APPLE, ANTITRUST, AND IRONY

By Chris Sagers

[If player pianos are permitted to exist, then] a condition is almost sure to arise where all incentive to further creative work is lacking and compositions will no longer flow from [composers’] . . . pens . . . .

—John Philip Sousa, 1906

I say to you that the VCR is to the American film producer . . . as the Boston strangler is to the woman home alone.

—Jack Valenti, President, Motion Picture Association of America, April 12, 1982

[Amazon’s eBOOK pricing policy was] impervious, of course, to the . . . overall welfare of the industries in which it [was] operating. . . . [T]he book publishing industry was and is one of delicate balances and cross-supports. It has a cultural role in a civilised society, and a sublime one. New, potentially important and perhaps great authors need to be found. They need to be nurtured.

—Tim Waterstone, Founder, Waterstones Booksellers, April 6, 2012

Amazon was using e-book discounting to destroy bookselling . . . [and] [t]he irony bites hard: our government may be on the verge of killing real competition in order to save the appearance of competition. This

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1 James A. Thomas Distinguished Professor of Law, Cleveland State University. Comments welcome at c.sagers@csuohio.edu. This paper began as a presentation at a conference entitled “In re Books,” held at the Institute for Information Law & Policy at the New York Law School in October, 2012. My thanks to James Grimmelman, who organized the event, and fellow panelists Mark Patterson, Ariel Katz, Niva Elkin-Koren, and Nico van Eijk.

2 John Philip Sousa, The Menace of Mechanical Music, 8 APPLETON’S MAGAZINE 278, 284 (1906).


would be tragic for all of us who value books, and the culture they support.

—Scott Turow, President, The Authors Guild, March 9, 2012

The claim in this paper is that competition as an institution of public policy is essentially failing, that its failure is not primarily a matter of doctrinal or economic detail within our antitrust or the several other laws that make up our competition regime, and that one key cause of the failure is revealed in the public perception of real cases. To clarify, I don’t mean to make the empirically controversial claim that American markets are generally sub-optimal, though anecdotally that seems possible. Rather, our public policy tools meant to address it are not presently very effective, and a cause of the failure can be seen in public perception of actual cases.

I take as my primary tool an examination of one recent, important case: United States v. Apple, Inc., the so-called “eBooks” case of 2012-2013. Apple, an antitrust enforcement action by the Justice Department, was an exceptionally strong case in black-letter doctrinal terms. To most antitrust lawyers it was a case the government basically couldn’t lose, so long as it could prove the facts alleged, and in fact the government won resoundingly at trial. And yet, the decision to sue was met with criticism and confusion throughout the press and popular

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7 Consider the early reaction of Professor Hovenkamp, for example, the country’s leading living antitrust authority: “If Apple in fact orchestrated the agreements [at issue in the case], then I don’t think it has a defense.” Sara Forden, U.S. Sues Apple For eBook Pricing as Three Firms Settle, BLOOMBERG, Apr. 17, 2012, available at http://www.bloomberg.com/news/2012-04-17/u-s-sues-apple-for-ebook-pricing-as-three-firms-settle.html.
8 See Apple, ___ F. Supp. 2d, 2013 WL 3454986 (findings of fact and conclusions of law finding Apple liable for having coordinated per se illegal price fixing conspiracy).
discussion,⁹ by no less than a member of the Senate antitrust subcommittee,¹⁰ and the criticism continued even after the government won. Two newspapers as editorially divergent as the New York Times and the Wall Street Journal said the case should not have been brought.¹¹ Though Apple should have seemed easy, if we believed in competition policy as we usually purport to do, to most Americans it did not seem easy at all.

My claim is that Apple lacked the popular support it deserved for the same reasons that competition policy more generally is failing, and that one key to its rehabilitation—rehabilitation of a

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policy that could be as useful or more so now than ever—is not in doctrinal corrections or advances in economic theory. A general reversal of the policy’s fortunes has been caused by what seem to the broader public to be deep ironies or inconsistencies inhering in competition itself. And so competition rules are unlike other fundamental policies. The public finds it hard to understand why they even exist, what their goals are, and whether any given application of them is desirable. In this they reflect a deeper American ambivalence. Though in loose terms we consider competitive markets important and desirable—to some degree, it has been our defining rhetoric, it is paradigmatically American—we find watching actual markets in healthy operation to be counterintuitive and confusing. We forget that when markets work as they are supposed to, they cause pain.

The problem is that without popular legitimacy for competition as a public policy value, government enforcers lack political support to bring significant cases, courts have fashioned ever more starkly anti-enforcement rules on their deepening skepticism of the policy, and lawmakers and regulators feel free to reward business with anticompetitive new policies. A key corrective could be to understand and counter the ironies or inconsistencies that seem to bench, bar and populace inherent in the institution of competition itself.

To explain what this paper adds requires context. Narratives of the policy’s failure are not only not new, they have cyclically recurred throughout its history. The Sherman Act was initially disdained by most economists,12 and much of the public took it as a symbolic gesture of no consequence.13 Since then, many on the


13 See Richard Hofstadter, What Happened to the Antitrust Movement?, in The Paranoid Style in American Politics and Other Essays 188, 190 (1964) (so describing the “conventional history”).
left have said that it just gives political cover to the business class, who continue to do as they please. ¹⁴ Many critics on the right are sure that it can do good in only the narrowest circumstances,¹⁵ and some condemn it completely as a matter of outright, radically conservative legal realism.¹⁶ Other critics, from across the spectrum, have thought it might just not work for institutional reasons¹⁷ or because it has unintended consequences.¹⁸ These

¹⁴ Thurman Arnold, ironically, made one of the most famous observations in this vein. It would prove embarrassing, as only a short time later he was nominated to lead the Antitrust Division and had to explain himself to a Senate confirmation committee. He had written that “[t]he actual result of the antitrust laws was to promote the growth of great industrial organizations by deflecting the attack on them into purely moral and ceremonial channels . . . . Thus, by virtue of the very crusade against them, the great corporations grew bigger and bigger, and more and more respectable.” THURMAN W. ARNOLD, THE FOLKLORE OF CAPITALISM 212, 217 (1937). The ironies surrounding him are an oft-told story; see, e.g., HOFSTADTER, supra note XXX, at 231-32. See also JOHN KENNETH GALBRAITH, THE NEW INDUSTRIAL STATE 195-96 (3d ed. 1978) (antitrust is a “fig leaf by which power is kept out of sight”); Theodore J. Kreps, Symposium, 39 AM. ECON. REV. 696, 701 (1949) (“The most palatable course [for federal enforcers] is . . . a maximum appearance of enforcement with minimum actual alteration in highly profitable practices.”).

A related early critique from the left, associated with Teddy Roosevelt and his supporters in the press, was that antitrust would be simply unable to confront the unstoppable rise of big business, and that the better course would be control of the inevitable oligopolies through government regulation, through some sort of countervailing private power, or through some new science of administration. See, e.g., WALTER LIPPMAN, DRIFT AND MASTERY: AN ATTEMPT TO DIAGNOSE THE CURRENT UNREST 121-48 (1914) (characterizing the antitrust movement as a “nation of villagers” attempting to stop inexorable social change).


¹⁶ See, e.g., DOMINICK ARMENTANO, ANTITRUST AND MONOPOLY xiii, 3 (2d ed. 1996) (“all of the antitrust laws ought to be promptly repealed” because “our formal antimonopoly policies have been a fraud, and . . . public attention concerning the monopoly problem in America has been totally misdirected”); EDWIN S. ROCKEFELLER, THE ANTITRUST RELIGION 1 (2007) (“There is no such thing as antitrust law. Antitrust is a religion. Antitrust enforcement is arbitrary, political regulation of commercial activity, not enforcement of a coherent set of rules adopted by Congress.”).

¹⁷ It is often said, for example, that the litigation moves so slowly that markets will have changed by the time any remedy takes effect. See, e.g., Frederick M. Rowe, The Decline of Antitrust and the Delusions of Models: The
criticisms can persist because assessing them empirically is difficult. Special problems frustrate empirical study of antitrust,\(^ {19}\) and little systematic measurement of costs and benefits exists.\(^ {20}\)

\(^{18}\) For example, it has been suggested many times that the Sherman Act’s ban on collusion actually caused the Great Merger Wave of 1890-1910, see, e.g., George Bittlingmayer, Did Antitrust Policy Cause the Great Merger Wave, 28 J. L. & ECON. 77 (1985); Samuel R. Reid, Antitrust and the ‘Merger Wave’ Phenomenon: A Failure of Public Policy, 3 ANTITRUST L. & ECON. REV. 25, 28 (1969), and that strict limits on horizontal mergers observed by the Warren Court drove the conglomerate merger wave of the 1960s, see Reid, supra, at 33-34; Rowe, supra note XXX, at 1527.

\(^{19}\) First, studying the net effects of antitrust poses a counterfactual problem. To say whether enforcement in the United States has been net beneficial during any given period, it is necessary to ask how U.S. markets would have performed without antitrust during that same period—a state of affairs that by definition did not exist. Comparative study might solve this problem, but it is frustrated by widely varying legal rules, enforcement priorities, and economic conditions. Further, even a highly successful antitrust policy will operate at the margin, producing comparatively small efficiency increases that can be overwhelmed by other variables affecting an industry. See generally John E. Kwoka, Jr., The Attack on Antitrust Policy and Consumer Welfare: A Response to Crandall and Winston, Northeastern Univ. Dep’t of Econ. Working Paper 03-008, at 2-3, June 2003, available at http://www.economics.neu.edu/papers/documents/03-008.pdf (discussing these problems).

\(^{20}\) There is substantial evidence in one limited area. The evidence is overwhelming that naked horizontal price and output restraints are prevalent, longer lasting than theory might predict, and cause significant harm. Because that conduct is vigorously pursued by government authorities and relatively simple to prosecute, it seems likely that the existing cartel enforcement program produces significant net benefits. See Jonathan B. Baker, The Case for Antitrust Enforcement, J. ECON. PERSP., Fall 2003, at 27, 28-30, 42-45 (summarizing this evidence and making this point). There is also growing evidence that, in
Such global assessments as there are have been either inconclusive\(^{21}\) or controversial.\(^{22}\)

general, mergers and acquisitions do not produce significant benefits, see Dennis C. Mueller, *Merger Policy in the United States: A Reconsideration*, 12 REV. INDUS. ORG. 655, 663-76 (1997) (surveying literature), and so one might argue that anti-merger enforcement at least does not suffer from meaningful false positive costs. But that evidence is not uncontroversial, and in itself it does not address the separate question whether enforcement is net beneficial.

There also is some comparative evidence that countries with developed competition policies enjoy lower real consumer prices for goods and services, see Oz Shy, *Industrial Organization* 5 (1995) (“in the United States real prices of products tend to be the lowest in the world. However, the United States also has the most restrictive antitrust regulation structure [and] . . . that antitrust regulation is probably the cause for low consumer prices in the United States.”), but that evidence remains superficial. Beyond those points, there is generally speaking very little systematic empirical evidence showing whether antitrust is net socially beneficial or not. See Kwoka, *supra* note XXX, at 2 (noting, as of 2003, the longstanding “absence of systematic evidence or even many good case studies that establish the effects” of antitrust enforcement); see also William E. Kovaci, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903, 905 (2009) (“The lack of widely-accepted, consistently applied standards for assessing the quality of agency performance has afflicted the field of competition policy throughout its history.”).

\(^{21}\) See, e.g., George J. Stigler, *The Economic Effects of the Antitrust Laws*, 9 J. L. & ECON. 225, 236 (1966) (presenting, largely as a demonstration project for methodological purposes, results of several tentative empirical studies, finding some modest effects of antitrust on concentration and collusion, but adding that “[t]he substantive findings of the study are meager and undogmatic”); Symposium, 39 AM. ECON. REV. 689 (1949) (collecting views of prominent antitrust economists and lawyers on effectiveness of antitrust law).

\(^{22}\) For example, one recent and bitter round was kicked off by Robert W. Crandall & Clifford Winston, *Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence*, J. ECON. PERSP., Fall 2003, at 3. Crandall and Winston surveyed several historical enforcement actions, assessed some existing empirical literature, and reported the results of a regression study of merger enforcement activity. They concluded that the empirical support for antitrust is “weak” and that the “authorities would be well advised to prosecute only the most egregious anticompetitive violations.” Id. at 3-4. (A commenter reports that their initial draft urged outright antitrust repeal, but that later, one presumes in reply to what may have been fairly caustic commentary, they withdrew that recommendation. See Kwoka, *supra* note XXX, at 1 n.2.) The paper was met with scathing critique, arguing that the historical review was flawed, the purported “synthesis[s] of available research” was selective and
My point is very different. While competition as a policy seems to be in some real trouble, I do not believe the cause is a broad failure in doctrinal antitrust rules or enforcement institutions. A vigorous competition policy, and in particular a set of rules like our antitrust, enforced consistently over time through simple, generalized, and moderately pro-enforcement rules, could pose a range of benefits. The problem is that consistent enforcement is hindered by the lack of popular commitment to competition itself.

This paper makes one theoretical claim and one empirical claim. Theoretically, popular doubts, though they seem to have different explanations in different cases, tend to share a common origin in the central problem of generalizability. A problem as old as antitrust is the struggle between the general and the specific (or, in slightly different terms, the simple and the complex). Despite misleading, and that the reported econometric result was not only based on a rejected methodology, but also on data so highly aggregated as to be meaningless. See Baker, supra note XXX; Kwoka, supra note XXX; Gregory J. Werden, The Effect of Antitrust Policy on Consumer Welfare: What Crandall and Winston Overlook, AEI-Brookings Joint Center for Regulatory Studies Related Pub. 04-09, April 2004, available at http://www.aei.org/article/the-effect-of-antitrust-policy-on-consumer-welfare/; Jonathan B. Baker, Letter, J. ECON. PERSP., Winter 2005, at 243. See also Russell W. Pittman & Gregory J. Werden, The Divergence of SIC Industries From Antitrust Markets: Indications from Justice Department Merger Cases, 33 ECON. LETTERS 283 (1990) (earlier paper explaining why the data later used by Crandall and Winston cannot be used to draw causal inference concerning competition).

I won’t really try to defend “moderate pro-enforcement” here. But the argument is that rules should resolve the fundamental antitrust problem of factual and normative uncertainty by shifting the burden of the uncertainty to defendants, according to simplified doctrinal rules which identify categories of competitively dangerous conduct on the basis of careful, empirical, academic research. The burden should be shifted to defendants in these cases because there is now substantial empirical evidence that the one-time concern for the chilling of pro-competitive conduct through “false positives” is actually quite backward; the risk of underenforcement in a range of categories of conduct is greater than the risk of overenforcement. See infra notes XXX and accompanying text.

Moreover, rules that are simple, generalized and anti-enforcement would have little substantive effect and may not justify the costs of enforcement.
rough consensus that competitive markets are desirable, we feel uneasy that simple rules to require them are always adequate. We can all generally feel good about, say, a strict ban on naked horizontal price-fixing. But many price-fixing scenarios turn out to involve unusual conduct or special technological features or what-not, that strike some of us ambiguous. *Apple* is itself such a case. The problem is not a narrow one of how to write specific doctrinal rules or how many per se prohibitions there should be. It is a deep and perhaps not ultimately resolvable empirical uncertainty as to the generalizability of the price theoretic model. To believe that antitrust should be a very general law of simple rules is to believe that markets are all pretty similar, across industries and over time.

A closely related theme is that however desirable competition may be most of the time, we often fear that in some cases it will be destructive of other values important to Americans. This point too, though it now manifests itself in seemingly novel ways, is old. The argument as it is now made broadly resembles the “destructive competition” reasoning that first surfaced in the late nineteenth century.\(^{24}\) What unites old-fashioned “destructive competition” and these various modern arguments is their claim that some good, service, or value is desired by the public and would be supplied in ideal markets, but that under real-world conditions cannot be supplied profitably.\(^{25}\)

\(^{24}\) Specifically, “destructive competition” usually refers to the dominant view among economists during the late 19th and early 20th centuries, that competition among many firms would be unsustainable in industries with high fixed costs. They argued that the industrial revolution exploding all around them would frequently result in either monopoly or endless price war. *See generally* NAOMI LAMOREAUX, *THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS*, 1895-1904, at 46-86 (1988) (explaining the argument and canvassing its development among American academics).

\(^{25}\) For example, antitrust defendants have frequently argued that they need private trade restraints because competitive revenues would not cover the costs of adequate safety or quality, *see, e.g.*, FTC v. Ind. Fed’n of Dentists, 476 U.S. 477, 462-63 (1986), or might waste resources or otherwise disserve important values, *see, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 170-71 (1940) (taking as true evidence that depressed prices might make some oil wells go out of production irrevocably, but finding price-fixing conspiracy per
Taking these two ideas together, the deep instinct that saps public support for real, effective competition enforcement is the instinct that some cases are special because sometimes competition is destructive.

So much for the theoretical claim. The paper’s second point is loosely empirical. It takes an example of antitrust enforcement in which that underlying fear—that destructive competition should preclude simple, general competition rules—convinced many intelligent observers that antitrust should not be enforced, but it shows that in fact none of the alleged problems in the case were new or unique, or showed that healthy, vigorous price competition without collusion was undesirable.

Apple is well suited to this purpose. A case in which the plaintiff won may not seem like strong evidence that antitrust has failed, but indeed it is ideal. Apple is one of a number of important cases historically in which a strong theory of liability lacked popular support. Moreover, because Apple involved innovative technology, and a changing marketplace in which a wholly separate firm (non-party Amazon) had gained a large market share, see illegal nevertheless). Likewise, a large literature argues that vertically imposed limits on retail competition may be needed so that retailers can provide expensive information and marketing services that consumers desire and need. The concern is that those services will go uncompensated, and therefore will be undersupplied, because consumers will consume them (for free) but then buy the underlying goods at lower prices elsewhere. See generally Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice 498-502 (4th ed. 2011).

26 As other examples, the public also disfavored the breakup of the vertically integrated Hollywood studio system in the 1940s, see United States v Paramount Pictures, Inc, 334 US 131 (1948), and was at best ambivalent about the breakup of AT&T in 1983, see United States v. AT&T Co., 552 F. Supp. 131, 226-27 (D.D.C. 1982) (consent decree), aff’d sub nom. Maryland v. United States, 460 U.S. 1001 (1983); see generally Tim Wu, The Master Switch: The Rise and Fall of Information Empires 160-61 (2010) (discussing these cases and their popular reception), and much of the public strongly opposed a case about which I will say more, United States v. Microsoft, Inc., 253 F.3d 34 (D.C. Cir. 2001) (en banc). See infra notes XXX and accompanying text.
it features a range of issues that trigger fear of simple rules and destructive competition: change, business failure, lost jobs and lost revenue, and confusion of the interests of competitors with the interests of competition. The case is also very recent, it is a “big” case in some sense, and its facts were very well developed by the government.

*Apple* is ideal for another reason, because it encapsulates a timely policy problem: transition from an older technology to a newer one. Times of change often test our faith in competitive markets. But technological transitions, like the rise of digital distribution, are not new; they are as old as capitalism. The uncertainty and risk of loss that surround the digital revolution, like those that have surrounded other technological transitions, are just instances of the pain and dislocation that is inherent in all healthy competition. (This is a poignant observation for me at this particular moment, as market changes force my employer and other law schools to face existential problems of their own.)

Ultimately then, the reason to study the *Apple* case is that a careful defense of it is a defense of competition policy generally. Methodologically, the only tool here is a rhetorical one familiar in antitrust, of showing that the purportedly special, distinguishing characteristics of a given case have occurred before, in differing markets and time periods. And if that defense of the case seems persuasive, in showing that it involved nothing more than a set of garden-variety, anticompetitive trade restraints, not justified by any special complexity, then it is some evidence favoring general rather than specific rules. In itself it cannot prove, but it supports an argument that, for purposes of antitrust, markets are largely similar and circumstances supporting relaxation of competition rules are rare.

In other words, the argument here is for taking seriously an old and cherished rule in antitrust, which at least nominally remains one of its fundamental commitments. As Justice Stevens wrote in a leading opinion:
The assumption that 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.27

Our antitrust is tolerably well suited to the job of imposing simple, generalized conduct rules. It is a law enforcement regime, and for the most part not a regulatory one.28 and at least in

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27 Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 692 (1978). See also United States v. Phila. Nat’l Bank, 374 U.S. 321, 371 (1963) (conduct challenged in antitrust “is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted [the antitrust laws].”); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222 (1940) (“Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike.”).

28 American antitrust has at times seemed somewhat more regulatory in nature and sometimes less; for example, merger remedies have sometimes imposed ongoing conduct requirements and obligations to deal; the Federal Trade Commission at one time made some use of its limited statutory power to make substantive trade conduct rules; and the agencies’ many guidelines and policy statements, while not legally binding, may be regulatory to the extent that they affect firm behavior.

But there is general consensus that antitrust should avoid prospective regulation, see, e.g., ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 3 (2007) (“Rather than create a regulatory framework that prohibits private . . . restraints that frustrate the operation of free-market competition.”); A. Douglas Melamed, Antitrust as Law Enforcement, ANTITRUST, Fall 2012, at 76 (“We take it for granted that antitrust is about law enforcement.”). The agencies appear to share this view, disfavoring remedies that are regulatory in nature, see, e.g., DEPT. OF JUST., ANTITRUST DIV., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 4-6 (2011) (suggesting that either structure remedies or suit to block will be preferred in all cases except in vertical mergers, where efficiencies can be gained through the merger only by combining assets that would encourage exclusionary conduct), and for the most part choosing not to use those limited substantive rulemaking powers they have.

That view will likely become more entrenched, as there is now some evidence that conduct remedies have not worked very well. See John E. Kwoka, Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes, 78 ANTITRUST L. J. 619, 640-44 (2013).
principle it can be made to consist of simple rules. But this then poses the political problem at the heart of this paper, and it is a reason that restoring popular legitimacy is important. As Professor Kovacic has written, commitment to enforcement waxes and wanes with the changing priorities of federal administrations, and during times of less enforcement markets consolidate and become less competitive. When enforcement rigor returns, the damage can be difficult to undo. So in the worst-case scenario, inevitably cyclical failures of popular resolve may be such that no competition policy can really be expected to work. I will endeavor to argue that things may not be that dire. There is value in enforcement, but there is even more in consistent enforcement supported by strong popular commitment.

The paper begins by defending the claim that antitrust and competition values are in some real jeopardy. Part II then describes the Apple case and puts it in context of the larger transition to digital distribution. Parts III through VI then address each of the purported ironies of the Apple case, and ask whether they really show that the lawsuit was unwise or that there was something wrong with competition enforcement. These Parts are meant to work through a process of elimination. I identify specific problems in antitrust cases that tend to undermine public confidence, using the Apple case as a guide, and then narrow them down by showing those that are implausible or contrary to experience. I attempt to work through them in order of increasing plausibility, to see if in the end we might count up circumstances in which antitrust enforcement really does pose serious problems, which can be demonstrated through meaningful theory and

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29 And indeed, for the most part it already does. The bulk of current antitrust consists of three comparatively simple conduct rules, that require no prospective government proscription: business firms must avoid agreements that unreasonably limit competition, Sherman Act § 1, 15 U.S.C. § 1; they must avoid unilateral acts that exclude their competitors, if they already hold monopoly market share, Sherman Act § 2, 15 U.S.C. § 2; and they must avoid acquisitions that will substantially lessen competition, Clayton Act § 7, 15 U.S.C. § 18. See Chris Sagers, Antitrust Examples & Explanations 1-9 (2011).

30 Kovacic, Deconcentration, supra note XXX.
evidence. In concluding, Part VI takes up those few remaining, genuinely deep problems that are left over, and suggests some thoughts about how we should feel about them.

I. COMPETITION AS A LIVING POLICY, CIRCA 2014

Antitrust, a storied and celebrated inheritance of the American industrial revolution, which judges once earnestly equated with the Magna Carta and the Bill of Rights, still retains a certain rhetorical privilege in American politics. We retain not one but two federal agencies to enforce it, and we allocate to them substantial budgets every year. The Antitrust Section is among the American Bar Association’s largest and most lucrative units, and it routinely issues statements, publications and testimony strongly supportive of vigorous antitrust. Politicians honor it in words, despite party affiliation, just as they always have done.

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32 NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104 n.27 (1984) (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4–5 (1958)) (“The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.”); Flood v. Kuhn, 407 U.S. 258, 291 (1972) (quoting Topco, 405 U.S. at 610) (the antitrust laws “are 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”); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940) (Sherman Act is a “charter of freedom”).

33 For example, for the past several decades the Antitrust Section has frequently given testimony to Congress and in other public venues opposing new antitrust exemptions or calling for repeal of existing ones. Many of these statements are available online at http://www.abanet.org/antitrust/at-comments/comments.shtml.

34 James Sensenbrenner, for example, a generally conservative Republican U.S. House member from Wisconsin, introduced legislation in 2001 creating a blue-ribbon antitrust study commission to study the antitrust laws. Many at the time feared the commission would simply be a tool to limit antitrust law. However true or not that may have been, he introduced the bill by saying that “our antitrust laws have worked well by fostering a competitive marketplace where American consumers have affordable choices. However, we shouldn't shy away from taking a look at some of these antitrust laws that have served us well
Especially in these latter deregulatory days, in which Congress and federal regulators have dismantled much of the rate-and-entry regulatory apparatus of old, they need to argue that free markets policed by antitrust can take regulation’s place. Occasionally even Presidents still mention it in important addresses. On a


35 Cf. LIPPMAN, supra note XXX, at 122 (noting, in a 1914 essay harshly critical of antitrust and asserting that the law was widely believed to be incoherent and ineffective, that politicians nevertheless “all say in public that it is a great piece of legislation— an ‘exquisite instrument’ someone called it the other day.”); Kreps, supra note XXX, at 697 (“It is doubtful whether during most of the period since 1890 Congress has actually . . . desired [to preserve competition.] . . . While its oratory has been ‘agin monopoly,’ its acts have steadily exempted one industry or practice after another.”).

36 During the Carter administration, regulators and Congress began what would be a decades-long process of repealing regulatory regimes, most of which originated in the Progressive and New Deal years, under which regulators directly controlled entry and prices in specific industries, mostly in communications, transportation, banking and finance, and energy sectors. For comprehensive coverage, see ALFRED E. KAHN, THE ECONOMICS OF REGULATION (1988).

37 For example, Christopher DeMuth, an official in the Reagan White House known as the President’s “deregulation czar,” explained his Administration’s intent that as it worked to repeal intrusive economic regulation, antitrust would naturally step into its place to protect the public interest. Christopher C. DeMuth, Deregulation Review, 53 ANTITRUST L. J. 189 (1984).


For the most part, Presidents now rarely discuss antitrust directly. The last time a president mentioned it in an inaugural address, for example, was Herbert Hoover in 1929. See George Slover, Obama Inauguration Speech Mentions
more substantive level, requests for special exception from antitrust typically face hostility, both from courts and Congress. The Supreme Court has said that “[l]anguage more comprehensive” than that in the antitrust statutes “is difficult to conceive,” United States v. Southeastern Underwriters Ass’n, 322 U.S. 533, 553 (1944), and accordingly that Congress meant “to strike as broadly as it could” in those laws. Goldfarb v. Va. State Bar, 421 U.S. 773, 787 (1975). The courts therefore traditionally observed a strong presumption against judge-made limits, in all but a few special situations. For example, courts long expressed disfavor for “implied repeal” of antitrust by other federal statutes. See, e.g., United States v. Phila. Nat’l Bank, 374 U.S. 321, 350 & n. 28 (1963) (“[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored”). They expressed disfavor even where antitrust was said to impinge on constitutional freedoms. See, e.g., Associated Press v. United States, 326 U.S. 1, 20 (1945) (rejecting First Amendment protection for horizontal boycott among newspaper publishers, because “[f]reedom of the press . . . does not sanction repression of that [same] freedom by private interests”).

The special situations in which courts traditionally would recognize limits on antitrust were rare and idiosyncratic. They always involved some special regulatory presence to take the place of antitrust, or some very clear indication that antitrust was not meant to apply. Such situations included very pervasive regulation of a market, see, e.g., Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363 (1973) (excusing antitrust liability for conduct directly overseen by Civil Aeronautics Board, which used its explicit statutory power to exempt the conduct from antitrust), direct regulatory control of prices themselves, see Keogh v. Chicago & Northwestern Railway Co., 260 U.S. 156 (1922) (prohibiting private damages actions in antitrust where the gravamen of the injury is a rate filed with a regulatory agency), Congress’s elaborate and extensive demonstration of its intent that antitrust not apply to organized labor, see, e.g., Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 n.15 (1940), or the Court’s special concern for protecting the political process, see Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961); Parker v. Brown, 317 U.S. 341 (1943).

and those that are already on the books face perennial pressure for limitation or repeal.\textsuperscript{41} However controversial the doctrinal details

\textsuperscript{40}Congress has admittedly adopted a few new antitrust safe harbors in recent years, and indeed, adopting them has been virtually the only antitrust legislation Congress has been able to accomplish in a few decades now. But the exemptions it has adopted are telling. In sharp contrast to the broad, industry-wide exemptions that were once common, recent bills have been very narrowly tailored, often time-limited, and some have included mandates for study by the Government Accountability Office to ensure that their effects are tolerable. \emph{See generally Sect. of Antitrust L., Am. Bar Ass’n, Federal Statutory Exemptions From Antitrust 13-18 (2007).}

\textsuperscript{41}For example, each of the many blue-ribbon antitrust study commissions established over the past several decades have urged repeal of existing exemptions and warned against new ones. In particular, the so-called “Shenefield Report” of 1979 contained seven full chapters comprehensively analyzing statutory and judicial antitrust limitations, calling for their drastic limitation or repeal. \emph{See 1 Nat’l Comm’n for the Review of Antitrust Law and Procedures, Report to the President and the Attorney General 177-316 (1979).}

\emph{Every other official antitrust study commission has made similar recommendations. \textsuperscript{40}See Antitrust Modernization Comm’n, Report and Recommendations 338 (2007) (“When the government decides to adopt economic regulation, antitrust law should continue to apply to the maximum extent possible . . . [and] should apply wherever regulation relies on the presence of competition . . . to achieve competitive goals.”); id. at 340-41 (calling for repeal of the filed rate doctrine specifically, particularly where “the regulatory agency no longer specifically reviews proposed rates.”); Report of the Task Force on Productivity and Competition, reprinted at 115 Cong. Rec. 15933, 15934 (June 16, 1969) (the “Stigler Report”) (broadly calling for policy change favoring competition in all regulated industries); id. at 15937 (calling for repeal of the Webb-Pomerene Act, an explicit antitrust exemption); Report of the White House Task Force on Antitrust Policy, reprinted at 115 Cong. Rec. 13890, 13897 (May 27, 1969) (the “Neal Report”) (decrying the “bias” in “the regulated sector of the economy . . . against competition,” and calling for “study of . . . the extent to which . . . the competitive standards of the antitrust laws can be substituted for at least some aspects of regulation.”); Attorney General’s Committee to Study the Antitrust Laws, Report 269 (1955) (“This Committee . . . endorses competition as the major rule in our private enterprise economy. . . . [W]e urge that moves toward regulation be taken only with full recognition of the effects of . . . exceptions to the policy favoring competition”).}
of antitrust might still be, those rare calls for its outright repeal are marginalized and ignored.42

And yet, on many measures antitrust is failing and perhaps losing effectiveness that it may once have had. While counting cases may be a crude measure of “failure,”43 it probably is not irrelevant that enforcement by both government and private plaintiffs is at historic lows.44 The drop in enforcement likely reflects the increased cost of bringing antitrust claims, which in turn is driven by the attitudes of the federal judiciary. Since about the mid-1970s, the courts have fashioned a long series of pro-defendant substantive and procedural rules.45 The serial repeal of

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42 For discussion of one recent, seriously marginalized example, see Chris Sagers, BREAKING NEWS: Rand Paul Proposes to Repeal Federal Antitrust as to “Individuals,” ANTITRUSTCONNECT BLOG, April 4, 2012, available at http://antitrustconnect.com/2012/04/04/breaking-news-rand-paul-proposes-to-repeal-federal-antitrust-as-to-“individuals”/. See also ARMENTANO, supra note XXX.

43 See Kovacic, supra note XXX, at 908-09, 919-23 (explaining this view).

44 The annual number of new antitrust filings hit a long-term low in 2011, of only 475 new filings. Prior to that, the number hadn’t dipped that low in twenty years, and did so only twice in the past fifty. Historically the numbers were quite a bit higher. One thousand or more new cases were filed per year throughout most of the 1970s and 1980s, hitting a peak of about 1600 in 1977, and not falling below 1000 again until 1987. See Paul E. Godek, Does the Tail Wag the Dog? Sixty Years of Government and Private Antitrust in the Federal Courts, ANTITRUST SOURCE, December 2009, available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec09 _Godek12_17f.authcheckdam.pdf; William Kolasky, Antitrust Litigation: What’s Changed in Twenty-Five Years?, ANTITRUST, Fall 2012, at 9. Both studies are based on data contained in the annual report ADMIN. OFF. OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS, recent editions of which are available at http://www.uscourts.gov/Statistics/JudicialBusiness.aspx.

While the number of new filings was higher in 2012—702 new cases were filed that year—it seems too early to predict any permanent rebound.

45 Additionally, aside from any specific doctrinal change, a truly remarkable turn has been the courts’ new reliance on what is essentially tort reform rhetoric.
They have stressed litigation costs, the purportedly misplaced incentives of the plaintiff’s bar, and the threat of nuisance settlements as reasons to limit substantive antitrust rules and access to the courthouse. See, e.g., Credit Suisse Secs. (USA), LLC v. Billing, 551 U.S. 264, 280-83 (2007) (finding implicit repeal of antitrust law as it would otherwise apply to some securities transactions, in part to ease litigation and compliance costs for defendants); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557-62 (2007) (stressing costs of frivolous private antitrust litigation to support tightening of pleading standards); Verizon Commc’ns, Inc. v. Law Off. of Curtis V. Trinko, LLP, 540 U.S. 398, 411-14 (2004) (stressing litigation costs and risk of false positives as reason to limit law against monopolization); cf. Credit Suisse, 551 U.S. at 287 (Stevens, J., concurring) (criticizing majority for considering litigation costs in setting the scope of antitrust).


47 In Ashcroft v. Iqbal, 556 U.S. 662 (2009), and Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), the Court held that plaintiffs in all federal civil actions must plead the material elements of their causes of action with sufficient factual support to render them “plausible.” In antitrust cases this fairly clearly means that that conduct ascribed to defendants must be shown to be economically rational, at least in the absence of substantial direct evidence of the conduct alleged. See Twombly, 550 U.S. at 565-66; see also id. at 554 (relying on Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574 (1986)). The challenge for antitrust plaintiffs is to meet a significantly tougher pleading obligation without the benefit of discovery.

Substantial uncertainty still surrounds the standard, see, e.g., Chris Sagers, A Tale of Two Panels: The Size of the Chancellor’s Foot in Text Messaging and Potash, COMPETITION POL’Y INT’L, Nov. 16, 2011, available at https://www.competitionpolicyinternational.com/a-tale-of-two-panels-the-size-of-the-chancellor-s-foot-in-text-messaging-and-potash/, but there is reason to believe it has already significantly dampened private civil enforcement, see infra note XXX.

48 Through a series of caselaw developments that culminated in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) and ComCast Corp. v. Behrend, ___ U.S. ___, 133 S.Ct. 1426 (2013), the courts have made clear that all
testimony have all gotten much attention. Less noticed but maybe no less significant have been changes in the substantive standards governing mergers and monopolization, the apparent

elements for class certification must be satisfied by a preponderance of the evidence at the time of certification, even if it requires a hearing and even though it may overlap with the merits of plaintiff’s claim. Under ComCast this may require resolving Daubert challenges to economic experts. The practical effect has been to make class certification—a sine qua non for proceeding past initial pre-trial stages in many cases, especially for consumer plaintiffs—extremely expensive. See Kolasky, supra note XXX.

49 Until really quite recently, courts considered antitrust claims non-arbitrable, because they believed there to be a “pervasive public interest in enforcement of the antitrust laws.” Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 827 (2d Cir. 1968) (stating rule followed until mid-1980s). That only began to change in Supreme Court decisions in the past few decades. But the Court has now confirmed not only that antitrust and other consumer claims are generally arbitrable, see Kolasky, supra note XXX, at 15, but also that waivers of class arbitration in consumer contracts are enforceable, AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011). These rules apply even when arbitration clauses and waivers are contained in mass market, boilerplate consumer contracts that are rarely read. And, since consumer claims are usually too small to support individual antitrust suits, an antitrust arbitration clause with a class waiver is likely to excuse a firm from antitrust risk entirely.

50 In practice, Daubert challenges are very frequent in antitrust and have had a much more significant effect on plaintiffs than defendants. A 2011 study found that about 85% of Daubert challenges in antitrust were directed at plaintiffs’ experts, and in about 40% of those cases the challenge was successful in excluding them. See James Langenfeld & Christopher Alexander, Daubert and Other Gatekeeping Challenges of Antitrust Experts, ANTITRUST, Summer 2011, at 21.

51 The primary antitrust constraint on mergers and acquisitions is Clayton Act § 7, 15 U.S.C. § 18. As recently as the early 1970s, § 7 was thought to contain a strong “incipiency” element—a rule that acquisitions should be stopped not only where they would surely create monopoly or trade restraint, but even when they were only likely to. See, e.g., United States v. Pabst Brewing Co., 384 U.S. 546, 554 (1966). Courts served that goal with an unusually strict standard of liability, under which a merger was illegal whenever it non-trivially increased concentration in an already non-trivially concentrated market, barring only the possibility of defense rebuttal, and courts were extremely skeptical of rebuttals. See United States v. Phila. Nat’l Bank, 374 U.S. 321, 362-63 (1963). But, to shorten a long story, the law has changed dramatically. Because the Supreme Court has not decided a merger case since shortly before the adoption of the Hart-Scott-Rodino merger review system in 1976, the development of merger law has been in the hands of the lower courts. Taking their cue largely
\textit{sub silentio} repeal of a once-strong rule making wrong-doers bear the risk of uncertain damages,\textsuperscript{53} and a fairly bizarre chain of events from the more cautious, conservative turn in the Supreme Court’s last substantive merger decision, United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974), they have nominally retained the analytical framework from \textit{Philadelphia National Bank}, but have demanded much more of plaintiffs to show that a merger could be anticompetitive. See \textit{Sagers, supra} note XXX. It is fair to say that there is now a strong presumption against enforcement, defended on a much greater judicial skepticism of the possibility of market power and concern for chilling of efficient consolidations, such that litigated merger challenges now succeed almost exclusively against the largest horizontal mergers.

But, obviously, the dearth of challenges has not been for lack of mergers to challenge. Since the 1970s the United States has experienced no fewer than three massive merger waves, each one larger than any before it in history. See F. M. Scherer, \textit{A New Retrospective on Mergers}, 28 REV. INDUS. ORG. 327, 327-27 & fig. 1 (2006).

\textsuperscript{52} Beginning in \textit{Copperweld Corp. v. Independence Tube Corp.}, 467 U.S. 752 (1984), the modern Court has adopted a strong view that “[c]oncerted activity subject to § 1 [should be] judged more sternly than unilateral activity under § 2,” \textit{id.} at 768. Since then, it has generally said that unilateral conduct, even by a monopolist, is unlikely to be anticompetitive and, even when it poses competitive risk, difficult enough to distinguish from healthy competition that false-positive risk requires standards of liability that are very difficult for plaintiffs to meet. See, e.g., \textit{Verizon Commc’ns, Inc. v. Law Offs. of Curtis V. Trinko, LLP}, 540 U.S. 398, 409-15 (2004) (recognizing only a “limited exception” under which refusals to deal can be illegal, because of antitrust’s “sometimes considerable disadvantages”); \textit{Brooke Grp., Ltd. v. Brown & Williamson Tobacco Corp.}, 509 U.S. 209 (1993) (adopting very restrictive test for predatory pricing as element of monopolization claim); see generally Jonathan B. Baker, \textit{Exclusion as a Core Competitive Concern}, 78 ANTI TRUST L. J. 527 (2013).

\textsuperscript{53} The traditional rule was that “the wrongdoer shall bear the risk of the uncertainty which his own wrong has created,” because “[a]ny other rule . . . would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain.” \textit{Bigelow v. RKO Radio Pictures, Inc.}, 327 U.S. 251, 264-65 (1946); \textit{see also} \textit{Zenith Radio Corp. v. Hazeltine Research, Inc.}, 395 U.S. 100, 123-124 (1969). It reflected the more general value that “the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.” \textit{Perma Life Mufflers, Inc. v. Int’l Parts Corp.}, 392 U.S. 134, 139 (1968), rev’d on other grounds \textit{Copperweld Corp. v. Independence Tube Corp.}, 467 U.S. 752 (1984).
by which many once-heavily regulated industries have come to be subject to neither regulation nor antitrust.\textsuperscript{54} Indeed, while the

A striking reversal of the policy has been the ever stricter application of the so-called “Illinois Brick” or “indirect purchaser” rule. The Supreme Court first barred indirect purchasers from recovering money damages on its view that it would be too difficult for them to show what portion of an antitrust injury was passed on to them (by the direct purchaser of the product in question). Ill. Brick Co. v. Illinois, 431 U.S. 720, 730-31 (1977). Somewhat ironically, it turns out, the Court adopted Illinois Brick in the first place only because an even older decision had already held that defendants could not raise it as a defense in a case brought by a direct purchaser that some of the injury they had caused was passed on to that purchaser’s own customers. That older decision adopted its rule explicitly to encourage private antitrust enforcement. See id. at 725-26 (quoting Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968) (“A . . . reason for barring the pass-on defense was the Court’s concern that unless direct purchasers were allowed to sue for the portion of the overcharge arguably passed on to indirect purchasers, antitrust violators ‘would retain the fruits of their illegality’ because indirect purchasers ‘would have only a tiny stake in the lawsuit’ and hence little incentive to sue.”)). Since then the rule has become increasingly strict, and the Court has increasingly stressed its desire to protect defendants from uncertainty, barring indirect purchaser plaintiffs even where the direct purchaser was mandated by state law to pass on the entire overcharge to its customers. See Kansas v. UtiliCorp United, Inc., 497 U.S. 199, 214-19 (1990) (so holding and narrowing any possible exceptions to Illinois Brick). The Court has so held even though Bigelow and Hazeltine Research remain nominally good law.

\textsuperscript{54} This is the result of developments within the so-called “filed rate” or Keogh doctrine, under which regulated firms that “file” their rates with a regulatory authority are immune from private money damages claims arising from the rates actually filed. Though the doctrine is now widely condemned, even in the contexts for which it was originally intended, see, e.g., Herbert Hovenkamp, Federal Antitrust Policy 781-82 (4th ed. 2011); Jim Rossi, Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era, 56 Vand. L. Rev. 1591 (2003), it has actually been expanding for the past few decades. Since an important case in which the Supreme Court reluctantly chose not to reverse the doctrine, Square D, Inc. v. Niagara Frontier Tar. Bur., 476 U.S. 409, 417-24 (1986) (calling lower court’s critique of doctrine “thoughtful and incisive,” acknowledging that doctrine might be “unwise as a matter of policy,” and that subsequent “developments [might] cast [the case originally creating the doctrine, Keogh v. Chi. & N.W. Ry. Co., 260 U.S. 156 (1922)] . . . in a different light”), lower courts have actually applied it more aggressively. In particular, disregarding the view of some courts and most commentators that deregulated markets should be subject to more antitrust and not less, see, e.g., Ting v. AT&T, 319 F.3d 1126, 1143 (9th Cir. 2003) (“In deregulated markets
courts still frequently repeat rote platitudes to the importance of antitrust, it turns out that they commonly do so either in the breach or with respect only to the law’s scope, and not when they are actually reaching the merits. 55 Growing judicial hostility may be

55 For example, in all the antitrust cases the Supreme Court has decided since 1992, defendants have won in every one except three. Two of those three were resounding, 9-0 victories for plaintiffs, written with the ringing endorsements of old. But they both only went to the scope of antitrust and did not reach the merits of the cases in question. FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003 (2013); American Needle, Inc. v. NFL, 130 S. Ct. 2201 (2010). In the one, solitary substantive plaintiff victory before the Court in more than twenty years, FTC v. Actavis, ___ U.S. ___, 2013 WL 2922122 (2013), the Court split 5-3 on ideological lines (Justice Alito abstaining), and produced a strongly worded dissent. That was so even though, to most observers, the conduct in question was glaringly anticompetitive and illegal, and some believed it should be per se illegal. See Chris Sagers, The ‘Reverse Payment’ Drugs Case: The Most Important Economic Issue You Never Heard of—And Why There Might Still Be Some Hope for Antitrust, HUFFINGTONPOST, June 25, 2013, available at http://www.huffingtonpost.com/chris-sagers/the-drug-patents-case-the_b_3480866.html.
political in some part, but it is probably driven more by changing academic fashion. Judges must contend with what is now a massive theoretical literature showing the ways that virtually any conduct might hypothetically be pro-competitive. Critics could once plausibly mock antitrust for presuming that everything is anticompetitive, but that shoe has switched feet. As the Apple

For what it may be worth, historians and law professors already believed that there has been a conservative turn on the federal courts, see, e.g., LAURA KALMAN, RIGHT STAR RISING (2010); Erwin Chemerinsky, Supreme Court’s Conservative Majority is Making Its Mark, L.A. TIMES, Oct. 4, 2010, and, with respect to the Supreme Court, that view enjoys increasingly sophisticated empirical corroboration, see Lee Epstein et al., Ideological Drift Among Supreme Court Justices: Who, When, and How Important?, 101 NW. L. REV. 1482 (2007) (introducing the “Martin-Quinn” score, under which serious rightward drift on the Supreme Court has been documented); Adam Liptak, Court Under Roberts Is Most Conservative in Decades, N.Y. TIMES, July 25, 2010, at A1; Nate Silver, Supreme Court May Be Most Conservative in Modern History, N.Y. TIMES: FIVETHIRTEEN BLOG, March 29, 2012, available at http://fivethirtyeightblogs.nytimes.com/2012/03/29/supreme-court-may-be-most-conservative-in-modern-history/.

However, the evidence appears mainly to support ideological influence on the Supreme Court and not on the lower courts, where judges are apparently less free to act on ideological preferences. See, e.g., Corey Rayburn Yung, Beyond Ideology: An Empirical Study of Partisanship and Independence in the Federal Courts, 80 GEO. WASH. L. REV. 505, 510-21 (2012); Frank B. Cross, Decisionmaking in the U.S. Circuit Courts of Appeals, 91 CAL. L. REV. 1457, 1514 (2003).

For example, Coase famously said that “if an economist finds something—a business practice of one sort or other—that he does not understand, he looks for a monopoly explanation. And as in this field we are rather ignorant, the number of ununderstandable practices tends to be rather large, and the reliance on monopoly explanations frequent.” Ronald Coase, Industrial Organization: A Proposal for Research, in 3 POLICY ISSUES AND RESEARCH OPPORTUNITIES IN INDUSTRIAL ORGANIZATION 59, 67 (V. Fuchs ed. 1972).

Like a lot of his pithy, largely unelaborated one-liners, this one gets quoted a lot. See, e.g., Joshua D. Wright, The Antitrust/Consumer Protection Paradox: Two Policies At War With Each Other, 121 YALE L. J. 2216, 2235 n.79 (2012); Richard A. Epstein, Inside The Coasean Firm: Why Variations In Competence And Taste Matter, 54 J. L. & ECON. S41, S60 (2011); Christopher S. Yoo, Network Neutrality And The Economics Of Congestion, 94 GEO. L.J. 1847, 1907 n.286 (2006); Alan J. Meese Monopolization, Exclusion, And The Theory Of The Firm, 89 MINN. L. REV. 743, 786 n.176 (2005); Jonathan H. Adler,
case demonstrates, it is now common that complex, defensive theoretical acrobatics are the first reaction to any industry conduct, even when the simplest explanation is profitable restraint of trade.\textsuperscript{58}

Fundamentally, these trends reflect a shift from: (1) a presumption in favor of enforcement, in place from World War II until the late 1960s or 1970s, which emphasized empirical confidence in large-numbers competition that loses more from inter-firm collaboration or very large-scale production than it gains, to (2) a presumption against enforcement, that emphasizes the risk of chilling procompetitive conduct\textsuperscript{59} and politically inappropriate limits on individual freedom.\textsuperscript{60} And at length, during

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\textsuperscript{58} See, e.g., sources cited in note XXX, supra, concerning the Apple case.

\textsuperscript{59} See, e.g., Trinko, 540 U.S. at 414; Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 438, 447-48 (2009), cannot in itself serve the economic goals of allocational efficiency or consumer welfare. Except in the empirically unlikely circumstance that they are disciplined by very quick, equally efficient potential entry, a firm with a monopoly share rationally raises price, regardless how it got that share. But the rule might serve a more economic purpose if liability for no-fault monopoly would chill pro-competitive conduct or be more costly to administer than the benefits it could bring.

And yet, there is another (and I think more likely) explanation that is not economic at all—the rule lets shareholders use their property as they want until someone can prove they got it illicitly. And indeed, both this and some other modern rules were first explained on explicitly non-economic, libertarian values. See, e.g., United States v. Alum. Co. of Am., 148 F.2d 416, 429-30 (2d Cir. 1945) (establishing the requirement of “exclusionary conduct” in monopolization cases, because it would be “unfair” to impose liability on persons who “unwittingly find themselves in possession of a monopoly”). See
this long season of antitrust decay, the courts have begun to issue opinions so radical that one doubts some of them could imagine a defendant ever losing.\footnote{The trend is nicely demonstrated by three appellate opinions that the Supreme Court has reversed in the past few years. That they were each found to be too anti-enforcement by one of the most conservative antitrust Courts since the law’s adoption shows how far the lower courts’ support for antitrust has sunk. In 2011 the Eleventh Circuit held that the state of Georgia effectively repealed federal antitrust with respect to municipal “hospital authorities” by doing no more than giving them legal powers to buy and sell property. FTC v. Phoebe Putney Health Sys., Inc., 663 F.3d 1369 (11th Cir. 2011), rev’d ___ U.S. ___, 133 S. Ct. 1003 (2013). In 2008 the Seventh Circuit held that the National Football League was completely exempt from Sherman Act § 1, on the theory that it is merely a “single entity” unable to conspire with itself, when in fact it is a loose joint venture of separately incorporated firms with no cross-ownership. American Needle, Inc. v. NFL, 538 736 (7th Cir. 2008), rev’d ___ U.S. ___, 130 S. Ct. 2201 (2010). And in 2012, a long, tortured saga involving so-called “reverse payment” or “pay for delay” settlements in the pharmaceutical industry culminated in the Eleventh Circuit’s 2012 decision in FTC v. Watson Pharms., Inc., 677 F.3d 1298 (11th Cir. 2012), rev’d sub nom. FTC v. Actavis, ___ U.S. ___, 2013 WL 2922122 (2013). Though it was widely agreed outside the courts that reverse payment deals should be illegal—including by very conservative observers like Orrin Hatch—most courts had found them to be virtually per se legal, including the Watson panel. See Chris Sagers, The ‘Reverse Payment’ Drugs Case: The Most Important Economic Issue You Never Heard of—and Why There Might Still Be Some Hope for Antitrust, HUFFINGTONPOST, June 25, 2013, available at http://www.huffingtonpost.com/chris-sagers/the-drug-patents-case-the_b_3480866.html.

There are plenty of other examples. The truly remarkable FTC v. Lundbeck, 650 F.3d 1236 (8th Cir. 2011), found that Clayton Act § 7 could not be violated by a firm’s acquisition of the only two drugs available to treat a particular disease—a merger to monopoly—followed by a 1300% price increase. Likewise, a recent district court opinion effectively held that private price predation claims can never again be plead. The court held that a predatory pricing plaintiff must plead, without discovery but nevertheless consistently with the Twombly-Iqbal plausibility standard, that defendant’s prices were below its costs. Affinity, LLC v. GfK Mediamark Research & Intelligence, LLC, 2013 WL 1189317, at *4 (S.D.N.Y. March 25, 2013) (acknowledging that cost data were...}}
At least some of these doctrinal changes may have driven the drop in enforcement, and in particular they have dissuaded the private plaintiff attorneys who have always brought the huge majority of civil antitrust enforcement. Many have stated that view anecdotally, and there is now some econometric support for it.

Competition as a policy has lost esteem in other areas. In intellectual property, especially in the developing copyright law of software, the internet, and digital distribution, protection of content owners’ revenues has almost completely eclipsed concern for the public interest, in both the courts and Congress. Competition

not public, but holding that “the difficulty of meeting a pleading standard does not provide an excuse for failing to satisfy that standard.”).

Government civil enforcement is a very small component of American antitrust enforcement. Over the past fifteen years, the government has commenced on average only about twenty civil antitrust claims each year, and its cases represent an average of only three percent of all civil antitrust enforcement. These data can be compiled from Admin. Off. of the U.S. Courts, Judicial Business of the U.S. Courts, available at http://www.uscourts.gov/Statistics/JudicialBusiness.aspx. Each annual edition of Judicial Business reports at Table C-2 the number of new matters commenced in the district courts, by party and nature of suit. For the years 1997 to 2011, the United States commenced an average of 19.9 new civil antitrust cases, which on average represented 2.72% of all new civil antitrust actions.

See, e.g., Kolasky, supra note XXX, at 9 (noting that a significant drop in new private filings followed a series of restrictive judicial decisions in the 1970s and early 1980s, and that a similar significant drop followed the Twombly decision in 2007).


See generally Jessica Litman, Digital Copyright (2006) (recounting and assessing legislative action on copyright law since early 1990s). Not
also plays little role in the priorities of officials outside the antitrust agencies, in administrations of either political party. Even in this deregulatory era, in which competition kept healthy by antitrust was supposed to replace government regulation, sectoral regulators frequently downplay competition values and have sought to protect their regulees from it. Common examples are the Securities and Exchange Commission’s long-running refusal to end the brokerage house price-fixing system, despite its statutory mandate to protect competition, that agency’s battle to secure general antitrust immunity for its regulees, the Surface Transportation Board’s acquiescence in rail consolidation, the broad disregard of competition values by federal energy and maritime regulators, and the Transportation Department’s brief everyone agrees, of course, that the expansion of copyright is necessarily bad, see, e.g., Jane C. Ginsburg, Copyright and Control Over New Technologies of Dissemination, 101 COLUM. L. REV. 1613 (2001), but no one doubts that the expansion has been very significant and few dispute that it has caused the law now to focus predominantly on maximizing authors’ incentives.

67 See supra note XXX and accompanying text.


69 The long-running saga began in Silver v. New York Stock Exchange, 373 U.S. 341 (1963), in which the Court first held that conduct regulated by the Securities and Exchange Commission might nonetheless violate antitrust. The Commission then participated in a number of lawsuits over the years in effort to secure antitrust immunity for its regulees, an effort that largely succeeded in Credit Suisse Secs. (USA), LLC v. Billing, 551 U.S. 264 (2007).

Often, the Commission was directly pitted against the Justice Department in this effort. In Gordon v. New York Stock Exchange, 422 U.S. 659 (1975), a private cause of action, the Commission and DOJ filed conflicting amicus briefs. In United States v. National Association of Securities Dealers, 422 U.S. 694 (1975), a DOJ enforcement action, the SEC filed an amicus opposing antitrust liability. And in Credit Suisse, the agencies each responded to the Second Circuit’s request to submit their views, and they opposed one another. Before the Supreme Court, the Solicitor General, appearing as amicus at the Court’s request, filed on behalf of both agencies and urged a compromise position to reconcile their doctrinal differences below. Credit Suisse Secs. (USA), LLC v. Billing, No. 05-1157 (U.S. Jan. 22, 2007) (Brief of U.S. Solicitor General).


career as airline merger regulator.72 Lesser-known but telling examples include the Dodd-Frank financial regulatory reform legislation of 2010. Despite the seemingly obvious fit between financial sector problems and competition policy,73 the Obama administration’s draft bill failed to use competition as any part of any solution, and it actually contained a handful of new and potentially serious antitrust exemptions.74


72 Following deregulation of the airlines in 1978, the Act deregulating them phased out their federal regulator, the Civil Aeronautics Board, and transferred a few of its functions to other agencies. It gave the CAB’s merger review power to the Department of Transportation, and an some years later transferred it permanently to the Justice Department. While review was still at DOT—a period of about ten years that were the industry’s critical first years after deregulation—the agency approved each of the many mergers proposed to it, several of which were strongly opposed by DOJ in presentations before DOT.

73 Systemic risk is widely associated with small-numbers, large-firm finance markets, both in the popular mind and among many commentators. Breaking up those big firms or encouraging the presence of more, smaller firms, over which to spread risk and decrease interconnectedness, seems like a common-sense step toward systemic stability. See, e.g., Simon Johnson, Bring in the Antitrust Division (on Banking), BASELINE SCENARIO, Apr. 16, 2009, available at http://baselinescenario.com/2009/04/16/bring-in-the-antitrust-division-on-banking/. Some concrete steps have occasionally be taken to apply competition-like rules to banking, like the so-called “Kanjorski Amendment” appended to the Dodd-Frank law by then-Representative Paul Kanjorski, which would allow for breaking up the largest of financial institutions under some circumstances. But the point is that no such ideas were of any interest to the Obama administration, which included none in its initial Dodd-Frank drafts, and opposed them in committee consideration. See Too Big to Fail: The Role for Antitrust and Bankruptcy Law in Financial Regulation Reform, 111th Cong., 1st Sess. (Nov. 17, 2009) (testimony of Assistant Treasury Secretary Michael Barr).

A sustained or increasing commitment to competition enforcement has survived in only one narrow area, the criminal enforcement of Sherman Act § 1. The Justice Department maintains an aggressive program, increasing criminal prosecutions significantly even as civil enforcement has waned,\(^75\) and it widely publicizes the fines and prison terms it secures.\(^76\) Congress has also dramatically increased penalties over the past few decades.\(^77\) But even within that area, the focus has been not only on the one narrow class of conduct now subject to criminal challenge—naked, horizontal price or output restraints\(^78\)—but often enough on only certain segments within it. For whatever reason, for significant periods in recent history, criminal prosecutions disproportionately focused on small businesses in a limited range of sectors. In particular there was a significant stretch when prosecution overwhelmingly targeted state government procurement and construction contracts.\(^79\) Perhaps because of this somewhat selective prosecution, as well as because price-fixing remains so


\(^78\) While federal antitrust includes several provisions that may be enforced criminally—Sherman Act §§ 1 and 2 and Clayton Act § 3, and the Robinson-Patman Act—in practice only Sherman Act § 1 is enforced that way, and even within § 1 only a narrow class of conduct is ever prosecuted as crime. Specifically, only naked, horizontal price-fixing or market allocations are prosecuted criminally.

\(^79\) See Pitofsky, *supra* note XXX, at 819 (“To a large extent, th[e] [Reagan] administration has only brought the same case over and over again—a long series of challenges to interrelated regional and local conspiracies in the construction industry.”).
exceptionally profitable in some sectors, the evidence is that it remains quite common.

In the end, the practical result of these trends is that antitrust enforcement has become more rare, the cost and difficulty of bringing it ensures that it is mainly brought against the nakedest horizontal collusion and the largest horizontal mergers, and many courts now receive even those cases with skepticism. And while many disagree that it is either necessarily bad or has any causal relation to declining antitrust enforcement, it is empirically demonstrable that there have been substantial increases in concentration in many individual sectors. Plainly there could be many explanations for the industrial changes, but there is also


See id.

There have come to be any number of industries in which there remain only four or sometimes even three dominant firms in control of nearly all sales in the United States. For example, that is true of several sectors in communications and broadcasting, see SUSAN CRAWFORD, CAPTIVE AUDIENCE (2013), recorded music, see Richard A. Feinstein, Dir., Bur. of Comp., FTC, Statement in the Matter of Vivendi, S.A. and EMI Recorded Music (2012), available at http://www.ftc.gov/os/closings/comm/120921emifeinsteinstatement.pdf (approving global 4-to-3 merger), U.S. domestic air travel, where even now a federal challenge is pending against a 4-to-3 merger (or 5-to-4, depending on how one views Southwest), see United States v. U.S. Airways Grp., Case 1:13-cv-01236-CKK (D.D.C. 2013) (complaint), in several more mundane sectors, like light bulbs and auto tires, see infra note XXX, and interestingly, it may shortly become true in English trade book publishing, where a merger consummated since the Apple case began has already reduced the Big Six to the Big Five.

In some sectors, for example, concentration might be driven by very large scale effects. It may be that the production of a given good or service enjoys such large economies of scale, relative to demand, that there is room for only a few firms to operate at minimum efficient scale. In other sectors, concentration might be explained by network or interoperability effects. For example, the most concentrated of all American sectors at present is internet search, in which three firms hold 98.5% of the market. Andrea Algeria et al., Highly Concentrated: Companies That Dominate Their Industries, IBISWORLD SPECIAL REPORT, Feb. 2012, at 1, available at
reason to believe that increasing concentration in specific sectors is dangerous, and that more vigorous antitrust might have slowed it.84

In any event, alongside all of these changes has been another, and it is the focus of this paper: antitrust law’s loss of popular legitimacy. Linking these two phenomena—competition’s decline as an active public policy and the decline in public support for it—poses empirical challenges. I cannot prove that loss of public support has caused trends in enforcement or caselaw. Antitrust remains a body of duly enacted federal statute law, after all, and it is not the only law that is enforced even though it is sometimes unpopular. Also, if there is a causal relationship, it seems complex


But plainly, phenomena like these explain little of present concentration. Among the 10 most concentrated U.S. sectors, all of which presently have four-firm concentration ratios in excess of 90%, seven are in the most mundane, garden-variety retail services or commodity manufacturing (specifically, they are arcade-restaurants, sanitary paper products, soft drinks, food service contracting, light bulbs, household appliances, and tires). Id. at 1-4. The same is true of most other highly concentrated industries.

And even in those sectors involving communications or other technology that might enjoy efficiencies from interoperability, the consensus standard-setting that is both omnipresent and ordinarily done on royalty-free or reasonable-and-nondiscriminatory terms should be able to resolve interoperability problems. For example, one must wonder whether it is really necessary or justified, given the risks of oligopoly abuse, that U.S. wireless communications are controlled by four firms that together hold 94.7% of the market. Id. at 2.

84 See, e.g., Stigler, supra note XXX. At this point, incidentally, it is not much of an answer that these very concentrated markets might nevertheless be “contestable.” Even the progenitors of contestability theory now admit that it was overstated, see William J. Baumol & Daniel G. Swanson, The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power, 70 ANTITRUST L. J. 661, 678-79 (2003) (“[W]e acknowledge that when the concept of contestable markets was first introduced, it was applied too widely and on the basis of insufficient evidence. . . . Today we recognize that ease or difficulty of entry can differ widely from one industry to another.”), and in the decades since it was introduced it has collected little or no meaningful empirical support, see Stephen Martin, The Theory of Contestable Markets (2000) (working paper), available at www.krannert.purdue.edu/faculty/smartin/aie2/contestbk.pdf.
and uncertain. Maybe loss of esteem caused dampened enforcement, or maybe it was the other way around. And in any case, as Michael Jacobs explained in an extremely thoughtful article, on the present state of our knowledge it is simply not possible to resolve normative antitrust questions objectively. In the end, they are political.\textsuperscript{85}

But I am not in bad company. Thurman Arnold, writing some years after his tenure as the country’s most celebrated antitrust enforcer, felt that “[t]he antitrust laws ha[d] not been effective in the real world,” and he laid the blame with the fact that “all antitrust law enforcement under any plan depends on the public attitude.”\textsuperscript{86} It seems like declining enforcement and declining public support are entwined and mutually enforcing, and it is hard to imagine one changing without the other.

One other, smaller methodological challenge is that the case comparisons I will make to Apple—historical comparisons meant to show that Apple was not special and did not call for antitrust clemency—cannot really be more than anecdotal. Owing to the nature of the case, the comparisons are all in some sense about innovation, and we have no simple, robust theory of innovation.\textsuperscript{87}


\textsuperscript{86} Thurman Arnold, \textit{Symposium}, 39 AM. ECON. REV. 690, 690 (1949).

\textsuperscript{87} Massive theoretical and empirical literatures on innovation have been basically inconclusive in economics and elsewhere. The economics of innovation have focused mainly on the effects of market structure. For most of its life, the literature has focused on whether innovation is better incentivized by monopolized markets, as suggested by Joseph Schumpeter in \textit{Capitalism, Socialism, and Democracy} (1942), or by competitive markets, as suggested by Kenneth Arrow in \textit{Economic Welfare and the Allocation of Resources to Invention, in The Rate and Direction of Economic Activity} (R.R. Nelson, ed. 1962). No strong generalizations can be drawn from the very complex resulting literature, though there may be a small preponderance of support for Arrow’s position. On a theoretical level, there is some rough consensus that competition better incentivizes process innovations, and that it might better incentivize product innovations under some common circumstances (that the innovation is really significant, that the innovator who invents it can protect it with strong intellectual property rights, and that the market is quite competitive).
But this is actually not so big a problem. The only question in Apple is the simple, normative one whether we should use our tool for enforcing vigorous price competition (antitrust) when innovation or change has in fact occurred. That is, I will ask whether competition is a desirable course once an equilibrium has already been destabilized by changes to a product or process or way of doing business. From a price-theoretical point of view, such cases are really just the same as any case in which one competitor bests another by way of cost or quality advantage. So maybe it is not such a problem that we have no theory that currently explains the drivers or desiderata of innovation itself.

II. THE EBOOKS CASE AND THE SIMPLE, PRICE THEORETIC ENFORCEMENT STORY

A. The Facts and the Price Theoretic Enforcement Story: Technological Transition Should Benefit Consumers

To antitrust lawyers the Apple case was not in and of itself all that remarkable, in part because much of it was over shortly after it
began, and also, *pace* the defendants and their supporters, because the facts were simple and the law was straightforward. For the most part, *Apple* is a simple horizontal price-fixing case. Several dominant publishers of eBooks agreed among themselves what their prices would be. It had the minor wrinkle that a downstream participant—Apple—coordinated the conspiracy. But “hub-and-spoke” cartels of that kind are familiar to antitrust lawyers, and on its facts the case was essentially identical to a celebrated Seventh Circuit case finding them per se illegal.

88 Each of the publisher defendants settled with DOJ well before trial, see Leslie Kaufman, *Macmillan Will Settle a Lawsuit on E-Books*, N.Y. TIMES, Feb. 9, 2013, at B9, and agreed to a set of conduct remedies ending the “agency” pricing scheme with Apple, Amazon, and other eBook retailers, see, e.g., *Apple*, Civil Action No. 12-CV-2826 (DLC) (Aug. 12, 2013) (final judgment as to defendants Verlagsgruppe Georg Von Holtzbrinck GmbH & Holtzbrinck Publishers, LLC, d/b/a Macmillan).


89 In a hub-and-spoke conspiracy, a participant at one level in a chain of distribution helps horizontal competitors at another level coordinate a conspiracy to constrain price or output, or to boycott a competitor, usually to the mutual advantage of all. Typically this “hub” player will act as a conduit for information among the conspirators, and will relay assurances among them. See, e.g., *Toys R Us v. FTC*, 221 F.3d 928 (7th Cir. 2000).

In *Apple*, the complaint details meetings among Apple and each of the publishers to coordinate the distribution contracts Apple would establish with each of them. *Apple Complaint*, supra note XXX, at ¶¶ 52-64. Most damningly, it quotes senior Apple executives assuring the publishers that Apple’s proposed distribution contracts were designed in consultation with all the publishers, id. at ¶¶ 62, 69, 73, and insisting that, though “pricing authority” would be given to the publishers, they would in fact charge identical prices, id. at ¶ 63.

90 *Toys R Us v. FTC*, 221 F.3d 928 (7th Cir. 2000); see *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 893-94 (2007) (citing *Toys R
The principal defendants were five of the six major publishing firms\(^91\) that represent almost all of what remains of the English-language trade publishing industry.\(^92\) The overwhelming evidence showed that, chafing at the low retail prices charged for eBooks by dominant retailer Amazon,\(^93\) they desired and had already sought to raise retail prices collectively.\(^94\) The evidence also showed that Apple was aware of these facts and sought to exploit them.\(^95\) When Apple planned to launch its new iPad in early 2010, it proposed to open a new eBook retail outlet, but only on condition that industry-wide retail prices be much higher than the prevailing Amazon price. Through a quick series of negotiations that Apple orchestrated with the publishers, they all agreed to a drastic, parallel price increase for eBooks sold through the new Apple outlet, and managed to impose it on Amazon as well.\(^96\)

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\(^91\) Of the “Big Six” firms, as they are known, all joined the conspiracy except for Random House.

\(^92\) Complaint at ¶ 29, United States v. Apple, Inc., No. 12-CV-2826 DLC (S.D.N.Y. Apr. 11, 2012), available at http://www.justice.gov/atr/cases/f282100/282135.pdf [hereinafter “Apple Complaint”]. “Trade” publishing means general interest publishing—books of either fiction or non-fiction of interest to readers in general, as opposed to specialized publishing like scientific, educational or religious books. For the most part, trade publishers do not compete with specialized publishing sectors.

\(^93\) At the time of the alleged conspiracy, Amazon charged only $9.99 for newly released and bestselling eBooks, substantially less than hardcover prices for those books. Apple Complaint, supra note XXX, at ¶ 2.

\(^94\) Apple, 2013 WL 3454986, at *2-3. The publishers had tried on their own to establish a “joint venture” or joint sales agency that would pressure Amazon to raise eBook prices. The effort was unsuccessful. Id.

\(^95\) See id.

\(^96\) The evidence of the conspiracy and the defendants’ motives—which in her opinion Judge Cote described as “overwhelming” or “compelling” no fewer than eleven times—consisted of dozens of explicit statements in emails, internal documents, deposition, and live testimony, as well as circumstantial evidence of the kind typically persuasive in antitrust cases, like the large flurry of communications among the publishers and apple at the time the agreements were made, and the shift to a new pricing model, which was parallel and simultaneous and would have been irrational for any of the publishers acting individually.
Some complexity surrounded the details of these price agreements, but, as is familiar in antitrust cases, the complexity was misleading. The pricing arrangements were styled “agency” agreements, and that seemed to some possibly to distinguish them from literal price-fixing. However, they each adopted identical retail pricing formulas that left the publishers little discretion and effectively just fixed prices among them. The agreements also included “most favored nation” clauses (“MFNs”) protecting Apple, and some debate concerned their apparent

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97 Superficially, the agreements provided that the publishers would set their own retail prices, and Apple would merely take a fixed commission on each sale.

98 Interestingly, the parties appear never to have disputed whether the arrangement could constitute a genuine “agency” of the kind exempt from Sherman Act § 1 under United States v. Gen. Elec., 272 U.S. 476 (1926) (holding a principal and its agent legally unable to “conspire” for purposes of § 1). The General Electric rule is a fact-specific inquiry into whether a vertical relationship is more like a genuine “agency” or “consignment,” or more like an arm’s length sale in which the buyer takes possession of the goods and assumes the risks associated with their possession. See id. at 481-85; Simpson v. Union Oil Co. of Cal., 377 U.S. 13, 22-24 & n.10 (1964).

Electronic distribution poses a small problem for the General Electric rule, since it traditionally depended so much on whether the principal parted title with physical commodities and whether principal or agent bore the risks. In electronic distribution there is no physical good, no inventory as to which to bear risks, and no literal transfer of possession of individual chattels in instantaneous transfers of data. But Apple’s arrangement with the defendant publishers seems rather unlike relationships traditionally known as “agency,” either in the common law or the law of antitrust. Apple was not subject to ongoing discretionary control by the publishers, was free to market its goods as it saw fit, and took the risks of its own enterprise. The eBooks distribution model prior to the alleged conspiracy was characterized as a “wholesale model,” and it apparently differed from the “agency model” only in that the publisher’s retained pricing authority and Apple received a commission rather than retained-revenues from its sales.

99 Each publisher’s pricing agreement contained a substantially identical MFN clause, providing that if a publisher permitted a retailer of eBooks to sell below the price it set for Apple, then Apple would be permitted to match that price in its bookstore. Apple originated the MFNs, and insisted on them.
complexity, but again the evidence was overwhelming that they were just a horizontal tool to force Amazon to raise price. 100

Several facts surrounding the publishing industry strongly corroborate the case for enforcement. First, substantial empirical evidence shows that, historically, there was some market power in trade publishing. Publishers traditionally enjoyed pricing discretion, apparently as a result of differentiation and perhaps some entry difficulty. 101 But during several years leading up to the 2010 conspiracy, their sales growth was very small and profits were shrinking. 102 While presumably there was more than one cause, 103 the rise of a low-cost substitute for their well-differentiated goods could not have been welcome. Second, Amazon’s presence in electronic distribution was widely perceived as an existential threat to the traditional publishers, as soon as it effectively created the eBook sector with the Kindle reader in 2007. 104 From the beginning, Amazon sold eBooks at radically

100 Though the agreements did not require the publishers to impose agency arrangements or any particular prices on other retailers, it was clear to all that they would have that effect. It would have defeated the entire purpose of the negotiation were the publishers forced into selling many additional books in the Apple iBookstore at the same low prices charged by Amazon.

Also, though the parties never put it in precisely these terms, including identical MFNs in identical RPM agreements could be a means to prevent cheating by cartel members. It is effectively a horizontal promise not to cheat, made binding as a contractually enforceable vertical promise to the retailer.

101 Among other things, paperbacks have long sold at substantial discounts from hard cover, but actually cost nearly as much to produce, suggesting that paperback sales are merely a profitable price discrimination strategy. See Breyer, supra note XXX, at 314; Landes & Posner, supra note XXX, at 328.

102 See THOMPSON, supra note XXX; Ken Auletta, Publisher or Perish, THE NEW YORKER, April 26, 2010.

103 See THOMPSON, supra note XXX (discussing the variety of challenges facing trade publishing in the past few decades).

104 A number of digital book efforts predated the Kindle, but none were commercially viable or very widely used. The first large scale effort is often said to be “Project Gutenberg,” a non-profit digitization effort of the 1970s affiliated with the University of Illinois, though it built on substantial work by academic computer scientists of the 1960s. The first commercial efforts were the Dynabook, a prototype developed by computer science pioneer Alan Kay in the early 1970s but never commercialized, and the Sony Data Discman,
discounted prices, and presumably as a consequence, both eBooks as a portion of all book sales and Amazon’s share of them expanded rapidly. The publishers accordingly had a strong motive to forestall any innovation that might cut into their historic profits, and it would be unlikely that they could do so without some collaboration among them.

As a retail price fixing scheme, the Apple agency agreements were effective. Prices for defendants’ books rose drastically as soon as the agreements were executed, both on Apple’s iBookstore and on Amazon; their prices were essentially identical; and they stayed high for the two-year duration of the conspiracy even as average prices for other eBooks were falling. Shortly after the publisher defendants settled with DOJ, their prices fell back to pre-conspiracy levels.

introduced in 1992. Somewhat more successful dedicated readers emerged in the late 1980s, including the “Rocket eBook” by a firm called NuvoMedia and the SoftBook by SoftBook Press. All early efforts suffered from lack of content variety and the difficulty of downloading files in the days before high-speed internet and wireless connectivity. Sony again entered the market in the mid-2000s with e-readers that could take advantage of faster downloads and the new “electronic paper” technology developed by a firm called E Ink, but that effort too was initially disappointing. No e-reader or library of e-books was commercially successful prior to Amazon’s introduction of the Kindle in 2007. See generally BRAD STONE, THE EVERYTHING STORE: JEFF BEZOS AND THE AGE OF AMAZON (2013).

105 During 2009, just before the Apple deal was struck, eBook sales had increased 177%, and it was projected that they would eventually account for between 25 and 50% of all book sales. See Auletta, supra note XXX. At the peak of its eBook success, Apple held about 90% of all eBook sales, though it lost market share once the Apple agency agreements took effect and it was forced to raise its prices.


A simple price theoretic argument that enforcement is desirable on these facts is familiar to anyone in antitrust. Retail price cutting to reflect lower-cost distribution technology\(^\text{108}\) should, like other cost reductions, benefit consumers. Were the markets for publishing, distribution and retail fully competitive, that would happen automatically.\(^\text{109}\) So price fixing or other conduct to confiscate those gains should be illegal.

There were certain minor factual wrinkles that might seem to complicate the enforcement story, but they each turn out to have simple explanations. First, a point the defendant publishers stressed, as evidence that the agreement was not anti-competitive, is that they actually lost money by moving to the Apple agency model.\(^\text{110}\) Similarly, other things equal, a manufacturer should like a price-competitive retail market.\(^\text{111}\)

These points are easy to dismiss. There are several well-recognized explanations under which a manufacturer or a group of them might impose higher resale prices downstream, and *Apple*

\(^{108}\) The transition to digital distribution should in principle be procompetitive, because it reduces costs—it is cheaper to stream data to a device than it is to print a hardcopy book, CD, or DVD and truck it to a physical store. (And in the case of books, it resolves the major publishing industry problem of unsold stock.)

\(^{109}\) A basic prediction of price theory is that, assuming that markets are competitive, any reduction in the costs of producing (or distributing) an item will result in lower prices. Any seller that can sell a good more cheaply will do so, assuming competition. If any publisher attempted to keep retail prices up at a level that incorporated a historically more expensive means of distribution—printing books on paper, putting them on trucks, displaying them in brick-and-mortar stores—then its competitors should be able to rob it of sales by passing on saved distribution costs in the form of lower retail prices.

\(^{110}\) While Amazon had been selling many of their eBooks at a $9.99 retail price, it actually paid more for many of them at wholesale. The publishers often earned $13.99 or more for new release best-sellers. With Apple, while the retail prices of those books would rise to $14.99, in many cases, Apple took a 30% commission on all sales. The publisher's take would therefore fall quite a bit on each individual sale, and they would also lose volume from higher retail prices.

\(^{111}\) If the retail level is competitive, a manufacturer acting alone should like low retail prices. Other things equal, it implies the lowest mark-up and the largest volume the manufacturer can hope for.
 plainly involves such circumstances. And under the circumstances it is perfectly plausible that the publishers would sacrifice some profit up front in the still comparatively small eBooks market, in order to stave off much larger feared losses elsewhere. This is so because Amazon’s growth through price-cutting posed at least three separate threats for the publishers. First, they feared that low-price eBooks would erode the consumer perception of value that allowed them to sell many hard cover books at much higher prices. Second, they feared that Amazon would eventually demand lower wholesale prices for defendants’ eBooks. Both these risks were acute ones, as eBooks were growing quickly as a share of all books and Amazon controlled a large share of them. But perhaps most important, the publishers feared Amazon itself entering the publishing business, or other substantial digital publishers coming into being (that is, they feared a “digital disintermediation” in publishing, as will be discussed). And so even an up-front profit sacrifice in a limited area was perfectly rational as part of an overall profitable anti-competitive scheme. Indeed, a manufacturer taking steps against a price-cutting distributor is one of oldest stories in mass market capitalism, and antitrust has been dealing with it for a long time. Manufacturers and their distributors are always adverse to some degree.

112 It is well recognized that RPM can help coordinate a horizontal agreement at the upstream level, see Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893-94 (2007), and Apple was just such a case. RPM can also facilitate a retail cartel or be forced on manufacturers by a powerful retailer, id. at 892-94.
113 See supra note XXX.
114 By the time of the initial conspiracy, Amazon sold 90% of all eBooks. See Apple, 925 F. Supp. 2d at 649.
115 See infra notes XXX and accompanying text.
117 The basic tension is that manufacturers and distributors each aim to secure as much of the finite pie of retail revenue available for any given good, and as between them that is a zero-sum struggle. Who gets more of it depends on whether there is market power at any particular level in the chain. These
Apple made some efficiency arguments at trial, but they tended to shift and vary pretty quickly as the government showed that each of them was either unsupported by evidence or legally irrelevant. In the end it is hard to imagine an efficiency enhancing rationale for a horizontal agreement that does literally nothing other than raise retail prices. Also, strictly speaking, it wouldn’t matter if any of the defenses suggested by Apple or its supporters had more weight, as perhaps the best established rule in antitrust is that where naked horizontal agreement on price or output is shown (or the coordination of it by a vertical participant), efficiency or cost-benefit judgments are no longer relevant.

And so, while many observers tentatively suggested procompetitive rationales for the conspiracy, and some others

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118 For example, Apple argued that its entry was necessarily procompetitive, as it increased the number of retailers, but that is not very persuasive when it entered only a drastically higher retail price. Apple also argued that it brought technological improvements, but in each case they either violated the “cross-market efficiencies” rule, see United States v. Phila. Nat’l Bank v. 374 U.S. 321, 371 (1963), or turned out to have predated Apple’s entry altogether.


120 For example, a natural suggestion was that RPM protected by a set of MFNs was needed so that Apple could protect its investments in entry. The idea is that it could lose that investment if it had to compete at Amazon’s very low prevailing prices. RPM helped get its prices up, but the MFNs protected Apple’s investment too, because under the “agency” model, its suppliers might allow competing sellers of the same books for less. See, e.g., Manne, supra note XXX.

But aside from the fact that these were not just independent vertical arrangements—overwhelming evidence showed a literal horizontal price agreement and a design to impose it on third party retailers—the RPM story would not really make sense here. The cost of entry for all parties seems very low—the publishers were already present and Apple had only to develop a bookstore app and include it on the iPad—and neither Apple nor Amazon nor presumably other eBook retailers appears to offer anything in particular in marketing these products other than providing search capability, a payment system, and streaming data once purchased. The argument also assumes that
thought there might be distinctions between Apple and the usual hub-and-spoke, and indeed, while there were some that thought Apple would win at trial, in the end the case was actually pretty open-and-shut.

B. A Bit Broader Context: eBooks as a Component of the Digital Revolution

However simple Apple may have seemed (to some) as a price-fixing case, questions inevitably surrounded the technological issues it raised. Those issues do not stop with the market for eBooks. They are part of a larger shift to digital distribution of all kinds of goods, and the transition has had similar characteristics across various markets. Again, the important point will be that their seemingly novel character does not actually distinguish digital distribution cases from the many other technological transitions that capitalism has coped with before. But it is worth understanding them in context.

Digital reproductions can now be made of most intellectual products, which are at least rough substitutes to most consumers, and sometimes they are essentially perfect or superior substitutes. The change poses economic consequences. Digital distribution of any good that can be digitized will ordinarily be much cheaper than distribution of physical goods. It is cheaper to

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Apple’s entry is unequivocally good, but that is not necessarily so. It is not good if can effectively raise price only for the sake of doing so.


122 See supra note XXX.

123 They can be superior insofar as, in the case of recorded music or video, they might be more perfect representations than other recordings, or if they offer users new features such as novel modes of replay, storage, sharing, or manipulation. In the case of eBooks, it is suggested that they may eventually seem superior to print books in a number of ways. They are searchable and text can be selected, cut and pasted. They can also incorporate audio, video and hyperlinks to online content.
stream data to a device than to produce physical copies, keep them in inventory, ship them to physical stores, and suffer breakage, losses, and returns.

However, technological changes in distribution or production typically hurt some players at least in the short-term, and across all digital contexts one theme is common. As an innovation arrives, it typically gives the innovator some advantage in terms of distribution or production costs, or product features, or the like. Incumbent firms are often disadvantaged and may face pressure either to (1) make costly changes or investments of their own, perhaps losing sunk investments, losing revenue and investor returns, and firing staff, or (2) find a means to neutralize the competitive threat. To do the latter they can choose from a familiar repertoire of anticompetitive strategies. They can simply acquire the disruptive innovator, they can try to exclude its product through boycott or regulatory action, they can exclude it through new legislation or legal challenge, or they can introduce technological changes of their own to frustrate the innovation’s adoption. In effect, disruptive innovation typically sets off a scramble among market participants, new and old, to secure as much as they can of the social wealth released by the innovation, wealth that in healthy markets would be competed away and enjoyed as consumer surplus.

Maybe the best-known examination of this kind of disruption in high tech markets was the government’s monopolization case of the late 1990s against Microsoft.¹²⁴ Microsoft, the government proved at trial, deployed a series of contractual restraints and technological maneuvers to protect a near total monopoly in computer operating systems, which it feared could be undermined by a specific new kind of software interface. The D.C. Circuit sitting en banc resoundingly found that Microsoft’s strategy was successful and illegal.¹²⁵

¹²⁵ At the time of suit, Microsoft’s market power was thought to flow from the very broad range of applications written for its Windows operating system, but that would not work on any other operating system. Had competitors
But Microsoft was hardly the first such case or the last. As it happens, advancing electronic technology has been the focus of a range of conflicts throughout the culture-based industries. The problem has been the subject of much scholarly study.126

As for books and other written materials, their digital distribution has been the subject of a variety of important policy developments. Prior to Apple, probably the most widely watched was the Google Books controversy—Google’s effort to digitize most books in existence,127 which triggered a long and still unresolved set of copyright challenges128 But even Google Books devised that more flexible sort of interface, Microsoft’s system would no longer be so vital to computer users. See id.

126 See, e.g., CRAWFORD, supra note XXX; LIND, supra note XXX; WU, supra note XXX (discussing and providing historical examples to support his model of the “Kronos effect,” in which incumbent firms in communications and media take anticompetitive action to thwart disruptive technological innovators); Peter J. Alexander, Peer-to-Peer File Sharing: The Case of the Music Recording Industry, 20 REV. INDUS. ORG. 151, 154 (2002); Peter DiCola & Matthew Sag, An Information-Gathering Approach to Copyright Policy, 34 CARDOZO L. REV. 173 (2012) (recounting the recurrent “content-technology conflicts” that have characterized the history of copyright at least since the turn of the twentieth century).


128 The lawsuit began in 2004 as a class action infringement suit by publishers and an authors group, just after Google and its library partners had begun digitizing books and made their intentions public. It became most interesting once the parties began hammering out settlement; they began settlement negotiations on the court’s suggestion, but ultimately produced a massive plan that would establish Google as a likely unrivaled world repository of digitized books, overseeing a massive revenue stream and administering it for both its own benefit and that of copyright holders. The settlement invited much controversy, including objection from the Department of Justice on antitrust grounds, and the district court rejected it in 2011. Authors Guild v. Google, Inc., 770 F. Supp. 2d 666 (S.D.N.Y. 2011). Copyright holders’ claims remain unresolved.

Scholarly commentary on the Google Books Settlement is voluminous. For just a small sampling, see Jonathan Band, The Long and Winding Road to the Google Books Settlement, 9 J. MARSHALL REV. INTELL. PROP. L. 227 (2009); Einer Elhauge, Why the Google Books Settlement is Procompetitive, 2 J. LEG.
is only one of several major book-digitization projects, and each of them has raised its own thicket of legal complications.

Several non-profit efforts have been undertaken to digitize public domain books, most of which are either consortia of university libraries or private philanthropic entities. The most ambitious of them include the Internet Archive, which provides free public access to a variety of digital media, including digital versions of about three million public domain books, and the Million Book Project, led by computer scientists at Carnegie Mellon, which digitized about 1.5 million public domain books. Other major projects exist as repositories for material digitized by others, including the Hathi Trust and the Digital Public Library of America, both of which are consortia of university libraries. The Hathi Trust was established specifically as a backup repository for books digitized by Google, and they represent most of its titles. See Miguel Helft, An Elephant Backs Up Google’s Library, N.Y. TIMES BITS, Oct. 13, 2008, available at http://bits.blogs.nytimes.com/2008/10/13/an-elephant-backs-up-googles-library/?_r=0; Rebecca J. Rosen, Now, With No Further Ado, We Present . . . the Digital Public Library of America!, THE ATLANTIC, Apr. 18, 2013, available at http://www.theatlantic.com/technology/archive/2013/04/now-with-no-further-ado-we-present-the-digital-public-library-of-america/274963/.

The most significant such case was the Google plaintiffs’ parallel action against the Hathi Trust, the non-profit backup repository of the Google Books digitization project. The Hathi Trust hosts about 10 million digitized books, a large portion of which are thought still to enjoy copyright protection, but the court in this parallel case found the digitization project itself and much of the public availability made of the books to be fair use, because of the Trust’s academic nature, the non-commercial access it provided, and its goal to provide services to print-disabled users. Authors Guild v. Hathi Trust, 902 F. Supp. 2d 445 (S.D.N.Y. 2012).

One other closely watched suit raising similar issues was brought by publishers against Georgia State University, which followed a policy under which its professors could post digitized selections of copyrighted works for their students’ use. Georgia State succeeded in showing that most of the postings, but not all, were non-infringing fair use. Cambridge Univ. Press v. Becker, 863 1190 (N.D. Ga. 2012).

Most other digitization projects have not triggered litigation because they involve only public domain books.
A somewhat older and more complete transition, also involving written content, has occurred in print news and entertainment. Print newspaper and magazine circulation has suffered severely, and those print media organizations still afloat are currently struggling to transition to sustainable online business models. On first glance the sequence of events may seem rather different here than in other sectors, since incumbent news and print media organizations have not mainly taken anticompetitive steps to halt innovation or change. Print products have just slowly faded away. But indeed similar twists and turns are evident, mainly because the transition has been driven by the cost and technological advantages of digital advertising.\footnote{With only a few exceptions among nationally read papers, American print news has always depended overwhelmingly on advertising revenue.} The scramble to secure online ad revenues has followed the familiar pattern. For example, the FTC and EU have investigated Google’s manipulation of internet search results, and there is a \textit{very} large merger presently pending between ad firms Omnicom and Publicis,\footnote{The deal would merge the second and third largest advertising/public relations firms, in a market in which the four largest firms currently hold about two-thirds of the global business. \textit{See} Steven Pearlstein, \textit{Don Draper, Your Antitrust Attorney Is on Line 2}, WASH. POST WONK BLOG, July 29, 2013, \textit{available at} http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/29/don-draper-your-antitrust-attorney-is-on-line-2/.} defended as needed to withstand the rise of digital advertising mavericks like Facebook and Google.\footnote{\textit{See} Pearlstein, supra note XXX.}

Broadly similar stories have played out in communications and in the distribution of music and video. Communications in the past four decades or so have seen repeated, familiar bouts of activity to neutralize competitive threats posed by new technology. The once and perhaps again-to-be monopolist AT&T ruthlessly suppressed innovations, both those developed by others and even those its own researchers developed internally, in large part by making use of its close association with its regulator, the Federal Communications
Commission. But by far the biggest story in communications was the federal effort to break up AT&T’s long-time monopoly, and to introduce competitive telephony. The effort was briefly successful, but following a few decades of lobbying, litigation, and acquisitions the world has returned to a state in which four massive companies again dominate both wired and wireless communications, and have thwarted the several points at which technological innovation might have brought destabilizing, pro-consumer change.  

In music, a saga now apparently winding itself up in a recent consolidation among record companies had its origins in technological changes of the 1970s and 1980s. Record companies claimed that introduction of audio cassette recording and then compact discs, with the ability cheaply to make perfect quality copies at home, threatened their existence. They responded in several ways, including an industry-wide conspiracy to fix CD prices uncovered in about 2000. The arguments were rehashed with the digital distribution of music, initially because it introduced the unbundled sale of individual songs, and then peer-to-peer

134 See, e.g., Wu, supra note XXX (recounting the well-known “Hush-a-Phone” controversy).  
135 See, e.g., Crawford, supra note XXX; Wu, supra note XXX.  
136 See Zimmerman, supra note XXX, at 9-10 (recounting 1970s-era industry concern over audio recording).  
137 The conspiracy, among five distributors controlling over 85% of recorded music in the United States, was designed as a parallel set of RPM agreements they each imposed on retailers. There was some suggestion that they imposed the restraints at the behest of traditional retailers, who feared competition from the newly arising big-box electronics stores, but the distributors themselves also feared

See In re BMG, 2000 WL 689347, No. 971-0070 (F.T.C. 2000). It was discovered and made the subject of a set of parallel FTC consent decrees against individual record companies, which prevented further RPM (which at the time remained per se illegal in itself).

139 Unbundled sales might threaten industry if there are supracompetitive profits to be gotten from bundled sales. [ELABORATE ON TYING ISSUE, WITH ELHAUGE] Whatever theoretical doubt there may be that tying or bundling of this kind is profitable, the industry itself surely perceived individual song sales as a threat. See [COOPER]
file sharing (P2P), even easier copying of songs, and now streaming internet radio. The industry’s response since then has combined lobbying, litigation and consolidation. As for P2P, the industry reacted with an aggressive push to suppress it completely, through lobbying and litigation. The effort was always fairly ill-starred and apparently ineffective, and has to some degree been abandoned. For now, the near-term future of music distribution seems likely to be in internet radio or similar online streaming services—a potentially disruptive innovation that might reorient control of the revenue stream produced by music distribution, and might have led to lower prices, greater variety, and new features for consumers, like the algorithms employed by some services to anticipate a listener’s preferences. At length, it appears that for now the balance of power has been re-established

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140 [ELABORATE ON] Digital Millennium Copyright Act
141 The industry, though its trade association, began its litigation campaign with a moderately successful effort against software providers that ... successfully suing the first Napster ..... and later succeeding in the Supreme Court against two Napster copycat products, called Grokster and Morpheus. MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005). The Court there vindicated the industry’s “contributory infringement” claim .......Arguably limited a fair
142 there was never much evidence that P2P sharing actually depressed sales at all,
and file sharing has apparently only increased in spite of the industry’s legal efforts, see Electronic Frontier Foundation, supra note XXX, at 11-12.
by a very large consolidation and reorganization of the industry, and by litigation and lobbying for copyright amendments.

Video has gone through a very similar transition. The modern story begins with initial litigation and lobbying over home video cassette recorders ... merger review of the acquisition by cable network owner Comcast of content creator NBC/Universal, in which the disruptive innovation was the online video distribution ...... Netflix .... the pending acquisition by Comcast of Time

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145 the internet radio firm Pandora, seeking a rate determination from the consent decree court ............blanket music broadcast licenses for “new media” from the performance rights organizations (PROs) that license most music, the ASCAP and BMI entities. “New media” were defined in effect to include all online, public transmissions of music.

However, the PROs have operated under antitrust consent decrees, continuously overseen by a federal district court since 1941, and the decree makes licenses mandatory and requires non-discrimination among licensees and access to each licensee to the PROs’ full repertories. Accordingly, ......

The major record companies attempted to withdraw the PROs’ permission to license streaming internet music services, but the consent decree court—in an opinion, interestingly enough, by the same judge that heard Apple—found that attempt barred by the consent decree. In re Pandora Media, Inc., 2013 WL 5211927 (S.D.N.Y. Sept. 17, 2013)

146 See CRAWFORD, supra note XXX, at [cite].
Warner Cable, a transaction that would give an already vertically integrated economic powerhouse control over by far the largest share of cable and internet subscribers in the country.

One theme cutting across all these areas has been the frequent appeal of content industry incumbents to Congress for protection, particularly in the form of copyright amendments. Beginning around the turn of the 20th century, Congress began to defer in the drafting and updating of copyright legislation to ad hoc groups composed mostly of content-industry participants. The several major revisions for which they have been responsible have ordinarily focused on just the kind of content-technology conflicts discussed here. Beginning with turn-of-the-century fear of the gramophone and the player piano, recurring with the mid-1970s reaction to photocopying, and then repeating with more frequency in the 1980s and 1990s,

Finally, things of value can be digitized and distributed electronically, other than just literary or artistic content, and in those cases the patterns and consequences have been similar. For example, there is a mad scramble right now to control markets in digital maps and driving directions. One other final point before moving on, and it will preview much of the argument to come. Though in all these changing contexts the incumbent firms claimed a need for protection, there is widespread evidence that frequently the changes brought pecuniary gains to the incumbents. For example, a persistent theme in most of these areas has been the fear of piracy (not in eBooks, as it happens, because by the time of the Kindle’s introduction the DMCA and the DRM protections in proprietary book software made it difficult). But in fact, it has very

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148 See Litman, supra note XXX, at 35-69 (canvassing the long history of copyright lobbying and reform); id. at 25, 37 (“[N]egotiated copyright statutes have tended, throughout the century, to be kind to the entrenched status quo, and hostile to upstart new industries. . . . The process leading to the 1998 enactment of the Digital Millennium Copyright Act extended the familiar, multilateral, interindustry negotiation to the point of self-parody.”); Dicola & Sag, supra note XXX.

149 [WAZE].
commonly been the case that new copying and distribution technology has increased sales and profitability for content owners.\textsuperscript{150} And, sure enough, though the publishing industry has resisted eBooks and their alleged threats, there is evidence since the end of the Apple “agency” system that even competitively priced eBooks have been surprisingly profitable for them.

C. And Finally, Some Even Broader Context: Absolutely All of This Stuff Has Totally Happened Before, Like, a Whole, Whole Lot, in All Kinds of Other Markets

Rhetorically, the most important point to be made in this paper is that technological transition in book publishing, and even the broader changes in digital transition throughout the content industries, are not actually unique or new. A key question is therefore whether similar stories can be found outside the recent history of the content industries, and indeed there are many such examples. In that broader context the purportedly special circumstances of the Apple case start to look more like mundane features of ordinary commerce. Theoretically, that result is predictable because the underlying economic mechanism is the same in the digital transition in content markets as it has been in other transitions in technology or methods of business. Where an innovation generates a cost or quality advantage, settled expectations in traditional business models are jeopardized, losses are suffered, and incumbents often react defensively through lobbying, litigation, or anticompetitive conduct.


As one of many examples, in the early 1980s the movie industry predicted its own demise at the hands of the new VCR device, but in fact the ability to display films at home opened huge new sales opportunities for the studios. See Alexander, supra note XXX, at 154. Likewise, peer-to-peer music file sharing is thought to have increased actual purchases, because it exposed music to new listeners on a song-by-song basis, see id. at 159, and it is generally thought that fair-use quotations from books in book reviews or the like helps book sales. Examples from other markets and time periods are plentiful, see id.
For example, digital distribution has had those impacts in markets unrelated to artistic or intellectual content. Right now a number of start-up firms are attempting to bring digital distribution to taxi cab dispatch. They would allow consumers not only to call and pay for a cab through their smart phones, but would provide other consumer-friendly innovations uniquely available through digital channels.\textsuperscript{151} They have faced major regulatory hurdles, however, at least in part for protectionist reasons. The District of Columbia taxi regulatory body has taken a particularly firm stand, having put a moratorium on new sedan or limousine licenses and attempting to adopt regulations fixing a minimum price for their services higher than that charged by street-hail taxi cabs.\textsuperscript{152} At length the commission went ahead with less restrictive regulations, but it nevertheless seriously impeded the digital dispatch firms’ innovative potential.\textsuperscript{153} It did so over the objection of the Federal Trade Commission and others, including a D.C.

\textsuperscript{151} A leading firm so far has been Uber, but others include Hailo and Flywheel (formerly known as Cabulous). They mostly exist as dispatch services for independently owned sedan or limousine services (Uber and Hailo have not tried to enter traditional taxi cab service because in most jurisdictions it is much more regulated). In addition to allowing smartphone users to hail and pay for a cab electronically, the services use data-heavy demand prediction algorithms to most efficiently dispatch vehicles, they allow both user-ratings of drivers and driver-ratings of their registered users, they allow users to pick the sort of vehicle they would like to ride in, and they allow prices to be modified by intensity of demand. See Megan McArdle, \textit{Why You Can’t Get a Taxi}, \textit{The Atlantic}, May, 2012, available at http://www.theatlantic.com/magazine/archive/2012/05/why-you-cant-get-a-taxi/308942/. They also appear to be substantially cheaper for drivers to use as dispatch services than affiliation with traditional tax or limousine services, and so facilitate entry by solo drivers and start-up car firms.

\textsuperscript{152} See McArdle, \textit{supra} note XXX.

\textsuperscript{153} The rules effectively restrict digital firms to dispatching only “sedans,” meaning large, luxury model, “black or blue-black” colored cars, and would thus prohibit an innovation favored by Uber and adopted elsewhere—the use of mid-size, fuel-efficient cars. They would also preclude a digital dispatch firm from affiliating with existing taxicab firms except in certain circumstances, and would impose reporting requirements and commission pre-approval for software changes that would be burdensome for an electronic, app-based firm. See Gavil, \textit{infra} note XXX (discussing the regulations in detail).
While the commission has offered some not entirely implausible explanations, it does not deny a desire to protect traditional taxi firms and drivers, and there have been persistent allegations that its opposition to digital dispatch is a political favor to traditional interests.

But more broadly, the transition need not involve digital technology at all. The underlying process really has nothing to do with digitization of anything, or any specific means of communication or technology. Even the content and information industries, which are at the center of the digital revolution, have actually seen a much longer and fairly sordid history of exclusionary struggles than is commonly known, dating to many decades before digital technology. Consider the huge publishing industry reaction against the invention of photocopying, or the

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157 The reaction to photocopying led to bouts of litigation to determine the scope of copyright exceptions, which content industries apparently still wants Uber dead. It also led to the first wholesale revision of the copyright statute in nearly seventy years.
sheet music industry’s reactions to the gramophone and (of all things) the player piano.\textsuperscript{158}

Examples with no connection either to intellectual content or to digital technology are routine. One recent example is the acquisition by Avis of Zipcars, the popular urban car-sharing service which plainly posed some threat to traditional car rental firms.\textsuperscript{159} For an older example, consider the demise of the ocean-sailing ship industry. During the mid 19th century the industry suffered a long period of devastating price wars with the new steam-ship industry, and was ultimately destroyed by it. Boats that have to wait for favorable winds can’t really compete with boats that can provide the regular, reliable departure schedules that shippers desire.\textsuperscript{160} And yet the tall-masted, swashbuckling ships of yore were very romantic and fun. Should the law have allowed the sailing industry to conspire with the steam industry to ensure prices that would preserve sailing ships as a living technology?

But at length, the most telling fact is that the same sequence of events routinely plays out with no technological change at all. All that is needed is an innovation, really any innovation at all, that modifies some competitor’s costs or quality offerings. A very common story has been cost-saving innovation in retail business models. For example, Ariel Katz observes the striking similarities

\textsuperscript{158} See White-Smith Music Pub’g Co. v. Apollo Co., 209 U.S. 1 (1908) (finding that creating player-piano rolls of copyrighted musical compositions was not infringement). The conflict began in 1895, when the major publishers of sheet music formed an umbrella group and collectively made one player-piano manufacturer their exclusive licensee. Apparently in exchange for exclusivity, that manufacturer agreed to finance infringement litigation against competing player-piano makers. The affair became a minor cause celebre, and no less than Theodore Roosevelt declared the arrangement a “giant music monopoly.” See DiCola & Sag, supra note XXX, at 198-203 (setting out this history).


between *Apple* and a much older case in book publishing: *Bobbs-Merrill v. Strauss*, the seminal, now more than 100-year-old case that established the copyright “first sale” doctrine. There, as in *Apple*, book publishers brought a copyright action against a discount reseller of their books (which happened to be the New York retail store Macy’s, at that time a discount operation). The publishers alleged that the books had been licensed only for resale at a fixed minimum retail price, and also predictably alleged that the discounter’s price-cutting imperiled the very publishing industry itself. It turns out as well that the publishers—just as in *Apple*—had fixed that minimum retail price as part of an industry-wide price fixing cartel. The Supreme Court rejected their copyright challenge, and in adopting the first-sale doctrine precluded the resale price-fixing scheme they claimed they needed to survive. As it turns out, they did just fine.

And since the process really has nothing in particular to do with either the content industries or digital distribution, it is not surprising that examples indistinguishable from *Bobbs-Merrill* can be found throughout retail sectors and extending back far in time. Periods of retaliation against innovators have actually come in predictable, cyclical waves, in a variety of sectors.

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162 A leading publisher wrote that a similar, industry-wide RPM scheme set up in England at the same time was necessary to “save[] the Retail Book Trade throughout Great Britain from bankruptcy and the virtual extinction with which it was threatened, owing to the suicidal system of underselling.” *Sir Frederick MacMillan, The Net Book Agreement 1899 and the Book War 1906-1908: Two Chapters in the History of the Book Trade* 77 (1924); see Ariel Katz, *Isn’t That Great?*, *ArielKatz* (Aug. 27, 2013), available at http://arielkatz.org/archives/2884.


So much for the eBooks case itself, and for its larger context. What remain are the challenges it posed for many observers. Responding to them is a way to make the empirical case at the heart of this paper. It is an empirical response to the impulse that competition rules cannot be simple because sometimes competition is destructive. Though as a matter of legal doctrine the Apple case was easy, many perfectly erudite and intelligent observers thought it was one in which a general rule should not apply, and in which unbridled competition would be bad for society.

III. IRONIES THAT AREN’T REALLY THAT INTERESTING

A. In General

That antitrust can sometimes seem ironic is not new, and some critics have been fairly obsessed with the idea for years. But the ironies that attract popular attention are often quotidian and uninteresting. Lay critics of Microsoft, for example, thought it was simply an attack on Bill Gates for succeeding in business. That was not true. Whether or not we should have a no-fault monopoly rule in this country, we emphatically do not have one, and the

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165 Certain specific purported ironies have been a dominant theme for many conservative critics of antitrust, hence the title of Robert Bork’s famous book, The Antitrust Paradox: A Policy at War With Itself. The specific irony they addressed was the view that while antitrust aspires to maximize economic efficiency, some specific doctrinal rules arguably retard efficiency, typically by protecting competitors in one way or another from price competition. See also Letwin, supra note XXX, at 3-11 (arguing that because antitrust must mediate between irreconcilable goals of competition and desirable combination, as well as other American values, the problem it faces “is, in fact, an unresolvable dilemma”).

166 See infra notes XXX and accompanying text.

167 The point was once seriously debated. Following a period of concentration perceived to be undesirable during the 1950s and 1960s, and the enforcement agencies’ perceived failure to act against it, public support grew for some affirmative deconcentration measure. In some sense the effort culminated in a famous 1969 study commissioned by President Johnson and led by University of Chicago Law School Dean Phil C. Neal, which recommended the adoption of a no-fault deconcentration statute, see White House Task Force
government did not sue Bill Gates or Microsoft just for succeeding or for making a lot of money. There may be educated disagreement on the merits, but the case culminated in a triumphant, unanimous per curiam opinion finding illegal monopolization, through an elaborate series of exclusionary devices. The opinion was issued by the en banc D.C. Circuit—not exactly a hot bed of leftist radicalism, when the case was decided in 2001—and was apparently written by a judge who is both a peerless antitrust expert and a Reagan appointee. That long opinion elaborately explained just how pernicious, deliberate

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The United States has only ever adopted one meaningful statute of that sort, the Public Utility Holding Company Act of 1935, 49 Stat. 803 (1935). Because the network of complex corporate families owning much of America’s public utilities was blamed in part for the crash of 1929, this New Deal statute authorized the Securities and Exchange Commission to forcibly dismantle those entities into smaller, simpler operating company organizations. The Commission’s work under that law was completed within the first several years after its passage. See generally JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET (3d ed. 2003) (describing purposes and history of the Act).

168 The mere holding of a large market share, the holding even of substantial market power, and the charging of supra-competitive prices are in and of themselves all perfectly legal. It violates federal antitrust only for a firm to acquire or maintain market power through exclusionary or predatory conduct. See, e.g., WILLIAM H. PAGE & JOHN E. LOPATKA, THE MICROSOFT CASE: ANTITRUST, HIGH TECHNOLOGY, AND CONSUMER WELFARE 243-48 (2007) (analysis by two distinguished antitrust scholars raising doubts about the desirability of the Microsoft enforcement action).

170 253 F.3d 34 (D.C. Cir. 2001) (en banc).

171 Specifically, while Microsoft was an unsigned per curiam opinion, it is widely assumed to have been written by Judge Douglas Ginsburg. See, e.g., Introducing Douglas H. Ginsburg, NYU LAW MAGAZINE, available at http://blogs.law.nyu.edu/magazine/2011/introducing-douglas-h-ginsburg/ (so implying). Judge Ginsburg was first a professor of antitrust law at Harvard Law School and later, during the Reagan administration, Assistant Attorney General for the Justice Department’s Antitrust Division.
and anticompetitive were Microsoft’s machinations, and how emphatically the suit was not an attack on the firm’s success. So far as American law is concerned, anyone can make any amount of money and can even capture as much of a market as they like, so long as they do it by selling things of better quality or lower price. And so, no one has been sued successfully in antitrust merely for succeeding in business, at least not in several decades if indeed it ever really happened.

A somewhat deeper manifestation of the same instinct is the tension between antitrust and individualism or property values, a problem antitrust has struggled with for a long time. In and of itself, the price theory on which contemporary antitrust builds has no concern for individualism or property rights and, though the point is rarely acknowledged, standard welfare economics is rather radically collectivist in such matters.172 Antitrust has not been so radical. Perhaps it would have been if courts and policymakers suffered no epistemic limits, but in what can be explained as a compromise with both the limits of human institutions, and with the individualist values we generally protect with things like procedural due process and the plaintiff’s burden of proof, a number of antitrust rules have evolved to protect individual freedom. For example, sellers enjoy a strong right to set their own prices,173 they may deal with whomever they choose except in

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172 Specifically, the optimization of aggregate welfare takes for granted that rules might be needed that disadvantage some for others’ benefit. For example, optimization may require taking property forcibly from some for public use, perhaps even without compensation. See Richard A. Posner, Economic Analysis of Law (8th ed. 2010).

173 There are a few limits, but they are very difficult to enforce and leave sellers with very broad freedom over their own prices. First, prices that are actually below cost may be illegal if they can be shown to be predatory—that is, if it can be shown that they are part of a plan to exclude competitors, following which there is a reasonable likelihood of recovering the losses of the predatory campaign. See Sagers, supra note XXX. Second, discriminatory prices can violate the Robinson-Patman Act, 15 U.S.C. §§ 13-13c, but generally speaking the Act has fallen into deep disfavor with courts and they have made it very difficult to enforce, see Sagers, supra note XXX.
unusual circumstances, and they cannot violate antitrust by merely earning monopoly profits, no matter how allocationally inefficient their price and output may be. Strictly speaking these rules can be explained on grounds other than individual freedom—for example, that they are needed to account for risk of false positives. But there is reason to suspect they serve other goals as well. There have been times and places when the tension has been resolved to favor individual liberty, as in the English law at the turn of the twentieth century. But the English example itself shows that choosing that path effectively means giving up on any competition policy at all. And the real point is that, again, vernacular opposition to competition enforcement are not very interesting when they are based on the perception that antitrust defendants have merely used their own property as they see fit. For antitrust already accommodates individualist or property rights values more than would the economic theory on which even its strongest critics desire it to be founded.

B. Business Failure

There is another tension, which, while not very interesting theoretically, is hugely significant politically. If antitrust is really enforced, and firms are forced to compete, it may result in some increase in business failure. Shareholders will lose money, productive assets will be shuttered, and workers will lose jobs.

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174 See Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc., 555 U.S. 438, 448 (2009) (citing United States v. Colgate & Co., 250 U.S. 300, 307 (1919)) (“As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing.”). The exception is that a monopolist may violate the law by refusing to deal where the effect is to exclude competition, so as to acquire or maintain the firm’s monopoly power. But the Supreme Court describes this rules as a “limited exception” it recognizes only “very cautiously[ly].” Verizon Commc’ns, Inc. v. Law Offs. of Curtis V. Trinko, 540 U.S. 398, 408-09 (2004).

175 See supra note XXX.

176 See id.
The problem of business failure was prominent in Apple. The publishers claim that they needed the Apple pricing model to survive the transition to digital distribution. They appear to have feared that if Amazon’s low prices drove consumers no longer to value hard cover new releases at the high prices they’d enjoyed, the publishers would be unable to remain in business. Specifically, because eBook prices would erode the consumer perception that hardcover new releases are really worth the prices that they had traditionally enjoyed, they would lose earnings needed to stay afloat. But that argument is patently ridiculous. Preserving demand inelasticity based on differentiation, for no reason except preserving prices that apparently were substantially supracompetitive even before eBooks, is not in itself a goal that anyone need take seriously.

But much more importantly, the most basic recommendation of economic theory is that if a firm cannot survive a change in a market’s cost structure, then it should exit. And in this particular case, the publishers complain not about some inherent economic defect in their market making it too hard for them to compete. There simply was a technological change that significantly reduced the cost of producing a closely competing product. An intermediary earns revenues in an efficient market only to the extent that they represent a competitive rate of return on capital that must be invested in order for the product to exist. In book markets, the product can now exist in a form that consumers appear to find acceptable, at least at the very low prices charged by Amazon, without the investment in traditional production and marketing that was the publishers’ reason for being.

A related theme is the argument that challenged conduct must not be anticompetitive if the defendants aren’t making any money. Monopolists, the argument goes, should at least be profitable. But, first, industry claims of poor performance have often been overstated when they are threatened with government oversight. That was the case, for example, throughout efforts to deregulate
the heavy infrastructure industries.\textsuperscript{178} And indeed, not only have trade book publishers remained profitable, despite rhetoric surrounding eBooks,\textsuperscript{179} it appears that their sales of eBooks are actually improving their bottom lines.\textsuperscript{180}

But even were it otherwise, there are well understood reasons that firms could suffer even while earning supracompetitive revenues. Wasteful investments in retaining market power and “X-inefficiency” are common explanations.\textsuperscript{181}

IV. THE AMAZON IRONY AND THE LOSS OF INTERMEDIATION

There are, however, more serious ironies. Probably the strongest running theme surrounding the Apple case was that the publishers could not survive Amazon’s new pricing model, and that with their loss would be lost certain social values that Amazon nor others could supply as their replacement.

A. The Amazon Irony

1. Price Predation

At the time of the eBooks conspiracy, Amazon held a very large share of eBook sales, and the publishers claim that it got that share by selling their eBooks at below its own costs. There is no question that this was true of some individual titles—Amazon’s price for new releases was less than the wholesale price it paid for some of them. But while they have not fully explained their theory of Amazon’s motives, and while the government asserted that

\textsuperscript{178} See Sagers, \textit{supra} note XXX (noting arguments by the ocean shipping industry during deregulation that loss of its legal right to fix prices would cause business failure).

\textsuperscript{179} See THOMPSON, \textit{supra} note XXX.


Amazon’s eBooks business was profitable even before prices were forced up,\textsuperscript{182} the defendants and their supporters maintain that Amazon sold eBooks at an overall loss in order to obtain monopoly.\textsuperscript{183} There is also the fact, which to the defendants looks like a smoking gun, that Amazon itself encouraged the government to bring the lawsuit.\textsuperscript{184} An old criticism of antitrust is that it really just helps competitors avoid competition,\textsuperscript{185} and to some Apple’s paramount irony is that federal regulators were used in a game to benefit an aspiring monopolist. And so, there has been much criticism of the Justice Department for having picked the wrong defendants, and failing to sue the real monopolist.

These concerns are not really very serious, but working through them is useful. It winds up raising issues similar to those raised whenever defendants claim that they just can’t compete without private trade restraints.

First, the theory of Amazon as predatory monopolist is factually unlikely. Despite some of their rhetoric, and despite having hired a small army of renowned economic experts, the defendants produced no proof that Amazon’s eBooks program was an overall loss.\textsuperscript{186} While it is undisputed that some of its

\textsuperscript{182} Apple Complaint, supra note XXX, at ¶ 30.


\textsuperscript{184} See Apple, 952 F. Supp. 2d at 681 (noting that federal government learned of the conspiracy from a letter sent by Amazon to Federal Trade Commission).

\textsuperscript{185} See, e.g.,

\textsuperscript{186} In fairness, that could be because they lost some discovery skirmishes in this case against non-party Amazon. But Amazon’s retail prices are public and the wholesale prices it paid were in the defendant publishers’ possession. Sales at an overall loss should not have been too hard to prove if it were true, and defendants did nothing to prove it.

Perhaps too they didn’t produce that evidence because it would not be legally relevant in defense of price fixing. But they did raise a number of other
individual sales were at a loss, there are various reasons to expect that its overall eBooks program was profitable, or would be in the longer term, without any anticompetitive conduct. First, Amazon also sold its own eBook reader device, the Kindle, which predated the iPad and other eBook-compatible products, and launched it at a time when there was effectively no market for eBooks.\footnote{Apple, 2013 WL 3454986, at *4 (noting that Kindle was first commercially successful eBook reader).} Kindle sales might have made the eBook business profitable even if eBook sales themselves were an overall loss. Second, Amazon might reasonably have meant to use the massive market share it gained through very low price eBooks to force down the wholesale prices it faced from publishers. That goal would be a reasonable one because “wholesale” prices for eBooks are fictitious.\footnote{In competitive markets, products are priced at marginal cost. Even Amazon’s price of $9.99 must be far in excess of the marginal cost of an eBook. The publishers made no effort to explain the “wholesale” price for eBooks on any case basis, and explained it only as needed to preserve their hard-copy book business.} The publishers’ efforts to keep those prices up was just an effort to find some substantially supra-competitive price point the market would bear for their highly differentiated products, not a competition-driven effort to cover the costs needed to produce them. Finally, Amazon might simply have needed to establish a sufficient scale for profitability, in which case aggressive pricing over the relatively short period it was alleged to have occurred was just part of the process of literally creating a new market. Separately, there is reason to doubt the predation story because in fact Amazon has been accused of predation so frequently, for so long, in so many sectors. Gaining market share through deep discounting, funded by innovation in internal efficiencies, is a very long-term Amazon strategy, dating back well more than a decade and evident throughout its large range of retail and other businesses.\footnote{See STONE, supra note XXX.} It seems extremely unlikely that the firm has operated on a genuinely predatory basis throughout its whole business for that long period.

arguments that also would not be relevant, mainly consisting of efficiency arguments.

\footnote{Apple, 2013 WL 3454986, at *4 (noting that Kindle was first commercially successful eBook reader).}

\footnote{In competitive markets, products are priced at marginal cost. Even Amazon’s price of $9.99 must be far in excess of the marginal cost of an eBook. The publishers made no effort to explain the “wholesale” price for eBooks on any case basis, and explained it only as needed to preserve their hard-copy book business.}

\footnote{See STONE, supra note XXX.}
Moreover, even if the theory of predation were more plausible, one could hardly fault the Justice Department for not (yet) suing Amazon. The law on predatory pricing is stacked overwhelmingly against enforcement. In the twenty years since the Court adopted its current, very strict legal standard,\(^\text{190}\) founded on its doubt that predation ever occurs or poses any threat when it does,\(^\text{191}\) predatory pricing plaintiffs have failed completely in almost every case.\(^\text{192}\) About fifteen years ago, the Justice Department itself brought one of the most important, most ambitious modern predation cases,\(^\text{193}\) but it lost because, even with a team of excellent lawyers and economists and the investigatory power of the federal government, it still could not meet the court’s exacting evidentiary expectations as to proof of defendant’s costs.\(^\text{194}\)

And finally, whether or not DOJ could win a case against Amazon, it is not legally relevant to a separate case against alleged price fixers that some third party priced predatorily or did anything else. Horizontal cartels and hub-and-spoke price conspiracies are per se illegal, and they should be, even if organized to repel another party’s antitrust violations. This is so because the cartel

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190 In its seminal *Brooke Group, Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209 (1993), the Court established a very demanding two-part standard to govern predation cases. Plaintiffs must show that the challenged prices were below some appropriate measure of costs (typically assumed to be average variable costs, as a proxy for marginal cost), and that once the predator excludes its victim, it has a reasonable likelihood of recouping the losses of the predatory episode. *Id.* at [CITE]


192 That trend actually predated *Brooke Group*; predation plaintiffs pretty much always lost for a decade or so before then, during which most lower courts adopted some version of the test that was ultimately adopted in *Brooke Group*. See Robert Pitofsky, *Antitrust in the Next 100 Years*, 75 CAL. L. REV. 817, 821 (1987).

193 See United States v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003).

194 335 F.3d at 1116-21.
won’t serve the public interest; it will only serve its own, at public expense.\footnote{And it would be a poignant result if, on the current state of the law, it were actually a defense to price fixing that some other person were pricing predatory. In that case, two harmful courses of conduct would both be effectively immune from challenge. If antitrust claims must lose whenever the defendant is lowering price (as is effectively the case under current predatory pricing law), and \textit{also} must lose when a defendant or a conspiracy of them indisputably raises prices, then antitrust really is finally dead completely and we ought to just repeal it and quit wasting our time.} In Apple, for example, there is no serious question that the cartel successfully raised price, by quite a lot and for a long time,\footnote{Defendants argued that Apple’s entry encouraged technological innovations, but the government showed that each purported innovation was either already in existence prior to the conspiracy, or was in development by others simultaneously.} but the defendants were unable to produce any serious evidence of having accomplished anything else.\footnote{Defendants also argued that it must be a good thing that Apple's entry reduced Amazon’s market share. And indeed, Amazon lost market share.} Only raising prices, and doing nothing else, is a serious social harm, with no offsetting benefit at all. No regulator cares less about the public interest than a conspiracy of horizontal competitors.

There may be a different reason to fear Amazon’s market share. It could be that even though Amazon wouldn’t push royalties so low that authors would no longer write, it might still set its purchase price for books monopsonistically low, which may ultimately reduce output in the retail market and produce a deadweight loss.\footnote{But market share in and of itself is not very relevant, and the evidence is that the world was better off with Amazon’s large, low priced share.} There could be more serious versions of Amazon’s motivations. There remains the alarming possibility that Amazon’s price-cutting goal is to establish a large installed base of Kindle owners, lock them in to its technology in a way that will prevent them from purchasing eBooks elsewhere, and then raise price or otherwise extract rents from its captive clientele. But the right response to that strategy, if it comes to light, is to sue...
Amazon. It is not to allow horizontal competitors to fix their prices.

2. Entry Must Be Good, and the New Brandeisians

Relatively, defendants and their supporters have argued in various ways that, whether or not Amazon priced below cost or took other exclusionary steps, its market share was inherently a problem and the appearance of new competitors in such circumstances must be desirable in all cases. Entry is competition, so the argument goes, it is the very thing that antitrust protects, and therefore it must be good.\(^{198}\)

But that is not correct. Entry is only good to the extent that it lowers quality-adjusted price, so if the only way a firm—say, Apple—can enter is to get not only its own prices but also those charged by everyone else way up, then its entry is not welcome. And so, black letter antitrust emphatically does not contain any rule that all entry is good. The defense attorneys now stressing that entry must be good would sing rather a different tune if Amazon were their client, and would stress the rule that antitrust does not protect less-efficient entry.\(^{199}\)

Finally, there is a separate and more quotidian objection to DOJ’s decision to tackle Apple and not Amazon. A criticism of

\(^{198}\) Again, Apple argued in its very first public comments on the case that “[t]he launch of the iBookstore in 2010” had to be good, because it broke Amazon’s monopolistic grip on the publishing industry.” Kafka, supra note [XXX] (quoting Apple spokesperson Tom Neumayr).

\(^{199}\) The argument typically arises as a defense in § 2 cases challenging an alleged monopolist’s exclusionary conduct. The argument is that if the conduct could only harm entrants or competitors who could not price as cheaply as the monopolist anyway, then those victims should have no antitrust remedy. It is a major justification, for example, for the rule that price cuts by a monopolist cannot be actionably “predatory” unless they are below the monopolist’s own costs. See Einer R. Elhauge, Why Above-Cost Price Cuts to Drive Out Entrants Are Not Predatory - And the Implications for Defining Costs And Market Power, 112 YALE L. J. 681, 699 & n.56 (2003) (citing Brooke Grp., Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993)).
price-theoretic antitrust, which comes mainly from the left, has been that it has forgotten the law’s original and essentially political purpose to challenge private power, in its own right. Amazon, the argument goes, is in itself a public policy concern demanding correction because it holds economic power that threatens authors, publishers, consumers and other market participants.

Aside from the irony that the antitrust defense bar has begun talking like Louis Brandeis, and forgetting their usually strong commitment that antitrust protects competition and not competitors, the basic response is just that policies to address size in and of itself have not worked very well. Where smaller firms have been sought to be protected against or empowered in dealing with larger ones, the result has quite often been unintended and seriously harmful side effects, nice examples being agricultural cooperatives policies and the anti-chain store legislation of the New Deal years. And while there might be more promise in some other approaches to bigness for its own sake—like the no-fault monopolization laws once seriously debated in Congress or the much more vigorous merger caselaw of the 1960s—those policies would be quite problematic, even had they any political feasibility whatsoever, when the large market share in question is gotten through long-term investments in cost-driven low prices.

B. Disintermediation of Socially Valuable Functions

202 For a nice discussion, see the exceptional VICTORIA SAKER WOESTE, THE FARMER’S BENEOLENT TRUST-LAW AND AGRICULTURAL COOPERATION IN INDUSTRIAL AMERICA, 1865-1945 (1998). As she demonstrates, well intended legislation meant to assist small farmers in their negotiations with large agricultural businesses in fact led to unintended results that hurt farmers and consumers.
Media firms have traditionally performed a number of intermediate functions needed to identify commercially promising works, oftentimes funding or organizing their creation, to prepare them for mass dissemination, and to take them to market. They do so, however, expensively, by comparison to digital distribution. Significant evidence in Apple showed their fear that Amazon, Google, or other major online distributors threatened entry as new publication venues that would compete as publishers.\textsuperscript{206} So perhaps we should fear the technological change the publishers tried to deter, because it risks losing important functions that they perform.

In and of itself, this kind of disintermediation is not obviously bad. A lower cost means of production or distribution should win out over more costly means, and aggregate welfare should improve. The failure of the major publishers is economically undesirable only if their investment of resources is needed for the desired product to exist. So, to show that disintermediation is bad, there must be some important intermediary function, other than production of the literary works themselves, that disintermediated markets can’t provide on their own.

A crucial fact in this respect, and one largely overlooked in eBooks and other digital disintermediation debates, is that digital distribution is cheaper in part because the infrastructure it requires is paid for by end use customers. The buyers download content on devices they purchase, and they do so over internet access paid for either by the buyers themselves or by third parties (as in coffee shop wi-fi).\textsuperscript{207}

There might arguably be other losses. One might be the “risk capital” function that media intermediaries often claim to serve. The development and marketing of new intellectual works involve some costs and a high frequency of commercial failure. Each new work is a differentiated and untested product, and its success is

\textsuperscript{206} See Apple Complaint, supra note XXX, at ¶ 34, 49.
\textsuperscript{207} See Ku, supra note XXX, at 268 (making this point as to music distribution).
ordinarily difficult to predict. Ordinary capital sources without specialized expertise would find such investments difficult to evaluate. Intermediaries argue further that they are specially suited to the risk capital function because they maintain large inventories of investments, and can diversify the risk.

A similar argument is that the traditional publishing firms, by maintaining large, diversified pools of investments in a variety of books, are able to support works of high literary merit but unlikely of commercial success. They cross-subsidize, in other words, to preserve art for its own sake.\footnote{The music and video industries have made the same arguments during various squabbles. See DiCola & Sag, supra note XXX.}

The loss of this function seems not terribly significant in the case of digital disintermediation, since its main impact is to reduce the very costs that make the markets risky. The high risk capital that intermediaries fronted was needed mainly to fund their own operations—publishers’ largest single cost is returns of unsold inventory\footnote{See Auletta, supra note XXX.}—much of which would be obviated by full digital distribution.

There is a possibly more significant problem. Traditional intermediation might perform a legitimating or sorting function that is socially valuable. To be published by a prestigious intermediary, like an academic press or major commercial publisher, means facing a screening or peer review process. If authors can widely distribute their work at very low cost, and in particular if they can feasibly sell directly to consumers, then there could arise an information problem. Book markets might be flooded with works lacking authoritativeness or legitimacy, and consumers could be too overwhelmed for markets themselves to isolate works of real quality. Even though authors have always been free to fund their own publications, it would traditionally have been very expensive to distribute any new, physical book without investment from an intermediary. The cost of vanity
publishing was a deterrent to a flood of products that could impede efficient consumer search.

But economically, this sorting or legitimizing function should be just a simple matter of intellectual property, and it should be easy for disintermediated markets to replicate. It is a function of trademarks, and their reason for being. No obvious reason suggests that a trademark in eBooks, differentiated by a reputation for literary quality, requires investment of the kind the major publishers apparently find necessary for their own continued existence. On the contrary, if there is money to be made in eBook markets, and rents can be generated through quality-differentiated branding, authors will have strong incentives not to disintermediate fully, all the way to direct, one-to-one sales to consumers. They would prefer to be published under the mark of some firm or cooperative which has been able to differentiate a brand for quality. If anything, online distribution should have an advantage in developing brands, given the internet’s power to support user reviews and other mass data collection.

Indeed, protection of the leading publishers from alternative intermediaries could deter desirable innovations, like authors’ cooperatives or book-buying guilds, or other non-traditional distribution forms that could brand their own reputation for quality. Prominent examples of such innovation already exist in cognate fields, where intermediation traditionally performed the similar function of validating or legitimizing the quality of content, as in journalism.\(^{210}\)

\(^{210}\) As mentioned, print and radio news have been devastated by digital competition, a fact mostly blamed on the internet’s superior ability to deliver advertising. See supra note XXX. One major concern in journalism is that as news organs have succumbed to earnings pressure, they have sacrificed quality and traditional journalistic integrity standards. In particular, it is thought that they have sacrificed commitment to investigative journalism, which is comparatively expensive and risky. See generally Brant Houston, The Future of Investigative Journalism, DAEDALUS, Spr. 2010, at 45; Eric Klinenberg, Convergence: News Production in a Digital Age, ANNALS AM. ACAD. POL. & SOC. SCI., January 2005, at 48; Edward Wasserman, Investigative Reporting:
Alternatively, even if the branding needed for efficient consumer search can’t be created by alternative intermediaries, the resulting need for sorting should simply shift demand curves outward for complementary products. Specifically, the need could be fulfilled by artistic criticism or arts journalism to a greater degree than is now the case, to take the place of the traditional publishers’ quality-differentiated, trademarked imprints.

In any case, the potential loss at issue here—the loss of the information contribution that publishers make by selecting books, at least in trade publishing and other ordinary retail markets—can be overstated. Particularly as trade publishing has become more concentrated and several of the major publishers now face pressure from public shareholders, they are under increasing pressure to focus on only profitable titles, regardless of quality.211

And so, even if disintermediation really does destroy the traditionally leading publishers—rather than, as seems more likely, just forcing them to adapt to changing circumstances—and even to the extent that they performed functions not made unnecessary by disintermediation, it seems likely that the disintermediated markets should be able quite easily to replicate them, and probably at lower cost.

V. MORE SERIOUS YET: TECHNOLOGICAL TRANSITION AND CULTURAL VALUES

Again, antitrust rejects arguments that particular values are better preserved through private restraints than through

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But there is some good news, and it is relevant here. As traditional news entities have shed investigative and other reporting capacity, newer forms of organization have appeared to take up the slack. The most prominent is ProPublica, an independent, non-profit newsroom founded .... Pulitzer Prize [BUT REMEMBER THIS IS SUSTAINED BY PHILANTHROPY]

211 See Thompson, supra note XXX.
competition; it therefore contains a presumption that markets are in relevant respects similar. “Whatever may be [the] peculiar problems and characteristics” of any given market, the Sherman Act “establishes one uniform rule applicable to all industries alike.” But the emphasis on competition as the preferred instrument of social values implies the corollary either that competitive markets won’t harm values of any importance, or that if they do, then those values are outweighed by the benefits of competition.

This can be troubling, even to free marketeers. For example, antitrust might sometimes implicate constitutional civil liberties, as when it is enforced against political boycotts or religious activities. Those concerns can be exaggerated, and indeed

212 See supra note XXX.
215 See, e.g., Barak D. Richman, Saving the First Amendment From Itself: Relief From the Sherman Act Against the Rabbinc Cartels, 39 PEPPERDINE L. REV. 1347 (2013) (explaining how some religious practices can be anticompetitive, and analyzing the applicability of antitrust to them).
216 To take one example that strikes some as very poignant, group protests can sometimes cause economic harms, and occasionally they can be made to look like anticompetitive conduct that could violate antitrust or other laws. For example, the NAACP has sometimes boycotted businesses to protest racist practices. The weapon to be used is economic—the goal is punish businesses economically by denying them sales—and since the boycotts consists of consumers refusing to engage in economic transactions with particular sellers, the protest

However, it has been clear for at least twenty-five years that in any case in which the basis of the protest is not “commercial,” and rather is expressive, it is flatly exempt from antitrust challenged under the First Amendment. See FTC v. Sup. Ct. Tr. Lyrs. Ass’n, 493 U.S. 411, 425-28 (1990); Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 508 (1988); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 914-15 (1982). Admittedly, Superior Court Trial Lawyers made that protection depend on whether a defendant “stand[s] to profit financially from a lessening of competition in the [affected] market,” 493 U.S. at
sometimes competition might support those other values rather than undermine them, \(^{217}\) but no one seriously denies that conflicts

427 (quoting Allied Tube, 486 U.S. at 508), and some critics object to that distinction as overly crude, and formally binary, see Greene, supra note XXX, at [cite]; Kindred, supra note XXX, at 731.

But categorization of different speech acts is inevitable in First Amendment law, see, e.g., Frederick Schauer [cite], and failure perceive this just reflects how omnipresent categorization is. The exclusion of some expression from full protection has always been recognized as a necessary compromise with ordered society. For what it may be worth, for reasons of public policy, a broad range of conduct that likely is expressive in some degree still receive essentially no First Amendment protection at all, and indeed that is true of much conduct subject to antitrust prohibition. In fact, when First Amendment authors need an example of speech that enjoys no protection, they often use the speech necessary to make a price-fixing agreement. See, e.g., Schauer, supra, at [cite]. And, in any case, on close examination, it turns out to be pretty hard to come up with examples of conduct likely to fail the test for constitutional protection stated in Superior Court Trial Lawyers, that also are likely to violate the antitrust laws, and that actually seem likely to involve substantial expression of the kind we normally value as worthy of a civil rights protection. The facts in Superior Court Trial Lawyers may be in that category, depending on to whom one talks, but they are actually quite exotic as naked horizontal restraints go. One other example might seem somewhat troubling—a consumer boycott directed to the actual prices or quality of a product or service. But there actually is an interesting question whether such conduct would be illegal if not protected under the First Amendment, given the now widely accepted view that the central purpose of antitrust is consumer (as opposed to total) welfare. See Lande [CITE].

\(^{217}\) Famously, Hugo Black argued that because values underlying the free press are well served by competition, the First Amendment should give media no special protection from antitrust:

[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . . Surely a command that the government itself shall not impede the free flow of ideas does not afford non-government combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.

Associated Press v. United States, 326 U.S. 1, 6-8, 20 (1945). Some such concept also underlies the famous “marketplace of ideas” metaphor. See [finish].

Likewise, Barak Richman argues antitrust enforcement against trade-restraining clerical employment rules does not invade religious freedoms, but
between competition and at least some important values can be troubling.²¹⁸

And so, even though we might decide along arguments like those in the previous Part that losses among the publishers are tolerable, since disintermediated markets could probably replicate their traditional functions, there may still be social losses from the transition. They may reflect cultural or institutional values inherent in the traditional organization of literary production.

A. Threats to Authors and Literature Itself

Among the most poignant concerns in the eBooks controversy, as in other content disputes, is the possibility that price competition could hurt authors themselves and the creative endeavor. Retail competition might push book prices so low that authors could no longer earn remunerative pay for their work, and be forced to seek other income that will keep them from creating written works. During the eBooks case and prior fights over digitized books, authors have so argued.²¹⁹

This will not follow. An author’s time devoted to composing a work has an opportunity cost and accordingly it is a fixed cost of the work’s production. The products cannot be sold without the authors to create them, and there is a point below which authors will no longer do so. Specifically, as in other markets, the return to authors must cover average total economic cost in the long run, “economic cost” including a market rate of return on the value of the invested capital (i.e., the authors’ time).

rather supports them by freeing local congregations to hire the ministers they prefer. See Richman, supra note XXX

²¹⁸ Even Justice Stevens, a leading voice for broadly applicable antitrust rules, even in the face of civil liberties claims, acknowledged in a leading opinion stating that view that “[r]easonable lawyers may differ about the wisdom of this enforcement proceeding.” FTC v. Sup. Ct. Tr. Lyrs. Ass’n, 493 U.S. 411, 421 (1990).

Whether authors have socially desirable incentives in given circumstances has been the subject of a rich academic literature, mainly among copyright scholars, since copyright’s major purpose is to ensure that authors’ financial incentives to create will be socially optimal. A robust consensus among them is that to encourage socially optimal literary output, authors probably need quite a lot less incentive than the protection they enjoy under current copyright, and a meaningful subset of scholars have even questioned whether they need any protection at all. Traditionally the argument was made as a function of the cost of producing paper books. Since the cost of copying and distributing paper copies would be high enough that with lead time and other advantages, publishers could recover their initial costs and continue selling copies competitively (that is, at their marginal cost, and there is no particular reason to expect that competing firms selling their own copies of a publisher’s works would have any cost advantage). The argument is bolstered by historical examples in which books have been sold profitably without any copyright protection at all.

220 While there is some minor uncertainty over copyright’s goals, see, e.g., Wendy J. Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors, 82 COLUM. L. REV. 1600, 1610 & n.62 (1982), it is generally agreed that U.S. copyright exists primarily to incentivize intellectual work for the larger social benefit, and not for individual benefit. See United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) (“The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. . . . [T]he primary object in conferring the monopoly lie[s] in the general benefits derived by the public from the labors of authors.”); see generally Breyer, supra note XXX, at 291-323; Gordon, supra, at 1610 n.62; cf. Stewart E. Sterk, Rhetoric and Reality in Copyright Law, 94 MICH. L. REV. 1197 (1996) (noting that much rhetoric surrounding copyright and some of its rules are only well explained by theories of the author’s “deserts,” but showing that such theories are not well founded in the history or copyright or in good policy).

221 Breyer, supra note XXX; see also Ku, supra note XXX (making related argument as to music).

222 Breyer, supra note XXX.

223 Breyer, supra note XXX (noting that foreign published books had no copyright protection in the United States until ).
It may be that this argument could only fully hold as long as the cost and delay of making physical copies kept copiers from denying publishers their fixed costs.\textsuperscript{225} It may be that those costs fell with the rise of photocopying and other innovations,\textsuperscript{226} and all the more so now that books can be copied and delivered electronically. [FINISH] But to be clear, that is an argument about piracy, in the absence of copyright protection. Even were it really a threat when other content industries faced similar changes—a widely disputed claim\textsuperscript{227}—for legal and technological reasons it is not a threat in current book publishing.\textsuperscript{228}

It will also be argued that even though some books will still be produced, quality will suffer. With tight margins, publishers will lack freedom to take chances on unknown authors or risky new projects, and will be forced to fund only the most commercially trustworthy products. But this argument is very weak. As with other products, where similar arguments have been made and disproven many, many times, where there is demand and reasonably well functioning markets, demand will be satisfied.\textsuperscript{229} Moreover, the value of what would be lost in the current trade publishing model should not be exaggerated. It is the case even now that publishers’ book-buying decisions are commercially driven, and were subject to growing earning pressure, even before eBooks existed.\textsuperscript{230} And many scholars believe that non-monetary

\begin{footnotes}
\textsuperscript{225} Book publishers enjoy not only copyright protection, but markedly expanded protection mostly won during fights over the digital distribution of music and video. Thus, even much gratuitous peer-to-peer sharing is illegal or technologically barred, though the same sharing would be legal if it involved hard copies. (Sharing a hard copy book, video or musical recording, and making copies of them for personal use or to share, are permissible fair uses. \textsuperscript{[CITE]} Copyright legislation [FINISH])
\textsuperscript{229} See supra notes XXX and accompanying text (discussing economics of book publishing).
\textsuperscript{230} THOMPSON, supra note XXX; see also supra notes XXX and accompanying text.
\end{footnotes}
incentives significantly drive literary production, perhaps more in some cases than monetary incentives,231 and there is empirical support for it.232 So long as intellectual property rights are reasonably secure, it is hard to see why authors won’t be able to earn returns sufficient to generate socially desirable levels of creativity. And those rights are secure. Content owners have often argued that disruptive technological innovations had to be stopped because they would encourage piracy. But as mentioned above, not only has piracy never been the problem that content owners predict, new reproduction and distribution technologies have ordinarily expanded sales and profits for content owners.233

Likewise, not only may expanded protections for the creators’ income impose some consumer harm through higher price and decreased output, it poses serious threats of its own to the creative process.234

And finally, in any case, if the goal of limiting price competition is to support high quality literary work, private price fixing is not a good solution. In any chain of distribution, relationships up and down the chain are necessarily adverse to some degree.235 Within those chains, such excess rents as can be extracted from the ultimate sale of the product tend to be claimed by that participant with the most market power. In all except rare cases—the world’s vanishingly small handful of best-selling


Lloyd L. Weinrib, 111 HARV. L. REV. 1149, 1232 (1998) (“the vast majority of authors, artists, and composers, professional as well as nonprofessional, do not earn a living from their works.”)

232 See Cohen, supra note XXX, 505 & n.160 (discussing evidence).

233 See supra notes XXX and accompanying text.


235 See supra notes XXX and accompanying text (discussing the work of Robert Steiner).
writers—meaningful market power in book distribution will not be
in the hands of authors, and in the case of trade publishing it seems
very likely to reside in the hands of the five large firms that now
dominate the publishing level as an oligopoly. Accordingly, only a
very few authors will be able to meaningfully represent their own
interests. Where the publishers are able to give effect to their
interests, it will be in lower output (like any other monopolist or
oligopolist), likely meaning that fewer authors will publish fewer
books. And there is no compelling reason to believe that
publishers care about “quality” in any sense that is not incentivized
by profitability. In short, authors’ interests are better served by
price-competitive distribution and retail markets. That competition
may cost a tiny handful of the most popular authors some of their
current earnings, but for others output will increase and revenue
will rise.

A separate argument has been that trade publishers have
traditionally paid large royalty advances to some authors, on which
those authors may depend in order to produce their books.
Publishers take large risks as to these royalties, as they represent a
large share of their costs and they are lost on most books, which
don’t earn enough to cover them.236

B. The Demise of the Paper Book and Its Institutional
Accoutrements

A more serious problem may be harm to the printed book.
Opinions are not uniform, but there seems a fair consensus that we
will see its demise to some degree in the relatively near future.237
At some point production of new physical books may cease
completely or become limited to narrow, specialty products like
fine art or photography books. The reason is simply cost—bound
paper books are much more expensive to produce and distribute. If
books do disappear, other institutional phenomena of real value

236 Auletta, supra note XXX.
237 See Nicholas Carr, Don’t Burn Your Books—Print Is Here to Stay, WALL
ST. J., Jan. 25, 2013 (noting the general expectation that paper books will soon
no longer exist, but suggesting reasons to doubt it).
would likely be lost as well. Bookstores hold a cultural value for many people, as meeting places and places to enjoy the experience of book browsing. The comparatively expert persons who own or work in some bookstores represent a special cultural asset as well.

And yet this eventuality, which seems both very sad and fairly likely, is not relevant to our competition law and it should not be. Accoutrements of the doing of business not uncommonly have apparent social value in and of themselves, and those values are not uncommonly threatened by technological change and other incidents of price competition. [FINISH—perhaps reprise the ocean shipping story]

C. The Walmart Irony and the Creeping Profusion of Externalities

In most retail markets vigorous competition ... differentiated brands can preserve quality, but in at least ... low quality products distributed as cheaply as possible. ..... the death of downtown shopping areas, especially in smaller towns. ..... ways of life, like the family farm. Indeed, the goal of antitrust sometimes seems not even just to replace Main Street retail with Walmart, but to replace it with The Dollar Store. As far as the law is concerned, price competitive vigor ..... to the exclusion of other values. This then seems like a pretty straightforward positive externality or free riding problem. Customers may very well like smaller, nicely appointed stores, but they are unlikely to internalize the cost of preserving those stores (in the face of lower-cost discount competition) as a component of their own willingness-to-pay.

This Walmart Irony then pretty quickly devolves into a complex of problems nicely characterized as externalities. Retail market participants do not internalize all harms that their purchases might impose on third parties ..... except for transaction costs .... An antitrust purist therefore is sometimes in the awkward position ..... where more competition results in increased output of goods that seem plainly undesirable, like cigarettes, gambling, or junk food during an impending diabetes epidemic. Their use is a social
negative, but antitrust enforcement that keeps their prices down will expand output and increase their use.

VI. CONCLUSION: REAL IRONIES AND SOME THOUGHTS ON MOVING FORWARD

Finally, though the point of this paper has mainly been to dispute the importance of the ironies seemingly inherent in competition, there are at least some problems that really are of deep concern. There are problems of a kind that progressives and other antitrust believers should be bothered by more, and when they are recognized at all, antitrusters mostly talk about them in private among themselves, admitting they don’t have much of an answer.

A. Market Optimism and the Apparent Schizophrenia of We the Thurman Arnold Progressives

Having observed serious failures of capture and abuse throughout the long experiment with rate-and-entry economic regulation, most antitrust proponents are as skeptical of government economic planning as they are of private trade restraints, even those who otherwise might be stereotypically liberal or progressive in most respects. And so, antitrust progressives typically share the view that regulators should interfere in markets only when necessary, and then should use that regulatory approach that mimics the working of actual markets as closely as possible.  But even the strongest competition proponents ordinarily agree that there are some times when unregulated price competition just isn’t up to the task of meeting every socially optimal goal.

But that then leaves antitrust with a big problem. When antitrust believers are convinced that some value must be protected in some way not easily addressed by markets, they ordinarily just

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say that it can be handled by some new regulatory intervention.\textsuperscript{239} The problem is that, even if a time comes when Congress functions better than it does now,\textsuperscript{240} we will still have no reliable theory of regulation, or at least none with a track record of any promise. Since deregulation, many market-mimicking models of limited intervention have been attempted, and the results have not been promising.

For example, it is generally assumed that electricity cannot be supplied by fully free markets, for technological reasons,\textsuperscript{241} and

\textsuperscript{239}See, e.g., Prof’l Eng’rs, 435 U.S. at 689-90 (“[T]he argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition . . . is properly addressed to Congress and may justify an exemption from the statute for specific industries”).


But Congress is also performing poorly on more objective measures. Notwithstanding the range of grave crises it had to deal with, the 112th Congress of 2011-2013 was among the least productive in history in terms of legislation adopted. See Chris Cillizza, The Least Productive Congress Ever, WASH. POST: THE FIX, July 17, 2013, available at http://www.washingtonpost.com/blogs/the-fix/wp/2013/07/17/the-least-productive-congress-ever/ (citing NORMAN J. ORNSTEIN ET AL., VITAL STATISTICS ON CONGRESS ch. 6 (2013)).

\textsuperscript{241}Electricity markets are thought to suffer several serious problems, but the economically relevant ones mainly flow from the following fact: on the one hand, electricity cannot be feasibly stored, and on the other, for technological reasons, supply and demand within an electrical system must be kept balanced or brownouts and blackouts will occur. The problem is compounded by the fact that in electricity, both supply and demand for electricity can be extremely inelastic. Supply turns sharply inelastic at the point of full usage, because additional supply requires building new power plants. Demand is inelastic because, until very recently, no technology existed to inform customers of the changing costs of the electricity they use. See Severin Borenstein, The Trouble With Electricity Markets: Understanding California’s Restructuring Disaster, J. ECON. PERSP., Winter 2002, 191, 195-98; Darren Bush & Carrie Mayne, In (Reluctant) Defense of Enron: Why Bad Regulation Is to Blame for California’s Power Woes (Or Why Antitrust Fails to Protect Against Market Power When the Market Rules Encourage Its Use), 83 OR. L. REV. 207, 235-38 (2004); Paul L.
therefore that deregulation cannot be total. Since initial deregulatory steps in the late 1970s\textsuperscript{242} state energy regulators and the Federal Energy Regulatory Commission (FERC) have worked to bring market discipline to wholesale electricity pricing.\textsuperscript{243} But the several, state-by-state schemes they have worked out are not only blindingly complex, they have sometimes inadvertently set up seriously misdirected incentives and rent-seeking opportunities, as in the California catastrophe of 2000-2001.\textsuperscript{244} a major abuse in

\begin{quote}
Joskow, Deregulation and Regulatory Reform in the U.S. Electric Power Sector, in Deregulation of Network Industries: What's Next? 133 (Sam Peltzman & Clifford Winston, eds. 2000); Sandeep Vaheesan, Market Power in Power Markets: The Filed-Rate Doctrine and Competition in Electricity, 46 U. Mich. J. L. Ref. 921, 928-32 (2013). Among other things, supply inelasticity can invite a serious market power abuse. A generator whose power is needed when demand is near the full capacity of the system can demand drastically elevated prices, even where that producer holds only a small share of overall capacity. See Joskow, supra; Vaheesan, supra note XXX, at 929-30. Other problems include ensuring a socially amount of installed generating capacity, when future demand is hard to forecast and consumers do not internalize future capacity needs, and coordinating sales and delivery generally. See Am. Bar Ass'n, Section of Antitr. L., Energy Antitrust Handbook (2d ed. 2009).
\end{quote}

\begin{quote}
Traditionally, electricity was supplied by heavily regulated monopolies. In any given area, electricity was usually supplied by one privately owned monopolist firm, that was vertically integrated into generation, transmission, and delivery. Its retail rates would be set by a state regulator, and any wholesale transactions with other suppliers regulated by FERC, in both cases under traditional cost-of-service procedures. See Joskow, supra note XXX.
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\begin{quote}
See generally Bush & Mayne, supra note XXX, at 214-23 (laying out haphazard history of wholesale electricity deregulation).
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California was one of the first states to experiment with deregulated electricity. But in the complex structure it set up to replace cost-of-service regulation, the state made several critical mistakes. It set retail price caps to satisfy consumers, but only on the mistaken assumption that wholesale prices would be kept low in the new competitive environment. It prohibited long-term contracts to ensure it would have an actively traded spot market for electricity, but thereby it precluded retail sellers from hedging against tight supply-demand conditions. And it ordered divestiture of generating capacity by the state’s traditionally vertically integrated electric companies, but in doing so it arranged for only five firms to own all of the state’s internal generating capacity. And so, as soon as a period of tight supply-demand hit, in the summer of 2000, generators were able to engage in massive market power abuses. See Bush & Mayne, supra note XXX, at [cite]; Vaheesan, supra note XXX, at 934-37.
\end{quote}
Texas in 2005,\textsuperscript{245} and a massive price-fixing scheme uncovered in New York City in 2006,\textsuperscript{246} none of which could be meaningfully remedied.\textsuperscript{247} In part those failures arise because courts still protect deregulated industries from antitrust,\textsuperscript{248} and because FERC and state regulators have chosen not to take serious enforcement steps.\textsuperscript{249} But they also arise because displacing competition with legal rules is both very complex and inherently subject to political manipulation. Accordingly, similar problems have been common

\textsuperscript{245} One of the largest generators in Texas recognized during that year that its capacity was needed during certain periods of unusually high demand, and through the kind of withholding described in note XXX, \textit{supra}, managed to push prices extremely high during periods of high demand. \textit{See} Vaheesan, \textit{supra} note XXX, at 934-37.

\textsuperscript{246} The conspiracy is described in Simon v. KeySpan Corp., 694 F.3d 196 (2d Cir. 2012), and Vaheesan, \textit{supra} note XXX, at 938-39. Briefly, the dominant generator in New York City, KeySpan reached agreement with a competitor to insure that an upcoming addition of new capacity would have no effect on its pricing power. The facts are complex, but the anticompetitive effect of the agreement would not have been possible without the special auction rules regulators had put in place to ensure capacity. \textit{See} 694 F.3d at 198-200.

\textsuperscript{247} The California crisis was by far the worst, resulting in as much as $20 billion in losses and wealth transfer, only a tiny fraction of which was ever recovered. \textit{See} Vaheesan, \textit{supra} note XXX, at 937. In Texas, the total consumer injury may have exceeded $200 million, but the only entity with authority to seek a remedy, the state electricity regulator, settled an enforcement action for only $15 million. \textit{See} Vaheesan, \textit{supra} note XXX, at 937. In New York The Justice Department secured a disgorgement remedy through settlements amounting to about $16 million, \textit{see} United States v. Morgan Stanley, 881 F. Supp. 2d 563 (S.D.N.Y. 2012); United States v. KeySpan Corp., 763 F. Supp. 2d 633 (S.D.N.Y. 2011), but defendant KeySpan earned something on the order of $49 million in profits on the underlying deal. \textit{See} Vaheesan, \textit{supra} note XXX, at 938-39.

\textsuperscript{248} This is the result of the courts’ continued reliance on the so-called “filed-rate” or \textit{Keogh} doctrine, which if anything they have applied more aggressively even as many industries undergo some deregulation. \textit{See supra} note XXX. Caselaw in each of the three jurisdictions here—California, Texas, and New York—precludes private damages recovery in electricity markets, even though they have been deregulated with a goal of making prices sensitive to competitive pressures. \textit{See} Vaheesan, \textit{supra} note XXX.

\textsuperscript{249} During the California crisis, for example, FERC refused state government entreaties to intervene in wholesale markets (where only FERC has jurisdiction), because FERC was not convinced that generators had the market power it thought would be required to cause injury by raising price.
in other once-regulated sectors, as in transportation\textsuperscript{250} and communications,\textsuperscript{251}

Plenty of other examples exist outside the once-regulated industries—examples in which perceived market problems have been addressed through some regulatory intervention that sought to mimic a market or to limit market impairments—and results in those other cases have also often been disappointing. A prime example is the effort of the past few decades to make pharmaceuticals more competitive. Ironically enough, the Hatch-Waxman Act of 1984\textsuperscript{252} was meant to encourage pro-competitive entry by generic drug makers, in particular because Congress believed that incumbent firms had frequently gotten patents for drugs that weren’t really patentable, and were able to prolong patents in various ways. The irony is that drug companies discovered immediately that the statute’s prime mechanism to

\textsuperscript{250} For example, ocean shipping within the U.S. jurisdiction was for much of its history governed through various regulatory programs, which mostly authorized price cartels subject to some oversight and enforcement. See generally Sagers, \textit{supra} note XXX. But now, even though these markets have all been at least partially deregulated, and even though the regulators that still have some authority over them have more or less completely failed ever to take any competition enforcement steps, courts continue to hold them exempt from antitrust

\textsuperscript{251} Both Congress and the courts have sought to bring competition to voice communications. The roughly century-long regulated monopoly held by AT&T was broken up by antitrust lawsuit in 1984 and was made subject to ongoing court oversight for many years after that. The break-up lowered prices and brought technological innovation, but a familiar series of lobbying and litigation steps, culminating in a legislative effort to encourage new entry, see Telecommunications Act of 1996, and a series of legal disputes, see Verizon Commc’ns, Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 409-15 (2004), the industry has been returned to a state of overwhelming consolidation. Two massive companies, Comcast and Time-Warner, hold dominant power in wired communications, and two other massive companies, AT&T and Verizon, hold dominant power in wireless communications. See generally \textit{CRAWFORD}, \textit{supra} note XXX; \textit{Wu}, \textit{supra} note XXX.

encourage entry\textsuperscript{253} set up an opportunity for them to collude and actually delay generic entry,\textsuperscript{254} an opportunity that was extremely profitable and appears to have caused massive consumer injury.\textsuperscript{255}

Finally, one especially poignant problem for free-market progressives, which at least superficially has the same contours as these others, is labor and income inequality. Progressives who believe in competition policy struggle with our current solutions to inequality in labor, and in related areas like family farm policy,\textsuperscript{256} where we have sought to protect the weak from abuse—a central goal, after all, of antitrust—but have done so mainly by allowing them to organize under very specific conditions, and use their own collective economic power in ways that would otherwise violate antitrust. The results have been, at best, mixed and

\textsuperscript{253} Hatch-Waxman provided certain special incentives for a generic drug maker that enters to challenge a brand-name drug. Generic firms were entitled to piggy-back on the patented firm’s FDA regulatory approvals, and the first generic to do so enjoys a special, 180-day exclusivity period in which no other generic firm can enter. \textit{See generally} Sagers, \textit{supra} note XXX (summarizing the Hatch-Waxman process).

\textsuperscript{254} Specifically, the statute made the generic firm’s entry an automatic patent infringement, authorizing the patented incumbent firm to bring infringement litigation, and triggering a 30-month stay of FDA approval of the generic’s drug. The statute’s drafters intended this process merely to accelerate legal challenge to patents, which they thought had been too freely given. But firms realized that it would often be in the incumbent and generic firms’ mutual interest not to litigate, and rather simply to agree that the generic would not enter at all, and would receive a large payment from the incumbent for doing so. The incongruity was that the payments were often very large, routinely far in excess of the expected cost of litigation, and were made by \textit{plaintiffs} to \textit{defendants}. Such payments are hard to rationalize other than as simple agreements not to compete. \textit{See} Sagers, \textit{supra} note XXX.

\textsuperscript{255} \textit{Federal Trade Commission, Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions 7-10} (2010) (estimating that as of 2010 pay-for-delay settlements cost consumers $3.5 billion per year). Pay-for-delay settlements have probably become something of a thing of the past, as the Supreme Court recently held them subject to an apparently uncompromising, nearly per se style liability rule, at least where the payment is “large.” \textit{Actavis}, 133 S.Ct. at 2234-38; Sagers, \textit{supra} note XXX. But that in itself hardly shows that Hatch-Waxman was wise when adopted or that it has been fixed, especially if, as seems likely, there is lobbying to come to undo \textit{Actavis} or otherwise modify Hatch-Waxman to again provide protection from competition.

\textsuperscript{256} As to which, see \textit{Saker Woeste}, \textit{supra} note XXX.
controversial. The primary point is that antitrust progressives so far seem to have no alternative policy under which to address income inequality and imbalances in economic power, problems which they tend to care about but also find awkward to approach with methods that seem like price-fixing or economic coercion.

B. The Case, in Spite of It All, for Simple, Generalized Competition Rules

The argument in this paper has been basically a process of elimination. I have identified specific problems in antitrust cases that tend to undermine public confidence, using the Apple case as a guide, and then narrowed them down by showing those that are implausible or contrary to experience. I have attempted to work through them in order of increasing plausibility, to see if in the end we might count up a list of specific markets or problems that seem like they really aren’t well handled by competition kept vigorous by antitrust.

Admitting that some values won’t be preserved by markets, and even admitting that we have no very good alternative theory to design regulatory interventions in such cases turns out not actually to be a good basis for a great deal of flexibility or openness to exceptions in the general run of cases. This is so for a series of reasons:

1. Hard Cases Make Bad Law, Especially if They Are Uncommon. It is not desirable that rules for cases in general be made with the facts of especially difficult cases in mind. And it turns out that those cases in which really compelling evidence casts doubt on the workability of a market are rare and exotic. They probably include electricity, insurance, and possibly some health care sectors. There is

257 See Saker Woeste, supra note XXX.
259 See generally Kenneth J. Arrow, Uncertainty and the Welfare Economics
evidence and argument in each case that the activities in question should be either regulated or owned by government. But the point is that while these stark problems in a few, idiosyncratic sectors may be reasons for treating them differently, they are not reasons for entertaining exceptions or special flexibility in antitrust cases generally.

2. Meaningful Competition Enforcement Can Often Address “Non-Economic” Values, Because They Are Actually “Economic.” Many concerns surrounding competition involve seemingly non-economic values. It is often thought that vigorous price competition will sacrifice values other than cost-cutting productive efficiency, like quality, or safety. But there is reason to believe that quite often competition policy does serve those other values in ways we might not recognize. For example, preserving mere numbers—seemingly the crudest competition policy—can sometimes serve values that are from any individual firm’s perspective external. For example, fractional reserve banking is afflicted with an inherent risk externality, especially in the presence of deposit insurance. But that risk and the externalized costs associated with bail-out are magnified when fewer firms hold larger shares of financial risk, and they become systemic when there are very few firms at stake with high degrees of interrelationship. We have learned that to our great regret in recent times.

Moreover, we have somehow forgotten in recent times that even seemingly severe externalities or other problems that probably cannot be addressed through competition can be addressed with regulatory interventions that are not at all inconsistent with strong antitrust enforcement and vigorous price competition. For example, pollution controls and regulation of safety and informational asymmetries in

_of Medical Care, 53 AM. ECON. REV. 941 (1963) (leading article introducing arguments that some health care markets may not work optimally under competition).
consumer products are corrected with interventions that do no more than forcibly internalize social risks. Those kinds of interventions are quite consistent with full-bore antitrust. So the fact that some markets bear economic “problems,” which competition itself does not address, does not mean that competition does not “work” there.

3. False-Positive Risk Is Overstated. Finally, while this is not the place to engage what is a large and contentious literature, there is coming be broad doubt of the body of theory which for some decades appears to have caused a lot of caution in enforcement: what had once been a consensus that “false positive” risk was more serious in antitrust than “false negative” risk. [Finish]