

# The Effective Competition Standard: A New Standard for Antitrust

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*America's failing antitrust system is, in large part, to blame for today's market power problem. Lax antitrust law and enforcement have allowed troubling trends like corporate consolidation to remain unchallenged, further embedding our skewed economy. In highly concentrated markets, individuals have limited choice and little power to pick their price, quality, or provider for the goods and services they need; workers are met with powerful employers and have little agency to shop around or bargain for competitive wages and benefits; and suppliers can't reach the market without paying powerful intermediaries or succumbing to acquisition.*

*Our Essay offers an alternative to the courts' consumer welfare standard. Ambiguous and inadequate, the consumer welfare standard identifies threats to competition only by the potential consequences for consumers and ignores adverse effects on workers, suppliers, product quality, and innovation.*

*Our effective competition standard would restore the primary aim of antitrust laws—namely, to promote competition wherever in the economy it has been compromised, including throughout supply chains and in the labor market. These changes are essential to protect competitive markets in the United States, as well as individuals and the economy at large, by deconcentrating private power.*

## INTRODUCTION

America, as legal and economic scholars are increasingly noting, has a market power problem. The emerging evidence points to less competition, higher markups, greater concentration, and widening wealth and income inequality. The current state of competition law benefits the select few—at the expense of nearly everyone else.

Our antitrust laws are supposed to deal with concentrated economic power. The problem is that the laws have been hijacked in two ways. First, ideologues narrowed the substance of antitrust from addressing a variety of goals to focusing solely on the concept

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of consumer welfare—namely, that harm to competition within the legal meaning of the antitrust laws consists solely of harm to consumers and their welfare, as measured almost exclusively by price and quantity effects in output markets. Second, some courts and enforcers went even further, declining to find antitrust liability in conduct that harms consumers on the theory that it carries other benefits, like long-run economic growth. Recent US Supreme Court decisions, including *Ohio v American Express Co.*,<sup>1</sup> and the US District Court’s decision to allow the AT&T/Time Warner merger<sup>2</sup> illustrate how antitrust, under the prevailing consumer welfare standard, has been weakened and distorted beyond all recognition. Courts have elevated the burden of proof on the government and other antitrust plaintiffs to such an extent that the Sherman<sup>3</sup> and Clayton<sup>4</sup> Antitrust Acts have become unenforceable for many anticompetitive practices, other than cartels.

If the United States continues with a light-if-any-touch antitrust review of mergers and turns a blind eye to abuses by dominant firms, concentration and crony capitalism will likely increase, competition and our well-being will decrease further, and power and profits will continue to fall into fewer hands. Startups, small and midsize firms, and Americans more broadly—as workers, consumers, and democratic citizens—will be left to the beneficence or spite of a few powerful, but arbitrary, corporations.

This trend is reversible if we restore antitrust as a guarantor of effective competition. To tackle today’s market power problem, we offer an *effective competition* antitrust standard to replace the prevailing *consumer welfare* standard, which courts and scholars have interpreted differently (and at times inconsistently). The effective competition standard restores the primary aim of the antitrust laws—namely, the dispersion and deconcentration of significant private power wherever in the economy it is to be found, including throughout supply chains and in the labor market.

Antitrust does not operate at the margins. In reality, antitrust has been enormously important for structuring the economy now and in the past, either in favor of concentrating economic power or against it. Although this Essay articulates antitrust policies aimed at deconcentrating power, we recognize that antitrust

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<sup>1</sup> 138 S Ct 2274 (2018).

<sup>2</sup> *United States v AT&T Inc.*, 310 F Supp 3d 161, 253–54 (DDC 2018), *affd* 916 F3d 1029 (DC Cir 2019).

<sup>3</sup> 26 Stat 209 (1890), codified as amended at 15 USC §§ 1–7.

<sup>4</sup> 38 Stat 730 (1914), codified as amended in various sections of Title 15 and Title 29.

alone cannot accomplish this urgent objective. Progressive taxation, labor reforms, effective (not captured) sector-specific regulation, corporate governance, and social welfare policies are only some of the other policy tools necessary. Thus, while strong anti-trust enforcement is often an important condition for preserving a competitive market structure, policymakers should not confine themselves to that tool.

To understand the need for an effective competition standard, it is helpful to initially take a historical perspective. Part I describes the rise of the consumer welfare standard since the late 1970s and the operational difficulties that the courts and agencies have experienced in applying this standard. As recent empirical research reveals, the consumer welfare standard, paradoxically, has neither helped consumers nor their welfare. Instead, the US economy has a market power problem, with a small number of firms reaping significant supracompetitive profits in many industries.

To promote competition and a more inclusive economy, Part II outlines an effective competition standard. Part III outlines changes to antitrust interpretation, law, and enforcement that would occur under the effective competition standard. Part IV addresses alternative legal and political means by which these changes could be accomplished.

#### I. THE RISE OF THE CONSUMER WELFARE STANDARD SINCE THE LATE 1970S AND ENSUING OPERATIONAL DIFFICULTIES IN APPLYING IT

In 1987, one scholar remarked that the terms “efficiency” and “consumer welfare” have “become the dominant terms of antitrust discourse without any clear consensus as to what they exactly mean” and that consumer welfare is “the most abused term in modern antitrust analysis.”<sup>5</sup> This remains true today.

Before 1975, the Supreme Court never mentioned the term “consumer welfare” in an antitrust case.<sup>6</sup> That changed with the rise of the Chicago School of Economics in the late 1970s, symbolized by the publication of then-Professor Robert Bork’s book *The*

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<sup>5</sup> Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 NYU L Rev 1020, 1020, 1032 (1987). See also Walter Adams and James W. Brock, *The Antitrust Vision and Its Revisionist Critics*, 35 NY L Sch L Rev 939, 943–46 (1990).

<sup>6</sup> See *United States v Citizens & Southern National Bank*, 422 US 86, 131 n 1 (1975) (Brennan dissenting).

*Antitrust Paradox* in 1978.<sup>7</sup> Over the past forty years, Chicago School–influenced enforcers viewed the political and moral cases for antitrust as insufficiently rigorous and somehow diluting antitrust policy from its true purpose: promoting economic efficiency, which the Chicago School frequently conflated with consumer welfare.<sup>8</sup> Under their view, antitrust relied on an incomplete and distorted conception of competition.<sup>9</sup>

The Chicago School assumed that markets are self-correcting and that free entry is a “natural” condition that erodes incumbent market power.<sup>10</sup> These substantive economic assumptions have never achieved hegemony inside or outside of antitrust economics, but they nonetheless seriously affected both non–Chicago-affiliated scholars and the judiciary. That’s because the Harvard School had its own, somewhat derivative, reasons for doubting the efficacy of robust antitrust enforcement—namely, that it was not properly aimed at moral or political goals and that antitrust intervention might serve to inflict more harm than good on the efficient operation of the economy.<sup>11</sup>

Thus, there was no need for robust antitrust enforcement to create or maintain the conditions necessary to make competition effective. Contemporary antitrust consensus derives from the view that market forces could naturally correct the episodic instances of market power and could do so far better and more quickly than government intervention. Furthermore, interventionist antitrust enforcement was more likely to create durable

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<sup>7</sup> See generally Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books 1978).

<sup>8</sup> See Mark Glick, *The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust*, 63 *Antitrust Bull* 455, 485–92 (2018); Maurice E. Stucke, *Reconsidering Antitrust’s Goals*, 53 *BC L Rev* 551, 563–66 (2012).

<sup>9</sup> For a description of the Chicago School’s conception of competition, see Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 *U Pa L Rev* 925, 931–33 (1979). For some criticisms, see Amanda P. Reeves and Maurice E. Stucke, *Behavioral Antitrust*, 86 *Ind L J* 1527, 1548, 1554–70 (2011); Maurice E. Stucke, *Better Competition Advocacy*, 82 *St John’s L Rev* 951, 957, 979–87 (2008).

<sup>10</sup> See Stucke, 82 *St John’s L Rev* at 957 (cited in note 9).

<sup>11</sup> See William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 *Colum Bus L Rev* 1, 17–33; William E. Kovacic, *The Chicago Obsession in the Interpretation of U.S. Antitrust History*, 87 *U Chi L Rev* 459, 464–66, 478–82 (2020).

market power than to erode it.<sup>12</sup> The authorities accepted the increased risks from concentrated telecommunications<sup>13</sup> and financial<sup>14</sup> industries, among others, for the prospect of future efficiencies and innovation, with the possible harm they might cause to competition assumed to be “disciplined” by the omnipresent threat of free entry enabled by inevitably procompetitive “technological change.”

Under the consumer welfare standard, antitrust enforcement, outside of cartel prosecutions, declined. By the start of the Trump administration, the US had neither a popular antitrust movement nor many significant antitrust prosecutions.<sup>15</sup> For example, over the past twenty years, the Department of Justice (DOJ) has brought only one major monopolization case under Section 2 of the Sherman Act, against Microsoft.<sup>16</sup> And even though the government prevailed on some of its charges, the appellate court took the opportunity to weaken some aspects of the law and raise procedural burdens on plaintiffs.<sup>17</sup> The *Microsoft* appellate ruling and even the DOJ’s decisions reflected a profound ambivalence about whether antitrust could be effective at structuring markets to benefit the public.<sup>18</sup> In contrast to the past twenty-year drought, the DOJ, between 1970 and 1972, brought thirty-nine civil and three criminal cases against monopolies and oligopolies.<sup>19</sup>

As we elaborate elsewhere,<sup>20</sup> the consumer welfare standard has numerous infirmities, including the following:

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<sup>12</sup> See Frank H. Easterbrook, *The Limits of Antitrust*, 63 *Tex L Rev* 1, 17–40 (1984). See also Bork, *Antitrust Paradox* at 406–07 (cited in note 7).

<sup>13</sup> See Tim Wu, *The Master Switch: The Rise and Fall of Information Empires* 244–45 (Knopf 2010).

<sup>14</sup> See Simon Johnson and James Kwak, *Thirteen Bankers: The Wall Street Takeover and the Next Financial Meltdown* 12, 203 (Pantheon 2010); Jesse W. Markham Jr, *Lessons for Competition Law from the Economic Crisis: The Prospect for Antitrust Responses to the “Too-Big-to-Fail” Phenomenon*, 16 *Fordham J Corp & Fin L* 261, 291 (2011).

<sup>15</sup> Kovacic, 87 *U Chi L Rev* at 479–80 (cited in note 11).

<sup>16</sup> See *United States v Microsoft Corp*, 87 *F Supp 2d* 30, 35 (DDC 2000), *affd in part, revd in part*, 253 *F3d* 34, 118–19 (DC Cir 2001). See also generally Department of Justice, *Antitrust Division Workload Statistics FY 2009–2018* (July 1, 2019), archived at <https://perma.cc/F7DC-JDUE>; Department of Justice, *Antitrust Division Workload Statistics FY 2000–2009* (Apr 4, 2012), archived at <https://perma.cc/2MTB-J8LU>.

<sup>17</sup> See *Microsoft*, 253 *F3d* at 80–81, 107.

<sup>18</sup> See Andrew I. Gavil and Harry First, *The Microsoft Antitrust Cases: Competition Policy for the Twenty-First Century* 116–31 (MIT 2014).

<sup>19</sup> Department of Justice, *Antitrust Division Workload Statistics FY 1970–1979*, archived at <https://perma.cc/35CW-G5N9>.

<sup>20</sup> See Marshall I. Steinbaum and Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust* \*11–21 (Roosevelt Institute, Sept 2018), archived at <https://perma.cc/AR68-6XKN>.

- *Under the consumer welfare standard, competition is diminishing, which harms consumers, workers, and innovation:* The infirmities of the consumer welfare standard would be less alarming if the welfare of consumers actually increased over the past forty years. If that were the case, one could quibble that their welfare might have increased a little more under a better antitrust standard, but it would be a question of degree. The sad reality, however, is that competition, under the consumer welfare standard, has diminished significantly in many markets. The consumer welfare standard, it turns out, benefited neither consumers nor their welfare.
- *Difficulty in Reconciling the Consumer Welfare Standard with Upstream Abuses:* The standard is hard to reconcile with plainly anticompetitive restraints that do not affect consumers and instead affect only upstream sellers and workers, such as no-poaching agreements.
- *No Well-Accepted Definition:* The consumer welfare standard has not fostered global convergence. It means different things to different competition agencies around the world.
- *Rule of Law Concerns:* Given the varying definitions of consumer welfare that exist, it is not surprising that courts have reached inconsistent results based on their own conceptions of consumer welfare. Rather than an objective standard, the consumer welfare standard invites considerable subjectivity—and, more to the point, tolerance of anticompetitive practices.

Consequently, the consumer welfare standard provides little guidance as an antitrust goal. There remains no consensus on what the term actually means or who the consumers are. Under any of the current definitions, there remains “no easy, non-contestable method for quantifying harm to consumer welfare that will work for all cases.”<sup>21</sup> Moreover, under this standard, antitrust has contributed to, rather than prevented, America’s current market power problem.

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<sup>21</sup> *Competition Enforcement and Consumer Welfare: Setting the Agenda* 47 (International Competition Network, 2011), archived at <https://perma.cc/GH9U-CJQK>.

Antitrust is supposed to play a critical role in promoting open and competitive markets. Today's market power problem matters because society overall pays a stiff price. We end up with a less stable, less efficient economy that generates less growth, less public investment, and less opportunity.<sup>22</sup> Our democracy is weakened with greater voter disillusionment and greater distrust in our government as 99 percent of the population are disempowered. The greatest cost imposed on society is "the erosion of our sense of identity in which fair play, equality of opportunity, and a sense of community are so important."<sup>23</sup>

Economic policies entail choices, and all economic policies have distributive consequences. Much of America's economic inequality resulted from deliberate legal and enforcement decisions, whereby the government, over the past forty years, failed to protect the 99 percent. Instead, the economically powerful used the government to enrich themselves at society's expense. Because antitrust policy is a necessary (but not sufficient) tool to redress the market power problem, it is time for a new antitrust standard.

## II. THE EFFECTIVE COMPETITION STANDARD

Antitrust, historically, was never about promoting either allocative efficiency or consumer welfare. Instead, antitrust aimed to deconcentrate private power by protecting the competitive process.<sup>24</sup>

No doubt the goal of promoting an effective competitive process has its own infirmities. It simply shifts the debate to a larger, unresolved issue—defining an effective competitive process. Without one, antitrust becomes a tautology: the goal of competition law is "promoting competition by discouraging anti-competitive behaviour."<sup>25</sup>

Thus, to provide courts and agencies greater guidance, we first propose the following effective competition standard:

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<sup>22</sup> See generally Jonathan B. Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* (Harvard 2019).

<sup>23</sup> Joseph E. Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* 117 (Norton 2012).

<sup>24</sup> See, for example, Barak Orbach, *How Antitrust Lost Its Goal*, 81 *Fordham L Rev* 2253, 2256 (2013).

<sup>25</sup> Consumer Unity & Trust Society Centre for Competition, Investment and Economic Regulation, *Towards a Healthy Competition Culture... \*i* (2003), archived at <https://perma.cc/W89G-5RWK>.

Agencies and courts shall use the preservation of competitive market structures that protect individuals, purchasers, consumers, and producers; preserve opportunities for competitors; promote individual autonomy and well-being; and disperse private power as the principal objective of the federal antitrust laws.

Let us unpack each element:

- “*Preservation of competitive market structures*”: This recognizes that competition is not a natural state, nor can it be ensured by focusing on consumer surplus. Horizontal and vertical consolidation should be viewed with suspicion given the failure of the current antitrust regime that has been credulous about their ostensible benefits.
- “*Protect individuals, purchasers, consumers, and producers*”: Antitrust law protects both the resiliency of the supply chain itself and market participants throughout the supply chain—including individuals, consumers, workers, and upstream suppliers.
- “*Preserve opportunities for competitors*”: It is a fundamental value to have competition at every level of the supply chain and for upstream firms to have access to the market without coercion, interference, exclusion, or discrimination by powerful and potentially vertically integrated middlemen.
- “*Promote individual autonomy and well-being*”: Courts have historically interpreted the antitrust laws as “the Magna Carta of free enterprise” and as “important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”<sup>26</sup> Competition policy can foster an inclusive economy that promotes important values, including autonomy and overall well-being.<sup>27</sup> This is especially important with respect to buyer power—and particularly when that power is exercised in labor markets. “Men are not free,” wrote Justice Louis Brandeis, “if

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<sup>26</sup> *United States v Topco Associates, Inc.*, 405 US 596, 610 (1972).

<sup>27</sup> See generally Maurice E. Stucke, *Should Competition Policy Promote Happiness?*, 81 *Fordham L Rev* 2575 (2013).



dependent industrially on the arbitrary will of another.”<sup>28</sup> The Clayton Act’s language that labor is not a commodity reflects this wisdom.<sup>29</sup> Most individuals rely on their labor to earn their living. In economic terms, that supply by individual workers is highly inelastic. As a result, workers can often be exposed to coercion by powerful employers. Preventing this coercion is an end in itself.

- “Disperse private power”: Economic power often translates into political power—not simply in the formal political system, but in everyday relations between employers and workers, between concentrated buyers and diffuse suppliers, and in channeling and directing the flow of information across social media platforms. A fundamental aim of antitrust is to prevent anticompetitive, antidemocratic pressures that arise from concentrated economic power and to ensure an inclusive, equitable distribution of power throughout the economy, including throughout supply chains and within firms.<sup>30</sup> As free markets operate within (rather than outside) our legal, ethical, moral, political, and social framework, the competitive process, if properly designed and maintained, should both limit the ability of shareholders and managers to exploit other stakeholders and prevent historically disadvantaged groups from being excluded or marginalized from the economy.

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<sup>28</sup> Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* 40 (Columbia Global Reports 2018).

<sup>29</sup> See Clayton Act § 6, 38 Stat at 731, codified at 15 USC § 17 (“[T]he labor of a human being is not a commodity or article of commerce.”).

<sup>30</sup> See, for example, Wu, *Curse of Bigness* at 54–58 (cited in note 28) (discussing how the more concentrated the industry, the more corrupted we can expect the political process); Robert Pitofsky, *The Political Content of Antitrust*, 127 U Pa L Rev 1051, 1051–52 (1979) (“It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws,” and any antitrust policy that excluded such political values “would be unresponsive to the will of Congress.”); Louis B. Schwartz, “Justice” and Other Non-Economic Goals of Antitrust, 127 U Pa L Rev 1076, 1076 (1979) (“[P]utative economic gains should not be the exclusive or decisive factor in resolving antitrust controversies.”).

### III. HOW THE EFFECTIVE COMPETITION STANDARD WOULD MODIFY THE STATUS QUO

The effective competition standard differs from *both* the consumer welfare standard and the total welfare standard<sup>31</sup> in that it expressly departs from the partial-equilibrium analysis of a single market as the basis for antitrust analysis. The effective competition standard further differs from the consumer welfare standard in four important ways:

- First, a substantial lessening of competition suffices for liability. Enforcers and courts need not demonstrate how the lessening of competition harms consumers, nor balance the harms to one set of stakeholders against the supposed benefits for another.<sup>32</sup> In this respect, the effective competition standard makes antitrust more enforceable.
- Second, it recognizes that competition needs competitors. Thus, it takes a tougher stance on monopolistic, predatory, and exclusionary practices, which often reduce the competitive opportunities for entrants and rivals.

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<sup>31</sup> The total welfare standard, now largely abandoned, cares only about economic efficiency and takes no stance as to how surplus is split between consumers and sellers. In more concrete terms, it locates antitrust harm to competition only in negative output effects and does not consider increases in price as evidence that competition has been harmed.

<sup>32</sup> Proving consumer harm is often difficult on the selling side—especially for intermediary goods. Proving buyer power’s adverse impact on the ultimate consumer is even more problematic and difficult. A consumer welfare screen, when actually applied, gives an incomplete and distorted measure of consumer harm. Antitrust enforcers typically consider the challenged behavior’s immediate effect on prices. If retail prices remain unchanged (or decline), then the competition authority, under a consumer-harm screen, would likely conclude that the challenged practice is competitively neutral or procompetitive. They would not investigate further the complaints over buyer power and would likely dismiss any non-price concerns as too tenuous or speculative. This exposes one fundamental difficulty in measuring consumer welfare. Buyer power can harm consumers, albeit indirectly. Upstream sellers are also consumers, such as farmers with less money to purchase goods. Our welfare is further reduced when negative externalities increase, such as when farmers with tighter margins cut corners by polluting more, engaging in less sustainable farming, allowing a more dangerous workplace, or hiring underage workers. Competition authorities generally do not consider these other harder-to-quantify harms, which may exceed the short-term benefits from lower prices. The authorities lack the tools to assess the short- and long-term harms arising from buyer power (for example, less variety and innovation). Thus, if a monopsony depresses wages in a local community, which in turn increases the taxpayers’ costs, would that be factored into the agency’s consumer welfare screen? Unlikely.

- Third, unlike the consumer welfare standard, which considers the impact only on consumers, the effective competition standard protects market participants throughout the supply chain, including workers and sellers.
- Finally, by eliminating the precarious step of how the lessening of competition will harm consumers' welfare, the effective competition standard restores the purpose of the Clayton Act to "arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act." As Congress noted, "A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints."<sup>33</sup>

To promote competition and innovation in our heavily concentrated markets, the effective competition standard would depart from today's light-touch antitrust policies in the following areas.

A. Establish a New, Clearer Set of Indicia for Determining Whether a Firm Has Market Power

The standard would first reverse the Court's illogical requirement of circumstantial evidence in *American Express*.<sup>34</sup> The government plaintiffs argued that they need not define the relevant market because they had actual evidence of adverse effects on competition—namely, increased merchant fees. The Court disagreed. It distinguished the cases the plaintiffs cited as involving horizontal restraints. As the Court opined, "Vertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the [c]ourt first defines the relevant market."<sup>35</sup>

But it is axiomatic that market power can be proven with direct or circumstantial evidence. So it makes little sense to require plaintiffs with direct evidence of market power to also prove market power with circumstantial evidence. Imagine a prosecutor with direct evidence of a serial killer's crimes being required to offer circumstantial evidence.

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<sup>33</sup> *Brown Shoe Co v United States*, 370 US 294, 323 n 39 (1962), quoting S Rep No 1775, 81st Cong, 2d Sess 6 (1950), reprinted in 1950 USCCAN 4293, 4298.

<sup>34</sup> See *American Express*, 138 S Ct at 2284, 2290.

<sup>35</sup> *Id* at 2285 n 7.

As a result of the Court's latest perplexing requirement in cases involving vertical restraints, plaintiffs will have to define a relevant market (often a costly, time-consuming endeavor, using antitrust's price-centric tools), calculate the defendant's market share in that market, and *then* show that the market share is high enough to infer the defendant's market power, even when plaintiffs have strong evidence of the restraint's anticompetitive effects.

Rather than establishing one criterion for market power—a high market share in an antitrust market—the courts should allow direct and circumstantial evidence of market power. As many scholars have argued, high market shares are dispositive neither in favor of nor against market power, and therefore a broader range of indicia are necessary. Indeed, as the economic evidence reflects, firms with low market shares nonetheless can, at times, exercise significant market power upstream against suppliers and workers.<sup>36</sup> These indicia of market power include:

- The unilateral ability to set prices or wages, or to charge prices in excess of the competitive level or pay wages below workers' marginal productivity;
- The ability to impose disadvantageous nonprice contractual terms on counterparties or to revise contractual terms in one's own favor, including by depressing quality, privacy, innovation, or variety below competitive levels;
- The ability to exclude competitors or entrants;
- The unilateral ability to restrict output or employment;
- The ability to price or wage discriminate;<sup>37</sup> and

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<sup>36</sup> See, for example, Peter C. Carstensen, *Competition Policy and the Control of Buyer Power: A Global Issue* 65–78 (Edward Elgar 2017); Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 *Emory L J* 1509, 1533–40 (2013).

<sup>37</sup> The Court in *Illinois Tool Works Inc v Independent Ink, Inc*, 547 US 28 (2006) noted how price discrimination “may provide evidence of market power,” but that “it is generally recognized that it also occurs in fully competitive markets.” *Id.* at 44–45. Although the Court cites, *inter alia*, William J. Baumol and Daniel G. Swanson, *The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power*, 70 *Antitrust L J* 661, 666 (2003), those authors, in fact, assume market power by way of market segmentation—consumers are prevented from transacting with one another. *Id.* at 681 n 38. The Court also cites William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law* 374–75 (Belknap 2003), but Posner elsewhere noted that “[p]ersistent price discrimination can be evidence of monopoly because it is inconsistent with a competitive market.” Richard A. Posner, *Antitrust Law* 80 (Chicago 2d ed 2001). Our point here is simply that it is evidence of market power, and the discrimination itself may be exploitative or benign.

- The ability to earn profits or make payouts to shareholders in excess of a firm's cost of capital for an extended period of time.

Under the effective-competition standard, any of these could be used by plaintiffs to establish market power.

B. Update Monopolization/Monopsonization Policy and Reinvalidate Enforcement of Section 2 of the Sherman Act

Under the Supreme Court's current consumer welfare standard, monopolies have little to fear, as the Court has significantly limited their potential liability for their anticompetitive actions. Predatory pricing cases have all but disappeared.<sup>38</sup> Courts now opine that monopolies have no duty to deal. And for all of these anticompetitive actions, courts must entertain "efficiency" defenses—as though otherwise illegal conduct, like fraud, might somehow be rectified by some larger benefit to society, a standard that exists in no other area of law.<sup>39</sup>

The effective competition standard would rectify several shortcomings of the Court's economic policymaking under Section 2 of the Sherman Act—which is imperative if the economy's existing and growing market power problem is to be reversed, as opposed to merely slowed. The essential thrust of monopolization/monopsonization policy under the effective competition standard would be to impose a more restrictive competition policy than prevails by default on firms with significant market power.

Under the effective competition standard, a defendant's unilateral anticompetitive conduct would violate the Sherman Act if:

- First, the defendant has, and exercises, significant market power, in accordance with one or more of the indicia outlined above;
- Second, this power excludes some potential competition and/or limits or has limited some actual competition; and

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<sup>38</sup> The DOJ, for example, brought its last predation case in 1999, which it lost. See *United States v AMR Corp.*, 335 F3d 1109, 1121 (10th Cir 2003).

<sup>39</sup> See *Microsoft*, 253 F3d at 59, 77; Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 10 (Aug 19, 2010), archived at <https://perma.cc/B3RM-WGMN>.

- Third, this power is not attributable solely to the defendant's ability, economies of scale, research, or natural advantages.

Next, as part of streamlining enforcement against unilateral conduct, the effective competition standard entails establishing certain actions as presumptive violations of Section 2 of the Sherman Act, including:

- Otherwise unlawful conduct that helps a firm attain or maintain monopoly or monopsony power;
- Predatory pricing below marginal cost for an extended period of time, for the purpose of excluding competitors and preserving market power, without the need for plaintiffs to prove "recoupment";<sup>40</sup>
- Simpler standards for assessing when refusals to deal<sup>41</sup> and exclusive dealing<sup>42</sup> are illegal, including when they violate suppliers' right of market access; and

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<sup>40</sup> This standard would foster greater convergence internationally. See, for example, *AKZO Chemie BV v Commission of the European Communities*, ECR I-3359, 3454–56 (EU Just 1991) (holding that it is presumptively illegal if a dominant firm prices below average variable cost to eliminate a competitor, and that if the dominant firm prices between total cost and average variable cost, this could be abusive with evidence of anticompetitive intent).

<sup>41</sup> The criteria for determining when refusals to deal are anticompetitive might include:

- The dominant firm controls a product, service, resource, or facility that is necessary for carrying on a particular business;
- The refusal is likely to significantly exclude competition;
- The refusal prevents the emergence of a new product for which there is potential consumer demand, or the refusal prevents improving current products in a relevant market; and
- The dominant firm cannot objectively justify, with particular facts, its refusal.

Our proposal would promote greater internal convergence with EU law on the question of when a dominant firm has a duty to deal. See generally *Communication from the Commission—Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* (Official Journal of the European Union, Feb 2009), archived at <https://perma.cc/E27M-CGM8>. This has become an especially important issue in the digital economy. See, for example, Mark R. Warner, *Potential Policy Proposals for Regulation of Social Media and Technology Firms* \*21–23 (draft white paper), archived at <https://perma.cc/S4EA-A67K> (discussing the need for interoperability and fair, reasonable, and nondiscriminatory (FRAND) terms for essential facilities).

<sup>42</sup> Any significant restraint by a dominant firm on other companies' freedom to compete should generally require a legitimate justification. Such an approach would allow for contracts and other restraints that promote competition. The new standard, consistent

- “Cheap exclusion,” or actions on the part of a dominant firm that cost little, that are intended to exclude, disadvantage, or discriminate against competitors within its market, and that do not improve efficiency.<sup>43</sup>

To make clear that a range of harms are to be considered when a firm engages in price discrimination, we additionally recommend amending Section 2 of the Clayton Act to prohibit price discrimination when it hurts consumers, workers, or other market participants, as when a firm tracks individuals’ spending patterns, collects personal data, and targets them in ways that get them to buy things they otherwise did not want at the highest price they are willing to pay (or lowest wage they are willing to work).<sup>44</sup> Alternatively, Congress could consider limiting customer data collection in the first place.

### C. Merger Policy Under Section 7 of the Clayton Act

Antitrust laws generally are intended to prevent harmful accumulations of market power from forming in the first place. Under current merger policy, however, the burden is on enforcers to make the case that merging firms will likely lessen competition (namely through higher prices), resulting in lax merger review and unchallenged large-scale acquisitions. To correct the merger-review process, we recommend the following amendments to Section 7 of the Clayton Act<sup>45</sup>:

- Rather than placing the burden on the plaintiffs, the burden would shift to parties seeking to merge in ways that would either (a) significantly increase concentration levels or (b) be undertaken by firms that already hold significant market power—as demonstrated through the indicia outlined above. The merging parties would have to prove that their proposed acquisition would not materially lessen competition, create a monopoly or monopsony,

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with the developments on competition law outside of the US, would deter dominant gatekeepers or technology platforms from engaging in exclusionary behavior that has significant potential to foreclose competitors and diminish competition.

<sup>43</sup> See, for example, Susan A. Creighton, et al, *Cheap Exclusion*, 72 Antitrust L J 975, 980–82 (2005).

<sup>44</sup> See, for example, John B. Kirkwood, *Reforming the Robinson-Patman Act to Serve Consumers and Control Powerful Buyers*, 60 Antitrust Bull 358, 359–61, 374–75 (2015). See 15 USC § 13.

<sup>45</sup> See 15 USC § 18.

or help maintain their market power.<sup>46</sup> This would deter monopolies/monopsonies from acquiring nascent competitive threats, thereby preserving their market power while potentially hindering innovation.

- Courts should be required to take all potential competitive outcomes of a merger into account: not just prices for consumers, but also nonprice effects such as harm to quality, choice, innovation, and privacy. The agencies and courts should examine upstream effects on workers and suppliers and downstream effects on customers and others who could be harmed, and cannot assume that market power exercised upstream would result in “efficiencies” downstream or could be offset by them.<sup>47</sup>
- Congress should prohibit vertical mergers when they could foster the firm’s ability and incentive to distort competition.

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<sup>46</sup> Our proposal does not define the baseline of when acquisitions significantly increase concentration levels. One reason is that the threshold/criteria will likely differ when evaluating upstream versus downstream effects because monopsonies are *not* the mirror image of monopolies. Another reason is that the appropriate threshold will likely be lower than the 2010 Merger Guidelines’ Herfindahl-Hirschman Index (HHI) thresholds. Professor John Kwoka’s data, based on examining postmerger reviews, suggest that lowering the HHI threshold from the current levels in the 2010 Merger Guidelines and creating a separate threshold based on the number of significant remaining competitors. Thus, one could justify restoring the HHI threshold to earlier levels (or no higher than 2000 levels) and the number of significant remaining competitors at no lower than five. But as Kwoka recognized, his data set involves only industries for which there was a postmerger review. Given that economic studies have recently explored the degree to which companies exercise market power, another HHI threshold or threshold of remaining competitors may be warranted. John Kwoka, *Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice* \*33–37 (Antitrust Institute Working Paper, Oct 2018), archived at <https://perma.cc/JC62-WTAA>.

<sup>47</sup> Arguably, the agencies should already do this under the Clayton Act and their own merger guidelines. See *Horizontal Merger Guidelines* at § 1 (noting how enhanced “market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation”); id at § 12 (noting how the agencies consider whether a merger is likely to enhance market power on the buying side of the market) (cited in note 39). Nonetheless, the agencies often consider the merger’s impact downstream on price. As a result, scholars recommend that any competitive analysis of mergers include upstream effects. See Carstensen, *Competition Policy* at 94–96 (cited in note 36). This includes identifying the various labor markets affected by the mergers and assessing the effect of the merger on concentration in these labor markets. See, for example, Alan B. Krueger and Eric A. Posner, *Policy Proposal: A Proposal for Protecting Low-Income Workers from Monopsony and Collusion* \*12 (Hamilton Project, 2018), archived at <https://perma.cc/6XSL-43NL>. This includes calculating the premerger and postmerger HHI levels of these labor markets and recognizing “a presumption against a merger if the postmerger absolute level of concentration and/or the increase indicate too high a risk of wage suppression.” Id.



#### D. Agreements Under Section 1 of the Sherman Act

Congress should update laws that govern agreements between or among parties under Section 1 of the Sherman Act, including vertical restraints such as resale price maintenance, territorial and other nonprice restraints, and noncompete clauses and other provisions restricting workers' rights in labor contracts.<sup>48</sup> This should include:

- Clarifying that federal antitrust law covers and equally protects both inter- and intrabrand competition—that is, competition both within and between supplier-distributor networks, such as franchises;<sup>49</sup>
- Specifying that price and nonprice vertical restraints are illegal, including in the labor market, other than in narrow circumstances when no party to them possesses market power and the restraints are necessary to foster innovation and competition;<sup>50</sup> and
- Further clarifying that attempts to engage in unlawful conduct (such as collusion), in addition to the conduct itself, are prohibited.<sup>51</sup>

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<sup>48</sup> See 15 USC § 1.

<sup>49</sup> For example, in *Leegin Creative Leather Products, Inc v PSKS, Inc*, 551 US 877 (2007), the Court justified a reduction in intrabrand competition by opining that the antitrust laws' primary purpose is to protect interbrand competition. See *id* at 890. But this policy statement never came from the Sherman Act or its legislative history. It came from a footnote in *Continental T.V., Inc v GTE Sylvania Inc*, 433 US 36 (1977), in which the Court stated that “[i]nterbrand competition is the competition among the manufacturers of the same generic product—television sets in this case—and is the primary concern of antitrust law.” *Id* at 52 n 19. While true for generic products, this is not true for brand-differentiated goods. Try negotiating a better price for a BMW with the price of an Audi or Mercedes (interbrand competition) versus the price of that same BMW offered by another dealer (intrabrand competition). The recent economic findings, post-*Leegin*, “are consistent with the view that anticompetitive explanations for resale price maintenance tend to predominate over procompetitive explanations.” Baker, *Antitrust Paradigm* at 89 (cited in note 22). The effective competition standard would create a strong presumption against price and nonprice vertical restraints.

<sup>50</sup> See, for example, *Leegin*, 551 US at 913 (Breyer dissenting) (noting how the Court identified two potential benefits of resale price maintenance: facilitating entry and curbing free-riding). Thus, unlike the per-se-illegal standard, the proposed standard would permit vertical restraints when they are unlikely to undermine intrabrand competition. See also John B. Kirkwood, *Rethinking Antitrust Policy Toward RPM*, 55 *Antitrust Bull* 423, 459–70 (2010) (proposing as an alternative to the rule of reason a presumption of illegality combined with safe harbors).

<sup>51</sup> The FTC can challenge invitations to collude under Section 5 of the FTC Act. See 15 USC § 45. The primary mechanism for the DOJ to prosecute such attempts would be as an attempt-to-monopolize claim under Section 2 of the Sherman Act, which is harder

### E. Reorient Courts and Enforcers to Look More Often Upstream

Antitrust laws in the United States are meant to protect sellers and workers. One positive sign was the DOJ, in 2016, announcing its intention to “criminally investigate naked no-poaching or wage-fixing agreements that are unrelated or unnecessary to a larger legitimate collaboration between the employers.”<sup>52</sup> The agency, along with the Federal Trade Commission (FTC), affirmed that workers, like other sellers, are entitled to the benefits of a competitive market for their services.<sup>53</sup> Unfortunately, the DOJ recently retreated significantly from that stance in its intervention in private actions against no-poaching clauses in franchising contracts.<sup>54</sup>

When they look upstream, enforcers and courts should not assume that monopsonies are the mirror images of monopolies.<sup>55</sup> In the leading monopsony case, *Weyerhaeuser Co v Ross-Simmons Hardwood Lumber Co*,<sup>56</sup> the Court’s initial premise was that monopoly and monopsony power were economically similar and shared a close theoretical connection.<sup>57</sup> Given the “kinship between monopoly and monopsony” power, the Court suggested “that similar legal standards should apply” to monopolization and monopsonization claims.<sup>58</sup> But developing the legal standards for

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to prove. As a result, the DOJ brings far fewer invitation-to-collude cases. For one notable example, see generally *United States v American Airlines, Inc*, 743 F2d 1114 (5th Cir 1984).

<sup>52</sup> Department of Justice and Federal Trade Commission, *FTC and DOJ Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation* (Oct 20, 2016), archived at <https://perma.cc/23YX-HRMA>.

<sup>53</sup> See *id.*

<sup>54</sup> See Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 L & Contemp Probs 45, 51–52 (2019).

<sup>55</sup> See generally Stucke, 62 Emory L J 1509 (cited in note 36).

<sup>56</sup> 549 US 312 (2007).

<sup>57</sup> See *id.* at 321–22. See also *Todd v Exxon Corp*, 275 F3d 191, 202 (2d Cir 2001) (noting that because “the equation for measuring market power in monopsony is a mirror image of the relationships that create market power in a seller[,] . . . [a] greater availability of substitute buyers indicates a smaller quantum of market power on the part of the buyers in question”) (quotation marks and citations omitted); *Growers 1-7 v Ocean Spray Cranberries, Inc*, 2015 WL 13649090, \*4 (D Mass); *GMA Cover Corp v Saab Barracuda LLC*, 2012 WL 642739, \*6 (ED Mich), adopted by 2012 WL 639528 (ED Mich); *Sprint Nextel Corp v AT&T Inc*, 821 F Supp 2d 308, 324 (DDC 2011); *In re Southeastern Milk Antitrust Litigation*, 801 F Supp 2d 705, 724 (ED Tenn 2011); *Addamax Corp v Open Software Foundation Inc*, 888 F Supp 274, 280 n 9 (D Mass 1995); Federal Trade Commission and Department of Justice, *Improving Health Care: A Dose of Competition* ch 6, \*13 (2004) (*Health Report*), archived at <https://perma.cc/7BK8-XJZZ>.

<sup>58</sup> *Weyerhaeuser*, 549 US at 322.

evaluating monopsonization claims is more complex than simply mirroring monopolization standards.

One important distinction between monopoly and monopsony is the market share needed to infer significant power. Courts, when reviewing monopolization claims, typically require the defendant's market share to be very large—often 70 percent or more.<sup>59</sup> One district court dismissed a claim under Section 2 of the Sherman Act because the market share of approximately 40 percent did not meet “the threshold of what it takes to establish monopoly or monopsony power.”<sup>60</sup>

On the other hand, retailers with a 20 percent market share can enjoy significant buyer power over sellers.<sup>61</sup> The FTC and DOJ recognize the difficulty, “in the abstract, to state market share thresholds for such monopsony concerns.”<sup>62</sup> Rather than rely on market-share thresholds alone to find monopsony power, the agencies correctly encourage the courts to consider several interrelated factors:

- (1) a large market share on the part of the purchaser; (2) an upward sloping or somewhat inelastic supply curve in the input market; and (3) an inability or unwillingness for new purchasers to enter the market or current purchasers to expand the amount of their purchases in the market.<sup>63</sup>

Consequently, under the effective competition standard, courts and agencies can lessen the risk of false negatives by looking beyond market-share thresholds upstream. Even in properly defined markets, buyers with low market shares can at times exert tremendous power. In their ability to decide when, whether,

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<sup>59</sup> See *United States v Aluminum Co of America*, 148 F2d 416, 424 (2d Cir 1945) (observing that “it is doubtful whether sixty or sixty-four percent” is sufficient “and certainly thirty-three per cent is not”); *Southeastern Milk*, 801 F Supp 2d at 725 (noting that *Byars v Bluff City News Co*, 609 F2d 843, 850 (6th Cir 1979), determined that “75–80 percent or greater is a ‘starting point’ in assessing monopoly power”); *R.J. Reynolds Tobacco Co v Philip Morris Inc*, 199 F Supp 2d 362, 394 (MD NC 2002) (“Seventy to seventy-five per cent is generally considered the minimum market share necessary to support a finding of monopoly power.”), *affd R.J. Reynolds Tobacco Co v Philip Morris USA, Inc*, 67 F Appx 810 (4th Cir 2003).

<sup>60</sup> *Southeastern Milk*, 801 F Supp 2d at 727. See also *Lima LS PLC v PHL Variable Insurance Co*, 2013 WL 12286066, \*1 n 1 (D Conn) (“The equation for measuring market power in monopsony is a ‘mirror image’ of the relationships creating market power in a seller.”).

<sup>61</sup> See Carstensen, *Competition Policy* at 58 (cited in note 36); *Toys “R” Us, Inc v Federal Trade Commission*, 221 F3d 928, 937 (7th Cir 2000).

<sup>62</sup> *Health Report* at ch 6, \*17 (cited in note 57).

<sup>63</sup> *Id.*

and from whom to buy a perishable product, and how much of that product to purchase, buyers perhaps have relatively more power than sellers; thus, buyers in these industries can discipline sellers more effectively from exercising market power than sellers can discipline buyers. It may also be that sellers in some industries are more dependent on the buyers than the buyers are dependent on the sellers. Depending on the elasticity of demand of the fringe buyers and overall supply, firms with relatively low market shares can enjoy as much, if not greater, buyer power as firms with higher market shares.<sup>64</sup>

The issue of false positives, however, remains. Monopsonists can have low market shares, but many buyers with low market shares are not monopsonists. Likewise, all monopsonists possess buyer power, but not all firms with buyer power are monopsonists, in the sense of having high market share.<sup>65</sup> Reduction in sellers' output is not the telltale mark of monopsony; buyers, for example, can price discriminate.

Therefore, in assessing upstream abuses, agencies and courts should use a sliding scale. The lower the alleged monopsonist's market share, the greater the plaintiff's burden in showing: (1) the fringe buyers' inability to acquire more of the sellers' output and (2) the sellers' inability to easily and cheaply produce and sell other products in other locales, or to other buyers. Granted, this is, at times, a matter of degree. The defendant can be a "hard-nosed actor in the market"<sup>66</sup> without being a monopsonist.

Thus, a rule of thumb is the buyer's coercion.<sup>67</sup> Coercion implicitly incorporates both elasticity of demand of the fringe buyers and overall supply; as the sellers' price is depressed, there remain

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<sup>64</sup> Arguably, market-share thresholds are arbitrary for both monopsony and monopoly claims. Indeed, the same factors to show monopsony power, despite a relatively low market share, could show monopoly power. In other words, when the elasticity of supply by fringe sellers and the elasticity of consumer demand are both low, a firm with, for example, a 43 percent market share could also exercise monopoly power. Plaintiffs, however, rarely challenge the monopolization case law's market-share thresholds per se. Instead, the litigants typically debate whether the market should be defined more broadly or narrowly.

<sup>65</sup> See *Health Report* at ch 6, \*18 (cited in note 57) (noting that "because one of the purposes of managed care is to lower prices closer to a competitive level, it can be difficult to determine when a managed care purchaser is exercising monopsony power").

<sup>66</sup> *Southeastern Milk*, 801 F Supp 2d at 727.

<sup>67</sup> For consideration of a coercion standard in light of foreign law, see generally Albert A. Foer, *Abuse of Superior Bargaining Position (ASBP): What Can We Learn from Our Trading Partners?* (American Antitrust Institute Working Paper No 16-02, Sept 29, 2016), archived at <https://perma.cc/37U7-DNHW>.

few alternative buyers or alternative selling opportunities to rescue the exploited sellers from their captivity to the buyer. Although market power “ordinarily is inferred from the seller’s possession of a predominant share of the market,”<sup>68</sup> the Supreme Court has explained that underlying market power is coercion, namely, “the power ‘to force a purchaser to do something that he would not do in a competitive market.’”<sup>69</sup> The more the evidence shows that the firm is forcing sellers to do things that they would not otherwise do in a competitive market, the more likely the firm possesses buyer power, even when its market share is relatively low. The stronger the evidence of the buyer’s coercion, the stronger the inference of monopsony power.

Moreover, there is strong evidence to suspect that monopsony power can be projected upstream at two or even three removes from the site of the dominant monopsonist. One recent study finds that powerful retail and manufacturing distributors can secure substantial price concessions from their suppliers, who, in turn, reduce margins on their workforces in the form of lower wages and more precarious working conditions.<sup>70</sup>

Looking upstream is critical because the recent economic evidence suggests that labor-market concentration exerts downward pressure on wages, induces employers to shift the costs of training onto workers, and results in greater inequality among firms hiring in a labor market.<sup>71</sup> To habituate the agencies to look upstream, the effective competition standard would require agencies and courts to consider whether a merger may substantially lessen competition or tend to create a monopsony for upstream labor, supplier, and product markets.<sup>72</sup> The reforms under the

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<sup>68</sup> *Eastman Kodak Co v Image Technical Services, Inc.*, 504 US 451, 464 (1992).

<sup>69</sup> *Id.*, quoting *Jefferson Parish Hospital District No 2 v Hyde*, 466 US 2, 14 (1984).

<sup>70</sup> See Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers’ Wages, 1978 to 2014*, 83 *Am Sociological Rev* 213, 215–16 (2018).

<sup>71</sup> See generally José Azar, Ioana Marinescu, and Marshall I. Steinbaum, *Labor Market Concentration* (National Bureau of Economic Research Working Paper No 24147, Feb 2017), archived at <https://perma.cc/Y5CU-KSN5>. See also Baker, *Antitrust Paradigm* at 22 (cited in note 22). See also generally Brad Hershbein and Claudia Macaluso, *Labor Market Concentration and the Demand for Skills* (Institute of Labor Economics Working Paper, July 2018), archived at <https://perma.cc/TYY5-S8BG>; David Berger, Kyle Herkenhoff, and Simon Mongey, *Labor Market Power* (Institute of Labor Economics Discussion Paper No 12276, Apr 2019), archived at <https://perma.cc/NWA8-4LZH>.

<sup>72</sup> For the deficiencies of the earlier approach and harms from restraints and mergers upstream, see Carstensen, *Competition Policy* at 105–16, 128–31, 260–63 (cited in note 36); Krueger and Posner, *Policy Proposal* at \*12 (cited in note 47) (recommending that the agencies’ merger guidelines include a new section that directs the government to screen mergers based on their likely effects on labor markets).

Sherman Act would also apply upstream to include monopsonization claims and anticompetitive restraints by buyers. Claimed efficiencies cannot amount to (or be derived from) the defendant's anticompetitive behavior in upstream markets.

#### F. Looking Beyond Price Effects

Competition agencies recognize that anticompetitive behavior can affect not just price and output but also privacy protection, quality, variety, services, and innovation. Nonetheless, courts usually measure an injury to competition "by a reduction in output and an increase in prices in the relevant market."<sup>73</sup> As Professor Jon Baker notes:

If competition would be harmed on dimensions other than price, such as quality or innovation, it would also not matter whether the price (or the quality-adjusted price) exceeds a competitive level. The antitrust issue is whether the reduction in competition made the terms of trade adverse to buyers relative to the but-for world, regardless of the dimensions on which the firms compete or the absolute level of prices.<sup>74</sup>

The effective competition standard would require the courts and agencies to look beyond price effects in mergers, anticompetitive conduct, and monopolization and monopsonization cases, including effects on other important, nonprice parameters of competition (such as quality, choice, and privacy). In weighing these effects, courts should not offset harm to competition for one set of stakeholders with benefits for another when there is no mechanism for compensation, as is usually the case.

The effective competition standard would also recognize that when a company violates the antitrust laws, the harm can be compounded when the conduct violates other laws meant to protect historically disadvantaged groups that have been excluded or marginalized from the economy (such as the civil rights laws). This would include illegal market allocations on the basis of historically disadvantaged groups' races and identities.

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<sup>73</sup> *Sterling Merchandising, Inc v Nestlé, S.A.*, 656 F3d 112, 121 (1st Cir 2011) (emphasis omitted).

<sup>74</sup> Baker, *Antitrust Paradigm* at 180 (cited in note 22).

### G. Remedies

The effective competition standard would adopt a preference for structural remedies. Ironically, in *Standard Oil Co of New Jersey v United States*,<sup>75</sup> which introduced the rule-of-reason analysis that eventually became so unwieldy, the Court also supported strong structural remedies, including breaking up the monopoly and monopsony.<sup>76</sup>

Thus, at a minimum, enforcers need to prevent monopolies/monopsonies from getting bigger. This means enforcing the Clayton and Sherman Acts as they were intended: cracking down trends toward concentration and anticompetitive practices—such as Google diverting search engine traffic to its own comparison shopping service while burying its rivals' services less prominently in the results.<sup>77</sup> The goal is to thwart these anticompetitive risks in their incipiency.

It also means blocking mergers rather than allowing the merger to go through with myriad behavioral conditions (as was the case of Comcast-NBCU,<sup>78</sup> Google-ITA Software,<sup>79</sup> and Ticketmaster-LiveNation<sup>80</sup>).

## IV. WHAT NEEDS TO HAPPEN TO IMPLEMENT THE EFFECTIVE COMPETITION STANDARD INTO FEDERAL ANTITRUST POLICY?

The existing consumer welfare standard is not statutory. It represents the industrial policy favoring consolidation and vertical integration promoted by the Chicago, post-Chicago, and Harvard School adherents. Given the mounting evidence that the consumer welfare standard has failed to protect competition and consumers, as well as the standard's operational difficulties, the standard should be scrapped.

Thus, we can rectify the market power problem through five different avenues:

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<sup>75</sup> 221 US 1 (1911).

<sup>76</sup> See *id.* at 77–82.

<sup>77</sup> See European Commission, *39740 Google Search (Shopping)* \*103–08 (2017), archived at <https://perma.cc/CJU6-W7VA>.

<sup>78</sup> See Modified Final Judgment, *United States v Comcast Corp*, No 1:11-cv-00106, \*9–14 (DDC filed Aug 21, 2013).

<sup>79</sup> See Final Judgment, *United States v Google Inc*, No 1:11-cv-00688, \*13–27 (DDC filed Oct 5, 2011).

<sup>80</sup> See Final Judgment, *United States v Ticketmaster Entertainment, Inc*, No 1:10-cv-00139, \*8–14 (DDC filed July 30, 2010).

- First, courts and agencies, without any legislative action, can enforce the federal antitrust laws as Congress intended them. Nothing prevents them from actually doing this. The effective competition standard, while new, is actually consistent with the legislative aim of the Sherman and Clayton Acts.
- Second, the FTC can use its authority under the FTC Act,<sup>81</sup> as Congress intended, to reach these anticompetitive practices and mergers through rulemaking.<sup>82</sup>
- Third, Congress could amend the Sherman and Clayton Acts to clearly prescribe the effective competition standard and delineate legal presumptions for common anti-competitive restraints to effectuate the standard.
- Fourth, Congress could enact a new civil antitrust statute and also delegate power to the FTC to make regulations for specific per se illegal rules and presumptions under the new standard.
- Finally, Congress could choose not to pass the effective competition legal standard itself but instead pass other specific measures that would effectuate the standard (as outlined above in Part III).

The first two options are possible. The FTC Act is intended to broaden the agency's mandate beyond the Clayton and Sherman Acts. But the composition of the federal judiciary, the time and expense to undo the damage caused by the Supreme Court's excursions in economic theory, the disincentives of the antitrust agencies to undertake this change, and the continuing harm to the public in the interim all call for legislative action. Given the failure of the more elitist branches of government to protect competition, it is appropriate for the democratically accountable branch to step in.

This brings us to the third and fourth options. Other jurisdictions, like Germany, have recently updated their competition

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<sup>81</sup> 38 Stat 717 (1914), codified as amended at 15 USC § 41 et seq.

<sup>82</sup> For a defense of FTC rulemaking, see generally, for example, Comment of Federal Trade Commissioner Rohit Chopra, *Competition and Consumer Protection in the 21st Century*, Hearing Before the Federal Trade Commission (2018), archived at <https://perma.cc/Q4E9-U6LQ>.



laws for the digital economy.<sup>83</sup> While Congress has amended the federal antitrust laws over the years, it hasn't significantly changed the substance of the federal antitrust laws for over sixty years.<sup>84</sup> Part of this may be attributable to the Sherman and Clayton Acts being viewed as common law. Another factor is that the Sherman Act imposes both criminal and civil liability.<sup>85</sup> No doubt, any statutory changes must account for these factors.

In amending US competition laws, Congress will likely confront the issue whether it needs to change only the standard (for example, adding the language of an effective competition standard) and/or specific presumptions and per se rules to promote that standard.

Under rule-of-law principles, the judiciary's role should be to interpret the antitrust laws based on (1) the original laws and (2) precedent that is true to the original laws. It would not interpret the acts based on what it believes to be the latest economic thinking on competition policy.<sup>86</sup> By declaring specific principles, Congress would be assured that the courts, under a rule of law, would construe the antitrust laws to further those principles, and would circumscribe the courts from arbitrarily reaching standards (or results) inconsistent with those principles.

Thus, we advocate two components: *first*, Congress should recognize that antitrust law invariably promotes multiple economic, political, and social objectives, rather than a single definition of harm to competition. Every country's competition law likely encompasses, but does not necessarily rank, multiple goals.

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<sup>83</sup> For example, in 2017 Germany amended its competition law to specify that direct and indirect network effects be considered in assessing a firm's market position. Act Against Restraints of Competition, § 18 (3(a)) (Competition Act—GWB), last amended by Article 10(9) of the Act of 30 October 2017, archived at <https://perma.cc/Y8XH-ZTMP>. In 2019, Germany proposed additional amendments to protect competition in the digital platform economy, including requiring in any assessment of market power the firm's access to data relevant for competition. See *Draft Proposal for the 10th Amendment of the German Competition Act* (D'Kart, Oct 7, 2019), archived at <https://perma.cc/5PA3-5543>.

<sup>84</sup> See Federal Trade Commission, *The Antitrust Laws*, archived at <https://perma.cc/3SSF-YY5K>.

<sup>85</sup> 15 USC §§ 2, 15(a)–(h).

<sup>86</sup> See Spencer Weber Waller, *Microsoft and Trinko: A Tale of Two Courts*, 2006 Utah L Rev 741, 749 (“The *Trinko* Court’s pronouncements on this score stand merely as a naked assertion of a policy preference that has been rejected since the passage of the antitrust laws themselves.”).

The issue is not whether competition policy should incorporate noneconomic values. Rather, the issue is the degree of freedom that courts and enforcers should have in weighing multiple goals and multiple stakeholders in their analyses.

Here, we see the shortcomings of the Court's prevailing rule-of-reason legal standard to evaluate most antitrust claims. One generally cannot have, consistent with the rule of law, a fact-specific weighing standard, like the rule of reason, and multiple objectives. Having the agencies and courts blend goals in every antitrust case is a recipe for disaster. It is questionable whether antitrust enforcers and courts can systematically operationalize multiple goals in the vacuous rule of reason, regardless of whether they apply a consumer welfare or an effective competition standard. Moreover, allowing them to blend goals creates more opportunities for error and political capture.

Consequently, in addition to an effective competition standard that recognizes antitrust's multiple aims, the *second* significant component we advocate is shifting from the Court's unwieldy rule of reason to clearer legal presumptions. Congress can shift the Court from its "case-by-case" rule-of-reason analysis, which focuses on the "particular facts disclosed by the record,"<sup>87</sup> to simpler antitrust presumptions and rules "clear enough for lawyers to explain them to clients."<sup>88</sup> The proposed legislation would shift, whenever feasible, from directly regulating market participants' behavior *ex post* to employing legal presumptions that seek to promote a competitive structure *ex ante* and preserving freedom therein.

This would significantly streamline, rather than complicate, the enforcement of the antitrust laws. The current rule-of-reason review "is data-intensive and, consequently, expensive for litigants; also, it consumes large amounts of court time and other resources."<sup>89</sup> It is little wonder why so few antitrust plaintiffs can afford to bring such cases to trial.

Ideally, Congress would enact the effective competition standard alongside legal presumptions that are simple enough for

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<sup>87</sup> *Eastman Kodak*, 504 US at 467, quoting *Maple Flooring Manufacturers Association v United States*, 268 US 563, 579 (1925).

<sup>88</sup> *Pacific Bell Telephone Co v linkLine Communications, Inc.*, 555 US 438, 453 (2009), quoting *Concord v Boston Edison Co.*, 915 F2d 17, 22 (1st Cir 1990).

<sup>89</sup> *California v Safeway, Inc.*, 651 F3d 1118, 1146 (9th Cir 2011) (Reinhardt concurring in part and dissenting in part).

counsel to explain to their clients, agencies to enforce, and courts to apply.

Furthermore, an effective competition standard would expand the theories of harm available to antitrust plaintiffs, and thus reduce the potency of defendants' strategy of using economic theory to dispatch with claimed price increases or output reductions to consumers. So, while the policy objectives for antitrust enforcement would indeed expand with the effective competition standard (relative to what has been propounded under the consumer welfare standard), the proposed standard coupled with the legal presumptions would nonetheless significantly reduce the administrative burden of individual enforcement actions—ultimately returning antitrust to its proper role as law enforcement rather than highly stylized theoretical speculation.

### CONCLUSION

Today, we have the following incongruities in our economy and society:

- First, the current antitrust policies claim to promote the welfare of consumers. This has not happened.<sup>90</sup>
- Second, courts often proclaim that antitrust law protects competition, not individual competitors.<sup>91</sup> But competition has diminished as a result of the courts' and agencies' largely noninterventionist policies.

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<sup>90</sup> Steinbaum and Stucke, *Effective Competition* at 22–28 (cited in note 20).

<sup>91</sup> See, for example, *Starlight Cinemas v Regal Entertainment Group*, 691 F Appx 404, 405 (9th Cir 2017), quoting *AT&T Mobility LLC v AU Optronics Corp*, 707 F3d 1106, 1112 (9th Cir 2013). The origin of this claim is *Brown Shoe*, 370 US at 344 (“It is competition, not competitors, which the Act protects.”). Ironically, modern courts typically ignore what the Court said immediately after making that statement:

But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

Id. The modern courts also ignore the Court's extensive discussion in *Brown Shoe* of the congressional intent of the 1950 amendments to the Clayton Act: “The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy.” Id at 315. “Other considerations cited in support” of the 1950 legislation were “the desirability of retaining ‘local control’ over industry and the protection of small businesses.” Id at 315–16. For a recent example, see Justice Neil Gorsuch's early intervention in the oral argument in *American Express*. Transcript of Oral Argument, *Ohio v American Express Co*,

- Third, while the Supreme Court of late has complained about the state of antitrust litigation (the interminable litigation, inevitably costly and protracted discovery phase, and the high risk of inconsistent results by lower courts), the Court itself has created this predicament.<sup>92</sup> Over the past forty years, the Court has increasingly relied on its fact-specific weighing standard (the rule of reason) and its vague economic goal (consumer welfare), even though each accommodates different personal values and interpretation and often points to no particular course of action.
- Fourth, while policymakers recognize dynamic competition as more important, antitrust agencies and courts have tended to avoid dynamic efficiency analysis, focusing instead on static price competition and productive efficiencies.<sup>93</sup> And insofar as antitrust does take a position on the distribution of economic surplus to consumers (versus producers), its narrow focus on price effects has carved out substantial space for business models that harm consumers—and society more broadly—in other ways, such as by harvesting their data for sale to third parties, discriminating in terms of quality, segmenting and dividing the market, and obstructing consumers' access to innovative entrants and alternative sources of supply.<sup>94</sup>
- Fifth is the economic power paradox. Our constitutional framework seeks to distribute power rather than promote its concentration. Despite historical concerns about concentrated economic power, the Court in *Verizon Communications Inc v Law Offices of Curtis V. Trinko*<sup>95</sup> praised

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No 16-1454, \*4 (US filed Feb 26, 2018) (available on Westlaw at 2018 WL 1050562) (“We’re not here to protect competitors . . . or necessarily even merchants.”).

<sup>92</sup> See Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 UC Davis L Rev 1375, 1378 (2009).

<sup>93</sup> See Brodley, 62 NYU L Rev at 1026 (cited in note 5).

<sup>94</sup> See generally Marshall Steinbaum, Eric Harris Bernstein, and John Sturm, *Powerless: How Lax Antitrust and Concentrated Market Power Rig the Economy Against American Workers, Consumers, and Communities* (Roosevelt Institute, Feb 2018), archived at <https://perma.cc/8S9V-RVVA>.

<sup>95</sup> 540 US 398 (2004).

monopoly prices as an important part of our free-market system.<sup>96</sup>

Between monopsony power, foreclosure, domination of the market by powerful distributors, and a multitude of other abuses the antitrust laws sought to rectify, the harms caused by the consumer welfare standard as it is interpreted and enforced—as opposed to how it was intended—indicate the need for a substantial overhaul.

Given the mounting evidence of the failures of current antitrust policies, we need to promote competition. Toward that end, a new standard and new legal presumptions to promote effective competition are not only warranted—they are necessary.

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<sup>96</sup> See *id.* at 407 (“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.”). In returning to the congressional purpose of the Sherman Act, the Court more recently condemned, rather than praised, monopoly pricing. *Apple Inc v Pepper*, 139 S Ct 1514, 1525 (2019) (“Ever since Congress overwhelmingly passed and President Benjamin Harrison signed the Sherman Act in 1890, protecting consumers from monopoly prices has been the central concern of antitrust.”) (quotation marks omitted). Nonetheless, the dicta in *Trinko* has taken on new meaning with the lower courts and agencies. See, for example, United States’ Statement of Interest Concerning Qualcomm’s Motion for Partial Stay of Injunction Pending Appeal, *Federal Trade Commission v Qualcomm Inc*, No 5:17-cv-00220-LHK, \*4 (9th Cir filed July 16, 2019) (available on Westlaw at 2019 WL 3306496) (arguing in favor of the monopoly, and against the FTC’s action and lower court’s ruling, the DOJ argued that “[c]harging high prices is not anti-competitive”).