com/jcle/article/6/1/153/791753; Frank H. Easterbrook, *Limits of Antitrust*, 63 Tex. L. Rev. 1, 15 (1984) ("[T]he economic system corrects monopoly more readily than it corrects judicial errors").

97. D. Daniel Sokol, *Vertical Mergers and Entrepreneurial Exit*, 70 Fla. L. Rev. 1357, 1366-1367, 1371-1374 (2018) (demonstrating various procompetitive benefits to vertical integration, including efficiencies, increased innovation, and reduced costs), https://scholarship.law.ufl.edu/flr/vol70/iss6/5.

98. Trelysa Long, *History Shows How Private Labels & Self-Preferencing Help Consumers*, Info. Tech. & Innovation Foundation (Nov. 30, 2022), https://itif.org/publications/2022/11/30/history-shows-how-private-labels-and-self-preferencing-help-consumers/.

99. *Id.*

100. Julie Carlson, *The Platform Competition and Opportunity Act Is a Solution in Search of a Problem*, Info. Tech. & Innovation Found. (Jan. 31, 2022), https://itif.org/publications/2022/01/31/platform-competition-and-opportunity-act-solution-search-problem/.

101. *The Impact of Consolidation and Monopoly Power on American Innovation: Hearing Before the Subcomm. on Competition Policy, Antitrust, and Consumer Rights*, 117th Cong. 2 (2021) (statement of Bettina Hein, Founder and Chief Executive Officer, juli),2, https://www.judiciary.senate.gov/imo/media/doc/Hein%20Testimony.pdf.

102. Fed. Trade Comm'n, Non-HSR Reported Acquisitions by Select Technology Platforms, *2010–2019:* An FTC Study 25 (Sept. 2021), https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf.

103. Frank H. Easterbrook, *Is There a Ratchet in Antitrust Law?*, 60 Tex. L. Rev. 705, 706 (1982).

133 YEARS YOUNG: SHERMAN ACT SECTION TWO KEEPS UP WITH BIG TECH

By Madhu Pocha and Patrick Jones[1]

If the ethos of Silicon Valley could be captured in a single phrase, it would be Mark Zuckerberg's directive to "move fast and break things." That approach emphasizes the importance of rapid innovation and experimentation, encouraging startups to push boundaries and challenge conventional thinking. It has led to the creation of some of the largest, most valuable companies in the world—ubiquitous "Big Tech" platforms that have helped solidify California as the engine of the American economy. But the rapid growth and increasing dominance of these companies have led to concerns about Big Tech's potential to stifle competition. Indeed, the major players—Amazon, Apple, Facebook (Meta), Google (Alphabet), and Microsoft—have all been around for a decade or more.[2]

Is now also the time for regulators to "move fast and break things" in the name of competition? In recent years, the Federal Trade Commission, the U.S. Department of Justice and numerous state attorneys general have advanced an aggressive enforcement agenda against Big Tech—relying primarily on the federal Sherman Act—that seems equally inspired by Zuckerberg's popular motto. Still, some critics argue states should take enforcement into their own hands through new legislation. In California, one question worth considering is whether the state should revise its antitrust laws to ban single-firm monopolization, perhaps using Section 2 of the Sherman Act or other similar prohibitions recently proposed in various other state legislatures as a model.

We think the answer is no. In our view, Section 2—which can be enforced by the California Attorney General and private individuals and businesses in California—will likely be enough to address any reasonable monopolization concerns regarding Big Tech platforms.

I. SECTION 2 OF THE SHERMAN ACT OFFERS A BALANCED BUT ROBUST ENFORCEMENT TOOL

Section 2 strikes the appropriate balance in its treatment of monopoly power—i.e., the power to control prices, restrict output, or exclude competition in a relevant antitrust market. Possessing monopoly power is not itself illegal, nor should it be. Monopolization under Section 2 requires both "(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.*" *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966) (emphasis added). The italicized language is crucial, as it distinguishes between exclusionary and pro-competitive conduct. In certain cases, a firm may attain monopoly power from the latter, such as when it offers a superior product or service, or when economies of scale make it more efficient than its nascent competitors. And, as the Supreme Court recognizes, the potential for monopoly profits is often what "attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth." *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). Cognizant of these realities, Section 2 aims not to eliminate monopolies, but rather to prevent firms from using tactics that *impede* the competitive process in order to gain or maintain a monopoly. In this way, Section 2 protects the competitive process that allows firms to succeed financially by innovating and competing on the merits.

The problem with Section 2, critics may contend, is that modern doctrinal principles seem outdated when confronted with the business models employed by dominant technology platforms. Under the current regime, to demonstrate harm to competition, a plaintiff typically must show harm to "consumer welfare," which "courts and antitrust authorities have largely measured . . . through effects on consumer prices."[3] Proponents of the consumer welfare standard argue that it provides a clear and objective measure for determining when legal intervention is necessary, and that it allows for a flexible and case-by-case approach to antitrust enforcement. But requiring proof of consumer price effects assumes that firms charge consumers a price to use their products and services. By contrast, Big Tech platforms are often free for users. As a result, the argument goes, prevailing doctrine will hamstring regulators' efforts to bring Sherman Act monopolization suits against these platforms when the anticompetitive effects of their dominant market positions cannot be measured directly through consumer price effects.

We think that perspective fails to properly credit the ability of Sherman Act jurisprudence to evolve with changing circumstances. Courts have long acknowledged that the Sherman Act has "a generality and adaptability comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933); *see Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 688 (1978) ("Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition."). Courts and practitioners have understood the Sherman Act, and Section 2 in particular, "to empower the federal courts to develop a federal 'common law' of antitrust and to do what common law courts do—namely, to formulate, augment, and alter legal rules in accordance with history, custom, and developing perceptions of the problems being dealt with."[4]

Section 2's history illustrates how adept the courts have proven to be despite changing times. During the first few decades of the Sherman Act, federal regulators brought monopolization suits against some of the largest corporations in the country, and courts largely upheld those enforcement efforts. *See, e.g.*, *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911); *United States v. United Shoe Mach. Co.*, 247 U.S. 32 (1918). That period later gave way to early New Deal-era thinking that "de-emphasized competition in favor of central-planning initiatives designed to combat the Depression and promote economic growth."[5] But starting in the mid-1930s, the Second New Deal brought with it a renewed willingness to target monopolistic behavior—and the courts obliged, adopting a robust view of anticompetitive conduct under Section 2. *See, e.g.*, *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945); *United States v. Griffith*, 334 U.S. 100 (1948). With certain exceptions, government- and plaintiff-

friendly precedents extended through the 1960s, after which—mirroring the rise of market-centric economic theory—the modern consumer welfare standard began to gain traction.[6]

Even then, however, the government and private plaintiffs have brought successful enforcement actions against technology giants. Take *United States v. Microsoft*, where the D.C. Circuit affirmed a finding that Microsoft illegally maintained its monopoly power over Intel-compatible PC operating systems by imposing various restrictive terms in its agreements with original equipment manufacturers ("OEMs") and internet access providers, and by "technologically binding" its browser and operating system in order to thwart the use of rival browsers. *United States v. Microsoft Corp.*, 253 F.3d 34, 58–78 (D.C. Cir. 2001). While the court acknowledged that for conduct to be considered exclusionary, "it must harm the competitive *process* and thereby harm consumers," the government did not need to prove that Microsoft's prices were inflated because of the exclusionary conduct or that prices would decrease absent the conduct. It was enough to show that "Microsoft reduced rival browsers' usage share not by improving its own product but, rather, by preventing OEMs from taking actions that could increase rivals' share of usage" and "closing rivals to a substantial percentage of the available opportunities for browser distribution" without legitimate justification. *Id.* at 62, 70–71.

Today, an era of enforcement against single firms has reemerged. Federal regulators, state attorneys general, and private plaintiffs have brought monopolization actions in the shadow of an apparent bipartisan willingness to curb the influence of Big Tech platforms.[7] Like Microsoft, IBM, and other technology giants before them, both Facebook and Google are fighting government suits alleging monopolization in violation of Section 2 of the Sherman Act. *See FTC v. Meta Platforms, Inc.*, No. 1:20-cv-03590 (D.D.C.); *United States v. Google LLC*, No. 1:20-cv-03010 (D.D.C.); *United States v. Google LLC*, No. 1:23-cv-00108 (E.D. Va.). Amazon faces numerous private suits under Sections 1 and 2 of the Sherman Act, primarily challenging its various "most favored nation" clauses as illegal restraints on trade and monopolization. *See Frame-Wilson v. Amazon.com, Inc.*, No. 20-cv-00424 (W.D. Wash.); *De Coster v. Amazon.com, Inc.*, No. 21-cv-00693 (W.D. Wash.); *In re Amazon.com, Inc. eBook Antitrust Litig.*, No. 21-cv-00351 (S.D.N.Y.). While many of these cases are in their early stages, if what's past is prologue, courts will likely interpret Section 2's prohibitions to respond to the circumstances, without the need for further legislation.

Skeptics might point to the Supreme Court's decision in *Ohio v. American Express Co.* ("*Amex*") as portending otherwise. *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018). That case involved the treatment of certain "two-sided platforms," which are businesses that "offer different products or services to two different groups who both depend on the platform to intermediate between them." 138 S. Ct. at 2280. Those platforms are distinct from other businesses because "the value of the services that [they] provide[] increases as the number of participants on both sides of the platform increases." *Id.* at 2281. The Amex credit card platform, for example, becomes more valuable to cardholders when more merchants accept the card, but also becomes more valuable to merchants when more cardholders use the card to pay them. Such two-sided platforms, the Court noted, "must be sensitive to the prices that they charge each side" of the platform because a loss of participation on either side "risk[s] a feedback loop of declining demand" across the entire platform. *Id.* at 2281, 2285 (referring to the phenomenon as "indirect network effects"). And because "[p]rice increases on one side of the platform . . . do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services," the Court concluded that in any case involving a two-sided "transaction platform" like Amex, "courts must include both sides of the platform" as part of the antitrust relevant market. *Id.* at 2285–86.

A "transaction platform" are a type of two-sided platform that "facilitate[s] a single, simultaneous transaction between participants" on each side. *Id.* at 2286. For instance, a credit card transaction

platform "can sell its services only if a merchant and cardholder both simultaneously choose to use the network. . . . It cannot sell transaction services to either cardholders or merchants individually." *Id.* When these dynamics are at play, the Court reasoned, platforms "exhibit more pronounced indirect network effects and interconnected pricing and demand." *Id.* The upshot is that, in cases where *Amex* applies, plaintiffs now face an elevated burden to show anticompetitive harm across the platform as a whole—including an elevated "net price," if relying on evidence of supracompetitive prices—instead of simply focusing on the effects on one side.

Despite this elevated burden, *Amex* does not necessarily pose a threat to the enforcement efforts against most Big Tech platforms.[8] For one, its holding is limited to "two-sided transaction platforms." Although Google, Facebook, Amazon, and other Big Tech companies operate certain two-sided platforms—for example, the Google Play app store, Facebook Marketplace, and Amazon Marketplace—a significant part of their business interests do not involve two-sided transactions. Facebook's social network serves as an intermediary between users and advertisers, but it does not facilitate simultaneous transactions between each side and does not exhibit the kind of "indirect network effects" of a credit card transaction platform. *Cf. Amex*, 138 S. Ct. at 2286 ("Newspapers that sell advertisements, for example, arguably operate a two-sided platform because the value of an advertisement increases as more people read the newspaper. . . . But in the newspaper-advertisement market, the indirect networks effects operate in only one direction; newspaper readers are largely indifferent to the amount of advertising that a newspaper contains."). Similarly, while Google's search and advertising services may be "two-sided" in a general sense, they do not involve simultaneous transactions.[9]

Moreover, even when *Amex* does apply, it is not an insurmountable hurdle. In *US Airways v. Sabre*—a case tried twice, once before *Amex* and once after—we obtained a successful Section 2 verdict on behalf of American Airlines (successor in interest to US Airways) against Sabre, a two-sided platform that connects travel agents with airlines. *See US Airways, Inc. v. Sabre Holdings Corp.*, No. 11-cv-02725 (S.D.N.Y.), ECF No. 1208 (May 19, 2022). Both the district court's pretrial rulings and the Second Circuit's opinion remanding the case for a new trial demonstrate that a plaintiff can prove harm to competition through both price and *non-price* effects on competition.[10] For example, the Second Circuit explained that "US Airways. . . introduced evidence of market harms beyond supracompetitive pricing," including "that the contractual restraints made entry into the marketplace extraordinarily difficult, . . . reduced the quality of options available in the marketplace and led to technological stagnation," which are "all types of harm that are cognizable when analyzing both sides of a two-sided platform." *US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43, 62 (2d Cir. 2019) (cleaned up).

II. THE PROPOSED ALTERNATIVES TO SECTION 2 WOULD STIFLE COMPETITION AND INNOVATION

Section 2's proven adaptability across decades of technological change makes it the most appropriate vehicle through which potential plaintiffs—state governments included—can address Big Tech monopolization concerns. The statute's text and robust jurisprudence already provide ample flexibility for courts to tailor doctrine to the circumstances surrounding concrete cases—a significant benefit when regulating companies so inextricably linked to social and economic progress. That stands in sharp contrast to the kinds of antitrust reform bills proposed as of late.

For example, New York State's "Twenty-First Century Antitrust Act" would, among other things, eliminate consideration of pro-competitive effects when evaluating the legality of challenged acts.[11] As a consequence, technology companies might be incentivized to abstain from conduct with clear net-benefits out of fear that even marginal anticompetitive effects would land them in regulators' crosshairs. This would deter, rather than foster, competition.

On the federal level, the "Competition and Antitrust Law Enforcement Reform Act of 2021" would liberally redefine "exclusionary conduct" to mean conduct which "materially disadvantages at least one potential competitor" or "tends to foreclose or limit the ability or incentive of at least one potential competitor."[12] It would also decree that such conduct, when undertaken by defendants with greater than fifty percent market share, would be "presumed to present a risk to competition" absent the defendant proving otherwise.[13] The former requirement would effectively abrogate the longstanding principle that "harm to one or more competitors will not suffice" by itself to show harm to competition. *Microsoft Corp.*, 253 F.3d at 58. And the latter would introduce a new formalistic rule where a flexible, case-by-case standard previously applied. Taken together, these provisions elevate the interests of an efficient platform's *competitors* over our collective interest in *competition*.

Either of these reforms would represent a fundamental shift in antitrust first principles—one that risks deterring the fierce competition that makes Silicon Valley (and by extension, California) unique in the eyes of so many aspiring entrepreneurs and innovators. And while the 100+ year history of Sherman Act jurisprudence provides guidance to companies with significant market power, these reforms are untested and will cause significant uncertainty about where the line is between lawful and unlawful conduct.

III. CONCLUSION

Big Tech moves fast, but Section 2 can keep up without breaking the legal standards that have proven reliable in confronting anticompetitive conduct for more than a century. To be sure, as recent advances in artificial intelligence portend, the years ahead will present novel competition questions. But as the history of Sherman Act jurisprudence and recent enforcement actions show, Section 2 is robust and flexible enough to proscribe conduct that stifles competition, including conduct by Big Tech firms. Adopting a broader prohibition on unilateral firm conduct would introduce uncertainty into the marketplace and potentially stifle the very competition it is intended to promote.

---

1. Madhu Pocha is Managing Partner of O'Melveny & Myers' Century City office and a member of the firm's Antitrust and General Litigation/Trial practice groups. Patrick Jones is a Counsel in O'Melveny's Washington, DC office and a member of the Antitrust practice.
2. Even potential disrupters like OpenAI, the company behind the generative artificial intelligence products ChatGPT and Dall-E, are partly owned, and closely aligned with, Microsoft. *See Microsoft and OpenAI extend partnership* (Press Release), Jan. 23, 2023, https://blogs.microsoft.com/blog/2023/01/23/microsoftandopenaiextendpartnership/.
3. *See* Lina Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 720 (2017).
4. Phillip E. Areeda (late) & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶810 (Fourth and Fifth Editions, 2023 Cum. Supp. 2016-2022).
5. William F. Adkinson Jr. et al., *Enforcement of Section 2 of the Sherman Act: Theory and Practice* (Fed. Trade Comm'n, Working Paper Nov. 3, 2008), https://www.ftc.gov/system/files/documents/public_events/section-2-sherman-act-hearings-single-firm-conduct-related-competition/section2overview.pdf.
6. Laura Phillps Sawyer, *US Antitrust Law and Policy in Historical Perspective* (Harv. Bus. Sch., Working Paper No. 19-110), https://www.hbs.edu/ris/Publication%20Files/19-110_e21447ad-d98a-451f-8ef0-ba42209018e6.pdf.
7. *See* Roger P. Alford, *The Bipartisan Consensus on Big Tech*, 71 Emory L.J. 895 (2022), https://scholarlycommons.law.emory.edu/cgi/viewcontent.cgi?article=1456&context=elj.
8. Although the restraints at issue in *Amex* were challenged under Section 1 of the Sherman Act, the Court's holding can apply with equal force in Section 2 cases. *See US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43, 56 (2d Cir. 2019).
9. Indeed, neither the FTC in its suit against Facebook nor the government enforcers in their suits against Google have alleged a relevant market involving a two-sided transaction platform. *See* Complaint, *FTC v. Meta Platforms, Inc.*, No. 1:20-cv-03590 (D.D.C.), ECF No. 3; Complaint, *United States v. Google LLC*, No. 1:20-cv-

03010 (D.D.C.), ECF No. 1; *United States v. Google LLC*, No. 1:23-cv-00108 (E.D. Va.), ECF No. 1.

10. *See*, *e.g.*, *US Airways, Inc. v. Sabre Holdings Corp.*, No. 11-cv-02725, 2022 WL 874945, at *9 (S.D.N.Y. Mar. 24, 2022) ("US Airways offers significant evidence from which a reasonable jury could find that Sabre exercised monopoly power in the GDS market, precluding Sabre's request for summary judgment on this issue. This evidence includes (i) net pricing that has approached double the competitive level, (ii) excessive profits, (iii) a flow of payments from GDSs to travel agents that would not exist in a competitive market, (iv) ability to price discriminate by charging airlines different fees, (v) maintenance of a high, stable market share while selling obsolete technology, (vi) retaliatory conduct against airlines that promote innovation, (vii) structural barriers to entry, (viii) artificial barriers to entry, (ix) the failure of even one GDS competitor to emerge within the last thirty years and (x) that Sabre had between a forty-nine and fifty-two percent share of TTA bookings through GDSs in the United States from 2006 to 2012.").

11. S. S933C, 2021-2022 Leg. Sess. (N.Y. 2021), https://www.nysenate.gov/legislation/bills/2021/S933.

12. Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/senate-bill/225/text.

13. *Id*.

OVER-PRESCRIPTION IS BAD MEDICINE: THE CASE AGAINST A KNEE-JERK REVISION OF ANTITRUST INJURY

By Beatriz Mejia, Dee Bansal, Alexander J. Kasner[1]

I. INTRODUCTION

The California Law Revision Commission seeks to evaluate whether California's laws should be revised to include a statutory analog akin to Section 2 of the Sherman Act.[2] They should not. More regulation is unnecessary and even counterproductive, introducing uncertainty into California competition law. There are plenty of tools under California law already available to police potentially bad behavior by monopolists. For example, California's Unfair Competition Law provides a remedy for consumers to seek redress for acts unlawful under Section 2 of the Sherman Act. Indeed, the California Supreme Court has made clear that the "unfair" act or practice prong of the UCL covers "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws business its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition."[3] Adding an additional provision to California's law to cover what is already actionable creates unnecessary confusion, duplicate liability, and the potential for gamesmanship.

But should California revise its law to add such a provision, it should be careful to both guard against a myopic understanding of antitrust injury and creating liability that only applies to one industry or type of business. Specifically, it should decline to revise the law to create a different "analysis of antitrust injury" in the context of "technology companies" that explicitly credits "competitive benefits such as innovation" and the "personal freedom of individuals to start their own businesses."[4]

There are several issues with such an approach. As an initial matter, it would create an "exception" that would swallow the rule: Nearly every modern company is a technology company.[5] Defining by statute a class of technology companies that is subject to a different conception of antitrust injury would create uncertainty, be largely unpredictable, and likely prove unenforceable.[6]

Moreover, technology companies are not static and will continue to evolve. Trying to tailor the antitrust laws to the current state of technology will require repeated revisions as technology evolves, making the antitrust laws subject to antiquation. Technology companies do not require a new vocabulary. The antitrust laws are already written to allow for adaptation to new ways of competition, emerging technologies and industries. Certainly, the sparse language of the Sherman Act, which California follows, leaves substantial interpretative power to the courts, and allows for the evaluation of how antitrust law applies in new contexts. Modern technology is just the latest area in which we must endeavor to assess competitive harm.

Further, whether by intention or accident, expressly crediting the individual freedom to start businesses as a priority when assessing antitrust injury would appear to depart from the long-established focus on consumers, rather than competitors. By emphasizing values such as individuals' "personal freedom" to start competing businesses, the proposal shifts the focus of California competition law from consumers to competitors, and to an overly generalized notion of fairness. Yet there is little reason to depart from the bedrock consumer welfare standard because that standard already promotes the necessary conditions for healthy competition.

To be sure, the most obvious and identifiable competitive harm is increased prices to consumers. But price fluctuations are not the only cognizable harm under the Sherman Act and California law. Increased innovation, for instance, is already credited in antitrust injury jurisprudence, along with quality of service, consumer choice, and output.[7] As a result, antitrust law has already effectively addressed anticompetitive questions that recur in the technology industry: harms to innovation; harms to suppliers (including in labor markets); and anticompetitive conduct involving products sold for zero monetary price. Moreover, recent cases out of the U.S. Court of Appeals for the Ninth Circuit and Northern District of California demonstrate how federal law's approach to technology companies can accurately assess antitrust injury without resorting to novel frameworks.

Creating statutory duplication and industry-specific carve outs misreads the tools available under current antitrust law and creates problems where none exist. Instead, there is far more promise in continuing to refine the application of the existing antitrust laws to the challenges of new industries such as technology markets and digital platforms.

II. ANTITRUST INJURY IN THE CONTEXT OF TECHNOLOGY COMPANIES AND DIGITAL PLATFORMS

The current understanding of antitrust injury reflects a broad range of concerns—higher prices, of course, but also lower quality of products, fewer choices available to consumers, and decreased innovation. Technology companies and digital platforms consistently make these tradeoffs, and for good reason: App markets set minimum standards that balance consumer choice with quality of offerings, to guard against spam, harassment, and privacy violations. Digital companies may wish to favor long-term innovation, which may mean a short-term increase in consumer prices. And the multi-player nature of digital ecosystems may mean balancing the interests of multiple categories of consumer, complicating a price-focused assessment of consumer welfare.

Antitrust injury under California law "is analyzed under the same general framework as federal law."[8] And the latter has already adopted a workable standard for antitrust injury in the context of technology companies—a holistic approach to consumers, benefits, and harms that avoids unnecessary fixation on price fluctuations. California law should continue to reflect this flexible and adaptable approach, buttressed by the additional California-specific protections of Business and Professions Code sections 16600 and 17200 that provide further consumer protections.

A. RECOMMITTING TO CONSUMERS WHEN ASSESSING ANTITRUST INJURY

A statute which redefines antitrust injury to focus on, among other aims, the promotion of small businesses, and only in the context of the technology industry, is a departure from the current consumer welfare approach. This is an unjustified departure—the proposed statute does nothing to address its implicit critiques of the consumer welfare standard or promote the interests of efficiency or innovation.

1. THE PROPOSAL'S DEVIATION FROM PLACING CONSUMERS AT THE CENTER

An antitrust claim requires an antitrust injury—the type of harm to competition that the antitrust laws were designed to prevent. Anticompetitive harm has long been understood to put consumers at the center: "reduction of competition does not invoke the Sherman Act until it harms consumer welfare."[9] Indeed, not every harm resulting from the sharp elbows of the marketplace is anticompetitive. The consumer welfare test is fundamentally inclusive, because consumer preferences are likewise varied. As a result, as far as federal antitrust law is concerned, the consumer-welfare standard is not limited to whether prices rise or outputs increase. It rather encompasses both "the maximization of wealth or consumer want satisfaction."[10] Indeed, the pro-consumer standard is designed to promote efficiency and innovation, namely, the introduction of new products and services from companies big and small alike.

A statute that would define antitrust injury as conduct that restricts "the personal freedom of individuals to start their own businesses" is fundamentally more focused on competing businesses rather than consumers.[11] But this artificial leveling of the playing field credits businesses with no consideration of their merit or value to consumers. Indeed, some would argue that such a policy "is likely to protect higher cost or less innovative competitors, many of whom may be smaller."[12] And, such an approach would depart from the axiom that the purpose of the antitrust laws "is not to protect businesses from the working of the market; it is to protect the public from the failure of the market."[13]

2. SHIFTING FOCUS FROM THE CONSUMER WELFARE TO OTHER AIMS IS NO SOLUTION

Whether one agrees with the consumer welfare standard for assessing antitrust injury, the statutory carveout at issue does not solve for the critiques of the consumer welfare standard. At the outset, it is not clear why the statutory aim of, say, fostering new business is a goal in search of an antitrust aid.[14] Instead, California could, for example, employ economic incentives to encourage new market entrants rather than dictating the contour of markets by statute.

Moreover, antitrust injury doctrine already considers potential restrictions on innovation. Therefore, adding such regulation serves no additional purpose and may, in fact, cause confusion as to which innovations to credit—those of new entrants or those of the incumbent firms. Certainly, *consumers* (not legislators) are best positioned to make that judgment.

Moreover, the consumer-focused standard works just as well for technology companies or innovative industries as it does for other sectors. While there may be an increasing concern that the technology industry is driven by a few Big Tech goliaths, as a recent White House Executive Order has noted, this is not a unique concern in the technology industry—the healthcare, financial services, and agriculture sectors likewise have large players.[15] A statutory carveout for technology is not merited merely because some of its participants are particularly well known.[16] Moreover, nowadays, it is hard to find any company that does not consider itself a technology company. Nor are such companies stagnant. In this context, it is hard to imagine the value of rigid statutory guidance.

Another common criticism that may be driving the Commission's proposal is "that [consumer welfare]-driven antitrust cannot address problems

of platform innovation."[17] But this "is wrong: both conceptually and as a matter of law."[18] The consumer welfare standard can and does take account of innovation—consumers stand to "benefit from high output, high quality, competitive prices, and unrestrained innovation."[19] The challenge posed by innovation is not that it is ignored by the consumer welfare standard, but that it is always going to be difficult to quantify and establish, no matter the standard.[20] Changing the legal framework without addressing that challenge is merely a surface-level non-solution.

An additional concern may be that the consumer welfare standard does not adequately address anticompetitive conduct in "zero-price" markets—where a seller does not charge a price for a service. These "zero-price" goods are particularly common in the technology industry; social networks, web-based email, online search, and mapping programs are all ostensibly "free."[21] The consumer welfare standard's focus on price changes is, at first glance, a poor fit for zero-price goods.[22]

But many of these zero-price goods are not, in fact, free.[23] For example, in platform markets such as "search and social networking" the "free" product is in exchange for user resources: "time, attention, and personal data."[24] Calculating "price increases" may be more complicated in these circumstances, but it is by no means impossible. And as a practical matter, courts have repeatedly dealt with antitrust cases involving zero-price technology markets without shying away from their challenges. In cases involving, for instance, exclusive dealing, predatory pricing, and refusals to deal, courts have "encouragingly" done more than "mere 'hand waiving' when confronted by zero prices" in technology markets.[25] And in doing so, courts have shown that the traditional antitrust framework is up to the challenge of zero-price markets—"squarely confront[ing] the unique issues presented by zero prices" and beginning "the process of modernization."[26]

Moreover, the Commission's proposed revision does nothing to address the challenges of zero-price markets. Requiring adjudicators to consider "innovation," "personal freedom to start . . . businesses," and "raise[d] prices" doubles down on price myopia while focusing on factors that have little to do with the zero-price markets.

B. EMBRACING A HOLISTIC APPROACH TO ANTITRUST INJURY

The current approach to antitrust injury embraces several different outcomes consistent with a pro-consumer focus—lower prices, higher quality of products, differentiated choices available to consumers, and increased innovation. And it also recognizes that tradeoffs between those values are inevitable and consistent with competition.[27] Indeed, consumers stand to benefit where major competitors trade off those values in different ways: A healthy market contemplates both the bargain-bin and cutting-edge widget.

Digital platforms can and do reflect these tradeoffs fundamental to prioritizing consumers.[28] And they likewise demonstrate that a narrow approach to antitrust injury that *must* reflect innovation is particularly inapt for technology companies. To the contrary, "with regard to digital platforms and other aspects of the digital economy, it has been shown repeatedly that the existing tools and principles of antitrust enforcement are sufficiently flexible to incorporate new economic understandings and to govern new forms of competition."[29] And courts have likewise "proven capable of adapting antitrust standards for effective application to new business practices in light of developments in technology and industry structure."[30]

We explore three noteworthy examples below in which federal courts have adopted a nuanced approach to anticompetitive harm in assessing technology companies and digital platforms that readily assesses tradeoffs in consumer welfare without need for statutory revision or enumerated factors.

1. QUANTITY OF CHOICES VS. ECOSYSTEM QUALITY

Digital platforms, such as mobile application stores, demonstrate that prioritizing consumers may often place other values above the factors enumerated by the Commission's proposal, namely purported decreases in price or increases in innovation. As an initial matter, such platforms are not unrestricted resources. Most are familiar, after all, with these platforms' terms and conditions—a set of restrictions that dictate what type of content an app may display, how it might be formatted, or what security parameters it must have in place. "[U]nfettered app distribution" may serve to increase the sheer volume of consumer choice and promote a race to the bottom for the lowest prices or the highest rewards for consumers.[31] But conditions which restrict what types of apps may pass through the door to platforms are not, standing on their own, anticompetitive; "limitation of consumer choice, in itself, does not amount to 'antitrust injury.'"[32] And for good reason. In setting and enforcing terms and conditions, platforms must make a fundamental tradeoff between choice and quality. And they do (and ought to) trade off these outcomes for several reasons, including ensuring minimum quality standards and promoting differentiated technology choices for consumers.

a. MINIMUM QUALITY STANDARDS

First, consumers expect to have a threshold degree of confidence that, when they enter a digital ecosystem, the products available meet a minimum quality standard. A digital platform's "ability to decisively police the integrity of its platforms is without question a pressing public interest. In particular, the public has a strong interest in the integrity of [digital] platforms," their ability to guard against "abuses," and "protection of [their] users' privacy."[33]

In multiple recent Northern District of California cases, courts have addressed this tradeoff between quantity of apps and digital ecosystem quality in the context of antitrust injury. And they have concluded that antitrust injury requires an assessment of the quality of outcomes. Most notably, in *Coronavirus Reporter v. Apple Inc.*, the court considered (among other claims) a Sherman Act Section 2 claim brought by a handful of developers whose apps were rejected from the Apple App Store for failure to meet the platform's guidelines.[34] The rejection of their apps, posited plaintiffs, restricted consumer choice and resulted in broad harm to the economy.[35] Not only that, plaintiffs argued that Apple's decision served to stifle "innovative applications."[36] The court disagreed, holding that a review process which "necessarily injures competition by excluding a number of developers from launching apps on Apple's App Store" is not "on its own sufficient to plead [] antitrust injury."[37] Instead, the court tacitly endorsed Apple's articulation that antitrust injury requires "reduc[tion of] the net quality of transactions in a relevant market."[38]

The *Coronavirus Reporter* court's decision underscores that any assessment of antitrust injury in a digital environment that does not include or diminishes quality as a key consideration is short sighted.

b. INTERBRAND COMPETITION

Second, beyond the basic quality threshold, the differing degree to which digital platforms trade-off between quantity and quality creates valuably differentiated products. As the district court noted in *Epic*, for instance, the Apple App Store adopts a "centralized app distribution and [] walled-garden approach."[39] This type of "curation" may well "differentiate[] it from other platforms," for instance, the Google Play Store. These different approaches "ultimately [increase] consumer choice."[40] Rather than two digital ecosystems which mirror one another by favoring the quantity of app choices above all else, consumers can choose the environment that best suits their needs.[41]

What's more, technology companies may elect different strategies when it comes to consumer digital privacy. While some consumers may place relatively little value on providing their data to technology companies, others may place a high

value and demand commensurate compensation in return. These different consumer preferences of digital data and privacy are tradeoffs that may differ among services to meet varied consumer demand. Serving this variety of consumer preferences may require altogether competing digital ecosystems that differently calibrate the tradeoff between price and privacy. And a dominant technology player may wish to cater to consumers that want a more robust set of data and privacy protections, who are unwilling to part with personal information even for high rewards or lower prices. Antitrust injury should reflect these complex preferences. A view of antitrust injury that requires companies and courts to mechanically prioritize specifically enumerated factors—price, innovation, and so forth—would result in a convergence of options (to the detriment of consumers). The result would be a diversity of choices in name only.

2. PRICE VS. INNOVATION

Any understanding of consumer welfare in the technology industry must account for "innovation competition."[42] Indeed, "[i]nnovation provides a significant share of the consumer benefits associated with competition, particularly in the most dynamic industries."[43] But innovation, valuable as it is, requires investment. "Particularly in innovative industries, such as those in which intellectual property assets are key, firms may have large, up-front fixed costs for research and development, and relatively small marginal costs of production."[44] As a result, consumers may necessarily experience short-term increases in price in order to gain the option of an innovative product (and possibly long-term reductions in price).[45] What's more, innovation is a competitive asset. The "innovation competition" in the digital economy thus means an increased emphasis on getting new products and services out at an increasingly breakneck pace.[46]

In technology industries, then, there is an inevitable tradeoff between lowering price and maximizing innovation, and even dominant market players must continue to compete for the next great consumer product. Antitrust injury must account for innovation; the only question is whether antitrust injury must explicitly enumerate innovation as a factor. And in practice, federal courts have been able to balance this antitrust-injury tradeoff without the need for enumeration or prioritization.

CollegeNET, Inc. v. Common Application, Inc. is instructive.[47] There, the Ninth Circuit made clear that an approach to antitrust injury focused only on price will miss obvious anticompetitive behavior, particularly for digital companies. Plaintiff alleged that the Common Application had driven all major competitors out of the market, but it was unable to allege any anticompetitive pricing activity. The Ninth Circuit held this was not fatal on a motion to dismiss. A monopolist in the digital realm that deprives consumers of innovative services because it feels no pressure to innovate is antithetical to consumer welfare. This conclusion required no special solicitude for innovation. It simply recognized that technology markets will often implicate a more robust theory of quality, and that the deprivation of innovation is contrary to a fully competitive digital market.

3. PRICE AND CHOICE IN MULTI-SIDED MARKETS

Finally, the simplistic price-focused approach to antitrust injury makes vanishingly little sense in two-sided digital platforms. A "two-sided market is one that intermediates between at least two interdependent groups,"[48] for the goal of "faciliat[ing] a single simultaneous transaction between participants."[49] Two-sided markets are common: Newspapers connect readers to advertisers by selling advertising space. Credit cards bring together merchants and buyers by facilitating financing. But if antitrust injury is focused on "consumer" welfare, then two-sided markets naturally prompt the question: Which consumer's welfare matters?

The Supreme Court, in *Ohio v. American Express Co.*, answered: "both." More specifically, the Court ruled that higher prices for one side of a credit card transaction—merchants, in the form of higher transaction fees—were not anticompetitive.[50] Indeed, that Amex "historically charged higher

merchant fees than [] competitors" was not anticompetitive but rather balanced by the fact that, "[o]n the other side of the market, Amex uses its higher merchant fees to offer its cardholders a more robust rewards program."[51] To be clear, *Amex* "does not require a plaintiff to allege harm to participants on both sides of the market."[52] Rather, as the Ninth Circuit has recently indicated, a multi-sided market requires an assessment of behavior "on the market as whole," to determine whether "a practice harming participants on one side of the market could outweigh the benefits to participants on the other."[53]

Unsurprisingly, technology companies commonly involve two (or more) players. And so an assessment of antitrust injury adds an additional wrinkle: We cannot assume that a practice which increases prices for the most colloquial customer is anticompetitive. Consider Herbert Hovenkamp's discussion of Uber: "Uber charges higher 'surge' prices during rush hour. Is doing so an exercise of market power over passengers? After all, the price goes up, and costs are not obviously higher. Or is surge pricing simply meant to ration scarce drivers during a period of high demand?"[54]

Likewise, digital app stores are paradigmatic multi-sided markets—the platform brings together (1) app users, (2) app developers, and (3) digital advertisers. But that complexity does not change the inquiry: does the challenged behavior hurt consumers and competition on the whole? And multiple federal district courts have followed suit, holding that litigation against digital app markets must begin with a showing of antitrust injury that assesses benefits and harms to app consumers and digital advertisers alike.

In *Coronavirus Reporter*, the district court dismissed for failure to plead antitrust injury where plaintiff "ignore[d]" that the Apple App Store "serves a two-sided transaction market"—app developers and app consumers.[55] As a result, an output restriction on one side of the market (i.e., guidelines which effectively prohibited certain apps) benefited the other side of the market (consumers receiving confidence in the functionality of products on the App Store). Likewise, in *Reilly v. Apple Inc.*, the district court explained that a plaintiff's "theory of antitrust injury" must affirmatively "apprehend [and] analyze the two-sided nature of the marketplace of transactions for apps."[56] After all, "Apple's App Store functions as an intermediary between the respective sides–app developers and end users." Indeed, the *Reilly* court raised this issue even though Apple "d[id] not advance this argument" in its motion to dismiss; instead, *Reilly* held that it was the plaintiff's obligation to affirmatively "address[] the two-sided nature of the relevant market."[57]

Relying on an isolated restriction on output or increase in price to assess antitrust injury is ill-suited to evolving technology. In a two-sided market, such restrictions or increases may in fact be commonplace and pro-competitive. What's more, the balancing act necessary to assess consumer welfare is already accomplished under the approach of federal courts. This holistic approach to antitrust injury is readily adaptable to technology companies and digital platforms without need for over-enumeration. It makes little sense, then, for California to adopt a standard for antitrust injury which specifically delineates that antitrust injury must account for price increases.

III. CONCLUSION

California law and antitrust doctrine already provide clear guideposts to protect consumer welfare using a nuanced and flexible approach, which can and has accounted for generations of industry and technology evolution. Indeed, as discussed above, courts have been more than up to the task of adapting traditional notions of antitrust injury to the complexities of technology companies, digital platforms, and mobile app stores. Creating a rigid statute mandating consideration of certain factors (innovation, new business) when assessing antitrust injury undercuts the adaptability of antitrust doctrine and, just as worryingly, removes fact-specific decision-making authority from judges and adjudicators best equipped to weigh competing interests. Over-prescription is poor medicine,

particularly for a doctrine that does not need to be cured.

---

1. Beatriz Mejia is a partner in the San Francisco office of Cooley LLP and serves as head of Cooley's San Francisco business litigation practice. Dee Bansal is a partner in the Washington, D.C. office of Cooley LLP. Alexander J. Kasner is an associate in the Washington, D.C. office of Cooley LLP. The views expressed herein are solely those of the authors, who are responsible for the content, and do not necessarily represent the views of Cooley LLP.

2. The California Legislature's specific question, delegated to the California Law Revision Commission for review, is "Whether the law should be revised to outlaw monopolies by single companies as outlawed by section 2 of the Sherman Act, as proposed in New York State's 'Twenty-First Century Anti-Trust Act' and in the 'Competition and Antitrust Law Enforcement Reform Act of 2021' introduced in the United States Senate, or as outlawed in other jurisdictions." *See* Assem. Con. Res. 95, 2021–22 Reg. Sess. ch. 147 (Cal. 2022). Section 2 of the Sherman Act reads, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony[.]" 15 U.S.C. § 2.

3. *Cel-Tech Commc'ns., Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999).

4. See Assem. Con. Res. 95, 2021–22 Reg. Sess. ch. 147 (Cal. 2022) (approving for student the question: "Whether the law should be revised in the context of technology companies so that analysis of antitrust injury in that setting reflects competitive benefits such as innovation and permitting the personal freedom of individuals to start their own businesses and not solely whether such monopolies act to raise prices.").

5. *E.g.*, Theodore Kinni, *Every Company Is a Tech Company and Tech Is No Longer an Industry*, MIT Sloan Mgmt. Rev. (Sept. 1, 2016) (noting that major companies in technology spaces "regularly encompass everything from semiconductor factories to high-end retail stores to Hollywood-style production studios").

6. See, for instance, the American Economic Liberties Project's letter to the California Law Review Commission from January 2023. Letter from Lee Hepner, Legal Counsel, Am. Econ. Liberties Project, and Pat Garofalo, Director State & Local Policy, Am. Econ. Liberties Project, to Brian Herbert, Executive Director, Cal. L. Rev. Comm'n (Jan. 18, 2023) [hereinafter Hepner & Garofalo letter], http://www.clrc.ca.gov/pub/2023/MM23-07s2.pdf.

7. "In reality, the consumer welfare approach to antitrust analysis already considers a variety of factors including, quality, variety, and, and innovation. Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 Ariz. St. L. J. 293, 358 (2019). "[A]ny claims that the consumer welfare standard contains large gaps that allow harms to innovation that ultimately harms competition to go unchallenged is believed by the case." *Id.* at 360. For some of these case examples, see *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 711 (D. Md. 2001) ("Since businesses compete through both lower prices and superior performance, a firm's stifling of innovative products would cause antitrust injury."); *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 94–95, 103 (D.D.C. 2000) (crediting argument that defendant's actions "deterred" competitor "from undertaking technical innovations," and reduced "competition [that] would have conduced to consumer choice and nurtured innovation").

8. *Reilly v. Apple Inc.*, 578 F. Supp. 3d 1098, 1109 (N.D. Cal. 2022) (citing *In re WellPoint, Inc. Out-of-Network "UCR" Rates Litig.*, 2013 WL 12130034, at *11 (C.D. Cal. July 19, 2013)); *see also Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.*, 198 Cal. App. 4th 1366, 1378 (2011) ("California case law holds that the requirement" of antitrust injury applied in federal antitrust cases "applies to Cartwright Act claims as well.").

9. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995).

10. Douglas H. Ginsburg, *Judge Bork, Consumer Welfare, and Antitrust Law*, 31 Harv. J.L. & Pub. Pol'y 449, 450 (2008) (quoting Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & Econ. 7 (1966)).

11. Assem. Con. Res. 95, 2021–22 Reg. Sess. ch. 147 (Cal. 2022).

12. Herbert Hovenkamp & Fiona Scott Morton, *The Life of Antitrust's Consumer Welfare Model*, Promarket (Apr. 10, 2023), https://www.promarket.org/2023/04/10/the-life-of-antitrusts-consumer-welfare-model.

13. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).

14. *See generally* Herbert J. Hovenkamp, *Antitrust and Innovation: Where We Are and Where We Should Be Going*, 77 Antitrust L.J. 749, 755 (2011) (noting that the

antitrust injury doctrine was developed in the 1970s, in part, as a corrective to prior view that antitrust law should "protect[] small competitors at consumers' expense and even condemn[] such practices precisely because they reduced costs").

15. "In over 75% of U.S. industries, a smaller number of large companies now control more of the business than they did twenty years ago. This is true across healthcare, financial services, agriculture and more." Press Release, The White House, Fact Sheet: Executive Order on Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy.

16. *See* Hepner & Garofalo letter, *supra* note 6.

17. A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 Rev. Indust. Org. 741, 752 (2019), https://link.springer.com/content/pdf/10.1007/s11151-019-09688-4#Fn31.

18. *Id.*

19. Hovenkamp & Morton, *supra* note 12.

20. Melamed & Petit, *supra* note 17 (describing the difficulty with crediting innovation as "not legal or conceptual" but "practical").

21. John M. Newman, *Antitrust in Zero-Price Markets: Applications*, 94 Wash. Univ. L. Rev. 49, 51 (2016).

22. *E.g.*, Melamed & Petit, *supra* note 17.

23. Newman, *supra* note 21, at 51.

24. Melamed & Petit, *supra* note 17, at 754.

25. Newman, *supra* note 21, at 102; *see also id.* at 101 (citing cases regarding exclusive dealing); *id.* at 102 (citing cases regarding predatory pricing); *id.* at 106 (citing cases regarding refusals to deal).

26. *Id.* at 111.

27. *See, e.g.*, Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 Fordham L. Rev. 2405, 2416 (2013).

28. For one such example, see Makan Delrahim, Deputy Assistant Att'y Gen. Antitrust Div., U.S., Dep't of Just., *Don't Stop Believin':* Antitrust Enforcement in the Digital Era, Remarks at Booth School of Business, the University of Chicago (Apr. 19, 2018), https://www.justice.gov/opa/speech/file/1054766/download (recognizing the "antitrust consensus" in the "digital world" continues to reflect the "consumer welfare standard" as the "lodestar of antitrust enforcement").

29. *Proposals to Strengthen the Antitrust Laws and Restore Competition Online Before the H. Judiciary Comm. Subcomm. on Antitrust, Com. and Admin. Law* (Oct. 1, 2020) (Statement of Abbott B. Lipsky, Jr., Assistant Professor, Antonin Scalia Law School), https://www.congress.gov/116/meeting/house/111072/witnesses/HHRG-116-JU05-Wstate-LipskyT-20201001.pdf. For another example, see Roger Alford, Deputy Assistant Att'y Gen. Antitrust Div., U.S. Dep't of Just., The Role of Antitrust in Promoting Innovation, Presented at King's College (Feb. 23, 2018), https://www.justice.gov/opa/speech/file/1038596/download ("[T]here is no reason to think that the lessons we have learned over the past several decades about the role of antitrust enforcement in protecting and respecting innovation do not apply to the digital marketplace. Quite the opposite: there is a strong case to be made that years of consistent application of antitrust law, with innovation as a key concern, fueled the growth of digital companies in the first place.").

30. Lipsky, *supra* note 29.

31. *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 1038 (N.D. Cal. 2021). Decreased choice as a proxy for decreased price competition is a common assumption in antitrust plaintiffs' cases. *E.g.*, *Netafirm Irrigation, Inc. v. Jain Irrigation, Inc.*, No. 1:21-cv-00540, 2022 WL 2791201, at *1, *12 (E.D. Cal. July 15, 2022) (asserting restrictions on choice invariably lead to reduced price competition and higher prices); *Brantley v. NBC Universal, Inc.*, No. CV 07-6101, 2008 WL 11338585, at *1 (C.D. Cal. 2008) (tying deprivation of consumer choice with inflated prices).

32. *Somers v. Apple, Inc.*, 729 F.3d 953, 966 (9th Cir. 2013).

33. *Stackla, Inc. v. Facebook Inc.*, No. 19-cv-05849, 2019 WL 4738288, at *6 (N.D. Cal. Sept. 27, 2019).

34. No. 21-cv-05567, 2021 WL 5936910, at *2, *4 (N.D. Cal. Nov. 30, 2021).

35. *Id.* at *14.

36. *Id.* at *1.

37. *Id.*

38. *Id.*

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

40. *Id.*

41. Platforms may very well get the tradeoff wrong and misjudge consumer preferences: Too restrictive of policies can underserve consumers' interests. Too lax of enforcement can lead to hacks, spam, and privacy violations that earn consumers' ire. But a mistake in calibrating the tradeoff between choice and quality is a business error, not anticompetitive conduct. That Microsoft may develop an operating system that is "particularly buggy and prone to crashes" may colloquially harm consumers, but "developing a bad version of Windows is not a monopolistic practice." Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 651 (4th ed. 2015).

42. Antitrust Modernization Comm'n, Report and Recommendations 41 (2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

43. *Id.* at 39.

44. *Id.* 40 & n.71.

45. "Antitrust policy toward markets with process innovation," for instance, "must recognize that short-run increases in price-cost margins provide incentives for invention and innovation. Short-run increases in price-cost margins make possible later reductions in prices that increase consumer welfare." Daniel F. Spulber, *Antitrust and Innovation Competition*, 11 J. Antitrust Enf't 5, 31 (2023).

46. *Id.* at 40 & n.79.

47. 71 F. App'x 405 (9th Cir. 2017).

48. Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 Yale L.J. 1952, 1968 (2021).

49. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2286 (2018).

50. *Id.* at 2287.

51. *Id.* at 2288.

52. *PLS.Com, LLC v. Nat'l Assoc. of Realtors*, 32 F.4th 824, 839 (9th Cir. 2022).

53. *Id.*

54. Hovenkamp, *supra* note 48, at 1962. Hovenkamp draws from *SC Innovations, Inc. v. Uber Technologies., Inc.*, No. 18-cv-07440, 2020 WL 2097611, at *3 (N.D. Cal. May 1, 2020), and *Meyer v. Kalanick*, 477 F. Supp. 3d 52, 57 (S.D.N.Y. 2020).

55. *Coronavirus Reporter v. Apple Inc.*, No. 21-cv-05567, 2021 WL 5936910, at *14 (N.D. Cal. Nov. 30, 2021).

56. *Reilly v. Apple Inc.*, 578 F. Supp. 3d 1098, 1111 n.3 (N.D. Cal. 2022).

57. *Id.*

WHY HAS CALIFORNIA WAITED SO LONG TO ENACT ITS OWN MERGER REVIEW LAW?

By Abiel Garcia[1]

While there is debate whether mergers and acquisitions ("M&A") benefit or harm the ultimate consumers, M&A activities are common practice in today's world.[2] On the one hand, they can offer businesses the opportunity to expand their operations, achieve economies of scale, and increase productivity through technological and "back-office" synergies, which in theory results in lower prices and better products to consumers. On the other, M&A activities can negatively impact an economy by reducing competition in the marketplace—thereby raising prices on existing products or slowing innovation—or by eliminating jobs when streamlining a merged entity's operations.

Over the past decade, mergers and acquisitions have exploded, both through traditional horizontal and vertical mergers, as well as private equity firm acquisitions.[3] The Federal Trade Commission ("FTC") and Department of Justice ("DOJ") (together the "Antitrust Agencies") reported that in 2021, more than 3,520 M&A transactions were reported pursuant to the Hart-Scott-Rodino Act ("HSR") guidelines,[4] almost 67% higher than the next highest year in the past decade.[5] This does not account for the additional thousands of non-HSR reportable mergers and acquisitions that take place each year.[6]

As of today, the Antitrust Agencies are the only two U.S. competition entities that consistently receive and review premerger notifications and filings under the federal HSR guidelines.[7] But it is no secret that the Antitrust Agencies are understaffed and are scratching the surface of potentially problematic mergers.[8] Out of the 3,520 HSR-reported transactions documented in 2021, the Antitrust Agencies investigated less than 2% of them.[9] This could be due to a variety of reasons such as resource constraints, political agendas, or the growing complexity and size of transactions that require scrutiny. Regardless of the reason, the Antitrust Agencies are limited in their ability to review a majority of the HSR-reported mergers.

In California, there is no state-law equivalent of an HSR Act, or any law containing the requirements set forth within the HSR Act that delineate how and when to file premerger notifications. While the California Attorney General and/or private parties can bring a merger challenge under federal law, such as section 7 of the Clayton Act,[10] California

should adopt its own state law equivalent—a law that empowers the California Attorney General to review and challenge mergers, while also granting California citizens the right to challenge mergers. As one of the top five economies in the world with progressive antitrust laws, a reputation for innovation, and a prohibition on noncompete clauses, California's economy is prevalent with potential and nascent competitors that need a unique merger law. A state law that would allow the California Attorney General to review transactions that are under the federal HSR standards, that would allow the California Attorney General to review acquisitions of potential or nascent competitors by dominant incumbents, and that would reflect California courts' broad interpretation of existing state law.

I. CALIFORNIA'S ANTITRUST LAWS ARE BROADER THAN THE FEDERAL ANTITRUST LAWS

"[T]he Cartwright Act is broader in range and deeper in reach than the Sherman Act."[11] "States have regulated monopolies and unfair competition for longer than the federal government, and federal law is intended only 'to supplement, not displace, state antitrust remedies.'"[12] These California Supreme Court declarations, made 30 years apart, demonstrate California's unwavering commitment to state antitrust law and California's unique interpretation of it. Whether it be reverse payment analysis, resale price maintenance, or price gouging, California's antitrust history is unique as "interpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act."[13]

Yet, for years, California and its state agencies have not had the independent ability to review mergers under California's antitrust laws due, in part, to the California Supreme Court's opinion in Texaco.[14] In Texaco, the court stated that California's Legislature "failed to include the latest invention of the evolving antitrust statues-an antimerger provision."[15] The "Legislature's inaction on this subject for the past 80 years is significant."[16] The California Legislature's failure to act for the 80 years leading up to Texaco and the 35 years since Texaco has hindered California—and its antitrust enforcers—in its mission to protect California from "threats to competition in their incipiency-much like section 7 of the Clayton Act."[17]

Though this is not without trying. In reaction to Texaco, the Legislature attempted to course correct with Assembly Bill No. 671. AB 671 was introduced in February 1989 and outlawed monopolization and provided authority to review mergers. The bill ultimately failed, more than likely due to the skepticism in state merger authority reflected in Texaco. But while the bill was working through the California Legislature, in July of 1989, the FTC wrote to the California Senate and stated that "[s]tate law enforcement can play a valuable role in restraining anticompetitive conduct, particularly when competitive effects are limited to markets in the state."[18] The letter, while criticizing some individual parts of AB 671, supported the idea that state law enforcement was valuable in protecting competition.

Some may argue that California does not need a state-specific merger law because the California Attorney General, or its citizens, can use section 7 of the Clayton Act as the predicate act for a Business and Professions Code section 17200 claim.[19] But, in practice, parties are constrained in being able to effectively challenge mergers under section 17200 given Proposition 64's amendments to section 17204.[20] While Section 17200—also known as the Unfair Competition Law—is powerful, it is ineffective in preventing mergers and is ineffective in preventing "conduct that threatens an incipient violation of an antitrust law."[21]

One consistent theme emerging from a review of the scant California-specific merger caselaw is the focus on protecting competition. As early as 1985, the California Supreme Court recognized that California's antitrust laws reached beyond "clear-cut menaces to competition" in order to deal with merely "ephemeral possibilities" and "threats to competition in their incipiency."[22] This is further reinforced by recent California Supreme Court language stating that effectively paying to avoid competition is a

violation of the Cartwright Act.[23] And there is a reason for this: California is a hot bed for innovation and for competitors that represent a threat to a dominant, incumbent company.

II. CALIFORNIA FOSTERS INNOVATION AND NASCENT COMPETITORS

California is home to many of the largest companies in the United States and is one of the top five largest economies in the world.[24] It is home to three "Big Tech" companies: Google, Apple, and Facebook.[25] California attracts top tech skilled laborers and employees due to the plethora of Fortune 100 companies headquartered in California. Additionally, California does not enforce noncompete clauses in employment contracts, thereby fostering a culture of innovation, which drives California's start-up culture.[26] In 2022, San Francisco ranked number one in the United States for incubating startups, with 14,000 of them calling San Francisco home.[27] Los Angeles was close behind, coming in at number three in the United States, with about 6,000 startups calling Los Angeles home.[28] Many of these companies are started with private investment funds or venture capitalist funds with aims to become acquired—turning equity into cash.[29]

"Who buys startups? The answer, increasingly, is dominant incumbent players."[30] In California, Big Tech companies are the dominant incumbent players. They have significant market power, whether it be in defined product markets or more generally given their market cap and size.[31] Recent reports have shown that Big Tech acquires companies at an astonishing pace, acquiring over 70 companies in 2019 and 2020.[32] Only a fraction of the acquisitions are reportable to the Antitrust Agencies under the HSR Act because many do not meet the reporting thresholds and requirements.[33] That means that the vast majority of the recent Big Tech transactions face limited antitrust scrutiny, at best, since they are nonreportable transactions.[34]

Why should we care about nonreported transactions? Well, some of these acquisitions that fly under the radar are potentially transactions between a large, entrenched player and a nascent or potential competitor. These types of competitors have a variety of definitions but a seemingly applicable one in this situation is "a firm whose prospective innovation represents a serious threat to an incumbent."[35]

Scholars point to a few classic examples of nascent competitor acquisition.[36] Facebook's acquisitions of Instagram and WhatsApp usually appear as examples of an incumbent buying a nascent competitor. Ultimately, the acquisitions helped entrench what is now known as Meta as a dominant market player. Explicit evidence uncovered during post-merger investigations revealed the true intent behind the deals. Meta's CEO stated that while Instagram had "a small team (10-25 employees) and no revenue," "the brand[] [is] already meaningful and if they grow to a large scale they could be very disruptive to us."[37] When asked by then Facebook's CFO about the reason for potential acquisition of Instagram, and others, Mr. Zuckerberg responded stating that "what we're really buying is time. Even if some new competitors spring up, . . . [the acquisitions] will give us a year or more to integrate their dynamics before anyone can get close to their scale again."[38] Mr. Zuckerberg went so far as to literally label Instagram's business as "nascent."[39]

Another example is Google's acquisition of Waze in 2013. Google acquired Waze for $1.1 billion and while it did get a quick look by some of the world's antitrust enforcers, none of them at the time pursued any further investigation. At least one of the antitrust enforcers stated that they believed Waze to be relatively small scale, which rendered the merger benign.[40] As the Antitrust Agencies, under new leadership, begin to focus on nascent competition and its importance,[41] the Google–Waze deal may come back under scrutiny as Google and Waze remain two of the dominant players in the market.[42]

Both Instagram and Waze were nascent competitors at their time of acquisition.[43] The two companies may have not been in what would typically be the defined market of the incumbents, but they were

competitors that innovated, becoming potential threats to the incumbents. Instagram changed how social media pages were consumed and Waze, by crowd sourcing real-time traffic conditions, was able to change how traffic data flowed. While Instagram and Waze had promising innovation and posed serious threats to the incumbents in their respective markets, the key to why their ultimate acquisition was harmful to competition was the fact that the potential innovation had not fully come to fruition at the time of acquisition. In short, what could have been was never allowed to come to fruition.

California is full of potential and nascent competitors, like Instagram and Waze, given the state's background in supporting innovation and startups. While the Instagram and Waze mergers were reviewed to a limited extent by the Antitrust Agencies, California is ready to have its own framework that specifically focuses on these types of acquisitions.

III. CALIFORNIA DESERVES TO HAVE ITS OWN MERGER LAW THAT FOCUSES ON REVIEWING POTENTIAL AND NASCENT COMPETITOR ACQUISITIONS

Under the current framework, which only involves federal law, some acquisitions of potential or nascent competitors may be reviewed by the Antitrust Agencies due to market outcry. The Antitrust Agencies may also review mergers after the close of the transaction in cases where post-merger actions raise significant competitive issues.[44] But, as every antitrust practitioner has heard, it is very hard to unscramble the eggs once the transaction has been consummated.[45] The current situation in the United States has two agencies reviewing, primarily, HSR-reportable transactions. But, as referenced above, many nonreportable transactions, likely filled with potential and nascent competitors, are being consummated daily. These acquisitions need to be reviewed at some level, even just to understand whether these acquisitions are ultimately harming consumers. California needs to provide tools to the California Attorney General, and its citizens, in order to challenge these oft non-reviewed acquisition.

California has state-specific issues it faces that strongly encourage its own state-specific merger law. California's unique view on the purpose behind its antitrust laws—protecting competition itself—not only strongly supports that the Legislature establish a California state-specific merger law based on protecting the competitive process but requires it. Couple that with the Antitrust Agencies' lack of resources, California's commitment to its workers and employees through its prohibition on noncompetes, its unique start-up culture, and its unique position in the economy, California not only deserves to have its own merger law. It needs one.

First, California's antitrust laws target incipient violations of law and protect the competitive process.[46] This is the strongest point in favor of having the California Legislature seriously consider writing and approving a state-specific merger law. A litany of California Supreme Court cases support the idea that California protects competition at its incipiency, and given that the United States is at its highest concentration in various markets in decades, it is clear that the Antitrust Agencies could use help in reviewing all sorts of mergers, including potential and nascent competitors.

Additionally, since at least the late 1980's, the Antitrust Agencies have at least supported the idea that California should have its own merger review law.[47] This is logical given the fact that the Antitrust Agencies constantly grind to review the most pressing HSR-reportable cases and have recently been on record stating that they are resource constrained.[48] At least one other state has attempted to create its own, and first of its kind, state-specific merger review law and has been moving through the process.[49] California should do the same.

Finally, California's prohibition on noncompete clauses and its start-up focused culture require that California should have a specific merger law that addresses the unique challenges facing California businesses, competitors, and workers. The unique

ban on noncompete clauses through Business & Professions Code Section 16600 encourages businesses in California to compete in the labor market thus fostering innovation. California should implement laws to ensure that said innovation is not cut at its knees due to an incumbent offering an over-the-top buyout whereby preventing competition from even occurring. Some have suggested that the way venture-backed startups are structured, from incipiency, partly fuels the problem of incumbents buying potential or nascent competitors.[50] Dominant incumbent players may buy startups in order to "eliminate a potential competitor or adjacent challenger who might leapfrog them."[51] Because of this view and fear of competition, "even if others are interested in buying the [start-up], the incumbent monopolist may value that company more than anyone else does."[52] Both the embedded structure of start-up culture and the prohibition on noncompete clauses drives a further need for a California-specific merger law.

IV. WHAT WOULD A POTENTIAL CALIFORNIA MERGER LAW LOOK LIKE?

It seems obvious that an economy like California's should have its own merger review law.[53] California caselaw supports adopting a California-specific merger law. California's culture against noncompete clauses and culture supporting innovation drive the need for one. But then the inevitable question becomes what does a California-specific merger law look like?

Luckily, the world is filled with multiple antitrust bills that provide valuable starting points for discussion. New York's Senate Bill 933, which has gone through various iterations, may be a helpful starting point that is more closely aligned with California's position. In the original version of the bill, New York would change its antitrust laws to provide a first-in-kind state premerger notification program specifically aimed at merging entities in New York.[54] Additionally, the bill had other unique provisions that significantly deviated from federal antitrust laws and the HSR Act: (1) the filing threshold would be lower than the HSR threshold;[55] (2) the reporting nexus was tied to the value of the assets or companies' sales in New York;[56] (3) the notice period for closing was 60 days rather than the 30-days for the HSR period;[57] (4) $10,000 per day penalty for noncompliance;[58] (5) procompetitive effects are not a defense;[59] and (6) importantly, New York would change the standard to evaluate mergers to an abuse of dominance position.[60]

While N.Y. SB 933 still has to work through various committees and legislative bodies, it posits interesting ideas that the California Legislature could reference in creating its own merger review law and premerger notification program.[61] Of particular note is the abuse of dominance standard articulated in the bill. The "abuse of dominance" standard is a European Union standard that seems to have emerged from Article 102 of the Treaty on the Functioning of the European Union.[62] In the United States, a relatively new movement, called the neo-Brandeis movement,[63] argues that this abuse of dominance standard was the original intent of the US antitrust laws.[64] Though we have moved far afield from said original intent, caselaw provides support for this position. In Otter Tail Power Co. v. United States, the Court held that "[u]se of monopoly power 'to destroy threatened competition' is a violation" of the Sherman Act.[65] In Philadelphia National Bank, the Court found that a merger between two banks that would control at least 30% of the commercial banking was problematic, stating that "the dominant theme pervading congressional consideration of the 1950 amendments [to section 7] was a fear of what was considered to be a rising tide of economic concentration in the American economy."[66] California's enforcement of its antitrust laws has not lost sight of this original intent; competition deserves to be protected and dominant firms should not abuse their power.

Just as Congress, through section 7 of the Clayton Act, "sought to assure the Federal Trade Commission and the courts the power to brake this force [the process of concentration in American business] at its outset before its gathered momentum,"[67] the California Legislature should enforce the words of the California Supreme Court in Cianci and Cel-

Tech. It should provide power to the California consumer and California State Attorney General to reach incipient and problematic mergers. The United States, along with California, is already facing historic levels of concentration, an indication that previous antitrust regimes, while attempting to enforce the antitrust laws, simply could not hold the door in order to ensure the competitive process, and competition itself, was protected.

California, as a bastion of innovation and as part of its commitment to protecting its citizens, needs to draft and implement its own state-specific merger law aimed at fostering the competitive process and protecting competition itself. The lack of a state-law equivalent to the HSR Act or section 7 of the Clayton Act hinders California's ability to promote innovation while protecting its citizens from abuses of market power and higher prices. Since California's economy is prevalent with potential and nascent competitors, it requires a unique merger law that would allow the California Attorney General the ability to review and challenge mergers under California's more expansive antitrust laws, while also providing private parties the ability to challenge mergers as well. By doing so, California would cement its place at the forefront of antitrust enforcement and double down on its commitment to protect competition.

---

1. Abiel Garcia is a Partner at Kesselman Brantly Stockinger LLP. He began his legal career as an Honors Attorney for the California Department of Justice, then as a Deputy Attorney General for the California Department of Justice, working in the Antitrust Section across his tenure. Thereafter, he joined Gibson Dunn and Crutcher, working in the Antitrust and White Collar practice groups. He received his J.D. in 2012 from Columbia Law School, where he was a Harlan Fiske Stone Scholar.

2. *See*, *e.g.*, Dario Focarelli and Fabio Panetta, Are Mergers Beneficial to Consumers? Evidence from the Market for Bank Deposits, 93(4) AM ECON. REV (2003).

3. M&A Activity by Year: Collected Reports, Boston Consulting Group, available at <https://www.bcg.com/capabilities/mergers-acquisitions-transactions-pmi/mergers-acquisitions-activity-by-year>.

4. Congress enacted the Hart-Scott-Rodino Antitrust Improvement Act in 1976 (15 U.S.C. § 18a) to establish a premerger notification process that parties to certain large mergers and acquisitions must follow. It is the only federal premerger notification process that applies to all mergers and acquisitions that meet the Act's requirements. The purpose of the Act, as set forth in the statutory scheme, and attendant regulations, is to provide the federal antitrust agencies (DOJ and FTC) with an opportunity to review prior to closing and seek to enjoin mergers or combinations that threaten to substantially reduce competition or tend to create a monopoly in violation of Section 7 of the Clayton Act. *See* FED. TRADE COMM'N, What is the Premerger Notification Program? An Overview (March 2009), https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide1.pdf.

5. FED. TRADE COMM'N, FTC and DOJ's Hart-Scott-Rodino Annual Report for Fiscal Year 2021 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf.

6. According to the Institute for Mergers, Acquisitions and Alliances, the number of mergers and acquisition deals in North America in 2021 was 29,642. Available at< https://imaa-institute.org/mergers-and-acquisitions-statistics/>.

7. Two banking statutes create alternative review procedures for proposed mergers between banks. The Bank Merger Act, 12 U.S.C. § 1828(c), grants merger review authority over banks to the Comptroller of Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, or the Office of Thrift Supervision, of which enforcement and review is executed via the DOJ.

8. Khushita Vasant, Kanter says US DOJ's antitrust division being understaffed is source of 'common', 'constant concern', LexisNexis (May 4, 2023), https://mlexmarketinsight.com/news/insight/kanter-says-us-doj-s-antitrust-division-being-understaffed-is-source-of-common-constant-concern.

9. FED. TRADE COMM'N, *supra* note 5, at app. A, available at <https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf>.

10. In practice, bringing merger challenges under federal law as a private actor or a state agency can be especially difficult as parties to the merger will take the position that since the Antitrust Agencies have not acted against the transaction, such inaction can be interpreted as "blessing the transaction." *See* Brief of the United States of America as Amicus Curiae

in support of Appellee Steves and Sons, Inc., *Steves and Sons, Inc. v. JELD-WEN Inc.*, Case No. 19-cv-1397 (4th Cir. Aug. 23, 2019), https://www.justice.gov/atr/case-document/file/1197696/download ("Contrary to JELD-WEN's suggestion, no inference should be drawn from the Division's closure of its investigations into JELDWEN's proposed and consummated acquisition of CMI. As the United States has stated twice previously in this case in response to JELD-WEN's assertions, there are many reasons why the Antitrust Division might close an investigation or choose not to take an enforcement action. The Division's decision not to challenge a particular transaction is not confirmation that the transaction is competitively neutral or procompetitive." (citations omitted)). Additionally, how to assess mergers involving potential or nascent competitors is the subject of much debate under federal law and a new state law crafted by the California Legislature could provide much needed clarity.

11. *Cianci v. Superior Court*, 40 Cal. 3d 903, 920 (1985).

12. *In re Cipro Cases I & II*, 61 Cal. 4th 116, 160-61 (2015).

13. *Aryeh v. Canon Business Solutions, Inc.* 55 Cal.4th 1185, 1195 (2013).

14. *State of California ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal.3d 1147 (1988).

15. *Id.* at 1162-63.

16. *Id.*

17. *Cianci*, 40 Cal.3d at 918.

18. Letter from Chairman Daniel Oliver Chairman, FTC, to Hon. John T. Doolittle, California State Senate, Sen. (July 7, 1989), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-hon.john-t.doolittle-concerning-california.b.671-require-certain-persons-who-file-hart-scott-rodino-premerger-notification-also-file-reports/v890079.pdf.

19. Section 17200 of the California Business & Professions Code states, "[U]nfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code."

20. Proposition 64 curtails private actions under the Unfair Competition Laws by amending the statute to confer standing only on "any person who has suffered injury in fact and has lost money or property as a result of such unfair competition." *See* Cal. Bus. & Prof. Code § 17204. The heightened requirements make it more difficult for a plaintiff to bring a section 17200 claim challenging a merger that involves a potential or nascent competitor since a plaintiff may not have standing under the amended standing requirement.

21. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999).

22. *Cianci*, 40 Cal.3d at 918 (citing to *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962)).

23. *In re Cipro Cases I and II*, 61 Cal.4th 116, 150 (2015).

24. Matthew A. Winkler, California Poised to Overtake Germany as World's No. 4 Economy, Bloomberg (Oct. 24, 2022 5:22 AM), https://www.bloomberg.com/opinion/articles/2022-10-24/california-poised-to-overtake-germany-as-world-s-no-4-economy.

25. Big Tech generally refers to Google, Amazon, Facebook, Amazon, and to an extent, Microsoft.

26. Chris DeVore, "Silicon Valley Keeps Winning Because Non-Competes Limit Innovation, TECHCRUNCH (Feb. 18, 2016 12:00PM), https://techcrunch.com/2016/02/18/silicon-valley-keeps-winning-because-non-competes-limit-innovation.

27. Telstra Ventures, "Year 3: Insights to America's Emerging Tech Hubs (Mar. 2, 2023), https://telstraventures.com/wp-content/uploads/2023/03/Emerging-TechHub-Report-2022.pdf.

28. *Id.*

29. *See* Mark Lemley & Andrew McCreary, Exit Strategy, 101 B.U. L. Rev. 1 (Jan. 2021).

30. *Id.* at 8.

31. Forbes list of Fortune 500 companies, by annual revenue, for the year 2022 names Amazon as the second largest company in the United States, followed by Apple at number 3, Google (Alphabet) at number 8, Microsoft at number 14, and Facebook (Meta) at number 27.

32. Diana L. Moss, AM. ANTITRUST INST., Update on Digital Technology: The Failure of Merger Enforcement and Need for Reform (Mar. 3, 2021), https://www.antitrustinstitute.org/wp-content/uploads/2021/03/Merger-Enforcement_Big-Tech_3.3.21_F.pdf.

33. *Id.*

34. "[S]crutiny is absent in nonreportable deals, leaving the buyer in position to assume significant future

antitrust risk if the seller has run afoul of antitrust laws." Jennifer Oliver, "Practical Guidance: M&A, Professional Perspective - Antitrust Issues in Nonreportable M&A Deals", Bloomberg Law (Dec. 2019), https://www.bloomberglaw.com/external/document/XAAV6U0C000000/m-a-professional-perspective-antitrust-issues-in-nonreportable-m.

35. C. Scott Hemphill & Tim Wu, Nascent Competitors, 168 U. Pa. L. Rev. 1879 (2020) https://scholarship.law.columbia.edu/faculty_scholarship/2661.

36. *Id*.

37. Email from Mark Zuckerberg, Chairman and CEO, Facebook, Inc., to David Ebersman, CFO, Facebook, Inc. (Feb. 27, 2012 11:41 PST), https://judiciary.house.gov/uploadedfiles/ 0006322000063223.pdf [https://perma.cc/4B6V-S42E].

38. Email from Mark Zuckerberg, Chairman and CEO, Facebook Inc., to David Ebersman, CFO, Facebook, Inc. (Feb. 28, 2012 9:55 AM), https://judiciary.house.gov/uploadedfiles/ 0006322000063223.pdf [https://perma.cc/4B6V-S42E].

39. Email from Mark Zuckerberg, Chairman and CEO, Facebook, Inc., to David Ebersman, CFO, Facebook, Inc. (Feb. 27, 2012 11:41 PST), https://judiciary.house.gov/uploadedfiles/ 0006322000063223.pdf [https://perma.cc/4B6V-S42E].

40. UNITED KINGDOM Office of Fair Trading, Completed acquisition by Motorola Mobility Holding (Google, Inc.) of Waze Mobile Limited, CASE NO. ME/6167/13 (December 17, 2013), https://assets.publishing.service.gov.uk/media/555de2cfed915d7ae2000027/motorola.pdf.

41. Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers: Agencies Launch Joint Public Inquiry Aimed at Modernizing Merger Guidelines to Better Dectect and Prevent Anticompetitive Deals (Jan. 18, 2022) https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers (stating that the FTC and DOJ were launching a joint public inquiry aimed at strengthening enforcement against illegal mergers, including threats to potential and nascent competition).

42. Mark Bergen & Ben Brody, Google's Waze Deal Is a Likely Target in FTC Antitrust Sweep, Bloomberg (Feb. 14, 2020), https://www.bloomberg.com/news/articles/2020-02-14/google-s-waze-deal-is-a-likely-target-in-new-ftc-antitrust-sweep#xj4y7vzkg.

43. While the two transactions are exemplars of nascent competitors, some may point out that these deals were at least reviewed by competition agencies and were reported pursuant to HSR guidelines. While that is true, the fact that the deals were ultimately not challenged further reinforced the need for California's own merger law that focuses on reviewing potential and nascent competitor acquisitions. *See infra* Section III.

44. *See* Third Amended Final Judgment, *U.S. v. Bazaarvoice, Inc.*, No. 13-cv-00133 WHO (N.D. Cal. Dec. 2, 2014) https://www.justice.gov/atr/case-document/file/488816/download (ordering the divesture of assets based on a DOJ complaint-stating that a consummated merger resulted in a substantial lessening of competition-that was subsequently filed after the close of a transaction).

45. DOJ's Antitrust Assistant Attorney General called the remedy of divesture difficult to do when competition and the market are "dynamic, complex and often multidimensional." Jonathan Kanter, Assistant Attorney Gen., Dep't of Justice, Antitrust Div., Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022), https://www.justice.gove/opa/speech/assistant-attorney-general-jonathon-kanter-antitrust-division-delivers-remarks-new-york.

46. *See* supra Section I.

47. *See* supra note 12.

48. *See*, *e.g.*, FED. TRADE COMM'N, Budget Justification for the Federal Trade Commission's 2024 Budget Request 11 (March 11, 2023), https://www.ftc.gov/system/files/ftc gov/pdf/p859900fy24cbj.pdf (stating that increased "pressure on staffing resources in recent years" justified the request for over 300 additional employees).

49. Assem. A812, 2021-2022 Leg. Sess. (N.Y. 2021); S. S933C, 2021 -2022 Leg. Sess. (N.Y. 2021); see N.Y. CITY BAR, Report on Legislation by the Antitrust and Trade Regulation Committee (June 2022), https://s3.amazonaws.com/documents.nycbar.org/files/20221055-21cAntitrustAct.pdf>. The proposed Senate Bill (S933) also added provisions covering monopolization and attempted monopolization under New York state law. *See* S. 933A, 2021-2022 Leg. Sess. (N.Y. 2021).

50. "Incumbent acquirers may (or may not) want the technology in good faith to add to their products, even if it does not work out in the end. They'd certainly

rather have it themselves than let a competitor have it. And they have money to burn. But one party is left out of this equation: the consumer. Incumbents pay—can afford to pay—even for technologies they don't use because eliminating potential challengers keeps their profits high." Mark Lemley & Andrew McCreary, *supra* note 30, at 10.

51. *Id.* at 8.

52. *Id.*

53. For those wondering about federal preemption and whether it is proper for state agencies to review mergers, this question was settled in *California v. American Stores Co.*, 495 U.S. 271 (1990), in which California was able to bring a claim against two merging supermarkets stating that the merger "constituted an anticompetitive acquisition violative of section 7 of the Clayton Act and would harm consumers throughout the state." *Id.* Not only is the law well settled at this point, but interestingly enough, now at least one state has taken the position that its review and blessing of a merger (under its Certificate of Public Advantage for hospitals) shields the hospital merger from federal HSR reporting guidelines. *See* The State of Louisiana's Motion to Intervene, *Louisiana Children's Medical Center v. Garland*, No. 223-CV-01305 (E.D. L.a. Apr. 23, 2023), https://litigationtracker.law.georgetown.edu/wp-content/uploads/2023/05/LCMC_20230423_State-of-Louisiana-Motion-to-Intervene.pdf..

54. S. S933A, 2021–2022 Leg. Sess. § 340(10) (N.Y. 2021); *see* Overview of Senate Bill S933C, https://www.nysenate.gov/legislation/bills/2021/s933/amendment/a.

55. S. S933A, 2021–2022 Leg. Sess. § 340(10)(A)(III) (N.Y. 2021).

56. *Id.*

57. *Id.* § 340(10)(B).

58. *Id.* § 340(10)(F).

59. *Id.* § 340(2(B)(III).

60. *Id.* § 340(2)(B)

61. There have been multiple federal bills that have attempted to rewrite the antitrust laws, though not all of them are merger specific. To name a few: the Competition and Antitrust Law Enforcement Reform Act from Sen. Amy Klobuchar; the Tougher Enforcement Against Monopolies Act from Sen. Mike Lee; the American Innovation and Choice Online Act; and the Prohibiting Anticompetitive Mergers Act from Sen. Warren, among others.

62. While Article 102 does not specifically use the language, it provides categories of behavior that it finds abusive such as limiting production to the prejudice of consumers or discrimination among similar transactions. *See* Consolidated Version of the Treaty on the Functioning of the European Union–Part Three: Union Policies and Internal Actions–Title VII: Common Rules on Competition, Taxation And Approximation of Laws–Chapter 1: Rules on Competition–Section 1: Rules Applying to Undertakings–Article 102, 2008 O.J. (C 115/1) 89, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A12008E102.

63. The New Brandeis movement is an academic and political antitrust movement that suggests excessive centralized private power is dangerous for a variety of reasons including economic, political and social reasons. *See* Timothy Wu, The Curse of Bigness: Antitrust in the New Gilded Age (2018).

64. Lina Kahn, Amazon's Antitrust Paradox, 126 Yale L.J. 710, 743 (2017).

65. 410 U.S. 366, 377 (1973).

66. *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363--64 (1963) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 317 (1962)).

67. *Brown Shoe Co.*, 370 U.S. at 317-18.

COMPETITION BEYOND RIVALRY: ADAPTING ANTITRUST MERGER REVIEW TO ADDRESS MARKET REALTIES

By Ausra O. Deluard[1]

We face a disconnect between how many businesses are operated today and how we as lawyers and economists evaluate them to *predict* a proposed transaction's probable impact on competition. The tools on which we have relied for merger review need to be reassessed as competition today in many industries has evolved to place more emphasis on innovative unique value creation over price rivalry. While it's human nature to crave easy-to-understand rules or set of presumptions, this makes us vulnerable to oversimplified fallacies that ignore the richness and multidimensionality of competition. At first glance, "big is bad" seems to be an obvious antitrust conclusion and a great soundbite, especially in a political environment with growing antagonism towards big business across both sides of the aisle. But if we delve deeper, we begin to realize that there are other factors that should be considered and basing antitrust enforcement decisions on unsupported presumptions drawn from market concentration is a dangerous oversimplification.

This article begins with a brief overview of the history of antitrust merger policy and a discussion of the merger review reform currently underway. The last section presents an examination of the current approaches to merger review and additional factors that we may consider for an enhanced assessment of whether a transaction would substantially lessen competition in today's economy.

I. A HISTORY LESSON IN ANTITRUST MERGER POLICY

Section 7 of the Clayton Act, one of the two primary sources of federal antitrust law, prohibits acquisitions that may substantially lessen competition or tend to create a monopoly.[2] The analysis of what constitutes a "substantial lessening" of competition has shifted over time. Politics and market realities have shaped how we gauge this "substantial lessening." Before the 1970s, antitrust merger law was applied to prevent increased market concentration in its incipiency, accepting a strong presumption of harm from market concentration

levels that would be considered low by today's standards—as low as five percent market share![3] These views were supported by the political climate that sought to protect small businesses and was weary of any business enterprise gaining too much economic, or relatedly, political, power.[4] Efficiency considerations were subordinated in favor of attaining a more decentralized commercial environment.[5] At that time, antitrust enforcement also sought to prevent tacit collusion based on the view that collusion was inevitable in concentrated markets.

By the later part of the 1970s, a series of Supreme Court decisions gave room to chip away at the structural presumption of illegality based on market concentration and began to embrace the importance of efficiency considerations.[6] While the Supreme Court has not issued a substantive antitrust merger decision since 1975, lower court decisions have embraced a more efficiency-oriented perspective that acknowledges that an examination of market shares is far from the only relevant inquiry in a Section 7 case.[7] The "Chicago School" approach took hold, which centered on the concept that markets left alone would lead to productive and allocative efficiency as firms act to maximize profits and that these efficient markets produce maximum consumer welfare. The Chicago School approach challenged the assumption that concentration is an indicator of competitive intensity, highlighting that trends toward concentration may reflect more efficient and desirable market structures. These viewpoints gained prominence as U.S. politics grew more conservative and weary of big government. President Reagan appointed a series of Chicago School-oriented academics to the federal bench, including Robert Bork (1987), Frank Easterbrook (1984), and Richard Posner (1981), who powerfully shaped modern antitrust law. The economic-centric perspectives have prevailed in antitrust enforcement through the past few decades as competition in the U.S. economy was evaluated during the rise of globalization and the digital age. However, a "Post-Chicago" school of thought has emerged–"New Brandeis"–concerned with the rise of concentration in American markets and questioning key assumptions of its conservative predecessor, such as the self-correcting nature of markets and efficiency gains. Today, Neo-Brandeisians lead the federal antitrust agencies.

II. U.S. ANTITRUST MERGER POLICY AT A CROSSROADS

Antitrust merger policy has been heavily influenced by the Federal Trade Commission and the U.S. Department of Justice's (collectively, the "Agencies") merger guidelines. The first merger guidelines were issued in 1968 to provide transparency into the standards applied by the Department of Justice in reviewing mergers. The 1982 and 1984 merger guidelines reflected a significant shift from the structuralist presumption to a Chicago School view focused on market power. The 2010 guidelines reflected a further departure from concentration metrics and market definition, although these continue to play a prominent role in merger investigations and particularly merger litigations.[8]

While the merger guidelines do not constrain the courts, they do set forth how the Agencies systematically analyze mergers. As many mergers are not litigated, and even when they are, they first undergo a burdensome and costly agency investigation, Agency merger practice largely informs the level of antitrust risk merging parties should anticipate.

Today, the future direction of U.S. antitrust policy is at a crossroads. In September 2021, the Federal Trade Commission (FTC) withdrew the 2020 Vertical Merger Guidelines.[9] On January 18, 2022, the Agencies launched a joint public inquiry seeking commentary on how to revise the merger guidelines "to strengthen enforcement against illegal mergers" as those mergers can "inflict a host of harms, from higher prices and lower wages to diminished opportunity, reduced innovation, and less resiliency."[10] The Agencies are examining how to address threats to potential and nascent competition, how to better account for non-price competition, how to address buyer power, zero-price products, multi-sided markets, and data aggregation,

in addition to overarching questions about the use of market definition and presumptions based on market concentration.[11]

As before, the policy will be shaped by the current prevailing economic and political viewpoints—and at this time, mainstream political sentiment on both sides of the aisle is trending towards an anti-business perspective. There is a pervasive distrust of corporations and, as the Agencies' Jan. 18 statement regarding the Merger Guideline revisions reflects, a heightened focus on the interests of individuals as "consumers, workers, entrepreneurs, and small businesses."[12] This could manifest in merger policy embracing a return to the precedent of the 1960s, moving away from a focus on the "consumer welfare" standard and favoring fragmentation over efficiency.

Given current sentiment and concerns with concentration, business combinations between competitors and parties in horizontal and vertical relationships are viewed by the Biden Administration with increased suspicion. Today, the Agencies are more concerned with under enforcement than over-enforcement, making a bright line rule approach more attractive. The revised merger guidelines under the Biden Administration will likely introduce a set of more stringent presumptions of illegality based on concentration levels and perhaps other metrics with less opportunity for the merging parties to rebut such presumptions.[13] This would shift merger analysis before the Agencies from an examination of the "totality of circumstances"[14] that requires an extensive case-by-case inquiry to a more rule-based approach that streamlines Agency merger enforcement. This may significantly curtail merger activity, which is likely an intended effect. While rule-based enforcement can provide more clarity, it will likely lead to more merger litigation as parties will turn to the courts to determine the bounds of what constitutes a *probable* substantial lessening of competition.[15]

III. MERGING LEGAL POLICY WITH BUSINESS REALTIES

Rule-based approaches inherently lead to enforcement error as they fail to capture the ever-changing complexity of market realities. If the intention of the merger guideline revisions is to "accurately reflect modern market realities,"[16] then we should analyze transactions with an evolved perspective that more closely resembles how business managers themselves view competition.

Today, mergers that may raise competitive concerns undergo extensive scrutiny. Merging parties are compelled to produce hundreds of thousands, if not millions, of documents and data to the FTC and DOJ. Yet despite the incredible amount of information produced, the Agencies' analysis often defaults to defining a narrow relevant product market and calculating market share and concentration, using produced documents to buttress their conclusion regarding the scope of the relevant market and its participants.[17] Data may be used to define the scope of the narrow product market by showing that buyers are not likely to choose a different type of product in the face of a 5 to 10 percent price increase.[18] Within that very specific product market, they may show that entry is unlikely to counteract the increase in concentration and presumed anticompetitive effects.[19] Generally, if there are four or fewer firms in that relevant market pre-transaction, then the transaction is presumed to be anticompetitive.

This process and analysis regularly mystifies executives of the merging parties because it is so disconnected with how they actually compete to maximize their profits, disregarding their actual corporate strategy and industry dynamics reflected in the compulsory document productions. Their strategy and competitive decisions are based on meeting their customers' needs, oftentimes through a differentiated value proposition, rather than reacting to what their rivals are doing.

What accounts for this disconnect between how businesses compete and how competition

is analyzed in antitrust merger reviews? Are we defining "competition" accurately to truly capture market realities? Modern antitrust analysis rests on the tenet that competition is a zero-sum game within a narrowly defined relevant market of equivalent products sold by evenly matched rivals. These rivals in the relevant market apply competitive pressure on each other that spurs lower pricing, innovation, better service or higher quality.

Michael Porter, a professor at Harvard Business School and the "most cited scholar today in economics and business,"[20] proposes that "creating value, not beating rivals, is at the heart of competition."[21] If "competition focuses more on meeting customer needs than on demolishing rivals,"[22] then limiting an antitrust analysis of competition to counting rivals in a narrowly defined product market misses the picture. This zero-sum game view—which fits everything into a neat box—may be convenient, but it ignores the richness and multidimensionality of competition. As Porter explains, our desire to solve everything mathematically (such as a simple rule based on market concentration) reduces competition to an abstraction too far removed from reality to be useful in all situations.[23]

A. EXAMINING SIMPLIFIED APPROACHES

The Agencies will often calculate the Herfindahl-Hirschman Index ("HHI") of market concentration to identify whether a market is "highly concentrated."[24] HHI is calculated by summing the squares of the individual firms' market shares.[25] A nice, neat mathematical formula that even lawyers can calculate. Transactions in highly concentrated markets that would result in an increase of HHI of more than 200 points for the post-merger entity are presumed to be likely to enhance market power and hence anticompetitive.[26]

"Big equals bad" right? But what is the basis for the key presumption that market concentration leads to anticompetitive effects? It is not supported by economic theory—market structure and competitive effects are not systematically correlated.[27] And high margins are not indicative of curtailed competition. Rather, high margins may reflect an industry where participants offer a unique valuation proposition to meet customer needs rather than commoditized price competition. High margins may also reflect superior efficiency, including lower cost of supply or selling costs.[28]

The Agencies' reliance on market shares and concentration ignores these other explanations for the market dynamics. Take for example the statement in Section 5.3 of the 2010 Horizontal Merger Guidelines, where the Agencies explain that they give more weight to market concentration when market shares have been stable over time, especially in the face of historical changes in relative prices or costs. But, if a firm can retain its market share even after its price has increased relative to those of its rivals, this could be because the firm offers buyers a unique value proposition which drives the pricing it can command and rivalry has little impact on its pricing decision. Thus, the elimination of that rivalry would not "substantially lessen competition."

Which begs the question of how such market concentration is even calculated. Many merging parties do not track the amount of unit sales lost to their closest rivals—let alone determine their pricing based on such data—yet this is a fundamental tenet of how we define a relevant market. The Agencies limit the "relevant market" to the narrowest set of products or services for which a price increase of five to ten percent could be sustained without sufficient loss of sales to products or services outside of the group that would defeat the profitability of such price increase. The 2010 Horizontal Merger Guidelines admit that "defining a market to include some substitutes and exclude others is inevitably a simplification that cannot capture the full variation in the extent to which different products compete against each other."[29] And from this relevant market, we measure market shares and calculate market concentration to determine whether the transaction is presumed to enhance market power.

How do we measure competition when industry participants are not competing against each other to offer the best price in a zero-sum rivalry, but rather are independently forging their path to deliver attractive value to the buyer? They are competing against a much broader range of alternatives for a share of a buyer's wallet than what is informed by limiting the competitive set to what buyers would do in the face of a five percent price increase. This is even more skewed in industries with higher margins as fewer lost sales to rivals are required to justify a narrowly defined market. And once that relevant market is defined, competitive factors outside of that relevant market are rendered nearly meaningless in the antitrust analysis. Even where countless strategic planning documents of merging parties paint a very different picture about competition.

B. IDENTIFYING RIVALRY

A model-based approach focused on anticipated pricing effects may be most useful where firms do engage in intense price rivalry with no differences in their offerings and customers have nothing but price as the basis for their choices. Thus, one step of the merger analysis should be to evaluate whether the firms are competing in a zero-sum model of rivalry within a close set of substitutes or if they are competing broadly to create unique value and earn a share of the buyers' wallet. This can be informed by industry dynamics, including profitability. It is more likely that competition is defined by rivalry if products are commoditized with no differentiation, buyers have low switching costs, and industry profitability is low and declining.[30]

While antitrust political crusaders may point to industry profits as a sign of lax antitrust enforcement and a roadmap to where antitrust efforts should focus, they may be locked in on the wrong target. Consolidation in industries characterized by intense price rivalry, which has led to low margins, could be the most likely to "substantially lessen competition" rather than consolidation in industries with high profit margins gained through superior business acumen of delivering unique value to buyers or efficiently managing costs. According to Porter, "it is where rivalry is the most intense that companies compete away the value they create, passing it on to buyers in lower prices or dissipating it in higher costs of competing."[31]

Porter identifies a number of characteristics that could indicate competition occurs as a rivalry to be the best, often competing on price when (1) it is hard to distinguish one rival's offerings from another and buyers have low switching costs, (2) rivals have high fixed costs and low marginal costs, creating pressure to drop prices because any new customer will contribute to covering overhead, (3) capacity must be added in large increments, disrupting the industry's supply-demand balance and leading to price cutting to fill capacity, and (4) the product is perishable in that it loses its value quickly if unsold (e.g., a hotel room, airline seat or restaurant table).[32] Porter cautions that the first element is more narrow than we may initially presume - competition for unique value creation rather than rivalry is apparent even in markets that may appear to be fairly homogenous at first glance–for example, airport seats, discount retailing, or fast food.[33] Thus, "in business, multiple winners can thrive and co-exist" and "in the vast majority of businesses, there is simply no such thing as 'the best.'"[34]

C. FACTORS TO ASSESS COMPETITIVE EFFECTS

Competition in many industries falls on a spectrum between intense rivalry and competing for a unique value proposition. Shortcuts for drawing the line, even model-based approaches, without qualitative assessments would ignore material factors that impact the potential effects of the transaction. Concentration alone does not necessarily correlate to the level of competition–indeed, competition may be most intense in markets with two large competitors. Pricing pressure analyses provide some indication of effects, but they also should not lead to a per se condemnation of transactions. Any transaction that combines two profitable market participants, even if they are highly differentiated distant competitors whose customers have rarely chosen the other, would result in some degree of predicted upward pricing pressure. Yet we

acknowledge that not every horizontal transaction substantially reduces competition in violation of Section 7 of the Clayton Act. The amount of pricing pressure that may be acceptable may vary by the circumstances of each transaction, including how quickly the market could shift to a disruptive new service or product, making a brightline threshold difficult to set.

As an alternative, several circumstances should receive more consideration in merger analyses of transactions that may raise antitrust concerns. These circumstances including transaction rationale, bargaining power of suppliers and buyers, and threat of substitutes beyond those in a narrow "relevant market". Evidence of these elements can be gleaned from internal company documents, particularly strategy presentations, and third-party materials, including investor analyst reports. It is already standard practice for the antitrust agencies to demand the production of hundreds of thousands (if not millions) of internal documents in the second-stage of merger investigations, including all documents discussing or reflecting business strategies and competition.[35] These qualitative factors would enable a more holistic perspective of whether a particular suspect transaction would substantially reduce competition, be neutral or have the potential to create significant value-enhancing improvements that benefit consumers and increase competition.

1. TRANSACTION RATIONALE

Under the current merger analysis framework, the "good guy" story does not get much airtime. It does not fit into the very narrow box of cognizable and verifiable efficiencies currently evaluated by the 2010 Horizontal Merger Guidelines.[36] The procompetitive transaction rationale can be difficult to quantify, especially if the parties envision creating something unique. Yet, innovation, the ability to transform and progress industries for the benefit of customers, and the ability to create enhanced value for customers is what we want to encourage and avoid thwarting through overenforcement.[37] The transaction ambitions should not be ignored simply because they are difficult to quantify, especially if internal strategic documents are replete with these goals.

The rationale can illuminate the parties' intent and whether the merging parties have a legitimate justification for the transaction. The transaction may provide access to capital to sustain innovation or production, access to talent that could spur further growth through complementary expertise, cross-selling opportunities to customer bases, brand recognition, access to assets or data, economies of scale and more. A company may have sunk costs in infrastructure or capacity that needs to be repurposed or it may need better managerial execution. And some companies are simply motivated to buy earnings to meet capital markets' pressure for growth—but this rationale is not inherently anticompetitive. Indeed, it may enable a company to better compete for talent vis-à-vis industry leaders who could lure top talent based on stock-based compensation offers.

"Leveling the playing field" is another defense that is often disparaged because it increases market concentration. Yet the Supreme Court in *Brown Shoe* noted that Congress "recognized the stimulation to competition that might flow from particular mergers," citing for example that Section 7 was not intended to impede "a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market."[38] Business literature explains that markets have more intense rivalry with competitors of equal sizes.[39] Enabling smaller competitors to gain the advantages that the 800-pound gorilla enjoys would create more competitive pressure on the market leader. Behemoth market leaders typically benefit from supply chain leverage, access to top talent, easier access to capital, and preferential downstream treatment (e.g., product placement, distribution channels) that perpetuate competitive disparities.

2. BARGAINING POWER

"Leveling the playing field" could also apply to vertical relationships. While a transaction may increase concentration, it could improve leverage for the merged party vis-à-vis powerful suppliers or buyers. This would result in a shift of the value capture in the industry, that could lead to more efficiency and innovation. It could also enhance competition among the suppliers or buyers if the merged party would be in a better position to support smaller suppliers or buyers, thereby promoting competition in the industry when viewed at a more macro level. The 2010 Horizontal Merger Guidelines do reflect that the Agencies consider the impact on vertical relationships, but the analysis has been limited to whether the transaction would harm suppliers through the merging parties' enhanced buyer market power or whether powerful buyers could forestall adverse competitive effects from the transaction. Examination of the relative positioning of the players in the supply chain could illuminate whether the transaction serves to pro-competitively balance dynamics or to exacerbate distorted leverage.

3. THREAT OF SUBSTITUTES

Any analysis should continue to consider the market's ability to correct any distortions in competition through potential entry and the threat of substitutes that could provide buyers more value and desired features, even if those substitutes are outside of the narrow "relevant market." The analysis should consider what other products or services meet the same basic needs, even if in a different way, and thus, not direct rivals. Our current analyses for market definition, and even pricing pressure, limit considered substitutes to those that would generally cap predicted price increases by five percent based on historical buying practices. An irrebuttable presumption regarding substitutes should not be drawn from the absence of historic switching. Substitutes can come from unexpected places so the analysis should be broadened and consider price-performance trade-offs and shifts in preferences of various consumer demographics. Any analysis of the threat of substitutes should continue to evaluate switching costs and the ability of competitors to invest to reduce switching costs and other barriers. Competitors may increase their marketing expenditure, investments in distribution networks, or technical support to aid customer transitions in the face of a profit opportunity presented by the proposed transaction. Apple's successful design and marketing campaigns, Tesla's investment in charging infrastructure, and the rise of streaming digital content have contributed to significant market shifts that would not have been predicted by observing historical purchasing data and market shares. While this more holistic analysis of competition departs from the narrow confinement of current "relevant market" based analyses, it is arguably not at odds with the statutory language of Section 7 of the Clayton Act that prohibits mergers "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly."[40] As Professor Louis Kaplow points out, "the statutory language is manifestly amenable to another interpretation, namely that the statute was intended to reach all anticompetitive mergers, wherever they may occur and whatever sorts of commerce they may affect"—without the need to limit that effect to a constructed relevant market.[41] Indeed, the Supreme Court's analysis in *Brown Shoe* of the legislative history of the Section 7 highlights that Congress hoped to make plain that Section 7 applied not only to mergers between actual competitors, but also to vertical and conglomerate mergers whose effect may tend to lessen competition in *any* line of commerce in *any* section of the country.[42]

IV. CONCLUSION

It is unlikely that the Agencies will depart from a structural presumption—it is a convenient fallacy that provides easy litigation victories. The inconvenient truth requires more work for overburdened regulatory agencies that are under pressure to aggressively enforce antitrust agendas especially in today's political environment. Merger litigations will become more prevalent, potentially

even leading to the first Supreme Court substantive merger decision in nearly fifty years.

Antitrust law is by its nature highly fact specific as competition is multi-dimensional and complex. To reduce it to simple rules—especially those that lack a solid empirical basis—stifles procompetitive and neutral transactions that lead to growth, innovation and efficiency in the U.S. economy. Merger review under the Hart-Scott-Rodino premerger notification process is a *predictive* exercise. As the Supreme Court in *Brown Shoe* explained, "[s]tatutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities."[43] Yet today, the Agencies seek to condemn mergers based on an unsupported presumption and without proof of anticompetitive effects. Legal error takes a long time to course correct while concerns with underenforcement can be addressed by challenging consummated transactions with evidence of *actual* anticompetitive effects.

---

1. Ausra O. Deluard is a partner at Dentons US LLP and the co-chair of Dentons' U.S. antitrust group. She also teaches as an adjunct professor of antitrust at U.C College of Law, San Francisco. The views expressed are solely her own and do not necessarily represent the view of Dentons US.
2. 15 U.S.C. § 18.
3. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966).
4. *Brown Shoe*, 370 U.S. at 316.
5. *Id.* at 344.
6. *See United States v. Gen. Dynamics Corp.*, 415 U.S. 486 (1974); *Cont'l T.V., Inc. v. GTE Sylvania*, 433 U.S. 36 (1977); *Broad. Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979).
7. *See e.g., United States v. Baker Hughes*, 908 F.2d 981 (D.C. Cir. 1990).
8. U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#8.
9. *See* Press Release, Fed. Trade Comm'n, Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary (Sept. 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary.
10. Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers.
11. *Id.* The FTC had already voted to withdraw the 2020 Vertical Merger Guidelines in September 2021.
12. *Id.*
13. Timothy (Tim) Wu, "hailed as the 'architect' of the Biden Administration's competition and antitrust policies" (https://www.law.columbia.edu/faculty/timothy-wu) advocates a brightline approach that bans mergers where the number of remaining material competitors would be less than four. *See* Tim Wu, *The Curse of Bigness: Antitrust in the New Age* (2018).
14. *See e.g., Baker Hughes, Inc.*, 908 F.2d at 984 ("The Supreme Court has adopted a totality-of-the-circumstances approach to the statute, weighing a variety of factors to determine the effects of particular transactions on competition.").
15. *Id.* ("Section 7 involves probability, not certainties or possibilities." (citing *Brown Shoe*, 370 U.S. at 323)).
16. Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers.
17. U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 5 (2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#8.
18. *Id.* § 4.
19. *Id.* § 9.
20. Michael E. Porter, Harv. Bus. Sch., https://www.hbs.edu/faculty/Pages/profile.aspx?facId=6532 (last visited June 28, 2023).

21. Joan Magretta, Understanding Michael Porter: The Essential Guide to Competition and Strategy (2011).

22. *Id.* at 28.

23 *Id.*

24. U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 5.3 (2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#8.

25. *Id.*

26. *Id.*

27. Douglas H. Ginsburg & Joshua D. Wright, Philadelphia National Bank: *Bad Economics, Bad Law, Good Riddance*, 80 Antitrust L.J. 201, 204, 208, 209 (2015) ("There is simply no general theoretical relationship between market concentration and price in markets for differentiated products, where it is well understood that market share data are not necessary to evaluate the potential for unilateral price effects.").

28. *See e.g.*, Harold Demsetz, Two Systems of Belief About Monopoly, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 164, 166–67 (Harvey J. Goldschmid et al. eds., 1974) (questioning whether the observed correlation between market concentration and profitability were better explained by superior efficiency of the larger firms in the market).

29. U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4 (2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#8.

30. Porter, *supra* note 19, at 57.

31. *Id.* at 56.

32. *Id.* at 57-58.

33. *Id.* at 28-29.

34. *Id.* at 28.

35. The vast majority of transactions (over 90 percent) reported under the Hart-Scott-Rodino Act do not raise concerns. Transactions that may reduce competition are investigated after an initial waiting period through the issuance of a compulsory "Request for Additional Information and Documentary Material," commonly referred to as a Second Request.

36. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#8..

37. *See* Maureen K. Ohlhausen & Taylor Owings, *How the New Anti-Merger Policy May Be the New Antitrust Paradox*, CPI Antitrust Chron., Nov. 9, 2022, at 3 n.5, https://www.competitionpolicyinternational.com/wp-content/uploads/2022/11/1-HOW-THE-NEW-ANTI-MERGER-POLICY-MAY-BE-THE-NEW-ANTITRUST-PARADOX-Maureen-K-Ohlhausen-Taylor-Owings.pdf (noting how over-enforcement would remove from the competitive race the companies that often have the best prospects for de-consolidating many markets, including digital markets that are prone to tipping).

38. *Brown Shoe*, 370 U.S. at 319.

39. Porter, *supra* note 19, at 57.

40. Section 7 of the Clayton Act, 15 U.S.C § 18.

41. Louis Kaplow, *Why (Ever) Define Markets?*, 124 Harv. L. Rev. 437 (2010).

42. *Brown Shoe*, 370 U.S. at 317.

43. *Id.*

THE RISKS OF REQUIRING CALIFORNIA-SPECIFIC MERGER APPROVALS

By Sarah Melanson and Megan Yeates[1]

This article is submitted in response to the California Law Revision Commission's (***CLRC***) study of certain aspects of California's antitrust law under Assembly Concurrent Resolution No.95.[2] This article is specifically focused on the question of "whether California should be directly involved in the approval of mergers and acquisitions."[3] For completeness, and as noted in the First Supplement to Memorandum 2022-50, the current federal pre-merger review process under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (***HSR Act***) "is not technically an 'approval' process, because there is no legal requirement that the [Federal Trade Commission (***FTC***)] formally approve mergers before they can occur. Instead, after completing its review of a proposed merger that is subject to review, the FTC will either decline to take further action, negotiate a consent decree to avoid anticompetitive effects, or initiate legal action to challenge the merger. Further, . . . states can also challenge a merger or acquisition, even if the FTC declines to do so."[4] In line with the approach suggested in the First Supplement to Memorandum 2022-50, this article "read[s] the language [of the CLRC resolution] broadly, as encompassing a range of reform possibilities"[5] and therefore considers broadly whether modifications to the existing merger review regime or any form of premerger notification regime should be introduced in California.

Merger control requires a delicate balance. Merger control broadly seeks to prevent a subset of acquisitions that threaten to substantially lessen competition or create a monopoly.[6] Any reforms to merger control must be carefully considered so as not to impose unnecessary and inefficiency-creating burdens on all businesses. These burdens can discourage businesses from pursuing acquisitions that are welfare-enhancing, leaving consumers worse off and undermining the overall dynamism and innovation of business.

This article will first outline the existing merger control processes in place in the US that already allow federal and state governments to review and investigate mergers, including mergers falling below premerger notification thresholds and / or where local effects are relevant to the assessment.

Secondly, this article will highlight the significant additional costs of introducing any form of state-specific premerger review. Costs range

from additional private costs on businesses as a result of the burden of an additional regulatory requirement to the public cost imposed on the state from modifying California's laws and administering the premerger review process. The burden on businesses is exacerbated by the increasing costs, complexity, and uncertainty that already exist in merger review as a result of parallel review processes in the US and around the world. A separate California-specific merger control process could set a precedent within the US of an increasingly state-level approach to merger control review with additional negative costs for Californian businesses operating nationwide that must then navigate multiple potentially differing regimes, and "reduce" the overall attractiveness of the US for merger activity.

This article will argue that these costs are likely to significantly outweigh any plausible benefits to California. In particular, considering California's existing ability to intervene or use federal laws to block mergers, the benefits to merger enforcement that a new California-specific merger control regime could provide would likely be significantly outweighed by its costs. If California were to introduce a more restrictive regime than already exists, the additional enforcement could discourage firms from operating or entering the California market with possible wider cost implications for the Californian economy.

Finally, the article will highlight the importance of deal certainty in the context of innovation and start-up industries to support the ongoing vibrancy and dynamism of the Californian economy. This article therefore submits that there is no basis on which to extend the scope of California's ability to review mergers beyond the existing legal framework or to introduce a new premerger regime in California.

I. EXISTING EXAMPLES OF LEGISLATION OR LEGISLATIVE PROPOSALS RELATING TO MERGER REVIEW

A. PREVIOUS LEGISLATIVE PROPOSALS IN CALIFORNIA RELATING TO MERGER REVIEW

California does not currently have in place any broad premerger notification regime. Companies are therefore under no obligation to report or file transactions specifically in California. There are limited exceptions applicable in only specific circumstances, which require parties to give written notice to, or obtain written consent from, the California Attorney General (***AG***) or other specific regulators prior to completing a transaction.[7] These exceptions arise in the context of transactions involving non-profits[8] or regulated industries including healthcare,[9] public utilities[10] or insurance.[11] The justifications underlying this specific statutory review power can be distinguished from justifications for a broader state-specific premerger notification regime as there are unique considerations that feed into non-profit transactions or transactions in these already highly regulated industries that differ from the considerations in "transactions involving" for-profit or other companies.

Within the context of the pandemic, two specific proposals relating to mergers and consolidations in the healthcare sector were introduced in the California State Assembly (***Assembly***) but ultimately both proposals were unsuccessful and have not been passed. The first proposed rule change was SB-977,[12] introduced during the 2019-2020 legislative session. The proposal would have required health care systems, private equity groups, or hedge funds to receive approval from the California AG before conducting a change of control or acquisition over a healthcare facility or provider. The California AG could deny these transactions unless the health care system, private equity firm, or hedge fund could prove it would lead to "a substantial likelihood of clinical integration, . . . increasing or maintaining the availability and access of services to an underserved population, or both."[13] In addition, if those benefits

were outweighed by "a substantial likelihood of anticompetitive effects" such as higher prices or lower quality, the California AG could deny the combination.[14] A second bill AB-2080,[15] which appears to be a recreation of SB-977, was introduced in the Assembly during the 2021-2022 legislative session with similar proposals that "would [have] require[d] a medical group, hospital or hospital system, specified health facility, health care service plan, health insurer, or pharmacy benefit manager to provide written notice to the Attorney General . . . before entering an agreement or transaction to make a specified material change with a value of $15,000,000 or more."[16] When assessing whether to consent to the transaction, the California AG could consider "[w]hether or not the proposed material change may have a significant impact on market competition or costs for payers, purchasers, or consumers," among other factors.[17]

These proposals were driven by specific concerns surrounding the healthcare industry which, particularly in the context of SB-977, were directly related to the COVID-19 pandemic.[18] However, a number of the concerns raised by third parties in the context of these proposals would similarly apply to any broadly applicable premerger notification regime. The bills were subject to significant opposition including from the California Chamber of Commerce, United Hospital Association, the California Hospital Association,[19] the California Medical Association, Sutter Health, and Tenet Health, among others.[20] As highlighted in the opposition letter of the California Medical Association to SB-977, premerger review would add an additional burden on physicians and on the state budget that ultimately could have unintended negative effects on consumers and in this context ultimately "limiting access to care."[21]

B. SPECIFIC PREMERGER REVIEW PROPOSALS IN OTHER STATES

State-specific premerger regimes have been considered in other states. However, no US state has implemented a broad premerger notification regime.[22]

Sector-specific premerger control regimes exist in Connecticut and Washington. Under both regimes, the states require parties to notify transactions to their respective state AGs of certain healthcare-related deals before the deal is closed.[23] States could use this information to investigate the transactions and potentially bring enforcement actions in court to prevent them. In both Connecticut and Washington, there is no minimum size-of-transaction threshold but the regime only applies to specific healthcare transactions.[24] Both regimes are therefore very limited in scope.

On June 7, 2021, the New York Senate passed a bill known as the "Twenty-First Century Anti-Trust Act" which, among other proposals, would have established a broad premerger notification regime.[25] The bill has since stalled and not had the support required to be passed by the New York State Assembly and made into law.[26] The initial proposals included a broad premerger notification requirement for transactions meeting certain thresholds lower than the HSR Act thresholds, and where one of the parties had a defined minimum of sales or assets in New York.[27] Following significant criticism that the scope of the regime would have significantly burdened transacting parties and potentially inundated the New York AG's Office, the bill was amended to simplify the premerger notification program.[28] Under the amended proposals, the bill provides that any entity "conducting business" in New York that is required to file an HSR notification would have to "provide the same notice and documentation in its entirety" to the New York AG in parallel to notifying the federal government under its premerger notification regime.[29] Even following amendments to the initial scope of the proposed new premerger regime, the creation of this parallel review process has been criticized strongly and seen as an unnecessary burden for the New York AG and transacting parties.[30] This is particularly the case given the duplicative nature of the requirement and the existing ability for coordination between State AGs and the Department of Justice (***DOJ***) / FTC (see further details below). In addition, if passed, these proposals could incentivize other states to impose similar duplicative requirements, which taken to its

extreme could result in merging parties having to submit the same filings and documents in each US state at significant cost for businesses.

II. EXISTING MERGER CONTROL PROCESSES ALLOW STATES TO REVIEW TRANSACTIONS

Federal agencies and states already have the authority to review transactions under antitrust law. Federal statutes, including the Clayton Act, afford authority to federal and state enforcers to assess the competitive effects of proposed transactions and challenge transactions where necessary.

A. CURRENT FEDERAL LAW PROVIDES AUTHORITY FOR MERGER REVIEW EVEN AT THE STATE LEVEL

Federal and state authorities, as well as private parties, already have the ability to challenge transactions that are anticompetitive. Specifically, Section 7 of the Clayton Act generally prohibits acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[31] The DOJ, the FTC, state AGs, and private parties are all authorized under the Clayton Act to seek an injunction to prevent an acquisition that would substantially lessen competition or create a monopoly in violation of Section 7.[32]

In addition to federal and state governments' authority to enjoin acquisitions that would substantially lessen competition, parties to proposed transactions must provide information to the FTC and DOJ under the premerger notification program to assist the agencies in assessing the competitive effects of larger transactions under Section 7 before the transaction closes.[33] The HSR Act requires parties to transactions above defined thresholds to file notifications with the FTC and DOJ and not close the transaction until a waiting period has expired or been terminated.[34] The notification form requests information from the parties that will allow the agencies to conduct a preliminary antitrust evaluation. If the FTC or DOJ requires further information after reviewing the parties' notifications, either agency can issue a "second request," which asks for information, data, and documents about the parties and the transaction.[35] The FTC and DOJ have each historically issued second requests in approximately one percent of the transactions notified.[36]

Even if a transaction falls below the HSR thresholds, the DOJ and FTC–as well as state AGs and private plaintiffs–are still able to challenge the deal under their Section 7 authority, regardless of whether the deal has already closed.[37] In addition to the Clayton Act, the California AG can challenge mergers under California's Unfair Competition Law by basing it on an underlying Section 7 violation or as an "unfair . . . business act or practice."[38]

Furthermore, other federal agencies have the authority to review transactions undertaken by or in relation to companies in the industries within their jurisdiction. For example, the Federal Communications Commission (***FCC***) has the authority to review communications transactions alongside the FTC and DOJ, by assessing whether a proposed transaction furthers "the public interest, convenience, and necessity."[39] The FCC exercised this authority in the Comcast/NBCU and AT&T/T-Mobile transactions.[40] Similarly, in the context of airline acquisitions, the US Department of Transportation (***DOT***) has the authority to review the transfer of international operating authority and ensure satisfaction of the US certificated air carrier requirements, as well as may consult the DOJ to provide its own competitive analysis.[41] Pursuant to its authority, DOT is currently reviewing the proposed merger between JetBlue and Spirit.[42] Along with the DOJ, several state AGs including in California are challenging JetBlue and Spirit's proposed transaction.[43]

B. EXISTING LAWS ALLOW FOR MERGER ASSESSMENTS AND CHALLENGES EVEN FROM STATE ENFORCERS

Even where federal agencies are investigating a proposed transaction, state AGs can and have used

their authority to challenge transactions. Following the DOJ's challenge of AT&T's proposed acquisition of T-Mobile–a transaction also under the FCC's review[44]–seven state AGs joined the DOJ's case.[45] In response, the DOJ reportedly stated: "We have had an excellent working relationship with a number of state AGs and they have provided invaluable assistance throughout our investigation."[46] On that same transaction, several state AGs also voiced their support for AT&T's acquisition in a letter to the DOJ and FCC.[47]

State AGs have also used their authority even when their views diverge from federal agencies. Following its investigation of the proposed merger between T-Mobile and Sprint, the DOJ reached a settlement that addressed its competition concerns through a divestiture.[48] While five state AGs joined that settlement,[49] several other state AGs led by then-California AG Xavier Becerra and New York's AG opposed the settlement and separately filed suit in federal court to enjoin the transaction.[50] Following the court's decision to deny the states' request for a permanent injunction, California and the other states settled with T-Mobile and Sprint to require certain commitments and recover costs.[51]

The degree of cooperation between state AGs and the federal antitrust enforcers is evidenced in the procedures established to facilitate their coordination. The DOJ and FTC have jointly published a protocol for coordination with state AGs on merger investigations. Those guidelines outline information sharing with the parties' consent, joint strategy planning, and unified settlement discussions between the FTC/DOJ and state AGs.[52]

III. OVERLAPPING PARALLEL PROCEEDINGS CREATE UNCERTAINTY, THE RISK OF DIVERGENT DECISIONS, AND INCREASED TRANSACTION COSTS

Introducing a premerger regime in California would result in significant private costs for businesses operating in California and significant public cost to the state. These costs would significantly outweigh any plausible benefits considering the existing merger control processes in place that allow the California AG to challenge transactions, and in light of the current broader antitrust enforcement climate associated with increasing uncertainty. The arguments set out below would apply broadly to proposals for any form of state specific premerger notification regime.

In broader debates about the international harmonization of antitrust enforcement globally, academics and commentators have noted the "potentially large costs of divergent national antitrust laws."[53] The costs of regulatory divergence include the transaction costs that companies incur to comply with diverging regimes,[54] unnecessary delays, and the increased risk of conflicting decisions.[55] Indeed, these concerns are clearly recognized by the International Competition Network (***ICN***). The ICN Merger Working Group looks to "promote the adoption of best practices in the design and operation of merger review regimes in order to: (i) enhance the effectiveness of merger review mechanisms; (ii) *facilitate procedural and substantive convergence*; and (iii) *reduce the public and private time and cost of multijurisdictional merger reviews*."[56]

A. SIGNIFICANT PRIVATE AND PUBLIC COSTS

Dealing with multiple overlapping merger control processes results in significant costs for businesses. While the exact quantification of the overall public and private costs imposed by compliance with multijurisdictional merger notification and review requirements is difficult, various outreach efforts and data collection processes suggest that these costs are significant.[57] Merger control seeks to promote efficiency in business. However, burdensome costs that are not outweighed by broader benefits can "actually impair economic growth and damage consumer welfare."[58]

Parallel merger control regimes impose direct costs on transaction parties including filing fees, attorneys' fees, and document production costs.[59] Although in the US filing fees have recently decreased for smaller transactions, filing fees have increased

significantly for some of the larger transactions. HSR filing fees can reach up to $2.25 million in the largest transactions.[60] The timelines for merger control reviews globally can also be significant in the context of complex deals with the potential for reviews to last for more than a year.[61] This can be particularly relevant in the context of jurisdictions such as the UK[62] or EU[63] which may have long pre-notification periods in addition to long periods for in-depth reviews. These longer timelines result in higher attorney's fees with ongoing burdensome information requests and document production requests. In a recent study carried out by Analysis Group, Inc.,[64] half the respondents to an online survey for industry practitioners indicated that "'the time spent on lawyer hours, internal client hours, economic expert hours, and other internal costs to a merger has gone up relative to pre-2020."[65] Parties will also often require active assistance from multiple different attorneys to navigate the differing procedures and requirements across jurisdictions. Costs imposed on businesses also include indirect and intangible costs such as loss of executives' time and impacts on productivity.[66] The burdensome nature of parallel review processes takes time away from people within the business being able to run their business efficiently. This is even the case where transactions do not raise substantive concerns requiring in-depth review; even the process of complying with the administrative process and simple information requests can be time-consuming.[67] In addition, parallel procedures, particularly if these delay deals, can often lead to further uncertainty, which has knock-on effects on employees and can lead to issues with customers and suppliers where the company is prevented from acting in certain ways while merger control processes are ongoing (e.g. while any other suspensory obligations apply such as the waiting period under the HSR Act or considering global antitrust law).[68] When considering the proposals in New York that have stalled (see above), the New York City Bar Association was clear that it viewed the introduction of what would have been the first state-level general premerger notification system as "the creation of a redundancy with few benefits and many clear costs."[69]

A separate Californian merger review process would also result in public costs to be shouldered by the State of California and ultimately the Californian taxpayer. In order for any premerger notification regime to be able to screen transactions in an efficient and informed manner, additional experienced staff and further resources would likely be required to carry out the review of any notifications and administer the regime. This cost could lead to allocation of resources away from other government initiatives, which may be of greater priority for Californians and bring greater benefits to California. In fiscal year 2023, the FTC's and DOJ's budgets to fund their merger review efforts are sizeable: the FTC's general budget is $430 million (including non-antitrust enforcement funding)[70] and the DOJ Antitrust Division's is $225 million.[71]

Costs can be justified where these are seen as "rationally related to the efficient review of transactions that have the potential to create appreciable anticompetitive effects within the reviewing jurisdiction."[72] The key question is therefore whether the costs of an additional parallel premerger control process can be rationally related and outweighed by ultimate benefits for competition and consumers. There is a rational relationship when balancing the costs associated with the introduction of new merger regimes around the world with the protection of competition in a specific country. This justification does not apply in the same way in the context of a state specific merger review regime, where federal merger control laws already apply. In addition, businesses in the US are already subject to the existing costs of federal merger control.

When carrying out the exercise of weighing the costs associated with the implementation of any premerger notification regime in California with the potential benefits for customers and consumers, the costs outweigh the benefits. As set out above, there is an existing legal framework in place to allow states to review and challenge transactions. On that basis, unlike the introduction of a merger control regime in a new state or country where there are no existing merger control rules, there is limited

incremental benefit to customers and competition particularly when contrasted with the costs set out above. In addition, the existence of directly parallel proceedings raises further efficiency concerns set out below.

B. INCREASING LEVELS OF DIVERGENCE IN OUTCOMES

The introduction of a new premerger notification regime would be likely to lead to further divergence in outcomes between California, the federal agencies, and global regulators. If the regime does not lead to any difference in outcomes as under the existing legal framework, this raises the question as to why the regime (and its associated costs) are necessary in the first place. Increasing the likelihood of divergent outcomes creates significant uncertainty for parties looking to enter into transactions and could lead to overenforcement.[73] The assessment of antitrust risk is already complicated as parties look to navigate the increasingly complex and novel theories of harm being applied in recent cases.[74] The current enforcement environment has already created increased uncertainty for businesses but this would be exacerbated if California were to implement a new premerger regime. Increased uncertainty has led to "[p]arties . . . internalizing regulatory risks in their calculations of whether to conduct a transaction and how to structure the deal, granting greater consideration to bidders that minimize agency scrutiny,"[75] which may lead to more efficient mergers being ignored as a result of regulatory risk.

Companies are already required to deal with significant divergence globally as a result of numerous parallel regimes with different standards of review, timelines, and procedure. This has been in particular focus for US-based companies with the increasingly broad jurisdictional reach of ex-US regimes including the United Kingdom's application of its expansive share of supply test[76] and the European Commission's Article 22 policy.[77] The number of divergent decisions has increased significantly since the GE/Honeywell acquisition in 2001, which at the time was the only merger case in which the US and the EU had reached conflicting decisions and prompted significant concerns on divergence.[78] This risk of divergent decisions has been prominently and more frequently illustrated recently in prohibited or abandoned transactions such as Cargotec's merger with Konecranes, Sabre's proposed acquisition of Farelogix, and Illumina's acquisition of Grail, among others.

Divergence in approaches to remedies can also raise efficiency problems. Following a merger investigation, several outcomes are possible: (i) the transaction may be cleared, (ii) the transaction may be blocked (by the courts in the US or by regulators abroad), (iii) the parties may abandon the transaction or (iv) the transaction may be allowed to proceed but only subject to the imposition of remedies.[79] A specific premerger regime in California could result in parallel settlement negotiations running concurrently. Parallel remedy negotiations could complicate FTC or DOJ review, add an additional burden to businesses, and lead to a possible patchwork of different remedies within the US that can ultimately undermine the efficiency-enhancing aspects of transactions.

A more restrictive regime in California could dissuade companies from either choosing to set up in California or incentivize companies to move their headquarters or operations to other states with broader costs for the California economy and job prospects for Californians. As set out below, this could impact the innovative start-up ecosystem that currently thrives in California and often relies on the existence of suitable exit strategy options. Other states may already seek to attract businesses with lower taxes and regulation and a California specific merger control regime could accelerate any such shifts or on the other hand result in increasing levels of state specific merger regulation, which could impact Californian businesses active nationwide.

IV. BENEFITING CONSUMERS BY ENCOURAGING M&A

Increasing the costs on businesses to engage in M&A, including from the uncertainty of potentially

diverging decisions, could discourage deals beneficial to consumers. M&A transactions can promote competition and encourage innovation. In particular, M&A can provide an important exit option for startups, without which they may be more likely to fail resulting in less innovation.[80] Venture capital (***VC***) firms invest in startups to obtain a return on their investment. Exit options for those investments, including by M&A, are needed to enable that return and thus encourage VCs to make the initial investments and for the startups to innovate.[81]

More broadly, deals can generate efficiencies for the merging parties that ultimately benefit consumers. By combining two companies, the merged entity can benefit post-transaction from lower costs, more streamlined and efficient operations, and economies of scale. Consumers often benefit from those efficiencies through lower prices and improved products and choices.[82] Analysis of prior tech transactions has found that most acquisitions benefited consumers and increased competition.[83] Consumers can obtain lower prices as a result of the merged entity's scale and ability to increase access to the target's novel ideas. In addition, the combined entity can share resources and expertise to advance innovation and R&D.[84] Introducing a new California-specific merger approval process could hamper this innovation that helps grow the California economy.

---

1. Sarah Melanson is a senior associate and Megan Yeates is an associate in the Silicon Valley office of Freshfields Bruckhaus Deringer. The authors would like to thank Ryan Nassar for his assistance with this article. The views that the authors express in this article are their own, and do not necessarily reflect those of their firm or their clients.

2. *See* A.C.R. 95, 2021-2022 Leg., Reg. Sess. (Cal. 2022).

3. Cal. L. Rev. Comm'n., Antitrust Law - Study B-750 (2022), http://www.clrc.ca.gov/B750.html; see Assem. Con. Res. 95, 2021–2022 Reg. Sess. ch.147 (Cal. 2022), "Whether the law should be revised in any other fashion such as approvals for mergers and acquisitions and any limitation of existing statutory exemptions to the state's antitrust laws to promote and ensure the tangible and intangible benefits of free market competition for Californians."

4. Memorandum from Brian Hebert to the Staff of the Cal. L. Rev. Comm'n (Nov. 9, 2022) http://jbtest.ucdavis.edu/pub/2022/MM22-50s1.pdf) [hereinafter Hebert Memorandum]. *See* Fed. Trade Comm'n, Premerger Notification and the Merger Review Process, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review-process.

5. Memorandum, *supra* note 4, at 3.

6. This is the standard in the US (*see* 15 U.S.C. § 18).

7. *See* Robert B. McNary, Marisa E. Adelson, *The California Difference: Why California Law Really Matters (Merger Enforcement)*, 22 No.2 Competition: J. Anti. & Unfair Comp. L. Sec. St. B. Cal. 69 (2013).

8. *See* Cal. Corp. Code § 5913 and Cal. Corp. Code § 7913.

9. *See* Cal. Health & Safety Code § 1340 et seq.; 28 CCR § 1300.52.4(d)(iii). *See also* Cal. Health & Safety Code § 127507.

10. *See* Cal. Pub. Util. Code § 854.

11. *See* Cal. Ins. Code § 839.1.

12. *See* S. 977, 2019-2020 Leg., Reg. Sess. (Cal. 2020).

13. *Id.*

14. *Id.*

15. *See* Assem. 2080, 2021-2022 Leg., Reg. Sess. (Cal. 2022).

16. *Id.* at 3.

17. *Id.*

18. *See* Press Release, State of Calif. Dept. of Just., Attorney General Becerra and Senator Monning Announce That Legislation to Reduce Healthcare Costs, Increase Access to Affordable Care Passes Senate Health Committee, https://oag.ca.gov/news/press-releases/attorney-general-becerra-and-senator-monning-announce-legislation-reduce (quoting Senator Bill Monning: "Physicians are facing severe financial pressures because of the current pandemic and data shows that prices skyrocket when providers consolidate and reduce competition in the marketplace. SB 977 will protect existing services for patients and address the issue of unfair business practices that increase healthcare costs for all Californians.".

19. *See* Press Release, Cal. Hosp. Ass'n, Urge Assembly Members to Vote No on AB-2080, Which Would Threaten California's Access to Care (last visited June

30, 2023) https://calhospital.org/calls-to-action/urge-assembly-members-to-vote-no-on-ab-2080-which-would-threaten-californians-access-to-care/.

20. HEALTH CARE CONSOLIDATION AND CONTRACTING FAIRNESS ACT OF 2022: *Hearing on Assem. 2080 Before the Assemb. Comm. On Judiciary*, 2021-2022 Reg. Sess. 14 (Cal. 2022) (List of those in opposition of the bill).

21. Letter from Amy Durbin, Legis. Advoc., Ctr. for Gov. Rel., Cal. Med. Ass'n, to the Hon. Anthony Portantino, Chair S. Appropriations Comm. (May 27, 2020), https://californiahealthline.org/wp-content/uploads/sites/3/2020/05/SB-977-Monning-Senate-Appropriations-Oppose-Letter.pdf.

22. Jeff Jaeckel, et al., *United States: merger review process*, (Sept. 30, 2022) (available at https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2023/download).

23. *Id.*

24. In Washington, the notification requirement applies when at least one party is a Washington entity, and a party that is an out-of-state entity (if applicable) generates $10 million or more in revenue from healthcare services for patients residing in Washington. See Wash. Rev. Code § 19.390, (2019). In Connecticut, transactions between physician group practices and hospitals, captive professional entities, medical foundations, or other group practices which constitute a "material change" trigger the notification requirement. *See* An Act Concerning Notice of Acquisitions, Joint Ventures, Affiliations of Group Medical Practices and Hospital Admissions, Medical Foundations, and Certificates of Need, (2014), https://www.cga.ct.gov/2014/ACT/pa/pdf/2014PA-00168-R00SB-00035-PA.pdf. *See also* Barbara Sicalides, Esq., Daniel Anziska, Esq., Megan Morley, Esq. and Dennie Zastrow, Esq., *State Enforcers Expanding Premerger And Antitrust Jurisdiction Over Healthcare Transactions: Guidance For This Growing Trend*, (Dec. 15, 2020) (available at https://www.americanbar.org/groups/health_law/publications/aba_health_esource/2020-2021/december-2020/sta-enf/).

25. S.B. S933A, 2021-2022 Leg., Reg. Sess., (N.Y. 2021) (available at https://www.nysenate.gov/node/8295611). N.Y. City Bar, Report on Legislation by the Antitrust and Trade Regulation Committee (June 2022), https://s3.amazonaws.com/documents.nycbar.org/files/20221055-21cAntitrustAct.pdf.

26. *Senate Bill S933C* (last accessed Mar. 22, 2023), https://www.nysenate.gov/legislation/bills/2021/S933.

27. *See* Assem. 1812A, 2021-2022 Leg, Reg. Sess. (N.Y. 2021); S.B. S933A, 2021-2022 Leg., Reg. Sess. (N.Y. 2021). *See also* Daniel Vitelli, New York State Amends Groundbreaking Antitrust Bill (May 19, 2022) (available at https://constantinecannon.com/antitrust-group/new-york-senate-amends-groundbreaking-antitrust-bill/).

28. Vitelli, *supra* note 27; *see* N.Y. City Bar, *supra* note 25.

29. *See* § 340, 10(A) of S.B. S933C, 2021-2022 Leg., Reg. Sess. (N.Y. 2022).

30. *See* Vitelli, *supra* note 27; N.Y. City Bar, *supra* note 25.

31. 15 U.S.C. § 18.

32. The DOJ's authority is provided in 15 U.S.C. § 25, while the FTC has authority under Section 13(b) of the FTC Act codified at 15 U.S.C § 53(b). *See also* 1 ABA Antitrust Law Section, Antitrust Law Developments 432 (9th ed. 2022). State AGs and private parties have similar authority under 15 U.S.C. § 26. *See id.* at 455.

33. *See Premerger Notification Program*, Fed. Trade Comm'n, https://www.ftc.gov/enforcement/premerger-notification-program.

34. 15 U.S.C. § 18a.

35. *See* Fed. Trade Comm'n, Introductory Guide I: What is the Premerger Notification Program? An Overview (March 2009) at 1.

36. Fed. Trade Comm'n & Dep't of Just., Hart-Scott-Rodino Annual Report: Fiscal Year 2021, App'x A, https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf.

37. *See* Investigations of Consummated and Non-Notifiable Merger, United States, O.E.C.D. Doc. DAF/COMP/WP3/WD(2014)23, at 2 (2014), https://one.oecd.org/document/DAF/COMP/WP3/WD(2014)23/en/pdf.

38. Cal. Anti. & Unfair Comp. L. §§ 5.01, 5.03 (Belinda S. Lee ed., 2022) (quoting Cal. Bus. & Prof. Code § 17200).

39. Jon Sallet, *FCC Transaction Review: Competition and the Public Interest*, FCC Blog (August 12, 2014 - 12:39 pm) (citing 47 U.S.C. § 310(d)), https://www.fcc.gov/news-events/blog/2014/08/12/fcc-transaction-review-competition-and-public-interest.

40. *Id.*

41. *See* Mergers and Acquisitions, Dep't of Transp., https://www.transportation.gov/policy/aviation-policy/competition-data-analysis/mergers-acquisitions (last visited July 1, 2023).

42. *See* Statement, Dep't of Transp., US DOT STATEMENT ON THE JUSTICE DEPARTMENT'S LAWSUIT TO BLOCK PROPOSED JETBLUE-SPIRIT MERGER (Mar. 7, 2023) https://www.transportation.gov/briefing-room/usdot-statement-justice-departments-lawsuit-block-proposed-jetblue-spirit-merger.

43. Dep't of Just., Four Additional States Join Justice Department's Suit to Block JetBlue's Acquisition of Spirit Airlines (Mar. 31, 2023), https://www.justice.gov/opa/pr/four-additional-states-join-justice-department-s-suit-block-jetblue-s-acquisition-spirit.

44. *See* Fed. Commc'n Comm., AT&T And T-Mobile, https://www.fcc.gov/proceedings-actions/mergers-transactions/att-and-t-mobile.

45. *See* Tony Romm, et. Al., *7 states join AT&T/T-Mobile suit*, POLITICO, Sept. 16, 2011, https://www.politico.com/story/2011/09/7-states-join-at-t-t-mobile-suit-063709.

46. *See id.*

47. *See* Reuters Staff, *11 state AGs show support for AT&T/T-Mobile merger*, Reuters, Jul. 27, 2011, https://www.reuters.com/article/ctech-us-tmobile-att-states-idCATRE76Q6P020110727.

48. *See* Press Release, U.S. Dept. of Just., Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish (Jul. 26, 2019) (available at https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package).

49. *See id.*

50. *See* Press Release, State of Calif. Dept. of Just., Attorney General Becerra: States Remain Opposed to T-Mobile/Sprint Megamerger, https://oag.ca.gov/news/press-releases/attorney-general-becerra-states-remain-opposed-t-mobilesprint-megamerger; *see also* New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179 (S.D.N.Y. 2020).

51. *See* Press Release, State of Calif. Dept. of Just., Attorney General Becerra Announces Settlement Ending the State's Challenge to T-Mobile, Sprint Merger, https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-settlement-ending-state%E2%80%99s-challenge-t-mobile#.

52. *See* Fed. Trade. Comm'n and Dept. of Just., PROTOCOL FOR COORDINATION IN MERGER INVESTIGATIONS BETWEEN THE FEDERAL ENFORCEMENT AGENCIES AND STATE ATTORNEYS GENERAL (available at https://www.justice.gov/sites/default/files/atr/legacy/2011/12/21/1773.pdf).

53. John O. McGinnis, *The Political Economy Of International Antitrust Harmonization*, 45, Wm. & Mary L.R. 551, 551 (2003).

54. *See Id.* (discussion of costs with industry compliance).

55. *See* Anu Bradford, *International Antitrust Cooperation and the Preference for Nonbinding Regimes*, 16, 319, 319 (Andrew T. Guzman ed., 2011).

56. Int'l Competition Network, https://www.internationalcompetitionnetwork.org/working-groups/merger/ (last visited July 1, 2023) (emphasis added).

57. *Int'l Competition Policy Advisory Comm. To the Attorney Gen. and Assistant Attorney Gen. for Antitrust*, Multijurisdictional Mergers: Rationalizing the Merger Review Process Through Targeted Reform, Final Report 87 (2000) [hereinafter Multijurisdictional Mergers] https://www.justice.gov/sites/default/files/atr/legacy/2006/06/01/chapter3.PDF) (citing J. William Rowley, QC & A. Neil Campbell, *Multi-jurisdictional Merger Review—Is It Time for A Common Form Filing Treaty?* in Policy Directions for Global Merger Review: A Special Report by the Global Forum for Competition and Trade Policy (1999)).

58. Multijurisdictional Mergers, supra note 58, at 94 (quoting Testimony of Luis de Guindos Jurado, Director General de Politica Economica y Defensa de la Competencia, ICPAC Hearings (Nov. 2, 1998), at 100).

59. Multijurisdictional Mergers, supra note 58, at 92.

60. See HSR threshold adjustments and reportability for 2023, Fed. Trade Comm'n (Feb. 16, 2023), https://www.ftc.gov/enforcement/competition-matters/2023/02/hsr-threshold-adjustments-reportability-2023.

61. Multijurisdictional Mergers, supra note 58, at 93.

62. *See* Competition and Mkts. Auth., Mergers: Guidance on the CMA's jurisdiction and procedures (2022), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1044636/CMA2_guidance.pdf.

63. Merger procedures Eur. Comm'n., https://competition-policy.ec.europa.eu/mergers/procedures_en#:~:text=From%20the%20opening%20of%20a,working%20days%20can%20be%20granted (last visited July 1, 2023).

64. *See* D. Daniel Sokol et al., *Antitrust Mergers and Regulatory Uncertainty*, (December 6, 2022) (unpublished

article, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4295283).

65. *See Id.* at 27.

66. Multijurisdictional Mergers, *supra* note 58, at 92.

67. *See Id.* at 92-93.

68. *See Id.* at 93-94. "Companies in a number of recent mergers have been waiting upward of a year or longer for a final verdict, and some deals have fallen apart because of government concerns. . . As time passes, merging firms can become increasingly worried about completing a deal. They have to ensure financing remains in place, and that can cost money. They can begin to lose employees nervous about the future, as well as customers." Brett Kendall, *U.S. Antitrust Reviews of Mergers Get Longer*, WSJ, June 7, 2015.

69. *See* N.Y. City Bar, *supra* note 25 at 7.

70. *See* Budget and Strategy, https://www.ftc.gov/about-ftc/budget-strategy.

71. *See* Sokol et al., *supra* note 65 at 11. See U.S. Dept. of Just., Appropriation Figures for the Antitrust Division, https://www.justice.gov/atr/appropriation-figures-antitrust-division.

72. Multijurisdictional Mergers, *supra* note 58, at 94.

73. *See* Bradford, *supra* note 56, at 319-20; Sokol et al., *supra* note 65, at 25-28.

74. *See* Sokol et al., *supra* note 65.

75. *See* Sokol et al., *supra* note 65, at 27.

76. The CMA can review deals where the target turnover in the UK exceeds GBP 70m or where parties together supply or acquire at least 25% of a particular good or service supplied in the UK (as long as there is an increment). Importantly the share of supply test does not look at markets in the traditional sense. The CMA emphasizes that it could define the share of supply using metrics such as: "value, cost, price, quantity, capacity, number of workers employed or some other criterion." *See* Enterprise Act 2002, ch. 40 § 23 (UK), https://www.legislation.gov.uk/ukpga/2002/40. The CMA's broad approach to this jurisdictional test was recently approved by the Competition Appeal Tribunal in Sabre Corporation v. Competition & Markets Authority [2021] CAT 11.

77. Article 22 is an existing article in the EU Merger Regulation (EUMR) which allows EU member states to refer deals that did not meet European Commission or national authority merger control thresholds to the European Commission for review. This shift in the policy approach to Article 22 to allow for referrals of certain categories of transactions was revived in a European Commission policy statement in 2021 (*Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases*, Brussels, 26.3.2021 C(2021) 1959 final, https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf).

78. *See* Donna E. Patterson & Carl Shapiro, *Transatlantic Divergence in GE/Honeywell: Causes and Lessons*, 25, UC Berkeley Cover Stories 18, 18-26 (2001); Bradford, *supra* note 56, at 324 n.15.

79. Martha Samuelson, Ishita Rajani and Alex Robinson, Economic Analysis of Merger Remedies (Nov. 8, 2021), https://globalcompetitionreview.com/guide/the-guide-merger-remedies/fourth-edition/article/economic-analysis-of-merger-remedies#footnote-074. *See* Merger Remedies Manual, DOJ Antitrust Division, September 2020, https://www.justice.gov/atr/page/file/1312416/download [hereinafter *DOJ Merger Remedies Manual*].

80. Noah Joshua Phillips, Commissioner, Fed. Trade Comm'n, Opening Keynote at the Global Antitrust Economics Conference (May 31, 2019), at 17-18.

81. Devin Reilly et. al., *The Importance of Exit via Acquisition to Venture Capital, Entrepreneurship, and Innovation* 32 Minn. J. In'l L. 159, 162 (Dec. 9, 2021), https://www.analysisgroup.com/globalassets/insights/publishing/2022_exit_via_acquisition_reilly_sokol_toniatti.pdf.

82. Fed. Trade Comm'n, Entry and Efficiencies (available at https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/entry-efficiencies).

83. David Crawford & Michael Schallehn, Regulate with Care: The Case for Big Tech M&A (Sept. 20, 2021), https://www.bain.com/insights/big-tech-mergers-and-acquisitions-regulate-with-care-tech-report-2021.

84. *Id.*

RESTRICTIONS ON WORKER MOBILITY AND THE NEED FOR STRONGER POLICIES ON ANTICOMPETITIVE EMPLOYMENT CONTRACT PROVISIONS

By Donald J. Polden[1]

I. INTRODUCTION

There is increasing concern in the United States about the difficulties that American workers are facing including concerns about limits on worker job mobility and how those limits affect workers' wages and compensation, employee benefits, and finding their next job.[2] Workers believe the challenges they face in changing jobs for better salary and benefits should be addressed so they have greater job mobility and opportunities for advancement. Workers are subject to restraints on job mobility across the spectrum of jobs, including those in executive-level positions as well as minimum-wage employees. Workers complain that they are not constrained in getting better jobs by their experience, training, or education but rather by their employers' policies and employment practices, especially their growing use of employment contracts with restrictive practices that limit workers' abilities to seek better work.[3]

This Article argues that California too should re-examine its laws concerning restrictive provisions in employment contracts and arrangements for their impacts on labor markets, job mobility, and wages. California is perhaps the most restrictive of states in prohibiting the enforcement of employer restraints such as non-competes. While current California statutory policy on non-compete provisions is seemingly clear, there is evidence that it is being evaded by employers who impose the noncompetition restrictions, even if unenforceable. California employers further restrain worker mobility through imposition of other restrictive provisions—such as no-shop clauses, no-hire provisions, confidentiality provisions—that are not explicitly covered by California's statutory policy against restraints on mobility but nonetheless are widely used to hamper worker mobility.[4]

This needed re-examination of the state's policy to limit enforcement of such restrictions in the workplace coincides with a national awareness that such employment restrictions harm workers and employers and should be curbed or banned outright.

States have passed legislation to limit the constraints that employers impose on their workers that make job mobility more difficult or even impossible. For example, California, for more than a century, has legislatively proscribed enforcement of employer restraints on worker mobility, especially covenants not to compete.[5] Similarly, Massachusetts and some other states have recently enacted legislation that curtails the use of non-competes except in narrowly specified circumstances, such as protection of trade secrets or commercial confidential materials.[6] Restrictive covenants are widely used in the United States and have been justified as necessary to protect employers' interests but, as many studies discussed below conclude, they often have the effect of impeding the ability of workers to move to another employer in the same line of work. But there is growing evidence that these statutory limits on use of employee non-compete provisions are not completely effective in preventing employers from imposing non-compete restrictions, nor for that matter in preventing employers from utilizing many other types of restrictive contractual provisions on their workers. For example, while California and North Dakota refuse to enforce employer non-compete provisions, an empirical study showed that a high percentage (approximately 19%) of those states' employers include non-compete provisions in their standard employment agreements.[7] Another study concluded that "[t]he use of non-competes is so pervasive that even volunteers in non-profit organizations, in states that do not even enforce them, are asked to sign away their post-employment freedom."[8] Employment experts agree that there has been a dramatic increase in the use of non-compete clauses in employment contracts, including one research finding that those clauses are found in somewhere between 20% and 50% of all employment contracts, including those of minimum wage workers.[9]

Federal agencies also have been energetic in using the antitrust laws to prevent competitor-employers' collusive conduct that constrains workers' ability to move jobs, such as employer use of "no-poach" and "no-hire " agreements where they agree to not hire each other's employees.[10] In 2016, the federal agencies, the Federal Trade Commission (FTC) and U.S. Department of Justice Antitrust Division (DOJ), issued a strong guidance for human resources officers, including threats of criminal enforcement, to avoid collusive conduct that suppresses worker wages and job mobility.[11] Recently, the FTC launched a rulemaking proceeding aimed at employer use of non-compete provisions in employment contracts.[12] The agency asserted the need for federal involvement in this area by noting the national economic effect of non-compete and other restrictive provisions in employment contracts. According to the FTC, more than one in five American workers (totaling about 30 million workers) are bound by non-compete clauses the effect of which is to lower wages for workers subject to the non-competes and to workers not directly subject to them but who are harmed nonetheless.[13] The agency also contends that these contractual provisions harm other employers who would otherwise hire workers that are handcuffed by the non-compete provisions imposed by their current employer.[14]

Employer conduct that constrains worker wages and mobility have traditionally been evaluated under two legal regimes—one involving employment contract provisions traditionally reviewed under state contract law and the other involving anti-competitive conduct prohibited by federal and state antitrust laws. While seemingly distinct forms of analyzing worker restraints, recent cases, agency actions, and scholarly works are re-examining economic and business foundations of these employment practices and contract provisions for their competitive effects both in markets for labor and in industries where such restrictive provisions are common.[15] With better understanding of the economic effects of use of restrictive employment practices on worker mobility, courts and legislatures are beginning to re-examine their policies and laws

that permit employers to impose restrictions that inhibit or eliminate workers' job opportunities.

The first part of the Article discusses the current employment environment that permits employers to restrict the mobility of their workers through a broad range of restrictive employment conditions and terms frequently imposed by employers. The second part of the Article examines efforts at enforcement of restrictive provisions by employers and recent federal and state cases and law aimed at protecting worker mobility. The part also considers a revealing example of an employment situation in which an employer aggregated several restrictive contract clauses into one contract that stifled, and were clearly intended to stifle, workers' ability to seek employment in the industry. The case demonstrates how, often, employment contracts contain a bundle of provisions that limit what workers can do during employment and after and that cumulatively inhibit their mobility to the next, better paying job. The example concerns an industry specific type of employment agreement that is apparently widely used in the entertainment industry, the so-called "Hollywood contract,"[16] and the Article examines those contracts with an aggregation of restrictive clauses to determine their effect on labor competition in the industry.

The third and final part of the Article examines the normative implications of efforts to constrain employee job mobility in California. It considers the broader reaches of constraining employee mobility and suggests a regime whereby employers are permitted only narrowly-drawn restrictions on their workers' opportunities for job movement while also permitting employers to negotiate for greater workforce stability. The Article, following recent California Supreme Court holdings, recommends that California lawmakers provide clearer guardrails on restrictive covenants in employment relations and increase penalties for employer use of most restrictive provisions. It also recommends that lawmakers should strengthen courts' ability to review employer use of restrictive covenants for the likelihood of competitive harms under the state antitrust statute.

II. RESTRICTIONS ON WORKER MOBILITY: USE OF NON-COMPETE AND OTHER RESTRICTIVE PROVISIONS

This part of the Article provides a background on the history and legal rules of restrictive provisions in employment contracts and then considers the effects of restrictive employment contract provisions on labor markets. Restrictive employment covenants are generally considered to be restraints of trade and analyzed under a common-law reasonableness standard that evaluates their beneficial effects mainly from the employers who wish to control their labor. Until recently they have not been examined for their competitive effects in markets for labor, for effects in the economy and for concerns that their use actually impedes entrepreneurship and innovation.[17] However, as the Article describes, that is changing.

A. POLICY PERSPECTIVES ON RESTRICTIVE EMPLOYMENT COVENANTS

The use of covenants not to compete traces its history to English common law which recognized that some restrictions on competition were appropriate when there were business justifications for the new buyer or former employer to be concerned about subsequent competition from the purchaser of his business or a former employee.[18] These concerns led to the recognition of noncompetition agreements at common law. The principal concerns were two-fold: First, non-compete clauses were justified because the former employee or former owner will use trade secrets, goodwill, and special knowledge related to the employer's business and would wrongfully use the information following departure from employment.[19] Second, a non-compete clause was justified as a legitimate method to permit an employer to gain back the investment it made in its employees' training.

However, today there are growing concerns that national economic policy is being thwarted by widespread use of restrictive provisions in employment agreements and practices, business merger agreements, customer and client

agreements, and others. While the reasons that employers seek to impose these restraints on their employees vary, they are almost always solely beneficial to employers; it is often difficult or impossible to discern how they are beneficial to employees. Yet, it is accurate that use of the restrictive provisions has become commonplace. For example, recent studies have shown that "bundles" or aggregations of restrictive provisions are seen in 80% of workers' employment contracts.[20] Further, research shows on a national scale, 18% of workers are bound by non-compete provisions but about 19% of workers in California and North Dakota, two states that refuse to enforce non-competes, have those provisions in their employment contracts.[21] The United States Treasury conducted an analysis of the use of non-compete provisions, acknowledging some of the beneficial aspects of such provisions for employers, but concluding that "a growing body of evidence suggests that non-compete agreements, as currently experienced by workers and enforced by states, are often deployed in ways that lack transparency and fairness."[22]

Restrictive covenants in employment agreements often contain promises or commitments not to compete with former employer (a non-compete provision), promises not to solicit or accept business from a former employer's customers, promises not to recruit or hire away employees from a former employer (a non-solicitation provision), and/or promises not to use or disclose former employer's commercially valuable information (a confidentiality or non-disclosure provision).[23] An important justification for enforcement of non-compete and other restrictive covenants is the employers' interest in protecting valuable trade secrets, methods of doing business, and other confidential information. Faced with strong competitive pressures in their market or industry, firms legitimately wish to protect their interests by ensuring that their employees do not take the information learned on the job, and take it elsewhere especially to competitors. Employers also are concerned about the business costs of competing for workers, for example by needing to pay higher salary or wages.[24] This is a cost of doing business, not a legitimate justification for imposing employment terms that lock employees into service to one employer or curbing their ability to move to better jobs. Employers also benefit from investments in employee training, knowledge, and skills and wish to recoup those investments by keeping the employee on the job and preventing the loss of a well-trained worker. The courts have frequently been called up to balance the worker's interest in moving to a better employment with the employer's interest in recouping its investment in training the employee.[25]

A public policy evaluation of these restrictive provisions recognizes that employees should be able to pursue their occupation without hindrance and yet allow employers and employees to contract with who they please.[26] However, these contractual provisions prevent a measure of competition and are therefore properly considered restraints on trade. Often state courts do not automatically reject these provisions but rather look to whether the burden imposed on the employee through these restrictions is reasonable and if it was truly designed to protect an employer's legitimate interest in the restriction on the employee.[27]

There are different treatments of restrictive employment provisions amongst the states as to whether or not, and to what extent, to enforce these covenants. A few states, including California, specifically provide that covenants not to compete are not enforceable, with California going a step further and limiting the use of contractual provisions that bar former employees' solicitation of former customers.[28] California Business and Professional Code section 16600 ("Section 16600") states "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[29] California will still allow enforcement of some restrictive covenants in some limited exceptions articulated in Section 16600. The next section addresses the questions of enforceability of restrictive covenants.

B. ENFORCEMENT OF RESTRICTIVE EMPLOYMENT CONTRACT PROVISIONS

Restrictive covenants have been regulated legislatively in most states.[30] In many jurisdictions, state courts have articulated policies on their enforceability, usually applying the common-law reasonableness doctrine.[31] The *Restatement of Employment Law* articulates a "rule of reason" standard for evaluating the reasonableness of non-compete provisions referring to the common law treatment.[32] But several states are beginning to re-examine the competitive implications of restrictions on worker mobility by way of restrictive covenants. For example, some states that have routinely enforced employment contract covenants not to compete are amending their laws to curb employer restrictions most often by prohibiting or limiting the enforceability of covenants not to compete in employment arrangements.[33] Further, some state attorney generals are aggressively pressuring the federal government to stop the use of non-compete agreements and provided an impetus for the FTC's rulemaking proceeding on non-compete clauses.[34] The re-examination of these often longstanding state legislative and judicial policies reflects the concern that these restrictive covenants harm an important form of free market competition, namely that of competition for workers and employees.

There are signs of growing federal interest in examining the competitive and economic policies promoting the use of restrictive covenants and other forms of conduct restricting employees. The FTC has launched an investigation into the harmful effect of those restrictions on worker mobility, compensation, and long-term earnings, as well as the implications for the use of these employment devices on national economic policy.[35] In furtherance of its investigation, the FTC has proposed a rule greatly limiting the broad application of non-compete provisions in employment relationships.[36] The investigation and proposed rule are predicated on the agency's finding that "[b]ecause non-compete clauses prevent workers from leaving jobs and decrease competition for workers, they lower wages for both workers who are subject to them as well as workers who are . . . [and] also prevent new businesses from forming, stifling entrepreneurship, and prevent novel innovation.[37] These initiatives at the federal level are clearly advancing the White House's launch of administrative and legislative efforts to curb policies that constrain worker mobility and inhibit competitive labor markets.[38] Further, there has been an increase in legal scholarship on the harms of restraints on competition in labor markets[39] and expert analysis of the restraints are advocating for limits.[40] Moreover, the U.S. Department of Justice Antitrust Division has launched an energetic campaign against closely related employment restrictions—no-poach agreements and no-hire agreements.[41] These agreements are usually between employers who agree not to hire each other's workers and are considered to be illegal restraints of trade under the antitrust laws.[42] Finally, there is a related and substantial increase in private class-action suits against employers utilizing these restrictive provisions that hamstring employees wishing to move to higher paying jobs which also harms their prospective employers as well as the employees.[43]

At the federal level, the greater emphasis on regulatory oversight of markets for labor stems from the recognition of the problem of monopsony in many markets for workers.[44] The ability of employers to engage in collusive, anti competitive conduct, such as no-poach agreements, stems from the economic power that they have over workers in labor markets. While the problem of monopoly was the principal concern of Congress when it passed the Sherman Act in 1890, there has been very little recognition of the problem of buyer-side power in some markets, including workers. Restrictive contract provisions (such as non-compete clauses) can be useful to powerful buyers of worker services (take the example of home health care nurses and professionals) because they make it more difficult for workers to leave employment and begin working for another employer in the same or similar line of work. And the problem of buyer-side power in labor is compounded when the employer has power in the product market (e.g., home health care services) that expands the employer's power to the labor

market for home health care nurses. Section 2 of the Sherman Act, prohibiting monopolization of a market has an extensive history of enforcement, but that is not true with respect to monopsony markets and there are complexities with extending the reach of Section 2 to labor markets where buyers, such as employers, have market power.[45]

C. CALIFORNIA'S PROTECTION OF WORKER MOBILITY–BUSINESS CODE § 16600 AND FIXED-TERM EMPLOYMENT CONTRACTS

Common law authorizes, but limits, non-compete clauses and, to some degree, other restrictive terms in employment contracts. However, California has strong employment laws governing use of restrictive covenants in employment contracts and is an acknowledged leader among the states in forbidding the enforcement of non-competes.[46] California's policy on other restrictive provisions—such as non-disclosure, non-solicitation, and no-hire provisions—is less clear and there is concern that the legislative and regulatory guardrails on the use of these covenants may not be enough to advance the positive, pro-worker mobility policies behind Section 16600. Since the 1800s, California labor and competition policy has limited the ability of employers to impose restrictions on their employees' ability to move to other employment, especially a competitor of the employer. The California policy is embodied in the statutory provision in Section 16600, which provides that: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[47] The provision, which was first enacted in 1872, provides a blunt statement of California's policy that workers should be relatively unfettered in their decisions and efforts to seek new employment.[48] In the leading case on the application of Section 16600 to employment contract restrictions, *Edwards v. Arthur Anderson LLP*, the California Supreme Court construed the statute expansively in the context of restraints on workers' mobility, such as non-compete and non-solicitation clauses.[49] Subsequently, the Supreme Court in *Ixchel Pharma, LLC. v. Biogen, Inc.*,[50] a case involving an exception to Section 16600 for business transaction provisions, described the fundamental policy of Section 16600 and its decision in *Edwards* as follows:

> Moreover, the rationale in *Edwards* focused on policy considerations specific to employment mobility and competition: The law protects Californians and ensures 'that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice.' It protects the 'important legal right of persons to engage in businesses and occupations of their choosing.' the statute 'evinces a settled legislative policy in favor of open competition and employee mobility."[51]

Further, the *Ixchel Pharma* court acknowledged that Section 16600's prohibition is clear; the only exceptions to the ban on restraints are the express exemptions articulated in Sections 16601 (limited use of restrictions upon sale of goodwill of a business) and 16602 (limited use of restrictions upon dissolution of a partnership). Although the *Ixchel Pharma* case involved a joint venture agreement between two pharmaceutical companies rather than an employment agreement, the court concluded that the litigation involved competition-related issues and that the antitrust "rule of reason" should be applied to evaluation of the competitive effects of the arrangement.[52] The court examined the agreement between the competitors as requiring one firm to not engage in business with any other entity in the development and use of a particular drug and then determine whether or not it violated Section 16600. Because the restriction on competition between the parties involved a restraint of trade (for example, concerted refusals to deal or exclusive dealing arrangements, in antitrust jargon), the court analyzed the competitive purposes and likely effects under the rule of reason was appropriate under cases interpreting the state's antitrust law, the Cartwright Act.[53] However, the Supreme Court did not perform the rule of reason analysis on the restraint, instead leaving it to the lower courts.

California and federal courts have given an expansive reading to the reach of Section 16600

including its applicability to non-compete clauses. However, the settled law is less clear on the reasonableness of other restrictive covenants common in employment contracts, such as non-solicitation, confidentiality, and non-disclosure provisions in employment agreements.[54] These forms of restraints on workers are common in California contracts (and most other jurisdictions) yet they evade the policy reasons favoring unfettered worker mobility. Courts tend to analyze them under the vague reasonableness standard for restrictive covenants and often fail to consider the competitive implications of the use of those types of restrictions. So summarizing, the chief problems are (1) the often vague justifications under contract law for these types of restrictive covenants, (2) what restrictions on employees in employment contracts present antitrust problems, and (3) the analytic prowess of the antitrust rule of reason in challenging restrictive covenants in employment contracts.

A recent California appellate court decision provides an example of the need for legislative and judicial action to clarify and strengthen Section 16600 and thereby provide answers to workers, courts, and employers. The case involved fixed-term contracts that included a bundle of restrictive covenants. These fixed-term provisions are also known as employment for a duration or for a term, which is simply an agreement that the employee will work for the employer, and the employer will permit the employee to work, for a stated period or duration.[55] Fixed-term agreements bind the employee to work for the employer for a set period of time, which benefits employers by stabilizing their workforces. In the abstract, fixed employment terms benefit employees by giving them some assurances of stability in their term of employment and salary, benefits, etc. But fixed-term agreements are frequently seen in some industries, including the Hollywood film and entertainment industry in which film and television companies retain their employees for contractually defined periods of time to prevent competitors from acquiring their talents. In the United States, these employment agreements for a stated duration are the exception to the usual, or "default," form of employer-employee relationship: employment at will.[56]

A problem with fixed-term employment contracts is created when the term of employment provision becomes an envelope that encases restrictive provisions that limit employees choices on new employment opportunities and constrains the labor market by preventing other employers from attracting new workers.[57] A legal issue is, then, whether or not an otherwise ordinary contract term, such as a stated duration for the employment, can protect a contract containing other, perhaps multiple, restrictive provisions that together lock employees in their employment. Practically speaking, that would essentially create a "fixed term restraint of trade" or, as some scholars refer, "aggregation" or "bundle" of restricted clauses.[58] How does the strong public policy against restraints on employee mobility in Section 16600 apply to an agreement for a fixed-term when accompanied by multiple restraints on the employee's mobility? A fresh look at the implications of fixed term employment contact bundled with other restrictive covenants would be helpful in creating clarity in the policy underlying Section 16600.

The recent decision was issued by a panel of the California Court of Appeal is *20th Century Fox Film Corp. v. Netflix, Inc*,[59] (hereinafter, *20th Century*). The case involves two employees of 20th Century Fox ("Fox"), a major entertainment firm, who had signed multi-year, fixed-term employment contracts but then decided to leave Fox to work for Netflix, another major entertainment firm.[60] Netflix was attempting to break into the Hollywood scene and was hiring talent to staff its new Hollywood production unit. Netflix offered both employees employment that included at least double the salary Fox was paying them. The evidence showed that the two Fox employees were paid considerably below market compensation for their job types. The employees were in breach of the Fox contracts when leaving for a new employer, but Fox did not sue the employees for breach of the term provisions. Instead, Fox sued its competitor, Netflix, for tortious interference and for violation of California law of

unfair competition.[61] In response, Netflix asserted affirmative defenses including that the employment contracts violated California public policy under Section 16600, that Netflix's interference was justified, and that the contract provisions were unconscionable. Netflix also filed a cross-complaint asserting claims for unfair competition that Fox's practices were unfair, unlawful, and fraudulent. The trial court ruled against Netflix on its complaint and on its defenses and imposed an injunction on Netflix against soliciting employees with "valid" contracts with Fox. A panel of the California court of appeals affirmed the lower court rulings.

For analytic purposes it is important to understand the terms, conditions, and requirements of the Fox contacts as they were found and examined in the *20th Century* courts' opinions. First, what provisions did the Fox contracts contain and what insights into Fox's competitive purposes in requiring and enforcing such provisions against Netflix?

- First, the employment contracts were for two or more years duration but they could be *unilaterally extended by Fox*. Employees lacked the ability to extend the contract term of years on their own, only Fox could extend the term of the agreement. Fox routinely and unilaterally extended the duration of the agreements often before their expiration which raised the possibility that Fox was able to bind the employees for many years.[62]
- The employees' *compensation was set at sub-market levels*, estimated to be below the 25th percentile of comparable or "market" salaries in the industry.[63]
- Many Fox employees at all levels of job types were required to sign the fixed term agreements. In fact, *more than 125 Fox employees* across its companies and subsidiaries signed the fixed term employment contracts. [64]
- The agreements contained *"no shop" clauses* which prohibited the employees from seeking or negotiating for new employment more than 90 days before the expiration of their current employment contract with Fox. The provision also included a "consent to injunction" provision in which employees were required to agree to accept a court injunction against them if they violated the "no shop" provision by discussing or seeking their next employment opportunity.[65] Fox could agree to waive those provisions for non-specified reasons.
- The contacts included provisions prohibiting Fox employees from *encouraging or soliciting other Fox employees* to move to other employers for a period lasting for two years after leaving Fox employment.[66]
- The contracts also contained *confidentiality provisions* prohibiting employees from disclosing any information about Fox to others outside the company. However, it is not clear what of Fox's assets deserved such confidentiality. The opinions of both the lower and appeals courts failed to indicate any trade secrets, commercially sensitive materials, or other Fox confidential materials that would warrant protection by a confidentiality covenant.[67] Moreover, there was no indication in the record that Fox invested in training or advanced education for these employees which would suggest a legitimate purpose to *recover its investment* by prohibited disclosure.
- Fox executives agreed that these fixed term agreements were utilized to "lock in," "gain control of" " and maintain leverage" over its employees. Indeed, the record at the trial court failed to indicate any substantial corporate purpose for the imposition of the agreements across the workforce except to limit those employees' ability to leave Fox for other employment.[68]
- Both the trial court and the appellate court emphasized that Netflix was enjoined from interfering with "valid" contracts between Fox and its employees. However, neither court defined or described would make a Fox fixed term employment contract "valid", or, conversely, what an "invalid" contract looked like.

Neither the trial court nor the appellate court addressed Netflix's argument that the employment contracts contained an aggregation of restrictive provisions that violated California's statutory policy protecting worker mobility. Instead, the appellate court held, first, that fixed-term contracts were enforceable under California contract law.[69] Then, however, the court refused or failed to consider Netflix's arguments that collectively they were anticompetitive in purpose and, as seen in the case, effect. Netflix argued that the contractual provision were void as against public policy because the "series of interrelated contract provisions and practices to limit employment mobility . . .violated the established public policy protecting an employee's right to move freely among jobs and employer's right to compete for skilled employees."[70] In this regard, Netflix claimed that the fixed term contracts with a constellation of restrictive provisions violated Section16600 and Labor Code section 2855, which prohibits personal services agreement for longer than seven years respectively.[71] The Court of Appeals rejected Netflix's public policy claims, finding, instead, that it was possible to sever any offending provisions, citing *Armendariz v. Foundation Health Pyschcare Services, Inc.*[72] and *Abramson v. Juniper Networks, Inc.*[73] Those cases were cited for the notion that contractual provisions that are considered invalid and unenforceable because they are illegal or contrary to public policy may be severed from the remainder of the contract if such severance is "in the interests of justice" and the unconscionability or illegality of the provisions does not "permeate[s] the whole contract . . ."[74] Netflix claimed that at least five provisions in the Fox contracts with its employees contravened the policy of Section 16600 and that the contract as a whole, with the myriad restrictive employment provisions, was unconscionable. The court summarily dismissed concerns as to each of those provisions, with little or no analysis, and completely failed to comment at all about the most anticompetitive provision, the "no-shop" clause.[75] The court's ruling on the severability doctrine is a subject for the judgment of later courts' analysis but it bears mentioning that if the five restrictive provisions were stricken from the fixed-term contracts there would be very little left of the contracts themselves.

The court found that the duration provision in the fixed-term agreements would benefit Fox, and ostensibly its employees, because the contracts would require periodic negotiations on employment terms when Fox unilaterally extended the duration of the agreements. According to the court, this process would establish rapport between employee and employer because of the negotiation that would take place every time Fox unilaterally extended the fix term contract.[76] These fixed-term agreements would have terms set in them to last over a period of time, so there would be continuous back and forth negotiation between the employee and employer to ensure that the final terms over the fixed period of years would be favorable to both parties. According to the court theory, the frequent negotiation of contract terms would establish a trust between each other and this ensures better future relations and a more likely chance that the employee will want to continue to work for the employer.[77] Factually, there was no evidence of the plausibility of this justification and no justifications were offered as to any legitimate purposes for the no-shop, consent to injunction, confidentiality, post-termination non-solicitation provisions (such as employees' access to trade secrets or commercially confidential information, employer investment in training, etc.).

Netflix also challenged four other provisions in Fox's fixed-term contracts According to the court, the unilateral extension of the duration of the agree at the sole option of Fox was consistent with public policy since it allowed Fox to "extend the stability and predictability of the parties' economic relationship for a period of two years."[78] The court, however, failed to discuss how these restrictive provisions were beneficial to employees, if at all. In sweeping terms, the court held that Fox had "legitimate business reasons" for each of the restrictive provisions and therefore individually or collectively, they "did not rise to the level of a policy violation that rendered those agreements unenforceable."[79] According to the court, those legitimate objectives of the contracts were to

ensure, for Fox, "stability and predictability of its workforce.[80] The court's opinion did not analyze, consider, or even mention Netflix's claims that the Fox contract restrictive provisions collectively constituted a violation of California public policy in Section 16600. The court also failed to consider the alternative, somewhat obvious explanations of Fox's purpose in its widespread use of employment contracts containing an aggregation of provisions that, as its own executives observed, "locked in" Fox employees to "gain control" and "maintain leverage" over them. Fox's desire for a "stable and predictable" workforce had obvious and predictable consequence for Fox's employees' compensation and for Fox's competitors in the entertainment business who also seek to compete with Fox for talented and qualified employees in the Hollywood labor market.

D. COMPETITION NORMS FOR LABOR MARKETS IN CALIFORNIA–THE *IXCHEL PHARMA* CASE

The California Supreme Court in the 2020 *Ixchel Pharma, LLC v. Biogen*[81] (*Ixchel Pharma)* case explicitly linked the policies of state competition law in the Cartwright Act to the policy foundations of Section 16600. The decision provides a look at the role of California state policy on business efforts to restrain competition through use of restrictive covenants. *Ixchel Pharma* involved an agreement between two bio-technology firms, Forward Pharma and Biogen, that resulted in Forward terminating its existing contract with Ixchel to jointly develop drugs for treatment of neurological diseases. The termination provision, according to Ixchel, was void and against California public policy under Section 16600 because there was a prospective business relationship that was thwarted by the agreement to terminate.

The *Ixchel Pharma* court emphasized the close relationship between the contractual provisions in Section 16600 and the state's antitrust law:

> Section 16600 appears alongside the Cartwright Act, which also employs broadly worded language to prohibit agreements in restraint of tradeSection 16600 should therefore be read in accordance with the Cartwright Act to incorporate the same rule of reason in such cases. . . . The similarities between the two statutes stretch beyond their language. They share a statutory purpose and doctrinal heritage in common law prohibitions on restraints of trade. They should therefore be interpreted together.[82]

The *Ixchel Pharma* case introduced an important element to the analysis of restrictive provisions by explicitly linking their impacts on competition in labor markets as they are affected by restrictive covenants. While the *Ixchel* Pharma case involved a business contractual provision rather than an employment-related provision, the court concluded that restraints in business transactions and in employment relationship are both considered "restraints of trade" under the statutory scheme of Section 16600. The *Ixchel Pharma* court concluded that the rule of reason, which is commonly applied to most antitrust restraints, should be applied in the case of restraints on business competition under Section 16600.[83] As the court in *Ixchel* discussed, there are California cases that hold such agreements are *per se*, illegal and void rather than requiring a broader examination of their reasonableness but determined that inquiry into the reasonableness of the provisions under the antitrust rules was appropriate.

The decision in *20th Century* case can be understood as reflecting 19th-century contract and tort-law principles extolling the notion of freedom to contact involving two executives who were capable of negotiating their employment contracts.[84] But, the central failing of the court's ruling is its rejection of the competition-law implications, especially that the obvious purpose of the contract was to restrict employees from seeking better employment with a competitor. The evidence showed that Fox refused to grant releases from the fix term contracts to employees "who joined competitors during the term of their agreement."[85] The next section addresses this gap between the reach of the policy underlying Section 16600 and the overarching goals of the state and federal competition law and policy.

III. A REAPPRAISAL OF CALIFORNIA POLICIES ON WORKER MOBILITY AND ANTICOMPETITIVE CONDUCT IN LABOR MARKETS

The Article makes the case for stronger, clearer policy-making regarding California's stated goal of ensuring greater worker job mobility and enhancing greater competition in labor markets. Without question, California has led the country in articulating policies, and implementing them with laws and regulations, that seek to protect the ability of workers to seek better jobs and opportunities. That state policy is grounded in the research demonstrating that job mobility is essential for workers' abilities to improve their earning potential, more vibrant (and competitive) markets for workers, and for increased entrepreneurship and innovation in product markets.[86] But it also seems clear that there is more to be done, legislatively and judicially, in California to fully achieve those goals.

Non-compete and Other Restrictive Covenants in Employment Contracts. The Article presents evidence of the widespread use of non-compete provisions in California even though they are not enforceable. Almost 19% of employment contracts in the U.S. (and in California) include non-compete provisions and, nationally and in California, the percentage is almost four times higher for executive positions.[87] Even unenforceable non-competes harm worker mobility.[88] Further, the courts have not clearly extended the worker protections of Section 16600 to other restrictive employment terms such as no-shop, non-disclosure, confidentiality, non-solicitation and fixed term contract terms. Therefore, a re-evaluation of the scope of the policy prohibiting restraints on worker job mobility is necessary and appropriate to enhance the clarity of the state's policy on restraining worker mobility. Legislative revisions to Section 16600 should prohibit non-compete clauses, not just make them unenforceable, and thereby increase the deterrence effect of 16600. Any revision should also clearly address the positive and negative labor and competition effects of other restrictive provisions, building on the existing policy on non-compete provisions. Legislative amendments should more precisely identify protectable employer interests for narrowly-drawn restrictive provisions but should also clearly state when such provisions fail to accommodate protectable interests of workers. This would be immeasurably helpful to California's employers who want to protect their legitimate interests (such as protection of trade secrets that the employee used in their employment) but in a manner that doesn't prevent their employees from improving their compensation, benefits, and access to better job opportunities.

A few states have adopted the new Uniform Restrictive Employment Agreement Act that clarifies the common-law treatment of restrictive employment provisions, including narrowing and articulating legitimate employer interests that support such restrictive contract terms.[89] The uniform law goes beyond the common law (and that of Section 16600) remedy of voiding such agreements and provides that such illegal provisions are "prohibited" and subject to statutory damages (recommending $5000 per worker per violation; but noting that states can decide their own damage levels). A thoughtful re-examination of the policy and text of Section 16600 would benefit from a careful consideration of the national uniform law, perhaps adopting the provisions that fill gaps in the California law.

Further, statutory revisions are needed to bring policies on standards for enforcement of worker protection and competition norms in markets for labor into clearer focus with less indeterminacy. The opacity of California public policy favoring freedom of job mobility in Section 16600 that was thoughtfully captured by Judge O'Scannlain of the Ninth Circuit Court of Appeals in case involving the application of Section 16600 to settlement agreements:

> The courts of California have not clearly indicated the boundaries of section 16600's stark prohibition, but have nevertheless intimated that they extend to a considerable breadth. At the very least, we have no reason

> to believe that the State has drawn section 16600 simply to prohibit "covenants not to compete" and not also other contractual restraints on professional practice.[90]

More "clearly indicated boundaries" for the reach of the state policy served by Section 16600 would be beneficial for California workers and employers. Section 16600 should clearly state that it also applies to other forms of restraints on employees, such as non-disclosure, no-hire, and no-shop provisions, that serve, and often are intended to serve, to limit worker mobility away from the restraining employer to other job opportunities. It should recognize that some of those restrictive covenants can serve to protect legitimate employer interests such as protecting its intellectual property (i.e., trade secrets, confidential customer information, some goodwill with customers) and an appropriate "walking away" from a business following the sale of the business or the cessation of partnership interests. A revised (and perhaps revitalized) Section 16600 would explicitly recognize narrowly-drawn legitimate employer interests and craft them into an operational rule for defining appropriate (and restricting inappropriate) restrictive employment provisions.

Another area for further analysis is the use of aggregations of employee restrictive provisions in employment contracts and practices as was seen in the *20th Century* case.[91] As the appellate court's opinion suggests, where there are aggregations of restrictive provision courts may simply examine each of the several restrictive provisions for their reasonableness but fail to evaluate the thicket of such restrictive provisions for their collective effect on employees. Perhaps obviously, the latter approach is most appropriate as aggregations of restrictive provisions in contracts exert an in terrorem effect on the affected employees.[92] As the Article and other commentary suggest, a comprehensive look at the employment and competition effects of such an aggregation may indicate an improper purpose and effect for the contract.

Competition Norms in Labor Markets. California should explicitly consider revisions to the Cartwright Act that would do two things: First, it should craft appropriate proscriptions on the use of restrictive covenants that restrain trade in labor markets and/or in product markets, and secondly, the legislature should address the problem of monopsony in labor markets. Buyer-side power is a significant economic problem that results in harms to workers.[93] However, California law does not explicitly prohibit monopolization, which may be problematic on a few levels, and therefore it does not prohibit monopsony. California law requires clear statement of state policy that the harmful effects of monopolization and monopsony harm citizens and violate state law and are prohibited by a revised Cartwright Act. The revision should identify what kinds of practices taken by a dominant firm in a seller market or a buyer market are proscribed. For example, in addition to traditionally proscribed conduct of monopolists, such as exclusive dealing or predatory pricing, the legislation could helpfully address conduct such as widespread use of non-competes or a thicket of restrictive provisions in a labor market. Further, it would be appropriate to consider the anticompetitive effects of restrictive provisions in particular industries or markets are prevalent or especially pernicious. Forexample, widespread use of non-competes in fast food or other minimum-wage labor markets, if taken by a firm with demonstrable power in the market, should constitute a violation of the Cartwright Act and likely are.[94] However, a clear legislative prohibition on other restrictive covenants and provisions in employment relationships would reinforce California state policy seeking to permit unfettered job mobility and freedom.

Further, if there is no legislative appetite for re-visiting restrictions in labor markets, the California courts should address the question raised but unanswered in the *Ixchel Pharma* case: How should courts apply the rule of reason in cases involving restrictive employment contract terms? There are several considerations that inform this important answer. First, California antitrust law can draw meaning in its application from the federal Sherman Act,[95] so it is appropriate to draw definitive concepts

and processes from that statute in determining analytic tools like the rule of reason. Therefore, cases such as *NCAA v. Alston*,[96] in which the United States Supreme Court applied the Sherman Act to conduct of the NCAA restraining economic benefits to student athletes, and the DOJ litigation involving no-poach agreements, would provide relevant guidance to California courts evaluating the legality of restraints in labor markets.

The Cartwright Act, like the Sherman Act, has been construed to prohibit restraints of trade under two forms of analysis: one treats restraints with no discernable procompetitive benefits as presumptively (or *per se*) illegal violations of law, and the second treats restraints with some arguable procompetitive attributes in a more comprehensively review to determine their reasonableness (i.e., the rule of reason).[97] The proper analytic approach to restraints of trade under California and federal antitrust laws involves a characterization of a restraint by considering its purpose and the effects or likely effects of the restraint.[98] If the characterization of the restraint leads to a conclusion that the purpose and likely effect in nearly all cases is to foreclose or prevent competition, then the restraint is considered as a presumptive, or per se, violation. If the analysis suggests that the restraint has some likely procompetitive benefits, then a fuller reasonableness analysis is conducted. It is important to point out that antitrust reasonableness analysis is markedly more rigorous and demanding on antitrust plaintiffs than the common-law reasonableness approach to restrictive covenants.

The U.S. Department of Justice Antitrust Division has been litigating cases against employers who collude with competitors to not hire each other's employees ("no-poach" or "no-hire" agreements) as *per se* violations of federal antitrust law.[99] That same classification of no-poach, no-hire, and no-shop agreements should be followed by California courts examining similar agreements under California law. No-poach and no-hire agreements are treated as horizontal restraints that most often lack any procompetitive attributes; they mainly eliminate competition for workers which suppresses worker wages. No-shop provisions should be treated as presumptively unlawful under California (and federal) antitrust law for the same reasons—there are no redeeming procompetitive benefits—as no-poach agreements. Even if no-shop provisions may be characterized as a vertical arrangement rather than a horizontal one, they should be found presumptively anticompetitive and illegal for the reason that they lack procompetitive justifications, almost always harm the targets–workers seeking job mobility–and, by definition, adversely affect competition for workers in the market or industry.[100]

Antitrust analysis of restrictive covenants would need to consider the purposes for their use in particular cases as well as the pro- and anticompetitive effects of the restrictive covenants involved. Consider non-compete provisions. Increasingly, covenants not to compete are commonly viewed in the same category as no-hire and no poach agreements because, although different in formation (non-competes are imposed by the employer and the no-poach are the product of agreement between competitors), they result in the same exclusionary outcomes for workers.[101] They explicitly prevent workers from or severely constrain them in attempting to move to a better job. And, both non-competes and no-poach restraints have another anticompetitive effect: Other employers are prevented, or severely limited in their ability, to hire the restrained employees. More significantly, the employer justifications for both forms of restraints on employees are the same—to prevent other employers who may compete in the same product market (for example, media or entertainment) but do compete in the labor market from getting trained, experienced workers.[102] The purpose and effect of the use of these employee restraints, in those factual circumstances, could be characterized by a fact-finder as a restraint of trade without significant procompetitive benefits and thus would violate the Cartwright or Sherman Act. However, non-compete agreements have not been treated as *per se* violations of the antitrust laws and DOJ is prosecuting some no-poach agreements as *per se* violations. Legislative guidance on proper treatment

under the Cartwright Act for particularly pernicious restrictive covenants in employment arrangement would be very helpful.

The *Ixchel Pharma* court concluded that the appropriate analysis of anticompetitive aspects of a non-compete provision was the rule of reason in a case involving a non-compete provision in a business transaction. The same reasoning was applied by Pennsylvania Supreme Court, in *Pittsburgh Logistics Systems, Inc. v. Beemac Trucking, LLC*, a case involving a no-hire agreement between a logistics provider and a shipping company. The no-hire clause was considered ancillary to the services contract between the companies but found to be an unreasonable restraint of trade and therefore unenforceable.[103] The court relied on similar holdings by other state courts to the effect that restraints on the mobility of workers should be analyzed and treated like agreements between competitors to not hire one another's employees that exert a public harm therefore held illegal.[104]

Second, consider no-shop provisions. The no-shop clause in the Fox agreements prohibited Fox's employees from seeking a new position until a three- or four-month period of time prior to the expiration of the employment contract. So, in a two-year fixed term agreement, Fox would have the contractual right to enjoin its employees from seeking or discussing new employment for 21 months. Moreover, any prospective suitor for that employee's services could face a lawsuit for tortious interference with that contact if the prospective employer knows of the employee's contractual bindings. There are few restrictive contract provisions that are facially as anticompetitive as conditioning when an employee can *seek* other employment. The use of "no shop" provisions have the clear, and arguably intended, purpose of preventing employees from testing their worth in the market by considering other opportunities and, reciprocally, prevents other employers from considering those workers for employment. The obvious target of these "no-shop" contract practices are the employer's competitors in the market for qualified workers. Courts should evaluate these provisions under the per se rule because they lack any obvious redeeming value. Alternatively, no-shop provisions should be treated as restraints of trade and analyzed under a rule of reason approach like the no-hire provision in the *Pittsburgh Logistics Systems, Inc.* case.[105]

Consider treating aggregations of restrictive employment provisions as restraints of trade.

The *20th Century* court failed to perform the kind of detailed consideration of the demonstrated purpose and effect of the aggregation of restrictive covenants in the Fox contracts. While it seemed clear that the underlying purpose of Fox's imposition of an aggregate of restrictions was to prevent Fox's competitors from gaining skilled, experienced employees, some of the restraints individually may have some off-setting procompetitive benefits. Confidentiality provisions are appropriate if an employer has intellectual property and trade secrets to protect from misappropriation by competitors. Non-solicitation provisions may be appropriate to prevent employees from soliciting customers to leave their current employer for a new venture. Fixed-term employment contracts may in many circumstances be appropriate and beneficial to both employees and employers. But the potential for anticompetitive effects from use of aggregations of restrictive clauses when there is no or very little justification is sufficient to treat them as restraints of trade and analyze them under the Cartwright Act as such.

IV. CONCLUSION

The Article encourages legislative and judicial consideration of the growing concerns about constraints on workers' job mobility and on the state's labor markets. The California state policy on these policy objectives is clearly stated but there is evidence that it is not being realized. The state policy of Section 16600 for unfettered worker mobility and freedom to seek new opportunities is still thwarted. This suggests, as the Article argues, that legislative re-examination of the California law, notably 16600 and the Cartwright Act would

be beneficial. The California Supreme Court has indicated that antitrust law and policy should play a greater role in examining how labor and employment constraints may prevent the achievement of state policy favoring—greater opportunities for entrepreneurship and economic self-determination of workers.

---

1 Donald J. Polden is Dean Emeritus and Professor of Law, Santa Clara University School of Law. He expresses his appreciation to Michael Wang, a 2022 graduate of the Santa Clara Law for his very helpful research and editorial comments. In addition to teaching antitrust law courses, Professor Polden frequently writes in the area of federal antitrust law and policy and is a member of the California Bar Section on Antitrust and Unfair Competition. Previously, he tried antitrust cases in federal trial and appellate courts. He expresses his appreciation to the editors of the journal—Anu Reddy and Stephen McIntyre—for the opportunity to submit this Article to be considered to efforts of the California Law Revision Commission's study on state antitrust laws. Any errors and position statements are solely the responsibility of the author. The author was retained as an expert witness for Netflix in a case discussed in the article.

2. *See* Eric A. Posner, How Antitrust Failed Workers, 91–106 (2021)(describing the economic and legal concerns with widespread use of non-compete provisions in employment contracts). See also, for example, the President's Executive Order on Promoting Competition in the American Economy, Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 14, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/ (expressing concern with employment terms that hinder workers' ability to seek new opportunities).

3. John M. McAdams, *Non-Compete Agreements: A Review of the Literature* (Fed. Trade Comm'n, 2019), SSRN: https://ssrn.com/abstract=3513639 ; Richard J. Pierce, Jr., *The U.S. Federal Trade Commission Workshop on Non-Compete Clauses* (Geo. Wash. Univ. Research Paper No. 2020-01, 2020). , https://ssrn.com/abstract=3520009. Princeton economist Alan Krueger summarized the new emphasis on protection of workers' opportunities for job mobility: "New practices have emerged to facilitate employer collusion, such as non-compete clauses and no-raid pacts, but the basic insights are the same: employers often implicitly, and sometimes explicitly, act to prevent the forces of competition from enabling workers to earn what a competitive market would dictate, and from working where they would prefer to work." Alan B. Krueger, *The Rigged Labor Market*, Milkin Inst. Rev. (Apr. 28, 2017), https://www.milkenreview.org/articles/the-rigged-labor-market; *see also* Kenneth G. Dau-Schmidt & Jozie M. Barton, *Non-Compete Covenants*, *in* Oxford Handbook of the Law of Work (forthcoming 2023), https://ssrn.com/abstract=4342965.

4. *See supra* note 2 and accompanying text. On effects of restrictive provisions other than non-competes, see Camilla Alexandra Hrdy & Christopher B. Seaman, *Beyond Trade Secrecy: Confidentiality Agreements That Act Like Noncompetes*, 133 Yale L. J. (forthcoming 2023), https://ssrn.com/abstract=4384661; Heidi Lynne Kurter, *4 Things You Didn't Know About Non-Disclosure Agreements*, Forbes (Jan. 21, 2020 8:55 PM), https://www.forbes.com/sites/heidilynnekurter/2020/01/21/4-things-you-didnt-know-about-non-disclosure-agreements/?sh=46a3e76b7c12 (non-disclosure agreements)

5. *See infra* note 28 and accompanying text.

6. *See infra* note 32 and accompanying text.

7. J.J. Prescott et al., *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2016 Mich. St. L. Rev. 369, 461 (2016); *see also* Orly Lobel, *Gentlemen Prefer Bonds: How Employers Fix the Talent Market*, 59 Santa Clara L. Rev. 663, 698–99 (2020).

8. Evan Starr, The Use, Abuse, and Enforceability of Non-Compete and No-Poach Agreements: A Brief Review of the Theory, Evidence, and Recent Reform Efforts (2019), https://eig.org/wp-content/uploads/2019/02/Non-Competes-Brief.pdf.

9. Pierce, *supra* note 3, at 2. Arguably, the most pernicious use of non-competes occurs in saddling low-wage, fast food workers with non-competes that prevent them from working in other fast-food restaurants for two years after they depart. *See* Dau-Schmidt & Barton, *supra* note 3, at 5.

10. *See*, *e.g.*, Final Judgment, *United States v. eBay, Inc.*, No. 12-cv-5869 (N.D. Cal. Sept. 2, 2014) ECF No. 66. *See generally* Michael Murray, *Antitrust Enforcement in Labor Markets: The Department of Justice's Efforts*, 59 Santa Clara L. Rev. 561 (2020) (Deputy Assistant Attorney General of Antitrust Division's description of Justice Department policies and actions to prevent unlawful employer conduct that restrains employee

compensation, benefits, and job mobility and violating the federal antitrust laws).

11. U.S. Dep't of Just., Antitrust Div., & Fed. Trade Comm'n, Antitrust Guidance for HR Professionals (2016), https://www.justice.gov/atr/file/903511/download.

12. Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R pt. 910), https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule.

13. Lina Khan, *Noncompetes Depress Wages and Kill Innovation*, N.Y. Times (Jan. 9, 2023), https://www.nytimes.com/2023/01/09/opinion/linakhan-ftc-noncompete.html (op-ed by the Chair of the Federal Trade Commission).

14. Non-Compete Clause Rule, 88 Fed. Reg. 3482.

15. *See, e.g.*, Starr, *supra* note 7, at 3–12; Murray, *supra* note 9, at 572 & n.64.

16. *See*, Ashley Cullins, *A New Era of Noncompetes May Shake Up Hollywood Contracts*, Hollywood Rep. (Jan. 12, 2023 12:03 PM), https://www.hollywoodreporter.com/business/business-news/ftc-noncompetes-hollywood-contracts-1235296702/. Employment contracts used in the entertainment business often contain provisions or terms for a duration; i.e., the contract is for a stated term of time (referred to as "fixed term contracts"), often with rights of the employer to renew the duration of the contract. Because many of the contracts involve artistic performers, the contracts were considered personal service contracts for employees rendering "special, unique, unusual, extraordinary, or intellectual character." Because of abuses by the studio employers, California passed legislation that cap the total number of years to a period not exceeding seven years. Cal. Lab. Code § 2855; *see* Jonathan Blaufarb, *The Seven-Year Itch: California Labor Code Section 2855*, 6 Hasting Comm. & Ent. L.J. 653, 655–58 (1984).

17. *See* Posner, *supra* note 2, at 104–08 ("[A] noncompete may cause harm to (1) workers in the labor market to which the employees subject to the noncompete belong, (2) other labor markets that the employer draws from, and (3) the product market that the employer sells into . . .wages generally decline rather than increase in states that enforce or strictly enforce noncompetes . . . Noncompetes can further reduce labor market competition by deterring entry.").

18. For a description of the common law development of the law of non-competes in employment, see Harlan M. Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 629–47 (1960). For a comprehensive look at the contemporary law of restrictive employment practices, see Mark W. Bennett et al., Employment Relationships: Law & Practice ch. 11 (2018).

19. Posner, *supra* note 2, at 95–101.

20. Orly Lobel, *Boilerplate Collusion: Clause Aggregation, Antitrust Law & Contract Governance*, 106 Minn. L. Rev. 877, 878 (2021) (citing Natarajan Balasubramanian et al., *Bundling Postemployment Restrictive Covenants: New Evidence from Firm and Worker Surveys* (July 2021) (unpublished manuscript)).

21. McAdams, *supra* note 3, at 3.

22. Karen Dynan, The Economic Effects of Non-compete Agreements, U.S. Dept. Treasury: Treasury Notes Blog (Mar. 31, 2016), https://www.treasury.gov/connect/blog /Pages/The-Economic-Effects-of-Non-compete-Agreements-.aspx. The report of the Treasury Department can be found at U.S. Dept. Of the Treasury, Non-Compete Contracts: Economic Effects and Policy Implications (2016), https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf.

23. Non-solicitation agreements include an employee agreement not to solicit other employees to leave the current employer, as well as agreeing not to start their own business to go compete against the employer. Confidentiality clauses, or non-disclosure agreements, limit what confidential information such as trade secrets, commercially sensitive materials, proprietary information and other intellectual property can be acquired and used by an employee during the term of employment and often for a certain period of years after the employment ends. Restrictive covenants are often embedded in employment contracts (usually with executive-level employees), in agreements that govern only the restrictive covenants or in workplace policies. *See* Bennett et al., supra note 18, at 43; *see also* Restrictive Covenants: What Are They and Where Can They Be Used, DLA Piper, https://www.dlapiperaccelerate.com/knowledge/2017/restrictive-covenants-what-are-they-and-when-and-where-can-they-be-used.html.

24. Posner, *supra* note 2, at 101–06 (describing the social and economic costs of non-compete provisions in worker contracts.).

25. *See, e.g.*, *Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 947 (7th Cir. 1994).

26. Stephen L. Brodsky, *Restrictive Covenants in Employment and Related Contracts: Key Considerations You Should Know*, A.B.A. (Feb. 8, 2019), https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2019/restrictive-covenants-employment-related-contracts/.

27. Blake, *supra* note 18 at 633–34 (history of use of workers' covenants or agreements not to compete with his employer following termination of the employment relationship); Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 Antitrust L.J. 165 (2020).

28. *Edwards v. Arthur Anderson LLP*, 44 Cal. 4th 937, 946 2008); *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.*, 28 Cal. App. 5th 923 (2018).

29. Cal. Bus. & Prof. Code § 16600.

30. *See, e.g.*, Mich. Comp. Laws § 445.774a(l) (restrictive covenants are enforceable if the agreement is reasonable); Tex. Bus & Com. Code. Ann. § 15.50(a) (non-compete covenants are enforceable if they are ancillary to, and the restraints do not impose a greater restriction than what is necessary to protect goodwill or a business interest) N.D. Cent. Code §§ 9-08-01 to 9-08-09 (general ban on any contracts that restrain an individual from entering into a profession, trade, or business of any kind); Okla. Stat. tit. 15, § 219A (prohibits non-compete contracts except for those written to protect the sale of goodwill of a business, dissolution of a partnership).

31. *See* Bennett et al., *supra* note 19, § 2–11, pp. 15–50 (surveying state court decisions on enforceability of restrictive covenants).

32. *Restatement of Employment Law* § 8.06 (Am. L. Inst. 2015). The Restatement provides that "a covenant . . . restricting the former employee's working activities is enforceable only if it is reasonable tailored in scope, geography, and time to further a protectable interest of the employer." *Id.*

33. *See, e.g.*, mass. Gen. Laws ch. 149, § 24L; D.C. Code §§ 32-581.01–.05.

34. Dallin Wilson & Erik Weibust, *State Attorney General Keep Pressure on FTC to Regulate Non-Competes*, Seyfarth: Trading Secrets (Dec. 13, 2019), https://www.tradesecretslaw.com/2019/12/articles/restrictive-covenants/state-attorneys-general-keep-pressure-on-ftc-to-regulate-non-competes/; Press Release, Cal. Dep't of Just., Attorney General Becerra Renews Call for Nationwide Ban on Non-Compete Agreements, Reminds Businesses of Existing Prohibition in California (Mar. 12, 2020), https://oag.ca.gov/news/press-releases/attorney-general-becerra-renews-call-nationwide-ban-non-compete-agreements.

35. Press Release, Fed. Trade Comm'n, *FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers* (Jan. 4, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers.

36. Non-Compete Clause Rule, 88 Fed. Reg. 3482. According to the proposed rule, the FTC would prohibit employers from (i) entering into, or attempting to enter into a non-compete clause with an employee, and (ii) telling employees that they are subject to a non-compete clause. The proposal would also require employers to terminate any active non-compete clauses and inform those employees that any such contract provision is no longer valid. *Id.*

37. Non-Compete Clause Rulemaking, Fed. Trade Comm'n (Jan. 5, 2023), https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking.

38. Press Release, The White House, *FACT SHEET: Executive Order on Promoting Competition in the American Economy*, (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.

39. *See, e.g.*, Lobel, *supra* note 20, at 87886; Hiba Hafiz, *The Brand Defense*, 43 Berkeley J. Emp. & lab. L. 1, 74–76 (2022); Gregory Day, *Anticompetitive Employment*, 57Am. Bus. L.J. 487, 520–25 (2020).

40. Chuck Loughlin, Hogan Lovells, Key Takeaways from the FTCs Noncompete Workshop (2020), https://www.hoganlovells.com/en/publications/key-takeaways-from-the-ftcs-noncompete-workshop.

41. *No Poach Approach: Division Update Spring 2019*, U.S. Dep't of Just. (Sept. 30, 2019), https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach.

42. *See*, Donald J. Polden, *Restraints on Workers' Wages and Mobility: No-Poach Agreements and the Antitrust Laws*, 59 Santa Clara l. Rev. 579, 588–609 (2020).

43. Lobel, *supra* note 6, at 694–96; *see also* Rachel Argenbright Rioux, Note, *The Necessity for Employer Liability in Unenforceable Non-Compete Agreements*, 86 UMKC L.R. 995 (2018).

44. Posner, *supra* note 2, at 71.

45. *Id.* at 74–75.

46. Lina Khan, *supra* note 13.

47. Cal. Bus & Prof. Code § 16600.

48. *Ixchel Pharma, LLC v. Biogen, Inc*, 9 Cal. 5th 1130 (2020) (providing extensive history of 16600).

49. *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937 (2008) (striking down provision in employment agreement prohibiting employees for one year after termination of employment from soliciting former clients).

50. 9 Cal. 5th 1130.

51. *Id.* at 1158 (citing to *Edwards*, 44 Cal. 4th 937).

52. *Id.* 1160–62. Referring to prior appellate court decision refusing to apply antitrust norms to the interpretation of contract provisions under 16600, the court held: "The similarities between the two statutes stretch beyond their language. They share a statutory purpose and doctrinal heritage in common law prohibitions on restraints of trade. They should therefore be interpreted together." *Id.* at 1160.

53. Cal. Bus. & Prof. Code §§ 16700-16770. The Cartwright Act draws upon the language of the federal Sherman Antitrust Act to prohibit restraints of trade, *In re Cipro Cases*, 61 Cal. 3d 116 (2015).

54. *See, e.g.*, *AMN Healthcare, Inc. v. Aya Healthcare Servs., Inc.*, 28 Cal. App. 5th 923 (2018) (holding that confidentiality and non-disclosure provisions which prevented employees from soliciting other employees to leave employer for one year after termination of employment is void under policy of 16600); *Dowell v. Biosense Webster*, Inc., 179 Cal. App. 4th 564 (2019) (Eighteen-month noncompetition and non-solicitation agreements violate state restraint-of-trade statute by effectively preventing former employees from practicing chosen profession); *Application Grp., Inc. v. Hunter Grp., Inc.*, 61 Cal. App. 4th 881 (1998) (refusing to enforce noncompetition agreements used by Maryland employer to prevent employees from seeking jobs with California-based competitor; agreements found to violate California statutory policy in 16600); *Golden v. Cal. Emergency Med. Physicians.*, 782 F.3d 1083 (9th Cir. 2015) (settlement agreement that included provision barring physician's employment by staffing consortium of medical facilities).

55. Restatement of Employment Law § 2.02 (Am. L. Inst. 2015) ("The employment relationship is not terminable at will by and employer if . . . (a) an agreement between the employer and the employee provides for (i) a definite term of employment . . ."). The author served as a member of the Consultative Group for the *Restatement of Employment Law*.

56. *See* Bennett et al., *supra* note 18, at ch. 2, pp. 3-8 (describing the widespread application of the employment at will doctrine in most U.S. jurisdictions; it is considered the "default rule").

57. *Twentieth Century Fox Film Corp. v. Netflix, Inc.*, No. B304022, 2021 WL 5711822, at *1–4 (Cal. Ct. App. Dec. 2, 2021) (the court decided that the opinion was not to be considered "published").

58. Lobel, *supra* note 6, at 666–85.

59. *Twentieth Century Fox*, 2021 WL 5711822.

60. The court stated that Netflix approached multiple Fox employees and about a dozen similarly left Fox for Netflix. *Id.* at *1–2.

61. *Id.* at *5-6 (discussing California's Unfair Competition Law set forth in Cal. Bus. & Prof. Code § 17200).

62. *Id.* at *1-3.

63. *Id.* at *2.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*, at *8.

70. *Id.* at *6.

71. Section 2855 of the California Labor Code addresses the length of personal services contracts and prohibits such agreements that lock up workers for seven or more years. In the *Twentieth Century Fox* case, Netflix argued that due to Fox's ability to, some contracts could extend beyond the limit in section 2855.

72. 24 Cal. 4th 83, 124–25 (2000)

73. 115 Cal. App. 4th 638, 658 (2004).

74. *Twentieth Century Fox*, 2021 WL 5711822, at *7.

75. *See id.* at *9–10 & n.10.

76. *Id.* at *8-9.

77. *Id.*

78. *Id.* at *9.

79. *Id.*

80. *Id.*

81. 9 Cal. 5th 1130 (2020).

82. *Id.* at 1159–60 (citations omitted).

83. *Id.* at 1160–62.

84. *Twentieth Century Fox Film Corp. v. Netflix, Inc.*, No. B304022, 2021 WL 5711822, at *9 (Cal. Ct. App. Dec. 2, 2021) ("[T]he evidence showed that both [Fox employees] were sophisticated business executives who negotiated their fixed-term employment agreements with Fox at arm's length."). Indeed, it is facially incongruent that so called "sophisticated business executives" would negotiate a substantially below market compensation arrangement that would include several restrictive provisions, both pre-termination and post-termination, without additional consideration for accepting those handcuffs on job mobility.

85. *Id.* at *2.

86. *See* Posner, *supra* note 2, at 101–06; McAdams, *supra* note 3, at 3-6, Pierce, *supra* note 3, at 2-4; *see also* Starr, *supra* note 7, at 7–12.

87. *See* Mark J. Garmaise, *Ties That Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J.L. econ. & Org. 376 (2011) (reporting that 70.2% of large national employers bound their employees with non-compete clauses); Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 U. Chi. L. Rev. 953, 980 (2020) (reporting on studies finding that 58-62% of firms headquartered in California have non-competes in their executive employment contracts).

88. *See* Dau-Schmidt & Barton, *supra* note 3, at 12 ("[E]ven unenforceable non-competes have a negative impact on employees' job search and wages.").

89. Stewart J. Schwab, *Regulating Noncompetes Beyond the Common Law: The Uniform Restrictive Employment Agreement Act*, 98 Ind. L.J. 275 (2022).

90. *Golden v. Cal. Emergency Med. Physicians.*, 782 F.3d 1083, 1093 (9th Cir. 2015).

91. *See*, Micha Mitch Danzig et al., *California Court Deals Blow to Employee Mobility*, MINTZ (Dec. 14, 2021), https://www.mintz.com/insights-center/viewpoints/2226/2021-12-14-california-court-deals-blow-employee-mobility (criticizing the appellate court's treatment of the Netflix's public policy arguments, including that "the contracts here seemed to create *one-sided indentured servitude* for as long as Fox wished to employ each individual." (emphasis added)).

92. Posner, supra note 2, at 102–05 (arguing that most restrictive clause are not negotiated with the employee); DauSchmidt & Barton, *supra* note 2, at 5 ("Even if a non-compete is unenforceable, its existence can raise barrier to job search because most employees don't understand that many non-compete are not enforceable").

93. Posner, *supra* note 2, at 61–75.

94. *See id.* at 75.

95. See *In re Cipro Cases I & II*, 61 Cal. 4th 116, 137 (2015); *Flagship Theaters of Palm Desert, LLC v. Century Theaters, Inc.*, 55 Cal.App.5th 381, 400(2020); *see* also John M. Landry & Kirk A. Hornbeck, *One Hundred Years in the Making: The Cartwright Act in Broad Outline*, 17 Competition: J. Antitrust & Unfair Competition L. Section St. Bar Cal. 7, 18–19 (2008).

96. *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021).

97. *See, e.g.*, *Ben-E-Lect v. Anthem Blue Cross Life & Health Ins. Co*, 51 Cal. App. 5th 867 (2020).

98. *See, e.g.*, *Flagship Theaters*, 55 Cal. App. 5th at 400.

99. *See* Murray, *supra* note 9, at 572–76.

100. It has been argued that restrictive covenants such as non-competes in employment contracts should be characterized as vertical restraints such as exclusive dealing and evaluated under the antitrust rule of reason. However, exclusive dealing occurs by agreement between parties in up-stream or down-stream relationships—buyers and seller. However, employees don't fit this mold because they often don't have the independence of vertically related businesses to simply move to another vendor (or customer). Further, widespread use of non-competes in markets (like fast food or home medical care) would exert the same effect as widespread no-poach agreements.

Posner, *supra*, note 2, at 108–12. This is a reason that the FTC is considering a rule to ban non-competes as an "unfair method of competition" under section 5 of the Federal Commission Act. *See* Dau-Schmidt & Barton, *supra* note 3, at 10.

101. Posner, *supra* note 2, at 109.

102. *See, e.g.*, Lydia DePillis, *Noncompete Clauses Get Tighter, and TV Newsrooms Feel the Grip*, N.Y. Times (Apr. 3, 2023), https://www.nytimes.com/2023/04/03/business/economy/noncompete-clauses-broadcast-news.html (describing the widespread industry use of non-compete clauses on many employees in the news business).

103. *Pittsburgh Logistics Sys., Inc. v. Beemac Trucking, LLC*, 249 A.3d 918, 936 (Pa. 2021) (the no hire agreement "creates a likelihood of harm to the public. . . impairs the employment opportunities and job mobility (of restricted former employees) [because] the effect of its enforcement. . . would have deprived its former employees of their current jobs and livelihoods [and therefore] undermines free competition in the labor market.").

104. *See, e.g.*, *Heyde Cos., Inc. v. Dove Healthcare LLC*, 258 Wis.2d 28 (2002) (agreement between provider or rehabilitation services and a health care facility that hospital would not hire its physical therapists from the rehab services provider was found to be unreasonable); *Commc'n Tech. Sys. v. Densmore*, 583 N.W.2d 125 (S.D. 1998) (South Dakota has a limitation on employee non-compete provisions similar to California's Section 16600). But *see Therapy Servs., Inc. v. Crystal City Nursing Ctr., Inc.*, 239 Va. 385 (1990).

105. *See* Henry Greco, *On the Interpretations of No-Hire Provisions in Pennsylvania—The Case for Utilizing Federal Antitrust Law*, 83 U. Pitt. L. Rev. 661, 667–71, 696–701 (2022).

DORMANT COMMERCE CLAUSE: A POTENTIAL BRAKE ON STATE ANTITRUST LEGISLATION

By Shira Liu[1]

The California Legislature has instructed the California Law Review Commission ("CLRC") to study expanding California's Cartwright Act.[2] The CLRC has been instructed to study whether to outlaw monopolies and redefine antitrust injury.[3] Either of these changes could expand the Cartwright Act beyond the current reach of federal antitrust law.[4] The CLRC has also been instructed to consider adding state-level merger enforcement to the federal regime.[5] These proposals are similar to those in New York's proposed "Twenty-First Century Anti-Trust Act," which would expand New York's antitrust law beyond the current reach of federal antitrust law and implement state-level merger enforcement.[6] New York's bill died in an Assembly Committee in June 2022, but its sponsor is seeking to reintroduce the bill in a future session.[7]

It is well-established that federal antitrust laws do not preempt state antitrust laws.[8] But that does not mean that states have unlimited authority to expand their antitrust laws. One potential limit to state antitrust laws is the dormant Commerce Clause. As state legislatures consider expanding the reach of state antitrust laws, they should do so with an awareness of potential dormant Commerce Clause challenges.

I. FROM DUAL FEDERALISM TO THE DORMANT COMMERCE CLAUSE

State antitrust legislation has outpaced federal antitrust legislation before. When Congress enacted the Sherman Act in 1890, at least eleven states had already enacted their own antitrust laws.[9] Nine more states passed antitrust laws in the decade that followed.[10] But courts circumscribed the spheres of state and federal law very differently at the dawn of the twentieth century compared to current jurisprudence. Under the doctrine of dual federalism interpreting the federal Constitution's grant to Congress "[t]o regulate Commerce . . . among the several States" at the time, state law governed ***intra***state activities, while federal law governed ***inter***state activities.[11] For example, four years before the passage of the Sherman Act, the Supreme Court held that Illinois could not regulate rates for train shipments that included interstate as well as intrastate segments, because only routes "exclusively confined to the limits of the territory of the state" are "within the competency of the Illinois

legislature to regulate."[12] Therefore, the Sherman Act was originally thought of as a "supplement to state regulation," providing a remedy to police interstate commercial activities.[13] This relationship between the reach of state and federal antitrust laws was confirmed in the Supreme Court's first case citing the Sherman Act. In *United States v. E. C. Knight Co.*, the Supreme Court held that sugar refining within a single state was not "commerce"—which would have been reached by the Commerce Clause—but "manufacturing" beyond the reach of the federal government.[14]

Dual federalism ended as the Great Depression and World War II transformed commerce, prompting the Supreme Court to embrace a broad understanding of the Commerce Clause.[15] In 1948, the Supreme Court held in *Mandeville Island Farms v. American Crystal Sugar Co.* that the Sherman Act could reach a price-fixing agreement between sugar growers in the same state.[16] The Court recognized that it was reaching the opposite conclusion from *E.C. Knight* on functionally identical facts, but explicitly rejected the "old ideas," explaining that the "evolv[ed]" inquiry is whether there was any "aspect of or substantial effect upon interstate commerce."[17] The Court observed that if *E.C. Knight* remained in place, the Sherman Act "today would be a weak instrument, as would also the power of Congress, to reach evils in all the vast operations of our gigantic national industrial system antecedent to interstate sale and transportation of manufactured products."[18]

After dual federalism fell out of favor, courts developed the dormant Commerce Clause as a new paradigm to limit state laws affecting commerce in other states.[19] In contrast to the strong geographic restraint on states' reach imposed by dual federalism, the dormant Commerce Clause doctrine restrains states' ability to "discriminate against or burden the interstate flow of articles of commerce."[20] In an approach familiar to antitrust lawyers, under the dormant Commerce Clause doctrine one must first evaluate if a state law should be evaluated under a per se standard or under a balancing test. The per se standard applies if the restriction on commerce is discriminatory—that is, "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[21] Discriminatory state laws are invalid because their "object is local economic protectionism."[22]

State antitrust laws are typically non-discriminatory, meaning that they apply with equal force to in-state and out-of-state economic interests. Non-discriminatory state laws are evaluated under the balancing test articulated in *Pike v. Bruce Church, Inc.*[23] The *Pike* balancing test asks whether the burden on interstate commerce is "clearly excessive in relation to the putative local benefits."[24] Challenges to non-discriminatory laws regulating national sports leagues and transportation, where the burden of state-by-state regulation is easier to conceptualize, have had the most success under the *Pike* balancing test.[25] In contrast, challenges applying the *Pike* balancing test to other state economic or social regulations have had less success.[26] Commentators have decried application of *Pike* to such cases as "notoriously unclear"[27] and "unsettled and poorly understood."[28] In *National Pork Producers Council v. Ross*, Justice Gorsuch, writing for three justices who would have overruled the *Pike* balancing test, asked "How is a court supposed to compare or weigh economic costs (to some) against noneconomic benefits (to others)? . . . Really, the task is like being asked to decide whether a particular line is longer than a particular rock is heavy."[29]

In May 2023, a majority of the Supreme Court in *National Pork Producers* reaffirmed that the *Pike* balancing test continues to apply, even as the Court failed to reach a majority that provided further guidance in its application.[30] The California statute at issue in *National Pork Producers* governed cruelty standards for pork sold, but not necessarily raised, in California. Writing for two justices, Justice Sotomayor wrote that the "complaint fails to allege a substantial burden on interstate commerce."[31] Writing for four justices, Justice Roberts wrote that interstate commerce was substantially burdened because the challengers identified not just compliance costs but "broader, market-wide *consequences*" which require "compliance even by

producers who do not wish to sell in the regulated market."[32] Justice Roberts would have remanded the case "consider whether petitioners have plausibly claimed that the burden alleged outweighs any putative local interests."[33] Separately, the Ninth Circuit has expressed reluctance to assess the "constitutionality of the challenged laws based on our assessment of the benefits of those laws and the State's wisdom in adopting them."[34]

II. APPLYING THE DORMANT COMMERCE CLAUSE TO STATE ANTITRUST LEGISLATION

One relatively clear area of guidance in the caselaw is that Commerce Clause challenges to state antitrust laws fail when they attack the *extraterritorial* application of state laws that are consistent with federal laws. A state does not, for example, violate the dormant Commerce Clause when it enforces its state law condemning price-fixing conduct extraterritorially.[35] Similarly, the Ninth Circuit and the District of Columbia have both rejected dormant Commerce Clause challenges where an in-state plaintiff was harmed by price-fixing conduct that occurred out of state.[36] And a California Court of Appeal rejected a dormant Commerce Clause attack on a Cartwright Act claim that the defendant tied products and services out of state.[37] As the Supreme Court recently explained in *National Pork Producers*, "[i]n our interconnected national marketplace, many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior," and banning laws which have extraterritorial effects would "invite endless litigation and inconsistent results."[38] These holdings are consistent with the shift away from dual federalism, with its focus on the geographic limits of state authority.

There is little precedent to guide the harder question of how expansive state antitrust legislation would fare when faced with dormant Commerce Clause challenges. The lack of precedent specific to antitrust cases is due to the fact that by the time the dormant Commerce Clause doctrine developed several decades ago, most states had "adopted statutes that either copied or paraphrased the language of the Sherman Act," causing state antitrust law to become "increasingly superfluous to the substantively almost identical federal law."[39] Indeed, in 1983 Professor Hovenkamp wrote that "[w]hen state antitrust laws are alleged to be in direct conflict with federal antitrust law, the courts have found them not to be so."[40] Even when states had antitrust statutes on their books, they were rarely enforced.[41] If a new era in state antitrust enforcement dawns, courts will no longer be able to avoid these inconsistencies. Courts will have no choice but to evaluate these new and expansive state antitrust laws under the balancing test, and determine whether the laws place a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits."[42]

The 1979 opinion in *State of Connecticut v. Levi Strauss & Co.* encapsulates the uncertainty in the law.[43] In that case, Levi Strauss & Co. argued that application of Connecticut's antitrust law was unconstitutional because "to the extent state and federal laws differ and state statutes are more exacting, Levi Strauss fears that it will have to comply with the strictest standard, which would then in effect preempt federal law."[44] The court appeared to brush off this argument, commenting that the burden of meeting a stricter antitrust standard in one state is limited—"far less," for example, "than that of different and possibly conflicting requirements for equipment moving along interstate highways."[45] Nevertheless, the court conceded that "the extent of the differences" between federal and state law "may affect constitutionality" and remanded the case to the state courts to interpret the state statute, with no further guidance.[46]

A few cases have recognized the state interest in protecting consumers when applying the *Pike* balancing test. In *In re Lorazepam & Clorazepate Antitrust Litigation*, the court resolved the balancing test with little analysis beyond that promoting competition by curbing monopolistic practices is a "legitimate state purpose."[47] In *Guidance Endodontics LLC v. Denstply International, Inc.*, a small dental supplier challenged its much-larger rival and supplier for violating various laws including the New Mexico

Unfair Practices Act.[48] The District of New Mexico rejected a dormant Commerce Clause defense because, although "different states may have different impressions of what constitutes unfair conduct," the "states' interest in" the protection of its consumers "is strong, and the countervailing burden on interstate commerce caused by restricting unfair and deceptive practices in situations in which the state can exercise personal jurisdiction over the defendant is relatively weak.[49]

Both *In re Lorazepam* and *Guidance Endodontics* indicate that local interests in enforcing antitrust laws weigh heavily in the *Pike* balancing test. These cases cannot be easily reconciled with last year's decision in *Association for Accessible Medicines v. Bonta*.[50] The plaintiff in that case was an association comprised of manufacturers and distributors of generic medication that challenged California's AB 824.[51] AB 824 codified the presumption that reverse payment settlements are anticompetitive.[52] This codified presumption puts California law at odds with federal law, under which reverse payment settlements are evaluated with a "quick look."[53] The court granted the challengers to AB 824 a preliminary injunction, agreeing that the association was likely to succeed on the merits of its dormant Commerce Clause argument.[54] While the court's analysis focused on the extraterritorial effect of the law—an analysis largely superseded by *National Park Producers*[55]—the court ultimately appeared to be persuaded by a hypothetical positing that "[i]f two parties settle a patent suit in Delaware on terms that AB 824 deems unlawful, the settling parties . . . would be liable for severe penalties under California law."[56] That is, the court was motivated by the fact that California was imposing a limit inconsistent with federal law and the laws of other states.[57] Again, AB 824 operates only to change the burden from the federal standard in one type of fact pattern. Applying this logic broadly would not leave much room for state antitrust laws to expand beyond federal laws.

If a state imposes a significant merger control statute, the court is likely to look to two early dormant Commerce Clause involving challenges to state corporate law. In *Edgar v. Mite Corp.*, a plurality of the Supreme Court struck an Illinois statute regulating tender offers for companies owned by at least ten percent Illinois shareholders.[58] The Court held that "the burden the Act imposes on interstate commerce is excessive in light of the local interests the Act purports to further."[59] Five years later, in *CTS Corp. v. Dynamic Corp. of America*, the Supreme Court rejected a challenge to an Indiana statute that conditioned acquisition of an Indiana corporation on approval of a majority of shareholders, explaining that it was within the state's "authority to define the voting rights of shareholders."[60] These decisions do not provide a sound basis for predicting whether more expansive state-level merger control will be held to excessively burden interstate commerce under the *Pike* balancing test. Challengers would likely argue that merger control is "inherently national," bolstered by Chief Justice Roberts' dissent in *National Pork Producers*.[61] Justice Roberts criticized the Ninth Circuit for failing to consider whether "by effectively requiring compliance by farmers who do not even wish to ship their product into California," the challenged pork cruelty standard "has a 'nationwide reach' similar to the regulation at issue in *Edgar*."[62] On the other hand, defenders would argue that requiring merging companies to meet a stricter standard in one state does not diminish from the federal merger control system.

III. CONCLUSION

Dormant Commerce Clause challenges will undoubtedly grow more frequent if states extend their antitrust laws beyond the bounds of federal enforcement. It is hard to predict the outcome of such challenges, as the law is currently unsettled and will develop as more cases are litigated.

In the meantime, when drafting an antitrust law that extends beyond the reach of federal antitrust law, state legislators would be wise to keep potential dormant Commerce Clause challenges in mind. For example, drafters could consider including findings of fact regarding the benefits of the law to the state's consumers and businesses. Drafters could also consider limiting the applicability of the law to

corporations that have substantial connections to the state or to conduct that has a substantial effect on consumers within the state. State merger control laws are more likely to succeed, for example, if they are tied to the local benefits of the law, such as a significant minimum threshold of activity affected within the state. Merger control laws targeted at clearly local markets, such as health care provider mergers, are even more likely to succeed.[63]

---

1. Counsel, Crowell & Moring. The views expressed herein do not necessarily represent the views of Crowell & Moring or its clients.

2. Assemb. Con. Res. 95, 2021-2022 Reg. Sess. (Ca. 2021).

3. Antitrust Law - Study B-750, California L. Rev. Comm'n (May 16, 2023), available at <http://www.clrc.ca.gov/B750.html>.

4. A flurry of federal antitrust bills was proposed in 2021-2022, but none of the substantive provisions passed before Democrats lost control of the House in November 2022 and it is unlikely that any of these bills will pass in the near term. *See* Matthew Perlman, *Mid-Year Update: No Antitrust Redux Yet Despite Stack Of Bills*, Law360 (July 13, 2022), https://www.law360.com/articles/1510974/mid-year-update-no-antitrust-redux-yet-despite-stack-of-bills (providing overview of then-pending legislation).

5. Assemb. Con. Res. 95, 2021-2022 Reg. Sess. (Cal. 2021).

6. S. S933A, 2021-2022 Leg. Sess. (N.Y. 2021); *see also* Assem. A1812A, 2021-2022 Leg. Sess. (N.Y. 2021)

7. *See* Kate Lisa, *No major changes expected to stalled New York antitrust reforms*, Spectrum News 1 (June 23, 2022, 8:20 PM), https://spectrumlocalnews.com/nys/central-ny/politics/2022/06/23/no-major-changes-expected-to-stalled-antitrust-reforms.

8. *California v. ARC Am. Corp.*, 490 U.S. 93, 102 (1989) (state antitrust statutes allowing recovery for indirect purchasers not preempted because "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies" (citing 21 Cong. Rec. 2457 (1890) (remarks of Sen. Sherman))); *see also Exxon Corp. v. Governor of Md.*, 437 U.S. 121, 132 (1978) ("[I]t is illogical to infer that by excluding certain competitive behavior from the general ban against discriminatory pricing, Congress intended to pre-empt the States' power to prohibit any conduct within that exclusion."); *Shell Oil Co. v. Younger*, 587 F.2d 34, 36 (9th Cir. 1978) (state price discrimination provision is not preempted even though it is broader than federal law), *cert. denied*, 440 U.S. 947 (1979); *R. E. Spriggs Co. v. Adolph Coors Co.*, 37 Cal. App. 3d 653, 6591974) (rejecting argument that the "relevant federal antitrust legislation has evidenced a congressional intent to occupy the field"); *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 668 F.2d 1014, 1049 (9th Cir. 1981) (California statute that presumes that pricing below average total cost is anticompetitive not preempted by federal law, which presumed pricing above average variable cost was permissible, because federal law "does not create a federal right to set such prices").

9. *See State ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147, 1154-55 (1988) (citing pre-1890 antitrust statutes in Kansas, Nebraska, Iowa, Michigan, Tennessee, Maine, Missouri, Mississippi, North Dakota, South Dakota, and Texas); *see also* James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. Pa. L. Rev. 495, 497-507 (1987) (describing early state antitrust laws).

10. Brief of Former State Antitrust Enforcement Officials & Antitrust Law Professors as Amici Curiae ISO Appellants and Reversal, *State of New York v. Facebook*, No. 21-7078, 2022 WL 266807, at *3 n.8 (2d. Cir. Jan. 28, 2022); *see also Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 772 (2010) ("The Cartwright Act was passed in 1907 as part of a wave of turn-of-the-century state and federal legislation intended to stem the power of monopolies and cartels.").

11. *See* Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 Ind. L.J. 375, 379-82 (1983); Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 2403a (4th and 5th Editions 2015-2021); *see also Pennoyer v. Neff*, 95 U.S. 714, 720 (1877) (applying a similar construct to personal jurisdiction, and explaining that the "authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established").

12. *Wabash, St. L. & P. Ry. Co. v. Illinois*, 118 U.S. 557, 582 (1886); *see also* Areeda & Hovenkamp, *supra* note 11, ¶ 2403a.

13. *See* Note, *The Commerce Clause and State Antitrust Regulation*, 61 Colum. L. Rev. 1469, 1473-74 (1961) (discussing debates during the consideration of the Sherman Act); *see also* Hovenkamp, *supra* note 11, at 379 ("The Senator's paradigm was simple: [I]f a

restraint on trade was located entirely within a state, it was out of congressional reach. On the other hand, if a combination or conspiracy was located in more than one state, then the entire combination was beyond the jurisdictional power of the state legislature and the state court.").

14. 156 U.S. 1 (1895).

15. "Between 1936 and 1995, the Court upheld every federal statute regulating private conduct challenged as beyond Congress's power under the Commerce Clause. . . . As one leading commentator observed, 'by the 1980s the Commerce Clause game seemed about over. Case book editors were driven to dream up wild hypotheticals to try to find ways to encourage students to consider whether the commerce power had any practical limits at all.'" A. Christopher Bryant, *The Third Death of Federalism*, 17 Cornell J. L. & Pub. Pol'y 101, 138 (citations excluded). For example, in *Wickard v. Filburn*, the Supreme Court held that "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." 317 U.S. 111, 125 (1942). The Supreme Court commented that *Wickard* and other contemporary cases "ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope." *United States v. Lopez*, 514 U.S. 549, 556 (1995). *Wickard* concerned a wheat regulation, but noted in dicta that the Sherman Act was the second "federal resort to the commerce power" and criticized *E. C. Knight* for limiting its reach. 317 U.S. at 121. Three years later, in what remains the Supreme Court's "canonical" personal jurisdiction decision, the Supreme Court similarly transformed personal jurisdiction jurisprudence as well. It held in *International Shoe v. Washington* that personal jurisdiction "depends on the defendant's having such 'contacts' with the forum State that 'the maintenance of the suit" is "reasonable, in the context of our federal system of government,' and 'does not offend traditional notions of fair play and substantial justice.'" *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021) (quoting *Int'l Shoe Co. v. State of Wash*, 326 U.S. 310, 316-17 (1945)).

16. 334 U.S. 219 (1948).

17. *Id.* at 233-34.

18. *Id.* at 233.

19. *See S.C. State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177 (1938); *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945); *see also* Sam Kalen, *Dormancy Versus Innovation: A Next Generation Dormant Commerce Clause*, 65 Okla. L. Rev. 381, 391-400 (2013).

20. *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of the State of Or.*, 511 U.S. 93, 98 (1994); *see also Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087-88 (9th Cir. 2013). The dormant Commerce Clause has been criticized as unmoored from the text of the Constitution. *See, e.g.*, *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 254-65 (1987) (Scalia, J., concurring); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 Duke L.J. 569, 581-90 (1987).

21. *Or. Waste Sys., Inc.*, 511 U.S. at 99; *see also Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992).

22. *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 390 (1994); *see also Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1153 (2023) ("Today, this antidiscrimination principle lies at the 'very core' of our dormant Commerce Clause jurisprudence."); *see also id.* at 1164-65 ("Before the Constitution's passage, Rhode Island imposed special taxes on imported "New-England Rum"; Connecticut levied duties on goods "brought into the State, by Land or Water, from any of the United States of America"; and Virginia taxed "vessels coming within the State from any of the United States.") (cleaned up).

23. 397 U.S. 137 (1970). In *National Pork Producers*, the Supreme Court suggested that the *Pike* test is not clearly delineated from the antidiscrimination rule, but instead "serves as an important reminder that a law's practical effects may also disclose the presence of a discriminatory purpose." 143 S.Ct. at 1157; *see also id.* at 1166 (Sotomayor, J., concurring); *id.* at 1167 (Roberts, C.J., concurring).

24. 397 U.S. at 142.

25. For example, in *Raymond Motor Transportation, Inc. v. Rice*, trucking companies challenged a Wisconsin law that governed the length and configuration of trucks that could be operated within the state. 434 U.S. 429, 439 (1978). The balancing inquiry was relatively straightforward because the trucking companies demonstrated that the state law imposed "a substantial burden on the interstate movement of goods" while the state "virtually defaulted in its defense of the

regulations as a safety measure." *Id.* at 444, 445. In *Partee v. San Diego Chargers Football Co.*, the California Supreme Court was "satisfied that national uniformity required in regulation of baseball and its reserve system is likewise required in the player-team-league relationships challenged . . . and that the burden on interstate commerce outweighs the state interests in applying state antitrust laws to those relationship." 668 P.2d 674, 679 (Cal. 1983).

26. *See, e.g.*, *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 950 (9th Cir. 2013) (rejecting dormant Commerce Clause challenge to California law banning sale of products that were the result of force feeding because law did not substantially burden interstate commerce); *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1155, 1156 (9th Cir. 2012) (rejecting dormant Commerce Clause challenge to California laws regulating licensed opticians the sale of prescription eyewear because laws did not substantially burden interstate commerce).

27. Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 Notre Dame L. Rev. 1057, 1060 (2009).

28. Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 789 (2001).

29. *Nat'l Pork Producers*, 143 S. Ct. at 1159-60 (plurality). *But see id.* at 1166 (Sotomayor, J.) ("I acknowledge that the inquiry is difficult and delicate, and federal courts are well advised to approach the matter with caution. Yet, I agree with the Chief Justice that courts generally are able to weigh disparate burdens and benefits against each other, and that they are called on to do so in other areas of the law with some frequency.").

30. 143 S. Ct. 1142, 1174 n.3 (2023) (Kavanaugh, J., concurring) ("six Justices agree[d] to retain the *Pike* balancing test"). Therefore, *National Pork Producers* "does not shut the door on" "*Pike* claims that do not allege discrimination or a burden on an artery of commerce." *Id.* at 1166 (Sotomayor, J., concurring); *see also id.* at 1168 (Roberts, C.J., concurring) ("As a majority of the Court agrees, *Pike* extends beyond laws either concerning discrimination or governing interstate transportation.").

31. *Id.* at 1166 (Sotomayor, J., concurring).

32. *Id.* at 1169, 1171 (Roberts, C.J.) (cleaned up).

33. *Id.* at 1169.

34. *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1155-56 (9th Cir. 2012).

35. *AT&T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1109, 1113 (9th Cir. 2013) (rejecting challenge to a Cartwright Act claim in a case in which price-fixed goods were purchased outside of California but some of defendants' price fixing agreements allegedly took place in California).

36. *See Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 993-94 (9th Cir. 2000) (claim could be brought under California's Cartwright Act where plaintiffs alleged price-fixing conduct occurred out of state but caused California cheese makers to purchase milk at artificially depressed prices); *In re Lorazepam & Clorazepate Antitrust Litig.*, 295 F. Supp. 2d 30, 49-50 (D.D.C. 2003) (holding that Illinois Antitrust Act reached price-fixing allegations brought by an Illinois corporation for indirect purchases of drugs sold in Texas and New Mexico, and rejecting dormant Commerce Clause challenge in part because the Illinois Antitrust Act "does not directly conflict with that of the Sherman Act"); *see also Heath Consultants v. Precision Instruments*, 527 N.W.2d 596, 606-07 (Neb. 1995) (allowing nonresident company to assert a Nebraska antitrust claim against another nonresident company for a tying arrangement perpetrated outside of Nebraska which ultimately affected Nebraska consumers, and explaining that the burden on interstate commerce was low when the state law was consistent with federal law); *Olstad v. Microsoft Corp.*, 700 N.W.2d 139, 158 (Wisc. 2005) (holding that Wisconsin's antitrust statute could regulate wrongful conduct that affects and impacts people in its state, even where the illegal activity occurred predominantly or exclusively outside the state).

37. *RLH Indus., Inc. v. SBC Commc'ns, Inc.*, 133 Cal. App. 4th 1277, 1289-90 (2005); *see also Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 1058 (N.D. Cal. 2021) (rejecting argument that the Commerce Clause requires restricting the scope of an injunction issued under the UCL to California where defendant is headquartered in California and "commerce affected by the conduct that the Court has found to be unfair takes place at least in part in California").

38. 143 S. Ct. at 1153-54; *see also id.* (Petitioners' argument "that our dormant Commerce Clause cases suggest an additional and 'almost *per se*' rule forbidding enforcement of state laws that have the 'practical effect of controlling commerce outside the State'" "falters out of the gate").

39. Areeda & Hovenkamp, *supra* note 11, ¶ 2401a; *see also* Note, supra note 13, at 1472 (lamenting a lack of state-level antitrust enforcement but predicting "a growing interest in the enforcement of state antitrust laws").

40. Hovenkamp, *supra* note 11, at 390 n.76; *see also RLH Indus.*, 133 Cal. App. 4th at 1289-90 (reasoning in part that the law "cannot create any inconsistency by projecting California's prohibition of tying arrangements into other states, because the Sherman Act already bars tying arrangements").

41. James A. Rahl, *Toward A Worthwhile State Antitrust Policy*, 39 Tex. L. Rev. 753, 754 (1961) ("Except for occasional appearance in private litigation, the laws in most of the remaining states have been comatose for many years."); *see also May*, *supra* note 9, at 498 ("In 1961, a leading commentator could declare enforcement of state antitrust laws 'virtually dead' and openly wonder whether it would have been unethical in recent years for lawyers in most states to tell their clients to ignore them. In 1900 or 1910, businesses and business lawyers in several states could overlook the possibilities of state-level challenge to anticompetitive activity only at substantially greater risk.") (discussing Rahl, *Toward A Worthwhile State Antitrust Policy*)).

42. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

43. 471 F. Supp. 363, 368 (D. Conn. 1979).

44. *Id.*

45. *Id.*

46. *Id.*

47. 295 F. Supp. 2d 30, 49 (D.D.C. 2003).

48. 663 F. Supp. 2d 1138, 1153-54 (D.N.M. 2009).

49. *Id.* at 1154.

50. *Ass'n for Accessible Meds. v. Bonta*, 562 F. Supp. 3d 973, 977 (E.D. Cal. 2021), *modified*, No. 2:20-CV-01708-TLN-DB, 2022 WL 463313 (E.D. Cal. Feb. 15, 2022).

51. Codified at section 134002 of the Health & Safety Code.

52. Reverse payment settlements arise when a generic drug manufacturer challenges a patent owned by an approved brand-name drug owner, and the parties' settlement prevents the generic from producing the in return for a payment. *See FTC v. Actavis, Inc.*, 570 U.S. 136, 140-44 (2013); *see also* C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as A Regulatory Design Problem*, 81 N.Y.U. L. Rev. 1553, 1563-73 (2006). AB 824 followed *In re Cipro Cases I & II*, 61 Cal. 4th 116, 154 (2015), in which the California Supreme Court held that certain reverse payment settlements establish a prima facie case that the settlement is anticompetitive.

53. *Actavis*, 570 U.S. at 159.

54. *Ass'n for Accessible Meds.*, 562 F. Supp. 3d at 987.

55. *See supra* note 38.

56. *Ass'n for Accessible Meds.*, 562 F. Supp. 3d at 986 (quoting plaintiff's brief).

57. *See id.* at 981 (quoting a declaration by one of the association's members averring that "the member recently decided, in light of AB 824. . . . to pull out of a tentative settlement agreement").

58. 457 U.S. 624 (1982).

59. *Id.* at 640; *see also id.* at 643-46 (*Pike* analysis).

60. 481 U.S. 69, 89 (1987); *see also id.* at 89-94 (*Pike* analysis).

61. *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1171 (2023) (Roberts, C.J., dissenting in part).

62. *Id.*

63. For example, Oregon H.B. 2362 went into effect in 2022. It requires 180 days' notice to the Oregon Health Authority of "material change transactions" involving health professionals, hospitals, and insurers. 2021 Oregon House Bill No. 2362, Oregon Eighty-First Legislative Assembly. Nevada's 2021 S.B. 329 requires hospitals and physician groups to notify the Nevada Department of Health and Human Services of transactions involving physician group practices, including hospitals. *See* 2021 Nev. S. Bill No. 329, Nev. Eighty-First Reg. Sess.

ANALYSIS GROUP

Excellence. Rigor. Impact.

Our antitrust and competition experience includes some of the most significant mergers, government investigations, and litigations in recent years – many of which have involved groundbreaking analyses of competitive markets.

Top law firms, Fortune Global 500 companies, and government agencies rely on our consultants and affiliated experts to provide in-depth analyses across a wide range of geographies, industries, and issues relating to the competitive effects of proposed mergers; class action certification, liability, and damages; monopolization and exclusionary practices; vertical restraints; and collusion.

AnalysisGroup.com

Boston Chicago Dallas Denver Los Angeles Menlo Park New York
San Francisco Washington, DC Beijing Brussels London Montreal Paris

ANTITRUST AND UNFAIR COMPETITION LAW

CALIFORNIA LAWYERS ASSOCIATION
400 Capitol Mall, Suite 650
Sacramento CA, 95814

CALIFORNIA LAWYERS ASSOCIATION

CLA Membership Plans:
Choose what works for you!

As the largest, established network for California attorneys, CLA provides a platform for you to make meaningful connections and to increase your visibility. All our membership plans are packed with incredible value and designed to meet you where you are in your career and practice.

Choose one of our plans to access member-exclusive benefits:

- The **Introductory** membership is for members who want access to all CLA-wide benefits.
- The **Standard** membership includes access to 1 Section of your choice. Add additional Sections anytime for $40 each.
- The **All-Access** membership is for members who want it all. Receive digital access to all 18 Sections.

If you have any questions or concerns, please do not hesitate to contact us at info@calawyers.org.

Learn more at **CALAWYERS.ORG**