DATA PRIVACY AS A PROCOMPETITIVE JUSTIFICATION: ANTITRUST LAW AND ECONOMIC ANALYSIS

*Erika M. Douglas**

INTRODUCTION

Digital platforms are invoking data privacy to justify their anticompetitive conduct. In the face of alleged antitrust law violations, social media, search and mobile application giants are arguing that online competition must be sacrificed to protect their users' data privacy.[1]

While some courts are skeptical of these "privacy-as-justification" claims,[2] at least one federal judge has accepted such an argument.[3] In

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1 *See, e.g.*, hiQ Labs, Inc. v. LinkedIn Corp., 938 F.3d 985, 994 (9th Cir. 2019) (LinkedIn, a professional social networking service, asserting user data privacy protection as the justification for its allegedly anticompetitive conduct), *vacated on other grounds*, 141 S. Ct. 2752 (2021); *Aptoide: EU National Court Rules Against Google in Anti-Trust Process*, PR NEWSWIRE (Oct. 22, 2018), https://www.prnewswire.com/news-releases/aptoide-eu-national-court-rules-against-google-in-anti-trust-process-821883497.html [https://perma.cc/7C3M-R6NB] (Google emphasizing data security in response to allegations of anticompetitive conduct from rival Aptoide); Epic Games, Inc. v. Apple Inc., No. 20-CV-05640, 2021 WL 4128925, at *106 (N.D. Cal. Sept. 10, 2021) (Apple establishing data privacy and security as a justification for anticompetitive conduct); SUBCOMM. ON ANTITRUST, COM. & ADMIN. L., H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS 55 (2020) (quoting testimony from Tile Chief Privacy Officer and General Counsel Kirsten Daru that "Apple has used the concept of privacy as a shield" for anticompetitive conduct).

2 *See, e.g.*, *hiQ*, 938 F.3d at 994 (rejecting arguments by LinkedIn, a professional social networking service, that user data privacy protection was the rationale for its allegedly anticompetitive conduct), *vacated on other grounds*, 141 S. Ct. 2752 (2021).

3 *See* Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 1042–43 (N.D. Cal. 2021).

Epic Games, Inc. v. Apple Inc.,[4] Judge Gonzalez Rogers of the U.S. District Court for the Northern District of California found that Apple's rules for its mobile applications (app) store were justified, because those rules improved app store data privacy and security for end users.[5] This privacy improvement, in turn, enhanced competition between Apple and other mobile device operating systems.[6] By establishing this privacy justification, Apple avoided federal antitrust liability. This was despite Judge Gonzalez Rogers also concluding that Apple's rules were *prima facie* anticompetitive under Section 1 of the Sherman Act.[7] Although the reasoning in *Epic v. Apple* has its flaws,[8] the case is significant—it is the first U.S. decision to accept data privacy and security as a procompetitive justification for the conduct of a digital giant.

As *Epic v. Apple* demonstrates, in rule of reason cases,[9] defendants may avoid antitrust liability by showing a "plausible (and legally cognizable) competitive justification" for their conduct.[10] The rule of reason proceeds based on a burden-shifting framework, under which the plaintiff must first demonstrate a *prima facie* case of harm to competition.[11] If the plaintiff makes this showing (as Epic did in *Epic*

4 *See id.* Apple's app store practices are also the subject of a statement of objections from the European Commission. European Commission Press Release IP/21/2061, Antitrust: Commission Sends Statement of Objections to Apple on App Store Rules for Music Streaming Providers (Apr. 30, 2021) (announcing that the Commission has "informed Apple of its preliminary view that [Apple] distorted competition in the music streaming market as it abused its dominant position for the distribution of music streaming apps through its App Store").

5 *Id.* at 1038, 1041.

6 *Id.*

7 The Sherman Act is one of the principal federal antitrust laws in the United States. Sherman Antitrust Act, 15 U.S.C. §§ 1–2 (2004) [hereinafter Sherman Act]. This Article focuses on rule of reason analysis conducted under Section 1 (prohibition on unreasonable restraints of trade) and Section 2 (prohibition on unlawful monopolization) of the Sherman Act.

8 *See infra* sub-section I.A.1.b: Data Privacy Restraints that Limit Free-Riding to Enhance Interbrand Competition (critiquing aspects of the reasoning in Epic Games, Inc. v. Apple Inc.).

9 The rule of reason is a common analytical standard applied in antitrust law. It considers evidence of the effects of the impugned conduct on competition. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977) (noting that the rule of reason is "the prevailing standard of analysis") (citing Standard Oil Co. v. United States, 221 U.S. 1 (1911)); FTC v. Qualcomm Inc., 969 F.3d 974, 991 (9th Cir. 2020) ("Regardless of whether the alleged antitrust violation involves concerted anticompetitive conduct under § 1 or independent anticompetitive conduct under § 2, the three-part burden-shifting test under the rule of reason is essentially the same."). This is in contrast to the per se standard, which presumes anticompetitive effects, see *infra*, footnote 32.

10 Polygram Holding, Inc. v. FTC, 416 F.3d 29, 36 (D.C. Cir. 2005).

11 United States v. Microsoft Corp., 253 F.3d 34, 58–59 (D.C. Cir. 2001) (per curiam) (describing the burden-shifting framework).

v. Apple), the defendant is then given the opportunity to demonstrate a nonpretextual, procompetitive justification for its impugned conduct.[12] If such a justification is established, the case is likely to end in the defendant's favor, as it did for Apple.

Though privacy protection is a novel type of justification, *Epic v. Apple* forms part of a longer history of high-profile technology cases in which procompetitive justifications determined the liability outcomes. In a seminal case over twenty years ago, computing giant Microsoft avoided liability for a Sherman Act claim by establishing a procompetitive justification.[13] In just the last two years, U.S. antitrust agencies have revived enforcement against a new era of digital giants, bringing the first major anti-monopoly cases since the Microsoft litigation. These high-profile claims will press courts once again into considering sophisticated justification arguments in complex, technology-driven markets. The question of what is—and is not—cognizable as a justification in antitrust law may well determine the outcome of these groundbreaking Section 1 and Section 2 Sherman Act cases.[14]

Despite its importance to high-stakes cases, the law on procompetitive justifications remains under developed. The unsettled state of the law is reflected in cases like *Epic v. Apple*, in which the court recognizes privacy protection as a justification but offers little explanation in law or fact. Scholarship on procompetitive justifications is equally sparse,[15] and has yet to consider how the law applies to claims of privacy protection as a justification. As justifications continue to determine high-profile case outcomes,

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12 *Id.* at 59 ("[I]f a plaintiff successfully establishes a *prima facie* case under § 2 [of the Sherman Act] by demonstrating anticompetitive effect, then the monopolist may proffer a 'procompetitive justification' for its conduct." (citing Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 483 (1992))); United States v. Dentsply Int'l, Inc., 399 F.3d 181, 196 (3d Cir. 2005) ("[H]aving demonstrated harm to competition, the burden shifts to [the defendant] to show that [its impugned conduct] promotes a sufficiently pro-competitive objective." (citing United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993))). If the defendant establishes a procompetitive justification, the burden then shifts back to the plaintiff, who may rebut the justification by showing a less restrictive alternative to achieve the same competitive effect or "demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit." *Microsoft*, 253 F.3d at 59.

13 *Microsoft*, 253 F.3d at 67 (establishing a procompetitive justification for overriding user browser choices, based on technical necessity in software design; Microsoft was, however, found liable for other claims for which it failed to establish justifications); *see also* Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1997) (establishing intellectual property right as justification).

14 *But see id.* at 829 (noting that most rule of reason cases are dismissed at the initial stage of the analysis because the plaintiff fails to establish a prima facie case that the defendant's conduct is anticompetitive).

15 With the notable exception of the recent article, John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 506 (2019).

agencies, courts, and defendants will need a clearer understanding of when privacy-protective conduct is—and is not—cognizable to justify conduct in antitrust law.

This Article contributes the first scholarly analysis of data privacy protection as a justification for anticompetitive conduct.[16] It argues that privacy protections are cognizable as such a justification in antitrust law when—and only when—their effect is to improve competition.

The Article draws on U.S. antitrust cases, international competition law, and economic literature to examine this argument in four parts. Part I argues that privacy restraints are cognizable as a justification when the restraint improves economic efficiency and thus competition. It applies this logic, developing two scenarios in which privacy restraints are likely to have efficiency-improving effects. Part II then constructs the other half of this argument, examining when privacy restraints are *not* cognizable as a justification in antitrust law. Supreme Court precedent is clear—there is no justification established when the defendant claims that competition must be limited to achieve data privacy. Parts III and IV of the Article then examine the challenges defendants are likely to face in substantiating privacy justifications on the facts as non-pretextual, and in the final weighing stages of the rule of reason, respectively.

For antitrust readers, it is worth distinguishing from the outset what these privacy justification arguments are not. The research for this Article did not uncover cases in which antitrust defendants claimed regulatory immunity, asserting that privacy regulation displaces antitrust law. Nor are defendants claiming that a particular statutory authorization or permission creates a conflict between antitrust and data privacy law. These arguments would be analyzed under different precedents and principles of antitrust law.[17] Instead,

16 For a practitioner-focused discussion of this issue, see also Erika Douglas, *Data Privacy Protection as a Procompetitive Justification*, ANTITRUST MAG. ONLINE (Dec. 2021), https://www.americanbar.org/groups/antitrust_law/publications/antitrust-magazine-online/2021/december/data-privacy-protection-as-a-procompetitive-justification/ [https://perma.cc/S9DC-WYCG].

17 The potential for state action or other antitrust law immunity to apply to privacy regulation is left for discussion in later work. *See generally* Richard M. Brunell, *In Regulators We Trust: The Supreme Court's New Approach to Implied Antitrust Immunity*, 78 ANTITRUST L.J. 279, 283 (2012) ("Conduct that is specifically authorized by regulators under a regulatory statute is often immune, but it may not be if there is no conflict between the underlying goals of the regulatory statute and the antitrust laws." (footnote omitted)). Cases like *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* have found that industry-specific regulatory regimes may supplant antitrust law, even where both areas of law impose compatible obligations. 540 U.S. 398, 412 (2004) (explaining that where there exists "a regulatory structure designed to deter and remedy anticompetitive harm . . . the additional

the arguments canvassed here involve more general assertions that the defendant's conduct protects the privacy interests of individuals and is therefore justified, even if the conduct is *prima facie* anticompetitive.

The arguments developed here matter beyond the specific cases in which defendants claim privacy as a justification. They form the tip of a legal iceberg where antitrust and data privacy have begun to overlap. In recent years there has been a global avalanche of broader and stricter data privacy laws, from the game-changing European General Data Protection Regulation (GDPR) in 2018,[18] to the proliferation of U.S. state privacy laws and beyond.[19] In the digital economy, the flow of data often enables competition among goods and services, and the proliferation of data privacy law has begun to impact that flow.[20] This has brought about a myriad of new interactions between data privacy and antitrust law.[21]

These interactions between antitrust law and privacy are marked by complexity and variability.[22] They can, at times, seem inconsistent. Antitrust authorities are taking the position that certain privacy laws improve competition,[23] and that digital privacy is eroded by market

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benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny").

18 European Parliament and Council Regulation (EU) 2016/679 of 27 April 2016, On the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), art. 1, 2016 O.J. (L 119) 1 [hereinafter GDPR].

19 *See, e.g.*, California Consumer Privacy Act of 2018, CAL. CODE §1798.100; Colorado Privacy Act, COLO. REV. STAT. ANN. §§ 6-1-1301–1313; Virginia Consumer Data Protection Act, VA. CODE ANN. §§ 59.1-571–581. Over 130 jurisdictions now have data privacy or data protection legislation. *Data Protection and Privacy Legislation Worldwide*, UNITED NATIONS CONF. ON TRADE & DEV., https://unctad.org/page/data-protection-and-privacy-legislation-worldwide [https://perma.cc/6B4F-8LEG] (noting 137 of 194 countries surveyed had data privacy or protection legislation).

20 As these legislative examples suggest, this Article focuses on data or informational privacy because it is the locus of most current interactions with antitrust law. The Article leaves for later discussion the potential interaction between antitrust law and the panoply of other legal conceptions of privacy. For a useful taxonomy of privacy and its embodiment in law, see generally, Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477 (2006).

21 *See, e.g.*, ERIKA M. DOUGLAS, DIGITAL CROSSROADS: THE INTERSECTION OF COMPETITION LAW AND DATA PRIVACY; REPORT TO THE GLOBAL PRIVACY ASSEMBLY DIGITAL CITIZEN AND CONSUMER WORKING GROUP (2021) (canvassing interactions between antitrust and data privacy in leading jurisdictions); Erika M. Douglas, *The New Antitrust/Data Privacy Law Interface*, 130 YALE L.J. F. 647 (2021) (describing the emergence of a new legal intersection between antitrust law and data privacy).

22 *See, e.g.*, DOUGLAS, *supra* note 21; Erika M. Douglas, *Monopolization Remedies and Data Privacy*, 24 VIR. J.L. & TECH. 1 (2020) (discussing tensions between antitrust data access remedies and privacy).

23 Press Release, FTC, FTC Announces September 22 Workshop on Data Portability (Mar. 31, 2020) (noting the data portability rights provided by privacy law may promote competition); Joaquín Almunia, Vice President of the Eur. Comm'n, Speech—Competition and Personal Data Protection (Nov. 26, 2012), https://ec.europa.eu/commission/

power.[24] At the same time, defendants are claiming that limits on competition improve privacy, and scholars are suggesting that privacy laws reinforce digital monopolies.[25]

As privacy and competition continue to collide, courts, policymakers, and enforcers will need theories to address this new antitrust/data privacy interface.[26] This will demand the development of antitrust doctrine like the thinking proposed in this Article. It will also require attention to broader digital policy questions where privacy and competition interact, particularly where there are tradeoffs between the two. When might it be necessary or desirable to prioritize privacy over competition, or vice versa? How should such tradeoffs be addressed in competition or privacy policy, or other areas such as digital regulation? Antitrust law alone cannot answer these questions, but each is well worth asking in the broader quest for effective and cohesive digital policy.

I. PRIVACY PROTECTIONS ARE JUSTIFIED ONLY IF THEY ENHANCE COMPETITION

Procompetitive justifications have a long history in antitrust law, tracing back to the words of Senator John Sherman himself. Senator Sherman described a then-proposed Sherman Act as covering "unlawful combinations to prevent competition,"[27] but emphasized that the legislation would "not in the least affect combinations in aid

presscorner/detail/en/SPEECH_12_860 [https://perma.cc/7K76-UULV] ("[P]ortability of data is important for those markets where effective competition requires that customers can switch by taking their own data with them.").

24 *See* Second Amended Complaint at 96–99, Texas v. Google LLC, No. 20-CV-00957-SDJ, 2021 WL 2043184 (E.D. Tex. Aug. 4, 2021) (alleging Google's planned termination of third party cookies access for its internet browser is anticompetitive, because it "raise[s] barriers to entry and exclude[s] competition in the exchange and ad buying tool markets" by blocking cookies tracking by publishers and advertisers, who would otherwise compete with Google to deliver advertising); Substitute Amended Complaint for Injunctive and Other Equitable Relief at 73–74, FTC v. Facebook, Inc., Inc., No. 20-CV-03590 (D.D.C. Sept. 8, 2021) (alleging that "[w]ithout meaningful competition, Facebook has been able to provide lower levels of service quality on privacy and data protection than it would have to provide in a competitive market").

25 *See supra*, notes 1–3 and accompanying text (discussing privacy justification claims); Alexander Bleier, Avi Goldfarb & Catherine Tucker, *Consumer Privacy and the Future of Data-Based Innovation and Marketing*, 37 INT'L J. RES. MKTG. 466 (2020) (providing research that suggests privacy laws like GDPR may advantage incumbent firms, making it more difficult for small or new firms to compete).

26 Erika M. Douglas, *The New Antitrust/Data Privacy Law Interface*, 130 YALE L.J.F. 647 (2021) (coining the term antitrust/privacy interface).

27 21 CONG. REC. 2456 (1890) (statement of Sen. Sherman); *see also* Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1317 (1999) (finding that this Sherman Act history indicates the Framers would allow defendants to introduce procompetitive justifications).

of production where there is free and fair competition."[28] This developed as a central tenet in Sherman Act jurisprudence, which holds that not *every* restraint of trade is prohibited, despite the literal wording of the legislation to that effect. Only restraints that impair competition in an unlawful manner violate the Sherman Act—other restraints are "justified."

Justifications have evolved to play a dual role in the adjudication of many antitrust claims. First, courts deciding Sherman Act claims must determine whether the conduct is subject to analysis under the per se standard, the rule of reason, or an analytical standard somewhere in between.[29] The court's choice of analytical standard tends to be influenced by the presence or absence of plausible procompetitive justifications for the defendant's conduct. For perniciously anticompetitive conduct, like horizontal price-fixing, the defendant is unlikely to be able to muster much of a justification, and the per se rule is likely to apply. If instead the court finds there is a potential procompetitive justification, then the rule of reason is more likely to be applied.[30]

This initial determination of the standard is significant because, if on first inspection, the court decides the per se rule applies, the defendant's conduct is presumed to be anticompetitive.[31] The plaintiff need not demonstrate anticompetitive effects and the defendant will not be afforded an opportunity to prove its procompetitive justification. If instead the rule of reason is applied, then the plaintiff must demonstrate the *prima facie* anticompetitive effects of the defendant's conduct. Sherman Act claims are more often subject to the rule of reason.[32]

Once a court determines that the rule of reason applies, justifications become relevant in a second way, as part of the substance of the rule of reason analysis. The rule of reason is typically applied using a burden-shifting framework.[33] The plaintiff must first demonstrate a *prima facie* case of harm to competition. Then, the

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28 21 CONG. REC. 2457.

29 *See, e.g.*, cases suggesting an abbreviated rule of reason analysis, sometimes referred to as a "quick look" FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459 (1986); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109 n.39 (1984).

30 Newman, *supra* note 15, at 508 (describing the presence or absence of a plausible justification as a "sorting mechanism" that can aid in determining the applicable standard).

31 The per se standard is applied to "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable." N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

32 Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977) (noting that the rule of reason is "the prevailing standard of analysis") (citing Standard Oil Co. v. United States, 221 U.S. 1 (1911)).

33 United States v. Microsoft Corp., 253 F.3d 34, 58–59 (D.C. Cir. 2001) (per curiam) (describing the burden-shifting framework).

defendant may avoid antitrust liability by showing a plausible and legally cognizable justification for its conduct. Plausible justifications are scrutinized by the court at this second step. If the defendant establishes a justification, the burden shifting continues. The plaintiff may demonstrate that the claimed procompetitive benefits could be achieved through less restrictive means, and the court proceeds to balance the overall competitive effects of the conduct.[34]

This Article focuses on this second role of justifications, and leaves for later consideration how the presence of privacy justifications may influence the earlier-stage determination of the appropriate analytical standard. It examines what constitutes such a procompetitive justification in law and fact, and, as a result, the Article is focused on cases in which the plaintiff has carried its initial burden of demonstrating that the privacy restraint is *prima facie* anticompetitive (as in *Epic v. Apple*), or cases in which the court takes a belt-and-suspenders approach of ruling on the justification arguments despite a finding that the restraint is not plausibly anticompetitive. As such, the Article also leaves for later discussion how courts might make the initial determination of whether a privacy restraint appears anticompetitive. At this first step in applying the rule of reason, courts may well conclude that certain privacy protections, particularly vertical restraints, do not have the plausible anticompetitive effects for the case to proceed further.[35]

Cases that proceed to the later steps in the rule of reason analysis are likely to end in the defendant's favor if it can make some plausible showing of a justification. Despite this potential importance of justifications to case outcomes, and their long history under the Sherman Act, the jurisprudence has yet to settle on a definition of what constitutes a procompetitive justification. Courts describe valid justifications in a variety of ways, and their articulation of the law is often brief. Courts also tend to be fairly quick to accept the

34 NCAA v. Alston, 141 S.Ct. 2141, 2155, 2284 (2021) (citing Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018)); United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001).

35 This has been the case in some comparable jurisprudence on vertical restraints, in which the restraint very clearly protected the safety or wellbeing of consumers. The analysis did not need to reach the question of justifications because the plaintiff failed to carry its initial burden. *See, e.g.*,Tripoli Co. v. Wella Corp. 425 F.2d 932, 938–39 (3d Cir. 1970) (finding no anticompetitive conduct where a manufacturer imposed vertical restraints on wholesalers to prevent the sale of wholesale-formulated beauty products to end consumers, which would create safety risks for end consumers); Clairol, Inc. v. Bos. Discount Ctr. of Berkley, Inc., 608 F.2d 1114, 1116–18, 1124–26 (6th Cir. 1979) (considering safety-related reasons for vertical distribution restraints and finding "clearly" the practices do not stifle competition). In cases like *HDC Med., Inc. v. Minntech Corp.*, 474 F.3d 543, 550 (8th Cir. 2007) involving unilateral conduct, courts have found that there was no anticompetitive conduct where a strong safety interest was established for the alleged misconduct.

justifications proffered by defendants.[36] Scholars lament this unclear and unsettled state of the law,[37] finding that "despite their prominent role in antitrust enforcement, procompetitive justifications have remained underexplored and poorly understood."[38]

Although the judicial descriptions of procompetitive justifications vary, they share a discernable focus on improved competition, enhanced efficiency[39] and consumer welfare.[40] In the leading case of *United States v. Microsoft Corp.*, the D.C. Circuit describes a procompetitive justification as "a nonpretextual claim that [the monopolist's] conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal."[41] The First Circuit similarly describes a justification, asserted in response to a Section 1 Sherman Act claim, as "valid if it

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36 This Article discusses all rule of reason cases generally, but Phillip E. Areeda and Herbert Hovenkamp suggest it may be easier to prove a justification in unilateral conduct cases than in joint conduct cases, given the latter are viewed as inherently more suspect by antitrust law. *See* 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 658(f) (4th ed. 2015).

37 *See* Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527, 554 (2013) (asking "what business justifications for exclusionary conduct are cognizable?"); Dustin Sharpes, *Reintroducing Intent into Predatory Pricing Law*, 61 EMORY L.J. 903, 933 (2012) (complaining that courts "have failed to provide any clear guidelines" and observing that the legal community is seeking a definite list of justifications); Ashley Ulrich, Note, *Crediting Procompetitive Justifications for Digital Platform Defendants: Continued Salience of a Broad, Efficiencies-Focused Approach*, 10 N.Y.U. J. INTELL. PROP. & ENT. L. 95, 109 (2020) ("In the over 100 years since *Chicago Board of Trade* and 40 years since *BMI*, antitrust doctrine has not yet coalesced around a clear standard for when to credit a procompetitive justification within rule of reason analysis.").

38 Newman, *supra* note 15, at 506.

39 *See, e.g.*, FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459 (1986) (stating that agreements limiting consumer choice in a market are anticompetitive, "[a]bsent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services"); NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 114 (1984) (rejecting the defendant's "efficiency justification" because there was no proof that the restraints "produced any procompetitive efficiencies which enhanced the competitiveness of college football television rights"); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 20 (1979) (considering whether the challenged practice is "designed to 'increase economic efficiency and render markets more, rather than less, competitive'") (citing United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16 (1978)); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54 (1977) (finding that "[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products"); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608 (1985) (finding a "failure to offer any *efficiency* justification whatever for [the defendant's] pattern of conduct") (emphasis added).

40 *See, e.g.*, Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1183 (1st Cir. 1994) ("In general, a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare."), *abrogated on other grounds by* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010).

41 United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001) (per curiam).

relates directly or indirectly to the enhancement of consumer welfare" such as the "pursuit of efficiency and quality control."[42] At times, courts describe justifications in more granular terms associated with improved efficiency or consumer welfare, such as increased output, improved operating efficiency, enhanced quality, or greater consumer choice.[43]

The jurisprudence emphasizes that the ultimate question is one of procompetitive effects.[44] Unless there is "some countervailing procompetitive virtue" then the restraint or conduct is not justified.[45] Though this may seem circular—a procompetitive justification must be procompetitive—it is useful. It means that a mere desire to maintain a monopoly market share, or to thwart the entry of competitors, cannot act as a justification because such conduct is the antithesis of competition.[46]

Most antitrust courts understand these various definitions of procompetitive justifications as closely intertwined. Restraints or conduct that ameliorate market failures—improve efficiency—are thought to increase competition, and thus consumer welfare. The different judicial definitions of justifications are distinguishable in

42 *Data Gen. Corp.*, 36 F.3d at 1183.

43 *See, e.g.*, Polygram Holding, Inc., 136 F.T.C. 310, 345–46 (2003), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005) ("Cognizable justifications ordinarily explain how specific restrictions enable the defendants to increase output or improve product quality, service, or innovation."); McWane, Inc. v. FTC, 783 F.3d 814, 841 (11th Cir. 2015) (describing cognizable justifications as "typically those that reduce cost, increase output or improve product quality, service, or innovation" (quoting McWane, Inc., 2014-1 Trade Cas. (CCH) ¶ 78670, 2014 WL 556261, at *30 (F.T.C. Jan. 30, 2014)); Law v. NCAA, 134 F.3d 1010, 1023 (10th Cir. 1998) (explaining that "increasing output, creating operating efficiencies, making a new product available, enhancing product or service quality, and widening consumer choice have been accepted by courts as [procompetitive] justifications" and observing further that "mere profitability or cost savings have not qualified as a defense under the antitrust laws"). *But see* Newman, *supra* note 15, at 517 (critiquing marketplace effects-based definitions of valid justifications on the basis that such effects cannot necessarily be equated with increased consumer welfare).

44 NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104 (1984) ("Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition."); *Ind. Fed'n of Dentists*, 476 U.S. at 459 (noting that agreements limiting consumer choice in a market are unlawful under the rule of reason, "[a]bsent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services"); *Data Gen. Corp.*, 36 F.3d at 1183 ("In essence, a unilateral refusal to deal is prima facie exclusionary if there is evidence of *harm* to the competitive process; a valid business justification requires proof of countervailing *benefits* to the competitive process.").

45 *Ind. Fed'n of Dentists*, 476 U.S. at 459.

46 *Data Gen. Corp.*, 36 F.3d at 1183.

certain circumstances,[47] but this Article adopts the conceptions of procompetitive justifications from existing jurisprudence, treating efficiency, consumer welfare, and competition as interrelated concepts.

As in much of modern antitrust doctrine, these judicial references to improved "efficiency" are understood to mean economic efficiency.[48] There are rare cases that have accepted non-economic, or at least tenuously economic, justifications such as enhancing the diversity of university student bodies,[49] or even improving the health of horses.[50] Such decisions lack any principled basis for labeling these interests as "justifications," and the cases should be viewed as outliers. The weight of Supreme Court precedent confirms that cognizable justifications are premised on improvements of consumer economic welfare,[51] in keeping with the consumer welfare standard applied across antitrust law.

How would this antitrust jurisprudence apply to claims of privacy protection as a procompetitive justification? These cases suggest there is nothing in existing law that precludes the recognition of new types of justifications. The jurisprudence focuses on the substance of the competitive effects, not simply established categories of justifications. Privacy protective restraints may therefore be justified in antitrust law where the restraint has procompetitive effects in the relevant market. The relationship or effect of the restraint on data privacy is not determinative—what matters is its effect on competition.

A 2016 Canadian case reinforces this view that procompetitive privacy restraints may constitute a justification. *Commissioner of*

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47 *See generally* Newman, *supra* note 15, at 516-17 (illustrating errors in judicial assumptions that conduct is justified when it increases output, because output increases do not always improve consumer welfare).

48 *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 887 (2007) (referring to the evaluation of justifications "based upon demonstrable economic effect" (quoting Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58–59 (1977))); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 690 n.16 (1978) (noting that the antitrust inquiry into the reasonableness of competitive restraints emphasizes "economic conceptions"). Hovenkamp's leading treatise also clarifies that this judicial use of the term "efficiency" to describe justifications should be understood to refer to reduction in the costs or outputs of the monopolist itself (productive efficiency), rather than the market as a whole (allocative efficiency), given that even monopolists are under no obligation to make the market larger. *See* AREEDA & HOVENKAMP, *supra* note 36, ¶ 658(f).

49 United States v. Brown Univ., 5 F.3d 658, 677–78 (3d Cir. 1993) (accepting the enhancement of choice for certain students and the broadening of the socioeconomic sphere of the potential student body as justifications for collusion on need-based financial aid between elite colleges).

50 *See* Newman, *supra* note 15, at 527–28 (discussing JES Props., Inc. v. USA Equestrian, Inc., No. 02-CV-1585-T-24, 2005 WL 1126665 (M.D. Fla. May 9, 2005)).

51 *See, e.g.*, Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 690 n.16 (1978); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 463–64 (1986).

Competition v. Toronto Real Estate Board is one of the most detailed decisions to date on whether privacy protection could justify anticompetitive conduct in fact and law. Canadian competition enforcers brought claims against the Toronto Real Estate Board (TREB) alleging that TREB had abused its dominance in certain markets for residential real estate brokerage services.[52] TREB is a professional association comprised of real estate brokers. It operated a database of real estate listings that, at the time of the case, had no readily available substitute. TREB had promulgated exclusionary rules that denied online real estate brokers access to certain home listing data in its database, while making that same data available to traditional bricks-and-mortar brokers.[53] These online brokers posed a competitive threat to TREB's many traditional realtor members, by undercutting their prices and providing more direct consumer access to real estate listings.

In response, TREB argued that it had limited online distribution of listing data to protect the data privacy of individuals who were selling their homes through its real estate platform.[54] TREB claimed it restricted online brokers from accessing certain information, such as home photos and historical home selling prices, because online distribution of this information would violate the home sellers' privacy interests. TREB presented a number of arguments in support of this position, arguing that its denial of online data access was necessary to comply with Canadian privacy law, and to accord with TREB's own terms and conditions of service for its home sales database.[55]

The case was heard by the Canadian Competition Tribunal, an adjudicative body that specializes in Canadian competition law. Importantly, the Tribunal recognized in obiter dicta that privacy could be cognizable as a justification in law, explaining that "there may be legal considerations, such as privacy laws, that legitimately justify an impugned practice, provided that the evidence supports that the impugned conduct was primarily motivated by such considerations."[56]

Although TREB failed to establish on the facts that user privacy protection was a significant driver of its misconduct,[57] the decision remains significant for this legal observation about privacy

52 Comm'r of Competition v. Toronto Real Est. Bd., 2016 Comp. Trib. 7 CT-2011-003 (Can.). "Abuse of dominance" under the Canadian Competition Act is, for the purposes of discussion here, roughly equivalent to unlawful monopolization under Section 2 of the Sherman Act.

53 *Id.*

54 *See id.* ¶ 321.

55 *Id.*

56 *Id.* ¶ 294.

57 *See id.* ¶ 380. See discussion of the evidence and factual findings in *Commissioner of Competition v. Toronto Real Estate Board.*, *infra* in text accompanying footnotes 184–89.

justifications. It implies there is no barrier in Canadian competition law doctrine to recognizing a privacy restraint as procompetitive. Similar logic applies to privacy protection as a justification under U.S. antitrust law. When a defendant demonstrates that its privacy-protective restraint is positive for competition, those restraints may be justified in antitrust law.

In determining whether specific privacy protective restraints or conduct are procompetitive (and thus cognizable as a justification), existing U.S. law suggests that economic effects evidence will be influential. In assessing novel justification claims, the Supreme Court has focused on demonstrated economic realities, and in particular, economic evidence that the restraint is likely to improve efficiency.[58] In leading cases like *Continental T.V., Inc. v. GTE Sylvania Inc.*[59] and later *Leegin Creative Leather Products., Inc. v. PSKS, Inc.*,[60] the Court looks to economic evidence to develop judicial understandings of how vertical restraints affect competition.[61] After examining the economic evidence that such restraints may often be procompetitive, the Court moved from subjecting such restraints to a per se standard to instead apply the rule of reason standard, which considers effects evidence. Where privacy restraints improve economic efficiency to the benefit of competition, those restraints may be justified in antitrust law.

A. When Might Privacy Protections Enhance Efficiency, and Thus Competition?

As argued so far, privacy protections may be justified in antitrust law when their effect is to improve competition. Such competitive effects are typically demonstrated through evidence of improved economic efficiency. This leaves an important question: When are privacy protections likely efficiency enhancing?

Alessandro Acquisti and his coauthors offer insight into this query with their extensive review of literature on the economics of privacy.[62] At a general level, the authors observe that the protection and disclosure of personal data "are likely to generate trade-offs with tangible economic dimensions."[63] This economic tangibility suggests

58 *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 888 (2007) (noting recent jurisprudence that rejects the evaluation of restraints on competition "based on 'formalistic' legal doctrine rather than 'demonstrable economic effect'" (quoting Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59 (1977))).

59 *Cont'l T.V.*, 433 U.S. 36.

60 *Leegin*, 551 U.S. 877.

61 *See id.* at 895–96; *Cont'l T.V.*, 433 U.S. at 54–55.

62 Alessandro Acquisti, Curtis Taylor & Liad Wagman, *The Economics of Privacy*, 54 J. ECON. LITERATURE 442 (2016) (reviewing theoretical and empirical economic literature on the tradeoffs associated with sharing and protecting personal data).

63 *Id.* at 444.

privacy restraints also have the potential to impact competition. Then, the authors canvas a wide array of theoretical and empirical economic research on such privacy tradeoffs, and conclude there is "one robust lesson" that can be drawn: "[T]he economic consequences of less privacy and more information sharing . . . can in some cases be welfare enhancing, while, in others, welfare diminishing."[64] The impacts of privacy protection on economic efficiency and welfare are, in other words, variable and context-dependent.[65]

In reaching this overall conclusion, Acquisti begins with "first wave" literature from Richard Posner and others. This early literature argues that the protection of privacy creates inefficiencies in markets by concealing relevant information from other economic agents.[66] For example, when privacy law protects job seekers from revealing personal information about their work experience, Posner argued employers may be left without relevant information, and may make suboptimal hiring decisions as a result.[67]

Then, Acquisti looks at a later wave of context-specific literature that suggests the effects of privacy restraints on efficiency are more variable. For example, studies suggest that ad targeting based on the collection and use of individuals' information increases the effectiveness of online advertising—but only to a certain point. There exists a threshold at which individuals begin to experience "personalization reactance"—a negative reaction to *too*-personalized advertising based on their data, which causes such ads to become less effective in provoking positive consumer responses.[68] Later economic literature confirms this personalization paradox, particularly where businesses engage in the covert collection of personal data.[69] However, studies also suggest that these negative consumer responses may be ameliorated through privacy disclosures or other transparency tools

64 *Id.* at 462.

65 *See id.* at 448 (finding that, "[d]epending on context and conditions, privacy can either increase or decrease individual as well as societal welfare").

66 *See id.* at 450 (citing Richard A. Posner, *The Right of Privacy*, 12 GA L. REV. 393 (1978) and *The Economics of Privacy*, 71 AM. ECON. REV. 405 (1981)).

67 *See id.*

68 *Id.* at 466 (quoting Tiffany Barnett White, Debra L. Zahay, Helge Thorbørnsen & Sharon Shavitt, *Getting Too Personal: Reactance to Highly Personalized Email Solicitations*, 19 MKTG. LETTERS 39 (2008)).

69 *See* Elizabeth Aguirre, Dominik Mahr, Dhruv Grewal, Ko de Ruyter & Martin Wetzels, *Unraveling the Personalization Paradox: The Effect of Information Collection and Trust-Building Strategies on Online Advertisement Effectiveness*, 91 J. RETAILING 34, 35 (2015) (describing a "personalization paradox" in advertising, where response rates to advertising tend to improve with greater personalization, but become lower in contexts where consumers feel discomfort or vulnerability because their information has been collected without their consent).

that reduce information asymmetry regarding user data collection practices.[70]

In a more recent review of privacy economics literature, Alexander Bleier, Avi Goldfarb, and Catherine Tucker reach similarly bimodal conclusions about the economic effects of privacy protections.[71] First, the authors find that, in data-intensive markets, consumer privacy concerns and privacy regulation may have disproportionate effects on innovation and marketing among small and new firms relative to large firms, which may reduce competition.[72] The article suggests this is due to foreclosure of access to data and to the disproportionate privacy litigation risk borne by smaller firms.[73] However, the authors also reach a second meta-conclusion: consumer privacy concerns may spark positive effects on competition, driving innovation in privacy-related marketing and services, and creating a competitive advantage for firms that distinguish themselves based on strong protection of user information.[74] Like Acquisti, this literature indicates that the economic effects of privacy regulation and privacy concerns on competition are context specific, and may be positive or negative.

This privacy economics literature supports the dual contentions of this Article: in some situations, privacy protections will improve competition (and thus may constitute a procompetitive justification), while in other situations, privacy protections will not improve competition (and will not constitute a justification). Though economic theory is not law, antitrust courts are likely to find justification arguments persuasive when supported by case-specific evidence that privacy protections improve economic efficiency. Applied to the question of whether privacy is a procompetitive justification, the findings of Acquisti, Bleier and others suggest that, in

70 *See* Kelly D. Martin & Patrick E. Murphy, *The Role of Data Privacy in Marketing*, 45 J. ACAD. MKTG. SCI. 135, 146 (2017) (citing several studies that suggest increased consumer control and data transparency may reduce negative consumer privacy responses); Bleier *et al.*, *supra* note 25, at 474 (summarizing literature suggesting greater transparency around data privacy practices may reduce consumer concern over data practices and increase willingness to disclose information); Aguirre, *supra* note 69, at 35 (finding "trust cues" that reduce information asymmetry around data collection (such as like information icons describing the use and collection of information) can offset negative consumer responses to personalized ads).

71 Bleier et al., *supra* note 25.

72 *See id.* at 472.

73 *See id.*

74 *See id.* at 475–76. For example, studies suggest that granting users more control over personalized advertising may make such advertising more effective, in a feedback mechanism that reduces user concern over privacy. *See id.* at 474–75 (citing Catherine E. Tucker, *Social Networks, Personalized Advertising, and Privacy Controls*, 51 J. MKTG. RSCH. 546 (2004) (providing a study of Facebook user control over personalized ads).

some cases, defendants will be able to present evidence that their privacy restraints improve economic efficiency and are justified in antitrust law. It also suggests that in other cases, the evidence will fail to demonstrate that the privacy restraint improves efficiency (or some cases may lack economic evidence entirely), and the defendant will not be able to establish its purported privacy-based justification.

1. Applying the Law and Economics of Procompetitive Justifications: Two Types of Privacy Restraints that May Improve Competition

This subsection applies the above law and economics approach to explore two scenarios in which privacy-protective rules may enhance efficiency, improve competition, and thus constitute a justification in antitrust law. The first scenario considers a hypothetical in which privacy disclosure rules reduce information asymmetry in a market for apps. The second scenario critiques, then extends, the reasoning in *Epic v. Apple* on restraints that may enhance interbrand competition by limiting free-riding on privacy investments.

a. Privacy Disclosure Rules that Reduce Information Asymmetry

Courts have regularly recognized that the reduction of information asymmetries between consumers and businesses may constitute a procompetitive justification. This sub-section considers how *California Dental Association v. FTC*,[75] the leading case on this type of justification, could be applied to a defendant's rules that improve the flow of privacy information to consumers.

California Dental involved an FTC challenge to the defendant dental association's advertising rules.[76] The rules required member dentists to include certain price and other disclosures in their advertising.[77] The FTC claimed that the agreement to, and enforcement of, these rules impermissibly restricted truthful advertising in violation of Section 5 of the FTC Act.[78]

The dental association argued its rules were justified because they increased the available information about dental services in the market. By requiring that advertising be accurate and verifiable, the rules improved the information available to consumers about dental service quality and pricing, which enabled competition for such services. The Supreme Court found this procompetitive justification plausible, in large part because of the potential for the association's rules to reduce information asymmetries between patients and dentists

75 526 U.S. 756 (1999).
76 *Id.* at 761–62 (1999).
77 *Id.*
78 *See id.* at 762.

in the specific market.[79] The Supreme Court remanded to the Ninth Circuit for further consideration of the claimed justification, finding the lower courts had too quickly dismissed these arguments from the dental association.[80]

Applying the rule of reason on remand, the Ninth Circuit found the dental association's rules were justified. In particular, the court found it likely that the rules reduced "informational asymmetries inherent in the market for dental services."[81] Dentists know much more about their services than consumers. It can be difficult for consumers to obtain accurate information about dental service quality until after those services are purchased, and even then, the court observed, it may be difficult for patients to discern the quality of care they have received.[82] Economic expert testimony indicated that the advertising rules made it easier for consumers to obtain accurate and verifiable information about dental services, and reduced the search costs for consumers to find the information needed to compare different dentists.[83] This transparency gave consumers the information necessary to compare dental services, which likely enhanced overall competition.[84] The dental association successfully argued that its advertising restrictions, by requiring dentists to fully disclose details about price and quality, benefited consumers.[85]

Though *California Dental* has been subject to criticism on other grounds,[86] it remains a useful precedent for the discussion of procompetitive justifications. In the litigation, both the Supreme Court and the Ninth Circuit (on remand) displayed strong receptivity to justifications premised on the improvement of information flow to consumers. The Supreme Court was careful to describe the theory of how the association's rules could potentially enable better consumer decision making in a market characterized by striking information asymmetries. On remand, the Ninth Circuit then confirmed the rules benefitted consumers, with an extensive examination of the supporting facts and economic theory.

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79 *See id.* at 775, 778.

80 *See id.* at 781.

81 Cal. Dental Ass'n v. FTC, 224 F.3d 942, 952 (9th Cir. 2000).

82 *See id.* at 950.

83 *See id.* at 952–53. The court provided the example of one dentist that advertises a $20 discount on bridge work for new patients, and one that advertises a 15% discount for the same services. The association's rules required each dentist to disclose their regular and discounted dollar rates so patients could determine the actual prices of each service. *See id.*

84 *See id.* at 952–53.

85 *See id.* at 953.

86 *See, e.g.*, Stephen Calkins, California Dental Association*: Not a Quick Look But Not the Full Monty*, 67 ANTITRUST L.J. 495 (2000) (discussing problematic aspects of the California Dental decision, many of which are echoed by other scholars).

Much like the ethical rules in *California Dental*, privacy disclosure rules could improve transparency and efficiency for consumers in some markets. Imagine a powerful industry association comprised of app developers. The association introduces rules requiring all of its members to notify users in real-time when an app is tracking a user's location. The association enforces the rules against non-compliant app developers. Many of the developers are unhappy with this new requirement because it changes consumer behavior, reducing the use of apps with location tracking. This hinders the developers' ability to collect user location data and monetize it with location-based advertising. Several app developers complain to the FTC, alleging the rules reduce competition for in-app advertising in violation of Section 5 of the FTC Act. The developers argue that the association's privacy disclosure rules limit truthful location-based advertising, reduce the number of ads served, and hinder competition among app developers to sell such advertising. Assume for this hypothetical that the FTC proceeds to establish a *prima facie* case of anticompetitive conduct under the rule of reason, though this can be a challenge in actual cases.

Could the defendant association justify its privacy rules as competition-enhancing? Based on the earlier economic literature discussed above, it seems counterintuitive to argue that privacy protection reduces information asymmetry in a market. That literature assumes privacy protection limits information flow, leading to a decline in efficiency and consumer welfare.[87] As economist Kenneth Laudon observed, "[p]rivacy is indeed about creating and maintaining asymmetries in the distribution of information."[88]

However, more recent literature suggests that privacy rules may reduce information asymmetries by providing information *about privacy itself*. Alessandro Acquisti observes that, in digital markets, consumers may be "severely hindered" in their ability to make decisions about their privacy, because consumers often have asymmetric information about when their data is collected, the purposes for which it is collected, and the consequences of such collection.[89] Economists observe that markets for the sale of personal data by websites, for example, may fail to function because consumers have minimal information about the privacy quality offered by competitors.[90] This draws on the long-established concept of "markets

87 Richard A. Posner, *The Economics of Privacy*, 71 AM. ECON. REV. 405, 405 (1981) (arguing privacy protection creates inefficiencies in markets by concealing information).

88 Kenneth C. Laudon, *Markets and Privacy*, 39 COMMC'NS ACM 92, 98 (1996).

89 *See* Acquisti et al., *supra* note 62, at 442, 477–78.

90 *See* Tony Vila, Rachel Greenstadt & David Molnar, *Why We Can't Be Bothered To Read Privacy Policies Models of Privacy Economics as a Lemons Market*, 2003 INT'L CONF. PROC. SERIES 403 (2003); James C. Cooper & John M. Yun, *Antitrust & Privacy: It's Complicated*, U. ILL. J.L. TECH & POL'Y (forthcoming, 2022) (manuscript at 20–21) (observing that unless consumer

for lemons," in which consumers have so little available information on quality that they must assume quality is poor.[91] The tracking and use of consumer data by websites is at times so opaque that consumers logically assume the quality of privacy is poor on all websites, and act accordingly, no longer distinguishing between websites that invest in privacy protection and those that do not. Websites that are willing to invest in strong privacy protections may fail, because they incur costs to protect privacy and that action reduces their ad revenue. Consumers cannot detect these privacy quality differences, which leads to market failures and, ultimately, poor overall privacy protection in the market. Applied to the app association hypothetical, this suggests a justification argument: the association's privacy disclosure rules make the relevant market for apps more transparent and thus more efficient.[92] Like the dental services market, the market for apps is characterized by significant disparities in the information known to the app companies relative to consumers about data processing practices. The terms and conditions governing how apps treat private information are often dense, and app companies change their terms unilaterally and regularly.[93] Even if a diligent consumer examined these terms for each app he or she used—an impractical and time-consuming scenario—the disclosures may not state with specificity how or when location tracking occurs within a given app.[94] In short, app markets are prone to invisible-to-consumer "lemons," in the form of apps that collect and use location data in a manner inconsistent with the reasonable privacy expectations of users.

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can understand firms' privacy policies and promises, a lemons equilibrium is likely to result).

91 George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489 (1970) (illustrating the idea of market failures in the used car market, where buyers have very little information about the quality of cars).

92 224 F.3d 942, 950–51 (2000). The app store operator may even find it easier to demonstrate that its conduct is justified than in *California Dental*, because the case would involve unilateral conduct, unlike the concerted action by the association of competitors in *California Dental*. AREEDA & HOVENKAMP, *supra* note 36, ¶ 658(f) (suggesting it may be easier to prove a justification in unilateral conduct cases than in joint conduct cases, given the latter are viewed as more suspect in antitrust law).

93 *See* Ehimare Okoyomon, On the Ridiculousness of Notice and Consent: Contradictions in App Privacy Policies (May 17, 2019) (Technical Report, Electrical Engineering and Computer Sciences Department, University of California, Berkeley), UCB/EECS-2019-76 (summarizing findings in literature that privacy policies tend to be confusing, difficult to access, and written in legal language that is challenging for users to understand).

94 *See generally id.* at 1 (a study of the privacy policies of 68,051 apps from the Google Play Store finding misrepresentations, inconsistencies, and contradictory disclosures that made it "in most cases impossible, for users to establish where their personal data is being processed").

The association's privacy disclosure rules are likely to increase transparency for consumers in the relevant app market. The rules improve the disclosure of location tracking within apps. This reduces information asymmetry between the apps and consumers regarding when tracking occurs. It makes it easier and faster for consumers to compare apps, and to choose apps that match their privacy preferences. This increased transparency about location tracking may well drive competition between apps to provide better privacy protection, perhaps reducing the extent to which apps engage in unexpected user location tracking, or prompting the use of just-in-time consumer consent to tracking when it occurs.[95]

In this hypothetical, the privacy rules appear likely to enhance efficiency in the relevant market to the benefit of consumers and competition. With economic evidence to support these procompetitive effects, the defendant could justify its privacy-protective rules under the rule of reason—despite the potential reduction in location-based advertising competition.[96]

b. Data Privacy Restraints that Limit Free-Riding to Enhance Interbrand Competition

This sub-section considers a second scenario in which privacy rules may improve competition—where vertical restraints on privacy prevent free-riding among same-brand distributors. *Epic v. Apple* is one of the first cases to accept such a justification. As this sub-section explains, the reasoning in *Epic v. Apple* lacks strong economic evidence and stretches precedent in its finding of privacy justifications. Despite these challenges, the case offers an interesting jumping-off point to consider privacy free-riding arguments, and to envision different facts where such a justification could be established.

Free-riding prevention is a classic procompetitive justification. In the leading case of *Leegin Creative Leather Products., Inc. v. PSKS, Inc.*,[97] the Supreme Court recognized that a manufacturer might improve its ability to compete with other brands by imposing minimum resale prices onto the retailers selling its products.[98] Such restraints between different levels in a distribution chain are termed "vertical," in contrast to "horizontal" agreements between competitors at the same level of

95 This scenario treats the procompetitive effects in app competition as occurring in the same market as the anticompetitive effects on advertising, analyzing this as a two-sided market. *See* Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018) (discussing two-sided markets).

96 The antitrust court would then proceed to weigh the effects of the restraints to determine their likely net effect on competition. See discussion *infra* Part IV: Completing the Rule of Reason Analysis: Less Restrictive Alternatives and Weighing Competitive Effects.

97 *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

98 *See id.*

distribution. The *Leegin* Court looked to economic literature to support its conclusion that vertical price restraints may enhance efficiency,[99] finding it "replete with procompetitive justifications" for such restraints.[100] The Court explained how resale price minimums may increase interbrand competition, by preventing free-riding between same-brand retailers:

> A single manufacturer's use of vertical price restraints tends to eliminate intrabrand price competition [among same-brand retailers]; this in turn encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers. . . .
>
> Absent vertical price restraints, the retail services that enhance interbrand competition might be underprovided. This is because discounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services generate. . . . Consumers might learn, for example, about the benefits of a manufacturer's product from a retailer that invests in fine showrooms, offers product demonstrations, or hires and trains knowledgeable employees. . . . Or consumers might decide to buy the product because they see it in a retail establishment that has a reputation for selling high-quality merchandise.[101]

Even though resale price restraints reduced competition among same-brand retailers, economic evidence showed that such restraints could be procompetitive, because of their potential to improve competition *between* brands. The court observed that "the primary purpose of the antitrust laws is to protect . . . [this latter type of cross-brand] competition."[102]

Leegin followed in the footsteps of an earlier Supreme Court decision, *Continental T.V., Inc. v. GTE Sylvania Inc.*,[103] which recognized a similar potential for vertical *non-price* restraints to have procompetitive effects. Such vertical restraints could promote all-important cross-brand competition, even if those restraints limited competition between retailers of the same brand. With these

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99 *See id.* (citing ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW AND ECONOMICS OF PRODUCT DISTRIBUTION 76 (2006) ("[T]he bulk of the economic literature on [resale price maintenance] suggests that [it] is more likely to be used to enhance efficiency than for anticompetitive purposes.")).

100 *Id.* at 889.

101 *Id.* at 890–91 (citing Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55 (1976)); RICHARD A. POSNER, ANTITRUST LAW 172–73 (2d ed. 2001); Howard P. Marvel & Stephen McCafferty, *Resale Price Maintenance and Quality Certification*, 15 RAND J. ECON. 346, 347–49 (1984)).

102 *Leegin*, 551 U.S. at 890 (quoting State Oil Co. v. Khan, 522 U.S. 3, 15 (1997)).

103 433 U.S. 36 (1977) (applying the rule of reason to manufacturer Sylvania's franchise agreements, which prohibited dealers from selling Sylvania products other than from approved locations, a form of vertical restraint on sales territories).

decisions, the Supreme Court began to subject vertical restraints to the rule of reason, a change from earlier per se prohibitions.

The *Epic v. Apple* decision invokes *Leegin* in reaching its conclusion that Apple's app store rules are justified. This high-profile litigation arose when Apple banished Epic's Fortnite app from the Apple app store for violating the store rules and the terms of Apple's developer licensing agreement.[104] Apple's online store is the near-exclusive source of iOS application downloads for use on Apple's popular mobile devices.[105] Epic brought claims against Apple for violating Sections 1 and 2 of the Sherman Act and state unfair competition laws for imposing anticompetitive payment and distribution restrictions on third-party apps as a condition of distributing those apps through the Apple app store.[106]

Applying the rule of reason under Section 1 of the Sherman Act, Judge Yvonne Gonzalez Rogers found that Apple's app store rules had *prima facie* anticompetitive effects.[107] Apple required that certain apps use the company's proprietary in-app payment processing system,[108] for which Apple collected a 30% commission from all in-app purchases.[109] Judge Gonzalez Rogers found that Apple's ability to maintain its 30% in-app commission rate for such payments likely

104 *See* Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 936–37 (N.D. Cal. 2021). Epic prompted this ban by introducing its own in-app payment methodology, in violation of Apple's rules for the app store.

105 Apple's mobile operating system is called iOS.

106 *See* Complaint for Injunctive Relief ¶¶ 207–14, 225–31, Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 936–37 (N.D. Cal. 2021) (No. 20-CV-05640) (alleging Sherman Act Section 1 unreasonable restraints of trade in iOS app distribution and in-app payments). The case also involved other claims that were resolved without reliance on justifications. *See id.* ¶¶ 184–91, 216–23 (alleging Sherman Act Section 2 unlawful monopoly maintenance in iOS app distribution and in-app payments); *id.* ¶¶ 193–205 (claiming that Apple denied Epic access to an essential facility in the form of Apple's app store under Section 2); *id.* ¶¶ 233–44 (alleging tying in violation of Section 1); *id.* ¶¶ 246–90 (alleging California antitrust and unfair competition law violations). Epic was unsuccessful in all of its Sherman Act claims, including a failure to establish that Apple held monopoly power in the relevant market under Section 2. *See Epic*, 559 F. Supp. 3d at 1032, 1041–44. However, the court found that Apple's antisteering provisions, which prevented apps from using buttons, links, or other calls to action to direct consumers to purchasing mechanisms other than Apple's own in-app payments system, violated California unfair competition law. *See id.* at 1052–56.

107 *See id.* at 1037–38. Judge Gonzalez Rogers also found that the developer agreement between Apple and app developers was not an agreement, because it was imposed by Apple unilaterally onto developers. *See id.* at 1035. She then "nonetheless continue[d] the analysis to inform the issues relating to anticompetitive and incipient antitrust conduct" for Section 1, and to express concern over Apple's antisteering provisions in state unfair competition law. *Id.* at 1036.

108 *See id.* at 942–46 (describing Apple's rules and rate for in-app payment commissions).

109 *Id.* at 945.

"stems from market power."[110] Further, Apple imposed distribution rules that prohibited "store-within-a-store" apps, blocked app downloads from outside the Apple store (termed "sideloading" of apps), and required human review of apps before distribution through the iOS store.[111] The decision found that these restraints on distribution precluded developers from operating online stores that would compete with Apple in the distribution of iOS apps.[112] Judge Gonzalez Rogers concluded that Apple's various app store practices were linked by "common threads" of unreasonable restraints on competition and harm to consumers.[113] Epic had met its initial burden to show anticompetitive effects.

However, Judge Gonzalez Rogers went on to find that Apple had established two justifications for its conduct.[114] Both were premised on privacy and security protection, but the substance of the justifications differed. Apple's first justification, termed the "security" justification in the decision, was that Apple's rules improve data privacy and security within its app store, which enhances the appeal of the store for consumers.[115] As discussed later in this Article, this is not a properly cognizable justification in antitrust law, because it lacks a connection to competitive effects.[116]

Apple's second justification, however, was tied to competitive effects. The "interbrand competition" justification begins from the same premise—that the app store rules improve data privacy and security within the app store—but it goes one step further, arguing that this privacy and security improvement enables Apple to better compete with other mobile operating systems.[117] Citing *Leegin*, Judge Gonzalez Rogers reasoned that Apple's centralized app distribution or "walled garden" approach was one of the company's competitive differentiators from rival mobile operating systems like Google

110 *Id.* at 1037.

111 *See id.* at 995–1002 (analyzing the anticompetitive effects of Apple's app distribution restrictions); *id.* at 1010–12 (analyzing the anticompetitive effects of Apple's in-app payment requirement).

112 *See id.* See also the court's separate evaluation of the facts regarding anticompetitive effects, which support the later legal conclusions. *Id.* at 994–1002.

113 *Id.* at 1013.

114 *See id.* at 1038–40. The decision also rejects a third justification that the restraints were imposed to protect Apple's intellectual property investment. *See id.* Epic then also attempted to rebut Apple's justifications by proposing several less restrictive means through which Apple could have achieved the claimed procompetitive effects, but Judge Gonzalez Rogers found that none of the alternatives would be as effective as the current human app review or in-app payment system, and that courts should "give wide berth to business judgments." *See id.* at 1041 (quoting NCAA v. Alston, 141 S. Ct. 2141, 2163 (2021)).

115 *See id.* at 1038.

116 *See infra* Part II: When Privacy Protection is Not a Justification: Limiting Competition to Achieve Data Privacy.

117 *See Epic*, 559 F. Supp. at 1038.

Android.[118] Apple's testimonial and survey evidence indicated that many consumers choose Apple devices because those devices offer strong data and privacy protection.[119] Judge Gonzalez Rogers found that Apple's rules for app distribution thus increase the available choices for consumers, "allowing users who value open distribution to purchase Android devices, while those who value security and the protection of a 'walled garden' to purchase iOS devices."[120]

There is no in-depth reasoning in the *Epic v. Apple* decision itself, but Apple's filings describe a modern analogy to *Leegin*, in which Epic is cast as a privacy free-rider.[121] Apple argues that it invests heavily in its online app store—the equivalent of a showroom for a digital company—including with its review of apps, customer service, distribution, marketing, and the creation of developer tools.[122] Apple takes the position that its mandatory in-app purchase commissions, and its restraints on app distribution, enable such investment and, in turn, the maintenance of a "secure and trusted platform for consumers to discover and download software."[123] Customers download apps from the Apple store at least in part because of Apple's trusted reputation for providing a high level of privacy and security quality.

Adapting *Leegin*'s arguments, Apple essentially claims that its privacy (rather than price) maintenance improves interbrand competition. Apple accuses Epic of seeking to free-ride, by operating

118 *Id.* (citing Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890–91 (2007)). The reasoning described here was articulated for Apple's distribution restraints in the decision. Judge Gonzalez Rogers appeared more skeptical that the same justifications apply to Apple's payment restrictions, but ultimately articulated similar reasoning: the in-app payment restraints improve data security, which provided Apple a competitive advantage, and consumers the choice of "a unitary safe and secure means to execute transactions." *See id.* at 1041–43.

119 The survey evidence indicated that security and privacy were an important aspect of iPhone purchasing decisions for 50–62% or more of users, depending on the country. *Id.* at 1007.

120 *Id.* at 1038.

121 Oddly the *Leegin* case is not cited in Apple's answer itself. Defendant and Counter-Claimant Apple Inc.'s Answer, Defenses, and Counterclaims in Reply to Epic Games, Inc.'s Complaint for Injunctive Relief at 43, 52, Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898 (N.D. Cal. 2021) (No. 20-CV-05640) (describing Apple's claimed investments in its app store and accusing Epic of free riding on Apple's investments in its app store).

122 *See id.* at 44 (noting the vast majority of Apple fees are in the form of commissions, which enable the app store to operate successfully, and that "Apple manages all aspects of the transaction on behalf of the developer—from offering an extensive library of tools for app development, to the promotion and marketing of apps within the App Store, to providing customer support for app purchases, to collecting sales proceeds from consumers for distribution to the developers").

123 *Id.* at 4. Apple further argues that the disputed commission "reflects the immense value of the App Store, which is more than the sum of its parts and includes Apple's technology, tools, software for app development and testing, marketing efforts, platinum-level customer service, and distribution of developers' apps and digital content." *Id.* at 5.

a "rent-free store within the trusted App Store that Apple has built," without investing in equivalent user privacy protections.[124] Apple paints a picture of Epic's attempts to evade the app store restrictions—first with a request to offer its own competing Epic Games mini-store within Apple's store, then with its own payment system in the Fortnite app.[125] Apple argues that Epic fails to uphold privacy and security standards equivalent to those of the Apple app store, pointing to a history of security vulnerabilities in Epic's apps distributed outside of the app store.[126]

If Apple's rules were loosened to allow Epic to offer a "store within a store," consumers would see Epic's offerings within the Apple app store (from which they ordinarily download Apple-vetted apps) and assume those apps meet Apple's usual privacy and security standards. Like the retailers who free-rode on the investments of others in *Leegin*, Apple would then lose sales to Epic, who would be able to offer lower app and in-app prices by virtue of its savings on privacy-protective investments. Privacy would erode to a level below that preferred by customers, as Apple loses the margins that enabled it to maintain privacy and security quality within its app store. The app distribution restraints purport to alleviate this privacy erosion problem, by preventing Epic from undercutting privacy and security quality within Apple's app store. Finally, the argument then ties the privacy restraints to competitive effects, claiming the challenged restraints enable Apple to offer a mobile app store with privacy and security quality that makes it more competitive with other mobile operating systems, such as Google Android.

Though *Epic v. Apple* tees up an interesting privacy analogy to *Leegin*, the decision leaves unaddressed several important differences between the cases. In *Leegin*, economic effects evidence played an essential role in the Supreme Court's finding that resale price maintenance had the potential to be procompetitive. The *Epic v. Apple* decision does not consider any economic effects evidence in support of Apple's justifications. Instead, the court accepts Apple's interbrand competition justification in just one paragraph. There is no reference to the earlier factual analysis in the decision. Even if there was, the evidentiary support provided was fairly minimal, consisting of testimony from Apple's CEO and company survey evidence that suggests the company competes with other operating systems based on privacy and security.[127] No economic evidence was provided to

124 *Id.* at 51–52. Apple also argues its rules are justified based on their effects in reducing transaction costs for Apple, app developers, and consumers. *See id.* at 51.

125 *Id.*

126 *See id.* at 51–52.

127 *Epic*, 559 F. Supp. 3d at 1007.

substantiate the effect of Apple's privacy protections on mobile operating system competition.

This criticism of *Epic v. Apple* illustrates the importance that case-specific evidence will play in assessing privacy justifications. Even if a justification is generally cognizable in law and economic theory (like free-riding prevention), the defendant must show that the impugned restraint is likely to generate the claimed economic benefits on the facts of their case.[128] The evidence must show that the claimed procompetitive effects are "actually attributable" to the challenged restraint.[129] Courts have rejected justification arguments where the evidence is inadequate to support the asserted economic efficiency improvements in the specific case.[130] For example, the Supreme Court affirmed the rejection of a justification in a recent case where the defendant failed to show "any direct connection" between consumer demand and the claimed procompetitive benefits.[131] The Eleventh Circuit explained in *McWane, Inc. v. FTC* that even where the claimed conduct "*could* result in increased efficiency in the right market conditions," the defendant will not establish a justification unless it demonstrates "reasons to think that such conditions exist in [the given] case."[132] This means defendants will need to produce relatively specific economic evidence to substantiate the claimed procompetitive effects of their privacy restraints.[133] Here, Apple provided none.

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128 Graphic Prods. Distribs., Inc. v. ITEK Corp., 717 F.2d 1560, 1576 (11th Cir. 1983) ("[M]erely offering a rationale for a . . . restraint will not suffice; the record must support a finding that the restraint in fact is necessary to enhance competition and does indeed have a pro-competitive effect."); *see also* 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, 2137 (2020) ("[G]eneral categorical evidence of benefits . . . should not be sufficient to carry the defendant's burden once the plaintiff produces evidence of probable competitive harm. . . . Permitting purely theoretical justifications to satisfy the defendant's burden in a particular case would amount to a *sub rosa* presumption and would lead to excessive false negatives. Justifications must be evaluated solely with the case-specific evidence . . . .").

129 Procaps S.A. v. Patheon Inc., 141 F. Supp. 3d 1246, 1287–88 (S.D. Fla. 2015), *aff'd*, 845 F.3d 1072 (11th Cir. 2016) (citing Graphic Prods. Distribs., Inc. v. ITEK Corp., 717 F.2d at 1576).

130 *See, e.g.*, McWane, Inc. v. FTC, 783 F.3d 814, 841 (11th Cir. 2015) (finding no reason that the challenged restraint would increase economic efficiency on the particular facts of the case); United States v. Visa U.S.A., Inc., 344 F.3d 229, 243 (2d Cir. 2003) (finding no evidence that the exclusionary rules had the claimed positive effect on competition).

131 NCAA v. Alston, 141 S. Ct. 2141, 2162 (2021) (largely agreeing with the district court finding that the NCAA's claimed procompetitive benefits were not persuasively connected to consumer demand on the evidence provided).

132 *McWane*, 783 F.3d at 841 (emphasis added).

133 *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890–91 (2007) (considering economic evidence of the ways in which resale price maintenance may prevent free-riding and therefore promote competition); Cal. Dental Ass'n v. FTC, 224 F.3d 942, 950–51 (9th Cir. 2000) (on remand, considering economic evidence of the effect of the

Differences between Apple's justification arguments and those recognized in *Leegin* may make such economic effects evidence difficult for Apple to produce. Apple is not merely restricting distributors of its own goods, as Leegin was. Instead, Apple is placing restraints on potentially competing app distributors and developers. This difference is significant from an antitrust perspective, because vertical restraints may enhance competition (as in *Leegin*) while restrictions on potential competitors simply reduce competition.[134] Restraints on same-brand competition were only justified in *Leegin* because of their positive effects on cross-brand competition; here Apple's rules are *imposed* on potential cross-brand competitors like Epic, potentially limiting the ability of other app developers to contest Apple's app distribution dominance.

Further, in *Epic v. Apple*, the claimed procompetitive effects occur in a different market (mobile operating systems) from that in which the anticompetitive effects were found (the market for app distribution or app transactions). There is some question in law as to whether and when courts may credit such "out-of-market" efficiencies.[135] The decision does not address whether improved competition in the mobile operating system market ought to be weighed against the decline in app-related competition. In fact, the reasoning fails to engage in the final effects-weighing step of the rule of reason analysis at all, a notable omission.[136]

Both Epic and Apple have appealed to the Ninth Circuit, raising these and other issues.[137] To succeed in proving its procompetitive justifications, Apple will need address these distinctions from *Leegin*, or proffer a creative variation on its justification arguments. Both approaches will require supporting economic evidence. The appeal is

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challenged restraints in ameliorating information asymmetries for consumers in the market, and other procompetitive effects).

134 *See, e.g.*, Brief of Amici Curiae 38 Law, Economics, and Business Professors in Support of Appellant/Cross-Appellee, Epic Games, Inc. v. Apple Inc., Nos. 21-16506 & 21-16695, (9th Cir., Jan. 27, 2022) (distinguishing *Leegin*'s restraints from those of Apple).

135 United States v. Phila. Nat'l Bank, 374 U.S. 321, 370 (1963) (albeit in the merger context, finding that "anticompetitive effects in one market [cannot] be justified by procompetitive consequences in another"). This limit on procompetitive benefits has been questioned as market definitions become increasingly narrow, placing more and more efficiencies "out of market." This short Article leaves that debate for later analysis. *See, e.g.*, Christine S. Wilson, Comm'r, U.S. Fed. Trade Comm'n, The Unintended Consequences of Narrower Product Markets and the Overly Leveraged Nature of Philadelphia National Bank: Remarks as Prepared for Delivery at the Antitrust Enforcement Symposium 2019 (June 30, 2019).

136 *See* discussion *infra* Part IV: Completing the Rule of Reason Analysis: Less Restrictive Alternatives and Weighing Competitive Effects.

137 Notice of Appeal, Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898 (N.D. Cal., Sept. 12, 2021) (No. 20-CV-05640) (Doc. 816); Notice of Appeal, Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898 (N.D. Cal., Oct. 8, 2021) (No. 20-CV-05640) (Doc. 820).

worth watching for its treatment of the justification arguments, which may inform the adjudication of privacy-as-justification claims by other digital platforms.

Despite these gaps in the *Epic v. Apple* reasoning, the decision offers a jumping-off point to envision privacy justifications that are more consistent with *Leegin*. For example, if Apple distributed its own applications through third party channels (which it does not currently do), the company might justifiably impose agreements with minimum privacy and security standards on those third-party distributors, as a condition of their distribution of Apple apps. Apple might, in turn, terminate distributors who fail to meet its conditions, leading those distributors to claim the company is engaging in anticompetitive conduct. But without such vertical restraints, app distributors might have little incentive to invest in secure and private storefronts, free riding on those who do invest. Security or privacy problems among delinquent app distributors could then negatively impact the security and privacy reputation of Apple's apps which are downloaded from those distributors. This could reduce Apple's ability to compete with other app developers based on its advantage of high app-privacy quality, eroding overall competition. Courts have recognized analogous free-riding justifications in Section 1 and Section 2 Sherman Act cases involving vertical restraints on distributors.[138] As in this hypothetical, vertical privacy restraints that improve cross-brand competition may be justified.

II. WHEN PRIVACY PROTECTION IS NOT A JUSTIFICATION: LIMITING COMPETITION TO ACHIEVE DATA PRIVACY

Since "privacy" is a wide-ranging and often amorphous concept, it is also helpful to understand when data privacy protection is *not* cognizable as a justification in antitrust law. Privacy restraints are not justified when the defendant's claim is that privacy benefits consumers, and such privacy is only reasonably achievable by limiting competition. In essence, this is a social welfare argument that data privacy is better for consumers than competition. As this Part explains, Supreme Court precedent is clear that such arguments do not constitute a procompetitive justification.

138 *See, e.g.*, Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 190 (2d Cir. 1992) (recognizing a justification in defense of a Section 2 claim, that "[a] business may properly seek to maintain the image of its products by controlling where [its] products are sold . . . . It also is legitimate for [the defendant distributor] to select only those retailers willing to make an economic investment in [its] products . . . ."); see also notes 97–103 and accompanying text for a discussion of *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1976) and vertical restraints challenged under Section 1 of the Sherman Act.

This privacy-is-preferable argument revives an old antitrust chestnut, in new terms. Defendants in Sherman Act cases have regularly claimed that limiting competition will produce some form of broader social benefit, such as improved public health or safety. Complainants in merger reviews have similarly pressed U.S. antitrust agencies to block mergers to prevent harm to the environment or to protect employees who may lose their jobs as a result of the transaction.[139] Now, data privacy protection arguments are supplanting these other societal interests like public health, safety, or labor protection in calls to extend the role of antitrust law.

The Supreme Court has made clear that such purported justifications are "nothing less than a frontal assault on the basic policy of the Sherman Act," because they rely on the premise that competition may be harmful to consumers.[140] In both *National Society of Professional Engineers v. United States*,[141] and *FTC v. Indiana Federation of Dentists*,[142] the Supreme Court firmly rejected arguments that restraints on competition were justified simply because the effect of the restraint was to improve public health or safety.

In *Professional Engineers*, the Department of Justice, Antitrust Division ("DOJ") established that the defendant engineering society's ethical rules were per se anticompetitive. The rules prohibited members of the society from bidding against each other to supply engineering services. The defendant claimed that its rules were justified because their enforcement protected the public from the inferior and unsafe engineering work that would result if engineers competed on price, leading to cost cutting that would drive down building quality.[143]

The Supreme Court flatly rejected this purported justification, reasoning that the Sherman Act makes a legislative judgment that competition is positive for consumers.[144] Even if this judgment is not correct in every market, or every situation, "the statutory policy precludes inquiry into the question [of] whether competition is good or bad . . . . The judiciary cannot indirectly protect the public against

139 *See* Statement of Federal Trade Commission Concerning Google/Doubleclick, F.T.C. File No. 071-0170, at 2–3 (Dec. 20, 2007) [hereinafter FTC Statement on Google /Doubleclick] (noting in response to calls to protect privacy in a merger review that "[t]he Commission has been asked before to intervene in transactions for reasons unrelated to antitrust concerns, such as concerns about environmental quality or impact on employees").

140 Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 695 (1978).

141 *See id.* at 695–96.

142 *See* 476 U.S. 447, 462–64 (1986).

143 *See Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 694–95 (describing a rule of reason standard under which the lower courts should have considered the proffered justification).

144 *See id.* at 695.

this harm by conferring monopoly privileges on the manufacturers."[145] Accepting arguments that competition is sometimes "bad" for consumers, as the defendant engineering society claimed, would create judicial exceptions to the Sherman Act policy, substituting the court's view for that of Congress on the proper role of competition.[146] The Supreme Court confirmed that, in considering whether a restraint is unlawful, the court's inquiry is properly "confined to a consideration of impact on competitive conditions."[147]

Twelve years later in *FTC v. Indiana Federation of Dentists*, the Supreme Court reaffirmed this view. Relying heavily on *Professional Engineers*, the Court rejected the defendant's claim that its restraints on competition improved the quality of dental care, and therefore improved consumer health.[148] The asserted health benefits to consumers flowed from an absence of competition, created by the defendant's unlawful conduct, and therefore did not constitute a justification in antitrust law.

Again in 2021, the Supreme Court confirmed this law on justifications in *National Collegiate Athletic Association v. Alston*.[149] The NCAA argued that its restraints on competition should be excepted from Sherman Act scrutiny, because the restraints involved higher education and the maintenance of amateur sport.[150] Citing *Professional Engineers* and related cases, the Court explained that it "has regularly refused materially identical 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."[151]

Based on *Professional Engineers* and its lineage, courts must reject claims that restraints on competition are justified simply because those restraints improve individuals' privacy. Such claims amount to an assertion of the social value of privacy over that of competition, which is inconsistent with firmly-established Supreme Court precedent.

Consider a hypothetical in which this law would apply to a defendant's claims of a privacy "justification." An industry association,

145 *Id.* at 695–96.; *see also* FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411 (1990) (refusing to consider whether the restraint of trade among criminal defense lawyers served a social good more important than competition: "[t]he social justifications proffered for respondents' restraint of trade . . . do not make it any less unlawful").

146 *See Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 694–95; United States v. Brown Univ., 5 F.3d 658, 664 (3d Cir. 1993) (observing that *Professional Engineers* and *Indiana Federation of Dentists* "preclude substituting Congress' view of the social benefits of competition for that of a defendant").

147 *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 690.

148 *See* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 462–63 (1986).

149 141 S. Ct. 2141 (2021).

150 *Id.* at 2159.

151 *Id.*

comprised of leading social media companies, imposes new privacy guidelines on its members. The guidelines advise members to terminate their interoperability with third parties that duplicate the member's own functionality or services, in order to "preserve user privacy." For example, if a member uses location data to offer a "find nearby friends" feature on its social network services, a third party that interoperates with that social media company and starts providing a similar service to end users would have its access terminated. The member social media companies often identify these duplicative services based on spikes in the amount of user data the third-party service is collecting. These same data spikes tend to signify that such third parties are gaining a foothold among users on the social network, making them a likely competitive threat to the members' own social media offerings.[152]

Third party companies that have had their access terminated bring claims alleging that the association's policy violates Section 1 of the Sherman Act. In response, the association argues that the protection of user privacy justifies its policy. Since members are already providing services like "find friends," the association argues that allowing third parties to interoperate and duplicate services erodes user social media privacy. After all, that third-party interoperability results in more collection of users' location data to find friends, and more use of that data for advertising, tracking, and the like by the third-party service.

Without more, the association's argument amounts to a claim that consumers must be shielded from competition for social media services, or else their data privacy will be eroded. The association's argument relies on the assumption that competition is harmful to consumers, putting it at odds with the basic premise of the Sherman Act—that competition improves consumer welfare. Like the purported justifications in *Professional Engineers* and *Indiana Federation of Dentists*, antitrust courts should reject arguments for this type of normative privacy "justification." Supreme Court jurisprudence confirms that restraints on competition cannot be justified based

152 This scenario is based loosely on the FTC's recent allegations against the social networking service Facebook. *See* Substitute Amended Complaint for Injunctive and Other Equitable Relief at 73–74, FTC v. Facebook, Inc., Inc., No. 20-CV-03590 (D.D.C. Sept. 8, 2021) (Count II). The important difference is that the FTC's allegations involve unilateral conduct by the defendant, rather than the coordinated conduct between association members described in this hypothetical. Violations of antitrust law involving unilateral refusals to deal are much more difficult to establish than those involving collusive conduct, as antitrust has long held that "as a general matter, the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise [its] own independent discretion as to parties with whom he will deal.'" Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004) (quoting United States v. Colgate & Co., 250 U.S. 300, 307, (1919)).

exclusively on claims of social welfare improvement, whether privacy or otherwise, that come at the cost of competition. Courts should distinguish this type of normative privacy claim from the justifications canvassed above, which argue not simply that privacy is "good" for consumers, but rather that the privacy restraint improves economic efficiency and thus competition.[153]

One important note is that *Professional Engineers* and the related cases above involved horizontal restraints, meaning restraints imposed between competitors or potential competitors. This is in contrast to vertical restraints, which are imposed between buyer and suppliers at different levels of the supply chain, and which are viewed with much less suspicion than horizontal restraints in antitrust law. Vertical restraints are less likely to be found *prima facie* anticompetitive at the first step in the rule of reason analysis, and this is likely to be true for vertical privacy restraints as well. Such a conclusion at the first step obviates the need to examine any claimed procompetitive justifications (except where the court reasons in the alternative).

However, for those vertical restraints cases that do proceed to consider privacy justifications, this Article takes the position that the same logic should apply as for horizontal restraints. Vertical privacy restraints, like horizontal restraints, must have procompetitive effects to be justified. Courts should reject purported justifications for vertical restraints when the claimed effect is simply to improve privacy, untethered to economic efficiency and competition. This is consistent with leading vertical restraints cases like *Leegin* and *Continental T.V., Inc. v. GTE Sylvania Inc.*,[154] which look to economic efficiency effects, not general assertions of social welfare, in defining justifications.[155] *Professional Engineers* itself describes *GTE Sylvania* as emphasizing "competitive impact" and "economic analysis" throughout the decision.[156] As argued above, defendants could still establish market-oriented justifications for their vertical privacy restraints—for example, if the restraint enables better competition based on more private products.[157] However, to establish such a justification, the defendant would need to explain why a competitive market would fail

153 *See infra* Section I.A: When Might Privacy Protections Enhance Efficiency, and Thus Competition?

154 433 U.S. 36 (1977).

155 See notes 130–36 and accompanying text for a discussion of the economic effects-based reasoning in *Leegin* and related cases.

156 *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 691 n.17 (quoting Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50–51 (1977)).

157 *See infra* Section I.A: When Might Privacy Protections Enhance Efficiency, and Thus Competition?; *see generally* Robert Pitofsky, *The* Sylvania *Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV 1, 23–24 (1978) (suggesting that "health and safety" justifications in vertical restraints cases may be market-oriented in their effects).

to produce optimal privacy (or safety) quality for consumers, and how its restraint fixes that problem through enhanced competition.

Applying this logic, the court in *Epic v. Apple* erred in accepting Apple's first "security" justification, which was premised on an improvement of privacy quality unrelated to competition. The court credited this particular justification for Apple's vertical restraints without identifying any related pro-competitive effects.[158] The decision indicates only that Apple's distribution rules, such as the requirement of human review for apps, protect privacy and security, which "enhance[s] consumer appeal" and use of the app store.[159] The factual analysis earlier in the decision also seems to describe app store distribution restrictions as a normative improvement in privacy, observing that if third party apps were left free from Apple's rules, many would likely offer lower levels of privacy protection.[160] The purported justification amounts to an assertion that the privacy restraints are "good" for consumers, regardless of their effects on competition. This is not a cognizable justification in antitrust law. Contrast this with Apple's second justification based on interbrand competition, which, despite certain gaps in the legal and economic analysis,[161] takes the argument the necessary step further to claim that privacy protection is "good" because it promotes competition between operating systems.

Merger review, another area of antitrust law, reinforces this argument that privacy in its normative capacity is not cognizable in antitrust law. Antitrust agencies have taken a dichotomous view similar to that argued here, refusing to protect privacy interests that are unrelated to competition, while also recognizing that privacy may be a non-price factor relevant to the competitive effects of mergers. This agency position emerged around 2007, when consumer privacy advocates pushed the FTC to impose remedies on Google's acquisition

158 Apple's restraints are imposed on apps in its store, making them a vertical restraint. However, the effects were largely "horizontal" in their alleged preclusion of Epic from app distribution in competition with Apple.

159 Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 1038 (N.D. Cal. 2021) (analyzing the justification for distribution rules) (citing FTC v. Qualcomm Inc., 969 F.3d 974, 991 (9th Cir. 2020)); *see also id.* at 1042 (analyzing the justification for payment rules, which provide "consumers with a unitary safe and secure means to execute transactions on the iOS platform").

160 *See id.* at 1005–06 ("Not all developers like these [Apple app store distribution] requirements; presumably because it impacts their own bottom line. Thus, privacy concerns may be more at risk with loosened app distribution restrictions. Under the current model, large developers who rely on advertising for monetization must comply or leave the App Store to avoid these requirements. Accordingly, privacy, more than other issues, likely benefits from some app distribution restrictions." (footnotes omitted)).

161 *See* discussion *supra* Part II: When Privacy Protection is Not a Justification: Limiting Competition to Achieve Data Privacy.

of ad-serving company DoubleClick.[162] Their concern was that the merging parties would combine ad-related data sets in a manner that eroded consumer privacy after the transaction.[163]

The majority of the FTC declined to impose merger remedies based on these privacy concerns, because there was no connection to competition. The majority analogized the privacy arguments to past calls to use merger review to protect the environment or labor, concluding that "[a]lthough such issues may present important policy questions for the Nation, the sole purpose of federal antitrust review of mergers and acquisitions is to identify and remedy transactions that harm competition. . . . [T]he Commission lack[s] legal authority to require conditions to this merger that do not relate to antitrust . . . ."[164] However, the FTC also distinguished such standalone privacy interests from those within the scope of antitrust law where a merger negatively affects non-price attributes of competition.[165] There was no evidence that such competition-related privacy effects would arise from Google's purchase of DoubleClick.[166] Since the Google/Doubleclick decision, the FTC and the DOJ have continued to take this position on privacy's competition-limited relevance to antitrust analysis.[167]

This bounded role of privacy in merger analysis echoes the dichotomy proposed in this Article for procompetitive justifications. When a defendant argues a "justification" based on normative privacy concerns, limiting competition to achieve privacy, courts and agencies should find the purported justification is not cognizable in antitrust law. However, when a privacy restraint improves competition, it may be justified in antitrust law.

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162 FTC Statement on Google/Doubleclick, *supra* note 139, at 2–3.

163 *See id.* at 2; *see also* Dissenting Statement of Comm'r Pamela Jones Harbour, In re Google/Doubleclick, F.T.C. File No. 071-0170, at 9–10 (2007).

164 FTC Statement on Google/Doubleclick, *supra* note 139, at 2–3. *But see* Harbour, *supra* note 163, at 10 (expressing greater concern over the privacy impacts of the transaction and considering "various theories that might make privacy 'cognizable' under the antitrust laws").

165 *See* FTC Statement on Google/Doubleclick, *supra* note 139, at 2–3.

166 *See id.* at 2–3.

167 *See, e.g.*, Noah Joshua Phillips, Comm'r, Fed. Trade Comm'n, Should We Block This Merger? Some Thoughts on Converging Antitrust and Privacy 3 (Jan. 30, 2020) ("Privacy can be evaluated as a qualitative parameter of competition, like any number of nonprice dimensions of output; but competition law is not designed to protect privacy."); Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, " . . . And Justice for All": Antitrust Enforcement and Digital Gatekeepers 9 (June 11, 2019) ("[D]iminished quality is also a type of harm to competition. . . . [P]rivacy can be an important dimension of quality."); Deborah Feinstein, *Big Data in a Competition Environment*, ANTITRUST CHRON. (May 29, 2015), https://www.competitionpolicyinternational.com/big-data-in-a-competition-environment/ [https://perma.cc/K73A-7CY4] ("[T]he FTC has explicitly recognized that privacy can be a non-price dimension of competition.").

Lastly, none of this discussion is meant to imply that privacy protection is unimportant to broader social welfare. Much like the public health and safety interests invoked as earlier justifications, there is no question that the protection of data privacy is a deeply worthwhile sociopolitical goal. Data privacy protection benefits consumers, and the broader public, in immediate and tangible ways. It prevents unwanted intrusion into the personal lives of individuals, and guards against financial harm from identity theft. Even more significantly, data privacy plays an essential role in underpinning personal autonomy,[168] democracy,[169] and dignity.[170] Privacy scholars such as Anita Allen describe privacy as "foundational" to social functioning, and valuable on normative grounds.[171] Shoshana Zuboff also describes privacy as intrinsically valuable, contesting our societal tolerance of markets for data extraction and the commoditization of our personal information.[172]

In economic literature, scholars like Joseph Farrell helpfully distinguish the dual character of privacy as both a final good—valued for its own sake—and also an intermediate good, valued for instrumental purposes.[173] The valuation of privacy for its own sake relates to, for example, the psychological discomfort of privacy invasion, and loss of freedom or autonomy. This can be understood as distinct from (though broadly connected to) the tangible tradeoffs that occur from consumers actually sharing or protecting personal information, such as access to digital services, price discrimination, or even identity theft.[174] These latter conceptions of privacy are of interest to antitrust law if there is a related effect on competition. But the former conception of privacy for its own sake does not fit within the strictures of antitrust law.

This is a recognition that antitrust law is bounded, as the law of competition. The promotion of privacy for its normative or intrinsic

168 *See, e.g.*, ALAN F. WESTIN, PRIVACY AND FREEDOM 44–46 (1967) (emphasizing the role of data privacy choice within a free society).

169 Laudon, *supra* note 88, at 92 ("Protecting individual information privacy is a widely accepted value in democratic societies—without which the concept of democracy based on individual choices makes little sense.").

170 *See* Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 738 (1999) ("Privacy has value relative to normative conceptions of spiritual personality, political freedom, health and welfare, human dignity, and autonomy.").

171 *Id.* at 725, 738.

172 *See* Shoshana Zuboff, *Big Other: Surveillance Capitalism and the Prospects of an Information Civilization*, 30 J. INFO. TECH. 75 (2015);); Ryan Calo, *Privacy and Markets: A Love Story*, 91 NOTRE DAME L. REV. 649, 661–64 (2015) (summarizing the literature from privacy law scholars who take issue, in various ways, with markets for privacy).

173 *See* Joseph Farrell, *Can Privacy Be Just Another Good?*, 10 J. ON TELECOMMS. & HIGH TECH. L. 251, 252–53 (2012).

174 *See* Acquisti et al., *supra* note 62, at 447 (citing Farrell, *supra* note 173).

value is beyond those bounds. The rule of reason analysis "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason;" rather, the sole inquiry under the Sherman Act is whether the restraint "is one that promotes competition or one that suppresses competition."[175] The unimpeachable social value of data privacy does not render its protection an antitrust concern under existing law.

Normative or quasi-moralistic arguments on the intrinsic value of privacy are not just beyond the scope of antitrust law—they can be at odds with its core assumptions. For example, Zuboff's eloquent opposition to markets for private data is difficult to reconcile with the promarket orientation at the heart of antitrust. As the Supreme Court points out in *Professional Engineers*, antitrust law assumes that competition, and by association, the markets in which it occurs, are positive for consumers. If courts accept social interest "justifications" at the cost of competition, that would amount to the creation of judicial exceptions inconsistent with the competition-focused Sherman Act. As *Professional Engineers* points out, such exceptions are beyond the role of the judiciary to create in antitrust law.

Given these bounds of antitrust doctrine, defendants may be left claiming a legitimate and important need to protect data privacy that is divorced from competition, and thus not recognized in antitrust law. In that sense, this Article and cases like *Epic v. Apple* point to unresolved, broader policy questions about tradeoffs between privacy and competition. Should particular privacy interests override competition interests, in the name of broader social welfare? Are there certain limits to the antitrust-assumed consumer welfare benefits of competition, if such competition erodes privacy? These privacy and competition tradeoffs are beyond the scope of antitrust doctrine alone to address.

However, the lessening of competition to promote socially beneficial conduct—whether the protection of privacy, health, safety, labor, or otherwise—is an entirely legitimate policy goal for consideration by policymakers rather than antitrust courts. Other areas of law, such as labor law, workplace health and safety law, and privacy law protect societal welfare. Congress may decide that, in certain situations, competition should be limited to achieve the social benefits of those other laws. The same is true of privacy—as understandings of competition and privacy tradeoffs grow, lawmakers may choose to prioritize the protection of data privacy over the promotion of competition in certain realms of economic activity.

175 Nat'l Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 688, 691 (1978).

III. PRETEXTUAL PRIVACY JUSTIFICATIONS?—A FACTUAL QUESTION

No discussion of procompetitive justifications is complete without mention of pretextuality. As cases like *United States v. Microsoft Corp.* indicate, the definition of a valid justification includes that it must be "nonpretextual."[176] Defendants are often tempted to assert justifications that are not substantiated on the facts. Courts will reject such purported justifications as merely pretextual.[177] This is an evidentiary question specific to each case. Ostensible justifications will be found pretextual when evidence (or a lack of evidence) shows that the claimed rationale does not plausibly explain the defendant's conduct.[178]

Privacy-related justifications are no exception to this requirement—courts will reject pretextual claims of privacy protection. The legal analysis discussed above is fundamentally important, but in practice, factual pretext may more often determine whether a defendant succeeds in claiming privacy protection as a justification. Courts will have to ask whether the defendant is merely invoking user privacy *ex post*, as a convenient means to ward off allegations of anticompetitive conduct.

When a firm invokes a purported "justification" after the fact, it will often be difficult to provide credible supporting evidence. For example, in *United States v. Dentsply International, Inc.*, the Third Circuit found that the claimed justification for exclusive dealing requirements was pretextual, because the justification was inconsistent with almost all of the evidence on the challenged policy, including the company's "announced reason for [its] exclusionary policies, its conduct enforcing the policy, its rival suppliers' actions, and [its own] dealers'

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

177 *See, e.g.*, New York *ex rel.* Schneiderman v. Actavis PLC, 787 F.3d 638, 658 (2d Cir. 2015) (finding "[a]ll of Defendants' procompetitive justifications . . . are pretextual"); LePage's Inc. v. 3M, 324 F.3d 141, 164 (3d Cir. 2003) (affirming a jury verdict that the defendant's justification was pretextual, because there was no "testimony or evidence" supporting the asserted justification of consumer demand); United States v. Dentsply Int'l, Inc., 399 F.3d 181, 197 (3d Cir. 2005) (affirming the District court's conclusion that the ostensible justification for exclusive dealing policy was pretextual); Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 484 (1992) (rejecting the claimed justifications as pretextual).

178 Some courts address this stage of the analysis with a further burden-shifting framework in which the burden shifts to the plaintiff to show that the defendant's claimed justification is pretextual. *See, e.g.*, Morris Commc'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1295 (11th Cir. 2004) (holding that once the defendant has met its burden of establishing a justification, the burden shifts to the plaintiff to show that the proffered business justification is pretextual); *Image Tech. Servs.*, 125 F.3d at 1212 ("A plaintiff may rebut an asserted business justification by demonstrating either that the justification does not legitimately promote competition or that the justification is pretextual.").

behavior in the marketplace."[179] In other cases, ostensible justifications have been undermined by more innocuous evidence, such as testimony from company leadership that the rationale for the conduct "did not cross [their] mind."[180]

The *Commissioner of Competition v. Toronto Real Estate Board* case (introduced above) also illustrates a pretextual claim of privacy as a justification. The Canadian Competition Tribunal was persuaded by the *absence* of contemporaneous documents identifying user privacy protection as a reason for the defendant's conduct, and by evidence of TREB's other practices related to data and consumer consent.[181] The documentary evidence showed that when TREB had faced earlier (unrelated) privacy concerns over the online posting of interior home photos, TREB had sought legal advice, then modified its standardized listing agreements to include consent to such postings.[182] Yet TREB took no equivalent action to address the privacy concerns asserted as a justification before the Tribunal. This discrepancy suggested that privacy was not, in fact, a motivating factor in TREB's restriction of online brokers' access to home listing data.[183] Further, in other business contexts, TREB had interpreted pre-existing consumer consents as sufficiently broad to enable the disclosure of consumer data. When it came to the challenged restraints in the case, though, TREB interpreted its user consent obligations as more onerous, invoking those obligations as a reason to limit data access.[184] This overall factual context, along with the lack of documentary evidence reflecting the asserted privacy concerns, demonstrated that "[p]rivacy played a comparatively small role" in TREB's choice to adopt and enforce the disputed policy.[185] The Tribunal found that the asserted privacy concerns were pretextual—an "afterthought," raised in the face of litigation.[186]

Early U.S. cases suggest that antitrust courts may be similarly skeptical when large digital platforms claim that user data privacy is

179 *See Dentsply Int'l*, 399 F.3d at 196–97 (finding the defendant's practice of refusing to sell to distributors that carried other manufacturers' artificial teeth violated Section 2 as an unlawful maintenance of monopoly power); McWane, Inc. v. FTC, 783 F.3d 814, 841–42 (11th Cir. 2015) (finding that the defendant's "damning internal documents seem to be powerful evidence that its procompetitive justifications are 'merely pretextual'").

180 *Image Tech. Servs.*, 125 F.3d at 1219–20 (finding the claimed intellectual property justification was pretextual where the manager responsible for the challenged policy testified that the ostensible justification "did not cross [his] mind" (alteration in original)).

181 Comm'r of Competition v. Toronto Real Est. Bd., 2016 Comp. Trib. 7, ¶¶ 405–06, 7 CT-2011-003 (Can.).

182 *See id.* ¶ 406.

183 *See id.* ¶¶ 405–06.

184 *See id.* ¶ 406.

185 *Id.* ¶ 390.

186 *Id.*

driving their conduct. In the *hiQ Labs, Inc. v. LinkedIn Corp.* litigation, both the Northern District of California and the Ninth Circuit were dubious of LinkedIn's claim that it had excluded a rival to protect users' privacy interests.[187] Social media company LinkedIn had initially permitted hiQ, a data analytics startup, to scrape (electronically harvest) data from user profiles on LinkedIn's popular social networking service.[188] HiQ used that information to power its data analytics software, which alerted employers to changes to their employees' LinkedIn profiles.[189]

LinkedIn later blocked hiQ from accessing any user profiles on its social networking service.[190] HiQ claimed that LinkedIn terminated its access to protect LinkedIn's own, competing data analytics services, in violation of state unfair competition law.[191] LinkedIn countered that it had acted out of concern for users' data privacy, rather than to limit competition.[192] HiQ was scraping data from individual profiles in a manner that, according to LinkedIn, violated users' privacy settings and reasonable expectations of privacy.[193]

On hiQ's motion for a preliminary injunction to regain access to LinkedIn's service, the district court was unconvinced that "*actual*" consumer privacy expectations were "shaped by the fine print of a privacy policy buried in the User Agreement that likely few, if any, users have actually read."[194] This skepticism is at odds with the FTC's fundamental assumption in Section 5 FTC Act enforcement that

187 hiQ Labs, Inc. v. LinkedIn Corp., 273 F. Supp. 3d, 1099, 1106 (N.D. Cal. 2017), *aff'd*, 938 F.3d 985, 994 (9th Cir. 2019), *vacated and remanded on other grounds*, 141 S. Ct. 2752 (2021) (mem.). The decision was vacated and remanded by the Supreme Court on grounds unrelated to the antitrust claims.

188 *See hiQ*, 938 F.3d at 991–92.

189 *Id.* at 990. Since LinkedIn is primarily used for professional social networking, such profile updates were used as a proxy to identify employees potentially at risk for leaving their job. HiQ brought several claims, including in state unfair competition law. Though not an agency or federal law case, the decision is interesting because privacy is claimed as the justification for alleged anticompetitive conduct.

190 *Id.* at 992.

191 *Id.* at 998.

192 *See id.* at 994.

193 *See hiQ*, 273 F. Supp. 3d at 1106–07. Approximately 50 million LinkedIn users had engaged a privacy setting called "Do Not Broadcast," which prevented changes to their LinkedIn profile from being automatically e-mailed to every contact in the user's professional network—a network that potentially included employers and fellow employees. *hiQ*, 938 F.3d at 994. When the setting is activated, changes made by users to their profiles are not sent via automated e-mail from LinkedIn to the contacts in the users' LinkedIn social networks. When the setting is not engaged, everyone in the users' networks receives an automated alert highlighting the changes in their profiles. *Id.* HiQ's software reported on such profile changes to employers in a manner that failed to account for this user privacy setting. LinkedIn claimed this disregard for user settings, and the terms and conditions of the social network, was the reason it terminated hiQ's access. *Id.*

194 *hiQ*, 273 F. Supp. 3d at 1107.

reasonable expectations of privacy are established by the terms of privacy policies. The FTC premises its privacy enforcement on the longstanding view that companies which make express or implied promises "simply ha[ve] to keep them."[195]

On appeal, the Ninth Circuit was similarly doubtful that users had expectations of privacy in their LinkedIn profile data, but the court focused more on the public nature of the profile information being scraped.[196] While acknowledging that posting publicly on social media may not imply consent to the use of data for "all purposes," the Ninth Circuit ultimately agreed with the district court, finding that user privacy expectations in LinkedIn profile information were "uncertain at best."[197] Even if such privacy interests did exist, the Ninth Circuit found those interests were outweighed at the preliminary injunction stage by hiQ's interest in accessing the profile data to continue operating its business.[198]

Along similar lines, a recent state antitrust agency case expressed preemptive skepticism that Google was acting to protect user data privacy. A Texas-led group of state attorneys general are pursuing a high-profile monopolization case against Google.[199] Their amended complaint includes allegations that the company is acting in an anticompetitive manner with its plans to terminate third-party cookies on its Chrome internet browser.[200] The complaint describes Google's purported privacy justifications for the cookies change as "a ruse" and mere "pretext."[201]

Although these cases are early-stage, the judicial skepticism toward the facts of such privacy justifications is perhaps understandable. Many of the digital platforms now invoking user data privacy as a shield against antitrust claims have been high-profile, repeat targets of data privacy law enforcement for violating the very same users' data privacy. At a more general level, Ryan Calo predicts this predisposition to skepticism, arguing that antitrust judges seek to decide cases "in ways that maximize efficiency," producing "overall judicial skepticism toward a force like privacy that stands in the way"

195 Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 648 (2014).

196 *See hiQ*, 938 F.3d at 998.

197 *Id.*

198 *See id.* at 995.

199 *See* Second Amended Complaint, Texas v. Google LLC, No. 20-CV-957, 2021 WL 2043184 (E.D. Tex. Aug. 4, 2021).

200 *See id.* at 96–99 (alleging Google's cookies change is anticompetitive, because it "raise[s] barriers to entry and exclude[s] competition in the exchange and ad buying tool markets" by blocking cookies tracking by publishers and advertisers, who would otherwise compete with Google to deliver advertising).

201 *Id.* at 60, 99.

of such efficiency at times by limiting information flow.[202] This may further explain the doubt these companies face in arguing that user privacy justifies their exclusion of competitors.

This sense of skepticism may also stem from the separation between the party whose privacy interests are at stake (often users) and the party invoking those interests (often the digital platform). It is typical for defendants to invoke their *own* rights or interests, such as intellectual property rights, to justify their conduct in antitrust law. However, this separation of privacy interests may be narrowing as digital platforms face a growing threat of liability for failures to police third-party privacy misconduct on their services. For instance, the FTC made clear in an action against Facebook that "Facebook will be liable for conduct by [third-party] apps that contradicts Facebook's promises about the privacy or security practices of these apps."[203]

Overall, these early cases and reasons for baseline skepticism suggest that defendants will need to carefully substantiate privacy justifications on the facts. As in *TREB* and *hiQ*, evidence of the defendant's past and current data privacy practices may shed light on whether a justification is pretextual. Ultimately, it will be important for agencies and courts to evaluate claimed privacy justifications on the specific evidence and arguments presented in each case, rather than generalized doubts about such privacy interests or their protection.

IV. COMPLETING THE RULE OF REASON ANALYSIS: LESS RESTRICTIVE ALTERNATIVES AND WEIGHING COMPETITIVE EFFECTS

This Article focuses on whether and when privacy restraints may constitute a procompetitive justification. The demonstration of such a justification by the defendant does not, however, end the rule of reason analysis. As this Part explains, the later steps in the burden-shifting framework may pose challenges for defendants who assert privacy protection as a justification.

Assuming a defendant succeeds in establishing a privacy-based justification, the burden then shifts back to the plaintiff, who may rebut the justification by demonstrating the benefits claimed by the defendant could be "reasonably achieved through less anticompetitive means."[204] If both the plaintiff and defendant carry their burdens, the

202 *See* Ryan Calo, *Privacy Law's Indeterminacy*, 20 THEORETICAL INQUIRIES L. 33, 50 (2019) (observing that "[e]conomists in general, law and economics scholars in particular, tend to be heavily skeptical about privacy for its tendency to deny market participants information.").

203 *In re* Facebook, Inc., F.T.C. No. C-4365 (Aug. 10, 2012) (Statement of the Commission).

204 NCAA v. Alston, 141 S. Ct. 2141, 2160 (2021) (quoting Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018)). In *Alston*, the Supreme Court clarified that the law does not,

court will proceed to weigh the demonstrated procompetitive benefits of the justification against the harms of the restraints, to determine the "actual [overall] effect on competition."[205]

Though often overlooked, this weighing goes to the heart of the rule of reason analysis. The rule of reason condemns only restraints that "unduly harm[] competition."[206] The test of legality is whether the restraint "merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[207] Therefore the inquiry must proceed to determine the overall competitive effects of the restraint. If the judicial analysis simply concludes with the finding of a procompetitive justification, it fails to address this central question of overall effects on competition. It risks allowing an egregiously anticompetitive restraint to continue simply because a minor procompetitive justification was shown.[208]

Courts have yet to reach this weighing analysis in considering claims of privacy protection as a justification. The District Court in *Epic v. Apple* failed to engage in such weighing, halting the examination of Apple's conduct too early.[209] Because of the District Court's findings at the earlier steps in its rule of reason analysis—that Epic demonstrated anticompetitive effects, that Apple established justifications, and finally that Epic failed to demonstrate a less

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however, require businesses to use "anything like the least restrictive means of achieving legitimate business purposes." *Id.* at 2161 (noting "courts should not second-guess 'degrees of reasonable necessity'" (quoting Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 227 (D.C. Cir. 1986))); Impax Lab'ys., Inc. v. FTC, 994 F.3d 484, 497 (5th Cir. 2021) ("[I]t is unreasonable to justify a restraint of trade based on a purported benefit to competition if that same benefit could be achieved with less damage to competition.").

205 *Alston*, 141 S. Ct. at 2155 (quoting *Am. Express Co.*, 138 S. Ct. at 2284); United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001) (The burden then shifts back to the plaintiff, who may rebut the justification by showing a less restrictive alternative to achieve the same competitive effect or "demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.").

206 *Id.* at 2160 ("The whole point" of the rule is to condemn a restraint that "unduly harms competition" after a "weigh[ing of] all of the circumstances of a case." (quoting Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768 (1984))).

207 Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) (describing this competitive effects inquiry as the "[t]he true test of legality").

208 *In re* NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1109 (N.D. Cal. 2019).

209 This lack of weighing analysis has been the subject of criticism on appeal to the Ninth Circuit. *See* Brief for the United States of America as Amicus Curiae in Support of Neither Party, Epic Games, Inc. v. Apple, Inc., No. 21-16506 (9th Cir. Jan. 27, 2022), at 15–19 (critiquing the district court's failure to engage in a weighing analysis to assess the overall competitive effect of Apple's restraints); Brief of Utah and 34 Other States as *Amici Curiae* in Support of Plaintiff-Counter-Defendant-Appellant and Reversal, Epic Games, Inc. v. Apple, Inc, No. 21-16695 (9th Cir. Jan. 27, 2022), at 18–25 (same).

restrictive means of achieving the benefits of the privacy justification—the District Court should have proceeded to weigh the competitive harms and benefits of Apple's rules.

Though the analysis will depend on the specifics of the case, these later steps in the rule of reason analysis may often pose a challenge for defendants claiming privacy as a justification. The defendant must prove not just the existence of a privacy-based justification, but also that the magnitude of the positive effects on competition outweigh the competition harms of the challenged restraint. In markets where privacy protection is one of several factors in consumer decision-making (among other parameters of quality, features, and price) the benefits of privacy competition may be marginal and outweighed by the anticompetitive effects of the impugned restraint. However, in markets where data privacy or security are more central to the product or service offering—for example, identity theft protection or browser pop-up blockers—the increase in privacy-based competition is likely to weigh more heavily against challenged restraints. In either scenario, once a privacy justification is established, the final weighing step will be crucial for courts to ensure that only conduct with unduly anticompetitive effects is condemned.

CONCLUSION

This Article offers the first scholarly analysis of privacy protection as a procompetitive justification. Using U.S. federal antitrust jurisprudence, economic literature, and international competition law, it argues that privacy protections are cognizable as a justification in antitrust law when—and only when—those privacy restraints also improve competition.

The Article first explores the law and economics of when privacy protections are likely to constitute such a justification. It develops two scenarios in which privacy protections are likely to improve competition, by reducing information asymmetry or by limiting dealer free-riding on privacy investments. Then, the Article examines when privacy restraints are *not* cognizable as a justification. Under Supreme Court precedent, there is no justification established when the defendant claims that competition must be limited to protect privacy. The Article concludes with insight on the challenges defendants are likely to face in establishing privacy justifications, including pretextuality on the facts and in the weighing of competitive effects.

The Article develops much-needed theory on the reconciliation of data privacy and antitrust law. Cases like *Epic v. Apple*, by accepting a privacy "justification" untethered to competition, imply that antitrust courts bear the burden of deciding whether defendants may protect

privacy at the cost of competition. They do not. Although privacy protection is imperative for the functioning of individuals and of society, it has bounded relevance as an antitrust justification. Normative privacy interests, divorced from competition, are not cognizable as a justification for conduct in existing antitrust doctrine. Beyond these bounds of antitrust law, there remain broad and important policy questions about tradeoffs between competition and data privacy—but those questions are for digital policymakers, not antitrust courts.