ANTITRUST WITHOUT COMPETITION

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ABSTRACT

Competition is everywhere in antitrust. Courts, agencies, and scholars routinely insist that antitrust can, does, and should measure the legality of conduct by asking whether it has harmed or promoted "competition." The idea that competition is, without further definition, a coherent value that can be increased or reduced—and used to guide the development and application of antitrust rules—has dominated doctrine for a century, and is deployed freely by judges, enforcers, and writers across the political spectrum.

This does more harm than good, and it should stop. There is no single value or quantity, in economics or antitrust law, that competition just is. Competition has long been essentialized, in both disciplines, in countless inconsistent ways. And its enduring dominance in antitrust doctrine causes real harms: indeterminacy and confusion, because the purported criterion cannot resolve concrete cases; utopianism, because it conceals antitrust's fundamental need for hard choices among desirable goals; and bluntness, because today's courts respond to antitrust's vague tests by erring in favor of defendants.

Antitrust would be better off without competition as a purported orienting value or criterion. There are multiple meaningful and plausible evaluative criteria available to which doctrine might turn instead. One such measure, "harm-centric antitrust," would orient antitrust to guard against welfare harms resulting from the unprivileged suppression of rival incentive, or rival ability, to meet demand. This is

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not the only option: there are plenty of other plausible orientations for the antitrust project. But the undefined "promotion of competition" is not among them. It is time to let it go.

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INTRODUCTION

"The [Sherman Act] says nothing about competition."

N. Sec. Co. v. United States, 193 U.S. 197, 403 (1904)
(Holmes, J., dissenting).

What is antitrust for? Despite the deep disagreements roiling antitrust's realm, many courts, enforcers, lawmakers, and scholars agree: *antitrust should protect competition.* This has given rise to an immensely influential idea that crops up time and again throughout antitrust doctrine and scholarship: Antitrust rules can and should test whether some practice or transaction promotes or hinders "competition," a quantity that need not be defined or specified in terms of other values, goals, or metrics.

This idea is everywhere. The Supreme Court frequently formulates or applies antitrust rules by reference to impacts on "competition" as such, often without much, or any, effort to liquidate that standard into other terms.[1] Enforcers have emphasized that antitrust is concerned with impacts on "competition" and "the competitive process," rather than on measurable welfare effects.[2] Congress wrote undefined "competition" tests into the antitrust statutes, and they are prominent in current proposals, including the leading tech regulation bill.[3]

The undefined competition criterion plays an utterly central role in core antitrust doctrine today. The basic doctrinal test under § 1 of the Sherman Antitrust Act of 1890 ("Sherman Act")—the "rule of reason"—asks whether a challenged practice "promotes competition or . . . may suppress or even destroy competition."[4] Courts have indicated that the same principle guides § 2's prohibition on monopolization.[5] And the statutory rule for mergers prohibits deals of which the effect "may be substantially to lessen competition."[6]

This all rests on the view that competition-ness, at least in the sense that antitrust measures and values, is something of which we can meaningfully have more or less, like time, density, or dollars. If that claim is correct, practices and transactions may have a positive, negative, or neutral impact on competition-as-such; they may "promote" or "restrict" competition, or be "procompetitive" or "anticompetitive"; and one situation may exhibit "more" competition than another. The application of antitrust rules can then be made to turn on whether these things have happened or are likely to do so.

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1. *See infra* Part I.B.
2. *See infra* Part I.C.
3. *See infra* Part I.D.
4. Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918).
5. *See, e.g.*, Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 998 (9th Cir. 2023) ("[A monopolization] plaintiff must show that the defendant acquired or maintained its monopoly through anticompetitive conduct. This anticompetitive-conduct requirement is essentially the same as the Rule of Reason inquiry applicable to Section 1 claims." (internal quotation marks and citations omitted)).
6. 15 U.S.C. § 18.

One can find this claim being made all the way across the political spectrum.[7] On the left, it can appear in the argument that antitrust should turn away from the welfare and efficiency tests that have dominated modern law, and instead return to the protection of competition and the competitive process. On the right, it can appear in arguments that antitrust should reject reformers' concerns about concentrated markets, domination, and small businesses, and should focus only on—you guessed it—competition. The common refrain is the (explicit or implicit) claim that "competition," as such, is a meaningful and knowable quantity—usually one that captures what the speaker happens to value about the antitrust project.

But the claim is wrong, and its frequent deployment in antitrust talk does more harm than good. "Competition" is a helpful descriptive label for any situation that is not a strict or literal monopoly, but the competition concept does not yield a useful evaluative criterion that can be used to compare situations or evaluate practices. It is irreducibly multidimensional: there are many different and independent things that one might plausibly think of as contributing to the ways in which competition is salient or valuable in antitrust. And there is no agreement *even within antitrust* about which dimensions really matter or "count," or how they can or should be integrated or combined.

Illustrations can be had by the dozen. A merger between two businesses reduces the number of rivals and increases market concentration but reduces prices. Two independent general-practitioner lawyers or physicians in a town enter a partnership, withdrawing from general practice and jointly specializing instead in some particular subfield. A large market-leading business under effective leadership is split into two, creating two new head-to-head competitors, with each one under ineffective management. A dominant business merges with an important complement supplier, lowering prices to consumers and reducing the extent to which rivals constrain its behavior. A vertically integrated firm refuses to share a valuable input with rivals, protecting its own incentives to invest in the input but making life hard for the rivals. Retailers of a particular brand of consumer good stop competing with one another on the price of that good. A business improves its own product to the point where rivals exert only a minimal constraint. In each of these cases, has "competition" increased or declined? Or, in what may or may not be

7. *See infra* Part I.E.

an alternative formulation of the same question, are these practices "procompetitive" or "anticompetitive"?

The point, and the central theme of this Article, is that asking that question without defining it is a waste of time at best. The purported measure of "competition-ness" means too many different things to different people—both in economic theory in general and in antitrust in particular—to be constructive.

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This Article makes three main claims. The first claim is that antitrust's competition criterion is so conceptually diffuse that it is virtually useless as an orienting measure for antitrust in real-world situations. Courts, agencies, and others operationalize "competition" by calling inconsistently on a wide selection of separate measures and metrics—from welfare and market power to concentration and trading partner independence—that are routinely in conflict. Accordingly, to invoke competition-as-such is to gesture broadly and unhelpfully at a whole array of wildly different ideas. "Competition" in antitrust is often little more than a euphemism for "the kind of thing that I, the speaker, believe antitrust should permit or promote—even if I will not or cannot explain why."

The second claim is that the dominance of the unliquidated competition criterion is affirmatively harmful. This Article focuses on three specific harms. The first harm is *indeterminacy and confusion*. Loose competition talk conceals all manner of mischiefs, from politically motivated interventions to innocent incoherence. This is a long-standing problem, but it may be particularly harmful in areas like digital antitrust, where the applicability of precedent is least clear and the need to turn to first principles is correspondingly greatest. The second harm is *utopianism*. Competition talk implies that all the various things that we might want from an antitrust system—economic benefits for consumers, equality of opportunity, contestability of markets, fairness, and so on—can be simultaneously pursued and achieved, so long as we only promote "competition." But this falsely denies antitrust's central need for hard choices among conflicting goals and values. The final harm, offered here in a more speculative register, is *doctrinal bluntness*: basically, a de facto prodefendant tilt that flows from indeterminacy. At a time of widespread concern that antitrust has grown too blunt on some important margins, I will argue that our antitrust system is unlikely to become more robust until its content becomes clearer.

The third and final claim is that we can do better. We—everyone who is professionally concerned with antitrust—can start weaning ourselves off the unliquidated competition criterion. Instead of "competition" (or by way of defining it), we can say whatever we really mean—more welfare, less market power, less concentration, fairness of means, some combination of tests, whatever one likes—without hiding it under competition's bushel. Plenty of writers do this already. So too with all the various friends and relations that reproduce the idea: "competition on the merits"; "competitive intensity"; "procompetitive"; "anticompetitive"; "rivalry"; and so on. Out, out, out with it all. We can then try to pin antitrust's real values down, measure or proxy them, and figure out what to do when they conflict.

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This Article unfolds in three steps. Part I shows that competition—in the sense of an integrated quantity or quality of a circumstance or practice—is, in fact, invoked and relied on by courts, enforcement agencies, Congress, and scholars to do real work. Competition talk in antitrust is not just a rhetorical flourish: it is offered, and purportedly used, to do real work.

Part II—reviewing the history of economic thought about competition and the substance of antitrust doctrine—sets out this Article's core claim: that there is no single "true" way to essentialize the circumstance of competition, in our antitrust tradition or otherwise. Antitrust's competition test is a gestural placeholder that has been, and is, used to channel a wide variety of inconsistent values and goals, no single one of which seems capable of bearing all the load that antitrust asks of competition. Adopting a preference for "competition" contributes not a dime toward figuring out which values and metrics should count and how they should be integrated or reconciled. Part II also argues that treating competition as a unitary value is not just mistaken but actively harmful.

A brief Part III suggests that a better antitrust system is possible. We can and should work to replace or elaborate competition tests throughout antitrust's empire. By way of illustration, Part III sketches an example evaluative criterion to that end: the "harm-centric antitrust" measure. This measure defines antitrust's orienting harm as (1) the impairment of rival ability or incentive to satisfy demand, leading to (2) net economic welfare harm, subject to (3) immunity for certain unilateral practices that are ubiquitous, generally benign, and unsuited to judicial micromanagement. This approach would bring valuable clarity to antitrust doctrine and policy—including as applied to an array of thorny puzzles—and appealing results.

But I am not much invested in trying to convince the reader that "harm-centric antitrust" is the right criterion to replace or define "competition." There are many plausible candidates. My aim is to convince the reader that the dominance of the unelaborated competition criterion is doing more harm than good, and that we would do better to set it aside and engage openly in the business of figuring out what we want antitrust to promote, permit, and prohibit.

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In arguing that antitrust should start to free itself from the undefined competition criterion, this Article builds on a vast and thoughtful literature. Most importantly, more than one economist and intellectual historian has emphasized the ambiguity of "competition," and of the idea of "promoting" or "maximizing" it, in economic theory.[8] If antitrust doctrine needs an integrated index of the "competition-ness" of a practice, circumstance, or effect in the rich sense that much antitrust talk implies, it must create one. Economists do not have one to lend.

More generally, a range of contributions from the antitrust academy have emphasized the indeterminacies, ambiguities, and challenges within antitrust's existing analytical paradigms. Professor Rebecca Haw Allensworth, for example, has chronicled the challenges

8. *See generally* Louis Kaplow & Carl Shapiro, *Antitrust*, *in* 2 HANDBOOK OF LAW AND ECONOMICS 1134 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (noting that economists "do not traditionally answer" questions about whether one "arrangement or outcome" is "more competitive" than another); HAROLD DEMSETZ, *The Intensity and Dimensionality of Competition*, *in* THE ECONOMICS OF THE BUSINESS FIRM: SEVEN CRITICAL COMMENTARIES 142–44 (1995) [hereinafter DEMSETZ, *Intensity and Dimensionality*] (underscoring the absence of a general metric of competitive intensity); John Vickers, *Concepts of Competition*, 47 OXFORD ECON. PAPERS 1 (1995) (noting a variety of meanings for the concept of "more competition"); Mary S. Morgan, *Competing Notions of "Competition" in Late Nineteenth-Century American Economics*, 25 HIST. POL. ECON. 563 (1993) (tracing different conceptions of competition in the work of five economists); Kenneth Dennis, "Competition" in the History of Economic Thought (Oct. 1975) (D.Phil. dissertation, University of Oxford) (on file with Oxford University Research Archive) (surveying the place of competition, as word and concept, in the history of economic thought); George J. Stigler, *Perfect Competition, Historically Contemplated*, 65 J. POL. ECON. 1 (1957) [hereinafter Stigler, *Perfect Competition*] (considering the treatment of the competition concept in economic history, and particularly "perfect" competition); *see also* Nicholas Gane, *Competition: A Critical History of a Concept*, 37 THEORY, CULTURE & SOC'Y 31 (2019) (analyzing the competition concept through a Foucaultian lens).

of achieving coherent welfarism in antitrust.[9] The "competitive process" contributions of Professor Tim Wu and others have highlighted the richness and variety of the social goals beyond welfarism plausibly associated with the circumstance of competition and, at times, served by antitrust—and have revived sharp questions about the normative orientation that Congress intended for antitrust.[10] The critiques of these contributions by Professors Fiona Scott Morton, Herb Hovenkamp, Einer Elhauge, and others have underscored that an instruction to protect the competitive process does not really help anyone figure out what practices and transactions should be prohibited and why.[11] And numerous scholars have highlighted the multiplicity of competition's meanings in antitrust.[12]

But these critiques have not been taken to their inevitable, and slightly daunting, conclusion. The problem is not only that welfare effects are difficult to sum up and net out; nor only that many values have played an important role in antitrust; nor only that some of those proposing deep reform have not explained how their proposals would

9. *See generally* Rebecca H. Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1 (2019) (noting commensurability challenges within antitrust welfarism).

10. *See generally* Tim Wu, *The "Protection of the Competitive Process" Standard*, Columbia Public Law Research Paper No. 14-612 (2018) [hereinafter Wu, *Competitive Process*] (supporting a "competitive process" criterion for antitrust); Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice*, COMPETITION POL'Y INT'L (Apr. 2018) [hereinafter Wu, *After Consumer Welfare*]; Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 87 U. CHI. L. REV. 595 (2020) (proposing an "effective competition" standard for antitrust); Ariel Ezrachi, *Sponge*, 5 J. ANTITRUST ENF'T 49 (2016); Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 CALIF. L. REV. 917 (1987); Robert Pitofksy, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191 (1977); Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226 (1960).

11. Herbert Hovenkamp, *The Slogans and Goals of Antitrust Law*, 25 N.Y.U. J. LEGIS. & PUB. POL'Y 705, 748 (2023) [hereinafter Hovenkamp, *Slogans*]; Herbert Hovenkamp & Fiona Scott Morton, *The Life of Antitrust's Consumer Welfare Model*, PROMARKET (Apr. 10, 2023), https://www.promarket.org/2023/04/10/the-life-of-antitrusts-consumer-welfare-model [https://perma.cc/L8W4-K36U]; Einer Elhauge, *Should The Competitive Process Test Replace The Consumer Welfare Standard?*, PROMARKET (May 24, 2022), https://www.promarket.org/2022/05/24/should-the-competitive-process-test-replace-the-consumer-welfare-standard [https://perma.cc/UCU2-3Q3G] [hereinafter Elhauge, *The Competitive Process*].

12. *See, e.g.*, Or Brook, *In Search of a European Economic Imaginary of Competition: Fifty Years of the Commission's Annual Reports*, 1 EUR. L. OPEN 822, 823 (2022); Eric A. Posner, *Toward a Market Power Standard for Merger Review*, PROMARKET (Apr. 7, 2023), https://www.promarket.org/2023/04/07/toward-a-market-power-standard-for-merger-review [https://perma.cc/B5HP-SJAJ]; Allensworth, *supra* note 9, at 4; John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 FORDHAM L. REV. 2425, 2427 (2013).

work. The problem is the centrality of undefined "competition" itself in antitrust talk and the pernicious practice of purporting to use it as an analytical criterion. This Article's central pitch is that this practice is doing more harm than good and that it is worth bringing to an end.

I do not suggest that antitrust is hopelessly incoherent in practice, nor that we can achieve a fully predictable and determinate antitrust system. It isn't, and we can't. I suggest only that we would do better if we stopped using undefined "competition" (and its "promotion" or "reduction") as if it had a self-evident meaning, and if we faced the task of doing antitrust without its dubious aid. Some scholars, and even the occasional court, do exactly this already. We can, and we should, embrace an antitrust without competition.

I. THE COMPETITION CRITERION

Many prominent actors in the antitrust world—including courts, agencies, Congress, and scholars—often indicate that antitrust rules can and should test whether some behavior promotes or hinders "competition," where "competition" is a meaningful quantum in its own right that does not require definition or liquidation into other values, goals, or metrics.

Part II will suggest that this claim is wrong and harmful, and Part III will suggest that antitrust law can and should manage without any undefined competition tests at all. But this Part aims only to establish that the undefined competition criterion is in fact offered up, and apparently relied upon, to do real work in antitrust: even in the age of the "consumer welfare" standard. The reader who is already persuaded of this point can jump straight to Part II.

To be sure, not everyone claims that competition-as-such can serve, without further liquidation, as a useful criterion for legal analysis. Plenty of writers avoid leaning on undefined "competition" to do necessary analytical work in antitrust.[13] This Part's claim here is only

13. *See, e.g.*, Carl Shapiro, *Using Economics To Diagnose a Lessening of Competition*, PROMARKET (Apr. 5, 2024), https://www.promarket.org/2024/04/05/using-economics-to-diagnose-a-lessening-of-competition [https://perma.cc/T3DZ-BBP8] [hereinafter Shapiro, *Using Economics*]; Eric A. Posner, *Market Power, Not Consumer Welfare: A Return to the Foundations of Merger Law*, ANTITRUST L.J. (forthcoming) (on file with *Duke Law Journal*) [hereinafter Posner, *Foundations*]; Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 330 (2003) [hereinafter Elhauge, *Better Standards*]; Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and* Microsoft, 7 GEO. MASON L. REV. 617, 652 (1999). Some of these contributions refer to versions of a thick-competition

that plenty of important actors in the antitrust drama, including many courts, do lean on it exactly in this way.

A. Thick and Thin Competition Distinguished

Right from the outset, we should make a critical distinction between two meanings of the term "competition." The first sense is what I will call the thin or binary sense. When used in this way, "competition" is simply a label for a circumstance of interaction among multiple actual or potential suppliers to satisfy demand, or among actual or potential purchasers to have their demand satisfied. It is something that is either happening or not.[14]

I will have no objection to the use of "competition" in this thin sense. One might say, for example, of suppliers or purchasers of substitute products or services that that they are "in competition"; that some set of events more closely or distantly resembles Cournot or perfect competition or some other theoretical model; that a strict monopoly—involving one supplier with no actual or potential rivals—is a circumstance devoid of competition; or that two or more actors are acting jointly and thus not competing. All fine by me.

The second sense is what might be called a thick or ordinal sense.[15] In this sense, competition is a quantity or quality manifested to a greater or lesser extent by particular situations or practices—that is, something we can have more or less of. Only in this latter sense is it possible to speak of competition being promoted, restrained, intensified, or harmed (assuming it is not being fully extinguished), and to speak of particular practices and transactions as being

standard, but on my reading, they do not make necessary use of it. *See also, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 61 (1978) (noting multiple possibilities but suggesting that an analyst is "compelled" to accept a welfarist criterion); James V. DeLong, *The Role, if Any, of Economic Analysis in Antitrust Litigation*, 12 SW. U. L. REV. 298, 321–23, 327–28 (1981) (noting multiplicity of definitions, but proposing a standard on which "the antitrust laws promote competition"—which appears to mean something like an integrated measure of head count of competitors and of "rivalry" among them—"under the constraint of avoiding excessive damage to other dimensions of market operation").

14. For a prominent definition in this sense, see George J. Stigler, *Competition*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS (Steven N. Durlauf & Lawrence E. Blume eds., 2008) [hereinafter Stigler, *Competition*].

15. Such a sense might be, but need not be, scalar. The term "scalar" typically denotes a quantity that has one-dimensional magnitude only, and not direction. Familiar examples include mass, density, and energy. But a quantity need not be scalar to offer a means of ranking or ordering states of the world.

procompetitive, anticompetitive, competition-on-the-merits, and so on.

This thick sense is the meaning of "competition" with which this Article is concerned: a criterion that can be used to evaluate and compare states of the world and practices.[16]

In principle, such a measure need not have any particular normative character or charge. "Competition-ness" could be normatively neutral, like length, speed, or mass. But there are reasons one might expect antitrust's "competition" quantum to have a normative valence. For one thing, in antitrust discourse, the concept appears to be used that way. "Procompetitive" tendencies or qualities are invariably good, at least for antitrust's purposes; "anticompetitive" ones are invariably bad. To say that something is "procompetitive overall" or that it "promotes competition" is virtually always to say that it is antitrust-lawful, while to say that it is "anticompetitive overall" or that it "harms competition" is usually to say that it is antitrust-illegal.[17] So if antitrust embodies some kind of normative project—if what it forbids is associated in some way with badness or undesirability—then the competition criterion, if one exists, appears to partake of that same normative character. More generally, for economists and antitrust lawyers alike, one might expect that the decision about what to measure—what one counts toward competition-ness, so to speak—will be influenced by an explicit or implicit idea that one or more things about the circumstance of competition are socially valuable, or at least salient. But figuring out *what those things are* is harder than it looks.

B. In Doctrine

The antitrust statutes are famously broad and generalized.[18] So the federal courts have developed an intricate system of doctrine to implement antitrust's three central "pillars": the prohibition on restraint of trade in § 1 of the Sherman Act, the prohibition on monopolization in § 2 of the Sherman Act, and the prohibition on certain mergers and acquisitions in § 7 of the Clayton Antitrust Act of

16. It follows that another way of reading my concern is with the concept of promotion of competition, or perhaps with the inverse concept of limiting, restricting, or lessening competition, rather than with normative competition itself. I am happy to be understood in either sense or both.

17. *See infra* Part I.B.

18. *See, e.g.*, Barnett Bank of Marion Cnty., N.A. v. Nelson, 517 U.S. 25, 40 (1996) (alluding to "[t]he Sherman Act's highly general language"); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 688 (1978) (describing the Sherman Act as a "broad mandate").

1914 ("Clayton Act").[19] Very many of these court-created rules purport to rely on an unliquidated "competition" criterion.[20]

Under § 1, for example, the seminal statement of the normal analytical test—the "rule of reason"—is found in *Board of Trade of Chicago v. United States*[21]: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[22] Courts routinely serve up this line with every appearance of seriousness, as if it meant something useful.[23] Antitrust courts and agencies routinely talk about weighing "anticompetitive" and "procompetitive" tendencies against one another to measure an "overall" effect on competition.[24] If a challenged restraint is overall "procompetitive," the measure is legal; if it is overall "anticompetitive," it is illegal.[25]

Not every agreement is analyzed under this rule of reason. Some are subject to a rule of per se illegality or an intermediate "quick look" test. Per se illegality forbids agreements that are nakedly or plainly "anticompetitive." Even price-fixing may not satisfy this criterion, depending on whether it is of an "anticompetitive" kind.[26] And

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19. *See generally, e.g.*, DANIEL FRANCIS & CHRISTOPHER JON SPRIGMAN, ANTITRUST: PRINCIPLES, CASES, AND MATERIALS chs. IV–VIII (2023) (summarizing doctrine).

20. "Competition" does not appear in the Sherman Act, although the first bill proposed by Senator John Sherman prohibited agreements which tend "to prevent full and free competition." *See* Daniel Francis, *Making Sense of Monopolization*, 84 ANTITRUST L.J. 779, 792 n.74 (2022) [hereinafter Francis, *Making Sense*].

21. Bd. of Trade of Chi. v. United States, 246 U.S. 231 (1918).

22. *Id.* at 238.

23. *See, e.g.*, 1-800 Contacts, Inc. v. FTC, 1 F.4th 102, 114 (2d Cir. 2021); Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys., 817 F.3d 934, 937 (6th Cir. 2016); California *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118, 1133 n.10 (9th Cir. 2011) (en banc).

24. *See, e.g.*, Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc., 9 F.4th 1102, 1108 (9th Cir. 2021); Robertson v. Sea Pines Real Estate Cos., 679 F.3d 278, 292 (4th Cir. 2012); 42nd Parallel N. v. E. St. Denim Co., 286 F.3d 401, 404 (7th Cir. 2002).

25. *See, e.g.*, Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 29 (1984); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 691 (1978); Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 403 (3d Cir. 2016); *In re* Cox Enters., Inc., 871 F.3d 1093, 1104 (10th Cir. 2017).

26. *Compare* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 9 (1979) (cautioning against a "literal approach" and noting that conduct formalism "does not alone establish that [a] particular practice is . . . 'plainly anticompetitive' and very likely without 'redeeming virtue'"), *with* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940) ("Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy."); *see also* Texaco Inc. v. Dagher, 547 U.S. 1, 3 (2006) (holding that joint price-setting by a "lawful, economically integrated

intermediate review is appropriate if "an observer with even a rudimentary understanding of economics could conclude that the arrangements . . . would have an anticompetitive effect on customers and markets" such that "the great likelihood of anticompetitive effects can easily be ascertained."[27] Competition, then, all the way down.

Under § 2, it is elementary that "the possession of monopoly power will not be found unlawful unless it is accompanied by an element of *anticompetitive conduct*."[28] The Court has explained that conduct is "anticompetitive" (or "exclusionary") if it "not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way."[29] The Court has alluded to the relevance of "anticompetitive bent" or "anticompetitive malice" in applying § 2,[30] suggesting that purposes as well as effects can be measured against the "competition" yardstick.[31]

Courts routinely define the core monopolization offense by reference to a purported—and notoriously confounding[32]—distinction between conduct that is "competitive," "legitimate," "procompetitive," or "on the merits," and conduct that is "exclusionary," "predatory," "harmful to competition," and so on. This test—variously applied to the nature, purpose, or effects of conduct—is routinely defined, in turn, by reference to yet more competition standards.[33] Sometimes this aspect of monopolization law is expressed

joint venture" is not per se illegal); Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 336–37 (2d Cir. 2008) (asserting that labels are not dispositive).

27. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).

28. Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (emphasis added).

29. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 603 n.32 (1985) (emphasis added); *see also, e.g.*, Dreamstime.com, LLC v. Google LLC, 54 F.4th 1130, 1137 (9th Cir. 2022).

30. *Verizon Commc'ns Inc.*, 540 U.S. at 409.

31. *But see, e.g.*, Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 379 (7th Cir. 1986) ("[I]f conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors . . . is irrelevant.").

32. *See, e.g.*, Thomas A. Lambert, *Defining Unreasonably Exclusionary Conduct: The "Exclusion of a Competitive Rival" Approach*, 92 N.C. L. REV. 1175, 1177 (2014) (lamenting that the "problem with Section 2" is that "nobody knows what it means").

33. *See, e.g.*, Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993) ("[T]his Court and other courts have been careful to avoid constructions of § 2 which might chill competition, rather than foster it."); Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 482–83 (1992) ("[Section 2 prohibits] the use of monopoly power to foreclose competition, to gain a

as a requirement of "harm to the competitive process."[34] In a recent case, the Ninth Circuit warned that even increased prices and reduced choice do not alone imply harm to competition: a plaintiff must show that they flow from "a less *competitive* market due to . . . artificial restraints or predatory and exclusionary conduct."[35]

Antitrust doctrine only treats a beneficial effect as cognizable if, among other things, it is "procompetitive." For this purpose, only a tendency to elicit a positive "impact on competitive conditions" counts.[36] In declining to entertain an argument that competitive bidding in civil engineering markets would lead to unsafe structures, the Court has made clear that the law is concerned with impact on "competition," not whether competition's effects in a particular case are beneficial or harmful: "Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad."[37] That opinion, of course, does not define "competition."[38]

Under § 7—unlike § 1 and § 2—"competition" is right there in the statute. The Clayton Act forbids transactions of which the effect "may be substantially to lessen competition, or to tend to create a monopoly."[39] In practice, virtually all the action has been on the first of those prongs—the substantial-lessening-of-competition test. Other Clayton Act prohibitions say the same thing.[40] Even the Robinson-Patman Act "proscribes price discrimination only to the extent that it

competitive advantage, or to destroy a competitor." (internal citation and quotation marks omitted)); *In re* Adderall XR Antitrust Litigation, 754 F.3d 128, 133 (2d Cir. 2014) ("Anticompetitive conduct is conduct without a legitimate business purpose that makes sense only because it eliminates competition." (internal quotation marks omitted)); HDC Med., Inc. v. Minntech Corp., 474 F.3d 543, 549 (8th Cir. 2007) (same).

34. *See* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135, 139 (1998); *Dreamstime.com, LLC*, 54 F.4th at 1136; Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308 (3d Cir. 2007); Gregory v. Fort Bridger Rendezvous Ass'n, 448 F.3d 1195, 1206 (10th Cir. 2006).

35. FTC v. Qualcomm Inc., 969 F.3d 974, 990 (9th Cir. 2020) (emphasis added).

36. Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 690 (1978); *see also* NCAA v. Alston, 594 U.S. 69, 94–95 (2021) ("This Court has regularly refused . . . requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important social objectives beyond enhancing competition.").

37. *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 695.

38. *See generally id.* (failing to define "competition").

39. 15 U.S.C. § 18.

40. *See, e.g.*, *id.* § 14.

threatens to injure competition."[41] None of these statutes defines "competition," nor do the seminal cases interpreting them.[42]

Similarly, the antitrust injury doctrine, which limits standing in private antitrust cases, relies on the concept of "competition" in the thick sense too. Antitrust recovery is available only for "anticompetitive effects," not for "competition" itself, as "[t]he antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.'"[43] This, rather cryptically, means that plaintiffs can recover for "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[44]

Again and again and again, throughout antitrust's empire, operative legal rules repeatedly turn on whether some practice or transaction harms or promotes "competition," without further defining what this might mean.

C. In Agency Guidance

The antitrust agencies routinely suggest that competition-as-such can serve as a meaningful standard for antitrust analysis. For example, Assistant Attorney General Jonathan Kanter, current head of the Department of Justice Antitrust Division ("Antitrust Division"), has repeatedly proposed that courts adopt a merger test based on whether the "competitive process" has been impaired, rather than on any

41. Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 176 (2006) (citation and internal quotation marks omitted); *see also* 15 U.S.C. § 13 ("It shall be unlawful . . . to discriminate in price . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition . . . .").

42. *See, e.g.*, Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 355–57 (1922) (repeatedly using, but not defining, the term); Brown Shoe Co. v. United States, 370 U.S. 294, 319–23 (1962) (same); *Volvo*, 546 U.S. at 164, 175–78, 180–81 & n.4 (same).

43. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487–88 (1977) (citation omitted).

44. *Id.* at 489; *see also* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 109 (1986) (same); Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990) (same). Applying this principle, the Fifth Circuit recently held that "[l]oss from *competition itself*—that is, loss in the form of customers' choosing the competitor's goods and services over the plaintiff's—does not constitute antitrust injury, *even if the defendant is violating antitrust laws in order to offer customers that choice*." Pulse Network, L.L.C. v. Visa, Inc., 30 F.4th 480, 489 (5th Cir. 2022) (emphasis added). Make of that what you will.

assessment of outcome effects.[45] Thus, "[h]igher prices or lower output can be evidence that conduct harms competition, but the more important question is how conduct affects the process by which firms compete over price—or anything else."[46]

Rather than a definition, Kanter offered illustrations of competition at work as a process, and emphasized that "competition" could be identified by looking at activities themselves rather than their consequences:

> What do I mean by the competitive process? The competitive process is how rivalry plays out in the market among multiple competitors. It is charging lower prices so customers buy your goods instead of a rival's or paying higher salaries so you attract talent away from a competitor. It is treating employees with respect because you know they can and will leave if you do not. The heart of the competitive process is the guarantee that everyone participating in the open market—consumers, farmers, workers, or anyone else—has the "the [sic] free opportunity to select among alternative offers."
>
> Antitrust enforcers should not decide what values should be promoted at the expense of others or attempt to weigh impacts, our job is simply to promote competition and then let the benefits—whether they are measurable or not—flow from the competitive process.[47]

Kanter specifically separated competition from economic welfare:

> [F]ocusing on competition is a much more administrable standard than one that attempts to quantify consumer welfare effects. The consumer welfare standard was originally promised as a solution to the hard cases, but experience has demonstrated just the contrary. . . . [T]he consumer welfare standard has often made even the easy cases hard to judge.[48]

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45. Jonathan Kanter, Assistant Att'y Gen., Antitrust Division, Remarks at the Keystone Conference on Antitrust, Regulation & the Political Economy (Mar. 2, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-keystone [https://perma.cc/8TE8-K959].

46. Jonathan Kanter, Assistant Att'y Gen., Antitrust Division, Remarks at New York City Bar Association's Milton Handler Lecture (May 18, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association [https://perma.cc/TMQ9-SJEV].

47. *Id.*

48. *Id.*

The Federal Trade Commission ("FTC") has followed suit. In its policy statement announcing a new view about the definition of the prohibition on "unfair methods of competition" in § 5 of the Federal Trade Commission Act of 1914 ("FTC Act"), the FTC offered "competition on the merits" as an operative legal standard.[49] To violate § 5, "[t]he method of competition must be unfair, *meaning that the conduct goes beyond competition on the merits*."[50] The statement defines this standard in turn by reference to two factors: the nature of the conduct and a "negative[] [effect on] competitive conditions."[51] It elaborates both factors in very broad language, turning on whether the conduct was "coercive, exploitative, collusive, abusive, deceptive, predatory, or involve[s] the use of economic power," or was "otherwise restrictive or exclusionary, depending on the circumstances."[52]

As this demonstrates, competition can be unelaborated in at least two ways. First, it may literally not be further defined, as in many of the doctrinal examples above. Second, it may be *over*defined: that is, associated in a vague way with an abundance of diverse ideas or qualities, as in these agency examples, leaving competition as the purported limiting principle.

More recently still, the revision of the agencies' Merger Guidelines ("2023 Merger Guidelines") puts the spotlight sharply on the role of the competition criterion. The previous guidance document—the 2010 Horizontal Merger Guidelines—had indicated that the central test for merger illegality was whether a merger reduced consumer welfare by increasing market power.[53] The agencies' public 2023 draft eliminated that language, centered the "competitive

49. FTC, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT 1, 8 (Nov. 10, 2022).

50. *Id.* (emphasis added).

51. *Id.* at 9.

52. *Id.* at 9.

53. This is clear enough in context, despite a "unifying theme" sentence that misleadingly suggests a pure market power test if read in isolation:

> The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise. . . . A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or *otherwise harm customers* as a result of diminished competitive constraints or incentives."

U.S. DEP'T OF JUST. & FTC, HORIZONTAL MERGER GUIDELINES 2 (2010) (emphasis added). Note, however, that other language in the document suggests a somewhat thicker and more elusive meaning of competition. *See, e.g.*, *id.* at 31 ("[T]he antitrust laws give competition, not internal operational efficiency, primacy in protecting customers.").

process," and introduced new theories, like "extend[ing] a dominant position," in terms that seemed to suppose that harm to competition need not involve market power or consumer harm, eliciting criticism from many commentators.[54] The final text makes a qualified course correction, retaining the centrality of "competition," connecting that standard to some extent with welfare harms, and softening the draft's presumptions of harm into possibility theorems.[55] So, do the 2023 Merger Guidelines inaugurate a new analytical standard for merger analysis, or not?

D. In Proposed Legislation

Current proposals to revise competition policy's statutory footings promise to continue and expand the practice of asking "competition" to do analytical work. For example, the most prominent of the recent competition-focused proposals in Congress—the American Innovation and Choice Online Act ("AICOA")[56]—relies heavily on an undefined concept of harm to competition. Its flagship prohibition against self-preferencing by platforms—that is, giving an advantage to one's own

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54. *See* U.S. DEP'T OF JUST. & FTC, DRAFT MERGER GUIDELINES 18–21 (2023); Herbert Hovenkamp, *The 2023 Merger Guidelines: Law, Fact, and Method*, 65 REV. INDUS. ORG. 39, 40 (2024) (arguing that "the initial draft was excessively influenced by a Neo-Brandeisian mindset that is both reactionary and backward looking"); *see also* FTC, COMMENTS OF ECONOMISTS AND LAWYERS ON DRAFT MERGER GUIDELINES *passim* (Sept. 15, 2023), https://www.regulations.gov/comment/FTC-2023-0043-1406 [https://perma.cc/UFB3-JJ45] (criticizing the turn away from market power); FTC, COMMENTS OF GREGORY J. WERDEN ON DRAFT MERGER GUIDELINES, at 3 (Aug. 14, 2023), https://www.regulations.gov/comment/FTC-2023-0043-0624 [https://perma.cc/GV4S-MW49] (same).

55. The 2023 Merger Guidelines explain:

> Competition is a process of rivalry that incentivizes businesses to offer lower prices, improve wages and working conditions, enhance quality and resiliency, innovate, and expand choice, among many other benefits. Mergers that substantially lessen competition or tend to create a monopoly increase, extend, or entrench market power and deprive the public of these benefits.

U.S. DEP'T OF JUST. & FTC, MERGER GUIDELINES 1 (2023); *id.* at 32–33 (indicating that efficiencies can rebut a prima facie case if the evidence "shows that no substantial lessening of competition is in fact threatened by the merger"). *But see, e.g.*, *id.* at 19 n.36 (using "competition on the merits" to distinguish between good and bad ways in which a merger may contribute to network effects, in a way that does not seem reducible to welfare and market power). *See generally* Daniel Francis, *The 2023 Merger Guidelines and the Arc of Antitrust History*, 39 J. ECON. PERSP. (forthcoming) [hereinafter Francis, *Antitrust History*] (reviewing the relationship between the 2023 Merger Guidelines and welfarism); CONG. RSCH. SERV., LSB11138, *The 2023 Merger Guidelines: Analysis and Issues for Congress* 2 (2024) ("According to the [final 2023 Merger Guidelines], increased market power can *result from* mergers that substantially lessen 'competition,' but the focus remains on 'competition' as an independent concept.").

56. American Innovation and Choice Online Act, S. 2033, 118th Cong. (as introduced to S. Comm. on the Judiciary, June 15, 2023).

products or services—requires a plaintiff to prove the practice "would materially harm competition."[57]

Other prohibitions in AICOA do not make harm to competition part of the basic offense. But these are subject to an affirmative defense if the defendant can establish that the practice "has not resulted in and would not result in material harm to competition."[58] Alas, AICOA does not define "harm to competition": competition itself, without explanation or definition, is the test.

AICOA is not unique. Other prominent antitrust reform statutes, including Senator Mike Lee's TEAM Act and Senator Amy Klobuchar's CALERA, also make impact on "competition," without further definition, a substantive legal test or rule of decision.[59]

E. In Scholarship

Many academic commentators have proposed tests that make competition in the thick sense (including synonyms like competition on the merits, rivalry, the competitive process, and so on) dispositive. These proposals sometimes suggest or imply that the processual nature of competition yields or implies a criterion for determining when competition has been increased, reduced, harmed, or distorted: in our parlance, that a thick definition of competition can be inferred from a thin one. Many such contributions are sharp and thoughtful, and some have been very influential: I will suggest that they would be clearer with "competition" out of the way, or more clearly defined.

Professor Tim Wu has led recent advocacy for a "competitive process" standard. He proposes replacing the "consumer welfare" standard with a "protection of the competitive process" standard.[60] His proposed formulation would ask: "[I]s [the] conduct actually part of the competitive process, or is it a sufficient deviation as to be unlawful?"[61] Wu illustrates the standard by reference to "the question . . . faced by a sports referee in football or soccer. One player tackles

57. *Id.* § 3(a)(1)–(2).

58. *Id.* § 3(b)(2).

59. *See, e.g.*, Competition and Antitrust Law Enforcement Reform Act, S. 225, 117th Cong. §§ 4(b)(3), 9, 13 (2021) (using "competition" to define, in part, the legality of certain acquisitions, the legality of certain exclusionary conduct, and the analytical consequences of certain kinds of evidence of harm); Tougher Enforcement Against Monopolists Act, S. 2039, 117th Cong. §§ 509, 511 (2021) (using "competition" to identify certain kinds of subjective intention and certain kinds of discrimination in distribution).

60. Wu, *Competitive Process*, *supra* note 10, at 1.

61. *Id.* at 2.

another. Is the maneuver actually part of the competition (a legal tackle), or something that threatens the competitive process itself?"[62] The question is whether the challenged conduct is among the "deviations and abuses that threaten to ruin the game, by providing an end-run around competition on the merits."[63]

In another recent contribution, in a broadly similar spirit, Professors Marshall Steinbaum and Maurice Stucke propose an "effective competition standard" to replace the consumer welfare orientation that reflects the "hijack[ing]" of antitrust.[64] The authors candidly define this standard as a vehicle for the protection of multiple different goals: "Agencies and courts shall use the preservation of competitive market structures that protect individuals, purchasers, consumers, and producers; preserve opportunities for competitors; promote individual autonomy and well-being; and disperse private power as the principal objective of the federal antitrust laws."[65] The unifying theme and limiting principle is competition itself.

And when the authors explain how these very different goals would be operationalized in legal doctrine, "competition" comes back in repeatedly. For example, vertical mergers should be unlawful "when they could foster the firm's ability and incentive to distort competition,"[66] while vertical restraints should be permitted only in "narrow circumstances" without market power and where the restraints are "necessary to foster innovation and competition."[67] Ultimately, they claim, "[g]iven the mounting evidence of the failures of current antitrust policies, we need to promote competition."[68]

Writers from other traditions have done the same thing. Antitrust economist Greg Werden, for example, argues that the Supreme Court's rule-of-reason decisions "exhibit a single-minded focus on the competitive process," and that "impact on competition" emerges as the "single criterion for evaluation [of] the legality of a trade restraint."[69] Werden's own proposed distillation of that test leans heavily on an

62. *Id.*

63. Wu, *After Consumer Welfare*, *supra* note 10, at 9.

64. Steinbaum & Stucke, *supra* note 10, at 595.

65. *Id.* at 602.

66. *Id.* at 610.

67. *Id.* at 611.

68. *Id.* at 623.

69. Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 731, 734, 737 (2014).

unliquidated harm-to-competition test.[70] And Professor Dan Crane defines and defends existing antitrust practice against its "radical" challengers by reference to its purported "commitment to competition as the default organizing principle for the American economy."[71]

There are many more examples. Professor Barak Orbach has argued that "[c]ompetition is . . . the most reasonable and practical goal for competition laws."[72] Professor John Flynn has written that "the concept of 'competition' should be understood as originally intended when the antitrust laws were adopted—competition as a process."[73] And so on.[74]

The point is not that any of these writings are in any sense mistaken or wrong. Rather, it is that the invocation of "competition" makes it harder, not easier, to appreciate their respective views, and the full implications of their claims. Indeed, the fact that writers of such different perspectives are united in centering "competition" might make us wonder whether that concept really does mean the same thing across the antitrust universe—and, if not, whether we might do a bit better if we gave up its undefined use.

II. ANTITRUST'S BROKEN COMPASS

This Part makes a simple claim about the practice described in Part I. Within the U.S. antitrust tradition, "competition" can be essentialized in so many different, sufficiently plausible, and mutually inconsistent ways that a bare competition standard is virtually no help in analyzing real practices and transactions, or in giving content and direction to antitrust doctrine.

Moreover, the purported use of the undefined criterion is actively harmful. It inserts an indeterminate norm at the heart of the antitrust system in place of one that can really do the work asked of it. It creates a false impression that the various things one might want from an

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70. *Id.* at 748–54.

71. Daniel A. Crane, *The Radical Challenge to the Antitrust Order*, 59 WAKE FOREST L. REV. 399, 402, 418, 421 (2024).

72. Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253, 2277 (2013).

73. John J. Flynn, *Antitrust Policy and the Concept of a Competitive Process*, 35 N.Y.L. SCH. L. REV. 893, 901 (1990).

74. *See, e.g.*, Eleanor M. Fox, *What is Competition? The Meanings and Usefulness of "Competition" as the Measurer of Legality* (forthcoming) (on file with *Duke Law Journal*); Warren Grimes, *A Post-Chicago Debate: Is Protecting the Competitive Process Antitrust's Overarching Goal?*, 35 ANTITRUST MAG. 72, 73–74 (2021); Harry S. Gerla, *Restoring Rivalry as a Central Concept in Antitrust Law*, 75 NEB. L. REV. 209, 239–40 (1996).

antitrust system can all be simultaneously pursued, without any need to make hard choices. And it contributes to the bluntness of antitrust doctrine by rendering the content of the law more doubtful in an area where defendants enjoy more than their share of the benefit of the doubt.

A. *There Is Nothing that (More) Competition Just Is*[75]

An antitrust case typically involves some specific behavior—usually an agreement, a unilateral practice, or a transaction. And, as Part I has shown, courts and other actors in the antitrust world often suggest that antitrust doctrine can and should ask: *Does this behavior, or some specific effect or aspect of it, harm or promote competition?*

But there is nothing like consensus, among either economic theorists or antitrust courts, about what that question really means—that is, about what evaluative criterion or criteria should be used to answer it. Recognizing that competition in the thin sense is a process of interaction—as it surely is—does not yield any particular standard to determine whether, in an all-things-considered sense, there is more, or less, or the same amount of competition, whether that process has been "harmed," or whether a practice or a transaction "is" procompetitive or anticompetitive.

There are many plausible ways or dimensions in which one might measure or essentialize competition, but they are very different, and there is scant agreement about which ones should count or how to resolve the (frequent) conflicts among them. Accordingly, to invoke competition-as-such is to gesture vaguely at an array of very different metrics without choosing from among them or articulating a way to reconcile or integrate them. This is not much of a way to run the antitrust railroad.

It is easy to identify examples of cases where plausible instincts about what might count pull in different directions. For example, are the following procompetitive or anticompetitive?

- *Concentration up, price down*. A merger between two businesses reduces the number of rivals and increases market concentration, but reduces prices, because the merged firm has lower costs that are sufficiently passed through to consumers. Is the result more competition because prices have fallen and consumer welfare has

75. Apologies to Cass Sunstein, *There Is Nothing That Interpretation Just Is*, 30 CONST. COMMENT. 193 (2015).

increased, or less competition because fewer firms are left? Or must these factors be weighed against each other—and if so, how?

- *Out of one market, into another*. Two independent general practitioners (say, lawyers or physicians) in a town partner up to perform some specialized service.[76] As part of this enterprise, they withdraw from general practice—depriving the general-practice market of two competitors—and enter some particular subfield. Is the impact on "competition" reducible to the net welfare effect on local consumers? Does it matter if the general-practice consumers and the subfield consumers are different?

- *From one well-managed business to two badly managed ones*. A large market-leading business under effective leadership is split into two, creating two new head-to-head competitors, with each half coming under ineffective management. Is there more or less "competition," "competitive pressure," or "rivalry"? How could one tell?

- *Advantages from integrating complements*. A dominant business merges with an important complement supplier, lowering prices to consumers and reducing the extent to which rivals constrain its behavior. Is this an anticompetitive effect, because it hinders rivals in ways that resemble tying and bundling, or a procompetitive one, because it reflects lower prices?[77]

- *Refusal to share*. A vertically integrated firm refuses to share a valuable input with rivals, protecting its incentives to invest in the input but dismaying rivals. Is this anticompetitive because it impedes rivals more than sharing at a low price would? Or is it procompetitive (or simply not anticompetitive) because it increases the firm's incentives to invest, and/or implicates some "freedom" or "right" of the integrated firm?

- *Elimination of "intrabrand" competition*. Retailers of a particular brand of consumer goods stop competing with one another on the price of goods so branded. The retailers earn more margin from that brand, and so now invest in promoting it more heavily, but no longer discount against one another. Is this procompetitive or anticompetitive? Is the answer reducible to whether overall sales output has gone up or down? Does it matter whether the

76. I owe this example to Louis Kaplow.

77. *See, e.g.*, U.S. DEP'T OF JUST. & FTC, MERGER GUIDELINES 21 (2023) (describing "exten[sion]" theories of harm in terms that may apply to such transactions).

harmonization was the idea of the manufacturer or organized spontaneously by retailers?

- *Product improvement.* A dominant business makes a leap forward—improving its own product, or lowering its own costs—such that rivals fall far behind and now exert only a minimal constraint, perhaps because they no longer enjoy viable scale. Is this procompetitive? Could it be anticompetitive?

Certainly the answer may depend on facts not mentioned. But the point of all this is to say: *On what does it depend?* Suppose in all these cases that a court or agency knows *everything* about the current and future worlds, with certainty. What questions will be dispositive of whether the practice or transaction is harmful or beneficial to competition? Does the analysis just boil down to an overall assessment of net welfare impact? Is some concept of "rivalry" or "competitive intensity" doing work in that assessment? Does the head count of firms in the market matter, if all else remains equal? Do rights and freedoms matter? Does the nature of the conduct matter? Purposes?

In each case, a commitment to "competition" says nothing very helpful about what facts determine the answer. The result is something like a tax code that uses "the demands of justice" as a legal criterion, or a constitutional doctrinal rule that uses "the needs of democracy." In those cases, just as with antitrust's competition criterion, the plausible views of what might be relevant are so many and varied that the criterion is of little real help, and purporting to use an undefined version of it gets in the way of helpful talk.[78] To illustrate, this Section

78. Competition arguably exemplifies what philosopher Walter Gallie called the "essentially contested concepts": that is, concepts characterized by "endless disputes" over the nature of their normative core. W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167, 169, 179 (1956). *See generally* W.B. GALLIE, PHILOSOPHY AND THE HISTORICAL UNDERSTANDING (1964). For such concepts, Gallie's lens encourages us to switch our focus toward an examination of specific uses of a contested concept and to changes in its use with time and context. It also helps us to recognize that our opponents are not necessarily either knaves or fools: they may not be misrepresenting or misunderstanding what the concept in question is "really" all about. *See, e.g.*, W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167, 189 (1956) (emphasizing that "it is quite impossible to find a general principle for deciding which of two contestant uses of an essentially contested concept really 'uses it best'"). Additionally, Gallie notes that:

> Recognition of a given concept as essentially contested implies recognition of rival uses of it (such as oneself repudiates) as . . . of permanent potential critical value to one's own use or interpretation of the concept in question; whereas to regard any rival use as anathema, perverse, bestial or lunatic means, in many cases, to submit oneself to the chronic human peril of underestimating the value of one's opponents' positions.

Id. at 193. One need not lean heavily on Gallie's work to find these insights helpful.

will take a look at the competition concept in both economic theory and antitrust doctrine.

1. *Competition and Economic Theory.* The natural starting point for an effort to grapple with "competition" is probably not law but economics. After all, many antitrust concepts—monopoly, substitutability, and so on—are borrowed from economics, where they have a clear meaning. "Competition" has a similar air. But this is misleading. Economists today do not share a consensus regarding competition's thick meaning: And a number of economic theorists have underscored this point very explicitly.

a. Some History of Economic Thought About Competition. The concept of competition in the thin, binary sense is owed, at least in large measure, to economic thought. The term "competition" arose in classical and preclassical economics—supplanting the term "emulation"[79]—as a label for the circumstance of multiple sellers or buyers vying for trading relationships.[80] Many classical and contemporary writers extolled the benefits of this circumstance as compared with monopoly, including lower prices, better and cheaper suppliers and techniques, and the greater satisfaction of wants.[81]

Some classical writing suggested, rather casually, that a higher head count of rivals meant more competition and therefore more social optimality.[82] But this rather loose and informal version of the thick

79. *See* Jonathan Hearn, *Reframing the History of the Competition Concept: Neoliberalism, Meritocracy, Modernity*, 34 J. HIST. SOCIO. 375, 379–80 (2021).

80. *See, e.g.*, ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS bk. I, ch. VII (Hartford, Conn., Lincoln & Gleason 1804) (1776); J.S. MILL, PRINCIPLES OF POLITICAL ECONOMY 794 (1848) [hereinafter MILL, PRINCIPLES].

81. *See, e.g.*, SMITH, *supra* note 80, at bk. I chs. I, VII; *id.* at 349 ("[E]very individual . . . [is] led by an invisible hand to promote an end which was no part of his intention."); JAMES STEUART, AN INQUIRY INTO THE PRINCIPLES OF POLITICAL ŒCONOMY, Vol. I bk. I chs. XII, XX (Andrew S. Skinner ed., Univ. Chic. Press 1966) (1770); *id.* bk. II ch. I; PIERRE-PAUL LE MERCIER DE LA RIVIÈRE, L'ORDRE NATUREL ET ESSENTIEL DES SOCIÉTÉS POLITIQUES 276 (London 1767) (exemplifying the physiocrat interpretation of economic competition as a component of overall harmony and common good); JOSIAH TUCKER, A BRIEF ESSAY ON THE ADVANTAGES AND DISADVANTAGES WHICH RESPECTIVELY ATTEND FRANCE AND GREAT BRITAIN xvi (1748) (suggesting that in open trade "[the merchant's] own interest is connected with the good of the whole").

82. *See, e.g.*, STEUART, *supra* note 81, at Vol. I bk. II ch. II (suggesting that competitive effects are determined not by the number of persons involved but by the number of separate interests they represented); SMITH, *supra* note 80, at 87 (indicating that limitation to a smaller number of competitors tends to produce similar effects to monopoly but to a lesser extent).

"competition" criterion did not survive the formalization of economic analysis.

In the second half of the nineteenth century, economic theory *did* embrace an integrated criterion for policy analysis: namely, welfarist preference satisfaction, or the maximization of utility. This criterion captures the idea that what is good for society is an aggregate measure (of some kind[83]) of what is good for people individually, and that what is good for people individually is whatever they subjectively prefer. This concept flows directly from utilitarian moral theory, including the writings of Jeremy Bentham, John Stuart Mill, and Henry Sidgwick.[84]

Welfarism came into mainstream economics as part of an intellectual and methodological package. In a fairly short period centered on the 1870s, the field saw three profound developments: (1) the explicit introduction of welfarism as a normative premise[85]; (2) the popularization of mathematical analytical methods in place of the somewhat casual qualitative discussions favored in classicism[86]; and (3) the introduction of marginalist analysis (that is, the idea that businesses and other rational actors make decisions incrementally rather than based on average historical factors).[87] These developments inaugurated what is sometimes called neoclassical economics.

This "marginalist revolution" coincided with a reevaluation of some fundamentals, including the relationship between competition, circumstances, and social optimality, and specifically the vague classical idea that more competitors meant more "competition" and a closer approach to optimality. The marginalists approached the study of this relationship with a stricter definition of social optimality—utility

83. This is, of course, a tremendously complicated issue. For a brisk summary of early engagements with this question, see, for example, JOSEPH A. SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS 1069–73 (1954).

84. *See generally* JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION (1789); J.S. MILL, *Utilitarianism* (1861), *in* ON LIBERTY AND OTHER ESSAYS (1991); HENRY SIDGWICK, THE METHODS OF ETHICS (1874).

85. WILLIAM S. JEVONS, THE THEORY OF POLITICAL ECONOMY 37 (1871) ("To satisfy our wants to the utmost with the least effort—to procure the greatest amount of what is desirable at the expense of the least that is undesirable—in other words, to maximize pleasure, is the problem of Economics."); F.Y. EDGEWORTH, MATHEMATICAL PSYCHICS 6 (1881) ("Economics investigates the arrangements between agents each tending to his own *maximum* utility . . . .").

86. Cournot had pioneered mathematical analysis in 1838. AUGUSTIN COURNOT, RESEARCHES INTO THE MATHEMATICAL PRINCIPLES OF THE THEORY OF WEALTH (1838).

87. JEVONS, *supra* note 85, at 45–57; CARL MENGER, PRINCIPLES OF ECONOMICS 12 (1871); LÉON WALRAS, ELEMENTS OF THEORETICAL ECONOMICS ch. III (1874–76) (trad. Donald A. Walker & Jan van Daal). Kenneth Dennis discerns stirrings of marginalism in the 1810s. Dennis, *supra* note 8, at 113.

maximization—in hand, as well as a formal methodology. They developed models of "perfect" competition (with an infinite number of suppliers interacting costlessly with infinite purchasers) and strict monopoly (a sole supplier with no actual or potential rivals) that would soon become textbook staples.[88] Perfect competition was associated with lower prices, higher output, and greater welfare than strict monopoly, and was, to that extent, preferable.[89] But intermediate cases were controversial.[90]

The inference that more competitors meant more "competition," and thus more optimality, was by this time already wobbly. Decades earlier, for example, Mill's *Principles of Political Economy* had grappled with the fact that, given economies of scale, more competitors did not necessarily mean socially better outcomes. A market dominated by fewer, larger firms with efficiencies of scale might mean lower costs and lower prices, though the higher concentration risked harmful collusion.[91] Despite his robust skepticism of monopoly,[92] Mill emphasized that the fact of competition was neither an independent policy goal nor an unqualified good.[93]

Mill's insight—that more competitors did not necessarily mean more of what might be valuable or salient about a circumstance of competition—became increasingly important, and increasingly hard to ignore. By the late nineteenth century, the emergence and proliferation of large-scale business, and its obvious cost advantages, suggested that what had been a special case for Mill might now be something like a new norm.

88. *See* EDGEWORTH, *supra* note 85, at 16–56 (setting out an "[e]conomical [c]alculus" including conceptions of perfect and imperfect competition); JEVONS, *supra* note 85, at 86–87 (discussing "perfectly free competition"). The actual elaboration of the "perfect competition" model was slow and painful: Edgeworth and later Frank Knight did most to specify what exactly was implicit in the idea of perfect competition. *See* Stigler, *Perfect Competition*, *supra* note 8, at 6–9, 11–14.

89. *See* WALRAS, *supra* note 87, at 437–54; ALFRED MARSHALL, PRINCIPLES OF ECONOMICS bk. V (8th ed. 1920).

90. *See generally* COURNOT, *supra* note 86, at 79–89 (setting out a model of duopoly competition in which duopolists set output levels); EDGEWORTH, *supra* note 85, at 20 ("Contract with more or less perfect competition is less or more indeterminate."); Joseph Bertrand, *Review of Walras's Théorie Mathématique de la Richesse Sociale and Cournot's Recherches sur les Principes Mathématiques de la Théorie des Richesses*, J. DES SAVANTS 499 (Sept. 1883) (criticizing Cournot's model of duopoly).

91. MILL, PRINCIPLES, *supra* note 80, at 132–34, 143.

92. *Id.* at 393, 794–96.

93. *See, e.g.*, *id.* at 795.

This fueled a full-blown policy crisis in the United States. The "trust problem"—the question of what to do about large national business enterprises—towered over politics from the closing decades of the nineteenth century to the passage of the Clayton Act in 1914.[94] Economists, commentators, and politicians took almost every conceivable position regarding the complicated problem of whether, when, and how big business was socially beneficial or harmful.[95] The antitrust laws—the Sherman Act of 1890, and later the FTC Act and Clayton Act of 1914—were hatched in this climate,[96] and lawmakers expressed a wide variety of hopes and expectations for them.[97]

Meanwhile, the loose classical idea that more competitors meant more of what was valuable about competition came under still more analytical pressure. As big business clashed with big business, it increasingly appeared that monopoly power could coexist with competition (unsettling the classical opposition between competition and monopoly) and that some concentrated markets were vigorously competitive (unsettling the idea that more competitors meant more intense and beneficial competition). Economist Alfred Marshall wrote in 1920 that "the fiercest and cruellest forms of competition are found in markets which . . . have been already brought in some measure under monopolistic control."[98]

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94. Luca Fiorito, *When Economics Faces the Economy: John Bates Clark and the 1914 Antitrust Legislation*, 25 REV. POL. ECON. 139, 143 (2013) [hereinafter Fiorito, *John Bates Clark*]; Morgan, *supra* note 8, at 565; James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 284 (1989).

95. *See, e.g.*, HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION chs. II, III, V, VI (1955); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY (1992); HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937 (1991); *see also* May, *supra* note 94, at 281 (noting "considerable intellectual diversity" even among adherents of political liberal and economic classicism).

96. The 1914 legislation was somewhat more influenced by professional economists. Luca Fiorito, *The Influence of American Economists on the Clayton and Federal Trade Commission Acts*, 623 QUADERNI DEL DIPARTIMENTO DI ECONOMIA POLITICA (Oct. 2011); Fiorito, *John Bates Clark*, *supra* note 94, at 146–48.

97. *See, e.g.*, May, *supra* note 94, at 288 ("[T]he debates appear to indicate a widespread congressional commitment to the long-established ideals of economic opportunity, security of property, freedom of exchange, and political liberty, and considerable hope that antitrust law might prove to be an effective vehicle for their substantial, simultaneous realization.").

98. ALFRED MARSHALL, INDUSTRY AND TRADE 395–96 (1920). *See also*, *e.g.*, ARTHUR C. PIGOU, THE ECONOMICS OF WELFARE 198 (4th ed. 1932) ("It does not seem possible to determine in a general way the comparative effects on output that will be produced by simple monopoly and by monopolistic competition."); *id.* at 268 (under monopolistic competition "[t]here is, obviously, no tendency for [investment] to approximate to the ideal . . . but we can no longer say . . . that it is likely to be less than the ideal").

In the 1930s, economists Joan Robinson and Edward Chamberlin led a devastating attack on the idea that atomistic "perfect competition" was a useful policy goal.[99] Their interventions centered three critical points. First, virtually no real market looked anything like perfect competition, given differentiation, transaction costs, and other complications.[100] Among other things, competitor head count had no reliable relationship with outcomes.[101] Second, virtually all suppliers face *both* some inelastic demand *and* some vigorous competition on an elastic margin.[102] Thus, intense competition and real monopoly could coexist.[103] Third, perfect competition was not a plausible goal or ideal. A world without differentiation, inelastic demand, and entrepreneurial profit could hardly be imagined or desired. There was no reason to think that a situation closer to the perfect competition model was any better than one further away.[104]

No attack was more forceful or exuberant than Joseph Schumpeter's.[105] Robinson and Chamberlin had suggested that the perfect competition model was not necessarily a social optimum, but Schumpeter argued that it might exemplify the opposite. For him, what was *really* beneficial about competition was its tendency to elicit useful inventions: The social value of marginal price reductions on existing products and technologies was trivial compared to the value of wholly

99. *See generally* EDWARD H. CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION (1st ed. 1932) (setting out a theory of "monopolistic competition" pursuant to which monopoly and competition coexist); JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION (1st ed. 1933) (analyzing a variety of competitive settings and emphasizing intermediate cases between perfect competition and strict monopoly, the unrealism of either extreme, and the use of a marginal revenue curve).

100. ROBINSON, *supra* note 99, at 88–90.

101. CHAMBERLIN, *supra* note 99, at 196–97 ("Do larger numbers make the demand curves approach more nearly to the horizontal position characteristic of pure competition?—that is the question. Clearly there is no general presumption that they do.").

102. *Id.* at 64; *see also* ROBINSON, *supra* note 99, at 50–51 ("[A]lthough each producer may have certain customers who prefer, for one reason or another, to buy from him, a rise in his price will drive some of them to buy from his competitors before it will drive them to give up buying the commodity altogether.").

103. CHAMBERLIN, *supra* note 99, at 205–06.

104. *See, e.g.*, *id.* at 214–15 ("[P]ure competition may no longer be regarded as in any sense an 'ideal' for purposes of welfare economics.").

105. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY *passim* (1943) [hereinafter SCHUMPETER, CAPITALISM]. Other prominent mid-century attacks on the purported optimality of perfect competition included, for example, Frank H. Knight, *The Ethics of Competition*, 37 Q.J. ECON. 579, 580 (1923), and Friedrich A. Hayek, *The Meaning of Competition*, *in* INDIVIDUALISM AND ECONOMIC ORDER 360 (1949).

new ones.[106] This depended on incentives: The greater and riskier the innovation, the heftier the profit incentive necessary to induce it.[107] Optimal policy might require tolerating not just monopoly, but also restrictive practices that would protect profits.[108] For Schumpeter, the static nirvana of perfect competition was the annihilation of all real competition, with no room for strategy, innovation, or discovery.[109]

Over the next two decades, scholars and courts began to focus again on the importance of competitor head count. Writers in what became known as the structure-conduct-performance ("SCP") school argued that market concentration—the extent to which a market is dominated by a few small suppliers—was an important proxy for the competitive health of a market, and that no-fault breakups of concentrated markets might be desirable.[110] Structuralist influence is clear in the Court's antitrust output in the 1960s.[111] In fact, in *United States v. Von's Grocery*,[112] the Court expressly said that, "[l]ike the Sherman Act in 1890 and the Clayton Act in 1914, the basic purpose of the 1950 [amendments to the Clayton Act] was to prevent economic concentration in the American economy by keeping a large number of small competitors in business."[113]

But structuralism eventually lost ground. In the academy, critics challenged the structuralists' ability to accurately measure key variables (like "performance"), and the accuracy of their inferences (for example, if profits were higher in concentrated markets, did that imply undesirable practices, or low costs?).[114] The endogeneity of structure in particular was confounding: If larger firms and more

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106. SCHUMPETER, CAPITALISM, *supra* note 105, at 82–89.

107. *Id.* at 73–74.

108. *Id.* at 87–91.

109. *Id.* at 104–05.

110. *See generally* Matthew T. Panhans, *The Rise, Fall, and Legacy of the Structure-Conduct-Performance Paradigm*, 46 J. HIST. ECON. THOUGHT 337 (2024); Leonard W. Weiss, *The Structure-Conduct-Performance Paradigm and Antitrust*, 127 U. PA. L. REV. 1104 (1979); CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS (1965); JOE S. BAIN, BARRIERS TO NEW COMPETITION (1956).

111. *See, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270, 275 (1966); United States v. Phila. Nat'l Bank, 374 U.S. 321, 356 (1963); Brown Shoe Co. v. United States, 370 U.S. 294, 343–44 (1962).

112. *Von's Grocery Co.*, 384 U.S. at 270.

113. *Id.* at 275.

114. Steven Berry, Martin Gaynor & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, 33 J. ECON. PERSP. 44, 46 (2019) (SCP perspective became "discredited" in mainstream economics). The discussion in the text borrows freely from FRANCIS & SPRIGMAN, *supra* note 19, at Ch. I.

concentrated markets were the result of better performance, the logic of the SCP approach and of an anticoncentration policy was impossible to maintain.[115]

While structuralism declined, other perspectives, like game theory and contestable markets theory, gained momentum.[116] And in the political arena, no-fault deconcentration receded in the deregulatory turn of the 1970s and 1980s.[117] Academic and political winds—including the rise of law-and-economics and Chicago-School perspectives—increasingly disfavored many regulatory interventions in markets.[118] In time, this perspective would be criticized in turn as hidebound, neglectful of important values, and reliant on excessively favorable assumptions about the workings of markets.[119]

For a long time, then, economic theory has grappled with the fact that competition is a multidimensional phenomenon, defying easy essentialization, in an ambiguous and contingent relationship with social optimality. Views about competition's essential dimension(s) differ profoundly: absence of monopoly, head count, welfare, dynamic innovation, market concentration, and so on have all played a role in the long conversation.

115. *See generally* Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1 (1973) (arguing that if increased concentration results from the superior efficiency of large firms, an anticoncentration policy risks inefficiency).

116. WILLIAM J. BAUMOL, JOHN C. PANZAR & ROBERT D. WILLIG, CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE *passim* (1982); Panhans, *supra* note 110, at 10.

117. There are many contemporaneous accounts of the deregulatory turn. *See generally* MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION (1985) (reviewing deregulatory efforts of the 1970s); STEPHEN BREYER, REGULATION AND ITS REFORM (1985) (critically considering regulatory policy and practice); Robert W. Crandall, *Deregulation: The U.S. Experience*, 139 J. INST. & THEORETICAL ECON. 419 (1983) (reviewing U.S. deregulation and evidence of its effects).

118. *See generally* GEORGE L. PRIEST, THE RISE OF LAW AND ECONOMICS: AN INTELLECTUAL HISTORY (2020) (tracing the history of law and economics, including its impact on U.S. regulatory policy and culture); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) (proposing a significantly narrowed role for antitrust intervention); RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976) (articulating a seminal law-and-economics account of antitrust law and policy); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1973) (offering an influential "law and economics" survey); GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970) (applying law-and-economics methods to tort, and emphasizing the policy significance of the costs of precaution, as well as the benefits).

119. *See generally* ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST: HOW EFFICIENCY REPLACED EQUALITY IN U.S. PUBLIC POLICY (2022).

b. Measuring "Competition" Today. Today, as Professor Lewis Kornhauser puts it, "[t]he evaluative tradition in economics is resolutely welfarist."[120] But welfarism is driven by subjective preference functions, and—like all consequentialisms—it is concerned with outcomes and effects, not processes. Economic theory has not yet yielded a consensus mechanism to enumerate and integrate the various dimensions of competitive interaction to measure the "competition-ness" of a circumstance or practice.[121]

A handful of economists have acknowledged this very directly. Professor Harold Demsetz, in particular, made the point with exceeding clarity in 1995. He pointed out that there are no "obvious criteria by which to judge competitive intensity."[122] He expanded:

> [In addition to] output, price, quality (including reputation), and innovation . . . [t]here is no sense in attempting to list yet other competitive activities. The list would never be complete. No matter. *Even a few competitive activities make it impossible to set forth a measure of competitive intensity to which all will agree.* One competitive mix, as compared to a second, contains more intensive innovation and quality competition and less intensive imitation and price competition. Which is the more intensively competitive mix as judged by the general level of competition? Even if one could measure competitive intensity along each and every single dimension of competition, *our inability to convert units of competitive intensity from one dimension of competition to another makes the general intensity of competition ambiguous and even meaningless.* There is a widely held but unarticulated belief that competitive intensity can be measured well enough so that scholars, lawyers, judges, and politicians can agree that a policy has increased (or decreased) the general level of competitive intensity. Although in one case or another this belief may be valid, *as a general proposition it is just plain wrong*.[123]

This heterogeneity, he suggested, made a nonsense of policy frameworks that rely, or purport to rely, on an integrated competition

120. *See, e.g.*, Lewis Kornhauser, *The Economic Analysis of Law*, *in* THE STAN. ENCYC. OF PHIL. (2022).

121. This is not to say, of course, that there are no such *proposals*! *See generally*, *e.g.*, Jan Boone, *A New Way to Measure Competition*, 118 ECON. J. 1245 (2008). Nor, of course, is it to deny that economists routinely measure many things that are relevant to understanding competitive processes: market concentration, profit margin, Lerner Index, and so on.

122. DEMSETZ, *Intensity and Dimensionality*, *supra* note 8, at 138.

123. *Id.* at 142 (emphasis added).

criterion.[124] And he directly drew the obvious implication for antitrust: "[T]he Sherman Antitrust Act is logically impossible to carry out if its goal is interpreted as increasing the overall intensity of competition (or reducing the overall intensity of monopoly). . . . *Increasing the intensity of competition (or reducing the intensity of monopoly) is not a feasible goal of antitrust*."[125]

More recently, Professors Louis Kaplow and Carl Shapiro have made a similar point:

> Although economists routinely use the term 'competition,' it does not readily bear the weight that it must under the rule of reason in judging industry practices. . . . [W]hen the conditions for perfect, textbook competition fail (that is, pretty much always), is there an unambiguous way to describe one or another arrangement or outcome as more competitive? Economists do not traditionally answer such questions.[126]

And, they point out, "if the rule of reason is legally defined in terms of competition itself" rather than economists' customary welfare criterion—such that "that which promotes competition is legal, that which suppresses competition is illegal, end of story"—then "economics cannot directly address the legal test."[127] When courts purport to evaluate effects on competition, "what metric is employed for measurement and conversion to a common denominator . . . and what is the ultimate decision rule remain somewhat of a mystery."[128] Kaplow puts it succinctly in a forthcoming book: Economists simply "have not developed . . . an abstract index of rivalry or competition."[129]

There are other examples, usually economic theorists and intellectual historians who have focused on the competition concept itself.[130] And it's not *just* economists, either. Business historian Thomas

124. *Id.* at 142–43.

125. *Id.* at 144 (emphasis added); *see also* Thomas B. Leary, *Antitrust Economics: Three Cheers and Two Challenges* (remarks of Nov. 15, 2000), https://www.ftc.gov/news-events/news/speeches/antitrust-economics-three-cheers-two-challenges [https://perma.cc/YT6M-S8DE] (quoting and discussing an unpublished 1991 Demsetz speech in which he stated that "[w]e do not yet possess an antitrust-relevant understanding of competition").

126. Kaplow & Shapiro, *supra* note 8, at 1134.

127. *Id.*

128. *Id.* at 1136.

129. Louis Kaplow, RETHINKING MERGER ANALYSIS § 8.D (forthcoming 2024).

130. *See, e.g.*, Joshua D. Wright, *Antitrust, Multi-Dimensional Competition, And Innovation: Do We Have an Antitrust-Relevant Theory of Competition Now?*, *in* REGULATING INNOVATION:

McGraw called "the difficulty of measuring competition" the "central problem underlying the entire antitrust question."[131] "[H]ow," he asked, "can it be determined with certainty whether a given policy is pro- or anti-competitive when economists cannot agree on the meaning of competition?"[132] Quite so.

2. *Competition and Legal Doctrine.* The idea that competition-as-such can be promoted or hindered—that there is some kind of nonarbitrary integrated measure of competition-ness—is a tenet of antitrust law, not economic theory. But lawyers do not appear to have made any more progress than have economists toward specifying such a measure.

a. Antitrust's Empty "Competition" Test. Early in the life of the Sherman Act, the Court used "competition" broadly and loosely to describe market interactions free from antitrust violations.[133] From here, it was a short step to the idea that competition and illegality were

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COMPETITION POLICY AND PATENT LAW UNDER UNCERTAINTY 233 (Geoffrey A. Manne & Joshua D. Wright eds., 2009) ("[E]conomic theory does not provide an analytically coherent method to equalize measures of intensity, efficiency, or consumer welfare."); Vickers, *supra* note 8, at 3 (describing competition as a concept "that has taken on a number of interpretations and meanings, many of them vague"); Morgan, *supra* note 8, at 595 (noting that a study of the writings of five nineteenth-century economists yielded *more* than five different conceptions of "competition"); Stigler, *Perfect Competition*, *supra* note 8, at 14 ("[A] persuasive case could be made that ['competition'] should be restricted to meaning the absence of monopoly power in a market. . . . But it would be idle to propose such a restricted signification for a word which has so long been used in a wide sense."); Dexter Merriam Keezer, *The Effectiveness of the Federal Antitrust Law: A Symposium: Summary Observations*, 39 AM. ECON. REV. 689, 723 (1949) ("[U]ntil we expose the various and complicated strands of our concepts of competition, and then put them together in a clear-cut design which we all understand and accept, our chances of charting clearly how well we are doing in preserving and protecting competition will be seriously compromised.").

131. Thomas K. McGraw, *What Economists Have Thought about Competition, and What Difference It Makes*, 101 PROC. MASS. HIST. SOC'Y 24, 53 (1989).

132. *Id.*

133. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 25 (1895) (Harlan, J., dissenting) ("[A] general restraint of trade has often resulted from *combinations* . . . destroying the opportunity of buyers and sellers to deal with each other upon the basis of fair, open, free competition."); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 321–22, 330, 337–39 (1897) (alluding repeatedly to "free" or "unrestricted" competition among railroads); United States v. Joint-Traffic Ass'n, 171 U.S. 505, 577 (1898) ("An agreement of the nature of this one, which directly and effectually stifles competition, must be regarded under the statute as one in restraint of trade . . . ."); Whitwell v. Cont'l Tobacco Co., 125 F. 454, 457 (8th Cir. 1903) (stating that the antitrust laws aimed to prevent "stifling or substantial restriction of competition").

opposed, and finally to the idea that one might appeal to competition to *determine* what was an antitrust violation.[134]

The early courts certainly needed an orienting principle for antitrust.[135] The competition concept offered several advantages: It had long been used casually to mean the opposite of monopoly; it was prominent in antitrust's legislative history; and it was something that everyone was for and no one was against. In vain, Justice Oliver Wendell Holmes Jr. grumbled that "[t]he [Sherman Act] says nothing about competition."[136]

In 1914, Congress used the concept of reduction in competition as the primary evaluative criterion in the Clayton Act, prohibiting various practices if "the effect . . . may be substantially to lessen competition."[137] And, as demonstrated above, the practice of centralizing competition in antitrust analysis has continued to this day.[138]

But the meaning of the competition norm that antitrust doctrine embraced was never decisively pinned down or worked out. Instead, "competition" became something like a placeholder, populated and operationalized by a rotating cast of *other*, more specific quantities. Invocation of a "competition" criterion became an accepted and convenient way to gesture broadly at all the good things one might want from an antitrust system, or all the bad things that one might plausibly want antitrust to oppose, without having to pick from among them or grapple with conflicts.

One way to see this clearly is to look closely at places in legal analysis where "competition" purports to be doing analytical work and

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134. *See, e.g.*, *E.C. Knight Co.*, 156 U.S. at 16 ("[I]n order to vitiate a contract or combination . . . it is sufficient if it really tends . . . to deprive the public of the advantages which flow from free competition."); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 57 (1911) ("[At common law,] contracts or acts which it was considered had a monopolistic tendency, especially those which were thought to unduly diminish competition and hence to enhance prices . . . came also . . . to be spoken of and treated . . . as being in restraint of trade."); Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 408 (1911) ("[A]greements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void."); Great A&P Tea Co. v. Cream of Wheat Co., 224 F. 566, 573 (S.D.N.Y. 1915) (stating that "[p]reventing competition is restraint of trade.").

135. On "restraint of trade," *compare Trans-Mo. Freight Ass'n*, 166 U.S. at 341, *and Joint-Traffic Ass'n*, 171 U.S. at 573–75 (holding all restraints of trade illegal), *with Standard Oil Co. of N.J.*, 221 U.S. at 54–55 (holding only unreasonable restraints illegal).

136. N. Sec. Co. v. United States, 193 U.S. 197, 403 (1904) (Holmes, J., dissenting).

137. *See* 15 U.S.C. §§ 13, 14, 18; *see also* S. REP. NO. 62-1326, at 3 (1913) (identifying the goals of the Sherman Act with "competition").

138. *See supra* Part I.

ask what, exactly, it contains or adds to the analysis. Two examples, distinguished by their stature, will serve: *Chicago Board of Trade*, the 1918 opinion authored by Justice Louis Brandeis that provided the canonical, competition-centered formulation of the rule of reason under § 1 of the Sherman Act; and *Microsoft*, the 2001 decision of the en banc U.S. Court of Appeals for the D.C. Circuit that is virtually a superprecedent of modern monopolization law under § 2.[139]

Chicago Board of Trade arose from a challenge to a rule adopted by a Chicago trading exchange that governed trading in grain "to arrive"—that is, in transit to Chicago or imminently to be shipped there. The rule created a half-hour "call" period at the end of regular daily trading in which to-arrive grain could be traded freely; outside that half-hour window, it could not be sold or solicited except at the price prevailing at the end of the call.[140] In other words, price competition was prohibited during the twenty-three-and-a-half-hour period between daily "calls."

Justice Brandeis's opinion for the Court states that "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[141] To determine this, Justice Brandeis explains, a court must "ordinarily" assess "facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable," as well as "[t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, [and] the purpose or end sought to be attained."[142] So *anything* might be relevant. Competition itself is the limiting principle.

But that is the last we hear of competition in the *Chicago Board of Trade* opinion. Justice Brandeis's application of the rule identifies at least fourteen different facts, or purported facts,[143] as inputs to the

139. Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918); United States v. Microsoft Corp., 253 F.3d 34, 58–59 (D.C. Cir. 2001) (en banc); *see also* Chiropractic Co-op. Ass'n of Michigan v. Am. Med. Ass'n, 867 F.2d 270, 277 (6th Cir. 1989) (describing *Chicago Board of Trade* as "seminal"); *see generally* ANDREW I. GAVIL & HARRY FIRST, THE MICROSOFT ANTITRUST CASES: COMPETITION POLICY FOR THE TWENTY-FIRST CENTURY (2014) (considering significance of *Microsoft* for antitrust law and policy).

140. *Bd. of Trade of Chi.*, 246 U.S. at 236–37.

141. *Id.* at 238.

142. *Id.*

143. As others have pointed out, there is reason to doubt the evidentiary support for at least some of the factual conclusions. *See, e.g.*, BORK, *supra* note 13, at 42.

analysis.[144] At no point does the opinion reveal what is meant by "competition" or its promotion—that is, why these factors rather than others are salient, or why other factors are not. Strikingly, the opinion finds little or no competitive harm from barring price reductions for twenty-three-and-a-half hours each day. The opinion simply moves from the invocation of a competition standard to an assortment of facts, and thence to a conclusion of legality.[145] Some of the selected facts—like the apparent boost to the amount of grain trading and lack of effect on "general market prices"—appear to be proxies for welfare effects or something similar.[146] Others—like the shortening of a working day, the elimination of the "risk" that prices might change, and the shifting of sales into one forum rather than another—decidedly do not.[147] Small wonder that the opinion has served as an inexhaustible subject for academic examination and controversy.[148]

The point is not that *Chicago Board of Trade* was wrong, arbitrary, or inexplicable. Professor Peter Carstensen, among others, has offered

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144. As I read the decision, the relevant factors were as follows: (1) the rule restricted the period of "price-making" (unclear quite what conclusion the opinion draws from this fact); (2) the rule only applied to grain "to arrive," which was a small part of the overall grain shipment volume to Chicago, and did not limit trading with respect to other grain; (3) grain "to arrive" in Chicago was also generally shippable to other cities; (4) lack of impact on "general market prices," a measure apparently including prices for grain shipped to other cities; (5) lack of material effect on the "total volume of grain coming to Chicago"; (6) the purported contribution of the rule to the creation of a "public market" without private bidding that would require "[m]en . . . to buy and sell without adequate knowledge of actual market conditions," which particularly disadvantaged "country dealers and farmers"; (7) the rule shifted some to-arrive sales into "regular market hours"; (8) the rule "brought buyers and sellers into more direct relations"; (9) the rule purportedly increased the head count of dealers engaging in this kind of business and increased the number of bids received; (10) the rule purportedly "enabled country dealers to do business on a smaller margin" and thus made it possible to increase prices paid to farmers without raising prices paid by consumers; (11) the rule enabled country dealers to sell grain to arrive that otherwise would have been sold some other way; (12) the rule enabled grain merchants to "trade on a smaller margin" by reducing risk, making trade more attractive for shippers and grain buyers; (13) the rule "incidentally" enabled sellers to tender grain arriving on any railroad, rather than one specified by a buyer; and (14) the rule "shorten[ed] the working day or, at least, limit[ed] the period of most exacting activity." *Bd. of Trade of Chi.*, 246 U.S. at 239–41.

145. *Id.*

146. *Id.* at 240–41.

147. *Id.*

148. *See, e.g.*, Peter C. Carstensen, *The Content of the Hollow Core of Antitrust: The Chicago Board of Trade Case and the Meaning of the "Rule of Reason" in Restraint of Trade Analysis*, 15 RSCH. IN L. & ECON. 1, 4–5, 60–68 (1992) (reviewing analysis); Richard O. Zerbe Jr., *The Chicago Board of Trade Case, 1918*, 5 RSCH. IN L. & ECON. 17, 43 (1983) ("A strong case can be made that enforcement of . . . minimum [commission] rates was the primary purpose of the [call] Rule after 1913, and was fairly successful."); BORK, *supra* note 13, at 41–47 (arguing that "Brandeis clearly [introduced] considerations of producer welfare" in the analysis).

a careful defense grounded in a close examination of the context and the concept of an ancillary restraint.[149] Rather, it is that there is no reason to think that "competition" as such had any particular meaning or did any analytical work within the four corners of the decision. Competition simply accepts a genuflection and then vanishes. Who knows what more helpful formulation Justice Brandeis might have offered if he had been encouraged to explain his analytical criterion without competition's doubtful aid?

More than eighty years later, the U.S. Court of Appeals for the D.C. Circuit decided *Microsoft*.[150] That case arose from allegations that Microsoft had maintained its operating system monopoly through a series of practices designed to suppress emerging threats: Netscape's Navigator browser and Sun's Java technologies. These growing firms presented Microsoft with the threat that, if allowed to flourish, they would make it easier for businesses to enter the operating-system market and challenge Microsoft's Windows, although this would not occur in the "foreseeable future."[151]

The court's en banc opinion sets out a multistep analytical framework for analysis under § 2 that comes close to stating that the "promotion of competition" means increasing subjective preferential welfare. In fact, the court begins by defining "competitive acts" explicitly as those that increase "social welfare."[152] At the first step of this framework, the court required that a plaintiff must prove an "anticompetitive effect," which is conduct that "harm[s] the competitive *process* and thereby harm[s] consumers," in "contrast [to] harm to one or more *competitors* [which] will not suffice."[153] (The court did not explain what it means to harm a "competitive process.") At the second step, a defendant may show a "procompetitive justification," defined as a "nonpretextual claim that" the "conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal."[154] (This is a puzzler too. Does "nonpretextual" measure genuineness of intentions or substantiality of effects? And what work is the notorious "competition

149. *See, e.g.*, Carstensen, *supra* note 148, at 68 ("[T]he Call Rule apparently functioned only to facilitate the joint creation of a better organized transactional forum. . . . [I]t is [probably] a classic example of the least restrictive control essential to the viability of a primary transaction.").

150. United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc).

151. *Id.* at 54–56.

152. *Id.* at 58.

153. *Id.* at 58–59.

154. *Id.* at 59.

on the merits" doing here?) At the third step, the plaintiff must show net harm.[155]

With some slightly uneasy qualifications, then, this all sounds like a broadly act-welfarist definition of what it means to promote or harm "competition."[156] But when the court *applied* this test, a thicker "competition" concept promptly surfaced, trailing confusion—and all kinds of nonwelfarist considerations—in its wake. Although some of the court's opinion resembles the promised act-specific welfarism,[157] much of it turns on very different ideas and standards, with competition and its cognates playing a prominent role in smuggling them in. The practices are complex, and the relevant section of the opinion is long—the analysis occupies almost ten thousand words[158]—so this Section will focus on a few highlights.[159]

In testing for "anticompetitive" effects, the court repeatedly did just what it had undertaken not to do: it inferred harm to competition from harm to competitors.[160] Despite the slew of "anticompetitive

155. *Id.*

156. For a discussion of the difference between act- and rule-consequentialisms, including welfarism, see generally Walter Sinnott-Armstrong, *Consequentialism*, *in* THE STAN. ENCYC. OF PHIL. (2023).

157. *See, e.g.*, *Microsoft Corp.*, 253 F.3d at 65 (removing Internet Explorer from the uninstall function "reduces the usage share of rival browsers not by making Microsoft's own browser more attractive to consumers but, rather, by discouraging OEMs from distributing rival products").

158. *Id.* at 59–78.

159. In addition to the observations in the text, it is worth acknowledging at the outset that the evidence of actual or likely harm to actual consumers, especially from monopoly maintenance in an operating-system market, was awfully thin in *Microsoft*. The court expressly held that the targeted businesses would not have dented Microsoft's monopoly in the "foreseeable future," *id.* at 55, and the district court's findings of fact went only far enough to show that Navigator and Java were plausible threats and nothing more. Findings of Fact, United States v. Microsoft Corp., 84 F. Supp. 2d 9, 28–29 (D.D.C. 1999). It is very hard to find many signs of the court's promised emphasis on harm to consumers, other than in the loosest and most directional sense.

160. *See, e.g.*, *Microsoft Corp.*, 253 F.3d at 61 ("By preventing OEMs from removing visible means of user access to IE, the license restriction prevents many OEMs from pre-installing a rival browser and, therefore, protects Microsoft's monopoly from the competition that middleware might otherwise present. Therefore, we conclude that the license restriction at issue is anticompetitive."); *id.* at 72 (holding that, for an agreement for default status with certain software vendors that did not amount to quantitative substantial foreclosure, "by keeping rival browsers from gaining widespread distribution (and potentially attracting the attention of developers away from the APIs in Windows), the deals have a substantial effect in preserving Microsoft's monopoly, we hold that plaintiffs have made a prima facie showing that the deals have an anticompetitive effect"); *id.* at 73–74 ("Because Microsoft's exclusive contract with Apple has a substantial effect in restricting distribution of rival browsers, and because . . . reducing usage share of rival browsers serves to protect Microsoft's monopoly, its deal with Apple must be regarded as anticompetitive."); *see also id.* at 65 ("Because the override [forcing users to use Internet Explorer

effects" the court purportedly identified, one can search the *Microsoft* opinion at length without finding an actual or likely consumer welfare injury, or much attention paid to the inferential gap that separates such an injury from the mere fact of harm to a rival.[161] In fact, on a candid reading, harm to rivals *dominates* the analysis. Moreover, the court repeatedly rested the analysis of harm on explicitly *nonwelfarist* criteria: whether a practice was "competition on the merits"; whether it involved a product improvement; whether it involved the creation of an incompatible product; whether it involved "superiority" and "acumen"; and so on.[162] At one point, the court concluded that Microsoft acted with "anticompetitive effect and intent" when it strongarmed Intel, but based this conclusion on evidence that spoke only to expectations of harm to a *competitor*.[163] Where did all the act-welfarism go?[164]

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rather than another browser] reduces rivals' usage share and protects Microsoft's monopoly, it too is anticompetitive.").

161. The closest the court approaches to this issue is in its discussion of causation: a brief section, treating all practices in aggregate, and focusing on contribution to monopoly power rather than consumer harm. *Id.* at 78–80. This discussion does not refer to consumers, and it is not clear whether the court regarded it as internal to "step one" of the proposed framework or an additional, separate test. It certainly does not closely approach a measure of actual or likely welfare impacts on consumers.

162. For example, the *Microsoft* opinion stated:

> Microsoft does not deny that the prohibition on modifying the boot sequence has the effect of decreasing competition against [Internet Explorer] by preventing OEMs from promoting rivals' browsers. Because this prohibition has a substantial effect in protecting Microsoft's market power, *and does so through a means other than competition on the merits*, it is anticompetitive.

Id. at 61–62 (emphasis added); *id.* at 62 ("By preventing the OEMs from [promoting other internet access providers and internet browsers], this type of license restriction . . . is anticompetitive: Microsoft reduced rival browsers' usage share *not by improving its own product* but, rather, by preventing OEMs from taking actions that could increase rivals' share of usage." (emphasis added)); *see also, e.g.*, *id.* at 65 ("Judicial deference to product innovation . . . ."); *id.* at 68 ("[A] monopolist does not violate the Sherman Act simply by developing an attractive product . . . ."); *id.* at 75 (stating that Microsoft's own Java virtual machine "does allow applications to run more swiftly and [therefore] does not itself have any anticompetitive effect"); *id.* at 75 ("[A] monopolist does not violate the antitrust laws simply by developing a product that is incompatible with those of its rivals."); *id.* at 77 ("Microsoft's conduct related to its Java developer tools served to protect its monopoly of the operating system *in a manner not attributable either to the superiority of the operating system or to the acumen of its makers*, and therefore was anticompetitive." (emphasis added)).

163. *Id.* at 77.

164. One might be drawn to a reading on which the apparent nonwelfarism was "really" just sophisticated proxying for some kind of (act or rule) welfarism, perhaps involving a chain of generalized inferences about consumer harms. But there is little in the opinion to suggest such an analysis, which is in any event a *long* way from the promised act-specific weighing of harms and

The court's handling of justifications also deviated from the promised welfarism, under "competition's" influence. For example, the court accepted that a license restriction that prevented original equipment manufacturers ("OEMs") from using a substitute "shell" interface was "procompetitive" for the reason that it prevented a "drastic alteration of Microsoft's copyrighted work."[165] (What has copyright protection or the drasticness of an alteration got to do with consumer welfare impacts?[166]) The court also concluded that Microsoft's decision to require, in certain circumstances, the use of Internet Explorer rather than rival browsers was supported by a procompetitive justification because it served a design purpose that Microsoft had chosen—allowing file browsing and internet browsing in the same window—with no suggestion that consumers actually valued that choice or were benefited by it overall.[167] And the court concluded that the fact that a challenged practice may have encouraged developers to write for Microsoft's own products—thus, presumably, increasing demand for the products at least to some extent—was not a procompetitive effect but rather a "neutral" one.[168]

Again, the point is not that *Microsoft* is wrong or unprincipled. In many respects, *Microsoft* deserves its place as a jewel in the crown of modern welfarist antitrust, and there are plenty of sensible ways to understand what the court did and why. The point is that the purported use of the "competition" concept does nothing to help, and much to impair, the clarity and analytical integrity of the opinion. Despite a fairly clear effort to commit to a consumer-welfarist criterion in its formulation of the applicable rules, the *Microsoft* court found itself drawn repeatedly into leaning on the "competition" criterion—anticompetitive, procompetitive, competition on the merits, and so on—to introduce an array of other considerations. In reading the

benefits. And with hand-waving welfarism like that, who needs deontology? For example, if the court was willing to infer welfare harms to consumers from mere harms to rivals—an effect that flows from product improvements too!—then why all the italicized emphasis that harm to competitors is not sufficient?

165. *Microsoft Corp.*, 253 F.3d at 63.

166. Remarkably, this holding—which appears to rely on the presence of an intellectual property right to make lawful something that would otherwise be unlawful—came right after a rather stirring peroration on the theme that intellectual property rights do not confer a privilege to violate the antitrust laws. *Id.* at 62–63.

167. *Id.* at 67.

168. *See, e.g.*, *id.* at 71, 72. This is particularly odd given that the most natural reading of the second-step burden in the court's formulation was a requirement to show some kind of consumer welfare benefit, even if that benefit was of lesser magnitude than the harms.

opinion, readers are forced into some puzzled reverse engineering of where and why the court qualified its welfarism or departed from it entirely. Here, just as in *Chicago Board of Trade*, "competition" does not seem to contribute anything except confusion.

b. Inferring Competition from Antitrust. At this point, the reader might be thinking: Well, OK, but even if "competition" can't give content to antitrust, can't antitrust give content to "competition"? Specifically, one might say, isn't it true that many people just use that term as a shorthand to mean "whatever antitrust treats as valuable"? And there is obviously a reasonable nub of consensus about what this includes: low prices, high quality, innovation, lower costs, and so on. There is about the same amount of consensus about what antitrust treats as disvaluable: high prices, low quality, and so on. So, whether that kind of working definition of "competition" comes from economic theory or from the praxis of antitrust law, what's the problem? In what sense, then, is it true or helpful to say that competition is empty?

There's certainly some truth there, but nothing that redeems the use, or purported use, of the competition criterion. Three points are critical.

First, the apparent consensus is and always was much more limited than it may seem. A consensus that some things—like price, quality, and innovation—are usually valuable or disvaluable does not imply any particular consensus about *how they are to be weighed against each other when they conflict*. A trivial example: If a merger will raise price by 5 percent, how much additional innovation must it cause to make the merger "procompetitive overall"? Why is that, and not some other amount, the demand of the competition criterion?

Likewise, a consensus that some considerations are relevant does not entail a consensus about *which other considerations are relevant and which are not*. To illustrate, take a roomful of consumer-welfare antitrust lawyers: folks one might have in mind when suggesting that there is or was a reasonable level of shared and settled understanding about competition's meaning. Ask them whether the presence or absence of the following in an antitrust case would change the assessment of an impact on competition, *without more*—that is, in their own right, and not as proxies for other things: the presence of a legitimate business purpose; an effect on concentration or rival head count; the fact that challenged conduct involves the use of a valid property right; coercion; the elimination of "intrabrand" price competition; the fact that challenged conduct constitutes, among other things, an improvement to some extent of a product or a method of production; the creation or increase of market power; the use of incumbency in one market to generate a competitive advantage in another market; the presence of "free riding" on a rival's investment and innovation; and so on. Even those who purport to adhere to "traditional" or "consumer welfare" antitrust will almost certainly sort these features differently by reference to whether their salience for a "competition" assessment is positive, negative, or neutral.[169] It should be very obvious that these are not esoteric edge cases, but central matters of basic principle.

Second, whatever may once have been the case, there is no plausible consensus meaning of "competition" in the thick sense across the antitrust conversation today. Even to the extent that a well-specified consensus has in fact existed at certain times about what it meant to promote or increase "competition" within antitrust—for example, perhaps, "to maximize consumer welfare" at some point in recent years, or "to promote deconcentration" in, say, the 1960s—it is clear that any such consensus has fractured today.[170] Today, as chronicled above, a purported competition concept is frequently found deployed in service of diametrically opposed arguments by those who talk and write about antitrust.[171] Under such circumstances, the idea that it is an efficient symbol for a shared meaning does not seem remotely plausible.

Third, a definition of "competition" formed by loose induction from existing antitrust practice—if such a criterion could be derived in

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169. One good way to see the truth of this is to see that courts—applying notionally welfarist antitrust doctrine and presumably not trying to innovate with respect to the definition of "procompetitive," "anticompetitive," and so on—routinely take different views about these things. *See infra* Part II.A.3.

170. *Compare, e.g.*, Herbert J. Hovenkamp, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 1 (2005) ("After decades of debate, today we enjoy more consensus about the goals of the antitrust laws than at any time in the last half century."), *and* Leary, *supra* note 125 ("[T]he objection [to what Leary refers to as 'Chicago School economics'] based on social and political factors seems to have died out."), *with, e.g.*, Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, 64 ANTITRUST BULL. 479, 479 (2019) ("[C]onsumer welfare antitrust rests on a bed of nonsense."), *and* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J. F. 960, 979 (2018) ("The existing approach [to antitrust] is premised on a theory of market power that proves deeply hostile to enforcement. Restoring a theory of power that accords with the original values of antitrust—including a distrust of concentrated private power—is critical . . . ."); *see also, e.g.*, Daniel Francis, *Reflections on the Revolution in Antitrust*, 11 J. ANTITRUST ENF'T 185 *passim* (2023) (describing contemporary debate); Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L. J. INDUS. ORG. 714, 717–21 (2018) [hereinafter Shapiro, *Time of Populism*] (same).

171. *See, e.g.*, *supra* Parts I.C. (enforcers), I.E. (scholars).

this way—is of very limited value. Clearly, such a definition cannot serve as a normative premise for a defense, critique, or renegotiation of the terms of that same practice.[172] But, as we have seen, the competition concept is routinely deployed in exactly such efforts. It also depends on the very thing that competition talk obscures: a clear sense of the unifying principles. Antitrust discourse can enjoy the luxury of a shorthand only if, and so long as, there is concrete consensus on what it is supposed to be shorthand *for*.

3. *Competition as an Instrument for Other Values.* For such an indeterminate value, competition seems to do a lot of work in antitrust cases. As *Chicago Board of Trade* and *Microsoft*—and countless other cases—illustrate, purported analytical recourse to "competition" *in application* typically involves attention to other quanta or metrics: welfare, (de)concentration, (lack of) market power, (lack of) coercion, and so on.

This need not be a problem. A stable and coherent compound of one or more other quantities or criteria—for example, "the maximization of welfare" or "the maximization of welfare in lexical priority over the maximization of deconcentration" (or whatever)—could serve as a perfectly meaningful and coherent yardstick for antitrust analysis, as well as a target for productive criticism and debate. So long as the compound was reasonably well understood, it would be churlish to complain that the word "competition" was used as a label for it.

But this does not, in fact, seem to be what is going on. Instead, in antitrust cases, "competition" is routinely found channeling a startlingly wide, and inconsistent, array of different metrics and quantities. Barring a small number of cases—the worst cartels, a small subset of horizontal mergers, and so on—it is very obvious that these measures will often give sharply different answers regarding whether and how competition-as-such has been affected.[173] Moreover, no single one of these metrics seems capable of plausibly standing in for "competition" in antitrust: that is, none of them alone seems to be what

172. The point here is that if "promotion of competition" means nothing more than "doing what we generally do in antitrust," the additional normative charge available from invoking that premise in critique or defense of whatever it *is* that we generally do is limited at best.

173. Consider, for example, horizontal mergers that increase concentration but reduce prices; product improvements or unilateral cost savings that increase market power and concentration but benefit consumers; and exclusive partnerships that raise rivals' costs but promote innovation.

courts and others really and consistently mean when they invoke the competition concept.

This Section will examine some of the leading candidates in three groups: metrics that essentialize competition to a state or quality of the world (like welfare or market power); metrics that essentialize competition to an impact on market participants (like an impact on market participant efficiency or costs); and metrics that essentialize competition to the nature, not the effect, of particular practices (like the purpose or inherent fairness of a practice).

This examination has two objectives: First, to illustrate the wide range of divergent measures on which courts and others have inconsistently drawn when purporting to measure "competition"; and, second, to show that it would not be doctrinally plausible to reduce antitrust's "promotion of competition" to the simple maximization of any one of these values. If antitrust is to enjoy a meaningful goal in place of (or by definition of) the "promotion of competition," that goal will almost certainly have to be a multidimensional one that includes or implies a metarule for integrating multiple measures.

a. Competition as a State of the World.

Welfare and Its Proxies. Since the 1970s, the Court has emphasized the primacy of "consumer welfare" as a guide for antitrust.[174] Welfarism, as noted above, broadly takes the satisfaction of the subjective preferences of persons to be the source of normativity.[175] Thus, courts often suggest that whatever promotes overall welfare (or the welfare of some subset of persons) is procompetitive, and whatever reduces it is anticompetitive.[176] And, in modern agency practice, the position taken by successive iterations of the Merger Guidelines—that price-reducing cost savings may cause a merger not to harm competition when it would otherwise do so—strongly implies that harm to competition is defined by a price increase or other welfare

174. *See, e.g.*, Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221 (1993); Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15 (1984); Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

175. *See supra* note 84 and accompanying text.

176. *See, e.g.*, Vasquez v. Ind. Univ. Health, Inc., 40 F.4th 582, 585 (7th Cir. 2022); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 309 (3d Cir. 2007); Major League Baseball v. Crist, 331 F.3d 1177, 1186 (11th Cir. 2003); United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc); *see also* N. Sec. Co. v. United States, 193 U.S. 197, 331 (1904) ("[T]he natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promoting trade and commerce.").

harm.[177] After all, if downward pricing pressure from cost savings can offset and eliminate a merger's illegal quality, it sure sounds like that quality might be the tendency to increase prices!

Commentators have also made the case for the essentialization of competition into welfare impact. Most famously, Robert Bork in *The Antitrust Paradox* explicitly confronted the fact that "competition" is capable of bearing multiple meanings, and argued that it should be defined for the purposes of antitrust law as "any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree."[178] Thus, for Bork, "promoting" competition simply meant increasing overall welfare, and "restraining" competition meant reducing it.

Welfare analysis presents many complexities. Some are practical, like the need to rely on proxies such as price and output,[179] or the difficulty of reflecting innovation effects.[180] Others are conceptual, like whether a welfare standard should include all persons, all end consumers, all trading partners in a relevant market, or something else,[181] and whether antitrust should promote welfare through a general-equilibrium allocative-efficiency frame or a partial-equilibrium surplus-maximization one.[182]

These puzzles aside, act-welfarism *alone* does not seem an especially plausible stand-in for "competition" in antitrust doctrine.[183]

177. U.S. DEP'T OF JUST. & FTC, MERGER GUIDELINES § 3.3 (2023); Malcolm B. Coate & Andrew J. Heimert, *Merger Efficiencies at the Federal Trade Commission*, FTC BUREAU OF ECONOMICS 4 (Feb. 2009).

178. BORK, *supra* note 13, at 61.

179. *See, e.g.*, Herbert Hovenkamp, *The Antitrust Text*, 99 IND. L.J. 1063, 1077 (2024); Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2410 (2013); Ward S. Bowman, Jr., *Toward Less Monopoly*, 101 U. PA. L. REV. 577, 615–20 (1953). *But see* John M. Newman, *The Output-Welfare Fallacy: A Modern Antitrust Paradox*, 107 IOWA L. REV. 563, 581–607 (2022) (emphasizing the divergence between output and welfare).

180. *See, e.g.*, Richard J. Gilbert & A. Douglas Melamed, *Antitrust For Innovation: A Progress Report* 12 (GW Competition & Innovation Lab Working Paper, Paper No. 2024/9, 2024) (noting complexity); Richard J. Gilbert, INNOVATION MATTERS: COMPETITION POLICY FOR THE HIGH-TECHNOLOGY ECONOMY 39 (2020) ("[I]t is difficult to construct empirical tests that isolate the effects of a transaction on innovation.").

181. *See* FRANCIS & SPRIGMAN, *supra* note 19, at 4–5 (collecting sources).

182. *See, e.g.*, Werden, *supra* note 69, at 714–18.

183. I am setting rule-welfarism aside here. It is not a standard for resolving individual cases, but rather a metarule for choosing such standards. *See* Sinnott-Armstrong, *supra* note 156. I set it aside because the demands of rule-welfarism are hard to pin down—it could serve as the normative ground for a very wide variety of specific rules, including rules that look nothing like

For one thing, of course, there is reason to doubt that many speakers and writers surveyed in Part I, or the framers of our antitrust laws, had preference welfarism in mind when they talked about promoting competition.[184]

The Supreme Court has repeatedly denied that antitrust's competition criterion can be essentialized to welfare effects. Thus, a transaction may harm competition even if its impact on welfare is positive. In *Brown Shoe Co. v. United States*,[185] for example, the Court held that while Congress "appreciated that occasional *higher costs and prices might result* from the maintenance of fragmented industries and markets," in enacting the Clayton Act's competition test it nevertheless "resolved these competing considerations in favor of decentralization."[186] A year later, the Court made the point again: "[Congress] proscribed anticompetitive mergers, *the benign and the malignant alike*, fully aware, we must assume, that some price might have to be paid."[187] And *National Society of Professional Engineers v. United States*[188] implies that a competition test does not require *or even permit* asking whether case-specific effects are good or bad.[189]

Conversely, the Court has also emphasized that welfare harm does not establish harm to competition. In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,[190] the Court went out of its way to emphasize that neither the charging of monopoly prices nor the cutting off of a rival was "anticompetitive."[191] In *NYNEX Corp v. Discon, Inc.*,[192] the Court squarely held that evasion of a regulatory price cap does not constitute competitive harm even if consumers are

act-welfarist ones—and because courts and other antitrust speakers generally suggest that the "competition" criterion applies to individual practices and transactions (that is, "acts"), not rules.

184. *See, e.g.*, Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359 *passim* (1993); Thomas W. Hazlett, *The Legislative History of the Sherman Act Re-examined*, 30 ECON. INQUIRY 263 *passim* (1992); Bok, *supra* note 10, at 233–38; Note, *Section 7 of the Clayton Act: A Legislative History*, 52 COLUM. L. REV. 766, 771 (1952).

185. Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

186. *Id.* at 344 (emphasis added).

187. United States v. Phila. Nat'l Bank, 374 U.S. 321, 371 (1963) (emphasis added); *see also* FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967) ("Possible economies cannot be used as a defense to illegality.").

188. Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679 (1978).

189. *Id.* at 695.

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

191. *Id.* at 407–11.

192. NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998).

harmed.[193] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*[194] explicitly says that above-cost discounts *do not harm competition* for antitrust purposes regardless of their effects.[195] And, as Part I demonstrated, enforcers and scholars have often distanced "competition," as they understand it, from welfare impacts.[196]

There are other problems too. Anything with an (actual or expected) negative impact on welfare would be anticompetitive under this standard. Thus, bad-idea joint ventures and new products alike would, in principle, be "anticompetitive." So would acquisitions that would result in competitive assets coming under the control of less able managers, and a whole swathe of unilateral practices (including mere price increases reflecting the use of previously unexploited monopoly power; the introduction of a bad product; and a great many refusals to deal or license).[197] In some circumstances, simply winning new business in a market with strong network effects or scale economies could lead to overall welfare harm, and would thus be "anticompetitive." None of this seems a convincing fit with antitrust's use of the competition criterion.

Market Power. A second plausible perspective essentializes competition as the opposite of market power. On this view, what reduces market power is procompetitive; what increases it is anticompetitive. Courts sometimes indicate that antitrust's competition criterion should be understood in just this way.[198] The 2010

193. *Id.* at 136; *see also* Rambus Inc. v. FTC, 522 F.3d 456, 464 (D.C. Cir. 2008) (reaching a similar holding in the standard-setting context).

194. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

195. *Id.* at 222–23.

196. *See supra* Part I.C., I.E.

197. *See* Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407–08 (2004) (emphasizing general freedom to refuse to share).

198. *See, e.g.*, NCAA v. Alston, 141 S. Ct. 2141, 2155 (2021) (describing rule of reason as "a fact-specific assessment of market power and market structure" to assess "the challenged restraint's actual effect on competition—especially its capacity to reduce output and increase price" (internal quotation marks and citation omitted)); Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 479 (7th Cir. 2020) (indicating, citing the 2010 Horizontal Merger Guidelines, that mergers may be anticompetitive where they contribute to market power); E. Food Servs., Inc. v. Pontifical Cath. Univ. Servs. Ass'n, Inc., 357 F.3d 1, 5 (1st Cir. 2004) ("Virtually always, anti-competitive effects under the rule of reason require that the arrangement or action in question create or enhance market power—meaning the power to control prices or exclude competition."); FTC v. H.J. Heinz Co., 246 F.3d 708, 713 (D.C. Cir. 2001) ("Merger enforcement, like other areas of antitrust, is directed at market power." (quoting LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST § 9.1, at 511 (2000))).

Horizontal Merger Guidelines—repeatedly endorsed and applied by courts—implementing a statutory commandment to protect against reductions in "competition," stated that "mergers should not be permitted to create, enhance, or entrench market power or facilitate its exercise."[199] Scholarly treatments have often suggested that competition and monopoly (or market) power are opposed and that the latter can be used to measure the former: Professor Eric Posner's work offers a recent and forceful example.[200] And the opposition of competition and monopoly is a clear theme in antitrust legislative history.[201]

But "reduction in market power" does not furnish a particularly plausible version of "competition" for antitrust purposes. As a threshold matter, it is notoriously difficult to pin down exactly what "market power" means: Share of a defined market, profit margin, Lerner Index (profit margin divided by price), and own-price inelasticity of demand are all plausible candidates.

None of the leading definitions seem well placed to serve as antitrust's central criterion. A key problem is compatibility with "the basic antitrust principle that a firm may gain monopoly power through superior efficiency": the proposition that it is not "anticompetitive" to do nothing but improve your product or reduce your costs.[202] Market power can increase when a product is improved or differentiated in a way that purchasers value, or when its costs are reduced. (Market share also increases when a supplier lowers its prices.) And if less market power meant more competition, these would all be *anticompetitive* effects. Instead, there is broad agreement they are centrally *procompetitive*.[203]

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199. U.S. DEP'T OF JUST. & FTC, HORIZONTAL MERGER GUIDELINES § 1 (2010).

200. *See* Posner, *Foundations*, *supra* note 13, at 2; *see also* Paul J. McNulty, *Economic Theory and the Meaning of Competition*, 82 Q.J. ECON. 639, 639–40 (1968) ("Probably the most general tendency concerning the meaning of competition in economic theory is to regard it as the opposite of monopoly."); Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CALIF. L. REV. 1580, 1587 (1983) (stating that the purpose of merger law is "to prevent corporations from acquiring market power through mergers").

201. "Remember, it is monopoly that we wish to destroy. Remember, it is competition we wish to maintain." 51 CONG. REC. 9265 (1914) (statement of Rep. Morgan).

202. Kirkwood, *supra* note 12, at 2432.

203. *See, e.g.*, Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (emphasizing antitrust's valorization of innovation); NCAA v. Bd. Regents Univ. Okla., 468 U.S. 85, 114 (1984) (evaluating procompetitive efficiencies); United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (stating that § 2 does not punish "superior product, business acumen, or

A rough paraphrase of the market-power view locates competition in "closeness" of rivalry, or just cross-elasticity of demand. This approach might resonate with the observation that an "intensely competitive" sports game is one closely fought between near equals. But the analogy to sports is profoundly unpromising. Parity between rivals is desirable in a sport because as participants we value both the experience of a hard struggle and a realistic prospect of victory (it is no fun to be on either side of a one-sided game), and because as observers we value tension and uncertainty. Parity of prospects may also help to elicit maximum effort, which we may value in a sporting context for its own sake.[204] None of that has much to do with the antitrust system. Any criterion that can be maximized by destroying or reducing social value—driving up the market leader's costs, or reducing the quality of its products, in the name of "leveling down" to achieve parity with rivals—does not seem much of a fit with a recognizable antitrust project.

Deconcentration. A third perspective would define competition as the inverse of concentration. On this view, whatever increases concentration is anticompetitive; whatever decreases it is procompetitive.

Certainly, there have been times in antitrust's history where concentration has dominated antitrust enforcement and policy. Courts have come close to identifying competition with concentration on some occasions.[205] And concerns about market concentration have been a prominent theme in antitrust's legislative history.[206] This idea resonates with an old theme that more competitors generally means more

historic accident"); *In re* EpiPen, 44 F.4th 959, 986 (10th Cir. 2022); Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 478 (7th Cir. 2020); Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 999–1000 (9th Cir. 2010); United States v. Microsoft Corp., 253 F.3d 34, 68 (D.C. Cir. 2001) (en banc) (indicating that "developing an attractive product" could not be anticompetitive).

204. I owe this point to Scott Hemphill.

205. *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 317–22 (1962); United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963); United States v. Von's Grocery Co., 384 U.S. 270, 278 (1966); *see also* United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945) ("It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few."); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323 (1897) ("Trade or commerce . . . may . . . be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein . . . .").

206. *See, e.g.*, *supra* note 184 (collecting sources).

competition and more optimality,[207] and with structuralist concerns about concentrated markets.[208] But the *identification* of concentration with competition—regarding a more fully atomized market as a "more competitive" one, and an increase in concentration as "anticompetitive"—runs into some serious problems.

Perhaps most obviously, this conception of "competition" may put it directly at odds with the central things that make interactions in (thin) competition socially valuable. This conception idealizes a situation in which costs are often higher, output lower, and innovation less valuable than they would be if business were operated at greater scale. In other words, it invites a retread of all the objections of the monopolistic-competition tradition as well as those of the post-structuralist reaction.[209] This reading of the concept idealizes an economy of individual entrepreneurs dealing with one another on spot markets. Many courts have disdained such a view,[210] doubting with Justice Holmes that antitrust should "be construed to mean the universal disintegration of society into single men, each at war with all the rest, or even the prevention of all further combinations for a common end."[211] And it is certainly not clear that the antitrust legislators thought they were prohibiting concentration as such.[212]

Using concentration to give content to competition generates some outcomes that cannot be right. It means that when a leading competitor wins share by improving its product or lowering its costs, competition is *harmed*.[213] But this idea conflicts with the basic principle that antitrust treats "mere" product improvements as an improvement in competition.[214] And it finds procompetitive benefits in some very odd places. Suppose, for example, that a monopolist allows its quality to decline—or even exits entirely—shedding its market share to other

207. *See, e.g.*, *supra* note 82 and accompanying text (describing head-count theory in classicism).

208. *See supra* note 110 and accompanying text.

209. *See supra* notes 99–117 and accompanying text.

210. *See, e.g.*, United States v. Baker Hughes Inc., 908 F.2d 981, 982–83 (D.C. Cir. 1990); United States v. Gen. Dynamics Corp., 415 U.S. 486, 503–08 (1974).

211. N. Sec. Co. v. United States, 193 U.S. 197, 407 (1904) (Holmes, J., dissenting).

212. *See, e.g.*, Orbach, *supra* note 72, at 2267 ("The small-business interests hypothesis . . . mostly builds on out-of-context quotes of lawmakers' concerns for competitors of the trusts.").

213. For example, in a market with a 40 percent player and six 10 percent players, the migration of 5 percent of the market from one of the smaller players to the market leader would increase the Herfindahl-Hirschman Index ("HHI") from 2200 to 2525. HHI, the standard modern concentration measure, is the sum of the squares of the market participants' respective shares.

214. *See supra* note 203.

firms. On this view, that result is an *improvement* in competition, although all that has happened is a classic antitrust harm.[215]

Rival Head Count. Another possible measure of "competition" involves simply counting heads. On this measure, whatever increases the number of market participants promotes competition; whatever decreases it restrains competition. As noted above, this idea has popped up from time to time in economic thought, usually in a casual way.[216] Some of the Court's mid-century decisions appear to suggest—at least broadly—that a harm to competition can be inferred from a downward trend or reduction in head count.[217] Such tests also make occasional cameos in more recent writing.[218]

But there are very deep problems with a head-count-based conception of competition. For one thing, it would automatically condemn as anticompetitive *any* practice that leads to fewer independent rivals. That includes the formation of partnerships, horizontal mergers, hiring workers who would otherwise compete on their own account—perhaps even any horizontal agreement, depending on whether the head count methodology counts cartel or joint-venture members separately or together. In each case, the number of independent rivals has been reduced.[219] For a second thing, this conception would contain no resources to distinguish between

215. *See, e.g.*, 1-800 Contacts, Inc. v. FTC, 1 F.4th 102, 118 (2d Cir. 2021); Procaps S.A. v. Patheon, Inc., 845 F.3d 1072, 1084 (11th Cir. 2016).

216. *See supra* note 82 and accompanying text; Vickers, *supra* note 8, at 3 (noting that common meanings of competition include "an increase in the number of rivals"); Dennis, *supra* note 8, at 278 ("From the very beginning of economic theory, the phrase 'more competition' was often meant to imply 'more competitors' and the condition of large numbers was taken to measure the degree or intensity of competition."); *see also* 51 CONG. REC. 15830 (1914) (statement of Sen. James Reed) (implying a rival head-count theory of competition by stating "so long as [a competitor] is there and can do business," competition has not been lessened).

217. *See, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270, 278 (1966) (describing a "market characterized by a long and continuous trend toward fewer and fewer owner-competitors" as "exactly the sort of trend which Congress, with power to do so, declared must be arrested [in the Clayton Act]"). *But see id.* at 287 (Stewart, J., dissenting) ("I believe that even the most superficial analysis of the record makes plain the fallacy of the Court's syllogism that competition is necessarily reduced when the bare number of competitors has declined.").

218. *See, e.g.*, Tim Wu, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 129 (2018) (proposing a rule against mergers that reduces the number of "major firms" to fewer than four).

219. *See, e.g.*, Elhauge, *The Competitive Process*, *supra* note 11 ("[On AAG Kanter's proposed approach] antitrust law would ban two plumbers, in a market with 1000 plumbers, from forming a partnership to offer better services. He can't mean that."); Bok, *supra* note 10, at 312 n.261 (collecting problems with head count metrics).

"good" and "bad" ways of driving out rivals—a distinction that has been central to antitrust since its incipiency.[220] Thus, a product improvement that drove out rivals would be condemned as "anticompetitive," despite widespread agreement that success through product improvement is the very essence of competition as antitrust values it.[221] And for a third thing, condemnation under this standard would find no competitive harm in any practice that reduced all the defendant's rivals to shadows of their former selves, and resulted in serious overall harm, while keeping them barely in the market.[222]

Contestability / Incumbent Insecurity. One vision of competition identifies it with something like contestability or insecurity of incumbency. On this view, competition increases or decreases in proportion to the threat that an incumbent will or might lose share to rival entry or expansion.

Certainly, the idea of contestability has long been prominent in scholarly discussion of competition.[223] The value of competition "for" the market was a major focus of the "contestable markets" literature, highlighting ways in which possible entrants could exert competitive pressure even if not already in the market.[224] The roots of potential-competition theory are older still: They are visible in nineteenth-century economic scholarship.[225] And antitrust legislators repeatedly referred to the objective of promoting open, free, and contestable markets.[226]

220. *See, e.g.*, Francis, *Making Sense*, *supra* note 20, at 793–94, 801–03.

221. *See supra* note 82 and accompanying text.

222. *See, e.g.*, McWane, Inc. v. FTC, 783 F.3d 814, 840 (11th Cir. 2015) (imposing liability despite the fact that the victim had not been completely excluded from the market); United States v. Microsoft Corp., 253 F.3d 34, 78–80 (D.C. Cir. 2001) (en banc) (affirming sufficient causation of anticompetitive effects, resulting in liability, in a case in which neither victim had entirely failed).

223. *See, e.g.*, Vickers, *supra* note 8, at 3 (noting that common meanings of competition include "freedom to enter an industry"); *see also* Dennis, *supra* note 8, at 99 (noting "free competition" in classicism often meant freedom to enter a market).

224. *See generally* Marius Schwartz, *The Nature and Scope of Contestability Theory*, 38 OXFORD ECON. PAPERS, NEW SERIES 37 (1986); Baumol et al., *supra* note 116; WILLIAM S. TYE, THE THEORY OF CONTESTABLE MARKETS: APPLICATIONS TO REGULATORY AND ANTITRUST PROBLEMS IN THE RAIL INDUSTRY (1990).

225. *See, e.g.*, J.E. CAIRNES, SOME LEADING PRINCIPLES OF POLITICAL ECONOMY 66 (1874) (supply responses in labor markets); John Bates Clark, *The Limits of Competition*, 2 POL. SCI. Q. 45, 49–51 (1887); JOHN BATES CLARK, THE CONTROL OF TRUSTS 28 (1901).

226. As one antitrust legislator put it:

But there are important problems in asking this measure to stand in for "competition." For one, this measure evaluates as "anticompetitive" mere success in markets in which scale or incumbency confer an advantage. Such effects make it more difficult for rivals to enter and thus reduce the market's contestability, even though it inverts universal practice to call this anticompetitive.[227] For another, the approach welcomes as "procompetitive" anything that makes an incumbent's product worse, thus making its incumbency less steady, and entry more likely. For a third, it is not really clear that contestability is any easier to render as a scalar, or to essentialize in any dimension, than is "competition" writ large.

b. Competition as an Impact on Market Participants.

Own Efficiency. One view constitutes "competition" as anything that improves one's own productive efficiency. Conduct is procompetitive if it makes any contribution to increasing useful output for the same input, or the same useful output for less input, and conduct is anticompetitive if it has the reverse effect.

There is some support for this idea. The *Microsoft* court, for example, suggested that "competition on the merits" in antitrust doctrine amounts to conduct that "involves . . . greater efficiency or enhanced consumer appeal."[228] Scholars have often offered best readings of law that centrally feature contribution to efficiency.[229] And, as far as I can tell, no court has held for decades that a practice or transaction was "anticompetitive" simply because it increased productive efficiency or product quality, even though, in the right circumstances, a simple cost reduction could result in overall welfare harms—for example, by reducing rivals below viable scale or by facilitating coordination.[230]

> We are trying to keep the doors of competition open in this land. We are trying to keep the highways of opportunity unobstructed. We are trying to keep it so that the feet of the men of to-day may travel along an open path, so that all may have a fair chance to gain a livelihood and to embark in business.

51 CONG. REC. 13231 (1914) (statement of Sen. James Reed).

227. *See supra* note 203 and accompanying text.

228. United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001) (en banc).

229. *See generally* Elhauge, *Better Standards*, *supra* note 13; Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L.J. 975 (2005).

230. *See, e.g.*, New York *ex rel.* Schneiderman v. Actavis PLC, 787 F.3d 638, 653–54 (2d Cir. 2015) (finding "product improvement alone" not anticompetitive). *But see, e.g.*, Jonathan B.

But reducing competition to this question *alone*—a move the aforementioned scholars avoid—would neuter great swathes of antitrust doctrine. In markets distinguished by economies of scale, anything that tended to exclude the firm's rivals and increase the firm's output would score well on this measure, giving a pass to some very familiar forms of monopolization.[231] This view would also give a pass to conduct that was immensely harmful *overall*, so long as there was some nonzero benefit to defendant efficiency, up to and including mergers to monopoly.[232]

Impact on Rival Ability / Incentive To Compete. On another view, "anticompetitive" conduct is anything that softens rival ability or incentive to meet demand—for example, by raising rivals' costs or by incentivizing rivals to avoid competition.

Appealingly, a criterion of this kind would capture both exclusion and collusion: antitrust's central concerns.[233] I have suggested elsewhere that an effect of this kind is a necessary, but not sufficient, element of liability for monopolization under § 2 of the Sherman Act.[234] And a concern with impact on rival ability to compete is visible in antitrust's legislative history.[235]

But this criterion cannot convincingly do full duty for antitrust's concept of *competition* as such. For one thing, it cannot yield a convincing account of the promotion of competition. It would not be sensible to describe as "procompetitive" conduct that *increases* rival

Baker, *Finding Common Ground Among Antitrust Reformers*, 84 ANTITRUST L.J. 705, 744 n.173 (2022) (arguing that both Neo-Brandeisians and post-Chicagoans "would be expected to favor enforcement" in a merger case that inflicted overall harms through an efficiency improvement).

231. *See generally* Michael A. Carrier, *The Four-Step Rule of Reason*, 33 ANTITRUST MAG. 50 (2019) (emphasizing role of balancing in rule-of-reason analysis). *But see* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 994 (9th Cir. 2023) (downplaying the importance of balancing).

232. *See, e.g.*, U.S. DEP'T OF JUST. & FTC, MERGER GUIDELINES 33 (2023) ("Cognizable efficiencies that would not prevent the creation of a monopoly cannot justify a merger that may tend to create a monopoly.").

233. *See generally, e.g.*, Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527 (2013) (evaluating centrality of exclusion to the antitrust project); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986) (offering a seminal general theory of a category of exclusionary practices).

234. Francis, *Making Sense*, *supra* note 20, at 804–06.

235. For example, during the Sherman Act debates, Senator George Hoar suggested that the standard for determining whether a person had obtained an illegal monopoly is whether that person used "means which prevent other men from engaging in fair competition with him." 21 CONG. REC. 3152 (1890).

ability and incentive to compete. And desirable conduct, including pure product improvement, routinely makes it harder, not easier, for rivals to compete (including in markets with scale economies or network effects), but antitrust courts do not for that reason label it "anticompetitive."[236] This illustrates an important point of principle: the kind of thing that one might want to measure to identify an "anticompetitive" effect need not be the same kind of thing that one might want to measure to capture a "procompetitive" effect. This is another reason why a purportedly unitary competition standard may do more harm than good.

Trader Independence / Freedom from Coercion. A long strand of adjudication and scholarship connects antitrust's competition concept with the freedom of trading partners from certain kinds of domination or coercion.[237] On this view, whatever promotes such freedom is procompetitive; whatever restricts it is anticompetitive.

This theme is an old one. Something like an inalienable substantive liberty interest in market participation, capable of trumping even a trader's own freedom to enter into contracts that limit that interest, was a central theme of the early English common law of "restraint of trade."[238] It has also appeared sporadically in U.S. adjudication and writing.[239] There are repeated references in the legislative history of the Sherman and Clayton Acts to the protection

236. *See supra* note 203 and accompanying text.

237. *See, e.g.*, Eleanor M. Fox, *What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 70 ANTITRUST L.J. 371, 377 (2002) (stating that midcentury antitrust law "sought to promote openness, opportunity, and freedom from coercion by firms with power"); GTE Sylvania Inc. v. Cont'l T.V., Inc., 537 F.2d 980, 1019–29 (9th Cir. 1976) (Browning, J., dissenting); Alan J. Meese, *Economic Theory, Trader Freedom, and Consumer Welfare:* State Oil Co. v. Khan *and the Continuing Incoherence of Antitrust Doctrine*, 84 CORNELL L. REV. 763, 765 (1999) (tracing the history of dealer freedom in antitrust doctrine).

238. *See* William Letwin, LAW AND ECONOMIC POLICY IN AMERICA 38–46 (1965); *see also*, *e.g.*, Dyer's Case, Y.B. 2 Hen 5 (1414) (holding that a six-month bond not to practice a trade was void); Colgate v. Bacheler (1602), 43 & 44 Eliz. 872, 872 (holding that an obligation not to trade as a haberdasher on pain of a twenty-pound penalty was void); *see also* N. Sec. Co. v. United States, 193 U.S. 197, 404 (1904) (Holmes, J., dissenting) ("Contracts in restraint of trade . . . were contracts with strangers to the contractor's business, and the trade restrained was the contractor's own.").

239. *Compare, e.g.*, Diamond Match Co. v. Roeber, 13 N.E. 419, 422 (N.Y. 1887) (applying a reasonableness test), *with* Leslie v. Lorillard, 18 N.E. 363, 365–66 (N.Y. 1888) (holding that monopoly was the hallmark of an illegal restraint). *See also*, *e.g.*, Rudolph J. Peritz, *A Genealogy of Vertical Restraints Doctrine*, 40 HASTINGS L.J. 511, 576 (1989) (reviewing and appraising the development of vertical restraint doctrine).

of the independence and freedom of traders,[240] as well as antidomination sentiment.[241]

Early Sherman Act cases often emphasized the antitrust importance of trader independence.[242] The *Standard Oil Co. of New Jersey v. United States*[243] opinion, for example, notes that "the pathway of the combination . . . is strewn with the wrecks resulting from crushing out . . . the individual rights of others."[244] The theme was clearest in vertical restraint cases, especially in the early to mid-twentieth century, which found the "restraint" in the limitation of dealer freedom,[245] until that concern was repudiated in favor of welfare

240. *See, e.g.*, S. REP. NO. 62-1326, *supra* note 137, at 3; *see also* 51 CONG. REC. 12742 (1914) (statement of Sen. Albert Cummins) (arguing, in the debates regarding the FTC Act, "I think we can purchase cheapness at altogether too high a price, if it involves the surrender of the individual, the subjugation of a great mass of people to a single master mind"); *Trust Legislation: Hearings Before the H. Comm. on the Judiciary*, 63d Cong. 2d Sess., 743 (1914) (statement of Rep. John Floyd) (questioning "the right, not only the legal right—because he has no such right . . . —but the moral right of a man when he has parted with the title to his goods and accepted the other man's money to dictate to that man at what price the goods shall be sold").

241. *See, e.g.*, Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 84 (1911) (Harlan, J., concurring in part and dissenting in part) (stating that the Sherman Act was passed "to the end that the people, so far as interstate commerce was concerned, might not be dominated by vast combinations and monopolies") (emphasis omitted); 21 CONG. REC. 2457 (1890) (statement of Sen. John Sherman) ("It is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances.").

242. *See, e.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 324 (1897) (stating that a combination "depriv[es] [the country] of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein"); United States v. Am. Tobacco Co., 221 U.S. 106, 183 (1911) (noting "danger . . . to individual liberty and the public well-being"); Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 407–08 (1911) (noting the "freedom of trade on the part of dealers who own what they sell").

243. Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911)

244. *Id.* at 47.

245. *See, e.g.*, Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 407–08 (1911) (condemning "agreements restricting the freedom of trade on the part of dealers who own what they sell"); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 213 (1951) ("[Maximum RPM] agreements . . . cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."); United States v. Richfield Oil Corp., 99 F. Supp. 280, 293–94 (S.D. Cal. 1951) (holding that the imposition on "independent business men . . . by oral agreements of restrictive conditions limiting their dealings to Richfield products and Richfield sponsored . . . products, and denying access to other dealers in petroleum and accessories to these stations, and, through them, to the public, is [unlawful]"); United States v. Arnold, Schwinn & Co., 388 U.S. 365, 378–79 (1967) ("Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it."); *see also* GTE Sylvania Inc. v. Cont'l T.V., Inc., 537 F.2d 980, 1019–29 (9th Cir. 1976) (Browning, J., dissenting)

and efficiency in the 1970s.[246] As late as 1968, one commentator was able to write that, in vertical cases, "the Court has [emphasized] equality of opportunity, free access to markets by competing sellers, and complete freedom of choice by buyers."[247] The idea still echoes today when courts regard "coercion" as an indication of competitive harm.[248]

But the idea that the "procompetitive" or "anticompetitive" character of a practice or transaction can be judged by reference to freedom raises some stiff complications. For one thing, *all* trading partners would prefer better deals than the ones they get.[249] It is not obvious which ones should count as undesirably "coerced." For another, if coercion is a function of the relative value of an agreement, compared to an outside option, the results are perverse: The *more* valuable the output, the more "coercive," and therefore anticompetitive, the relationship. This directly condemns valuable output.

Relatedly, it is not obvious why it is "coercive" for a trading party to be willing to supply goods or services only on particular terms, nor whose freedoms of property or contract should be prioritized and in what way. Nor do liberty tests contain clear resources to condemn practices that involve very willing partners, including arrangements involving the sharing of monopoly rents,[250] voluntary collusion, or mergers.

(discussing the "statutory policy [under the Sherman Act] of protecting the independence of individual business units"); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212–13 (1959) (imposing liability in a "group boycott" case with strong vertical overtones, as the "combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants' products").

246. *See, e.g.*, Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (discussing the "redeeming virtues" of restrictions that allow "the manufacturer to achieve certain efficiencies").

247. Thomas E. Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 MICH. L. REV. 325, 332 (1968).

248. *See, e.g.*, Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984) (identifying "forcing" as the "essential characteristic of an invalid tying arrangement"); *In re* EpiPen, 44 F.4th 959, 996 (10th Cir. 2022) (stating that "[c]oercion . . . will often be present in successful exclusive dealing cases"); Kaufman v. Time Warner, 836 F.3d 137, 141 (2d Cir. 2016) (noting that, in a Sherman Act tying claim, "the seller uses actual coercion to force buyers to purchase the tied product").

249. Edwin Rockefeller may have been making a similar point when he suggested that market power "is an imagined power, like witchcraft." Edwin Rockefeller, THE ANTITRUST RELIGION 40 (2007).

250. *See, e.g.*, Margaret C. Levenstein & Valerie Y. Suslow, *How Do Cartels Use Vertical Restraints? Horizontal and Vertical Working in Tandem*, 83 ANTITRUST L.J. 15, 25 (2020) (noting

Finally, the *Continental T.V., Inc. v. GTE Sylvania Inc.*[251] decision of 1977 seminally repudiated this freedom-based reading of antitrust's competition norm.[252] It is hard to discern much room for trading-partner freedom as a measure of "competition" in modern antitrust doctrine.

c. Competition as an Inherent Quality of Conduct.

Noncoordination. One fairly plausible idea has not yet been considered: If competition in the thin sense refers to the presence of multiple sellers and buyers, then perhaps thick competition can be essentialized to the absence of coordination among them. On this view, whatever eliminates competition in the thin sense between rivals is "anticompetitive" in the antitrust sense.

This view has tremendous intuitive appeal. The Court has long emphasized that what is now called "naked" coordination is the paradigmatic anticompetitive practice, exemplified by the price-fixing ring and the market allocation agreement.[253] Indeed, the Court has sometimes explicitly contrasted competition with coordination, such as when stating that "[t]he central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion—that is, *by competing successfully rather than by arranging treaties with its competitors*."[254] The antitrust laws were a response, in significant part, to concerns relating to the emergence of

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that downstream cartels "may share monopoly rents with upstream producers in return for exclusivity").

251. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

252. *Id.* at 59 (overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967)). Oddly, the majority opinion barely even mentioned this view. *See id.* at 53 n.21 (noting and dismissing concern with "the autonomy of independent businessmen"). It was left to Justice Byron White to point out what was going on. *See id.* at 66–71 (White, J., concurring). Judge James R. Browning's dissent below superbly summarized the dealer freedom principles and authorities that the Court rejected. *See* GTE Sylvania Inc. v. Cont'l T.V., Inc., 537 F.2d 980, 1019–29 (9th Cir. 1976) (Browning, J., dissenting).

253. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940) (noting that "price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense"); Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49–50 (1990) ("[Market allocation] agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other.").

254. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 600 (1985) (emphasis added) (quoting United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 116 (1975)).

commercial coordination at scale.[255] And scholars and courts have frequently identified competition with the absence of collusion or coordination.[256]

But on closer inspection, this view breaks down fairly quickly.[257] Most obviously, it is universally appreciated that structures of coordination may *promote* what antitrust seems to value as competition: including basic forms of business organization like the corporation, which antitrust doctrine does not just value but usually exempts from its background suspicion of horizontal coordination.[258] Even in the heat of the crucible that produced the antitrust laws, many kinds of coordination were widely accepted, including railroad pools, unions, and even some cartels.[259]

More generally, modern antitrust doctrine does not support the view that horizontal coordination is invariably, or even usually, anticompetitive. Cooperative agreements among competitors are

255. *See, e.g.*, 21 CONG. REC. 2460 (1890) (statement of Sen. John Sherman) ("[No social problem] is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition."); 21 CONG. REC. 2647 (1890) (statement of Sen. Zebulon Vance) ("We are all enemies to these illegal combinations of capital which devour the substance of the people and grind the faces of the poor.").

256. *See, e.g.*, Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004) (describing collusion as "the supreme evil of antitrust"); Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 986 (9th Cir. 2000) ("Foremost in the category of per se violations is horizontal price-fixing among competitors."); Vickers, *supra* note 8, at 3 (noting a common meaning of competition as "a move away from collusion towards independent behaviour between rivals").

257. *See, e.g.*, Kaplow & Shapiro, *supra* note 8, at 1134 n.88 (describing competition's noncoordination conception as "reasonably clear" but "one that antitrust tribunals often disregard, and with good reason").

258. *See* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771 (1984); United States v. Joint-Traffic Ass'n, 171 U.S. 505, 567 (1898) ("[T]he formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce."). Sanjukta Paul has described this as antitrust's "firm exemption." Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 LAW & CONTEMP. PROBS. 65, 66 (2019). But "anticompetitive" coordination may take place within the firm. Am. Needle, Inc. v. NFL, 560 U.S. 183, 200 (2010).

259. *See, e.g.*, May, *supra* note 94, at 285 ("Many contemporary Americans . . . approved of 'loose' combinations as well . . . on the ground that full-blown competition sometimes did more harm than good . . . ."). Specifically, Senator Sherman noted:

> This bill does not seek to cripple combinations of capital and labor, the formation of partnerships or of corporations, but only to prevent and control combinations made . . . to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer.

21 CONG. REC. 2457 (1890) (statement of Sen. John Sherman). Senator Sherman also commented that: "It is the unlawful combination, tested by the rules of common law and human experience, that is aimed at by this bill, and not the lawful and useful combination." *Id.*

routinely lawful, even when they involve strict coordination on price and terms of dealing.[260] So too are horizontal mergers. A standard that condemns in the bone *all* such transactions does not seem much of a plausible fit with antitrust's use of the competition concept.[261] Long-established policy and law repudiate the idea that the mere fact of horizontal coordination is conclusive of illegality.[262]

This is no modern indulgence. Productive horizontal joint ventures and partnerships have *never* been deemed incompatible with the version of "competition" recognized by the antitrust system.[263] In sum, as Professor Sanjukta Paul has perceptively noted, antitrust doctrine requires choices about which forms of horizontal coordination will be permitted, valued, and condemned, rather than expressing a flat anticoordination norm.[264] Every business organization joins together entities, including workers, that might otherwise be competing separately.

Finally, this essentialization of competition contains no resources with which to condemn practices not involving coordination. This

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260. *See, e.g.*, Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 9 (1979) (sustaining a joint venture involving common pricing); Texaco Inc. v. Dagher, 547 U.S. 1, 7 (2006) (same).

261. *See, e.g.*, New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179 (S.D.N.Y. 2020) (permitting horizontal merger); FTC v. Thomas Jefferson Univ., 505 F. Supp. 3d 522 (E.D. Pa. 2020) (same).

262. *See, e.g.*, U.S. DEP'T OF JUST. & FTC, MERGER GUIDELINES *passim* (2023) (describing framework for determining the legality of a horizontal merger); U.S. DEP'T OF JUST. & FTC, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000) (describing a framework for determining the legality of a collaboration between competitors).

263. *See, e.g.*, Union Pac. Coal Co. v. United States, 173 F. 737 (8th Cir. 1909) ("There are lawful and unlawful combinations of persons conducting interstate and international commerce, and undoubtedly the former vastly outnumber the latter. There is no presumption that two or more persons who have combined to conduct interstate or international commerce are guilty of a combination in restraint of that commerce."); May, *supra* note 94, at 321 ("Preservation of competition was never deemed to require maintenance of all existing business rivalry . . . and the New York courts were careful to distinguish productive partnerships and other true joint ventures from naked cartel arrangements, despite contrary characterizations urged by litigants."); Martin J. Sklar, *Sherman Antitrust Act Jurisprudence and Federal Policy-Making in the Formative Period, 1890–1914*, 35 N.Y.L. SCH. L. REV. 791, 813–17 (1990) (noting decisions sustaining combinations). During the hearings leading up to the enaction of the Clayton Act, Congressman Walter McCoy made a version of this point: "I think that every restraint of trade is harmful, and I think Congress, in passing the Sherman Act, meant to say so, but I think there are restraints of competition which are beneficial." *Trust Legislation: Hearings before the H. Comm. on the Judiciary*, 63d Cong. 983 (1914) (statement of Rep. Walter McCoy); *see also* 51 CONG. REC. 14457 (1914) (statement of Sen. LeBaron Colt) ("[T]he law of cooperation is just as much of a force in our commercial life as the law of competition.").

264. Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 382 (2020) [hereinafter Paul, *Allocator*]; *see also* DEMSETZ, *Intensity and Dimensionality*, *supra* note 122, at 158–63 (reflecting on the differences between price agreements and firm structures).

leaves antitrust without the means to object to many exclusionary practices and vertical transactions—including those inflicting classic foreclosure—that involve no horizontal coordination.

Deontological Fairness and Commercial Morality. At various times in antitrust's history, the concept of normative competition has been defined by reference to the fairness, or commercial morality, of the specific practice involved. This idea can certainly be discerned in antitrust's legislative history.[265] And a criterion of unfair, predatory, or inherently bad conduct frequently appears in formulations offered by courts,[266] as do ideas of legitimacy, normalcy, or good faith as a quality of conduct or purpose.[267]

But an effort to reduce antitrust's competition criterion to a vocabulary of fair practices, or a theory of unfairness, runs into serious trouble right out of the gate. Theories of fairness—particularly in the unusual moral terrain of the market—vary wildly, with no stable consensus about what kinds of things should be evaluated and against

265. *See, e.g.*, 21 CONG. REC. 3152 (1890) (statement of Sen. George Hoar) ("The great thing that this bill does, except affording a remedy, is to extend the common-law principles, which protected fair competition in trade in old times in England . . . ."); Thomas J. Horton, *Fairness and Antitrust Reconsidered: An Evolutionary Perspective*, 44 MCGEORGE L. REV. 823, 824–25 (2013) (reviewing legislative history); Paul, *Allocator*, *supra* note 264, at 384 ("An original goal of federal antimonopoly legislation was to promote fair competition and business practices . . . ."); S. REP. NO. 62-1326, *supra* note 137, at 3 ("[The Committee] believes that the progress of the world depends in a large measure upon . . . fair, reasonable rivalry among men . . . .").

266. *See, e.g.*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 (1985) (describing the key issue in a monopolization case as "whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive' . . . or 'predatory,' to use a word that scholars seem to favor"); FTC v. Qualcomm Inc., 969 F.3d 974, 990 (9th Cir. 2020) ("Accordingly, plaintiffs are required to prove . . . 'predatory or exclusionary means of attempting to monopolize the relevant market.'" (quoting Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 1000 (9th Cir. 2010))); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 229 (1st Cir. 1983) (emphasizing centrality of whether conduct "went beyond the needs of ordinary business dealings, beyond the ambit of ordinary business skill, and 'unnecessarily excluded competition'" (quoting Greyhound Computer Corp. v. Int'l Bus. Machs. Corp., 559 F.2d 488, 498 (9th Cir. 1977))); William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1031 (9th Cir. 1981) (describing attempted monopolization as involving an effort "to create a monopoly by means other than fair competition").

267. There are plenty of examples. *See, e.g.*, Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 58 (1911) (noting that contracts "had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade"); United States v. Aluminum Co. of Am., 148 F.2d 416, 434 (2d Cir. 1945) (concluding that acquisition was lawful in part because of the "good faith" of the acquirer); *In re* Adderall XR Antitrust Litigation, 754 F.3d 128, 133 (2d Cir. 2014) ("[A]nticompetitive conduct is 'conduct without a legitimate business purpose that makes sense only because it eliminates competition.'" (quoting Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 124 (2d Cir. 2007))).

what measure.[268] One natural candidate—conduct that involves the use of power[269]—directly conflicts with the antitrust axiom that the exploitation of market power is not itself anticompetitive.[270]

There is virtually no practice that antitrust doctrine regards as "anticompetitive" by virtue of its inherent nature, without regard to context or effects. Even price fixing—the "supreme evil" of antitrust—can be "procompetitive" under the right circumstances.[271] Conversely, much conduct that is routinely held to be anticompetitive does not appear inherently unconscionable. Exclusivity, tying, and so on are ubiquitous and do not shock the conscience: When they are held unlawful, it is generally because of their effects, not their intrinsic nature.[272]

Property and Privilege. Antitrust's competition concept is in a special relationship with common-law endowments, including rights of property and contract.

Perhaps most fundamentally, antitrust's analytical paradigm is built on the understanding that basic rights of property and contractual obligations will be respected. It would not be plausible within our antitrust tradition to say that it was "procompetitive" to steal a rival's property to put it to more valuable use, or to compete more aggressively. Indeed, antitrust doctrine is pointedly reluctant to condemn as "anticompetitive" a mere refusal to sell at a price, for reasons that are sometimes traced to freedoms inherent in, or to the purpose of, the property right itself.[273]

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268. *See, e.g.*, Philip Marsden, *What If Competition Law Was Easy?*, *in* KARTELLRECHT UND ZUKUNFTSTECHNOLOGIEN 18 (Eva Fischer & Lena Hornkohl eds. 2024) ("[A]n allegation of unfairness . . . is not a concept that can be operationalised in enforcement cases."); *see also* Milton Handler, *Unfair Competition*, 21 IOWA L. REV. 175, 175 (1936) ("['Unfair competition'] is obviously more of an epithet than a word of art."). Louis Kaplow and Steven Shavell concluded that plausible definitions of fairness were "so many and varied" that, for their seminal book, they chose to define fairness as any rule not turning on the well-being of individuals. LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 39 (2002).

269. The FTC § 5 statement leans on this idea. *See supra* notes 49–52 and accompanying text.

270. Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407–11 (2004).

271. *See supra* note 26 and accompanying text.

272. *See, e.g.*, *In re* EpiPen, 44 F.4th 959, 983 (10th Cir. 2022) ("Courts repeatedly explain that exclusive dealing agreements are often entered into for entirely procompetitive reasons and pose very little threat to competition even when utilized by a monopolist.").

273. *See, e.g.*, *Verizon*, 540 U.S. at 407–08 (rejecting a general antitrust duty to share); *In re* ISO Antitrust Litigation, 203 F.3d 1322, 1327 (Fed. Cir. 2000) (emphasizing exclusionary rights of a patent holder); *see also, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 63 (D.C. Cir. 2001)

But the relationship between competition and common-law rights is complicated. For one thing, the antitrust edifice can only sensibly be understood as a massive project in *limitation* of background common-law endowments and commercial liberties, including what would otherwise be background liberties to enter price-fixing contracts, impose exclusionary restraints, and buy up rivals.[274] (And sometimes, perhaps, even to refuse to sell or supply one's own property![275]) Moreover, it is often not at all clear what the implicit scope and demands of a particular common-law endowment might be. For example, in figuring out the antitrust legality of a vertical restraint imposed by a manufacturer upon a retailer (such as a requirement to sell only at a particular price or only in a particular area), antitrust courts have had to struggle through competing assertions of property *and* contract freedoms by *both* manufacturer *and* retailer.[276] In some cases—including intellectual property cases—antitrust appears to recognize the possibility of adjudicating the question of "harm to competition" without first adjudicating the underlying property rights.[277] Ultimately, antitrust's competition concept seems to be subsequent to and contingent on common law property rights, but only to some, generally undefined extent.

Illegitimate or Anticompetitive Purpose. Finally, any effort to locate normative competition in the fact of a "legitimate" or "procompetitive" purpose simply reproduces the key question: What normative conception is doing the work? Virtually every competitor wants to prosper at the expense of rivals, earn more profit, face less

(en banc) (holding the conduct was procompetitive because it protected copyrighted work from drastic alteration).

274. *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 63 (D.C. Cir. 2001) (en banc) (making a similar point regarding copyright in computer code).

275. *See* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 (1985) (imposing liability for refusal to deal).

276. *See generally* Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) (analyzing minimum resale price maintenance); United States v. Colgate & Co., 250 U.S. 300 (1919) (analyzing a refusal to deal incidental to a minimum resale price maintenance policy); United States v. Schrader's Sons, 252 U.S. 85 (1920) (analyzing the relationship between *Dr. Miles* and *Colgate*); United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (analyzing territorial limitations on distribution); Albrecht v. Herald Co., 390 U.S. 145 (1968) (analyzing maximum resale price maintenance). For an exceptionally thoughtful account of the relationship between competition and property paradigms in the law of vertical restraints, see Peritz, *supra* note 239.

277. FTC v. Actavis, Inc., 570 U.S. 136, 159 (2013) (holding that in a reverse settlement case, "the Commission need [not] litigate the patent's validity").

competition, and so on.[278] If antitrust should treat similar practices dissimilarly by reason of subjective purposes, it is not clear how—or why.

B. The Harms of Competition

So antitrust's "competition" criterion turns out to be in a complex and inconsistent relationship with a whole parade of rather different values. Is this a problem? And why start worrying about it now?

The centrality of unliquidated competition tests fuels at least three distinct harms to our antitrust project, each of which is becoming more serious. I will argue that our competition habit: (1) promotes *indeterminacy and confusion*, at a time when the emergence of novel business models and practices have raised the need for clear first principles to an historic high; (2) creates a false *utopian* impression that the shaping of antitrust doctrine need not involve choices among appealing but inconsistent goals, at a time when antitrust faces a generational need (and enjoys a generational opportunity) to confront and make those choices; and (3) contributes to the *bluntness* of doctrine, at a time when commentators across the political spectrum agree that antitrust has lost its edge on some important margins.

1. *Indeterminacy and Confusion.* When we use "competition" or "harm to competition" without further definition or liquidation, we fail to explain which criterion, or combination of criteria, we really intend to apply.

This leaves us high and dry in cases when plausibly relevant values conflict: for example, when welfare increases but market power or concentration does too (as when a monopolist acquires further scale in a market characterized by network effects, or lowers its costs and—by a lesser degree—its prices, resulting in greater profit margins); when welfare harm results from a practice that seems to be the exercise of a monopolist's legal right (as when a monopolist declines to license IP or share an asset with a rival that would make more efficient use of it); when some practice intended to improve a product ends up reducing welfare and output (as when a joint venture turns out to be a failure); and so on. This is a great many—probably most—real cases.

An undefined competition standard thus cannot possibly do the work asked of it, except in the handful of cases where all the plausibly

278. *See, e.g.*, Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 379–80 (7th Cir. 1986).

relevant values happen to point in the same direction: a very few exceptionally clear cases that are unlikely to be contested. As noted above, the result is much like using "justice" or "fairness" as a rule of decision in a tax code, or "correct play" as a rule of decision in the rules of a sport or game: hopeless indeterminacy.

Almost everyone is worse off as a result. Market participants are left wondering what their rights and obligations really are. Courts and agencies struggle to discern the rules that constrain their work. Legislators are hard-pressed to see what "existing antitrust" really is, so that they can evaluate proposals for reform. And—above all during times of deep disagreement about antitrust—the dominance of Rorschachian "competition" in doctrine makes it tremendously difficult for folks with different views to agree on what the law descriptively *is*, as a prelude to a fruitful discussion about what changes might be desirable.[279] The fact that antitrust's central criterion can be claimed with sufficient plausibility by adherents of deeply divergent views challenges projects of description, reform, and apology alike.

Of course, *some* degree of indeterminacy is inevitable in legal language. I have not the least intention of entering here into deeper debates about the limits and inevitability of indeterminacy (and cousins, like vagueness and ambiguity) in law, and the enterprise of interpretation that it implicates.[280] My point is a very practical one: When we use "competition" as an antitrust criterion, we say much less than we could, and we leave an unnecessarily wide margin of room for confusion, manipulation, and strategic arbitrage as a result. Not all terms are equally vague, and not all vagueness is equally necessary. We can do better.

This indeterminacy is a pervasive and long-standing problem. But it might be thought a particularly serious problem for the emerging project of digital antitrust. Ambiguity at the level of principle is most harmful in the parts of antitrust's domain where the applicability of

279. For example, is our existing merger law, correctly understood, welfarist? The answer probably depends on what you think "competition" means in the Clayton Act. *See supra* note 39 and accompanying text. *See generally* Francis, *Antitrust History*, *supra* note 55 (reviewing the changing interpretation of the "competition" concept in the history of merger law and policy).

280. The literature is vast. *See generally, e.g.*, LON L. FULLER, THE MORALITY OF LAW 63–65 (2d ed. 1964); RONALD DWORKIN, LAW'S EMPIRE (1986); Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549 (1993); Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509 (1994); H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994); Gary S. Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL'Y 411 (1996); BRIAN BIX, LAW, LANGUAGE, AND LEGAL DETERMINACY (1995).

precedent is least certain—that is, when novel and unfamiliar markets, practices, or competitive dynamics most heavily strain incremental analogies to previously decided cases, forcing courts and others to lean more heavily on first principles. This is a central reality for digital antitrust, which requires judges, enforcers, and scholars to puzzle through the implications of platforms, network effects, big data, and novel practices, far afield from antitrust's landmark precedents. These novelties ruthlessly expose the failure to choose among the possible orienting principles that might guide antitrust. To illustrate, let's take some examples from new markets and old.

a. Merger Efficiencies. Section 7 of the Clayton Act requires a court to determine whether the effect of a transaction may be "substantially to lessen competition."[281] Suppose that a particular transaction lowers the costs and prices, but increases the profit margins and market share, of the market leader. There are countless ways this can happen,[282] including in cases that involve the combination of complementary businesses (say, a platform and a complementary product) or the combination of user networks. Setting aside the fact of the elimination of the target as a constraint, how should we think about the contribution to the acquirer's efficiency? Is that effect, alone, a competitive harm because it increases market power and may leave rivals behind? Is it a competitive benefit, because it lowers costs and improves welfare? Or is it neutral?

This is a notorious puzzle for § 7.[283] It is a shocking thing—embarrassing, really—that, more than a century into the life of our merger control law, we do not know how efficiencies should be treated under § 7. The 2023 Merger Guidelines put a point on it, emphasizing concerns about entrenching dominance, including through "artificial"

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281. 15 U.S.C. § 18.

282. Of course, *how* commonplace it is is a matter of debate. *Compare, e.g.*, Nancy L. Rose & Jonathan Sallet, *The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting it Right*, 168 U. PA. L. REV. 1941 (2020) (emphasizing limits on evidence of merger efficiencies), *with* Maureen K. Ohlhausen & Taylor M. OWINGS, U.S. CHAMBER OF COM., *Evidence of Efficiencies in Consummated Mergers* (2023) (challenging, to some extent, a "generalized skepticism of merger efficiencies").

283. For a sampling, see Louis Kaplow, *Efficiencies in Merger Analysis*, 83 ANTITRUST L.J. 557 (2021); Herbert Hovenkamp, *Appraising Merger Efficiencies*, 24 GEO. MASON L. REV. 703 (2017); William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 ANTITRUST L.J. 207 (2003); Fisher & Lande, *supra* note 200, at 1599–1650.

network growth, suggesting that such effects alone may be treated as harms.[284]

b. Self-Preferencing. Suppose that a vertically integrated business—digital platform or otherwise—provides rivals with less favorable terms than those that it extends to its own integrated divisions. That is, it "self-preferences" its own products or services. This is a ubiquitous practice and a focus of competition policy debate.[285]

Is this anticompetitive, on the ground that it reduces rival ability and incentive to compete (at least against a counterfactual of equal treatment)? Or procompetitive, on the ground that the monopolist is simply introducing a special benefit for its own products: That is, a form of product improvement? Neutral? An unelaborated "competition" standard is of no use in figuring out whether antitrust should approve or disapprove of this practice.

c. Product Integration. Suppliers of multiple complementary products and services—say, a device and an accessory, or a car and tires—have advantages over unintegrated rivals. The integrated business will tend to price lower overall, because a reduction in the price of one complement increases demand for the other.[286] Economies of scope can make it cheaper to produce them together than separately.[287] And a supplier of complements may benefit from various interoperabilities, preinstallation practices, and so on.

But here's the puzzle. When a business uses incumbency in one market to affect competition in a second market, is that a distortion of competition, or is it competition itself? On the one hand, the integration of multiple complementary products is often recognized as

284. U.S. DEP'T OF JUST. & FTC, MERGER GUIDELINES 19 n.36 (2023).

285. *Compare* Written Testimony of Daniel Francis, U.S. Senate, Committee on the Judiciary, Subcommittee on Competition Policy, Antitrust, and Consumer Rights, Hearing on "Reining in Dominant Digital Platforms: Restoring Competition to Our Digital Markets" (Mar. 2023) [hereinafter Written Testimony of Daniel Francis] (opposing a legislative prohibition on self-preferencing), *with* Written Testimony of Fiona Scott Morton, U.S. Senate, Committee on the Judiciary, Subcommittee on Competition Policy, Antitrust, and Consumer Rights, Hearing on "Reining in Dominant Digital Platforms: Restoring Competition to Our Digital Markets" (Mar. 2023) [hereinafter Written Testimony of Fiona Scott Morton] (supporting such a prohibition).

286. *See* ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 24–25, 119–20 (7th ed. 2009).

287. *See* John C. Panzar & Robert D. Willig, *Economies of Scope*, 71 AM. ECON. REV. 268, 268 (1981).

a classic procompetitive benefit, not least because consumers often value it.[288] It is harder to think of a better example of valuable innovation than the integration of flashlights, digital cameras, internet browsers, and so on into smartphones, even though it was devastating to an array of legacy business models.[289] On the other hand, rules against tying and bundling imply that product combination or integration is or can be an improper means of obtaining or increasing market power: that in some sense each product "should" compete on its own merits, without a boost from other incumbencies.[290] But, on a third hand, antitrust generally does not treat as "anticompetitive" a refusal to disaggregate products and services down to their components, even if there is some demand for those components.[291] As always, an unliquidated "competition" standard is no use at all in pinning down what antitrust is supposed to be worried about.

d. Free Riding. Very often, investments made by one firm result in a benefit to another firm: Business A invests, and Business B benefits. When B does not pay, it may be said to be "free riding" on A's investments. In such circumstances, because A does not enjoy all the benefits of the investment, A may "underinvest" in the relevant activity: That is, if A internalized all the benefits, it would undertake more of the investment, more closely approaching a purportedly optimal level of investment.[292] This is a ubiquitous phenomenon, including the kind of "copycat" interactions that take place all the

288. *See, e.g.*, Princo Corp. v. Int'l Trade Comm'n, 616 F.3d 1318, 1335 (Fed. Cir. 2010); SD3, LLC v. Black & Decker Inc., 801 F.3d 412, 435 (4th Cir. 2015).

289. *See, e.g.*, Kento Hirashima, *Panasonic, Nikon Quit Developing Low-End Compact Digital Cameras*, NIKKEI ASIA (Aug. 6, 2022), https://asia.nikkei.com/Business/Business-trends/Panasonic-Nikon-quit-developing-low-end-compact-digital-cameras [https://perma.cc/PB8A-9KN5] (noting a 97 percent fall in digital camera shipments from 2008 to 2021).

290. *See, e.g.*, Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15 (1984). The position with bundled discounting is less clear. *Compare* Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 903–09 (9th Cir. 2008) (using a price-cost test), *with* LePage's Inc. v. 3M, 324 F.3d 141, 162–63 (3d Cir. 2003) (en banc) (using a qualitative test).

291. *See, e.g.*, Sheridan v. Marathon Petroleum Co. LLC, 530 F.3d 590, 596 (7th Cir. 2008) (denying that "tying" sensibly includes selling a car with tires attached).

292. *See generally* Russell Hardin, *The Free Rider Problem*, *in* THE STANFORD ENCYC. OF PHIL. (2020) (explaining that free riders receive benefits without contributing towards production costs); RICHARD TUCK, FREE RIDING (2008) (arguing that the problematization of free riding can be traced to relatively recent normative conceptions of competition).

time.[293] For a high-profile recent illustration, witness the training of AI large language models on publicly available texts.

Antitrust doctrine often treats free riding as anticompetitive. Defendants often argue that a challenged practice is procompetitive because it protects against free riding. This is a classic justification, for example, for vertical restraints such as territorial exclusivity clauses for retailers,[294] or exclusivity agreements with input suppliers.[295] Plaintiffs use it too. For example, DOJ has challenged a vertical merger on the theory that it would allow the merged firm to free ride on rivals' investments,[296] and the FTC has alleged that Google acted anticompetitively by "scraping" public content from third-party rivals in ways that reduced rivals' incentives to develop that content.[297] The theory now appears to be enshrined in the 2023 Merger Guidelines.[298]

But *why* is free riding anticompetitive? Free riding is at the heart of classic accounts of competition and its benefits. The classic example of desirable competition is the development of the "better mousetrap," but the better mousetrap is an imitation of the original mousetrap in ways that reduce the return on the first version.[299] The second mousetrap maker free rides on the first. Moreover, product complementarities routinely involve free rides: Pencil manufacturers benefit from the investments of paper mills and eraser manufacturers; service stations from automobile manufacturers' investments; popcorn manufacturers from those of movie studios. And so on.

The point is that a commitment to "competition" implies nothing in particular about how we should treat free riding. It might be "anticompetitive" because it diffuses returns from investment away

293. *See, e.g.*, KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION (2012).

294. *See, e.g.*, Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55 (1977).

295. *See, e.g.*, Victrex plc, 2016 WL 3913333, at *12–13 § II.E (F.T.C. July 13, 2016) (decision & order) (permitting exclusivity for this purpose).

296. *See, e.g.*, United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 140–41 (D.D.C. 2022).

297. *See, e.g.*, Press Release, FTC, *Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns in the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search* (Jan. 3, 2013).

298. *See, e.g.*, U.S. DEP'T OF JUST. & FTC, MERGER GUIDELINES 17 (2023) ("[T]he merged firm's ability to preempt, *appropriate*, or otherwise undermine the rival's procompetitive actions can discourage the rival from fully pursuing competitive opportunities." (emphasis added)).

299. *See, e.g.*, Handler, *supra* note 268, at 189 ("The right to compete means the right to imitate."); PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1761g3 ("[F]ree riding is both widespread and socially tolerated unless society enacts special legislation to control it . . . .").

from the investor. It might be "procompetitive" because imitation is central to paradigmatic stories of competitive striving, and because it increases the value of rival output. Or it might be competitively neutral because a commitment to competition implies nothing in particular about the distribution of fruits of innovation. Competition's compass needle spins aimlessly.

2. *Utopianism and Honest Antitrust Debate.* When we use "competition" or "harm to competition" in a statute, or agency guidance, adjudicative doctrine, or scholarship—or even in policy advocacy—we give the false impression that all the various things we might want antitrust to permit or promote are coherent and consistent with one another. We also get a sneaky tactical boost from the fact that competition is something that everyone is for and no one is against.

This is an old antitrust sin.[300] From Senator John Sherman onward,[301] the claim that the simple pursuit of "competition" will get us everything we might want from an antitrust system was repeatedly deployed in legislative debates.[302] It has long been a recurrent theme in the adjudicative output of the courts.[303]

But, as we have already seen, the claim is false. A practice that improves welfare might increase market power; a practice that respects the freedoms of a property owner might harm welfare; a practice that harms welfare and impairs rivals might reduce market power; and so on. And it is very implausible that a doctrinal criterion aimed at maximizing, say, deconcentration and atomistic rivalry, will produce the same results as a criterion aimed at maximizing overall social

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300. The idea that all is for the best in the most "competitive" of all possible worlds has deep roots in classical and physiocratic thought. *See, e.g.*, HERNY MARTYN, CONSIDERATIONS UPON THE EAST-INDIA TRADE 128 (1701); FRÉDÉRIC BASTIAT, ECONOMIC HARMONIES (1850); May, *supra* note 94, at 298–99.

301. May, *supra* note 94, at 290 ("Throughout the debates, Sherman continued to embrace traditional nineteenth century assumptions treating economic opportunity, efficiency, competition, wealth distribution, and political liberty as all of a piece.").

302. *See, e.g.*, Fisher & Lande, *supra* note 200, at 1592 ("The majority in Congress thus believed that vigorous antitrust enforcement would not require a tradeoff between the goals of increased productive efficiency and limiting market power, but rather would advance both."); THORELLI, *supra* note 95, at 226 ("[L]ittle need was felt to attempt penetrating analyses of the underlying economic theory or to support the prevalent belief by extended argument—the members of Congress proclaimed the norm of a free competition too self-evident to be debated, too obvious to be asserted." (internal quotation marks omitted)).

303. *See, e.g.*, Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 695 (1978).

welfare,[304] or that the pursuit of maximal protection for trader freedom will produce the same results as protection against impairment of the ability and incentive of rivals to meet demand.

There is no avoiding the need for choice among the possible liquidations of a "competition" standard. Deciding and stating what concerns properly belong to an antitrust analysis and which do not, and how they are to be reconciled when they conflict (for example, through a lexical priority rule or some kind of weighing), is plainly necessary if antitrust is to satisfy elementary requirements of clarity and publicity.[305]

This problem is particularly acute today. After decades of relative obscurity and at least substantial consensus about many aspects of antitrust's direction and operation,[306] "[a]ntitrust is sexy again"[307]: front-page news, the focus of mainstream debate, and even the subject of executive orders and State of the Union commentary.[308] Antitrust is enjoying some time in the spotlight of public attention. This means a generational opportunity for real engagement, and ultimately a political choice to retain, reform, or revolutionize antitrust.

But if it is to be productive, that debate must *begin* with the recognition that antitrust doctrine and policy implicate hard choices among the competing values and goals that they might plausibly serve. What do we want our antitrust law to do, and what costs are we willing to incur to that end? Getting full value from antitrust's current moment

304. *Compare, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270, 272–79 (1966) (condemning, under the deconcentration paradigm, a supermarket merger in a market with very many rivals), *with* New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 233–49 (S.D.N.Y. 2020) (permitting, under the welfarist paradigm, a merger that reduced the number of rivals from four to three).

305. FULLER, *supra* note 280, at 49–51 (promulgation); *id.* at 63–65 (clarity). *See generally* Jeremy Waldron, *The Rule of Law*, *in* THE STAN. ENCYC. OF PHIL. (2016) (assessing content of the idea of the "rule of law" in political philosophy).

306. *See, e.g.*, Leary, *supra* note 125 (writing in 2000 that "[u]p to relatively recent times, there was a rigorous debate about possible alternative sources for antitrust decisions, like dispersion of political power, wealth transfer effects, and various social considerations, but economic analysis of consumer welfare effects has swept the board"); Wright, *supra* note 130, at 234 (writing in 2009 that "there is now consensus that antitrust analysis proceeds by asking whether the challenged business practice harms consumers or reduces total welfare").

307. Shapiro, *Time of Populism*, *supra* note 170, at 714.

308. *See, e.g.*, Francis, *Making Sense*, *supra* note 20, at 782–84.

in the sunshine requires making the content of law, and reform proposals, as transparent as possible.[309]

Let's take a very practical example: the American Innovation and Choice Online Act.[310] AICOA reflects a view that existing antitrust doctrine—with its case-by-case analysis of economic effects and its notoriously slow and expensive expert-driven litigation—cannot keep up with the competitive problems presented by digital monopoly.[311] As Part I demonstrated, the draft legislation makes extensive reference to "harm to competition" as an element of certain offenses and of certain affirmative defenses, without defining that concept.[312] Some of the most prominent defenses of the bill have emphasized that this feature is a vital safeguard to ensure that the law does not have adverse effects on consumers.[313]

But reliance on a "harm to competition" criterion makes the law's meaning profoundly ambiguous. On the one hand, it could be applied and interpreted along broadly "traditional" welfarist lines. On the other hand, it could be applied and interpreted to forbid certain practices by reason of their unfairness, tendency to harm rivals, or otherwise.

Resolving the meaning of this test implicates a fundamental choice between two very different visions. The first, welfarist, version would make the legislation unlikely to punish much proconsumer conduct, but it would also have the result that litigation under AICOA would

309. *See* James C. Miller III, *Comments on Baumol and Ordover*, 28 J.L. & ECON. 267, 268–69 (1985) (lamenting "public ignorance about [antitrust] issues, an ignorance pandered to shamelessly by demagogues").

310. American Innovation and Choice Online Act, S. 2992, 117th Cong. (2022).

311. *See* Press Release, Amy Klobuchar, Senator, Klobuchar, Grassley, Colleagues Introduce Bipartisan Legislation to Boost Competition and Rein in Big Tech (June 15, 2023), https://www.klobuchar.senate.gov/public/index.cfm/2023/6/klobuchar-grassley-colleagues-introduce-bipartisan-legislation-to-boost-competition-and-rein-in-big-tech [https://perma.cc/AL4E-JVYF] ("Our bill will help create a more even playing field, ensure that small businesses are able to compete with these platforms and promote an environment for greater consumer choice."); *id.* ("This bill will outlaw much of the discrimination and self-preferencing that tech companies currently get away with . . . .").

312. *See supra* Part I.D.

313. *See, e.g.*, Written Testimony of Fiona Scott Morton, *supra* note 285; Aaron Schur, *The Critiques Against the American Innovation and Choice Online Act Miss the Mark*, PROMARKET (July 18, 2022), https://www.promarket.org/2022/07/18/the-critiques-against-the-american-innovation-and-choice-online-act-miss-the-mark [https://perma.cc/5L98-75C2]; Adam Conner & Erin Simpson, *Evaluating 2 Tech Antitrust Bills to Restore Competition Online*, CTR. FOR AM. PROGRESS (June 2, 2022), https://www.americanprogress.org/article/evaluating-2-tech-antitrust-bills-to-restore-competition-online [https://perma.cc/NBF7-KXEN].

look a lot like antitrust litigation, turning on market definition, economic effects, procompetitive benefits, and so on. The second, nonwelfarist, version would disconnect the legislation from those issues, but it would also mean that the law would almost certainly prohibit an array of practices that consumers value.[314]

Centralizing "harm to competition" in a measure of this kind without defining it forestalls the debate that a political community deserves. It plays for support from *both* those who want a welfarist standard *and* those who do not, even though both constituencies cannot both be satisfied. But legislators deserve to know what they are voting on, and the public deserves to know how a bill is intended to work. AICOA thus exemplifies the ways in which the use of an unelaborated "competition" standard can distort and subvert the necessary conversation about antitrust choices. And it exemplifies the ways in which competition tests can provide a way for decision-makers to punt hard choices to other institutional players, whose constitutional or political credentials to make those choices may be very much weaker.

3. *Bluntness and the Adequacy of Antitrust.* Unliquidated competition talk fuels at least one more significant problem: antitrust's bluntness. There is wide agreement from across the political spectrum that antitrust seems to have become unduly blunt—that is, a bit too prodefendant—on some important margins, even if there is disagreement (particularly outside the Big Tech zone) about what those margins are.[315] Reasonable minds can certainly disagree about the ideal form of an antitrust system, but it sure does seem to be true

314. Written Testimony of Daniel Francis, *supra* note 285, at 18.

315. *See, e.g.*, Molly Ball & Brody Mullins, *Biden's Trustbuster Draws Unlikely Fans: 'Khanservative' Republicans*, WALL ST. J. (Mar. 25, 2024), https://www.wsj.com/politics/policy/lina-khan-ftc-antitrust-khanservatives-a6852a8f [https://perma.cc/FTS3-PMXD]; Press Release, Mike Lee, Senator, Republican Senators Urge House Republicans to Support Antitrust Reform Package (Sept. 26, 2022), https://www.lee.senate.gov/2022/9/republican-senators-urge-house-republicans-to-support-antitrust-reform-package [https://perma.cc/S5JJ-AKM5]; Kara Frederick, *Combating Big Tech's Totalitarianism: A Road Map*, HERITAGE FOUND. (Feb. 7, 2022), https://www.heritage.org/technology/report/combating-big-techs-totalitarianism-road-map [https://perma.cc/S4CY-V3FN]; Francis, *Making Sense*, *supra* note 20, at 781. *See generally* JONATHAN B. BAKER, THE ANTITRUST PARADIGM (2019); Jonathan B. Baker, *Taking the Error out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1 (2015); Andrew I. Gavil & Steven C. Salop, *Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis: Revitalizing the Rule of Reason for Exclusionary Conduct*, 168 U. PA. L. REV. 2107 (2020). *See also supra* Part I.D. (noting proposed antitrust reform legislation, including CALERA and TEAM Act).

that plaintiffs do not win very often. This trend is particularly, but not only, clear in "tech" cases.[316]

Many commentators have underscored the difficulties of proving harm to the satisfaction of modern courts, and I share the intuition that judicial skepticism accounts for much of the effect.[317] But is it plausible to think that the vagueness of antitrust's competition tests might also be contributing to this phenomenon? That, in close cases, the vacuity of "harm to competition" and "competition on the merits" and all the rest of it might tend to favor findings of nonliability?

I think there are at least a couple of reasons to think so. The first is specific, even if anecdotal. Several recent high-profile findings for defendants in flagship government actions seem to have been the result of surprising conclusions about what the applicable legal rules were. In other words, these outcomes involved errors, or at least innovations, in the articulation of the relevant legal standard—exactly the kind of confusion that competition's dominance invites.

It is hard, for example, not to think that a clearer definition of "anticompetitive effect" might have precluded or deterred, for example: The Ninth Circuit's holding in *FTC v. Qualcomm Inc.*[318] that increased customer prices were not "'anticompetitive' [harms] in the antitrust sense" because the customers were not themselves competitors[319]; the Supreme Court's conclusion in *Ohio v. American Express Co.*[320] that a showing of increased prices was not prima facie evidence of an "anticompetitive" effect given the mere *possibility* of

316. *See, e.g.*, FTC v. Microsoft Corp., 681 F. Supp. 3d 1069, 1101 (N.D. Cal. 2023) (holding for defendant); Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 966 (9th Cir. 2023) (holding for defendant on antitrust claims); New York v. Meta Platforms, Inc., 66 F.4th 288, 302 (D.C. Cir. 2023) (holding for defendant); FTC v. Facebook, Inc., 581 F. Supp. 3d 34, 59 (D.D.C. 2022) (eliminating conduct claims); United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 155 (D.D.C. 2022) (holding for defendant); FTC v. Qualcomm Inc., 969 F.3d 974, 1005 (9th Cir. 2020) (holding for defendant); United States v. Sabre Corp., 452 F. Supp. 3d 97, 150 (D. Del. 2020) (holding for defendant), *vacated as moot*, No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020); Ohio v. Am. Express Co., 585 U.S. 529, 552 (2018) (holding for defendant). *But see* Jaspreet Singh & Harshita Mary Varghese, *Google's Court Loss to Epic Games May Cost Billions but Final Outcome Years Away*, REUTERS (Dec. 13, 2023), https://www.reuters.com/legal/googles-court-loss-epic-games-may-cost-billions-final-outcome-years-away-2023-12-12 [https://perma.cc/L7HC-9UQA] (noting jury verdict against Google in antitrust case brought by Epic Games).

317. *See, e.g.*, Herbert Hovenkamp, *Charting A Future for Progressive Antitrust,* 77 FLA. L. REV. (forthcoming) (on file with *Duke Law Journal*) ("Antitrust's rule of reason has become too cumbersome, to the point that it undermines effective enforcement.").

318. *Qualcomm Inc.*, 969 F.3d 974.

319. *Id.* at 992.

320. *Am. Express Co.*, 585 U.S. 529.

benign explanations[321]; the D.C. Circuit's conclusion in *Rambus Inc. v. FTC*[322] that deception of a standard setting organization that enabled the defendant to obtain power over price that it would not otherwise have enjoyed was not "anticompetitive" because the plaintiff had not shown that a different business would have had its own IP incorporated into the relevant standard[323]; and the D.C. Circuit's conclusion in *New York v. Meta Platforms, Inc.*[324] that a conditional-dealing practice that punished horizontal competition was not "anticompetitive" in part because there is no general antitrust duty to deal with rivals.[325]

The second reason is more general. It is widely recognized that antitrust courts are often motivated by a desire for judicial caution and a fear of false-positive liability findings, contributing to what Professor Herbert Hovenkamp has called an "anti-enforcement bias."[326] This can be discerned in a variety of antitrust settings, but it is particularly clear in monopolization cases that fall outside familiar subcategories,[327] as well as in cases in novel or high-tech markets.[328] In other words, on the very frontiers where concerns about antitrust's adequacy are highest, defendants seem to get more than their pro rata share of the benefit of the doubt.

The point is a simple one: If a lenity principle, or something like one, favors antitrust defendants in cases of doubt, practices that increase doubt and uncertainty will disproportionately end up favoring defendants. And if "competition's" dominance does indeed lead to more confusion and indeterminacy than there would otherwise be, the result will be to exacerbate the prodefendant skew.

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321. *Id.* at 549.

322. Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008).

323. *Id.* at 466.

324. New York v. Meta Platforms, Inc., 66 F.4th 288 (D.C. Cir. 2023).

325. *Id.* at 305–06.

326. Herbert Hovenkamp, *Antitrust Error Costs*, 24 U. PA. J. BUS. L. 293, 300 (2022); *see also* Gavil & Salop, *supra* note 315, at 2112 ("Continued reliance on what are now exaggerated fears of 'false positives,' and failure adequately to consider the harm from 'false negatives,' have led courts to impose excessive demands of proof on plaintiffs that belie both established procedural norms and sound economic analysis.").

327. *In re* EpiPen, 44 F.4th 959, 1001–02 (10th Cir. 2022) (declining to decide the issue where the doctrinal subcategory is unclear); Am. President Lines, LLC v. Matson, Inc., 633 F. Supp. 3d 209, 231 (D.D.C. 2022) (same).

328. FTC v. Qualcomm Inc., 969 F.3d 974, 990–91 (9th Cir. 2020) (giving the extra benefit of doubt in cases involving novel practices and "*especially*" technology markets); United States v. Microsoft Corp., 253 F.3d 34, 89–91 (D.C. Cir. 2001) (en banc) (relying on this principle to create an exception to a per se rule).

To be sure, all this is historically contingent. The distribution of the benefit of the doubt between antitrust plaintiffs and defendants changes over time: And thus the likely consequences of leaning heavily on "competition" might be expected to do the same. In a very different antitrust climate, Justice Potter Stewart once complained that "[t]he sole consistency that I can find is that in litigation under § 7, the Government always wins."[329] Appraising that era, Professor James DeLong made the reverse of the point I am offering here: "[T]he government won if it could invent a moderately plausible scenario in which a business arrangement might be 'anticompetitive'—and that term could have any of several not necessarily consistent meanings."[330] "Competition" swings with the prevailing wind: it is a handy analytical vessel for whatever it is that the decision-maker is generally inclined to do anyway.

C. Objections and Responses

To close this Part, this Section considers—and rejects—some important objections.

1. *No One Is Deceived.* There is room, at least in principle, to accept that competition is an empty vessel, but to deny that this is a real problem, on the ground that no one is really confused about anything. On this view, everyone already understands that competition is a catchphrase—a harmless bit of table pounding—and nothing more. After all, there is plenty of cheap talk and sloganeering in antitrust, and it is not obvious that it does much harm.[331]

But the idea that all, or even most, of competition's usage in antitrust can be explained and understood this way does not survive close examination. One must ascribe a striking amount of cynicism to those doing the speaking and writing in Part I—including judges explaining what the applicable legal rules are, agencies explaining what principles they will use to guide enforcement policy, and legislators crafting operative statutory rules—to suppose that all that talk is intended cheaply, and a striking amount of hard-headedness to everyone else to suppose that it is heard as such. How can it possibly be the case that, when Congress stated that mergers would be illegal

329. United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966).

330. DeLong, *supra* note 13, at 301.

331. *See generally, e.g.*, Hovenkamp, *Slogans*, *supra* note 11 (considering the role of slogans and goals in antitrust).

where the effect "may be substantially to lessen competition," it did not intend "competition" to be taken seriously? How could it possibly be true that the head of the Antitrust Division is, in effect, only kidding when he says that effects on the competitive process, not welfare impacts, should govern merger analysis?

This does not hold up. The host of examples in Part I (and many others) explicitly purport to make competition-as-such a working criterion in antitrust's fabric. The same is plainly true of the recent contributions focused on the "competitive process," all of which are explicitly designed to offer normative criteria for antitrust analysis. There is no reason to suppose that any, or much, of this is intended to be cheap talk. All evidence is to the contrary.

2. *Competition Supplies Flexibility.* A second objection would concede that competition is a fuzzy placeholder for a combination of other things, and would perhaps acknowledge the costs and harms identified above, but would nevertheless suggest that it brings an important countervailing benefit in the form of flexibility to meet political, social, and economic change in the real world. The virtues of a common-law, incremental tradition might be emphasized in such an account.[332] So too might the virtues of an imperfectly theorized consensus among those sharing some, but not all, policy priorities for the antitrust project.[333] One could add the worldly sigh that *all* legal tests are somewhat indeterminate.

This point has some weight. The flexibility benefits of broad standards over detailed rules are proverbial,[334] and some have thought that the exceptional breadth of antitrust's mission seems to call for flexible rules.[335] And the dramatic changes over the 133-year life of the antitrust project have plainly required corresponding changes in its nature and function over that time.[336] It is certainly true that a bit of

332. *See, e.g.*, Michael L. Katz & A. Douglas Melamed, *Competition Law as Common Law:* American Express *and the Evolution of Antitrust*, 168 U. PA. L. REV. 2061, 2065–71 (2020).

333. *See, e.g.*, Baker, *supra* note 230.

334. *See generally*, *e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) [hereinafter Kaplow, *Rules Versus Standards*]; Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

335. *See, e.g.*, WILLIAM H. TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 47–48 (1914); THORELLI, *supra* note 95, at 226.

336. For a potted history, see FRANCIS & SPRIGMAN, *supra* note 19, at ch. I.

fuzz in some key definitions might valuably help us to agree publicly where we can, while privately differing where we must.[337]

One can also grant that, in practice, agency staff, lawyers, judges, scholars, and others engaged professionally with antitrust participate, to some extent, in a vast overlapping consensus about what kinds of things matter to antitrust and in what ways. These people, one might add, generally have a reasonably good idea what they are doing most of the time, and they usually agree on the kinds of things that are plausibly in- and out-of-bounds. So one might think that some vagueness in the wording of the rhetorical and doctrinal banners fluttering overhead might not make for a very serious problem.

But things fall apart on a closer look. For one thing, this objection amounts to a general apology for incoherence or vagueness today on the basis that it promotes the continuity of the incoherent or vague system. This has the cart and the horse the wrong way round. Avoiding the need to amend the antitrust system as times change is at best a second-order goal, if it is a goal at all. The *first*-order question is: Here and now, how does our system measure up? And I am suggesting that, in some important ways, it does not measure up well.

Moreover, this objection is profoundly antidemocratic. To put it a little crudely: The fact that a competition standard *looks* to the untrained eye like a reasonably specific and settled criterion *while in fact* conferring handy discretion on elite expert technicians to change the underlying standards over time is, at least, not obviously a vote in its favor. The content and implications of tacit expert consensus—even assuming that such consensus does exist and that we can figure out in an acceptable way whose opinion and practice should "count" for this purpose—deserve to be measured openly against the applicable legal norm. Competition talk hinders that enterprise. If such talk allows politically accountable institutions to avoid or delegate hard questions about the nature and content of the antitrust project, there are plenty of good reasons to think of that as a bug, not a feature.

And although it is certainly true that vagueness and indeterminacy are part of the law game on any view, "competition" in antitrust doctrine is unlike many standards, even fuzzy ones, typically encountered in other areas of legal life. In the case of the typical standard, we know what kind of thing we are measuring or looking for: What makes the norm open-textured (less rule-like, if you prefer) is

337. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1736 (1995).

the nature of the threshold that triggers the criterion. For example, to borrow from Louis Kaplow, "[a] rule might prohibit 'driving in excess of 55 miles per hour on expressways,'" while "[a] standard might prohibit 'driving at an excessive speed on expressways.'"[338] But competition talk is indeterminate at a deeper level. As we have seen, it implicates a startlingly wide range of values that may or may not be relevant. It leaves unresolved what things we are trying to measure, and against what criterion or criteria we are doing so: not just the location of the threshold on an axis. Borrowing Kaplow's example, it leaves unsettled the question of what should count toward "speed" in the first place, and how we should integrate the things that do count.

Finally, the flexibility argument is vulnerable even on its own terms. Sure, changes in political, social, and economic conditions might result in changes in the optimal structure and content of antitrust law. But it is not at all obvious why vagueness and indeterminacy in the content of antitrust law would be helpful, rather than harmful, to necessary criticism, reaction, and reform. It seems more likely that concealing the content and operation of antitrust doctrine behind bland, benign placeholders like "the promotion of competition" will confuse and misdirect public energies and understandings, resulting in less, not more, responsive change.

3. *Competition Is Ineradicable.* A third objection would concede everything above but conclude that there is just nothing to be done about any of it. "Competition" as a value is in the Clayton Act; it's throughout our antitrust cases; it's foundational to our thinking about antitrust; and there is no reasonable prospect that any of this is going to change. So we are better off focusing on other problems.

There is some truth here, but this is not a killing objection. First, if nothing else, we can stop creating *new* instances in which undefined "competition" is used to do real evaluative work. In new statutes, agency guidance, judicial opinions, and so on, we can stop multiplying the problem. We need only say something more specific instead, or as well.

Second, this objection has less force today than it has had in a generation. There is evident political will to revisit the antitrust statutes, including proposals to amend and clarify the language of the core antitrust prohibitions themselves.[339] This may be the *best* time for

338. Kaplow, *Rules Versus Standards*, *supra* note 334, at 560.

339. *See supra* Part I.D (discussing recent proposals).

decades to fix problems in antitrust's fabric, particularly those fueling indeterminacy and bluntness.

Third, this is not primarily a problem of statutory text. It lives in adjudicative doctrine, agency guidance, and so on: all of which can be changed or elaborated by the same judicial actors that gave it life.[340] There is a vast amount that can be done without asking for a moment of Congress's time.

Fourth, it is possible to do better without re-inventing the wheel. We need only choose from materials with which we are abundantly supplied by decades of thoughtful adjudication and scholarship. Plausible, appealing, and specific standards are abundant. All we have to do is let go of the idea that competition as such is one of them.

III. KICKING THE COMPETITION HABIT

The preceding pages have argued that antitrust's heavy reliance on an unelaborated competition test is unsound, confusing, and harmful. This Part argues that we can and should do something about it. We can abjure the undefined competition criterion; and we can take up the task of understanding, evaluating, and reforming antitrust without its help.

A. Letting Competition Go

The most important thing we can do—where "we" is anyone who deals professionally with antitrust—is very simple. *We can and should stop relying on unelaborated "competition" as an evaluative criterion for antitrust*. Just say no. Before antitrust doctrine can meaningfully protect competition, it must embody and articulate some conception of what that means.

This means that whenever competition or one of its cognates (anticompetitive, procompetitive, competition on the merits, rivalry, and so on) is deployed in antitrust talk, it should be accompanied—or replaced—by a more specific evaluative norm. This approach may, and probably should, involve one or more of the more specific values and criteria mentioned above, such as welfare, market power, or concentration. This approach would be a real step toward a more fully specified and coherent antitrust doctrine, and, particularly, one with the necessary coherence of principle to handle novel cases like those in digital markets.

340. *See supra* Part I.C.

There are some good reasons to jettison the "competition" label altogether for antitrust's evaluative criterion or criteria. For one thing, any plausible effort to pin down the function previously performed under the label "harm to competition" will almost certainly involve adopting multiple separate criteria. A unitary standard does not seem to capture what is really going on.

For another thing, the kind of consideration that makes something "anticompetitive" may not differ only in magnitude from the kind of consideration that makes something "procompetitive." We might want to define harm as one thing (or set of things), and benefit as one or more *different* things. Indeed, I propose doing exactly this, as we shall see below. The idea of a single dimension or axis uniting anticompetitive and procompetitive effects in commensurate terms may lead us astray.

For a third thing, the use of the competition label invites confusion between antitrust law's evaluative criterion, on the one hand, and the descriptive "thin" meaning of "in rivalrous interaction," on the other. As we have seen, our competition criterion cannot plausibly be reduced to whether or not some literal competition has been lost. Separate terms seem desirable for separate concepts.

Some writers do this already. Many thoughtful works of scholarship are very explicit about what exactly they understand antitrust tests to do, or propose that they should do, in ways that make no use—or at least no necessary use—of an unliquidated competition criterion. And as we have seen, courts and agencies have often expressly grounded their version of the competition criterion in one or more of the more specific values highlighted above (even if they have not done so *consistently*).[341] In a recent exclusivity case, for example, the Tenth Circuit conceded that "the term 'substantially foreclose competition' is not a self-contained, or clearly-defined yardstick," and recognized that "[t]o delineate between permissive and prohibited exclusionary contracts, we need some guiding principle—some standard that allows us to quickly and easily resolve whether exclusive contracts harm competition. In our Circuit, this is the consumer welfare standard."[342] Say what you like about the standard and its application, this gets full marks for transparency.

But it was the work of Part I to show that, nevertheless, plenty of actors in the antitrust world—including courts—are relying heavily on

341. *See supra* Part II.B.2.

342. *In re* EpiPen, 44 F.4th 959, 984 (10th Cir. 2022).

the unliquidated competition criterion in antitrust analysis. That practice is ubiquitous even if it is not universal. And it is worth bringing to an end.

B. Reconstructing Antitrust Without Competition

My primary project in this Article is unashamedly critical, not reconstructive. Sometimes you're building up, sometimes you're throwing rocks, and today, I'm throwing rocks at the practice of using unelaborated competition tests. And part of the point of that critical project is to open up the tremendous diversity of opinion that lurks under the false clarity and unity of "competition." But this also invites the question of how exactly one might define or replace competition as an evaluative criterion in antitrust's edifice.

Plenty of folks have offered evaluative criteria that—agree or disagree with their merits—are clearer and more constructive than the undefined competition criterion, and which set the stage for efficient discussion. Some prominent examples from the literature include:

- *A strict market power standard for § 7.* In recent work, Professor Eric Posner proposes a reading of merger law's "competition" standard that identifies harm to competition with an increase in market power.[343] One provocative dimension of this reading—which appears specific to § 7's version of "competition"—is that it would condemn even mergers that reduce costs and prices so long as they lead to an increase in margins, on the basis that "the market power increase is assumed to cause broader social harms that are not incorporated in product characteristics consumed by the immediate buyers."[344]

- *An impact-on-efficiency measure for § 2.* Professor Einer Elhauge has argued that § 2's notoriously elusive "anticompetitive conduct" criterion should be replaced with a two-part rule: Conduct should be "per se legal if its exclusionary effect on rivals depends on enhancing the defendant's efficiency," but "per se illegal if its exclusionary effect on rivals will enhance monopoly power regardless of any improvement in defendant efficiency."[345]

- *Welfare harm plus increased market power.* A number of writers—including Professors Steve Salop and Craig Romaine,

343. Posner, *Foundations*, *supra* note 13, at 3.

344. *Id.* at 31. The margin measure is average industrywide margin, not just that of the merged firm. *Id.*

345. Elhauge, *Better Standards*, *supra* note 13, at 330.

> and Professor Carl Shapiro—have proposed an orienting criterion that combines welfare harms with increased market power.[346] This standard also seems to be the best reading of the criterion expressed in the 2010 Horizontal Merger Guidelines to implement § 7's harm to competition measure.[347]

My own view comes closest to the last example. I take any plausible reading of existing law—as distinct from a clean reboot—to be constrained by at least three important axioms.

First, antitrust must take welfare seriously. There are many plausible ways to understand and implement antitrust's purported orientation to "consumer welfare," and many other goals with which it could be brought into conversation, but the fact of the project's welfarist recalibration in and since the late 1970s is beyond dispute.[348] This means that antitrust must take seriously and centrally the normative value of market participants' preference functions. This implies the disvaluing of welfare harms (including through higher prices or reduced output), and the valuing of product improvements and cost reductions that tend to promote the satisfaction of demand. It also means that harms to rivals alone must be untroubling in the absence of broader welfare harms. I take this to be the core meaning of the antitrust proverb that antitrust protects competition, not competitors.[349]

Second, antitrust cannot *only* be about outcomes. Antitrust might be concerned with outcomes of the competitive process, like prices, but it expresses that concern through rules about the process of interaction among market participants, not by punishing results alone. Thus, high prices or reduced output *alone* are not unlawful unless they flow from a prohibited kind of conduct; likewise, the conduct alone may be unlawful even if it has not (yet) resulted in harmful outcomes.[350] This is sometimes expressed as the antitrust proverb about liability requiring harm to the competitive process (though, alas, that proverb does not specify what "harm" is supposed to mean).

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346. Salop & Romaine, *supra* note 13, at 652; Shapiro, *Using Economics*, *supra* note 13.

347. *See supra* note 53 and accompanying text.

348. *See* FRANCIS & SPRIGMAN, *supra* note 19, at 4–5, 22–24 (collecting sources).

349. *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

350. *See, e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945) ("[I]t is no excuse for 'monopolizing' a market that the monopoly has not been used to extract from the consumer more than a 'fair' profit.").

Third, and relatedly, antitrust has special solicitude for certain kinds of behavior. This includes, for example: acts of omission, including decisions not to share or supply products; "mere" enforcement of valid property rights; above-cost unconditional price-setting; new market entry; and product design and improvement decisions. Antitrust does not discipline these practices even when they may have deleterious effects.

Within these axioms, I suggest a framework, or compound criterion, that I call *harm-centric antitrust*. It conceptualizes antitrust's orienting concern as: (1) the infliction of overall welfare harm (2) through suppression of the ability or incentive of actual or potential rivals to trade, *subject to* (3) absolute immunity for certain unilateral practices. I offer this framework as a reasonably plausible and broadly appealing "best reading" of the core analytical criterion discernible in existing antitrust doctrine.[351]

Element (1)—the requirement of (tendency to cause) overall welfare harm—implements the first axiom. It grounds the moral case for antitrust squarely on the value of human flourishing, the disvalue of human suffering, and the autonomy interest of each human person to choose for themselves what version of the good or right shall be used to guide rules that govern them.[352]

Element (2)—suppression of rival ability or incentive to contest trading relationships—captures and unites the concepts of collusion and exclusion. By responding to impacts on the "process" of competition, and by defining what it might mean to inflict a processual harm of the relevant kind, it implements the second axiom.

Element (3)—an immunity for certain unilateral practices—expresses the idea that there are some things that every business can just do, or just refuse to do, without antitrust regarding it as a harm or wrong in the relevant sense. Merely entering a new market, reducing costs, setting an unconditional above-cost price, deciding not to sell a product: Antitrust has no beef with any of this, *even if it harms welfare and suppresses rivals' ability or incentive to compete*. Reasonable minds can disagree about the bounds of this zone. My own view is that it should embrace conduct that is ubiquitous, generally benign, and for

351. *See* Francis, *Making Sense*, *supra* note 20, at 804–20 (setting out the "dangerous exclusion" model of monopolization doctrine, of which this is a generalization).

352. *See supra* note 84 and accompanying text.

which judicial micromanagement would be undesirably burdensome.[353] (It can be thought of as the mirror image of the rule of per se illegality under § 1.)

I have not included a market power test in this framework. In part, this reflects a general Occamist preference for keeping unnecessary entities out of that framework; in part, it reflects the fact that market power is frequently associated with structural measures like market-share tests that may or may not correspond to welfare harms[354]; in part, this reflects the fact that the creation or increase of market power is not necessarily a ground to conclude that anything is amiss[355]; and, in part, it reflects the fact that the infliction of welfare harms through a price increase or equivalent conduct tends to "use" market power, inviting antitrust's infamous "*Cellophane* fallacy."[356]

For these reasons, I think trading away the "competition" concept for a central criterion like this one would be a real step forward for the antitrust project. But this is a far-distant secondary claim. I offer it, and highlight the proposals of other writers, only to illustrate that there are plenty of ways to design an antitrust without competition. We have nothing to fear, and much to gain, from setting competition aside, and tackling the puzzles that await beneath it.

CONCLUSION

Antitrust is experiencing a generational moment. We face a singular opportunity to have a candid conversation about what antitrust can and should do, and what we might be willing to tolerate and surrender to that end. But competition talk is getting in the way, and the costs are piling up. It is time to set it aside.

Part I argued that important actors in the antitrust world—including courts, enforcers, legislators, and scholars—often purport to

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353. *See* Francis, *Making Sense*, *supra* note 20, at 811–14 (defending this view at length in the context of § 2).

354. *See, e.g.*, E. Food Servs., Inc. v. Pontifical Cath. Univ. Servs. Ass'n, Inc., 357 F.3d 1, 6 (1st Cir. 2004) ("[A] low share is almost always an indication that the defendant lacks market power.").

355. *See, e.g.*, Louis Kaplow, *On the Relevance of Market Power*, 130 HARV. L. REV. 1304, 1306 (2017) ("[G]reater market power sometimes opposes liability, different senses of market power can have opposite effects on the desirability of liability, and different components of a given meaning of market power can have opposite implications. In short, the conventional view that greater market power favors liability is woefully incomplete.").

356. *See* United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 394–404 (1956) (rejecting a proposed market for cellophane); *see also* FRANCIS & SPRIGMAN, *supra* note 19, at 73 (discussing the fallacy).

use an unliquidated "competition" criterion as a guiding value and legal test, as if it were a scalar measure. They did so before and during the heights of "consumer welfare" hegemony, and they do so today on the left and on the right alike. The competition criterion is right at the heart of antitrust doctrine and practice, and very different ideologies claim "competition" as their own.

Part II argued that it is a serious mistake to treat competition as a coherent evaluative norm. Its role in antitrust is best understood as a placeholder for a great many different—and usually inconsistent—values and goals. Unelaborated competition talk disguises and hinders accurate recourse to those values. And this is harmful: because it involves vast indeterminacy, particularly in novel markets; because it perpetuates utopian misunderstandings about antitrust; and because it contributes to the troubling bluntness of modern law.

So Part III argued that we can and should do better. We can reject the bland platitudes of the competition criterion, and grapple directly with the underlying values that antitrust implicates. And, mainly by way of illustration, Part III offered a proposal—the "harm-centric antitrust" framework—to that end. Reasonable minds, of course, will prefer other measures. But in evaluating, criticizing, and defending the substance of antitrust doctrine, we will do better if we insist that an undefined competition criterion has no place in the discussion—and if we work to remove it from the fabric of antitrust rules.