A REMEDY-CENTERED APPROACH TO ANTITRUST

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This Article advocates for a remedy-centered approach to antitrust law, placing remedial concerns at the forefront of antitrust analysis. It asserts that the limits of effective remedies should fundamentally shape the scope of antitrust liability. Drawing on the "nirvana fallacy" from economic theory, the Article argues that antitrust should only intervene when a judicial remedy can reliably improve upon market conditions. If no such remedy exists, liability should not be imposed. The Article further demonstrates how remedial considerations already play a significant, if often unrecognized, role in antitrust doctrines, including the definitions of "agreement," monopolists' duties to deal, and the premerger notification program under the Hart-Scott-Rodino Act. These considerations also inform the judiciary's treatment of antitrust liability in the face of alternative regulatory frameworks. By focusing on remedy, the Article offers a clearer, more coherent approach to existing doctrines and proposes improvements, including for emerging challenges like Big Tech monopolies, including the recent cases against Amazon and Google. Ultimately, the Article emphasizes that remedies are not an afterthought in antitrust; they are essential in determining both the scope of liability and the future development of antitrust law.

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INTRODUCTION

Remedies tend to be the thing we think about last. Law school courses often teach remedies in the final weeks of a course, prayers for relief come at the end of briefs, and courts order remedies at the conclusion of litigation. Though remedies embody the only implementation of substantive causes of action outside of the courtroom, they are often treated as an afterthought: something to figure out after liability has been adjudicated. But a key principle that shapes antitrust law—and that has not yet been subject to an in-depth exploration—is that remedy helps define liability. The impact of remedial considerations on the development of antitrust is pervasive, though rarely explicit. But the role of remedy in shaping substantive antitrust law has yet to be made an essential part of a theory of antitrust liability, leaving areas of antitrust that could benefit from a principled remedial analysis. To fill this gap, this Article discusses remedies as a way of understanding the scope of antitrust liability; adopting a remedy-centered approach can help us to make sense of some existing antitrust doctrines and to improve upon others. In sum, this Article argues that remedies are no afterthought; rather, they do—and should—drive antitrust law from the very beginning.

Political and legal theory teaches us that when evaluating public policy economics, the government cannot always improve upon market inefficiencies. This lesson is most evocatively captured by the nirvana fallacy, coined by Harold Demsetz in 1969, which criticizes an approach to public policy economics where the real is compared with the ideal; if the real falls below the ideal standard, it is deemed inefficient. Those who fall victim to the nirvana fallacy therefore assume that intervention—generally *government* intervention—can solve all market inefficiencies and achieve a perfect, idealized outcome. To avoid succumbing to the nirvana fallacy, Demsetz advocated for the use of a "comparative institution approach," where practitioners compare *real* alternative institutional arrangements to evaluate which is best equipped to deal with the economic problem at hand.[1] Demsetz's theory illustrates the importance of engaging in a critical consideration of remedy before deeming certain conduct to violate antitrust law; any

1 The idea of comparative institutional analysis is known in law, *see* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 4 (1994), economics, *see* MASAHIKO AOKI, TOWARD A COMPARATIVE INSTITUTIONAL ANALYSIS 3 (2001), and antitrust, *see* D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 GEO. MASON L. REV. 1055, 1057 (2010). What is distinctive in this Article is the use of the nirvana fallacy to point up the systematic problems in antitrust remedies and thus their need for other institutional approaches with a recognition that the market may be the superior if far from perfect institutional alternative.

other approach is based on the faulty assumption that antitrust law can remedy every market inefficiency.

The principle of giving remedial considerations primacy in developing substantive law has been explored in constitutional law. Professor Daryl Levinson's theory of remedial equilibration suggests that the scope of a constitutional right is determined by the available remedies. Criticizing the view that remedies are designed to implement rights, Levinson instead looks first to remedies to shape the nature of rights.

In synthesizing Demsetz's theory of public policy economics and Levinson's legal theory, it therefore makes sense to develop a legal principle that remedies help define rights when considering substantive antitrust law. Bill Baxter, a Stanford professor and Assistant Attorney General for the DOJ Antitrust Division under President Reagan, laid some rudimentary groundwork for considering the issue in deciding to exercise his prosecutorial discretion in the enforcement context. Baxter questioned the value of prosecuting antitrust cases when it was uncertain that appropriate and effective relief could be obtained, even if a violation of the law were to be proven. This remedy-centered approach defined Baxter's actions at the DOJ, most visible in the contrast between his approach to two massive enforcement actions he faced during his tenure: *AT&T* and *IBM*. On the very same day that Baxter settled the *AT&T* abuse of dominance case with a structural remedy, he recommended dismissal of the *IBM* case. Why did he reach such different outcomes on two of the largest antitrust cases in history? Because he cared about remedy. This Article expounds on the remedy-centered approach that Baxter applied to antitrust *enforcement*, arguing that a similar approach should govern antitrust *liability* in the first place.

Because of the inherent importance of remedy, remedial considerations already shape many key areas of antitrust doctrine, meaning that a remedy-centered approach can help us to make sense of existing antitrust rules. This Article highlights several examples. First, the Court's jurisprudence defining "agreement" under section 1 of the Sherman Act really boils down to a determination of whether the conduct at hand can be remedied. For example, mere parallel conduct does not constitute an agreement because it is not remediable. Courts cannot order competitors to "stop having similar prices," and so without more, parallel pricing is excluded from section 1's coverage. It is only with the addition of so-called "plus factors," which represent instances of remediable conduct, that "tacit agreements" subject defendants to section 1 scrutiny.[2]

2 The best work in this area is William H. Page, *Tacit Agreement Under Section 1 of the Sherman Act*, 81 ANTITRUST L.J. 593 (2017).

Monopoly pricing provides another apt example of remedial considerations. For instance, the Court's exclusion of price squeezes from section 2's reach reflects remedy; without a showing of predatory pricing or duty to deal, the only remedy the court is left with in a price-squeeze case is an exhortation to a defendant to "be nicer to your rivals."

In the same vein, the caselaw governing monopolists' duty to deal with competitors implicitly recognizes the limits of remedy. Courts generally do not impose a duty to deal on monopolists because doing so would require the court (1) to write the "rules of the game" for private enterprises' dealings and (2) to monitor and enforce these dealings, perhaps indefinitely. The Supreme Court's *Aspen Skiing* decision provides a narrow exception to this rule, which can be explained by the availability of remedy. The parties in that case had already worked together for years, which lessened the remedial problem because the Court could simply require them to replicate the preexisting joint venture, instead of starting from scratch. Similarly, the approach taken by circuit courts in dealing with anticompetitive product design imposes liability only where there is an available remedy: where the monopolist changed its product design for the sole purpose of destroying compatibility with competing peripheral products, and with no accompanying improvement to the product itself. Only in that case can a court clearly improve upon the market by penalizing such conduct.

Further, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 serves as a legislative recognition of the remedial limits of antitrust law. In establishing the premerger notification program, and thus providing an opportunity to challenge anticompetitive mergers *before* their consummation, Hart-Scott-Rodino was meant to solve the remedial problem facing the government in merger litigation: though the government frequently prevailed on the merits of merger challenges, by the time the court ruled in its favor, the merger had already been consummated, and the companies had been integrated. In other words, it was too late to "unscramble the eggs." Hart-Scott-Rodino therefore illustrates that a remedy-centered approach to antitrust law sometimes means *expanding* antitrust law, rather than restraining it.

And finally, the Court's treatment of the relationship between regulation and antitrust law provides an example of remedy's role in shaping existing antitrust doctrine. The Court's increased willingness in recent years to recognize implied antitrust immunity where regulatory schemes create a potential for conflict can be thought of as a remedy calculus. In these situations, the benefit of an antitrust remedy is small (given the existing role of a different regulator more expert than the judiciary), while the potential harms in imposing such a remedy may be great (given the potential for conflict). Antitrust law is therefore

not the best vehicle for improving the institutional arrangement at hand. But even without such a finding of immunity, the Court has shown that the presence of a regulatory scheme can still influence the role of antitrust law, illustrating that determining whether to impose antitrust liability is sometimes a decision not between antitrust remedy and *no* remedy, but between antitrust remedy and regulatory remedy.

So, while no scholar has outlined the contours and benefits of a remedy-centered approach to crafting antitrust liability rules, these considerations do not come from thin air but are already woven into many well-known antitrust doctrines. But even so, neither the Court nor academics have fully embraced a remedy-centered approach to antitrust. Accordingly, there are antitrust contexts—both old and new—that would gain clarity and coherence from a more explicit consideration of remedy.

For example, a remedy-centered approach to the essential facilities doctrine could help bring sense to this muddled area of law. Courts and commentators have distinguished between the viability of the essential facilities doctrine under sections 1 and 2, citing the remedial concerns inherent in unilateral essential facilities claims. These remedial problems have a familiar resemblance to those underlying any monopolist duty-to-deal situation—the difficulty in creating a court-ordered sharing scheme for private enterprise and the accompanying monitoring and enforcement costs. But in focusing on the remedial limits of section 2 claims, this conversation has largely ignored how many of the same remedial problems may still plague essential facilities claims brought under section 1, as illustrated by the remedy ordered in *Associated Press*. There, the Court enjoined an association of newspapers from enforcing a bylaw that allowed members to block competing newspapers from joining the association; but in doing so, the Court glossed over the creation and enforceability problems inherent in such a remedy. Considering the availability of remedies in these cases may lead to the conclusion that antitrust law cannot remedy a given essential facility problem, even when based on concerted conduct; instead, the issue may be better suited to regulatory oversight.

Applying the remedy-centered approach to an emerging issue—Big Tech—further illustrates the importance of remedial considerations. Though "breaking up Big Tech" is an increasingly popular policy proposal, these sweeping calls for structural reform ignore the remedial limits inherent in any breakup remedy and amplified by the nature of the technology industry. The steady decline in the use of breakups can be attributed in part to the limits of these structural remedies, particularly the difficulties in crafting the remedy, such as determining fault lines in an organization. And these concerns are even more serious in the context of Big Tech, where the companies are

highly integrated and rely on intangible assets like Big Data, which is much more difficult to effectively divide. Moreover, even some of the important claims in the government's suits against Google and Amazon lack an obvious remedy besides breakup. These remedial limits may counsel against turning to antitrust litigation as a means of dealing with harms associated with Big Tech, and instead suggest other means of intervention, such as increased data privacy laws.

In advocating for a remedy-centered approach to antitrust law, this Article proceeds in four parts. Part I draws on public policy and legal scholarship to highlight the value in centering remedial considerations in the development of substantive antitrust law. This remedy-centered approach builds on three existing bodies of scholarship: Demsetz's nirvana fallacy, Professor Levinson's remedial equilibration theory of constitutional law, and Bill Baxter's theory of antitrust prosecution. Together, this literature establishes the necessity of beginning with the question "Is this conduct remediable?" before "Should this conduct be prohibited?" Part I also addresses the role of fines and damages in answering this remedial question. We first explain that fines are rarely available. Second, we show that while fines or damages can be appropriate, they cannot solve the remedial problems discussed in this Article. To be an effective remedy, damages or fines must be in the service of a standard of compliance that will improve on the market. And the lack of an appropriate structure of compliance is what a remedial analysis shows in the situations we discuss.

Part II provides examples of antitrust doctrine already rooted in a remedy-centered approach: (1) defining "agreement" for purposes of section 1 of the Sherman Act, (2) evaluating monopolists' pricing practices, (3) regulating monopolists' dealings with competitors, (4) challenging mergers under Hart-Scott-Rodino, and (5) applying antitrust in the presence of a preexisting regulatory scheme. These examples showcase the effectiveness and feasibility of a remedy-first approach in creating antitrust liability rules. This Part shows that the Court already implicitly relies on such an approach to ground antitrust doctrine in many contexts. To illustrate the payoff of explicitly adopting a remedy-centered approach to antitrust law, Part III describes how a remedy-centered approach could be extended to other areas of antitrust law. This Part therefore extends this approach to two additional antitrust contexts: (1) the essential facilities doctrine and (2) calls for antitrust to break up or otherwise constrain Big Tech.

I. THEORETICAL UNDERPINNINGS: BUILDING A REMEDY-CENTERED APPROACH TO ANTITRUST LAW

We argue that a remedy-centered approach is necessary to avoid crafting antitrust rules where no remedy can improve upon an existing

institutional arrangement. To do so, this Article first draws on Demsetz's critique of the nirvana approach to public policy economics. Avoiding the nirvana approach requires an understanding of the inextricable link between rights and remedies. Second, to support the contention that remedial considerations necessarily shape the content and scope of rights—and thus of liability rules—this Article next examines a remedy-centered theory of constitutional law. Finally, this Article expands upon Bill Baxter's remedy-centered approach to the exercise of prosecutorial discretion in antitrust enforcement during his time at the DOJ, arguing that such an approach should apply to antitrust doctrine.

A. *Nirvana Isn't on the Table: Demsetz's Nirvana Fallacy*

Harold Demsetz coined the "nirvana approach" in his 1969 article *Information and Efficiency: Another Viewpoint.*[3] Demsetz's article was a response to and a sharp critique of Kenneth Arrow's paper *Economic Welfare and the Allocation of Resources for Invention.*[4] Arrow's influential piece discussed inefficiencies in resource allocation in the market for information production, particularly invention.[5] Highlighting three main problems with resource allocation in a competitive market—inappropriability, indivisibility, and uncertainty—Arrow concluded that research and invention should be financed by the government or some other nonprofit entity.[6] But Demsetz attacked Arrow's approach to evaluating market efficiency, dubbing it the "nirvana approach."[7] Demsetz argued that Arrow artificially froze key variables in his models, relied on assumptions that did not reflect reality, and ultimately compared the real (the market for information production) with the unreal (an imaginary, untested counterfactual of government intervention that assumed zero costs).[8] Thus, the nirvana fallacy was born.

Demsetz explained that this nirvana approach dominated public policy economics, where economists frame "the relevant choice as between an ideal norm and an existing 'imperfect' institutional

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3 Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1 (1969). For an interesting description of Harold Demsetz's life, professional work, and legacy, see Art Carden, *In Memoriam: Harold Demsetz, 1930–2019*, FORBES (Jan. 8, 2019, 11:55 AM EST), https://www.forbes.com/sites/artcarden/2019/01/08/in-memoriam-harold-demsetz-1930-2019/ [https://perma.cc/UWQ3-MZG8].

4 Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609 (1962).

5 *Id.* at 610.

6 *Id.* at 609–10, 623.

7 Demsetz, *supra* note 3, at 1 (emphasis omitted).

8 *Id.* at 1–2.

arrangement."[9] These economists evaluate a real institutional situation by seeing how it measures up against the ideal; if the real falls short of this ideal standard, it is deemed inefficient.[10] Those taking a nirvana approach thus "rely on a comparison of real-world markets and real-world institutions to imaginary ones implemented by experts without error," resulting in the comparison between real life and fantasy.[11]

Instead, Demsetz advocated for the adoption of a comparative institution approach, which frames the choice as one "between alternative *real* institutional arrangements."[12] This approach does not completely leave out the idealized standards prized by economists, such as the perfect competition model.[13] But while the nirvana approach involves a comparison between real-world Option A and the economist's model of perfect efficiency in order to evaluate whether Option A is efficient, the comparative institution approach compares real-world Option A with real-world Option B, using the ideal only as an objective standard through which to compare the efficiency of real alternatives.

In advocating for a comparative institution approach, Demsetz explained that the nirvana approach can be broken down into three fallacies: (1) the grass-is-always-greener fallacy, (2) the fallacy of the free lunch, and (3) the people-could-be-different fallacy.[14]

First, the grass is always greener.[15] Demsetz illustrated this fallacy by evaluating Arrow's conclusion that because free markets do not allocate an ideal amount of resources to knowledge production, achieving optimal allocation requires the government to take over the financing of research and invention.[16] The flaw in this logic comes from the assumption that because the current institutional arrangement does not live up to the ideal measure of efficiency, government intervention must be better: the grass must be greener in the world of government control.[17] But this one-sided approach does not take into account the real-life variables that may affect a government solution, such as

9 *Id.* at 1.

10 *Id.*

11 Joshua D. Wright & Jennifer Cascone Fauver, *Antitrust Reform and the Nirvana Fallacy: The Case Against a New Sherman Act*, 2022 COLUM. BUS. L. REV. 72, 78; *see also* Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1229–30 (1994) ("[T]hrough the 'nirvana fallacy,' scholars erroneously compare real-world institutions with some abstract or ideal institution, even if the ideal institution has never existed or, as in this case, has been proven impossible to devise.").

12 Demsetz, *supra* note 3, at 1 (emphasis added).

13 *Id.* at 19.

14 *Id.* at 2.

15 *See id.* at 2–3.

16 *Id.* at 2.

17 *Id.*

interest group distortion of government decisions.[18] In the world of antitrust, this preference for "an unexamined alternative" or "perfection by incantation"[19] is seen in duty-to-deal claims, when plaintiffs seek to have the court write the rules of the game and impose certain duties on a monopolist in its dealings with competitors. But the general rule that monopolists do not owe a duty to deal rejects the comparison of an existing institutional arrangement—a monopolist's decision regarding how it deals with competitors—with an unexamined alternative—how a judge may order private parties to deal with each other where she lacks the information to choose the efficient terms of the bargain.

Second, the fallacy of the free lunch.[20] Demsetz highlighted that "the nirvana approach relies on an implicit assumption of nonscarcity" because the ideal institutional arrangement that is used to judge whether the real arrangement is "efficient" incorporates assumptions of a zero-cost world.[21] Accordingly, economists may erroneously determine that a real policy or market arrangement is "nonoptimal" because it does not live up to the standard of an ideal world where all costs are assumed away: a world which, of course, does not exist.[22] For example, Arrow wrote that companies' unwillingness to bear risk results in a nonoptimal amount of resources being dedicated to risky endeavors such as invention, supporting his contention that the competitive market for information production is inefficient and should instead be subject to government centralization.[23] But Demsetz noted that such an argument ignores the real cost of risk management measures.[24] Is the competitive market for information production really inefficient because it factors in the cost of risk? In failing to consider that the institutional arrangement at hand may differ from the ideal because it must account for real-world costs—such as risk reduction—the nirvana approach leads people to assume that the situation is "nonoptimal" and can thus be improved upon, when in reality such an improvement may only exist in nirvana.[25] In antitrust, we may see this fallacy play out in applications of the essential facilities doctrine, where the existing institutional arrangement is deemed inefficient as compared to a theoretical world where competitors shared, assuming

18 *See id.* at 3.

19 *Id.*

20 *See id.* at 3–4.

21 *Id.* at 4, 6.

22 *See id.* at 4.

23 *See* Arrow, *supra* note 4, at 611–12.

24 *See* Demsetz, *supra* note 3, at 3–4.

25 *See id.*

away real costs associated with ordering such a remedy, such as the long-term impact on incentives to innovate.[26]

Finally, the people-could-be-different fallacy.[27] Building on the fallacy of the free lunch, Demsetz argued that "a relevant notion of efficiency must refer to scarcity and people as they are, not as they could be."[28] In criticizing Arrow's suggestion that information production be shifted to the government in order to achieve optimal levels of invention, Demsetz noted that in evaluating this alternative, Arrow simply assumed away variables such as risk and moral hazard.[29] For example, Arrow argued that insurance cannot eliminate misallocation of resources in the market for invention, citing the effect of moral hazard, which means that risk shifting through insurance is inherently accompanied by the creation of bad incentives for the insured.[30] But Demsetz notes that this reasoning demonstrates the people-could-be-different fallacy, where a real institutional arrangement—insurance as a risk-reduction measure in a competitive market for invention—is deemed nonoptimal because it does not live up to a world that could exist if only people could be different—a world without moral hazard.[31] Price-squeeze claims illustrate this fallacy in antitrust. Recognizing a price-squeeze claim is to deem inefficient the existing institutional arrangement (where a vertically integrated monopolist raises its wholesale prices so its competitors at retail must pay more for inputs and therefore struggle to compete on price) because it does not reflect the idealized world that could exist if only people could be different (where vertically integrated monopolists play nicely with competitors and ignore incentives to raise wholesale prices).[32]

The comparative institution approach therefore evaluates alternatives based on how they would operate in the real world to determine which varies the least amount from the ideal, instead of writing off an institutional arrangement in isolation because it does not achieve impossible goals. This Article extends Demsetz's nirvana framework to antitrust liability rules by focusing on the judicial remedies that provide the alternative to a market unregulated by antitrust.[33] We argue

26 *See infra* Section III.A.

27 *See* Demsetz, *supra* note 3, at 5–13.

28 *Id.* at 9.

29 *See id.*

30 *Id.* at 5.

31 *Id.* at 7.

32 *See infra* Section II.B.

33 Demsetz's teachings lend themselves naturally to antitrust law. To begin, Demsetz himself highlighted the flaws in Arrow's nirvana approach by evaluating Arrow's conclusion that there is less incentive to invent under monopolistic conditions than competitive ones, an application impacting antitrust policy. *See* Demsetz, *supra* note 3, at 14–19 (rejecting Arrow's conclusion "that there are special adverse effects of monopoly on the incentive to

that to execute a comparative institution approach in the world of antitrust liability, remedial considerations must be central. Without a remedy-centered approach, antitrust law will fall prey to the nirvana fallacy, much like Arrow did over half a century ago, by comparing the real (a claimed antitrust violation) with the imaginary (a world where that "inefficiency" is magically fixed), rather than with an actual alternative (a remedy). If no such remedy exists in the real world, then the situation at hand cannot be improved upon with antitrust law. Of course, inherent in Demsetz's work is the idea that other alternatives may exist—for example, regulation by a specialized government agency rather than the judiciary. Consideration of such alternative schemes for improving upon an institutional arrangement is beyond the scope of this Article, which focuses only on whether antitrust law provides a superior alternative to the unregulated market.

B. Remedies Define Rights: Exploring Levinson's Remedial Equilibration

A principled consideration of remedies is inherent in a comparative institution approach; only if a remedy both exists and can be implemented should there be liability, which requires the ability to improve upon the current situation with a real alternative institutional arrangement. This approach to public policy economics therefore naturally leads to a legal approach that centers remedial consideration. Though such an approach has not been explored in antitrust law, Daryl Levinson's "remedial equilibration" model explores a similar approach in constitutional law.

Levinson urged a new model of constitutional decision rules in his 1999 article *Rights Essentialism and Remedial Equilibration*.[34] In doing so, Levinson rejected the widely accepted "rights essentialism" paradigm, otherwise known as the decision rules model.[35] Rights essentialists

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invention," *id.* at 18). Additionally, Demsetz later went on to apply the nirvana framework in challenging the long-accepted Structure-Conduct-Performance paradigm, which assumed that high concentration levels meant high profits and monopolistic output restrictions. Thomas W. Hazlett, *The Nirvana Fallacy in "Hipster Antitrust,"* 28 GEO. MASON L. REV. 1253, 1259–60 (2021). The "Demsetz critique" showed that the concentration-profits correlation could be explained by efficiency because high concentration was tied to economies of scale. Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1, 1 (1973). This finding, which evaluated the realities of how monopolists became monopolists, profoundly changed industrial organizational thinking and public policy, motivating antitrust reforms surrounding views on concentration. Hazlett, *supra*, at 1261–62. Other scholarship has employed the nirvana approach as a paradigm to criticize existing antitrust theories, such as the rise of Neo-Brandeisian antitrust law. *See, e.g.*, *id.*; Wright & Fauver, *supra* note 11, at 115.

34 Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 939 (1999).

35 *Id.* at 858; Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 415 (2012).

recognize a dichotomy between right and remedy.[36] Under this view, the "operative proposition" is a statement that describes a constitutional ideal: a constitutional right.[37] This right exists as a concept embodied by the Constitution, separate from and prior to the application or enforcement of that right.[38] The "decision rule" is a statement that translates this ideal into a standard that can be applied in actual real-life cases: a rule, resulting in a remedy.[39] This approach therefore recognizes the existence of a divide between the true meaning of the Constitution—the rights that it grants—and judicial doctrine "that courts create to decide whether rights have been violated or powers exceeded."[40] Rights essentialists view decision rules and the remedies that accompany them as honoring the true, pure constitutional rights granted by the Framers, however imperfectly.[41]

Levinson rejected the rights essentialism paradigm, arguing that it "serves to maintain the illusion that rights are defined by courts through a mystical process of identifying 'pure' constitutional values without regard to the sorts of functional, fact-specific policy concerns that are relegated to the remedial sphere."[42] Instead, he advocated for a remedial equilibration model, where "rights and remedies are inextricably intertwined."[43] Rights, he argued, do not just depend on remedies as their vehicle for application in the real world, "but for their scope, shape, and very existence."[44] Levinson relied on examples from structural reform litigation[45] to highlight that constitutional adjudication is functional from the very beginning, not just at the remedial phase, because "[r]ights are often shaped by the nature of the remedy that will follow if the right is violated."[46]

Levinson identified what he termed "remedial deterrence" as one of the key ways that remedies influence constitutional rights; the nature of the remedy for a violation of a right may shape the right itself.[47]

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36 Levinson, *supra* note 34, at 858; Leong, *supra* note 35, at 414.

37 Leong, *supra* note 35, at 414–15; *see also* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004).

38 *See* Leong, *supra* note 35, at 414–15; Levinson, *supra* note 34, at 861.

39 Leong, *supra* note 35, at 414–15.

40 Kermit Roosevelt III, *Aspiration and Underenforcement*, 119 HARV. L. REV. F. 193, 193 (2006).

41 Levinson, *supra* note 34, at 858; Leong, *supra* note 35, at 415.

42 Levinson, *supra* note 34, at 857.

43 *Id.* at 858.

44 *Id.*

45 *See id.* at 874–84 (discussing "the evolution of rights and remedies in three different structural reform contexts: school desegregation, prison conditions, and apportionment of electoral districts").

46 *Id.* at 874.

47 *See id.* at 884–85, 889. Levinson claims that remedies influence constitutional rights in two other ways as well. First, *remedial incorporation*: a right's definition may itself

Concerns about remedial consequences often motivate courts to define a right in a way that avoids such consequences; as part of this principle, Levinson articulated that "where no viable remedy is at hand, courts may define the right as nonexistent."[48] This Article applies a similar logic to antitrust law, highlighting the role of remedial deterrence in shaping existing antitrust doctrine and illustrating how it can be even more extensively applied to other areas of antitrust law. This Article's remedy-centered approach to antitrust is rooted in the understanding that remedies define the contours, scope, and substance of rights.[49] This approach eschews a nirvana view where "inefficiencies" in the market are identified as antitrust violations, for which the courts must find an antitrust remedy to improve upon. Instead, a remedy-centered approach to antitrust law asks first, "Can this institutional arrangement or conduct be improved upon with an antitrust remedy?" If so, the situation at hand ought to be considered a violation of antitrust law, for which that available remedy should be ordered. But if not, courts and regulators must resist the urge to deem the conduct a violation, and instead accept that antitrust law cannot improve upon every institutional arrangement that falls below the idealized standard.

Levinson's remedial equilibration theory has been applied in a few limited areas beyond constitutional law, including workers compensation and international human rights law, but never in antitrust law.[50] But the public law parallels between constitutional law and

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incorporate a remedy. *Id.* at 899–904. For example, a right may build in a prophylactic remedy to make that right work better practically, like the incorporation of protections mitigating against the risk of prison violence into the Eighth Amendment. *Id.* at 885–87. Second, *remedial substantiation*: the value of a right is nothing more than the remedies associated with violating it. *Id.* at 904–13. This basic principle "reminds us of the Realist insight that we should look at rights and remedies as part of a single package." *Id.* at 904. But Levinson's remedial deterrence theory best captures the concept of remedy that this Article suggests.

48 *Id.* at 885.

49 Of course, the debate surrounding the proper paradigm for considering constitutional decision rules is ongoing. *See, e.g.*, Leong, *supra* note 35; Roosevelt, *supra* note 40; Berman, *supra* note 37. Kermit Roosevelt III highlighted one shared premise embodied by both rights essentialism and remedial equilibration in a 2006 article, *Aspiration and Underenforcement*: "the available remedy influences the content of the right that courts articulate in a given case." Leong, *supra* note 35, at 416 ("Roosevelt's work highlights that the decision rules and pragmatist positions share an important characteristic: the available remedy influences the content of the right that courts articulate in a given case."); Roosevelt, *supra* note 40, at 194. Accordingly, while this Article adopts a framework similar to Levinson's remedial equilibration in advocating for a remedy-centered approach to antitrust law, acceptance of Levinson's framework is not a prerequisite to accepting the core component of such an approach: remedies are central to the development of rules defining rights.

50 *See* Mary "Kati" Haupt, *Workers' Compensation Law & the Remedial Waiver*, 21 BARRY L. REV. 217, 228 (2016) ("In the workers' compensation context, application of the remedial equilibration model demonstrates that the right interrelates with the remedy, that is,

antitrust law make the extension of Levinson's theory to antitrust rules here particularly apt.[51]

C. *A Remedy-Centered Approach to Antitrust Enforcement: Bill Baxter*

Bill Baxter's approach to antitrust enforcement, which he implemented as President Reagan's Assistant Attorney General at the Department of Justice's Antitrust Division,[52] provides a unique example of an explicitly remedy-centered approach to antitrust law. This Article expands upon Baxter's teachings to embrace a remedy-centered approach, not just to the exercise of prosecutorial discretion in enforcement of antitrust law, but to the development of antitrust rules themselves.[53]

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the right to workers' compensation relief under a negligence theory necessarily ties the liability rule protection for the right into a remedial equilibration model."); Margaux J. Hall & David C. Weiss, *Human Rights and Remedial Equilibration: Equilibrating Socio-Economic Rights*, 36 BROOK. J. INT'L L. 453, 465 (2011) ("Remedial equilibration is important because it offers an alternate, more holistic view of human rights jurisprudence in which rights and remedies operate in a symbiotic relationship."); Tanusri Prasanna, *Taking Remedies Seriously: The Normative Implications of Risking Torture*, 50 COLUM. J. TRANSNAT'L L. 370, 375–76 (2012) ("[T]his Article draws from the classification of 'rights-implementing' rules in U.S. constitutional jurisprudence to develop a methodology for classifying obligations imposed by the prohibition of torture in international human rights instruments as either 'inherent' to or 'affiliated' with the right not to be tortured." (footnote omitted)).

51 Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 474 n.51 (2001) ("This interrelationship between the construction of the remedy and the elaboration of the meaning of the right is not unique to this area. It is indeed a common feature of public law." (citing Levinson, *supra* note 34, at 884–85)); *see* Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1360–79 (1991) (describing how areas of public law share unique remedial considerations).

52 *See* Nomination of William Francis Baxter to Be an Assistant Attorney General, 1981 PUB. PAPERS 145 (Feb. 20, 1981).

53 Interestingly, in his early antitrust work, Baxter did not demonstrate the principled, remedy-centered approach to antitrust that he implemented at the DOJ and in his later writings, which this Article builds upon. Richard Schmalensee, *Bill Baxter in the Antitrust Arena: An Economist's Appreciation*, 51 STAN. L. REV. 1317, 1319 (1999) ("There is a sense in which Bill learned economics twice. The first time, reading the literature of the 1960s, Bill, like most of us who studied economics outside Cook County in that hopeful period, learned that markets were prone to a variety of failures and that carefully crafted government intervention could generally improve their performance."). In fact, seven years after rejoining Stanford's faculty, Baxter served on a White House Task Force on Antitrust Policy, resulting in the "Neal Report," which "recommended new federal legislation designed to attack instances of high market concentration regardless of conduct patterns." *Id.* at 1320, 1319–20. In essence, the Neal Report recommended antitrust liability for concentration itself. But in the years that followed, Baxter "became more skeptical of the ability of administrative regulation and antitrust litigation to improve market outcomes in complex situations." *Id.* at 1320. Demonstrating his shift in thinking, Baxter wrote in a 1977 piece responding to Posner's critique of the Neal Report that "[e]verything that has been learned in the intervening years has dragged me to the reluctant conclusion that Posner's . . . probably

At the DOJ, Baxter believed that "a theory of antitrust liability must envision a remedy that is both feasible for a court to administer and conducive to enhancing consumer welfare."[54] Baxter's focus on remedial considerations in pursuing antitrust enforcement actions is best illustrated by his contrasting treatment of the two biggest cases he faced during his tenure: *AT&T* and *IBM*. Baxter resolved *AT&T* through a consent decree resulting in a major structural breakup; but on the very same day, he announced the decision to drop the *IBM* case. Although these two resolutions may appear to stand in marked contrast, Baxter's remedy-centered approach to antitrust enforcement demanded the divergent results.

The consent decree Baxter reached with AT&T, resulting in divestiture of the telecommunications giant, is widely cited as one of the most significant uses of structural remedy in antitrust history.[55] The DOJ filed its complaint against AT&T in 1974, alleging monopolization in violation of section 2 of the Sherman Act.[56] The crux of the complaint was that AT&T foreclosed competition in the market for long-distance communication services because its ownership of local operating services—the Bell operating systems or "Baby Bells"—allowed it to deny competing long-distance providers necessary local connections.[57] After six years of discovery, trial began in January 1981: the same time that Baxter arrived at the Division.[58] Accordingly, he immediately reviewed a proposed consent decree that had been negotiated before his arrival.[59] But Baxter rejected the proposal because it did not call for complete separation of AT&T's local and long-distance systems, and despite pressure from the White House to drop the case, Baxter pushed forward, promising to litigate it "to the eyeballs."[60] By

represents the sounder position." William F. Baxter, *Posner's* Antitrust Law: An Economic Perspective, 8 BELL J. ECON. 609, 613 (1977) (book review). But by the time that Baxter arrived at the DOJ, his approach to antitrust law had evolved markedly from its origin, leading him to the remedy-centered approach that this Article builds upon today.

54 Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1188 (1999).

55 *See, e.g.*, Maham Usman, Comment, *Breaking Up Big Tech: Lessons from AT&T*, 170 U. PA. L. REV. 523, 532–33 (2022); Noah Joshua Phillips, Comm'r, Fed. Trade Comm'n, We Need to Talk: Toward a Serious Conversation About Breakups 10 (Apr. 30, 2019), https://www.ftc.gov/system/files/documents/public_statements/1517972/phillis_-_we_need_to_talk_0519.pdf [https://perma.cc/SAT6-UX9M]; RICHARD A. POSNER, ANTITRUST LAW 111 (2d ed. 2001); William E. Kovacic, *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 CONN. L. REV. 1285, 1303 (1999).

56 United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131, 139 (D.D.C. 1982).

57 Phillips, *supra* note 55, at 10.

58 *Am. Tel. & Tel. Co.*, 552 F. Supp. at 139–40; Schmalensee, *supra* note 53, at 1323, 1325.

59 Schmalensee, *supra* note 53, at 1325.

60 *Id.* at 1326, 1325–26.

the end of the year, AT&T agreed to the structural remedy Baxter sought: complete divestiture, splitting the telecommunications company along lines of business into long-distance operations and the local Baby Bells.[61] Baxter's remedy, which went into effect on January 1, 1984, transformed the telecommunications industry.[62]

But on the very same day that Baxter announced this monumental structural remedy, he announced the DOJ's decision to dismiss *IBM*.[63] By the time Baxter reached the DOJ, the government's case against IBM alleging section 2 monopolization of the market for mainframe computers had dragged on for over a decade.[64] The DOJ had sunk millions of dollars and years of time into the prosecution.[65] Despite this massive investment, Baxter conducted a "shadow trial" to evaluate the future of the litigation, ultimately determining "that the government did not deserve to win the case."[66] Baxter was "afraid that the government might prevail nonetheless," so he dismissed the *IBM* case in January of 1982.[67]

So, what explains these markedly different results in two of the largest enforcement actions in antitrust history? Baxter's focus on remedy. The AT&T breakup is often considered to have been successful, "and there is compelling evidence to suggest that competition in the telecommunications industry increased after the breakup."[68] Scholars attribute this success to the existence of clear fault lines within AT&T.[69] Unlike many of the highly integrated Big Tech companies that exist today, AT&T's institutional structure was organized such that "the post-divestiture entities had well-defined predecessor organizations in the original Bell System."[70] Accordingly, "[t]he divestiture essentially took functional operating entities and spun them off as independent firms."[71] Though the breakup still required some tough decisions, the remedy was clear: separating the long-distance operations from the

61 *Id.* at 1326; *Am. Tel. & Tel. Co.*, 552 F. Supp. at 140–41.

62 Schmalensee, *supra* note 53, at 1326.

63 Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 2 (2001).

64 Schmalensee, *supra* note 53, at 1326.

65 *See* William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1109 n.20 (1989) ("By the time the case was dismissed in 1982, the number of trial days had reached 700, the trial transcript exceeded 104,000 pages, and the parties had introduced 17,000 exhibits. The Justice Department's cost of litigating the suit, excluding expert witness fees, approached $17 million.").

66 Schmalensee, *supra* note 53, at 1327.

67 *Id.*

68 Usman, *supra* note 55, at 533; *see* Kovacic, *supra* note 55, at 1303.

69 *See, e.g.*, Kovacic, *supra* note 55, at 1303.

70 *Id.*

71 *Id.*

local Baby Bells and establishing line-of-business restrictions to avoid collusion.[72] In addition to being fairly implementable, the available remedy could improve upon the existing institutional arrangement by directly tackling the situation giving rise to abuse of dominance—the ability of AT&T to use its long-distance dominance to foreclose competition in local telecommunications operations through its ownership of the local connections. Further, the AT&T monopoly did not arise through natural market forces, but rather was largely a product of government regulation of the telecommunications industry, meaning "there were fewer concerns that the decree would sacrifice economic performance by tampering with market structures that had emerged through a natural, market-driven search for superior efficiency."[73] Remedial considerations favored a breakup.

In contrast, *IBM* was not poised for remedy. In a memorandum sent to the Attorney General at the direction of Baxter on January 6, 1982, Baxter described the considerations that led "almost inexorably to the conclusion that we must dismiss the case."[74] Most of this discussion was dedicated to considerations of remedy, with Baxter emphasizing that "even assuming that the government could prove IBM's liability, there is no assurance that appropriate relief could be obtained."[75] Baxter explained that "[w]here illegal acts have been proven, the purpose of relief is to remove the defendant's ability and incentive to engage in similar acts in the future," before detailing the reasons that each remedial option would be ineffective in this case.[76] First, he wrote that injunctions would not work because IBM's conduct that would be most likely to result in liability was "time-bound and highly specific to the immediate context in which [the conduct] occurred," meaning it would be "impossible to fashion injunctions to prevent similar future violations that are neither so specific that they would be meaningless outside those now-extinct circumstances, nor so general that they would simply echo the language of the antitrust laws themselves."[77] Next, Baxter explained that "despite years of effort, no structural relief proposal has been identified that would inject new competition into the industry while retaining the efficiencies necessary to create viable

72 *See* Kovacic, *supra* note 55, at 1302–03.

73 *Id.* at 1303; *see* Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, 105 CORNELL L. REV. 1955, 1966 (2020).

74 Information Memorandum from Abbott B. Lipsky, Jr., Acting Assistant Att'y Gen., Antitrust Div., to the Att'y Gen. 3 (Jan. 6, 1982) [hereinafter Information Memorandum], *in* Lawrence A. Sullivan, *Monopolization: Corporate Strategy, the IBM Cases, and the Transformation of the Law*, 60 TEX. L. REV. 587, 639, 640 (1982); *see also In re* Int'l Bus. Machs. Corp., 687 F.2d 591, 594 (2d Cir. 1982).

75 Information Memorandum, *supra* note 74, at 4, 60 TEX L. REV. at 641.

76 *Id.* at 4, 4–5, 60 TEX L. REV. at 641, 641–42.

77 *Id.* at 4, 60 TEX. L. REV. at 641–42.

successor companies."[78] Finally, he explained that fines and penalties were unavailable given the civil nature of the action and that damages for injury to the United States would be "unrealistic" for a variety of reasons, including the difficulty in calculating them years later.[79]

Given Baxter's willingness to enact broad structural remedies in *AT&T*, it is safe to say that his contrasting treatment of *IBM* did not reflect an aversion to strong medicine for antitrust violations but concern about whether such a remedy fit the situation at hand. In describing Baxter's remedy-centered approach to antitrust enforcement, two scholars noted that "Baxter taught us that the government's proof of liability does not suffice to predict its success in crafting a remedy."[80] This Article takes this lesson a step further, arguing that where there is no remedy, antitrust liability should not exist in the first place.

D. What About Fines and Damages?

In considering the availability of antitrust remedies, one might suggest relying on the imposition of fines or damages as a cure-all remedy where conduct or structural remedies are unavailable or ineffective. But while fines and damages should play an important role in some circumstances in antitrust, reliance on fines or damages to solve the remedial problems identified in this Article has two shortcomings. The first is the less important: fines are often unavailable to U.S. regulators in enforcing antitrust law. The second is more fundamental: even if U.S. agencies could more readily award fines or courts could provide damages in private antitrust suits in cases where conduct or structural remedies are ineffective, slapping a fine on a defendant or awarding damages does not solve the fundamental remedial problem at hand. Simply making a defendant pay money does not improve the situation, unless the court can show that such fines or damages would systematically result in better behavior than the unregulated market encourages. Of course, fines and damages are useful antitrust remedies in many situations (like penalizing cartels), but only when they improve welfare going forward by deterring conduct that can be both defined and improved.

First, consider the case of fines. U.S. antitrust enforcement agencies are limited in their ability to impose fines. Though generally Sherman Act claims are brought civilly, the Sherman Act is also a criminal

78 *Id.* at 4, 60 TEX. L. REV. at 642.
79 *Id.* at 5, 60 TEX. L. REV. at 642.
80 Shelanski & Sidak, *supra* note 63, at 3.

statute.[81] But the DOJ is the sole agency with authority to bring Sherman Act cases, which means it is the only enforcement agency that can seek these penalties.[82] And criminal prosecutions generally target only violations of section 1, and even there "are typically limited to intentional and clear violations such as when competitors fix prices or rig bids."[83]

But because every Sherman Act violation is also a violation of the FTC Act,[84] the FTC can in practice bring the same types of cases, though it is limited to pursuing *civil* actions.[85] In doing so, the FTC may seek civil penalties in only a few narrow contexts.[86] First, where there is a violation of an FTC consent order, a district court can impose civil penalties in a suit brought to enforce the order.[87] Second, the FTC may rely on its Penalty Offense Authority, which allows the Commission to seek civil penalties where a defendant knew its conduct violated the FTC Act as unfair or deceptive and the FTC had already issued a written decision declaring such conduct to be unfair or deceptive.[88]

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81 *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/TP3U-UZ3T].

82 The Sherman Act allows individual violators to be fined up to $1 million and corporations to be fined up to $100 million for each offense. *Id.*

83 *Id.* The government can levy fines when it is the purchaser, but here the government is acting more like a private consumer.

84 *Id.*; *see also* FTC v. Cement Inst., 333 U.S. 683, 694 (1948).

85 *The Enforcers*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers [https://perma.cc/H3ED-U2A8].

86 Jon Leibowitz, *Building on the Muris and Pitofsky Years: Evolving Remedies from "Time-Outs" to Civil Penalties (Not the Third Rail of Antitrust)*, 80 TUL. L. REV. 595, 596 (2005) ("Lastly, there are civil penalties, available to the Commission in very limited instances . . . ."); *see also* Harry First, *The Case for Antitrust Civil Penalties*, 76 ANTITRUST L.J. 127, 141–43 (2009).

87 15 U.S.C. § 45(*l*) (2018) ("Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation.").

88 *Id.* § 45(m)(1)(B) ("If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and (2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation."). For a more detailed discussion of the history and practice of the FTC's Penalty Offense Authority, see Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, 170 U.

While it would be possible for Congress to enact monetary penalties outside of the criminal prosecution context, fining defendants does not fill the remedial gap identified in this Article. The imposition of fines ultimately still requires the determination that a remedy would improve the situation. But in situations where the judicial process cannot identify such a rule of conduct, a fine is not appropriate. So, while increased reliance on fines solves the surface-level question of "What is the remedy?," it does not answer the deeper question underlying a remedy-centered approach to antitrust law: Can antitrust law provide a remedy that improves the situation at hand?

The problem with damages is the same. In private antitrust suits, plaintiffs can seek the award of damages (treble damages in the case of the Sherman Act).[89] But the problem with the damages in the cases we describe is the same with fines. As James Speta has observed, "[A] damages case must also establish a standard of compliance."[90] If it does not establish a standard that improves on the market, it does not advance the goals of antitrust.

II. The Remedy-Centered Approach in Action: Existing Examples of Remedial Considerations in Antitrust Law

Remedial considerations are already woven into some of the Court's antitrust jurisprudence, though often not explicitly drawn out in its decisions. This Part highlights the remedial considerations underlying five areas of antitrust law: (1) defining agreement under section 1, (2) condemning abusive pricing practices under section 2, (3) defining a monopolist's duty to deal with its competitors under section 2, (4) preventing irremediable harm through the Hart-Scott-Rodino premerger notification program, and (5) determining antitrust law's role in the fact of regulation. Doing so helps to shed some light on the inherent impact of remedial considerations on antitrust; liability and remedy are so inextricably tied together that remedy

Pa. L. Rev. 71, 93–98 (2021), and Daniel Kaufman, *The FTC's Fall 2021 Letter-Writing Campaign—Section 5(m)(1)(B) of the FTC Act and the Focus on Civil Penalties*, Antitrust Mag. Online, Apr. 2022, at 1, 2. To help establish the actual knowledge requirement, the FTC generally sends a notice of penalty offenses to a variety of relevant businesses following an adjudication, putting them on notice that certain conduct has been deemed unfair or deceptive. *Notices of Penalty Offenses*, Fed. Trade Comm'n, https://www.ftc.gov/enforcement/penalty-offenses [https://perma.cc/LMA2-T8GP]. If one of these companies then goes on to commit such conduct, they may face civil penalties up to $50,120 per violation. *Id.*

89 Shelanski & Sidak, *supra* note 63, at 47.

90 *See* James B. Speta, *Antitrust and Local Competition Under the Telecommunications Act*, 71 Antitrust L.J. 99, 136 (2003); *cf.* Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & Econ. 445, 449 (1985) ("The [antitrust damages] system should give optimal incentives to potential violators.").

bleeds into decisionmaking, even when not expressly cited as a justification.

A. *Defining Agreement*

The Court's jurisprudence dictating when conduct constitutes an "agreement" subject to section 1 liability can be explained by remedial considerations. Though rarely mentioned as a justification for the Court's holdings, the implicit remedy-centered approach highlights the underlying impact of remedial considerations in shaping antitrust doctrine—in particular, the problem of remedy *creation*.

Section 1 of the Sherman Act applies to agreements that unreasonably restrain trade.[91] It applies only to coordinated action; unilateral action is covered by section 2.[92] Whether an "agreement" exists is therefore a threshold issue for liability under section 1 and has been a central question facing the Court in shaping the scope of antitrust law for years.[93] Courts subject express price agreements between competitors to a rule of per se illegality; in such a case, the existence of an agreement alone is enough to bring the force of the Sherman Act down on the conspirators.[94] But most cases do not involve direct evidence of an express price-fixing agreement, subject to a traditional meeting of the minds and memorialized in an email or a telephone conversation, for example.[95] Instead, courts must often determine whether defendants' conduct itself can be considered a "tacit

91 15 U.S.C. § 1 (2018); Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 775 (1984).

92 15 U.S.C. § 2 (2018).

93 *See, e.g.*, Interstate Cir., Inc. v. United States, 306 U.S. 208, 221 (1939) ("As is usual in cases of alleged unlawful agreements to restrain commerce, the Government is without the aid of direct testimony that the distributors entered into any agreement with each other to impose the restrictions upon subsequent-run exhibitors."); Texaco Inc. v. Dagher, 547 U.S. 1, 5–6 (2006) (finding a pricing policy of a joint venture to be "little more than price setting by a single entity" and thus "not a pricing agreement between competing entities with respect to their competing products"); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553 (2007) (holding that allegations of parallel conduct are not enough to plead a section 1 agreement).

94 United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

95 *See, e.g.*, *In re* Text Messaging Antitrust Litig., 630 F.3d 622, 628 (7th Cir. 2010) ("What is missing, as the defendants point out, is the smoking gun in a price-fixing case: direct evidence, which would usually take the form of an admission by an employee of one of the conspirators, that officials of the defendants had met and agreed explicitly on the terms of a conspiracy to raise price."); *Interstate Cir.*, 306 U.S. at 221 ("As is usual in cases of alleged unlawful agreements to restrain commerce, the Government is without the aid of direct testimony that the distributors entered into any agreement with each other to impose the restrictions upon subsequent-run exhibitors.").

agreement" subjecting them to section 1.[96] The rules developed by the Court for making these determinations can be explained by remedial considerations.

First, the rule of per se illegality reflects the most obvious example of a liability rule rooted in remedy. In the case of an express agreement amongst competitors to fix prices, the conduct is remediable, and the available remedy can improve upon the existing institutional arrangement. For example, in *United States v. Socony-Vacuum*, the classic price-fixing case that established the modern rule of per se illegality, defendant oil companies and service stations met and reached a gentleman's agreement where certain defendants would purchase distress gasoline to raise the price of oil and gas for all.[97] This conduct is clearly remediable with a liability rule: do not get together with your competitors and make an agreement to fix prices. Further, the creation of such a liability rule and the accompanying remedy can improve upon the existing institutional arrangement by eliminating cartels—or at the very least, by making cartels work harder to cover their tracks and therefore increasing coordination costs. Thus, comparing the market situation at hand (where competitors meet and agree to fix prices) with a real, practical, examined alternative (a world where such agreements result in criminal sanctions or civil liability) yields the conclusion that the existing institutional arrangement is nonoptimal and can be improved upon through antitrust law intervention: the per se rule.

Second, remedy can help explain the Court's treatment of tacit agreements, shedding light on the Court's distinctions between mere parallel conduct that ought to be written off as business as usual, and coordinated conduct beyond completely tacit interdependence bringing down the full force of the antitrust laws.[98] To establish a section 1 agreement, the Court has repeatedly held that a plaintiff must show more than mere parallel conduct.[99] The Supreme Court has explained that "[t]he inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational

96 Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540 (1954); *see* United States v. Container Corp. of Am., 393 U.S. 333, 335 (1969).

97 *Socony-Vacuum Oil Co.*, 310 U.S. at 166.

98 The Sherman Act is, in fact, forceful. A section 1 violation can result in a fine up to $100 million for a corporation and up to $1,000,000 or ten years' imprisonment for an individual. 15 U.S.C. § 1 (2018).

99 *Theatre Enters.*, 346 U.S. at 541; Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 548–49 (2007); *see also In re Text Messaging*, 630 F.3d at 627.

and competitive business strategy."[100] This reasoning can also be framed as reflecting a problem of remedy creation: parallel conduct or interdependence, without more, cannot be remedied. For example, the court cannot order competitors who merely offer their goods at the same price to make their prices different from one another, as their parallel prices may reflect similar costs, fierce competition, or responses to demand.

But antitrust law *can* provide a remedy when this parallel conduct is accompanied by certain "plus factors." In the words of the Seventh Circuit, an agreement may be inferred when defendants engage in "parallel plus" conduct.[101] Examples of the types of plus factors that have led the Court to find an agreement amongst competitors date back over a century.[102] A close examination of these tacit agreement cases reveals that these plus factors are nothing more than instances of remediable conduct, the presence of which permitted the Court to condemn coordinated action. In other words, the plus factors open up the door to section 1 liability by giving the Court something that it can improve upon, solving the remedy-creation problem; courts cannot wish away parallel behavior, but they can condemn specific instances of conduct that make such behavior more likely to occur.

The contrast between the Court's holdings in *Interstate Circuit v. United States* and *Theatre Enterprises v. Paramount Film* best illustrates this point.[103] In *Interstate Circuit*, defendants were film distributors and Texas theatres.[104] Distributors would license the films whose copyrights they owned to "first-run theatres," who would show such a film for the first time in an area, generally at a price of forty cents or more.[105] The distributors would then license the same film to second-run theatres in the same area, who would exhibit subsequent showings of the film at a lower price, generally for around fifteen cents.[106] The two affiliated theatre defendants—Interstate Circuit and Texas Consolidated Theatres—together "dominate[d] the motion picture business"

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100 *Twombly*, 550 U.S. at 554.

101 *In re Text Messaging*, 630 F.3d at 628.

102 *See, e.g.*, Am. Column & Lumber Co. v. United States, 257 U.S. 377, 399 (1921); Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588, 606 (1925); Sugar Inst., Inc. v. United States, 297 U.S. 553, 600 (1936); Interstate Cir., Inc. v. United States, 306 U.S. 208, 221 (1939); Am. Tobacco Co. v. United States, 328 U.S. 781, 797 (1946); FTC v. Cement Inst., 333 U.S. 683, 709–10 (1948); *Theatre Enters.*, 346 U.S. at 540; Goldfarb v. Va. State Bar, 421 U.S. 773, 791–92 (1975); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 765 (1984); *Matsushita Elec.*, 475 U.S. at 588.

103 *Compare Interstate Cir.*, 306 U.S. at 221 (agreement), *with Theatre Enters.*, 346 U.S. at 539 (no agreement).

104 *Interstate Cir.*, 306 U.S. at 214.

105 *Id.* at 215, 215 n.1.

106 *Id.* at 215 n.1, 217.

for first-run theatres in most of the Texas cities where they operated.[107] The defendant theatres sent a letter to each of the distributor defendants, "naming all of them as addressees," demanding that the distributors comply with two conditions if they wished Interstate to continue to show their pictures at its first-run theatres.[108] First, the letter demanded the distributors require that second-run theatres who showed their films not charge less than twenty-five cents for a showing.[109] Second, the letter demanded that when the films were shown at a price over forty cents, it would not be done as part of a double feature.[110] Following some negotiations, each distributor ultimately agreed to adopt these two conditions in the relevant Texas cities, with the exception of Austin and Galveston.[111]

The Supreme Court affirmed the district court's finding that the distributor defendants conspired to impose the two restrictions on second-run theatres, subjecting them to section 1 liability.[112] Though there was no "direct testimony that the distributors entered into any agreement with each other to impose the restrictions upon subsequent-run exhibitors," the Court highlighted that the "letter named on its face as addressees the eight local representatives of the distributors, and so from the beginning each of the distributors knew that the proposals were under consideration by the others," creating an incentive for coordinated action.[113] This motivation, combined with the parallel conduct of the defendants—each agreeing to adopt the same restrictions, down to the detail of exempting the same two cities—was enough to establish an "agreement" for purposes of section 1.[114]

But the Supreme Court reached the opposite conclusion in *Theatre Enterprises*.[115] Plaintiff was the owner and operator of Crest, a theatre located six miles from downtown Baltimore.[116] Crest repeatedly attempted to gain first-run licenses from the defendant film distributors, who "uniformly rebuffed petitioner's efforts and adhered to an established policy of restricting first-runs in Baltimore to the eight downtown theatres."[117] As in *Interstate*, there was no direct evidence of an express agreement between the defendants to restrict first-run licenses

107 *Id.* at 215, 214–15.
108 *Id.* at 216, 215–17.
109 *Id.* at 217.
110 *Id.*
111 *Id.* at 218–19.
112 *Id.* at 221.
113 *Id.* at 221–22.
114 *Id.* at 222–23.
115 Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 539 (1954).
116 *Id.*
117 *Id.*

to the downtown theatres nor to reject Crest's applications.[118] But the plaintiff argued that the defendants "had violated the antitrust laws by conspiring to restrict 'first-run' pictures to downtown Baltimore theatres, thus confining its suburban theatre to subsequent runs."[119] A jury reached a verdict for the defendants, and the Fourth Circuit affirmed.[120] The Supreme Court noted that "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement," but held that the business behavior at hand did not rise to the level of an agreement under section 1.[121] In doing so, the Court emphasized that "this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense."[122]

The similarities between the fact patterns in these two cases are striking: parallel behavior involving the imposition of restrictions on film licenses granted to theatres. But the different results can be attributed to the presence of "plus factors" or, in other words, conduct that creates a remedy. Because of the letter addressed to each competitor in *Interstate Circuit*, the Court could target specific conduct without having to itself fix prices or dictate agreements between private parties. In enjoining the enforcement of the second-run theatre restrictions, the Court in essence announced a remedy-based rule: do not agree to a course of conduct that is invited by a letter addressed to you and all your competitors. Unlike *Theatre Enterprises*, *Interstate Circuit* therefore involved *avoidable* conduct, which could be remedied. Each distributor received an avoidable invite to a common action, and in the future, defendants could avoid antitrust liability by not responding to such common invitations.[123] In contrast, mere parallel behavior like that seen in *Theatre Enterprises* is not well suited to antitrust remedy because the conduct at hand (making decisions about who to grant first-run

118 *Id.* at 539–40 (noting that "there is no direct evidence of illegal agreement between the respondents").

119 *Id.* at 538 (footnotes omitted).

120 Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 201 F.2d 306, 308, 316 (4th Cir. 1953), *aff'd*, 346 U.S. 537 (1954).

121 *Theatre Enters.*, 346 U.S. at 540, 542, 544.

122 *Id.* at 541.

123 The Second Circuit in *United States v. Apple, Inc.* applied reasoning similar to that in *Interstate Circuit* in holding book-publisher defendants conspired to impose restrictions on their wholesale agreements with Amazon for e-books. United States v. Apple, Inc., 791 F.3d 290, 339 (2d Cir. 2015). Much like the theatres in *Interstate Circuit*, which addressed the letter to all of the distributors, Apple orchestrated the agreement by telling the defendant publishers that it was offering the same terms to each of them and that it would only launch its e-bookstore if enough of them agreed to participate. *Id.* at 302. Accordingly, in agreeing to Apple's demands that they restrict their relationships with Amazon and signing contracts with Apple, the publisher defendants assented to an invite to coordinated action. *Id.* at 327.

licenses to) is neither definable nor avoidable, without more. In *Theatre Enterprises*, to issue a remedy, the Court would have to step into the management decisions of private enterprises, replacing the decisionmaking of the film distributors as to licensing policies with its own. Doing so would be to take a nirvana approach to antitrust law, and so the Court was right to reject such a liability rule, recognizing the remedy-creation problem.

These remedial considerations are visible across the Court's agreement jurisprudence.[124] For example, in *Sugar Institute v. United States*, the Court held that defendants violated section 1 where a sugar-seller trade association's code of ethics required members to announce their price changes in advance and took steps to enforce adherence to those prices.[125] These enforcement mechanisms constituted remediable conduct; the Court could improve upon the given institutional arrangement by creating a liability rule prohibiting trade associations from enforcing adherence to price changes. This is identifiable conduct which (1) can be targeted with a liability rule, and (2) if eliminated, will make the world "better" by decreasing price-fixing. In contrast, the Court has repeatedly refused to find a section 1 agreement where parallel conduct alone is shown—whether parallel pricing or parallel decisionmaking.[126]

And this remedy-centered approach to defining "agreement" is not cabined to horizontal agreements; it is true for vertical agreements under section 1, too. For example, the Court's 1984 decision in *Monsanto Co. v. Spray-Rite Service Corp.* can be viewed as the vertical-

124 *See, e.g.*, FTC v. Cement Inst., 333 U.S. 683, 714 (1948) (remediable conduct: enforcement of a base-point pricing system by boycotting defectors and punishing them by making their city a basing point with a low base price); Goldfarb v. Va. State Bar, 421 U.S. 773, 791–92 (1975) (remediable conduct: association published a suggested minimum-fee schedule and enforced it by announcing that deviation from the suggested fees could be met with disciplinary action); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 765–67 (1984) (remediable conduct: defendant approached noncomplying distributors and threatened to cut off supply, and distributors sent a newsletter to dealer-customers with language indicating that defendant "would terminate competitors who sold at prices below those of complying distributors," *id.* at 766). The circuit courts also have significant caselaw demonstrating these remedial considerations. *See, e.g.*, C-O-Two Fire Equip. Co. v. U.S., 197 F.2d 489 (9th Cir. 1952); United States v. Foley, 598 F.2d 1323 (4th Cir. 1979); E.I. Du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984); *In re* Coordinated Pretrial Proc. in Petroleum Prods. Antitrust Litig., 906 F.2d 432 (9th Cir. 1990); *In re* Baby Food Antitrust Litig., 166 F.3d 112 (3d Cir. 1999).

125 Sugar Inst., Inc. v. United States, 297 U.S. 553, 601 (1936).

126 *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 597 (1986); Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588, 606 (1925). Finding an agreement based on such conduct was a position defended by Richard Posner in his early days. *See* Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562, 1562 (1969).

agreement parallel to *Interstate Circuit*.[127] There, Spray-Rite, a distributor of agricultural chemicals, alleged that Monsanto, a manufacturer of such products, conspired with its distributors to fix Monsanto's herbicides' resale prices, and that Monsanto terminated Spray-Rite's distributorship as part of this conspiracy.[128] In addressing whether the requisite vertical agreement existed there to subject Monsanto's conduct to section 1 scrutiny, the Supreme Court rejected the Seventh Circuit's holding that "an antitrust plaintiff can survive a motion for a directed verdict if it shows that a manufacturer terminated a price-cutting distributor in response to or following complaints by other distributors."[129] Complaints alone—or even termination in response to such complaints—are insufficient to show vertical agreement.[130] This makes sense from a remedial standpoint—how can a defendant avoid such an agreement? By not allowing complaints? Or by not responding to them? If such conduct constituted an agreement under section 1, the Court would have to wade into the private workings of defendant's business to order a remedy, dictating if and how they can receive complaints and on what terms they may terminate business relationships in response to the information contained in such complaints.

But despite the insufficiency of the complaints relied on by the Seventh Circuit, the Court found other facts in the case were sufficient to show a vertical agreement.[131] For example, the Court pointed to the existence of a newsletter sent by one of the distributors to its dealer-customers, which could be reasonably interpreted "as referring to an agreement or understanding that distributors and retailers would maintain prices, and Monsanto would not undercut those prices on the retail level and would terminate competitors who sold at prices below those of complying distributors."[132] The presence of such a newsletter mirrors the conduct sufficient to show a horizontal agreement in *Interstate Circuit*. The plus-factor analysis determines whether an agreement exists in both horizontal and vertical antitrust cases, because both turn on the possibility of an effective remedy.

This judicial line drawing in the definition of agreement highlights the role of the remedy-creation problem in antitrust jurisprudence. Reframing the extensive caselaw defining agreement as reflecting a remedy-centered approach to antitrust law sheds light on these otherwise seemingly minute distinctions in the Court's jurisprudence.

127 *Monsanto*, 465 U.S. at 757–58.
128 *Id.* at 755–57.
129 *Id.* at 759.
130 *Id.* at 764.
131 *Id.* at 765.
132 *Id.* at 766.

Some may reject this framing of the Court's agreement jurisprudence, arguing instead that the caselaw is simply about ferreting out when an agreement actually exists. But this suggestion is not plausible because in many situations there really is no "agreement" present at all. Tacit agreement or "agreement" for section 1 purposes is simply a term of art that means the conduct at hand is sufficient to subject the defendants to antitrust scrutiny. The plus factors relied on by the Court do not show a meeting of the minds any more than a situation where competitors have all eerily adopted identical, parallel conduct in the market. So, given that the caselaw defining agreement is not about actually identifying when a traditional "agreement" or "meeting of the minds" has been reached, it makes sense to instead think of this jurisprudence as identifying when defendants' conduct can be identified—and thus remedied by antitrust law.

B. Monopoly Pricing Practices

The Court's liability rules governing monopolists' pricing practices can also sometimes be explained by a remedy-centered approach to antitrust law. Monopoly pricing is analyzed under section 2 of the Sherman Act, which applies to *unilateral* conduct, unlike section 1.[133] To be subject to section 2 liability, a defendant must (1) possess monopoly power in a market, and (2) have gained or maintained that power through exclusionary conduct—an abuse of dominance.[134] A monopolist's pricing policy itself can constitute exclusionary conduct in certain circumstances, opening it up to section 2 liability.

But because of the problem of remedy, the Court has refused to impose any liability on monopolists who adopt a potentially abusive pricing strategy: price squeezes.[135] This treatment of price squeezes highlights how the remedial considerations underlying the Court's decisionmaking can alternatively limit and negate liability. A price squeeze is a pricing tactic that can be implemented by vertically integrated firms, where the company sells both (1) an input at wholesale, and (2) finished goods using that input at retail.[136] To execute a price squeeze, a firm with power in the input market can simultaneously

133 *See* 15 U.S.C. § 2 (2018). Pricing abuses are also subject to attack under other antitrust laws, such as the Robinson-Patman Act, ch. 592, 49 Stat. 1526 (1936) (codified at 15 U.S.C. §§ 13–13b, 21a). But most predatory pricing claims are pursued under section 2 of the Sherman Act, so this Article focuses on section 2 cases. *See* Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695, 1697–98 (2013).

134 United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

135 Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 442 (2009).

136 Patrick Kennedy, *Squeezing* linkLine*: Rethinking Recoupment in Price Squeeze Cases*, 57 AM. BUS. L.J. 383, 391–92 (2020); Erik N. Hovenkamp & Herbert Hovenkamp, *The Viability of Antitrust Price Squeeze Claims*, 51 ARIZ. L. REV. 273, 273–74 (2009).

raise the price of its inputs at wholesale, while cutting its price on the finished goods at retail.[137] As a result, other firms competing with the defendant in the retail market for the finished goods will have higher costs—paying more for the input due to the increased price—while also being forced to cut their prices to compete with the defendant's cheaper prices at retail.[138] In other words, their profit margins are "squeezed," if not eliminated. In theory, this pricing strategy could give rise to a section 2 cause of action, and for many years, some circuit courts recognized such a claim.[139] But the Supreme Court put an end to price-squeeze claims (without more) in its 2009 decision *Pacific Bell Telephone v. linkLine Communications*, relying in large part on remedial considerations to justify its holding.[140]

According to the Supreme Court's *linkLine* rule, a price squeeze alone does not constitute actionable exclusionary conduct under section 2.[141] Instead, a price squeeze is actionable only if the defendant's pricing constitutes predatory pricing[142] or if it amounts to a constructive refusal to deal, which requires that the defendant have a duty to deal with its competitors in the first place.[143] Without an allegation that the defendant's pricing of its retail goods falls below cost, or that there is an antitrust obligation to sell inputs to the plaintiffs in the first place, the Court held that a price-squeeze claim is "nothing more than

137 Kennedy, *supra* note 136, at 391.

138 *Id.* at 392.

139 *See, e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416, 436–38 (2d Cir. 1945) (holding price squeeze unlawful where defendant had monopoly power in input market, input price was set above a "fair price," *id.* at 438, and competing retailers could not "make a living profit," *id.* at 437, at the price defendant set the input); City of Anaheim v. S. Cal. Edison Co., 955 F.2d 1373, 1376–78 (9th Cir. 1992) (extending price squeeze liability to regulated industries); *see also* Sandeep Vaheesan, Pacific Bell v. linkLine*: Price Squeezing and the Limits of Judicial Administrability*, 4 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 129, 132–35 (2008) (collecting cases).

140 *Pac. Bell*, 555 U.S. at 442.

141 *Id.* at 456–57.

142 Predatory pricing refers to a pricing strategy where a monopolist cuts its prices in order to drive out competition (predation) and then raises its prices to a supracompetitive level once its competitors have failed (recoupment). Leslie, *supra* note 133, at 1697. The Supreme Court's rule accordingly requires a plaintiff to establish two prongs to show a defendant has committed predatory pricing. First, that the defendant's prices were set below an appropriate measure of its costs. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 (1993). And second, after a showing of price below cost, the defendant must also have a "dangerous probability" of recouping its losses from these below-cost prices. *Id.* at 224.

143 *Pac. Bell*, 555 U.S. at 450.

an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level."[144]

In reaching this conclusion, the Court leaned into remedial considerations—explicitly this time.[145] Citing language from *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, the Court explained:

> We have repeatedly emphasized the importance of clear rules in antitrust law. Courts are ill suited "to act as central planners, identifying the proper price, quantity, and other terms of dealing." "'No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.'"[146]

The Court also expressed concern that "firms that seek to avoid price-squeeze liability will have no safe harbor for their pricing practices."[147] The Court explained that a price-squeeze rule that condemned a vertically integrated firm's pricing strategy without a showing of predatory pricing or duty to deal would not provide clear standards of conduct for defendants.[148] As described by the Court, the proposed standards for identifying a price squeeze would require a defendant to "leave its rivals a 'fair' or 'adequate' margin between the wholesale price and the retail price," which would leave courts in the position of policing the proper pricing levels between private enterprises.[149]

In essence, such a claim is not remediable. The Court's only option would be to order the defendant to make its pricing more friendly to its competitors. "Be nicer to your rivals," absent other remediable conduct—such as pricing below cost—is not a remedy that antitrust law can order. And the *linkLine* Court recognized this, with its reference to nonexistent "central planners" nearly speaking in terms of the nirvana fallacy itself. To recognize a price-squeeze claim would be to assume that the Court, acting as a central planner, has the

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144 *Id.* at 452 ("If there is no duty to deal at the wholesale level and no predatory pricing at the retail level, then a firm is certainly not required to price *both* of these services in a manner that preserves its rivals' profit margins.").

145 *See id.* at 452–55.

146 *Id.* at 452–53 (alteration in original) (citations omitted) (first quoting Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004); and then quoting *id.* at 415). We discuss *Trinko infra* text accompanying notes 215–28, 236–45.

147 *Pac. Bell*, 555 U.S. at 453 (citing Town of Concord v. Bos. Edison Co., 915 F.2d 17, 22 (1st Cir. 1990)).

148 *Id.* at 453 ("At least in the predatory pricing context, firms know they will not incur liability as long as their retail prices are above cost. No such guidance is available for price-squeeze claims." (citation omitted)).

149 *Id.* at 454.

informational ability to perfectly orchestrate private business to achieve idealized efficiency; but outside of nirvana, this is not a real alternative institutional arrangement. Accordingly, a price squeeze, without a showing of additional remediable conduct, is not suited to antitrust liability because it suffers from a remedy-creation problem.

C. Dealing with Competitors

Caselaw analyzing monopolists' dealings with competitors also illustrates the impact of remedial considerations on antitrust doctrine. Generally, a monopolist's refusal to deal with its competitors does not constitute a violation of section 2, at least outside the essential facilities doctrine which we will discuss in Section III.A.[150] But one notable Supreme Court case, which has never been overruled, seems to stand against the Court's hesitance to impose a duty to deal on monopolists: *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[151] Focusing on its facts and reasoning illustrates remedial considerations at the root of the general unwillingness to impose liability on the refusal to deal. *Aspen Skiing* is the classic exception that proves the rule.

In *Aspen Skiing*, Aspen Skiing (Ski Co.) and Aspen Highlands Skiing (Highlands) both ran ski facilities.[152] Ski Co. operated facilities on three mountains, while Highlands operated on one mountain.[153] For years, the two competitors jointly offered an "all-Aspen" ski pass, where skiers could purchase just one lift pass in order to access all four mountains.[154] Eventually, Ski Co.'s management grew tired of collaborating with Highlands, so the Ski Co. board offered to continue the joint pass only if Highlands would agree to accept an unprecedentedly low fixed percentage of revenue: in other words, "an offer that [Highlands] could not accept."[155] Following the discontinuation of the all-Aspen pass, "Ski Co. took additional actions that made it extremely difficult for Highlands to market its own multiarea package to replace the joint offering," such as discounting its own three-day pass and refusing to sell Highlands any lift tickets.[156] As a result, Highlands' revenues and share of the ski market declined sharply; a jury found Ski Co. guilty of violating section 2.[157]

150 *Trinko*, 540 U.S. at 411. This was recently emphasized in Judge Mehta's opinion in the Google Search decision. *See* United States v. Google LLC, No. 20-cv-3010, 2024 WL 3647498, at *150 (D.D.C. Aug. 5, 2024).

151 Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

152 *Id.* at 589.

153 *Id.*

154 *Id.* at 589–90.

155 *Id.* at 592 (citation omitted).

156 *Id.* at 593, 593–94.

157 *Id.* at 594–95.

The Supreme Court affirmed.[158] Though acknowledging "that even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor," the Court wrote that "[t]he absence of an unqualified duty to cooperate" did not insulate Ski Co. from liability.[159] The Court emphasized that Ski Co. "did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor," but rather "elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years."[160] This "decision by a monopolist to make an important change in the character of the market" was therefore subject to section 2 scrutiny.[161] The Court further held that the jury's conclusion that this conduct was a predatory attempt to exclude rivals based on something other than efficiency was supported by the record, citing consumers' preference for the all-Aspen ticket, the effect of the decision on Highlands' ability to compete, and the lack of a "normal business purpose" justifying Ski Co.'s decision other than harming Highlands.[162]

The *Aspen Skiing* decision has been held not to stand for any sort of general duty of a monopolist to deal with its competitors; in fact, the Court expressly disclaimed the existence of such a duty in the opinion.[163] So what makes this case stand out as distinct from the general rule that monopolists need not work together with their competitors? The existence of a remedy. Unlike in a run-of-the-mill duty-to-deal claim, the parties in *Aspen Skiing* had a long history of working together on the all-Aspen pass.[164] Accordingly, the Court did not face a remedy-creation problem. It could point to a remedy without being forced to create "rules of the game" of cooperation: just keep doing what you have been doing. In contrast, had there never been an all-Aspen pass, if Highlands had brought a section 2 claim when Ski Co. refused to start such a joint venture in the first place, there would be no remedy for the court to order, without having to create the terms of cooperation from scratch—an acute remedy-creation problem. *Aspen Skiing* may therefore be understood as standing for the limited holding that where a joint venture exists between competitors, a monopolist cannot terminate that joint venture for anticompetitive reasons. The greater ability of the Court to craft a remedy shows that its general inability to do so in refusal-to-deal cases is behind its general denial of liability.

158 *Id.* at 611.
159 *Id.* at 600–01.
160 *Id.* at 603.
161 *Id.* at 604.
162 *Id.* at 608, 605–10.
163 *Id.* at 600.
164 *Id.* at 591.

In addition to the *Aspen Skiing* example, the doctrine developed by circuit courts involving anticompetitive product design—and the resulting rejection of a duty to maintain compatibility with competitors' products—illustrates how a remedy-centered approach runs through decisions interpreting Sherman section 2 claims of monopoly. The Supreme Court has never addressed a section 2 claim alleging anticompetitive product design, but several circuit courts have. Though the precise approach varies by court, a general rule has emerged that section 2 is not violated when monopolists change their product's design such that it is no longer compatible with others' peripheral devices.[165]

But despite this general rule, under which "any firm, even a monopolist, may generally bring its products to market whenever and however it chooses,"[166] several circuits have held "that deliberate efforts to create incompatibility with a rival's products without achieving any improvement in quality or reduction in cost could be illegal."[167] In *C.R. Bard, Inc. v. M3 Systems, Inc.*, the Federal Circuit affirmed a jury's verdict finding a violation of section 2 where the defendant modified the product design of its biopsy gun such that it only accepted defendant's biopsy replacement needles because the change was made "for predatory reasons . . . rather than for improving the operation of the gun."[168] Judge Bryson, concurring in part and dissenting in part, explained that the evidence showed "the gun modifications had no effect on gun or needle performance" and the "real reasons for modifying the gun were to raise the cost of entry to potential makers of replacement needles."[169]

And the D.C. Circuit applied a similar distinction in *United States v. Microsoft Corp.* when evaluating the application of section 2 to Microsoft's design changes integrating Windows OS and Internet Explorer, which stifled other internet browsers' ability to compete on the

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165 *See, e.g.*, Cal. Comput. Prods., Inc. v. Int'l Bus. Machs. Corp., 613 F.2d 727, 744 (9th Cir. 1979) ("IBM, assuming it was a monopolist, had the right to redesign its products to make them more attractive to buyers—whether by reason of lower manufacturing cost and price or improved performance. It was under no duty to help CalComp or other peripheral equipment manufacturers survive or expand. IBM need not have provided its rivals with disk products to examine and copy, nor have constricted its product development so as to facilitate sales of rival products." (citation omitted)); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 284 (2d Cir. 1979) (refusing to impose a duty on monopolists who change their product design to predisclose such changes to competitors in the market for peripheral devices).

166 *Berkey Photo*, 603 F.2d at 286.

167 ANDREW I. GAVIL, WILLIAM E. KOVACIC, JONATHAN B. BAKER & JOSHUA D. WRIGHT, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 1248 (4th ed. 2022).

168 C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1382 (Fed. Cir. 1998) (Bryson, J., concurring in part and dissenting in part).

169 *Id.*

Microsoft operating system.[170] On one hand, it found Microsoft's design change causing Windows OS to sometimes override the user's default browser preferences in favor of Internet Explorer not to have violated section 2 because the United States did not rebut the "valid technical reasons" provided by Microsoft for this change.[171] But on the other hand, the court held that Microsoft's other two related design changes—commingling the operating system and browser codes and excluding Internet Explorer from Windows' Add/Remove Programs utility—did violate section 2 because Microsoft provided no justification for the changes.[172] The Ninth Circuit summarized this distinction best in *Allied Orthopedic Appliances, Inc. v. Tyco Health Care Group LP*, writing that a "design change that improves a product by providing a new benefit to consumers does not violate Section 2 *absent some associated anticompetitive conduct.*"[173]

The rule that emerges from this caselaw subjects product design changes that strip competitors' products of compatibility to section 2 only if the design change brings no improvement to the product, such that it is purely implemented to foreclose competition in compatible peripheral products.[174] Remedial considerations explain this distinction. Courts can offer no effective remedy where a defendant makes an improvement to its product design which also affects the effectiveness of its competitors' products. Attempting to impose liability in this situation would force the court to measure the desirability of such a change and regulate the product design choices of private companies, much like a product regulatory body. In contrast, where the defendant cannot produce evidence establishing any benefit brought on by the design change, the conduct at hand is easily remediable. The court can improve upon the existing situation with a clear warning against identifiable conduct: do not make changes to your product that bring you absolutely no improvement (in product design or costs) just to thwart your competitors' compatibility with peripheral products. Such

170 United States v. Microsoft Corp., 253 F.3d 34, 64–67 (D.C. Cir. 2001).

171 *Id.* at 67 ("As a general rule, courts are properly very skeptical about claims that competition has been harmed by a dominant firm's product design changes." *Id.* at 65.).

172 *Id.* at 66–67 ("Microsoft failed to meet its burden of showing that its conduct serves a purpose other than protecting its operating system monopoly." *Id.* at 67.).

173 Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 998–99 (9th Cir. 2010) (emphasis added) ("If a monopolist's design change is an improvement, it is 'necessarily tolerated by the antitrust laws,' unless the monopolist abuses or leverages its monopoly power in some other way when introducing the product." *Id.* at 1000 (citation omitted) (quoting Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 545 (9th Cir. 1983), *overruled by* Hasbrouck v. Texaco, Inc., 842 F.2d 1034 (9th Cir. 1987)).).

174 The precise formulation of this rule varies by circuit. For a comprehensive discussion of the varied application of section 2 to product design changes, see John M. Newman, *Anticompetitive Product Design in the New Economy*, 39 FLA. ST. U. L. REV. 681 (2012).

a rule provides a standard by which defendants can guide their actions and avoid antitrust liability.

One might argue that it makes more sense to understand the product design rule as simply rooted in efficiency concerns. Under that view, the doctrine would evaluate when conduct is more egregious, or harmful to efficiency, not when it is remediable. For example, a product design choice that is made only to further anticompetitive goals brings no productive efficiency to the table, while one boasting a design improvement does. But this rationale does not explain the bright-line nature of the rule applied by the lower courts in analyzing design changes impacting compatibility. There is no balancing; any evidence that the design change improved the product at hand is enough to shield the monopolist from liability, no matter how small. If this rule simply focused on imposing liability where the conduct was harmful to the market, courts would subject design changes to an efficiency balancing standard, making the monopolist liable where the benefit to the product was too small, or outweighed by the accompanying harm to competitors' peripheral products. Without such balancing, this rule is best understood as reflecting remedial considerations—only imposing liability on monopolists for conduct that antitrust law can improve upon.

The Ninth Circuit recognized the remedial considerations underlying this rule in its *Allied Orthopedic* decision.[175] The court emphasized that a rule condemning product improvement would prove unadministrable in remedy, but also that it would improperly substitute the judgment of the court for that of the market:

> "Antitrust scholars have long recognized the undesirability of having courts oversee product design, and any dampening of technological innovation would be at cross-purposes with antitrust law."
>
> To weigh the benefits of an improved product design against the resulting injuries to competitors is not just unwise, it is unadministrable. There are no criteria that courts can use to calculate the "right" amount of innovation, which would maximize social gains and minimize competitive injury. . . . Absent some form of coercive conduct by the monopolist, the ultimate worth of a genuine product improvement can be adequately judged only by the market itself.[176]

This language rejects a rule based in nirvana—one where the court assumes that antitrust law can improve upon a given situation by replacing the market's judgment of a product for that of the court, in

175 *Allied Orthopedic*, 592 F.3d at 999–1000.

176 *Id.* at 1000 (citation omitted) (quoting U.S. v. Microsoft Corp., 147 F.3d 935, 948 (D.C. Cir. 1998)).

order to improve upon an "inefficiency" (namely, the harm to competitors' peripheral product) that may not actually be inefficient if the product design improvement is accepted by consumers in the long run.

D. Hart-Scott-Rodino's Premerger Notification Program

Another example of an existing remedy-centered approach to antitrust law is the premerger notification program established by the Hart-Scott-Rodino Antitrust Improvements Act.[177] Section 7 of the Clayton Act primarily governs merger law, prohibiting the acquisition of stock or assets of another where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[178]

Prior to 1976, merger enforcement under the Clayton Act typically occurred *after* the merger had been consummated.[179] This practice meant that by the time the government—acting through either the FTC or DOJ—was able to bring its section 7 challenge, litigate it, and even achieve success on the merits, the court was often unable to grant meaningful relief:

> Since these challenges often took years to litigate, it was very difficult for courts to come up with an appropriate remedy to restore competition—"that is, to unscramble the eggs"—because it was very difficult to recreate the acquired entity as an independent "competitively viable firm." So even when the government was successful in its challenge, it was often a hollow victory and too late to gain any "meaningful relief."[180]

177 15 U.S.C. § 18 (2018 & Supp. IV 2023).

178 *Id.* There is a "panoply of different laws" that may apply to a proposed merger, but section 7 of the Clayton Act is the most common cause of action, and the subject of Hart-Scott-Rodino, so we focus our attention there. Peter Bowman Rutledge, *A Brief Review of Merger Control in the United States*, 13 INT'L L. PRACTICUM 8, 9 (2000).

179 Debbie Feinstein, *Un-Consummated Merger*, FED. TRADE COMM'N (Dec. 18, 2013), https://www.ftc.gov/enforcement/competition-matters/2013/12/un-consummated-merger [https://perma.cc/MJ8J-EUCE] ("Prior to the passage of the Hart-Scott-Rodino ('HSR') Act and the implementation of the premerger notification program in 1978, all merger enforcement under Section 7 of the Clayton Act was after-the-fact."); Raymond Z. Ling, *Unscrambling the Organic Eggs: The Growing Divergence Between the DOJ and the FTC in Merger Review After* Whole Foods, 75 BROOK. L. REV. 935, 941 (2010) ("Before the passage of the HSR Act, it was very difficult to challenge a merger successfully. Without advance notice of the transaction, mergers were typically challenged after they were already consummated." (footnote omitted)).

180 Ling, *supra* note 179, at 941 (first quoting ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 47 (2007); and then quoting H.R. REP. NO. 94-1373, at 8 (1976)).

This problem was not an anomaly—the difficulty of remedying a consummated merger[181] led to "growing concern that government policing of mergers was becoming ineffective."[182] First, though the government frequently prevailed on the merits in merger litigation,[183] the same was not true on the remedy issue.[184] In a 1969 study of the remedies achieved in section 7 litigation brought by the government between the law's inception and 1960, Kenneth Elzinga found that nonoptimal relief predominated: "Of the 39 cases, 21 relief orders are *unsuccessful* and 8 *deficient*."[185] Second, even where the government achieved postacquisition relief, it took on average five years to effectuate that relief.[186] This delay only made it more difficult to "unscramble the eggs" because "[d]uring this lag time, the firms' assets, operations, and management become integrated, and so . . . '[t]he independent identity of the acquired firm disappears.'"[187] Accordingly, when Elzinga took into consideration the time required to obtain relief in the thirty-nine cases consummated between 1950 and 1960, only four were deemed to have achieved successful or sufficient relief; notably, "three involved acquisitions stopped in their incipiency *before* full consummation so that no divestiture was actually necessary; the other was a stock acquisition."[188]

Enter Hart-Scott-Rodino (HSR). Passed in 1976, "the Hart-Scott-Rodino Act expanded the investigatory power of the Department of Justice, required notification after public announcement of a proposed combination, and established a waiting period to enable enforcement authorities, including both the Justice Department and the Federal Trade Commission, to investigate the combination's likely competitive effects."[189] Accordingly, under the Clayton Act,

181 Feinstein, *supra* note 179 ("[A]chieving a remedy in consummated mergers often involved a complicated 'unscrambling of the eggs' to restore competition to pre-merger levels.").

182 Andrew G. Howell, Note, *Why Premerger Review Needed Reform—and Still Does*, 43 WM. & MARY L. REV. 1703, 1714 (2002).

183 *See id.* (noting "that a defendant's win in 1974 represented the government's *first* outright loss in nearly a quarter-century of merger litigation" (footnote omitted)); *see also* United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting) ("The sole consistency that I can find is that in litigation under § 7, the Government always wins."); H.R. REP. NO. 94-1373, at 8 (noting that, on the merits, "the government is successful in the vast majority of its litigated merger cases").

184 *See* Howell, *supra* note 182, at 1714 ("The government, however, actually lost more often than not on the issue of remedy."); *see also* H.R. REP. NO. 94-1373, at 8.

185 Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. & ECON. 43, 51 (1969).

186 *Id.* at 52.

187 Howell, *supra* note 182, at 1714 (quoting H.R. REP. NO. 94-1373, at 8).

188 Elzinga, *supra* note 185, at 46, 51–52.

189 Rutledge, *supra* note 178, at 9.

transactions meeting three elements—a jurisdictional requirement, an assets or annual sales requirement, and a size threshold—are subject to HSR's notification requirements, unless an exemption applies.[190] The parties must submit a Premerger Notification Form to the FTC and DOJ, including various details of the transaction, and then face a waiting period, during which the agencies review the transaction before deciding whether to approve it or to issue a "Second Request," seeking more information.[191] Following the provision of the Second Request materials, each agency chooses whether to challenge the merger and, if it wishes to do so, generally seeks a preliminary injunction in federal court.[192] Given its creation of this premerger notification program, "[t]he HSR Act is often credited with establishing the modern merger review process by giving the DOJ and the FTC the ability to block mergers *before consummation.*"[193]

HSR was passed with an explicitly remedy-centered purpose.[194] Legislative history establishes that in creating HSR's premerger notification program Congress wanted to enhance the likelihood of meaningful remedies in merger challenges.[195] For example, according to the Act's purpose statement in the House Report,

> H.R. 14580 will, however, strengthen the enforcement of Section 7 by giving the government antitrust agencies a fair and reasonable opportunity to detect and investigate large mergers of questionable legality before they are consummated. The government will thus have a meaningful chance to win a premerger injunction—which is often the only effective and realistic remedy against large, illegal mergers—before the assets, technology, and management of the merging firms are hopelessly and irreversibly scrambled together, and before competition is substantially and perhaps irremediably lessened, in violation of the Clayton Act.[196]

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190 *See id.* at 11–12.

191 *Id.* at 12.

192 *Id.*

193 Ling, *supra* note 179, at 940–41 (emphasis added).

194 *See* Roundtable Discussion, *Developments—and Divergence—in Merger Enforcement*, ANTITRUST, Fall 2008, at 9, 21 (statement of William Kolasky, Jr.) ("The whole point of Hart-Scott-Rodino was to give the agencies an opportunity to challenge mergers before they were consummated so you did not have the problem of unscrambling the eggs after the fact."); Jessica C. Strock, Note, *Setting the Terms of A Break-Up: The Convergence of Federal Merger Remedy Policies*, 53 WM. & MARY L. REV. 2147, 2155–56 (2012) ("Without these premerger requirements, the remedial measures merging firms took were often inadequate to solve anticompetitive problems, leaving the agencies to 'unscrambl[e] the eggs' after an anticompetitive merger had already been consummated." *Id.* at 2156 (alteration in original) (quoting S. REP. NO. 94-803, pt. 1, at 61 (1976)).).

195 *See* William Blumenthal, *Introductory Note*, 65 ANTITRUST L.J. 813, 813–14 (1997).

196 H.R. REP. NO. 94-1373, at 5 (1976).

The House Report explained that one of the "fundamental propositions" on which HSR is based is that "after consummation occurs, many large mergers become almost unchallengable [sic]," such that even where the government wins on the merits of its Clayton Act challenge, "by the time it wins the victory . . . it is often too late to enforce effectively the Clayton Act, by gaining meaningful relief."[197] It highlighted the remedial dilemma: "'Unscrambling' the merger, and restoring the acquired firm to its former status as an independent competitor is difficult at best, and frequently impossible."[198]

The passage of HSR—designed to give the FTC and DOJ the notice and time required to challenge conduct that harms competition *before* becoming irremediable—provides a clear example of a remedy-centered approach to antitrust law, meant to prevent the remedy-creation problem. This example also illustrates that adopting a remedy-centered approach to antitrust law is not always a matter of *reducing* antitrust regulation or enforcement; sometimes remedial considerations suggest an *expansion* of antitrust law, allowing antitrust adjudicators to remedy undesirable conduct—to improve upon an existing institutional arrangement—that may otherwise be irremediable.

E. The Role of Regulation

A final example of the persisting role of remedy in shaping and explaining antitrust doctrine is the intersection between antitrust and regulatory law. This connection illustrates an important component of a comparative institution approach. When comparing real institutional alternatives through a remedy-centered approach to antitrust law, the choice is not always between antitrust intervention and nothing. Rather, there are instances where antitrust law cannot improve upon the situation at hand, but a different intervention—such as agency regulation—can, or where agency regulation can address a harm *better* than antitrust law can. Antitrust law is already sensitive to this consideration; the Court's antitrust analysis is shaped by the existence of a relevant regulatory scheme.[199] Where another enforcer is already present in the area, the choice becomes one of which institutional arrangement can better remedy the harm at hand.

The Court has illustrated how these remedial concerns mediate the relationship between antitrust law and other existing regulatory

197 *Id.* at 8.

198 *Id.*

199 *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366, 374 (1973); Gordon v. N.Y. Stock Exch., Inc., 422 U.S. 659, 688 (1975); Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 412 (2004); Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 283 (2007).

frameworks through the doctrine of implied antitrust immunity. In addition to regulatory statutes that expressly preclude the application of antitrust laws,[200] the Supreme Court has long recognized *implied* antitrust immunity in certain "pervasively" regulated federal industries.[201] But historically, the application of this doctrine was narrow; regulation was rarely considered to displace antitrust law.[202] In 1963, the Court explained that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of *plain repugnancy* between the antitrust and regulatory provisions."[203] Under this strict plain repugnancy standard, repeal is implied "only if necessary to make the [regulation] work, and even then only to the minimum extent necessary."[204]

But in recent decades, the Court has become increasingly willing to find a regulatory scheme to preclude the application of antitrust law.[205] This path away from its prior hesitancy towards finding implied antitrust immunity culminated in *Credit Suisse*.[206] There, the plaintiffs challenged investment banks' underwriting practices, alleging that they agreed to impose harmful conditions on investors for obtaining certain IPO shares, in violation of antitrust laws.[207] But the Supreme Court held that the securities laws implicitly precluded the antitrust claims.[208] Building on three prior Supreme Court decisions addressing the relationship between securities law and antitrust,[209] the *Credit Suisse* Court articulated four elements that must be present for the securities laws to be "clearly incompatible" with a given application of antitrust law, such that implied antitrust immunity applies: "(1) an area of

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200 *See Credit Suisse*, 551 U.S. at 270 ("Sometimes regulatory statutes explicitly state whether they preclude application of the antitrust laws."); Jacob L. Kahn, Note, *From* Borden *to* Billing*: Identifying a Uniform Approach to Implied Antitrust Immunity from the Supreme Court's Precedents*, 83 CHI.-KENT L. REV. 1439, 1439 (2008).

201 *See, e.g.*, Jessica A. Rebarber, Note, Credit Suisse v. Billing*: The Limited Impact on Application of Antitrust Laws in Federally Regulated Industries Following the 2008 Financial Crisis and Beyond*, 6 J. BUS. & TECH. L. 417, 423 (2011); Kahn, *supra* note 200, at 1443–54 (discussing history of implied antitrust immunity precedents); *Credit Suisse*, 551 U.S. at 271 (collecting cases).

202 *See* Howard A. Shelanski, *Justice Breyer, Professor Kahn, and Antitrust Enforcement in Regulated Industries*, 100 CALIF. L. REV. 487, 496 (2012).

203 United States v. Phila. Nat'l Bank, 374 U.S. 321, 350–51 (1963) (emphasis added) (footnote omitted).

204 Silver v. N.Y. Stock Exch., 373 U.S. 341, 357 (1963).

205 *See, e.g.*, Kahn, *supra* note 200, at 1451; Richard M. Brunell, *In Regulators We Trust: The Supreme Court's New Approach to Implied Antitrust Immunity*, 78 ANTITRUST L.J. 279, 286–98 (2012) (describing the Supreme Court's "shift" in implied antitrust immunity).

206 *Credit Suisse*, 551 U.S. 264; s*ee* Shelanski, *supra* note 202, at 498.

207 *Credit Suisse*, 551 U.S. at 269.

208 *Id.* at 285.

209 *Id.* at 271–75 (summarizing these three opinions).

conduct squarely within the heartland of securities regulations, (2) clear and adequate SEC authority to regulate, (3) active and ongoing agency regulation, and (4) a serious conflict between the antitrust and regulatory regimes."[210]

In evaluating whether such a "serious conflict" existed in *Credit Suisse*, rising to incompatibility, the Court first noted that antitrust courts are "likely to make unusually serious mistakes" in these types of cases due to "the fine securities-related lines separating the permissible from the impermissible; the need for securities-related expertise (particularly to determine whether an SEC rule is likely permanent); the overlapping evidence from which reasonable but contradictory inferences may be drawn; and the risk of inconsistent court results."[211] This potential for error by antitrust courts "would threaten serious harm to the efficient functioning of the securities markets."[212] And even more, "any enforcement-related need for an antitrust lawsuit is unusually small" given the role of SEC enforcement here.[213] The Court therefore concluded:

> In sum, an antitrust action in this context is accompanied by a substantial risk of injury to the securities markets and by a diminished need for antitrust enforcement to address anticompetitive conduct. Together these considerations indicate a serious conflict between, on the one hand, application of the antitrust laws and, on the other, proper enforcement of the securities law.[214]

This broader understanding of the requisite "conflict" necessary for implied antitrust immunity to apply can be understood through remedy: the *Credit Suisse* Court's determination that the securities laws preclude antitrust's application to the underwriting practices at hand can be understood as a determination, following a comparative institution approach, that the regulatory agency at hand can better improve upon the situation than antitrust law. Because an enforcer already exists in this space, any improvement that an antitrust remedy can arguably bring to the given institutional arrangement is outweighed by the harms such a remedy will bring.

But even where a regulatory framework does not completely immunize conduct from antitrust scrutiny, regulation still impacts the remedial calculus, as seen in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*.[215] In *Trinko*, Verizon was an incumbent local exchange carrier in New York, meaning that under the

210 *Id.* at 275–76, 285.

211 *Id.* at 282.

212 *Id.* at 283.

213 *Id.*

214 *Id.* at 284.

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

Telecommunications Act of 1966, it was subject to certain regulatory duties, including a duty to share its network with competitors via interconnection agreements and to provide competitors access to its operation support systems, which were essential to filling customer orders.[216] The complaint alleged that Verizon was filling competitors' operation support system orders after filling its own, or not filling them at all, in order to deter consumers from switching to its competitors, and argued that this breach of Verizon's duty under the 1966 Act violated section 2.[217] The resulting opinion addressed two key areas, both relevant to this Article: (1) the impact of the 1966 Act and the resulting regulatory scheme on the application of antitrust law to this case, and (2) the Court's duty-to-deal precedent and the essential facilities doctrine. The first of these issues is discussed here, and the second in the following Part.[218]

Relevant to the regulatory aspect of the opinion, the *Trinko* Court held that the 1966 Act did *not* immunize Verizon from antitrust liability due to the presence of an antitrust-specific saving clause in the statute.[219] But even so, the Court still leaned on the presence of this regulatory scheme in holding that Verizon had not violated the Sherman Act.[220] The Court justified its holding under the Court's duty-to-deal precedent, explaining that it was not justified to add the case "to the few existing exceptions from the proposition that there is no duty to aid competitors."[221] In doing so, the Court explained the importance of "an awareness of the significance of regulation" in antitrust analysis.[222] Where there is already a regulatory structure designed to address anticompetitive harm in place, "the additional benefit to competition provided by antitrust enforcement will tend to be small," whereas without such a scheme "the benefits of antitrust are worth its sometimes considerable disadvantages."[223] The Court therefore pointed in this case to "the existence of a regulatory structure designed to deter and remedy anticompetitive harm" as a factor limiting the added benefit of imposing section 2 liability on the conduct at hand.[224] In other words, the 1966 Act had it covered.[225]

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216 *Id.* at 402–03.

217 *Id.* at 401, 404–05.

218 *See infra* Section III.A for a discussion of *Trinko* as a duty-to-deal and essential facilities case.

219 *Trinko*, 540 U.S. at 406–07.

220 *Id.* at 413, 415–16.

221 *Id.* at 411.

222 *Id.*

223 *Id.* at 412.

224 *Id.*

225 *See id.* at 412–13 (explaining the 1966 Act's mechanisms for diminishing the risk of antitrust harm).

Given that the 1966 Act addressed anticompetitive harms, "the slight benefits of antitrust intervention" in this case were outweighed by its costs.[226] Analogizing to the remedial concerns inherent in condemning above-cost monopoly pricing, the Court wrote that "[e]ffective remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of a highly detailed decree,"[227] citing Professor Areeda for the proposition that "[n]o court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency."[228]

Trinko is therefore an example of the Supreme Court's recognition that the harm at hand could be remedied, but that antitrust law was not the proper vehicle for doing so. Rather, in cases where there are monitoring and enforcement problems in an area of activity under the jurisdiction of a regulatory agency, it is preferable to have that agency—not a court turned into a quasi-agency—overseeing the competitive landscape of the telecommunications industry.[229] The Court did not need to order an antitrust remedy to improve the situation because there already was an existing remedial structure better suited to the task.

III. APPLYING THE REMEDY-CENTERED APPROACH: FUTURE APPLICATIONS

Though the previous Part discussed several examples of a remedy-centered approach already existing in antitrust doctrine, antitrust law has not fully—nor explicitly—embraced the importance of remedial considerations in developing the law and addressing individual cases. Accordingly, this Part identifies areas of antitrust law that could benefit from a more focused consideration of remedy: (1) the essential facilities doctrine and (2) proposals to "break up Big Tech."

A. *Clarifying the Essential Facilities Doctrine*

The essential facilities doctrine provides an opportunity to apply a remedy-centered approach to an area of antitrust law in need of clarity. This doctrine raises thorny remedial questions, involving both

226 *Id.* at 414, 414–15.

227 *Id.* at 414–15.

228 *Id.* at 415 (second alteration in original) (quoting Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 853 (1990)).

229 Conversely, when the agency does not have jurisdiction of the activity, antitrust law, of course, should not be impliedly preempted on that basis. There is then no argument that an agency is in a better position to provide a remedy than the court.

remedy creation and remedy enforcement and maintenance. When must a monopolist, or members of a joint venture, share a valuable asset with competitors? Who must they share with? And on what terms? The difficulty inherent in these issues underlies the seemingly disjointed application of the essential facilities doctrine throughout history. But addressing these remedial questions head-on in every case is key to ensuring courts impose antitrust liability only where antitrust law can improve upon a given situation.

The essential facilities doctrine is a potential exception to the general rule that a monopolist has no duty to deal with its competitors, which "posits that it is anticompetitive to allow a monopolist in a market that has exclusive control over an input essential to that market to deny potential competitors access in order to concentrate control over that market."[230] The Supreme Court has never explicitly approved this theory by name, though several of its cases have indicated acceptance of such a doctrine, including *Associated Press v. United States*, discussed below.[231] In 1983 the Seventh Circuit became the first court to articulate the elements of an essential facilities doctrine claim in its *MCI Communications Corp. v. AT&T Co.* opinion.[232] According to the Seventh Circuit, to show a violation of section 2 under the essential facilities doctrine, the plaintiff had to establish "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the

230 Maxwell Meadows, Note, *The Essential Facilities Doctrine in Information Economies: Illustrating Why the Antitrust Duty to Deal Is Still Necessary in the New Economy*, 25 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 795, 805 (2015).

231 *See, e.g.*, United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383, 409–10 (1912) (holding that St. Louis railroad association violated sections 1 and 2 when it refused to allow non-member railroads to access its railroad bridges, which were the only way for railroads to enter the city, and thus to compete); Associated Press v. United States, 326 U.S. 1, 4, 19 (1945) (holding that AP's bylaws allowing member newspaper to block competing newspapers' membership and prohibiting the sale of AP news to non-member newspapers violated sections 1 and 2); Otter Tail Power Co. v. United States, 410 U.S. 366, 368, 378–79 (1973) (holding that Otter Tail violated section 2 by refusing to sell electricity wholesale to municipal power systems or to wheel power from another supplier across its transmissions lines, which were the only available lines in the area, to preserve its monopoly position in electric power).

232 MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983), *superseded by statute*, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56*; see* Armando A. Ortiz, Note, *Old Lessons Die Hard: Why the Essential Facilities Doctrine Provides Courts the Ability to Effectuate Competitive Balance in High Technology Markets*, 13 J. HIGH TECH. L. 170, 186 (2012) ("While commentators view the above cases as the Court's unofficial application of the doctrine, the essential facilities doctrine did not undergo an elemental description until the Seventh Circuit's treatment in the 1982 case of *MCI Communications Corp. v. AT&T Co.*").

facility."[233] Following the Seventh Circuit's landmark elemental description of an essential facilities claim, it became a common cause of action for a few years, although recovery based solely on an essential facilities theory was still uncommon.[234] But expansive reliance on the doctrine quickly drew scholarly criticism,[235] sparked by Professor Phillip Areeda's 1990 article *Essential Facilities: An Epithet in Need of Limiting Principles*.[236]

Fifteen years later, the Supreme Court addressed the essential facilities doctrine by name for the first time in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, influenced by many of the concerns raised in Areeda's article.[237] The *Trinko* Court held that Verizon's alleged refusal to cooperate with its competitors pursuant to the 1966 Act did not violate section 2.[238] The Court found that the facts at hand did "not fit within the limited exception recognized in *Aspen*" because it was not alleged that Verizon had "voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion," and the services being refused here "are not otherwise marketed or available to the public."[239] Accordingly, the Court concluded that "Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents."[240]

But the Court did not stop there, going on to write that its "conclusion would be unchanged even if we considered to be established law the 'essential facilities' doctrine crafted by some lower courts."[241] The Court explained:

> We have never recognized such a doctrine, and we find no need either to recognize it or to repudiate it here. It suffices for present purposes to note that the indispensable requirement for invoking

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233 *MCI*, 708 F.2d at 1132–33 ("Such a refusal may be unlawful because a monopolist's control of an essential facility (sometimes called a 'bottleneck') can extend monopoly power from one stage of production to another, and from one market into another. Thus, the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms." *Id.* at 1132.).

234 Ortiz, *supra* note 232, at 188 ("In the period after *MCI*, the essential facilities became a common cause of actions for plaintiffs, despite the fact that recovery was very rare on the doctrine alone."); Spencer Weber Waller, *Areeda, Epithets, and Essential Facilities*, 2008 WIS. L. REV. 359, 363; *see, e.g.*, Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1521 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985).

235 *See* Waller, *supra* note 234, at 368.

236 Areeda, *supra* note 228.

237 Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 410–11, 415 (2004); *see supra* Section II.E for a description of *Trinko*'s facts.

238 *Trinko*, 540 U.S. at 416.

239 *Id.* at 409–10.

240 *Id.* at 410.

241 *Id.*

> the doctrine is the unavailability of access to the "essential facilities"; where access exists, the doctrine serves no purpose. Thus, it is said that "essential facility claims should . . . be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms." Respondent believes that the existence of sharing duties under the 1996 Act supports its case. We think the opposite: The 1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access. To the extent respondent's "essential facilities" argument is distinct from its general § 2 argument, we reject it.[242]

Scalia's discussion of the essential facilities doctrine is somewhat unclear, leaving open to interpretation, for example, whether he was discussing the essential facilities doctrine only as it applies to section 2, or also in the context of section 1.[243] In fact, despite the opinion's pessimistic view of the doctrine, the Court itself stated that it was neither recognizing nor rejecting the doctrine in its decision.[244] Instead, it relied on the existence of a parallel regulatory scheme to reject the antitrust claim.[245] Second, even if the opinion is read to cast doubt on the application of the essential facilities doctrine, the discussion may be considered purely dicta.[246] As a result, the remaining vitality and precise contours of the essential facilities doctrine following *Trinko* is unclear.

Applying a remedy-centered approach to essential facilities doctrine cases could help courts to craft a principled, practical essential facilities doctrine liability scheme to help clear up this muddled area of law. In evaluating whether, and to what extent, essential facilities claims should give rise to liability under the antitrust laws, courts should be guided by several remedial considerations, likely limiting liability in almost all cases.

First, a remedy-centered approach would consider whether it involved concerted action (section 1) or unilateral action (section 2) because of the inherent remedial differences involved in these

242 *Id.* at 411 (alteration in original) (citations omitted) (quoting PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 773e, at 150 (Supp. 2003)).

243 *See* Ortiz, *supra* note 232, at 191–92 ("[T]he relationship between the essential facilities doctrine and § 1 and § 2 of the Sherman Act is far from clear.").

244 *Trinko*, 540 U.S. at 411 ("We have never recognized such a doctrine, and we find no need either to recognize it or to repudiate it here." (citations omitted)).

245 For our discussion of this analysis, see *supra* text accompanying notes 219–25.

246 *See* Ortiz, *supra* note 232, at 191 (describing *Trinko*'s discussion of essential facilities as "mere dicta"); Waller, *supra* note 234, at 365 ("dicta"); Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1, 9 (2008) ("technically dicta").

situations.[247] As noted by Professor Areeda in his article criticizing the essential facilities doctrine, "concerted exclusion is much easier to remedy, particularly when an outsider, who is willing to invest on an equal basis, seeks admission at the time the joint venture is created."[248] By the very nature of a concerted refusal to allow access to an essential facility, a scheme of joint access already exists: the defendants—the conspirators—are already working together to share the essential facility. Therefore, Professor Areeda concluded that "it is relatively easy to define the terms under which others should be admitted" if they sought the same terms the conspirators agreed to at the start of the joint venture without the court having to create such a system of shared access from scratch, dictating the terms and methods by which private entities interact with each other in a joint venture.[249] But unlike concerted conduct, the presence of a preexisting sharing scheme is not inherent in an essential facilities claim under section 2. As a result, imposing liability for an essential facilities claim under section 2 may require courts to write the rules of the game: ordering that a monopolist share with its competitors and creating the terms on which that sharing must occur. This is the same remedy-creation problem we see in *Theatre Enterprises*, where to remedy the alleged problem, the court would have to dictate how private parties deal with each other, writing business dealings for private enterprise.[250]

But even in the context of concerted exclusion of competitors from a joint venture, the remedy-creation question is rarely simple. The situation in *Associated Press* demonstrates this well.[251] Associated Press (AP) was a nonprofit association that distributed news to its member newspapers, news which was obtained by AP employees, other member newspapers, and foreign news agencies.[252] Under AP's bylaws, existing members could block a prospective member's acceptance into the association if the newspaper competed with an existing member; the bylaws also prohibited the sale of news to nonmember newspapers.[253] The Court held that AP's bylaws violated sections 1 and 2 of the Sherman Act, writing that "[i]nability to buy news from the largest news agency, or any one of its multitude of members, can have most serious effects on the publication of competitive newspapers."[254] The Court rejected AP's argument that the presence of other news agencies

247 *See* Areeda, *supra* note 228, at 844–45.
248 *Id.* at 844.
249 *Id.*
250 *See supra* notes 122–23 and accompanying text.
251 Associated Press v. United States, 326 U.S. 1 (1945).
252 *Id.* at 3–4.
253 *Id.* at 4.
254 *Id.* at 13, 12–13.

selling news meant that their conduct did not violate the antitrust laws,[255] emphasizing that although "the record shows that some competing papers have gotten along without AP news," access to AP service "gives many newspapers a competitive advantage over their rivals."[256]

The Supreme Court therefore affirmed the district court's order enjoining defendants from observing the bylaws that allowed AP members to block the membership of competing newspapers and temporarily enjoined the enforcement of the bylaw prohibiting the sale of AP news to nonmembers.[257] But importantly, AP was *not* required to admit all nonmember newspapers for membership. The Court expressly permitted AP to develop new bylaws restricting membership, so long as members were no longer able to prohibit competing newspapers from obtaining membership and the new membership criteria did not include any assessment of whether admission of the nonmember would impact competition with existing members that operated in the same area.[258] The Supreme Court, in affirming this remedy, rejected the contention it was "vague and indefinite" and difficult to enforce, writing that it assumed "that AP will faithfully carry out its purpose."[259] The Supreme Court also rejected the government's request that the decree be modified to include "certain specific terms . . . to assure the complete eradication of AP's discrimination against competitors of its members."[260] In doing so, the Court emphasized the district court's retention of the case for future proceedings, if necessary, writing that "[i]f, as the government apprehends, the decree in its present form should not prove adequate to prevent further discriminatory trade restraints against non-member newspapers, the court's retention of the

255 *Id.* at 17–18.

256 *Id.* ("[T]he District Court's unchallenged finding was that 'AP is a vast, intricately reticulated organization, the largest of its kind, gathering news from all over the world, the chief single source of news for the American press, universally agreed to be of [great] consequence.'" *Id.* at 18 (second alteration in original) (quoting United States v. Associated Press, 52 F. Supp. 362, 373 (S.D.N.Y. 1943)).).

257 *Id.* at 21–23.

258 *Id.* at 21 ("[N]othing in the decree should prevent the adoption by the Associated Press of new or amended By-Laws 'which will restrict admission, provided that members in the same city and in the same "field" (morning, evening or Sunday), as an applicant publishing a newspaper in the United States of America or its Territories, shall not have power to impose, or dispense with, any conditions upon his admission and that the By-Laws shall affirmatively declare that the effect of admission upon the ability of such applicant to compete with members in the same city and "field" shall not be taken into consideration in passing upon his application.'" (quoting Decree of Judgment, *Associated Press*, 52 F. Supp. 362)).

259 *Id.*

260 *Id.* at 22.

cause will enable it to take the necessary measures to cause the decree to be fully and faithfully carried out."[261]

Thus, the *Associated Press* remedy highlights the remedial pitfalls that may arise even in a section 1 claim under the essential facilities doctrine. Putting aside whether requiring equal access to AP benefits efficiency and enhances competition, the court must first grapple with whether it could even order such access. In *Associated Press*, doing so came with a host of considerations that made the existence of an appropriate remedy doubtful, despite the Court's ultimate holding. On one hand, unlike in *United States v. Terminal Railroad Ass'n of St. Louis* where the Court required the joint venture to offer each competing railroad in St. Louis an ownership share, the Court in *Associated Press* could not order that AP give every newspaper the option to become a member.[262] Why? Because unlike railroads wishing to utilize a shared station, the newspapers in *Associated Press* likely varied widely in size, capacity, resources, and locale. Accordingly, the newspapers offered divergent benefits to the joint venture. Additionally, competing newspapers in the same region who were admitted to AP would be able to run each other's stories, creating incentives for members who wished to keep stories out of their rivals' hands to *not* share with AP. Accordingly, simply mandating access for all newspapers was not a feasible remedy in *Associated Press*.

Likely recognizing these remedial concerns, the district court instead enjoined enforcement of the problematic bylaw at hand, which allowed member newspapers to block the acceptance of competing newspapers into the association.[263] The district court expressly permitted new bylaws to replace the old, so long as they did not include the blocking feature that was deemed problematic in the prior bylaws, nor any other consideration of an applicant's competitive situation in the admission process.[264] But while this remedy avoided the problems inherent in ordering access for all newspapers, described above, it also brought its own remedial concerns: remedy enforcement and monitoring problems.

First, as pointed out by Associated Press in the case, "it will be impossible for the Association to know whether or not its members took into consideration the competitive situation in passing upon applications for membership."[265] This is a problem of enforceability. Members are incentivized not to admit newspapers in competition with

261 *Id.* at 22–23.

262 *Compare id.* at 21, *with* United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383, 411 (1912).

263 *Associated Press*, 326 U.S. at 21.

264 *Id.*

265 *Id.*

current members, as doing so destroys the competitive advantage of member newspapers and results in competing newspapers being forced to share their stories. It therefore is likely that members voting on the admission of a nonmember newspaper will still consider whether the applicant competes with an existing member, despite the injunction prohibiting express consideration of the competitive situation and the inability to directly block membership from consideration at all. There is no way to identify violations of the remedy ordered, which basically says, "Don't think about whether the applicant competes with a member when deciding whether to admit it."

Second, though the Supreme Court was convinced that this enforcement concern was insignificant because of the district court's retention of the case, and thus its ongoing ability to supervise AP's admission process, this solution itself raises remedial concerns. From a practical standpoint, a remedy that relies on continued interpretation and enforcement by the district court means that the defendants remain free to refuse access until those being excluded complain and the court finds the conduct to violate the terms of the earlier order.[266] We can imagine how this would play out in the remedy ordered by the *Associated Press* Court: Associated Press can continue to discriminate in the admission process against nonmembers whose newspapers compete with existing members, despite the absence of an explicit bylaw sanctioning such discrimination, until one of the nonmembers can prove that the joint venture's admission process still somehow incorporates their competitive situation into the admission decision, resulting in further district court action.

But even more, one of the primary critiques of the essential facilities doctrine is the risk of transforming the judiciary into a mini regulatory agency, tasked with supervising access for a potentially infinite amount of time.[267] We have seen these concerns play out in antitrust

266 *See* James R. Ratner, *Should There Be an Essential Facility Doctrine?*, 21 U.C. DAVIS L. REV. 327, 371 (1988) ("A requirement to negotiate in good faith or to provide access at a 'reasonable price' will not avoid the problem. The facility will still be free to price the access at a harmfully high level until the purchaser complains and the court finds the price unreasonable." (footnote omitted)).

267 *See, e.g.*, *id.* at 376 ("The major concern with a rule rendering inefficient denials by an essential facility illegal and requiring that access be provided at a competitive or non-welfare-harmful level is that the rule will be arduous to implement. Courts and commentators frequently express fear of turning courts into regulatory bodies that determine price levels a firm may charge. The argument is that courts are not competent to make the complex, ongoing determinations that might be necessary and that such extensive regulatory judicial involvement is inappropriate in an antitrust context." (footnote omitted)); Daniel E. Troy, *Unclogging the Bottleneck: A New Essential Facility Doctrine*, 83 COLUM. L. REV. 441, 483–84 (1983) ("The problems inherent in a duty-to-deal remedy are so great and arouse such fears of protracted judicial oversight, that some commentators recommend

courts before.[268] And in the essential facilities context, concerns about judicial regulation are particularly pointed because the typical remedy—ordering access—continues indefinitely until the essential facility at hand is not essential anymore.[269] In fact, the board of Associated Press was so concerned with being subject to constant judicial scrutiny of its bylaws and admission practices that it brought a bill to Congress seeking an exemption from the antitrust laws for news media to try to escape indefinite judicial regulation.[270] It is worth considering whether antitrust courts—as opposed to regulatory agencies, for example—are best suited to the role of indefinitely monitoring and policing the operations of private industry. If remedying an essential facilities claim requires a judge to put on a regulator's hat, and to keep that hat on until the essential facility becomes irrelevant, antitrust law is not likely the proper vehicle for improving upon the situation at hand. Assuming that antitrust law is always the answer is to fall prey to the nirvana fallacy.

The danger of antitrust intervention is also exacerbated by the potential for the remedy itself to create long-run harm to competition.[271]

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eliminating entirely the offense of a unilateral refusal to deal. For example, Judge Posner argues that only in this way can the law avoid burdening an antitrust court 'with the detailed and continuous supervision of an ongoing commercial relationship, a function that courts are ill-equipped to perform effectively.'" (footnote omitted) (quoting RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 211 (1976))).

268 Despite being widely regarded as a successful—and administrable—breakup, the *AT&T* consent decree included line-of-business restrictions, in addition to the primary divestiture remedy, which prohibited the local Baby Bells from engaging in long-distance operations. Joseph D. Kearney, *From the Fall of the Bell System to the Telecommunications Act: Regulation of Telecommunications Under Judge Greene*, 50 HASTINGS L.J. 1395, 1403 (1999). Enforcement and administration of this consent decree resulted in Judge Greene acting as a one-man regulatory agency for nearly twelve years, handling satellite litigation involving the line-of-business restrictions, until the passage of the 1996 Telecommunications Act. *Id.* at 1398–99. The 1996 Act was largely a product of the Baby Bells' lobbying efforts, in hopes of getting out of Judge Greene's courtroom, though the legislation incorporated many aspects of the consent decree as Judge Greene had interpreted them. *Id.* at 1402. Judge Greene's administration of the post-1986 telecommunications industry, though arguably executed as effectively as possible, illustrates the remedial concerns inherent in requiring federal judges to oversee entire markets, particularly with no end date. For an in-depth discussion of Judge Greene's regulatory role, see *id.* at 1398–1403.

269 Troy, *supra* note 267, at 483–84.

270 Margaret A. Blanchard, *The Associated Press Antitrust Suit: A Philosophical Clash over Ownership of First Amendment Rights*, 61 BUS. HIST. REV. 43, 72–85 (1987).

271 *Associated Press* had an additional and unique remedial problem—that its remedy might violate the Constitution. The Court also addressed the argument "that to apply the Sherman Act to this association of publishers constitutes an abridgment of the freedom of the press guaranteed by the First Amendment," making the decision foundational not only to antitrust law, but First Amendment law as well. Associated Press v. United States, 326 U.S. 1, 19 (1945). Justice Murphy's dissent argued that courts should be extra vigilant in applying the Sherman Act to violations involving the gathering and distribution of

One downside to ordering a remedy that encourages a joint venture like AP, for example, to include more competitors is the potential for *depressing* competition in an otherwise dynamic market. For example, competition might well be better promoted if the competing nonmember newspapers were forced to start their own news venture, rather than gaining access to AP. The *Associated Press* Court itself recognized that other such organizations existed and that access to AP was not indispensable to competition in the newspaper market.[272] A court is not well-placed to determine the future course of competing joint ventures. This makes them central planners—a role the *Verizon* Court correctly warned against.[273]

Thus, even in section 1 essential facilities cases, plaintiffs would generally have difficulty in showing that there is an appropriate remedy. Given the different capabilities of different members of an industry, the court will lack the ability to determine the efficient agreement. Moreover, it will have difficulty in determining whether such an agreement will not deter the rise of other similar facilities that will inject competition into the market. In essence, although antitrust law cannot always effectively improve upon an existing institutional arrangement, given the remedial limitations at hand, that does not always mean that the problem is *irremediable*. Rather, it means that *antitrust law* is not the proper vehicle for doing so.

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information because of the danger that the Act could be used for "unjustified governmental interference with the distribution of information." *Id.* at 52 (Murphy, J., dissenting). But Justice Black, widely regarded as one of the biggest champions of the First Amendment, wrote for the majority that

> [t]he First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. . . . Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.

Id. at 20. Following this holding, "[s]ince federal antitrust laws have been interpreted to regulate solely commercial transactions, and because the antitrust laws are not directed at speech, courts have been reluctant to entertain First Amendment arguments made by newspaper defendants subject to antitrust regulation." Richard Brand, *All the News That's Fit to Split: Newspaper Mergers, Antitrust Laws and the First Amendment*, 26 CARDOZO ARTS & ENT. L.J. 1, 3 (2008). But this discussion provides a good reminder that in ordering antitrust, law does not stand alone; in considering remedies, courts must be cognizant not to run afoul of other restrictions. For additional discussion of the relationship between antitrust law and the First Amendment, see generally Andrew I. Gavil, *Can Antitrust Protect the Fourth Estate from the Fourth Industrial Revolution?*, 18 FIRST AMEND. L. REV. 25 (2020).

272 *Associated Press*, 326 U.S. at 17–18.

273 *See supra* text accompanying note 146.

B. Breaking Up Big Tech

One hot-topic antitrust area—Big Tech—highlights the need for a principled consideration of remedies in crafting antitrust policy. "Big Tech" generally refers to the "Big Four" technology companies: Facebook, Amazon, Google, and Apple.[274] These tech giants boast massive market capitalization, growth, and influence.[275] But despite their once-revered status as pioneers of the internet who revolutionized consumer technology, Big Tech companies are falling out of favor, facing increasingly strong criticism for their market dominance, bigness, and use and collection of consumer data.[276] Critics ranging from Neo-Brandeisian antitrust scholars to legislators and politicians have argued for reform targeting Big Tech's bigness, often culminating in calls to "break up Big Tech."[277] But these sweeping calls for court-ordered breakups often ignore the complex remedial considerations that, though inherent in any breakup, are amplified and made even more complicated by the digital nature of Big Tech.[278]

Antitrust law provides two main remedial choices: structural and conduct remedies. Conduct remedies restrict a defendant's future

274 *See, e.g.*, Jacob Beaupre, Note, *Big Is Not Always Bad: The Misuse of Antitrust Law to Break Up Big Tech Companies*, 18 DEPAUL BUS. & COM. L.J. 25, 26 n.14 (2020); Olivia T. Creser, Note, *In Antitrust We Trust?: Big Tech Is Not the Problem—It's Weak Data Privacy Protections*, 73 FED. COMMC'NS L.J. 289, 291 (2021).

275 *See, e.g.*, Beaupre, *supra* note 274, at 25 ("Apple has a market capitalization of over $1 trillion. Amazon also has a market capitalization of over $1 trillion and boasts 100 million subscribers to 'Amazon Prime.' Google computes 3.5 billion of searches a day and 1.2 trillion searches a year. Facebook has 2.23 billion active monthly users and 2.5 billion people use at least one Facebook-owned application. Facebook and Google-owned and operated websites and services accounted for 70% of all internet traffic in 2017." (footnotes omitted)).

276 For a discussion of common antitrust concerns involving each of the "Big Four," see Usman, *supra* note 55, at 527–31.

277 *See, e.g.*, *id.* at 524 ("In recent years, Senator Elizabeth Warren proposed breaking up the 'Big Tech' companies as part of her presidential campaign platform, and former Assistant Attorney General Makan Delrahim spoke passionately about addressing competition issues in the technology industry in his parting speech. Constituents and politicians on both sides of the aisle are in favor of breaking up Big Tech companies, making this an issue with bipartisan support." (footnotes omitted)); Kiran Stacey & Kadhim Shubber, *Democratic Calls to Break Up Big Tech Raise Fears in Silicon Valley*, FIN. TIMES (Feb. 17, 2020), https://www.ft.com/content/acfceb66-4695-11ea-aee2-9ddbdc86190d [https://perma.cc/2979-ZRXH]; TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 132–33 (2018); Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1962 (2018); Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 800 (2017).

278 For concerns about the impulse to use antitrust to cure the public policy problems caused by digital technology, see D. Daniel Sokol & Bo Zhou, *Antitrust Regulation*, 7 J.L. & INNOVATION 27 (2024).

conduct in some way, targeting specific behavior.[279] Conduct remedies are the most common choice to remedy antitrust violations,[280] but some scholars criticize the reliance on this option as being ineffective in addressing underlying market structures and entailing extensive judicial monitoring costs.[281] On the other hand, structural remedies dismantle undesirable market structures through breakups or divestiture.[282] Structural remedies are rarely invoked in modern antitrust[283] and have a long history of controversy in U.S. antitrust law.[284] While advocates of structural remedies praise their power in checking monopoly and preventing future abuse,[285] critics raise concerns about error costs, difficulties crafting effective structural relief, and potential harms to efficiencies.[286]

Historically, courts relied on the breakup remedy more frequently in addressing section 2 violations, ordering the dissolution of monopolies formed through the combination of separate businesses.[287] For example, the 1911 dissolution of Standard Oil into thirty-four independent entities involved splitting off several fully operational business units, which already "had significant degrees of organizational integrity within the holding company structure and had established (at least internally) their own institutional identities" prior to their court-ordered independence.[288] But even so, the Standard Oil breakup still "required a number of complicated restructurings and involved true risks of sacrificing substantial efficiencies from vertical integration."[289]

279 Kovacic, *supra* note 55, at 1292; Kenneth G. Elzinga, David S. Evans & Albert L. Nichols, United States v. Microsoft*: Remedy or Malady?*, 9 GEO. MASON L. REV. 633, 648–49 (2001). Conduct remedies are also referred to as "behavioral relief" by some scholars. *See, e.g.*, Robert W. Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, 80 OR. L. REV. 109, 114 (2001).

280 Spencer Weber Waller, *The Past, Present, and Future of Monopolization Remedies*, 76 ANTITRUST L.J. 11, 18 (2009); Crandall, *supra* note 279, at 116; Elzinga et al., *supra* note 279, at 649.

281 Kovacic, *supra* note 55, at 1293; Elzinga et al., *supra* note 279, at 649.

282 Crandall, *supra* note 279, at 114.

283 Van Loo, *supra* note 73, at 1964 (noting that "antitrust breakups have become rare in practice" and "[t]he government has not broken up one of the country's largest firms since 1982, when it split AT&T into seven telephone operating companies and a long-distance carrier").

284 *See, e.g.*, Elzinga et al., *supra* note 279, at 650; Crandall, *supra* note 279, at 109.

285 *See, e.g.*, WU, *supra* note 277, at 132–33; Peter C. Carstensen, *Remedies for Monopolization from* Standard Oil *to* Microsoft *and* Intel*: The Changing Nature of Monopoly Law from Elimination of Market Power to Regulation of Its Use*, 85 S. CAL. L. REV. 815, 817–18 (2012); Van Loo, *supra* note 73, at 1959, 1962.

286 *See, e.g.*, Elzinga et al., *supra* note 279, at 650–51; United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 348 (D. Mass. 1953); Kovacic, *supra* note 55, at 1294–95.

287 Kovacic, *supra* note 55, at 1295–1300; Waller, *supra* note 280, at 14–15.

288 Kovacic, *supra* note 55, at 1299, 1301–02.

289 *Id.* at 1301.

Thus, though *Standard Oil* is often cited as an example of an administrable and smooth divestiture, commentators note that even this comparatively simple breakup came with remedial difficulties.[290] But following in *Standard Oil*'s footsteps, the first few decades of the twentieth century saw the most reliance on the breakup remedy as a "vehicle for courts to force the dissolution of enterprises whose dominance largely had resulted from mergers."[291]

Despite this early popularity of breakups, courts quickly grew wary of ordering this drastic remedy.[292] The government has not used antitrust law to break up a major firm in over four decades, since the 1982 breakup of AT&T pursuant to Baxter's consent decree,[293] which split the telecommunications giant into one long-distance carrier and seven local operators (the "Baby Bells"), as described in full in Section I.C above. This breakup stands in marked contrast, of course, to the DOJ's concurrent dismissal of the *IBM* case under Baxter, based largely on the lack of remedy,[294] and the D.C. Circuit's 2001 rejection of the district court's breakup remedy in *Microsoft*,[295] which ultimately resulted in the entry of a breakup-free consent decree.[296]

The increased wariness about ordering a breakup is understandable, given the remedial concerns inherent in such a remedy. First, it is difficult to determine the fault lines on which a monopoly should be divided, particularly where the monopoly was not created through a pattern of merger and acquisitions: a remedy-creation problem. Without postdivesture restrictions, the breakup remedy may not actually change anything in the market structure; the previously unified spinoffs can continue to work together and treat each other more favorably than other competitors, defeating any competitive gains

290 *See, e.g.*, *id.* ("Even those who most strongly advocated dissolving Standard Oil at the time would probably be surprised at how casually later observers characterize the contemplated divestitures as being relatively easy to implement and having predictably minimal disruptive effects in the market.").

291 *Id.* at 1295.

292 Van Loo, *supra* note 73, at 1964–65; Waller, *supra* note 280, at 14–15.

293 Van Loo, *supra* note 73, at 1964.

294 *See* discussion *supra* Section I.C.

295 United States v. Microsoft Corp., 253 F.3d 34, 103–07 (D.C. Cir. 2001); *see also* Carstensen, *supra* note 285, at 837 ("Although the trial court accepted this remedy, the Court of Appeals rejected it for a variety of reasons: the judge had not had a hearing on the issues; he had not provided a sufficient rational [sic] for breaking up the company; and most importantly, it would seem, divestiture is a disfavored remedy for a monopoly. The strong inference from the decision is that the remedy should be narrowly tailored to remove specific 'bad' practices but not strike at the power that created the monopoly." (footnotes omitted)); Waller, *supra* note 280, at 23. For an in-depth look at the remedies ordered by the district court in the *Microsoft* case, see generally Elzinga et al., *supra* note 279, at 644–46.

296 Carstensen, *supra* note 285, at 837.

achieved by the breakup.[297] Thus, structural remedies may still require judicial monitoring be effective.

In addition to the remedial considerations inherent in any breakup remedy, breakups are uniquely complex in the context of Big Tech, given the high degree of integration associated with technology companies and the intangible nature of their assets—particularly, the role of data.[298] Unlike companies that have been successfully broken up in the past, Big Tech is defined by "the intangible nature of the technology industry and its products."[299] When AT&T was broken up, for example, "[t]he telecommunications industry . . . did not rely on algorithms and massive amounts of consumer data" like today.[300] Rather, the breakup had to deal mostly with physical assets, such as local interconnection infrastructure.[301] In contrast, today in the Big Tech industry, "[i]ntellectual property and proprietary algorithms make up the core of these businesses, and thus should be a central consideration in any developing proposal to break up a technology company."[302]

More complicated than the intangible nature of the Big Tech industry alone is the deep level of integration associated with these intangible assets within the firms' operations.[303] As described above, one of the remedial concerns inherent in any breakup remedy is the ease with which fault lines can be determined—how does the company actually get broken up? This problem is exceedingly difficult in the world of Big Tech, where the success of tech giants turns largely on the consumer data they accumulate and put to work.[304] The deep integration of and reliance on massive banks of data across each company's operational functions makes breakup remedies more difficult to craft, creating dilemmas that are impossible to solve. First, assume that one of the units of the tech company is given ownership of the proprietary data but another unit of the company needs the proprietary data to flourish as an independent company.[305] The resulting failure of that unit just results in the creation of a less efficient and slightly smaller tech giant, and thus does not improve upon the concentration problem such a remedy seeks to address. Indeed, since the proprietary data is most of the real value, the breakup will have just dissolved a

297 Usman, *supra* note 55, at 540–42.

298 *See* Creser, *supra* note 274, at 294–97 (discussing unique characteristics of Big Tech: network effects, economies of scale, and the role of data).

299 Usman, *supra* note 55, at 536.

300 *Id.*

301 *Id.*

302 *Id.* at 537.

303 *See* Peter Lee, *Innovation and the Firm: A New Synthesis*, 70 STAN. L. REV. 1431, 1449–50 (2018) (discussing the advantages of integration in tech companies).

304 Creser, *supra* note 274, at 296–97.

305 Usman, *supra* note 55, at 537.

peripheral business without doing much to improve competition.[306] Moreover, such restructuring may decrease incentives to "maintain a . . . platform . . . and continue to innovate."[307] Assume that given the reliance on shared data, a court orders successor spinoff companies to share the use of the proprietary interdependent information.[308] But this option hardly improves the competitive harm raised by those calling for the breakup of Big Tech—the barriers to entry and resulting concentration created by Big Tech's data dominance.

Beyond these general problems of remedy in Big Tech, some of the key, specific claims in the government's recent suits against Big Tech companies illustrate why the remedial problems should make courts think twice before imposing liability. For instance, the most important claim in the government's suit against Google is that the company has abused its monopoly position by paying to be the default search on Apple's browser.[309] But it is the choice of Apple, not a party to the suit, to have a default search engine, presumably for the convenience of its customers, who would be frustrated being forced to make a choice among engines every time they searched. Assuming Google is the most popular search engine (and there is enormous evidence that it is even outside of Apple users),[310] what is the remedy that makes things better for consumers? The Court cannot order Apple to make Bing or some other engine its default, and Apple is unlikely to voluntarily choose a less popular search engine.[311] Just eliminating Google's payment is likely bad for consumers since having the most popular search engine as the default makes for a better customer experience, and some of the extra money Apple gets from Google now likely goes to product innovation.[312] Thus, there is no obvious remedy for the

306 *Id.* at 537–38.

307 *See* Diana L. Moss, *Breaking Up Is Hard to Do: The Implications of Restructuring and Regulating Digital Technology Markets*, ANTITRUST SOURCE, Oct. 2019, at 1, 8.

308 Usman, *supra* note 55, at 537.

309 Cecilia Kang & Tripp Mickle, *Top Apple Executive Defends Favoring Google on iPhones*, N.Y. TIMES (Sept. 26, 2023), https://www.nytimes.com/2023/09/26/technology/apple-executive-google-trial-iphones.html [https://perma.cc/Z7X2-6QWN] (noting that agreement between Apple and Google is central to antitrust case).

310 *Search Engine Market Share Worldwide: Nov 2023–Nov 2024*, STATCOUNTER, https://gs.statcounter.com/search-engine-market-share#monthly-202311-202411 [https://perma.cc/5UB3-DTBK].

311 *See* Tech Policy Podcast, *#353: The Google Search Antitrust Trial*, TECHFREEDOM, at 02:40–07:20 (Sept. 11, 2023), https://podcast.techfreedom.org/episodes/353-the-google-search-antitrust-trial (making this similar point about remedy problem).

312 *Id.* As this Article was in press, the Google Search decision came down, which found Google liable for monopolization, holding that the agreement with Apple that made it the default browser on Apple's operation system "unlawfully maintain[ed] its monopoly." United States v. Google LLC, No. 20-cv-3010, 2024 WL 3647498, at *125 (D.D.C. Aug. 5, 2024). The district court, however, had not yet made a decision about remedy. At least one

Department's complaint about Google's payment to Apple to be the default search engine.

One of the key claims in the FTC's suit against Amazon is that it has abused its monopoly power by providing too great an advantage for its sponsored products compared to other sellers on its platform.[313] In other words, it creates a forum in which companies must spend too much to advertise with it. But in a marketplace with millions of products, some advertising is necessary to make products stand out as well as to give consumers confidence that the company is reputable.[314] How are courts continuously to monitor how much advertising is enough in changing conditions?

Commentators have noted such remedial problems with the government lawsuits.[315] Our systemic approach to antitrust shows that

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commentator has already noted that it will be difficult to fashion a remedy that will improve the situation because, regardless of the agreement, Apple has every incentive to create a default in favor of a search engine—Google—that consumers largely prefer. Geoffrey A. Manne, *A Critical Analysis of the Google Search Antitrust Decision*, INT'L CTR. FOR L. & ECON. (Aug. 14, 2024), https://laweconcenter.org/resources/a-critical-analysis-of-the-google-search-antitrust-decision/ [https://perma.cc/A6RN-Q66D]. Manne also argues that the opinion's weakness is that it does not show that the agreement rather than Google's superior performance has caused the maintenance of Google's monopoly. *Id.* A focus on remedy necessarily would force the causation issue to the fore. If the conduct complained of is not at the root of the maintenance of monopoly power, eliminating the agreement will not improve the situation economically. Moreover, the district court's failure to account for this remedial problem at the liability phase stands in contrast to the duty-to-deal analysis conducted in the same opinion. *See Google LLC*, 2024 WL 3647498, at *130 (citing Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398 (2004)).

The week this Article was going to press, the DOJ announced that it would seek wide-ranging remedies against Google. Dave Michaels & Miles Kruppa, *Google Should Be Forced to Sell Chrome Browser, Justice Department Says*, WALL ST. J. (Nov. 21, 2024, 11:37 PM ET), https://www.wsj.com/tech/google-should-be-forced-to-sell-chrome-browser-justice-department-says-13602df9 [https://perma.cc/A9E7-TKN4]. They include a forced sale of its browser Chrome and even regulation of the search engine used by its cellphone operating system, Android. *Id.* On their face, these remedies do not seem well tailored to remedying a liability predicated on the exclusive contract with Apple. Yet another advantage of considering remedy earlier in antitrust litigation is a better focus on determining what liability is necessary to support a proposed remedy.

313 Chiara Farronato, Andrey Fradkin, Andrei Hagiu & Dionne Lomax, *Understanding the Tradeoffs of the Amazon Antitrust Case*, HARV. BUS. REV. (Jan. 11, 2024), https://hbr.org/2024/01/understanding-the-tradeoffs-of-the-amazon-antitrust-case [https://perma.cc/NDS2-DHTJ].

314 *Id.*

315 *See, e.g.*, Daniel J. Gilman, *Antitrust at the Agencies Roundup: Take My Default . . . Please! Edition*, TRUTH ON THE MARKET (Sept. 15, 2023), https://truthonthemarket.com/2023/09/15/antitrust-at-the-agencies-roundup-take-my-default-please-edition/ [https://perma.cc/Y2CF-KAK9]; Lazar Radic & Geoffrey A. Manne, *The FTC's Gambit Against Amazon: Navigating a Multiverse of Blowback and Consumer Harm*, TRUTH ON THE MARKET (Aug. 3, 2023), https://truthonthemarket.com/2023/08/03/the-ftcs-gambit-against-amazon-navigating-a-multiverse-of-blowback-and-consumer-harm/ [https://perma.cc/W7RK-

judges should not wait until the remedial stage of the case to address these difficulties. If there is no plausible remedy to these antitrust claims—and we take no ultimate position on these questions in either the Google or Amazon cases—the claim should be dismissed. There is no reason to expend resources trying an antitrust liability claim unless a remedy will improve the situation.

The other side of the coin of recognizing the remedial problems of breaking up Big Tech may call for more vigorous policing of mergers and takeovers by Big Tech so that monopoly power is less likely to be abused. This response demonstrates again that a remedial focus can result in more enforcement in some areas, not less.

Moreover, scholars have also identified a range of potential means of reforming the legal landscape giving rise to Big Tech outside of the antitrust sphere; these regulatory proposals are institutional arrangements that must be brought into the comparative calculus.[316] For example, legislation and regulation targeting data and privacy concerns—the linchpin of Big Tech dominance[317]—could help protect consumers from abuse and break down the entrenched position of Big Four companies, rooted in the intersection of data dominance, economies of scale, and network effects.[318] This is an especially intriguing path for tackling Big Tech given the almost complete lack of regulation currently governing data in the United States.[319] Proposals include forced sharing of data by the Big Four with smaller technology companies,[320] new data and privacy laws,[321] and congressional amendment of section 5 of the FTC Act to allow the FTC to regulate and enforce data-related abuses.[322] Alternatively, some scholars suggest regulating Big Tech as public utilities, given their natural monopoly-like characteristics.[323] These potential nonantitrust solutions align with recent changes in the Supreme Court's attitudes towards the relationship

RAHB] (considering problems of remedy in preventing Amazon from preferring its own products on Amazon).

316 *See, e.g.*, Creser, *supra* note 274, at 311–12; Angela Chen, *Making Big Tech Companies Share Data Could Do More Good Than Breaking Them Up*, MIT TECH. REV. (June 6, 2019), https://www.technologyreview.com/s/613629/making-big-tech-companies-share-data-could-do-more-good-than-breaking-them-up/ [https://perma.cc/AV2E-NAJA]; Joshua P. Zoffer, *Short-Termism and Antitrust's Innovation Paradox*, 71 STAN. L. REV. ONLINE 308, 311 (2019); Beaupre, *supra* note 274, at 28.

317 Creser, *supra* note 274, at 297; Usman, *supra* note 55, at 529.

318 Creser, *supra* note 274, at 294–97.

319 Beaupre, *supra* note 274, at 45 (describing the "patchwork" of regulations that currently exist for data and privacy).

320 *See, e.g.*, Chen, *supra* note 316.

321 *See, e.g.*, Beaupre, *supra* note 274, at 45.

322 *See, e.g.*, Creser, *supra* note 274, at 312–15.

323 *See, e.g.*, Zoffer, *supra* note 316, at 318; Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 1971 (2021).

between regulation and antitrust law and the "embrace of regulatory solutions to competition problems that is the reverse of the previous thirty years of deregulatory fervor."[324]

Further, considering regulatory solutions as potential alternatives recognizes that some institutional arrangements are better suited to improvement through regulatory reform than antitrust scrutiny.[325] The redirection of the locus of reform serves as a reminder that a remedy-centered approach to antitrust law does not always mean a choice between antitrust law and no action, but rather a choice between institutions that can best remedy the alleged harm.

CONCLUSION

This Article describes the value of a remedy-centered approach to antitrust law, explains that such an approach can be used to make sense of existing doctrine, and identifies areas where these remedial considerations could be more thoroughly applied. In doing so, this Article does not advocate for greater or lesser enforcement of antitrust law. Rather, it posits that antitrust law can and should be understood through a remedial lens. Remedy shapes the contours of liability, so antitrust law should not treat remedy as an afterthought to liability.

The remedy-centered approach to antitrust law requires accepting that antitrust law will not always be able to improve upon a given institutional arrangement. This incapacity may mean that there is no mechanism by which an alleged harm can be improved—in which case, we must reframe whether such a situation is truly a harm at all—or it may mean that antitrust law is simply not the proper vehicle for such improvement, which may be better suited to a regulatory response. In this way, only by bringing remedial considerations to the forefront of antitrust analysis, both in shaping doctrine and adjudicating individual cases, can antitrust law avoid falling prey to the nirvana fallacy.

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324 *See* Waller, *supra* note 280, at 24 ("If we take *Trinko* and *Credit Suisse* seriously, we must look first to available regulatory rules and remedies, as opposed to using antitrust as the default system of liability and remedies." *Id.* at 25.).

325 *See* Moss, *supra* note 307, at 10.