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Unlocking Antitrust Enforcement

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THE YALE LAW JOURNAL

JONATHAN B. BAKER, JONATHAN SALLET & FIONA
SCOTT MORTON

Unlocking Antitrust Enforcement

There is no antitrust law without antitrust law enforcement. Legal action turns economic and jurisprudential theory into litigation, remedy, prohibition, deterrence, and precedent that advance competition.

This Collection, *Unlocking Antitrust Enforcement*, demonstrates that tools to advance antitrust enforcement already exist, and they are well-suited to confront today's U.S. antitrust challenges. The Features arrive at a critical moment, when economic forces mirror the industrial concentration and economic inequality of the turn of the twentieth century. Recall that the impetus for the creation of U.S. antitrust laws was the growing power of Industrial Age trusts, combinations of holdings within and across industries that dominated important economic sectors like oil, steel, and tobacco. Trusts exercised what reformers saw as outsized political power, and they were blamed for the rise of economic inequality in the early years of the twentieth century. Public outrage at their economic dominance spurred the passage of the Sherman Act in 1890,¹ and, fueled by a decade of merger mania, the Clayton² and Federal Trade Commission Acts³ in 1914. One leading proponent of antitrust reform captured the prevailing mood when he warned of the "gross inequality in the distribution of wealth and income which giant corporations have fostered."⁴

Today, we see similar economic trends. The United States has a market power problem; one that may well extend beyond individual markets to slow

1. 15 U.S.C. §§ 1-7 (2012).

2. 15 U.S.C. § 12-27 (2012).

3. 15 U.S.C. § 41-58 (2012).

4. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 570 (1933) (Brandeis, J., dissenting).

economic growth and widen economic inequality.⁵ But there is also an arsenal of antitrust-enforcement actions that can be used to preserve and garner the benefits of competition.

The nine Features in this Collection primarily focus on the efforts that can be undertaken by the federal antitrust agencies: the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC). Together, these Features lay the foundation for an overarching enforcement agenda, one written in the long, but receding, shadow of the Chicago School, which brought economic analysis to the forefront of antitrust but failed to fully capture the realities of competition and the private actions that can curb it. This agenda can be implemented immediately, relying on the “dynamic potential” of the antitrust laws,⁶ which “evolve[] as circumstances change and learning grows.”⁷

Key to that learning is the discipline of economics. Each Feature includes an economist author. Economic analysis lies at the center of antitrust analysis as an indispensable tool for establishing harm or benefit from firms’ actions. Though the Chicago School relied on economics to criticize the antitrust rules of an earlier era, economic analysis should not be considered as synonymous with opposition to enforcement. The discipline of economics has developed many tools that identify and measure anticompetitive conduct. Theories of collusion and exclusion have developed in sophistication and variety since the founding of the Chicago School. And advances in empirical methods since that time have allowed for careful and rigorous measurement of anticompetitive strategies. Economic tools are powerful and neutral and can be used for assessment of proposed remedies and enforcement policies. When applied to anticompetitive acts, economic analysis will demonstrate the need for enforcement and indicate solutions. To that end, the authors in this Collection rely upon the modern economic tools of game theory, empirical estimation, bargaining theory, and other techniques that can help courts determine where, and if, there is harm to competition. And, in so doing, this Collection illustrates three larger themes important to the future of antitrust.⁸

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5. Jonathan B. Baker, *Market Power in the U.S. Economy Today*, WASH. CTR. EQUITABLE GROWTH (Mar. 20, 2017), <http://equitablegrowth.org/research-analysis/market-power-in-the-u-s-economy-today> [<http://perma.cc/722A-ZZW7>].
 6. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988) (“The Sherman Act adopted the term ‘restraint of trade’ along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.”); *accord* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 888 (2007).
 7. Frank H. Easterbrook, *Is There a Ratchet in Antitrust Law?*, 60 TEX. L. REV. 705, 706 (1982).
 8. Although *Unlocking Antitrust Enforcement* states an overall point of view, no author necessarily supports the views expressed in any other Feature.

First, competitive harm today may arise from business arrangements far more diverse than horizontal agreements reached between powerful, competing sellers. Horizontal agreements have been too-often treated as the ground zero of antitrust. In fact, competitive harms and exclusionary conduct can result from any number of corporate arrangements, and this Collection contains several Features that illustrate the potential for such enforcement. The antitrust laws can be applied to reach horizontal shareholding in a concentrated product market, as demonstrated by Herbert Hovenkamp and Fiona Scott Morton,⁹ as well as rules adopted by standards-setting organizations that are ineffective in preventing the owners of standard-essential patents from exploiting the monopoly power they gain from the creation of a standard that employs their patents, as explained by Douglas Melamed and Carl Shapiro.¹⁰ Danger to competition may come, we are told by Scott Hemphill and Nancy Rose, from buyers as well as sellers,¹¹ and from vertical contractual arrangements of the kind analyzed by Jonathan Baker and Fiona Scott Morton¹² and vertical mergers, which are discussed by Steven Salop.¹³

Second, we believe that the common-law approach to antitrust must always reflect current economic theory and the facts at hand, even requiring a rethinking of skeptical Supreme Court dicta. Scott Hemphill and Phillip Weiser show that careful application of precedent would allow modern predation cases to escape *Brooke's Group's* incredulity about the likelihood of predatory pricing,¹⁴ and Howard Shelanski urges reexamination of *Trinko's* doubt about the ability of the judiciary to fashion effective antitrust remedies in cases that present very different fact patterns from *Trinko* itself.¹⁵ At the same time, examination of new economic trends and business models reinvigorates, rather than deemphasizes, the importance of treating market concentration as a critical starting point in antitrust analysis,¹⁶ the issue on which Carl Shapiro and Herbert Hovenkamp focus, while also reminding enforcers and courts alike that the customers in each

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9. Fiona Scott Morton & Herbert Hovenkamp, *Horizontal Shareholding and Antitrust Policy*, 127 YALE L.J. 2026 (2018).
 10. A. Douglas Melamed & Carl Shapiro, *How Antitrust Law Can Make FRAND Commitments More Effective*, 127 YALE L.J. 2110 (2018).
 11. C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078 (2018).
 12. Jonathan B. Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 YALE L.J. 2176 (2018).
 13. Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962 (2018).
 14. C. Scott Hemphill & Philip J. Weiser, *Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing*, 127 YALE L.J. 2048 (2018).
 15. Howard Shelanski, *Antitrust and Deregulation*, 127 YALE L.J. 1922 (2018).
 16. Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996 (2018).

properly-defined antitrust market deserve protection, a principle discussed by Michael Katz and Jonathan Sallet.¹⁷

Third, we call on antitrust enforcers to recognize that underenforcement will not inevitably be corrected by the market. It is mistaken, for example, to expect that a new firm will always enter to attack monopoly profits.¹⁸ A dominant incumbent can use its profits to buy up small entrants, build entry barriers, or enlist a regulator's support to suppress rivalry. Concerns about the potential for under-enforcement are growing.¹⁹ It is therefore time – indeed past time – for a reassessment of the assumption that markets will always, and in a timely way, self-correct. For this reason, enforcers must be vigilant in their protection of the competitive process. The Features in this Collection demonstrate several actions by which enforcers could act against current forms of anticompetitive behavior that have, in some cases, existed for many years without any self-correction through the actions of private firms.

Concern that antitrust enforcement must be curbed today to avoid inevitable over-enforcement ignores the practical threat of under-enforcement. As veterans of antitrust agencies know, practical considerations influence how and which cases are brought. Antitrust agencies must investigate and prosecute an enforcement action against a defendant that will counter the government's case by undermining the government's view of the law, economics, and evidence. The agency must be confident both in its evidence and the match with relevant precedents to bring a case. To write a complaint that will be argued before a federal judge entails a deep contemplation of what knowledge is needed to demonstrate the necessity of enforcement and the nature of harm. Antitrust actions must be defended in court as well as to the public, and given that the enforcer might lose, enforcement is risky. This risk may discourage enforcers from bringing some meritorious cases, and forces them to devote a substantial (and perhaps socially

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17. Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142 (2018). Both this Feature and Hovenkamp & Shapiro, *supra* note 16, demonstrate the continuing importance of *Philadelphia National Bank*.
 18. Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1, 8-12 (2015).
 19. Baker, *supra* note 5; Carl Shapiro, *Antitrust in a Time of Populism*, INT'L J. INDUSTRIAL ORG. (forthcoming 2018) (manuscript at 24), <http://faculty.haas.berkeley.edu/shapiro/antitrustpopulism.pdf> [<http://perma.cc/4HYN-7LUU>] ("Sound competition policy would tolerate some false positives – blocking mergers involving targets, only to find that they do not grow to challenge the incumbent – in order to avoid some false negatives – allowing mergers that eliminate targets that would indeed have grown to challenge the dominant incumbent.").

excessive) fraction of their limited resources to strengthening the cases they do bring.

And yet there is no symmetric reminder of the risk of inaction; no judge that scolds antitrust enforcement authorities after a cleared merger causes higher prices or less innovation; and no court that chastises the government for declining to challenge exclusionary conduct harming competition. This inherent imbalance in risks motivates this Collection: without persistent and comprehensive analysis of anticompetitive conduct in the economy, followed by action, enforcement will tend to be inadequate. In this Collection, we offer tools for enforcement that include detailed economic analysis, that are informed by experience, new technologies, and data, that advance the sound evolution of the law, and that are always anchored to the competitive realities of a controversy. Antitrust has long been described as a common-law discipline;²⁰ this Collection's ambition is to demonstrate that antitrust enforcement can become more effective while working with the core tenets of common-law logic and experience.²¹

20. *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 887, 899-900 (2007) ("From the beginning the Court has treated the Sherman Act as a common-law statute.").

21. O.W. HOLMES, JR., *THE COMMON LAW* 1 (1881) ("The life of the law has not been logic, it has been experience.").