The Enduring Promise of Antitrust

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In this Essay, I will address the challenges related to antitrust remedies in high technology industries. Notably, a concern raised by Judge Posner, among others, is that antitrust courts are not well situated to oversee behavior in dynamic industries.[1] As discussed below, I remain convinced that antitrust law is adaptable and antitrust doctrine can continue to develop to meet new challenges. Part of the adaptability of our antitrust system is the role of states—and State Attorneys General (AGs) in particular—and I will discuss this issue before proceeding to address how antitrust doctrine and remedies can adapt to the challenges of overseeing internet platforms and technology markets.

I. The Role of the States in Antitrust Enforcement

During the 1970s, Congress began to develop a range of "cooperative federalism" regulatory programs. Under such programs, Congress authorizes state enforcement of federal law and generally calls on the federal government to set a floor for enforcement. In so doing, it generally provides states with additional authority to tailor standards as well as pick up any slack in enforcement. By instituting such a model, Congress

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1. *See* Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 925 (2001) ("The real problem [facing antitrust law] lies on the institutional side: the enforcement agencies and the courts do not have adequate technical resources, and do not move fast enough, to cope effectively with a very complex business sector that changes very rapidly.").

adopted a hedging strategy—ensuring a base level of uniformity, allowing for appropriate experimentation, and building in the opportunity to pick up the slack as to any underenforcement at the federal level.[2]

The environmental laws provide the classic example of cooperative federalism in action, with the Clean Air Act being a clear case in point.[3] Under the Clean Air Act's model, the Environmental Protection Agency (EPA) authorizes state agencies to address air pollution using a variety of tools, provided that they ensure a basic level of air quality. Where state agencies decide to go above the level specified by the EPA, they are permitted to do so.[4] Following this precedent, both telecommunications regulation and health care policy later adopted a cooperative federalism architecture, blending state and federal authority and calling on state agencies to develop and enforce federal regulatory standards.

Antitrust law operates in a functionally similar manner to other cooperative federalism regimes. In 1976, by adopting the Hart-Scott-Rodino Antitrust Improvements Act, Congress embraced the ability of state AGs to enforce federal antitrust law on behalf of their states, using what is called "parens patriae" authority.[5] The theory of this delegation of authority, like other cooperative federalism programs, is twofold: (1) states may be better positioned to know of competitive issues in their jurisdictions; and (2) states may have a greater willingness to take action and have the ability to collect damages on behalf of their citizens, thereby further advancing the goals of antitrust law. As the Supreme Court stated, the role of states in antitrust enforcement "was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition."[6]

One of the questions inherent in a cooperative federalism framework is whether the federal government has the authority to prevent states from going further than the federal government where, in their view, local conditions warrant. In the environmental arena, the EPA has the authority

2. *See* Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 663 (2001) (highlighting how Congress favors cooperative federalism programs that combine federal and state authority in creative ways and recognizing the value of state implementation of cooperative federalism statutes).

3. Clean Air Act (CAA), 42 U.S.C. §§ 7401–7671q; *see* Weiser, *supra* note 2, at 670 ("In the case of the Clean Air Act, for example, the statute provided for certain uniform federal standards, but left the states with considerable flexibility in addressing the statute's objectives.").

4. 42 U.S.C. § 7416.

5. 15 U.S.C. § 15c; *see also* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 600 (1982) ("*Parens patriae* means literally 'parent of the country.'"); Margaret S. Thomas, *Parens Patriae and the States' Historic Police Power*, 69 SMU L. REV. 759, 761 (2016) ("[Parens patriae suits are] civil suits brought by state attorneys general against mass tortfeasors for injuries to the states' citizenry.").

6. California v. Am. Stores Co., 495 U.S. 271, 284 (1990).

to ensure a minimum level of enforcement, but not to prevent states from taking additional action. In the antitrust arena, the situation is similar: the federal government can take action to ensure a basic level of enforcement, but it does not have the power to prevent states from going further—under federal or state law—to stop anticompetitive conduct.[7]

For an example of parallel federal and state action, consider the *Microsoft* case.[8] In that case, the federal government ultimately decided—after a remand on the remedies issue by the Circuit Court of Appeals of the District of Columbia—on a regulatory remedy and declined to pursue structural relief. A number of states that were part of this litigation took a different view and proceeded to challenge the absence of divestiture. As this case was litigated and ultimately decided, it was accepted that the states have the requisite authority to pursue a different view from the federal government if they choose to do so.[9]

The opposite approach—empowering the federal government to bar states from antitrust enforcement whenever it so chooses—would undermine the architecture of cooperative federalism. Such an approach would also hurt consumers in states where state AGs pick up the slack in federal enforcement by bringing additional resources to bear and by applying their local expertise. Consider, for example, the case of a recent merger in Colorado Springs between DaVita's clinical network and UnitedHealth Group's Medicare Advantage insurance product.[10] In this case, UnitedHealth consummated the merger after its market share declined from around 75% to around 50% as a result of the emergence of a disruptive entrant, Humana. Humana emerged as a rival after building its relationship with DaVita's clinics, which referred patients to Humana's Medicare Advantage offering. In the wake of the merger, however, Humana faced the prospect of losing access to referrals for its

7. I should note that, in discussing going further, I am referring to the development of federal antitrust law through action by state officials. There is the entirely separate matter of state antitrust law, which can differ from federal law as states adopt different standards, whether through case law or legislation. The adoption of "*Illinois Brick* repealer" statutes or judicial decisions in several states is an instructive case in point. *See* Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and* Illinois Brick, 100 IOWA L. REV. 2115, 2119 (2015) ("Thirty-five states have rejected the doctrine, permitting antitrust enforcement by indirect purchasers under their state antitrust laws.").

8. *See generally* United States v. Microsoft Corp., 253 F.3d 34, 45–47 (D.C. Cir. 2001); Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1204 (D.C. Cir. 2004).

9. *See* New York v. Microsoft Corp., 224 F. Supp. 2d 76, 87 (D.D.C. 2002) ("The states which opted not to join the settlement between the United States and Microsoft have proposed a remedy distinct from that presented in the proposed consent decree.").

10. Complaint at 3, Colorado *ex rel.* Weiser v. UnitedHealth Grp., Inc., No. 2019CV31424 (Colo. Dist. Ct. June 19, 2019) ("UnitedHealth Group Incorporated entered into an equity purchase agreement to acquire DaVita Medical Group for approximately $4.9 billion in cash.").

Medicare Advantage product from patients at DaVita's clinics.

The Federal Trade Commission (FTC) reviewed the UnitedHealth/DaVita merger and declined to take action in the Colorado Springs market.[11] In Colorado, however, the Attorney General's office was concerned about the prospect of UnitedHealth using control over DaVita's clinics to reestablish its dominant position in the Medicare Advantage market—thereby leading to higher prices, less choice, and lower quality offerings to patients. By taking action in this case, separate and apart from the FTC, we were able to protect Colorado consumers. And rather than protest our action, the FTC respected our authority. Indeed, two commissioners wrote separately to highlight the valuable role state AGs play in enforcing antitrust law.[12]

Unfortunately, federal antitrust authorities don't always show respect for state antitrust enforcement. In late 2019, for example, the Department of Justice (DOJ) filed a brief taking an unfortunate and unjustified position in the Sprint/T-Mobile merger.[13] In particular, the DOJ asserted in its brief that the states' "[quasi-sovereign] role does not permit states to override the sovereign interests of the United States."[14] In essence, the DOJ argued that the DOJ itself is the supreme arbiter of antitrust law. On the DOJ's view, once it takes a position on a matter, the states are foreclosed from any enforcement that would be contrary to the selected path of the federal agency.[15] That view runs contrary to what Congress

11. UnitedHealth Group and DaVita; Analysis of Agreement Containing Consent Orders to Aid Public Comment, 84 Fed. Reg. 30,114, 30,118 (June 26, 2019).

12. *In re* UnitedHealth Group and DaVita, No. 181-0057 (F.T.C. June 19, 2019), https://www.ftc.gov/system/files/documents/public_statements/1529359/181_0057_united_davita_statement_of_cmmrs_s_and_c.pdf [https://perma.cc/JLT5-Y68R] (Statement of Commissioners Rebecca Kelly Slaughter and Rohit Chopra).

13. *See* Statement of Interest of the United States at 25, New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179 (S.D.N.Y. 2020) (No. 1:19-cv-5434-VM-RWL), ("The Litigating States' strong interest in this merger does not justify their attempt to substitute their judgment for the nationwide perspective of the United States.").

14. *Id.* at 24. Colorado had earlier dropped out of that litigation in favor of a settlement that benefited Coloradans, so our office was not involved in the litigation itself. *Attorney General's Office Secures 2,000 Jobs, Statewide 5G Network Deployment Under Agreements with Dish, T-Mobile*, COLO. ATT'Y GEN. (Oct. 21, 2019), https://coag.gov/press-releases/attorney-generals-office-secures-2000-jobs-statewide-5g-network-deployment-under-agreements-with-dish-t-mobile-10-21-19/ [https://perma.cc/UVA2-P77D].

15. Statement of Interest of the United States, *supra* note 13, at 25. Famously, Judge Posner has called for an end to state attorneys general enforcement of the antitrust laws, calling into question their institutional competence to manage such litigation other than free riding on the federal government's efforts. *See* Posner, *supra* note 1, at 940 ("I would like to see, first, the states stripped of their authority to bring antitrust suits, federal or state, except under circumstances in which a private firm would be able to sue, as where the state is suing firms that are fixing the prices of goods or services that they sell to the state."); *see also* Richard A. Posner, *Federalism and the Enforcement*

intended in framing broad enforcement of the antitrust laws that recognizes the critical role of the states.[16] Because this position would upend forty-five years of antitrust practice and jurisprudence, the litigating states properly responded that the "[s]tates are independent enforcers of the antitrust laws, and it is the role of the Court—not any federal agency—to decide the lawfulness of the merger."[17]

The DOJ's flawed argument in the T-Mobile case was based on the dissenting opinion in *Georgia v. Pennsylvania Railroad Co.*[18] Notably, the majority in that case held that states *are* authorized to seek injunctive relief under the antitrust laws. Moreover, the DOJ's suggestion—that the DOJ and FCC (Federal Communications Commission) merger review in the T-Mobile case is exclusive and preclusive—contradicts Congress' empowerment of state AGs and is a dangerous idea as well. Under the DOJ's theory, if a federal antitrust agency approves a merger, antitrust enforcement against the merger would be precluded as long as the merger was subject to review and approval by the federal agency. That would diminish antitrust enforcement and would, in effect, permit the federal

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of Antitrust Laws by State Attorneys General, 2 GEO. J.L. & PUB. POL'Y 5, 13 (2004) ("I am even more convinced that Congress should repeal the provision of the Hart-Scott-Rodino Act that authorizes *parens patriae* antitrust suits by the states"). Congress has failed to act on this suggestion and, as Harry First has explained, Posner's depiction of the role of state AGs litigation is unfair and misstated. *See* Harry First, *Delivering Remedies: The Role of States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004, 1005 (2001) ("An examination of Posner's arguments, however, shows that his policy prescription is extreme and his supporting arguments are weak, if not mean-spirited.").

16. *See* Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L.J. 375, 375 (1983) ("The legislative history of the federal antitrust law indicates that Congress intended to leave state antitrust enforcement more or less intact but to provide an additional federal forum for dealing with restraints of trade which exceeded the jurisdiction of the courts of any particular state.").

17. Plaintiffs' Response to Statement of Interest of the United States, New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179 (S.D.N.Y. 2020) (No. 1:19-cv-5434-VM-RWL); *see also* Letter from Bob Ferguson, Att'y Gen. of Wash., to Hon. Victor Marrero, J. S.D.N.Y (Jan. 14, 2020), https://www.courtlistener.com/recap/gov.uscourts.nysd.517350/gov.uscourts.nysd.517350.372.0.pdf [https://perma.cc/NE6A-VKZQ] ("States—and, for that matter, private parties—have every right to bring a merger challenge that the evidence and the law warrants, regardless of the position of the federal enforcers, or whether the markets are national or local."). This argument was also developed in the filing by the States on the draft Vertical Merger Guidelines. *See* U.S. Dep't of Just. & F.T.C., Public Comments of 28 State Attorneys General on Draft Vertical Merger Guidelines (Feb. 26, 2020), https://www.justice.gov/atr/page/file/1258786/download [https://perma.cc/7EYG-QJZU] ("Many states have their own merger statutes, often patterned after federal antitrust laws. Moreover, State Attorneys General working together can bolster antitrust enforcement across the nation by effectively deploying expertise and resources."); Jay L. Himes, *Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the* Microsoft *Case*, 11 GEO. MASON L. REV. 37, 46 (2002) ("[T]he fact that federal enforcers take a particular course of action in response to a particular set of facts—or take no action at all—does not preclude action by state enforcers under either federal or state law.").

18. Georgia v. Pa. R.R. Co., 324 U.S. 439, 468–90 (1945) (Stone, C.J., dissenting).

antitrust agencies to extinguish the rights of states and private parties to enforce and seek remedies for harm caused by violations of antitrust laws.

The DOJ's rationale in the T-Mobile case would also justify exempting transactions from antitrust review because a federal regulatory agency approved such a matter. Notably, the DOJ invoked the FCC's regulatory action in that case as a basis for stripping states of authority to challenge the merger. This is a dangerous claim and goes flatly against federal merger law, which has consistently refused to reject antitrust claims for non-antitrust reasons since the Supreme Court's 1963 decision in *Philadelphia National Bank*.[19]

In a later speech, DOJ Antitrust Division Chief Makan Delrahim defended the DOJ's position.[20] He argued that allowing states to bring antitrust actions of their own "creates the risk that a small subset of states, or even perhaps just one, could undermine beneficial transactions and settlements nationwide."[21] Moreover, he suggested that states should not be authorized to seek any "relief that is incompatible with relief secured by the federal government."[22] This concept of federal supremacy is incorrect and ignores the fact that states can enforce the federal antitrust laws only by bringing cases in federal court. If states advance claims that are unfounded and would undermine procompetitive mergers, the courts will reject them. And the courts can, of course, take into account any action or decision by the federal antitrust agencies in assessing a state's claims, just as the Court in *Philadelphia National Bank* took into account the actions of federal bank regulatory agencies.[23] But there is no basis in the statutes, the cases, or sound policy for a decision by a federal agency to preclude the states from exercising their rights under the antitrust laws by asking a federal court to prevent or provide remedies for a violation of those laws.

Although the court ruled against the states in the T-Mobile case, Judge Marrero declined to adopt Delrahim's proposed limit on the states' role. Rather than reject the states' authority to bring the action, the court

19. United States v. Phila. Nat'l Bank, 374 U.S. 321, 371 (1963) ("[A merger whose effect] 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial.").

20. *See* Makan Delrahim, Asst. Att'y Gen., U.S. Dep't of Just., Remarks at Media Institute Luncheon, "Getting Better": Progress and Remaining Challenges in Merger Review (Feb. 5, 2020), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-media-institute-luncheon [https://perma.cc/4CTW-4DHK] ("Permitting states to undermine federal enforcement also would be contrary to congressional intent.").

21. *Id.*

22. *Id.*

23. *See Phila. Nat'l Bank*, 374 U.S. at 361–62 ("We are helped to this conclusion by the fact that the three federal banking agencies regard the area in which banks have their offices as an 'area of effective competition.'").

evaluated the case on the merits, noting that the views of federal regulators can be informative, but are not conclusive.[24] To be sure, the presence of a remedy—a fix to the harm occasioned by the merger, as it were—is a fact of life that the litigating states and the court rightly had to address. Similarly, the DOJ would also need to "litigate the fix" if another federal regulatory agency (say, the FCC) adopted a remedy in the face of a DOJ merger challenge. But to face challenges in litigation is a far cry from being barred from the courtroom.

In short, the states are partners in antitrust enforcement, reflecting the cooperative federalism architecture adopted by Congress. In effect, Congress has empowered states to act as a check on federal enforcement, or, more precisely, on instances of federal underenforcement; as such, it declined to allow federal inaction or preference for particular remedies to remove the states from antitrust enforcement. In this sense, the central question is not—as the DOJ suggests—whether states might "displace the federal government's role as the nation's federal antitrust enforcer,"[25] but rather whether states are positioned to pick up any slack and ensure that important issues are raised before the courts, whether or not the federal agencies are inclined or able to do so.[26]

II. THE STATE OF ANTITRUST LAW AS TO DOMINANT PLATFORMS

For both state and federal enforcers, the rise of dominant internet platforms raises an important challenge for antitrust oversight. In particular, enforcers must address the concern that dominant platforms are able to exclude upstart, or nascent, rivals before those firms can emerge as competitive threats.[27] In some cases, the concern is that dominant firms can acquire such upstarts while they are still developing.

24. *See* New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 224–26, 225 n.21 (S.D.N.Y. 2020) ("Having been tasked with independently reviewing the legality of the Proposed Merger, the Court is not bound by the conclusions of these regulatory agencies. Similarly, the Court does not simply adopt their conclusions wholesale.").

25. Statement of Interest of the United States, *supra* note 13, at 25.

26. *See* Himes, *supra* note 17, at 63 ("Multiple enforcers stimulate not only antitrust enforcement, but also innovation *in* antitrust enforcement. . . . This multiplicity of antitrust enforcers, each with varying incentives, also minimizes the opportunity for serious antitrust violations to avoid detection."); *see also* Robert L. Hubbard & James Yoon, *How the Antitrust Modernization Commission Should View State Antitrust Enforcement*, 17 LOY. CONSUMER L. REV. 497, 506 (2005) ("Antitrust federalism means that the market for antitrust enforcement, like the markets to which antitrust laws apply, is ruled by competition, and that competition among antitrust enforcers and bodies of law fosters alternative, choice, innovation, and insight.").

27. In short, a platform is a product or service that provides a standard that consumers rely on and allow applications providers to interface with. The concept of a platform, and the competitive dynamics raised by platforms, is discussed in Philip J. Weiser, *The Internet, Innovation, and Intellectual Property Policy*, 103 COLUM. L. REV. 534 (2003).

In others, the concern is that the firm will respond to an upstart rival with actions that protect its dominance—say, exclusive dealing, tying, loyalty rebates, and most favored nation provisions.[28] Under either concern, dominant firms can undermine these upstart and nascent competitors to protect their positions in the market. An expert report commissioned by the United Kingdom's Competition and Markets Authority recently emphasized the importance of ensuring that upstarts have a fair opportunity to compete and challenge incumbent firms: "It is the threat of being overtaken by rivals that provides the spur to companies to innovate and produce new products that consumers want."[29]

In the wake of the Chicago School revolution, a number of commentators—myself included—have explained that antitrust doctrine has, on occasion, mistakenly bent over backward to avoid false positives, effectively ignoring false negatives.[30] Consider, for example, predatory pricing cases where courts have excused dominant airlines' actions focused on excluding a rival.[31] The *American Airlines* case is a notable illustration of this dynamic. In that case, the Tenth Circuit affirmed a summary judgment ruling in favor of American Airlines on the ground that the government had not demonstrated pricing of airplane flights below marginal cost.[32] With the benefit of hindsight on this case (as well as higher prices and more concentration in the airline industry), however, the failure to focus more on the costs of false negatives bears close attention.[33]

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28. For a good discussion of both sets of concerns, see generally Giulio Federico, Fiona Scott Morton & Carl Shapiro, *Antitrust and Innovation: Welcoming and Protecting Disruption* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26005, 2019), https://ssrn.com/abstract=3412680 [https://perma.cc/795J-XCQA].

29. COMPETITION & MKTS. AUTH., ONLINE PLATFORMS AND DIGITAL ADVERTISING: MARKET STUDY INTERIM REPORT 8 (2019), https://assets.publishing.service.gov.uk/media/5dfa0580ed915d0933009761/Interim_report.pdf [https://perma.cc/8EVQ-WTC2]. That same report importantly acknowledges that "[w]here a platform has gained a large market share by being consistently better than its competitors and where it must respond to continued competitive pressures to maintain that position, it may be considered to operate within a competitive market even with a large market share." *Id.* at 10–11.

30. For the classic defense of the Chicago School approach, see generally Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984). For a modern critique of this view, see generally JONATHAN B. BAKER, THE ANTITRUST PARADIGM (2019).

31. Scott Hemphill and I discuss the failings of this area of the law. *See* C. Scott Hemphill & Philip J. Weiser, *Beyond* Brooke Group: *Bringing Reality to the Law of Predatory Pricing*, 127 YALE L.J. 2048, 2067 (2018) ("[A] predator could recoup its investment in below-cost prices even if supracompetitive pricing in the market in which the predation occurred did not suffice to recover investment. A second recoupment strategy is to exploit imperfections in capital markets to deny financing to the rival.").

32. United States v. AMR Corp., 335 F.3d 1109, 1111 (10th Cir. 2003).

33. For more discussion of how antitrust law should approach "false positives" versus "false

With an appreciation of the risk of underenforcement, we can examine critically two potential limits in the reach of monopolization law. First, courts must consider whether enforcers must demonstrate consumer harm as a specific element of Section 2 of the Sherman Act violations (in addition to the standard requirement to demonstrate monopoly power and a predatory act).[34] In some cases, courts have suggested such a showing is necessary, whereas others have made plain that demonstrating harm to the competitive process (including to nascent rivals) suffices.[35]

Second, since the *Trinko* case, courts have evaluated whether a change in a prior course of dealing is sufficient to give rise to antitrust liability. In *Trinko*, the Supreme Court declined to overrule the *Aspen Skiing* decision and the duty to deal doctrine, but it did suggest that *Aspen Skiing*'s holding lay at the outer limits of antitrust liability.[36] In *Aspen Skiing*, the decision of a firm that owned three mountains to refuse to continue cooperating with a firm that owned one mountain through a four-mountain pass was the basis of antitrust liability for monopolization.[37] As Judge Posner later put it, *Aspen Skiing* can be viewed as justifying antitrust liability where "cooperation is indispensable to effective competition."[38] Despite *Trinko*'s skepticism, the duty to deal doctrine set out in *Aspen Skiing* continues to have vitality.[39]

The Chicago School project continues to perform an important role in calling for greater economic rigor in antitrust analysis. But the trend to downplay or overlook false negatives is a dangerous one. Going forward, I would like to see a greater reexamination of efforts to limit antitrust

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negatives," see generally Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1 (2015).

34. *See* 15 U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ."); *see also* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 595–97 (1985) (discussing the two elements of the offense of monopolization as defined by the Sherman Act).

35. *Compare* Energy Conversion Devices Liquidation Tr. v. Trina Solar Ltd., 833 F.3d 680, 685 (6th Cir. 2016) ("It does not suffice for a plaintiff to allege only that 'the defendant has tried to knock out other businesses'; the plaintiff must show that 'the means it has employed to that end are likely to . . . injure consumers.'") (citations omitted) *with* United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam) ("[I]t would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will.").

36. Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004).

37. *Aspen Skiing Co.*, 472 U.S. at 610–11.

38. Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 379 (7th Cir. 1986).

39. *See, e.g.*, Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 454–60 (7th Cir. 2020) (holding that advertising representative made out a plausible claim against cable company Comcast, which provided its own advertising representation services, on a refusal to deal theory of monopolization).

liability (as in the predatory pricing example) rather than to further restrict it (as in the case of the duty to deal doctrine or requiring specific proof of consumer harm).

III. Reflections on Antitrust Remedies as to Digital Platforms

One of the great challenges for antitrust in the twenty-first century is to develop remedies to oversee digital platforms. On that front, in contrast to substantive antitrust doctrine, too little scholarly analysis informs how to approach antitrust remedies.[40] In this Part, I will focus on three broad categories of remedies that, among others, merit further discussion and analysis. Specifically, with regard to enabling rivals to have access and interoperability with dominant digital platforms in high technology industries, potential remedies include (1) relying on a regulatory agency, (2) identifying a prior course of dealing as a benchmark, or (3) establishing a set of requirements to be overseen by an antitrust court or other entity.

Courts and enforcers clearly need to devote more analysis to how to approach remedies. In the *Microsoft* case, for example, the district court decided on a structural remedy without undertaking a hearing or much analysis.[41] In response, the DC Circuit remanded this issue for more careful consideration, leading to the ultimate regulatory requirements overseen by the district court.[42]

One important starting principle for analysis of remedies should be comparative institutional competence. When, for example, a court has the option of adopting different potential remedies, it will need to conclude which option is best. With the *Microsoft* case almost certainly in mind, Judge Posner explained some of the challenges related to antitrust remedies.[43] In that sense, Judge Posner might be seen as calling for humility in devising remedies of a court's own making.

In the *AT&T* case, Judge Greene opted for a belt-and-suspenders strategy, empowering both the FCC and the district court to oversee the

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40. To be sure, there are notable exceptions. *See, e.g.*, Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 75 (2001) (examining remedies—particularly divestiture—in network monopolization cases).

41. *See generally* United States v. Microsoft Corp., 97 F. Supp. 2d 59 (D.D.C. 2000), *vacated*, 253 F.3d 34 (D.C. Cir. 2001).

42. United States v. Microsoft Corp., 253 F.3d 34, 105–06 (D.C. Cir. 2001); United States v. Microsoft Corp., 231 F. Supp. 2d 144 (D.D.C. 2002), *aff'd sub nom.* Massachusetts v. Microsoft Corp., 373 F.3d 1199 (D.C. Cir. 2004).

43. Posner, *supra* note 1, at 936–40 (discussing the administrative difficulties enforcement agencies and the courts face due to a lack of adequate technical resources and limited ability to act quickly).

antitrust remedies.[44] In so doing, he went beyond the *Otter Tail* case, where the court required the electric utility defendant to commit to providing access to its network by filing a tariff deemed acceptable by the Federal Power Commission.[45] By contrast, Judge Greene was unwilling to rely solely on the FCC, also imposing judicially enforceable requirements that the Bell Companies could not discriminate "between AT&T and other companies in their procurement activities, the establishment of technical standards, the dissemination of technical information, their use of Operating Company facilities and charges for such use, and their network planning."[46] This requirement, along with others that mandated equal access to Bell Company infrastructure, was designed to be flexible and adaptable, allowing for ongoing waivers and refinements.[47] Indeed, nondiscrimination as a remedy requires careful consideration in a variety of settings because it protects competition and is manageable by judges.

Judge Greene's adoption of a regulatory regime overseen by a district court was controversial and ultimately ended with the Telecommunications Act of 1996.[48] Commentators differ on the effectiveness of this model,[49] but there is wide appreciation for the boon to competition and innovation that resulted from the *AT&T* case. Less commented on, however, is that Judge Greene faced a painful dilemma: had he relied solely on the *Otter Tail* model, he would have lacked confidence that the FCC would be able to effectively facilitate competition. After all, Judge Greene heard powerful evidence in the *AT&T* case that the FCC was unable to regulate AT&T previously and was institutionally flawed.[50]

In some cases, where a firm changes the terms of dealing to create an

44. *See generally* United States v. Am. Tel. & Tel. Co. (*AT&T*), 552 F. Supp. 131, 142 (D.D.C. 1982), *vacated*, United States v. W. Elec. Co., Inc., 890 F. Supp. 1 (D.D.C. 1995).

45. Otter Tail Power Co. v. United States, 410 U.S. 366, 377 (1983).

46. *AT&T*, 552 F. Supp. at 142.

47. *See id.* at 197 ("[S]ince the Bell System network is both vast and complex, a variety of approaches will in all probability be necessary to achieve equal access." [and not] "Imposition by the Court of a single procedure applicable to all areas and all interconnection requirements").

48. Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

49. *See* Joseph D. Kearney, *From the Fall of the Bell System to the Telecommunications Act: Regulation Under Judge Greene*, 50 HASTINGS L.J. 1395, 1402 (1999) (discussing criticism and defending Judge Greene).

50. *AT&T*, 552 F. Supp. at 168 ("Two former chiefs of the FCC's Common Carrier Bureau, the agency charged with regulating AT & T, testified that the Commission is not and never has been capable of effective enforcement of the laws governing AT & T's behavior."); *see also* Philip J. Weiser, *Institutional Design, FCC Reform, and the Hidden Side of the Administrative State*, 61 ADMIN. L. REV. 675, 684 (2009) (discussing criticisms of FCC, including the depiction that its acronym stands for "Forever Captured by Corporations").

advantage for itself over upstart rivals, courts can look to fashioning relief based on a prior course of dealing where feasible. In the *Aspen Skiing* case, for example, this was indeed the situation.[51] As I stated elsewhere, both cases grounded their remedies in "a prior course of dealing or some benchmark that can provide a tractable guide as to what constitutes a reasonable type of behavior."[52]

In thinking about antitrust law, courts probably underappreciate the impact of having a regulatory agency as a partner in overseeing remedies. In both *Otter Tail* and *AT&T*, the courts were able to benefit from such a partnership. In the *Microsoft* case, by contrast, the court was forced to develop a regime of its own making. Until and unless a digital platforms agency is established, courts in the internet platform arena are going to be left with the model used in *Microsoft* as their best guide.

In addressing this challenge recently, the UK's Competition and Markets Authority touched on a potential innovation in this area. In particular, that body suggested that "an enforceable code of conduct may help address a number of concerns that we have identified in digital advertising markets."[53] For American audiences, this model is likely less familiar than it is to their European counterparts. To be sure, the Federal Trade Commission has employed such a model successfully in the past, such as in the case of false advertising claims, but what Europeans call "co-regulation" is less familiar on this side of the Atlantic. In many respects, the framework for such a model follows from the pathmarking work of Ian Ayres and John Briathwaite's *Responsive Regulation*,[54] which envisions a more dynamic and adaptive model of regulatory oversight than traditional command-and-control regulation.[55]

CONCLUSION

Antitrust law, over its 130 years, has proved to be an adaptive tool. A critical element of our antitrust regime is state enforcement of the antitrust laws. When Congress empowered State AGs to enforce antitrust law, it adopted a cooperative federalism regime to allow experimentation, tailoring, and redundancy in our antitrust enforcement. In practice, this means that the federal government should not and cannot disregard the

51. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 598 n. 23 (1985).

52. Philip J. Weiser, *Regulating Interoperability: Lessons from* AT&T, Microsoft, *and Beyond*, 76 ANTITRUST L.J. 271, 295 (2009).

53. COMPETITION & MKTS. AUTH., *supra* note 29, at 22.

54. IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992).

55. I discuss this model in Philip J. Weiser, *Entrepreneurial Administration*, 97 B.U. L. REV. 2011 (2017).

role of the states in antitrust enforcement.

In the years ahead, both state and federal antitrust enforcers will continue to confront the challenges of a more dynamic economy and one in which there is increasing market concentration. Given the level of market concentration, we should reconsider carefully antitrust doctrines that put a thumb on the scale against enforcement, indulging the highly questionable assumption that false positives are a markedly bigger concern than false negatives. We also should invest time and energy into addressing the challenge of developing more effective models of monitoring anticompetitive conduct. At least at this time, the absence of any administrative agency oversight over technology markets means that antitrust courts must act on their own—as was the case in *Microsoft*—and without the benefit of an agency to fall back on for enforcement support—as was the case in *AT&T*.