Antitrust's Consumer Tradeoffs

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In modern antitrust law, courts are required to ask only one question: did the challenged action harm consumers? This Article asks a different question: which consumers? Over the last few decades, the Supreme Court has increasingly required antitrust plaintiffs to prove not only that they were harmed, but also that their harm outweighed any other consumers' gains. The doctrine forces courts to pit groups of consumers against each other. In Amex*, it was merchants against credit card holders. In* Brooke Group*, it was consumers buying a product during predation against consumers buying it during recoupment. In cases involving aftermarkets for durable goods, it was sophisticated consumers against less sophisticated consumers. And when it comes to antitrust remedies, it was direct purchasers against indirect purchasers. These tradeoffs follow a pattern: the consumers who lose often are poorer and less powerful than the consumers who win. Consumer tradeoffs like those in* Amex *and* Brooke Group *also raise significant barriers to recovery for plaintiffs, even in cases where there is demonstrated consumer harm. And these tradeoffs undermine the democratic appeal of the consumer welfare standard—that everyone's rights matter equally. This Article shows how courts got into the business of making consumer tradeoffs, how it is harming consumers today, and how to get us out of it.*

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INTRODUCTION

Modern antitrust jurisprudence relies on a decisional framework known as the consumer welfare standard ("CWS").[1] To find an antitrust offense, courts focus exclusively on consumer harm,[2] typically determined by whether the defendant restricted a good's output, thereby raising prices or otherwise reducing consumer welfare.[3] Notably absent from the CWS are factors like the effects of industrial concentration on local businesses or democracy. And the standard forecloses liability based merely on the defendant's size.[4] Antitrust case law has established more specific tests for particular types of conduct, but the overarching question is always the same: will the defendant's actions reduce output, harming consumers in the form of higher prices, lower quality goods, or reduced innovation?

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1. *See, e.g.*, *In re* EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig., 44 F.4th 959, 984 (10th Cir. 2022) ("To delineate between permissive and prohibited exclusionary contracts, we need some guiding principle—some standard that allows us to quickly and easily resolve whether exclusive contracts harm competition. In our Circuit, this is the consumer welfare standard."); Thomas B. Nachbar, *Heroes and Villains of Antitrust*, 18 ANTITRUST SOURCE 1, 3 (2019) (reviewing TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018)) ("[T]he consumer welfare standard has come to dominate American antitrust doctrine . . . ."); Marshall Steinbaum & Maurice Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 87 U. CHI. L. REV. 595, 597 (describing the "rise of the consumer welfare standard since the late 1970s").

2. In some cases, courts also have considered whether a firm's other trading partners, like workers, suffer competitive harm. *See, e.g.*, United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 56 (D.D.C. 2022) (enjoining a proposed book publishing merger because the transaction was likely to harm authors of best-selling books).

3. *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 122 (2d ed. 1993) ("The task of antitrust is to identify and prohibit those forms of behavior whose net effect is output restricting and hence detrimental."); Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L 65, 66–67 (2019) (observing that the consumer welfare standard's "overall goal is clear, however, which is to encourage markets in which output, measured by quantity, quality, or innovation, is as large as possible" and "prices . . . are accordingly as low"); John M. Newman, *The Output-Welfare Fallacy: A Modern Antitrust Paradox*, 107 IOWA L. REV. 563, 565 (2022) ("Leading treatises, law-school casebooks, *amicus* briefs, and oft-cited journal articles all conclude that antitrust can be boiled down to output effects.").

4. *See* Harry First, *American Express, The Rule of Reason, and the Goals of Antitrust*, 98 NEB. L. REV. 319, 328 (2019) ("Some commentators have . . . vigorously defend[ed] the consumer welfare standard against those who would enlarge antitrust's remit to include a broader set of goals, now labeled as 'public interest.'"); A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 REV. INDUS. ORG. 741, 746 (2019) (stating that the consumer welfare standard "makes clear that the antitrust laws are about conduct that reduces or is likely to reduce economic welfare and [are] not intended to prevent noneconomic harms such as harm to the political process or to serve other social objectives").

The CWS has come under withering attack in recent years.[5] As Big Tech and other dominant companies have grown larger and more influential, and as concentration has increased in key sectors of the U.S. economy, Neo-Brandeisians, like former Federal Trade Commission Chair Lina Khan, place the blame squarely on the CWS.[6] The standard, they say, employs the wrong metrics and is inconsistent with congressional intent.[7] Antitrust, in their view, should focus on firm size, industry concentration, and conglomerations of power—not just low prices.[8] A rival camp argues, though, that consumer welfare ought to remain antitrust's only goal, and that attempts to pursue other objectives would be unadministrable, anti-democratic, and harmful to

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5. *See, e.g.*, Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 716 (2017) ("[T]he current framework in antitrust—specifically its equating competition with 'consumer welfare,' typically measured through short-term effects on price and output—fails to capture the architecture of market power in the twenty-first century marketplace."); Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 134 (2011) (contending that "under all present interpretations of the term 'consumer welfare,' there are several sets of circumstances in which the application of the antitrust laws may hurt consumers and reduce total social welfare."); Tim Wu, *The Consumer Welfare Standard Is Too Tainted*, PROMARKET (Apr. 19, 2023), https://www.promarket.org/2023/04/19/the-consumer-welfare-standard-is-too-tainted [https://perma.cc/95XF-TM7Y] (arguing that "the consumer welfare standard is . . . an indefensible and embarrassing deviation from Congressional intent" and "is starkly incompatible with rule-of-law goals").

6. The Neo-Brandeisian movement endorses reviving the anti-monopoly philosophy of Justice Louis Brandeis, with the goal of promoting a "democratic distribution of power and opportunity. . . ." Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 131 (2018) [hereinafter Khan, *New Brandeis Movement*]; *see also* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J.F. 960, 964 (2018) [hereinafter Khan, *Ideological Roots*] ("The sweeping market power problem we confront today is a result of the current antitrust framework."); Sandeep Vaheesan, *The Twilight of the Technocrats' Monopoly on Antitrust?*, 127 YALE L.J.F. 980, 995 (2018) ("Consumer welfare antitrust . . . disregards important manifestations of corporate power and thereby tolerates the monopolistic and oligopolistic domination of markets and society.").

7. *See* Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice*, COMPETITION POL'Y INT'L, Apr. 2018, at 4 (stating that the "progressive school" of antitrust rejects the Borkian consumer welfare approach "based on its raw incompatibility with Congressional intent" in passing the major antitrust laws and that progressives "take[] as more faithful to the original intent of the antitrust laws other statements of antitrust's goals," especially decentralizing economic power); Vaheesan, *supra* note 6, at 991 ("The consumer welfare model of antitrust is not true to the intent of Congress.").

8. *See, e.g.*, Mark Glick et al., *Why Economists Should Support Populist Antitrust Goals*, 2023 UTAH L. REV. 769, 778 ("[T]he traditional goals of antitrust, such as political democracy, the benefits of a vibrant small business sector, and access to entrepreneurship, are excluded *a priori* by the CWS."); Vaheesan, *supra* note 6, at 990 ("Congress's original vision for the antitrust laws, one that recognizes both the economic and the political impacts of monopoly, is a superior alternative to the consumer welfare philosophy.").

consumers.[9] The Neo-Brandeisian approach, they contend, would require courts to engage in an unworkable balancing exercise, pitting concerns about firm size, the vitality of local businesses, and democracy against the benefits of low prices for consumers.[10] In their telling, a strength of the CWS is that it avoids these kinds of tradeoffs.[11] Courts evaluating antitrust claims need focus only on consumer effects. On this view, consumers are treated as a unified class: what is good for one consumer is good for all.[12]

But increasingly that conventional view is at odds with how the antitrust laws are actually applied. Case law since the 1970s has evolved to compel courts to make consumer tradeoffs in many types of cases. Sometimes, tradeoffs are explicitly required. In cases involving two-sided transaction platforms, like credit-card networks, courts must weigh harms to consumers on one side of a platform (e.g., merchants) against any benefits to consumers on the other side (e.g., cardholders).[13] Other times antitrust case law implicitly trades off the welfare of one group of consumers against another. Take, for example, cases involving addictive products where higher output will benefit purchasers who are not addicted while harming those who are.[14] When it comes to remedies for severe antitrust harms, like price fixing and bid

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9. *See, e.g.*, Hovenkamp, *supra* note 3, at 92–93 (arguing that the Neo-Brandeisian approach to antitrust analysis involves a "disregard for democratic values" and would require "a far more difficult tradeoff to manage" than tradeoffs required by a general welfare standard); Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, 35 ANTITRUST 33, 42 (2021) (opining that the Neo-Brandeisian's "blunt deconcentration policies would cause the prices of many goods and services to go up, harming many American households").

10. *See* Hovenkamp, *supra* note 3, at 92 ("The neo-Brandeis approach would trade off low prices and high output in favor of a set of goals defined as curbing excessive political power or large firm size . . . .").

11. *See id.* at 93 (contending that "[t]he advantage of the consumer welfare principle" is that it does not require "excessive amounts of balancing").

12. *See* Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 838 (1965) (arguing that under the Rule of Reason, courts are not "involved in making comparisons of and choices between persons and groups of persons"). Bork also contended that Antitrust's per se rule "eliminates any problem of weighing or comparison" and that "[o]utside the per se area, the courts consider only the benefit of consumers as a class." *Id.*

13. *See* Ohio v. Am. Express Co., 585 U.S. 529, 544 (2018) ("Price increases on one side of [a] platform . . . do not suggest anticompetitive effects without some evidence that they have increased the overall costs of the platform's services."); Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142, 2145 (2018) (analyzing how to evaluate antitrust cases in which users on different sides of a platform experience "distinct gains and losses").

14. *See* James Niels Rosenquist, Fiona M. Scott Morton, & Samuel N. Weinstein, *Addictive Technology and Its Implications for Antitrust Enforcement*, 100 N.C. L. REV. 431, 438 (2022) (arguing that there is a "strong possibility that more output [of digital media] causes net consumer harm").

rigging, case law explicitly dismisses indirect purchasers and remote plaintiffs in favor of giving the entire recovery to direct purchasers and more proximate plaintiffs.[15] Consider a price-fixing conspiracy among makers of computer parts, for instance. Computer manufacturers who purchase those parts at artificially high prices (the direct purchasers), can recover damages even when they pass on those higher prices to end users (the indirect purchasers). Consumers who buy those more expensive computers have no antitrust remedy.

While scholars, enforcers, and courts have largely ignored these consumer tradeoffs,[16] they have critical implications for antitrust law. First, doctrines that explicitly require courts to balance harms among different groups of consumers tend to favor monopolists and other firms whose conduct would damage competition, by making it much more difficult for plaintiffs to prevail. Plaintiffs often have the burden to show that losses to consumers suffering competitive harm exceed gains to other consumers. This is true for cases involving two-sided transaction platforms and is also true for predatory pricing litigation, where plaintiffs must show that consumer gains during a price war do not exceed consumer losses once a monopolist raises its prices above the competitive level.[17] In most cases, this burden is a death-knell for plaintiff's claim: even when they prove consumer harm, they still lose.

Second, these tradeoffs mean that in many antitrust cases some consumers are disfavored, as one group will benefit at another's expense. Who are these disfavored consumers? In some settings, the identity of favored and

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15. *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 747 (1977) (barring recovery by indirect purchasers); Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 545–46 (1983) (denying antitrust standing to plaintiff whose injury was adjudged to be too remote from the antitrust violation).

16. For examples of scholarship discussing consumer tradeoffs, *see, e.g.*, Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1, 22–24 (2016) (discussing "Interconsumer Tradeoffs" and noting that "resolving a Rule of Reason case often does involve at least implicitly elevating the interests of one kind of consumer over another"); Katz & Sallet, *supra* note 13, at 2162 (discussing consumer tradeoffs in the context of multi-sided platforms); *see also* Laura Alexander & Steven C. Salop, *Antitrust Worker Protections: The Rule of Reason Does Not Allow Counting Out-of-Market Benefits*, 90 U. CHI. L. REV. 273, 278 (2023) (arguing that benefits to consumers from a competitive restraint in a labor market "should neither be considered a cognizable justification nor be balanced against the competitive harms suffered by the workers from the restraint"). *See also*, Rebecca Haw Allensworth, *Long Term Consumer Welfare*, 79 VAND. L. REV. (forthcoming 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5133539 (describing the trade-offs antitrust courts applying the consumer welfare standard implement between consumers' short-term and long-term welfare).

17. Katz & Sallet, *supra* note 13, at 2164 (observing that predatory pricing analysis "can raise a[n] . . . issue regarding balancing" between consumers who purchase during the predation period and consumers who purchase during the recoupment period).

disfavored consumers seemingly will be random. This might be true of predatory pricing cases, for example. Whether someone purchased a good during the low-price predation period or high-price recoupment period often will be a matter of luck and timing. In other settings, though, antitrust law consistently favors wealthier, more powerful consumers and disfavors their poorer, less powerful counterparts. This effect is most obvious in rules restricting recovery for antitrust harms to direct purchasers, who tend to be companies that can pass on inflated prices to end-users. The disfavored victims are indirect purchasers, mostly individual consumers, who absorb the higher prices but have no remedy. Less obvious examples include cases involving addictive products (such as legalized gambling), where the higher output the CWS promotes will harm addicts and benefit everyone else, and cases involving aftermarkets for durable goods (such as app stores and repair services for smartphones), in which sophisticated purchasers who can make complex pricing decisions often are favored over average consumers.

While the debate between the CWS's supporters and Neo-Brandeisians is an important one, this Article argues that it is equally salient to recognize the ways that the CWS fails on its own terms. The consumer-tradeoff framework explains many of these failures. Where case law has developed to require explicit or implicit tradeoffs, the CWS often is not doing its job of protecting consumers. So, even if one believes that consumer welfare is the only appropriate goal of antitrust, reform is required. What shape should that reform take? The most direct approach is to reduce or eliminate consumer tradeoffs in the case law. This Article suggests a variety of ways that might be accomplished, including reforming predatory pricing doctrine, rejecting or strictly limiting *Amex*, and rethinking the indirect purchaser and antitrust standing doctrines. Further, when consumer tradeoffs are deemed necessary, defendants should bear the burden of showing that any alleged gains to consumers outweigh demonstrated anticompetitive effects. Finally, focusing on whom antitrust law disfavors is also critical. To the extent that antitrust enforcement exacerbates inequality in the United States and privileges more powerful consumers over vulnerable populations, the case for reform is even more urgent.

The Article proceeds as follows. Part I describes the CWS, explores criticisms of the standard, and evaluates its strengths and weaknesses. Part II identifies and analyzes the many ways that current antitrust doctrine requires explicit and implicit tradeoffs among groups of consumers. Part III discusses the types of consumers that tend to be disfavored in antitrust litigation and suggests doctrinal solutions to antitrust's consumer tradeoff problem.

I. THE CONSUMER WELFARE STANDARD & ITS CRITICS

Courts and commentators began to refer to a consumer welfare standard for antitrust analysis in the late 1970s. During the ensuing half-century, the CWS became the dominant analytical approach to evaluating potential antitrust violations. As both critics and supporters have observed, however, the CWS exists in tension with pre-1970s case law and evidence of Congress's intent in passing the antitrust laws, both of which emphasized the significance of factors other than lower consumer prices, especially the importance of maintaining small, local businesses. This Part discusses the CWS's origins and its relationship with older precedent and congressional intent. It also introduces critiques of the standard and arguments in its defense.

A. Origins

Most antitrust litigation focuses on three types of claims. Under § 1 of the Sherman Act, agreements between firms that unreasonably restrain trade are illegal.[18] Unlawful monopoly acquisition or maintenance is prohibited by § 2 of the Sherman Act.[19] And § 7 of the Clayton Act bars mergers that are likely to substantially lessen competition.[20] While important differences exist among these types of claims, the overarching litigation framework is similar for all three areas of antitrust law. To make out a prima facie case, plaintiff must show that defendant's conduct or proposed merger will harm competition in some way.[21] If plaintiff makes this showing, defendant has an opportunity to prove that its conduct or deal has procompetitive benefits that outstrip any anticompetitive effects.[22] Plaintiff then can try to disprove

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18. 15 U.S.C. § 1; *In re* Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1192 (9th Cir. 2015) (holding that § 1 "prohibits agreements that unreasonably restrain trade").

19. 15 U.S.C. § 2.

20. *Id.* § 18 (barring acquisitions which "may . . . substantially . . . lessen competition, or . . . tend to create a monopoly").

21. *See* Ohio v. Am. Express Co., 585 U.S. 529, 541 (2018) (holding that under the § 1 rule of reason framework, "plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market"); Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 783 (9th Cir. 2015) ("The plaintiff must first establish a prima facie case that a merger is anticompetitive."); U.S. v. Microsoft Corp., 253 F.3d 34, 58-59 (D.C. Cir. 2001) (in a § 2 case, plaintiff "must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect").

22. *See Am. Express*, 585 U.S. at 541 (holding that once plaintiff satisfies its prima facie burden, "then the burden shifts to the defendant to show a procompetitive rationale for the restraint"); *Saint Alphonsus Med. Ctr.-Nampa*, 778 F.3d at 783 (holding that if plaintiff satisfies its prima facie burden in a merger challenge, the "burden then shifts to the defendant to rebut the

defendant's claimed efficiencies or show that they could be achieved in other ways that would not harm competition (or harm it less).[23] Should plaintiff fail to rebut defendant's procompetitive justification, it must show that the anticompetitive harm from the conduct or merger exceeds any procompetitive effects.[24] If the case proceeds this far, courts will decide whether, on balance, anticompetitive effects or procompetitive efficiencies predominate.[25]

In this framework, anticompetitive harms and procompetitive benefits are measured exclusively by effects on consumers or a firm's other trading partners, like workers.[26] Conduct that harms competitors but not consumers does not violate the antitrust laws.[27] Output is the key measure of consumer harm.[28] Higher output is a proxy for lower prices, higher quality goods, and increased innovation. Lower output leads to higher prices, lower quality goods, and less innovation. If plaintiffs can show that specific conduct or a

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prima facie case"); *Microsoft*, 253 F.3d at 59 ("[I]f a plaintiff successfully establishes a *prima facie* case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a 'procompetitive justification' for its conduct.").

23. *See Am. Express*, 585 U.S. at 542 (holding that if a defendant shows a procompetitive rational for its conduct, "then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means"); U.S. v. H&R Block, Inc., 833 F. Supp. 2d 36, 50 (D.D.C. 2011) (holding that if the defendant successfully rebuts plaintiff's prima facie case in a merger case, "the burden of producing additional evidence of anticompetitive effects shifts to the government . . ..").

24. *See Microsoft*, 253 F.3d at 59 ("[I]f the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.").

25. *See, e.g.*, Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (6th Cir. 2001) (stating that because plaintiffs "failed to meet their burden of advancing viable less restrictive alternatives, we reach the balancing stage" where the court "must balance the harms and benefits" of defendants' conduct).

26. Carl Shapiro has proposed replacing the phrase "consumer welfare standard" with "protecting competition standard," to "make clear that the goal of antitrust is to protect and promote competition." Shapiro, *supra* note 9, at 38. The "protecting competition standard" explicitly protects a defendant firm's trading partners, including workers, not only its customers. *Id.* at 38–39.

27. *See* Innovation Ventures, LLC v. N.V.E., Inc., 694 F.3d 723, 741 (6th Cir. 2012) ("As the Supreme Court has emphasized, the Sherman Act protects competition, not competitors.").

28. *See Am. Express*, 585 U.S. at 531 (focusing its competitive effects analysis on output of credit card transactions); E. THOMAS SULLIVAN, HERBERT HOVENKAMP, HOWARD A. SHELANSKI & CHRISTOPHER R. LESLIE., ANTITRUST LAW, POLICY AND PROCEDURE: CASES, MATERIALS, PROBLEMS 2 (7th ed. 2014) ("Absent a finding of output limitation, the conduct is deemed efficient and beyond the condemnation of the antitrust laws.").

proposed merger is likely to reduce output of a good or service, they will probably prevail. This is the CWS.[29]

Judge Robert Bork coined the phrase "consumer welfare standard" in his highly influential 1978 reexamination of antitrust law, *The Antitrust Paradox*.[30] Bork's conception of the standard, however, encompassed the welfare of producers, as well as that of consumers.[31] That approach has been discarded in favor of an analysis that focuses solely on consumer effects.[32] Courts have used the language of consumer welfare in their decisions since the late 1970s. The Supreme Court in 1979 stated that the floor debates on the Sherman Act "suggest that Congress designed the [Act] as a 'consumer welfare prescription.'"[33] The Court has referred to protecting consumer welfare as the goal of antitrust in several other decisions since the 1970s.[34] The language of consumer welfare is standard in the lower courts as well.[35]

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29. As Leah Samuel and Fiona Scott Morton have shown, the definition of "consumer welfare" as applied in antitrust litigation is contested. Leah Samuel & Fiona Scott Morton, *What Economists Mean When They Say "Consumer Welfare Standard"*, PROMARKET (Feb. 16, 2022), https://www.promarket.org/2022/02/16/consumer-welfare-standard-antitrust-economists [https://perma.cc/UR7U-TQP3]. Samuel and Scott Morton observed that while academic economists conceptualize consumer welfare as "the area under the demand curve and above the price paid," the Chicago School "successfully advocated" for courts to apply "a version of the CWS that was as defendant-friendly as possible." *Id.* Chicago School advocates achieved this end by persuading courts to "significantly limit[] what could be 'counted' in the 'consumer welfare' concept." *Id.* They convinced courts to "minimize harms by assuming they were implausible or speculative" and to "minimize harms that were more difficult to quantify with the tools available in 1975[,]" particularly "quality dimensions such as privacy or innovation." *Id.* At the same time the Chicago School persuaded courts to "be generous in accepting claims of efficiencies." *Id.* In sum, Samuel and Scott Morton argued that "[w]hile claiming to 'use economics,' the Chicago theorists actually depended on a few simplistic economic assumptions and applied economic analysis selectively to purportedly show that no enforcement was needed." *Id.*

30. BORK, *supra* note 3.

31. *See* Hovenkamp, *supra* note 3, at 68 ("Bork's concept of 'consumer welfare' included the sum of welfare enjoyed by producers and consumers . . . .").

32. Courts will in some cases also consider effects on a defendant firm's other trading partners, like workers. *See* United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 56 (D.D.C. 2022).

33. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (citing ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 66 (1978)).

34. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 106 (2021) ("Judges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare."); Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 889 (2007) ("The end result hinders competition and consumer welfare because manufacturers are forced to engage in second-best alternatives and because consumers are required to shoulder the increased expense of inferior practices.").

35. *See, e.g.*, *In re* EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig., 44 F.4th 959, 985 (10th Cir. 2022) ("Under the consumer welfare standard, we still seek to 'protect[] the process of competition,' but we do it 'with the interests of consumers, not

Explicit discussion of consumer welfare was less common in antitrust cases before the 1970s. And while courts in that earlier era routinely focused on price and output effects when analyzing conduct and transactions,[36] they also sometimes considered other values, including the importance of preserving small businesses. In an influential 1945 opinion, for example, Judge Learned Hand wrote that, in addition to "the economic reasons which forbid monopoly," there are other reasons "based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results."[37] He observed that it "is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few."[38] Hand concluded that "[t]hese considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes."[39]

In 1950, Congress passed the Celler-Kefauver Antimerger Act, which expanded the reach of the Clayton Act's restrictions on mergers to include vertical and conglomerate transactions.[40] The debates leading to passage of the Act demonstrated that members of Congress were concerned about the

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competitors, in mind.'" (quoting Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1072 (10th Cir. 2013))); Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1445 (9th Cir. 1995) ("[B]ecause the Sherman Act's concern is consumer welfare, antitrust injury occurs only when the claimed injury flows from acts harmful to consumers.").

36. *See, e.g.*, United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956) ("Monopoly power is the power to control prices or exclude competition."); United States v. Int'l Harvester Co., 274 U.S. 693, 701 (1927) ("The purpose of perventing [sic] undue restraint of trade is to prevent unreasonably high prices to the purchasers and users of the articles traded in."); Addyston Pipe & Steel Co. v. U.S., 175 U.S. 211, 244 (1899) ("We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity"); *see also* Herbert Hovenkamp, Antitrust's Goals in the Federal Courts 1 (May 28, 2024) (unpublished manuscript), https://ssrn.com/abstract=4519993 [https://perma.cc/F3VL-MS54] (arguing that, "[i]n general, antitrust courts . . . have focused exclusively on price and output as the criteria for defining the goals of the antitrust laws" and noting that "these concerns appeared in lower court decisions as early as 1891 and 1892, and in common law predecessors even earlier").

37. U.S. v. Aluminum Co. of America, 148 F.2d 416, 428 (2d Cir. 1945).

38. *Id.* at 427.

39. *Id.*

40. Celler-Kefauver Act, Pub. L. No. 81-899, 64 Stat. 1125 (1950) (codified as amended at 15 U.S.C. § 18 (2018)).

effects of corporate consolidation on small businesses, local communities, and local control.[41] As one of the bill's sponsors put it,

> We are approaching a point where a fundamental decision must be made in regard to this problem of economic concentration. Shall we permit the economy of the country to gravitate into the hands of a few corporations . . . [o]r on the other hand are we going to preserve small business, local operations, and free enterprise?[42]

A little over a decade later, in *Brown Shoe*, the Court revisited this legislative history.[43] It characterized the "dominant theme" of the congressional debate on the Celler-Kefauver Act as "a fear of what was considered to be a rising tide of economic concentration in the American economy," and it noted that "[o]ther considerations cited in support of the bill were the desirability of retaining 'local control' over industry and the protection of small businesses."[44] In evaluating the proposed merger at issue in *Brown Shoe*, the Court held that "not only must we consider the probable effects of the merger upon the economics of the particular markets affected but also we must consider its probable effects upon the economic way of life sought to be preserved by Congress."[45] Specifically, "[w]here an industry was composed of numerous independent units, Congress appeared anxious to preserve this structure."[46]

The Court in *Brown Shoe* explicitly addressed the tension that sometimes can arise between this vision of a decentralized, localized economy, and what is good for consumers. Big companies that can achieve economies of scale often can offer lower prices than small, local firms.[47] The Court noted that the expansion of national chains sometimes benefitted consumers, and that such expansion was "not rendered unlawful by the mere fact that small independent stores may be adversely affected."[48] Famously, the opinion cautioned that "[i]t is competition, not competitors, which the Act protects."[49]

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41. *See* Richard M. Brunell, *The Social Costs of Mergers: Restoring "Local Control" as a Factor in Merger Policy*, 85 N.C. L. REV. 149, 190 (2006) (arguing that the legislative history of the Celler-Kefauver Act shows "there is little doubt that . . . Congress was concerned with the loss of local control of industry").

42. 96 CONG. REC. 16423, 16450 (1950).

43. Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962).

44. *Id.*

45. *Id.* at 333.

46. *Id.*

47. *See* John B. Kirkwood, *Powerful Buyers and Merger Enforcement*, 92 B.U. L. REV. 1485, 1511 n.110 (2012) ("[M]uch of a big chain's ability to charge low prices is due to its economies of scale . . . .").

48. *Brown Shoe Co.*, 370 U.S. at 344.

49. *Id.*

Nonetheless, the Court held that it could not "fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business" and that "Congress appreciated that occasional higher costs and prices might result . . . ."[50]

B. Critiques

In light of this history, vigorous debate has developed over the past decade about the proper goals of antitrust, and whether Congress intended consumer protection to be the sole or even main objective of the antitrust laws.[51] Neo-Brandeisian critics of the CWS argue that the Congresses that passed the antitrust laws intended that they would defend a range of interests beyond mere consumer welfare, including protecting small businesses and preserving democracy from the threat of economic concentration.[52] As Lina Khan and Sandeep Vaheesan have argued, members of the Congresses "involved in the debates preceding the passage of the principal antitrust laws voiced a number of concerns, including the protection of consumers and suppliers from firms with market power, the defense of small businesses from the predatory tactics of large rivals, and the preservation of democracy."[53] It was only during the Reagan era, the authors contend, that "unelected policymakers and judges retrospectively imposed their conservative ideology on Congress's original vision."[54]

The Neo-Brandeisian critique is not merely historical; its proponents argue that courts' application of the CWS has led to consistent underenforcement of the antitrust laws, resulting in widespread concentration across industries, increased wealth inequality, and serious threats to U.S.

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50. *Id.*

51. *See* Shapiro, *supra* note 9, at 42 (noting that there are "some major differences between the policy proposals of [antitrust] Populists and Modernists, which stem from fundamental differences in what they want antitrust to accomplish"). Shapiro observed that "Populists want to use antitrust to deconcentrate private power while the Modernists want antitrust to protect and promote competition." *Id.*

52. *See, e.g.*, Glick, Lozada & Bush, *supra* note 8, at 4 ("Recently, new voices have suggested that antitrust policy should address several [] important social objectives" other than consumer welfare, including the "traditional antitrust goals that motivated passage of the antitrust statutes" like "dispersion of economic and political power, and protection of small business."); *see also* Shapiro, *supra* note 9 at 42 (describing Populists as Neo-Brandeisians).

53. Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 270 (2017).

54. *Id.* at 271.

democracy.[55] They would scrap the CWS in favor of a broader framework that redirects antitrust to focus on reducing concentrations of private economic power, rather than narrowly evaluating whether conduct or transactions are good for consumers in the short run.[56]

Advocates of the CWS have responded to these criticisms by arguing that the Neo-Brandeisian approach is fatally flawed, both because it is unadministrable in any realistic sense and, perhaps more importantly, because it focuses on the wrong goal.[57] In terms of how courts decide antitrust cases, critics say that the Neo-Brandeisian framework would require judges and juries to confront unworkable tradeoffs.[58] In some cases, decisionmakers would have to weigh high output and low prices against hard-to-measure metrics, such as the value of small business to a community and threats to democracy.[59] Balancing in antitrust is challenging generally, but this type of balancing, of what are essentially apples and oranges, seems especially difficult.[60] Proponents of the CWS argue that because it focuses exclusively on consumer harm as measured by output, it is more administrable than the Neo-Brandeisian framework.[61]

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55. *See* Khan, *Ideological Roots*, *supra* note 6, at 971 (arguing that "[a]dopting consumer welfare as the single goal of antitrust . . . turned out to be deeply damaging for enforcement"); *id.* at 964 ("The sweeping market power problem we confront today is a result of the current antitrust framework."). *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?: Hearing before the Subcomm. on Antitrust, Competition, and Consumer Rights or the S. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Barry C. Lynn, Exec. Dir., Open Markets Institute) (arguing that adoption of the CWS "cleared the way for three decades of corporate concentration that has remade almost every corner of the U.S. political economy").

56. *See, e.g.*, Glick, et al. *supra* note 8, at 812 (arguing that "the most important traditional antitrust goals and those that motivated Congress to pass the antitrust statutes in the first place are now firmly located outside the Consumer Welfare Standard's narrow bounds[,]" and that the CWS is "simply too narrow, too biased, and too unreliable to remain a standard that courts and antitrust policy makers follow."); Khan, *Ideological Roots*, *supra* note 6, at 979 (arguing for "[r]estoring a theory of [market] power that accords with the original values of antitrust—including a distrust of concentrated economic power . . .").

57. *See, e.g.*, Shapiro, *supra* note 9, at 42–43 (noting that the "Populist" goal of "[b]reaking up successful, efficient, and innovative companies merely because they have grown too large or powerful is antithetical to the competitive process").

58. *See, e.g.*, Hovenkamp, *supra* note 3, at 92 (observing that the tradeoff the Neo-Brandeisian approach requires between low prices and high output on the one hand and "a set of goals defined as curbing excessive political power or large firm size" on the other, "would be a far more difficult tradeoff to manage" than that required by a general welfare framework).

59. *See id.*

60. *See id.*

61. *See id.* at 93 ("The advantage of the consumer welfare principle is that economics gives us a set of tools for assessing the conditions that are conducive to high output and lower prices . . . without excessive amounts of balancing.").

More fundamentally, CWS advocates contend that the Neo-Brandeisian approach is undemocratic and, if implemented, would result in higher prices for consumers.[62] On this view, the Neo-Brandeisians want to enforce a preference for small, local businesses that consumers simply might not share.[63] Critics of the Neo-Brandeisian approach assert that its application, through legislation or enforcement, will raise prices for consumers by punishing firms according to their size, even if they have not engaged in anticompetitive conduct, and that, in at least some cases, regressive outcomes will result.[64] CWS proponents observe that the standard is not explicitly redistributive, though as compared to a total welfare standard, it tends to shift wealth from producers to consumers.[65] By contrast, they argue, the Neo-Brandeisian framework would explicitly redistribute wealth from larger firms and consumers toward smaller firms.[66]

At the heart of the debate between the Neo-Brandeisians and advocates of the CWS is the question of which values the antitrust laws should pursue. This is a crucial issue, on which a great deal of impactful scholarship has been produced in recent years. But it is not the subject of this Article. Nor is the related question of how to trade off the value of consumer welfare, as measured by higher output and lower prices, against other types of values, like democracy and the flourishing of small business. The subject of this Article is other forms of tradeoffs, and how the CWS handles them. It takes the CWS as a given, on its own terms, and asks, what tradeoffs does the standard require or avoid? We begin with the latter.

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62. *See id.* (describing the "disregard for democratic values that the New Brandeis approach pursues").

63. *See id.* (contending that the Neo-Brandeisian approach "rests on the as yet unverified assumption that people have a set of concerns about large firm size that are not expressed in their market behavior").

64. *See, e.g.*, *id.* at 93 (contending that the "Neo-Brandeisian attack on low prices as a central antitrust goal is going to hurt consumers, but it is going to hurt vulnerable consumers the most."); Shapiro, *supra* note 9, at 42 (arguing that "blunt deconcentration policies would cause the prices of many goods and services to go up, harming many American households").

65. *See, e.g.*, Hovenkamp, *supra* note 3, at 66 (arguing that while the CWS "redistributes a certain amount of wealth away from producers and toward consumers[,] . . . it does not overtly distribute wealth from wealth to poor, from employed to unemployed, from capital to labor, or along some other axis that we traditionally associate with redistributive policies").

66. *See, e.g.*, *id.* at 67 (explaining the redistributive impact of the Neo-Brandeisian approach).

C. Welfare Tradeoffs

Courts applying the CWS in its current form typically can eschew certain types of analytically challenging welfare tradeoffs. In particular, courts do not need to balance harms to consumers arising from specific conduct against any related gains to producers.[67] Courts simply will not account for gains that accrue solely to producers, unless there is evidence that those gains ultimately will be shared with consumers. Nor, in many (but not all) cases involving one type of trading partner (e.g., customers), must courts necessarily weigh potential harms and benefits to a defendant's other trading partners (e.g., suppliers).[68] Further, courts in merger cases generally do not need to consider merger-related efficiencies that arise outside the relevant market.[69]

Consider first producer/consumer tradeoffs. Applying a total or general welfare standard would require courts to balance any gains to defendants from their conduct against harm to consumers.[70] Such balancing would not only be administratively challenging,[71] it would also lead to results that would harm consumers in some cases. Under a total welfare approach, for example, a court might approve a merger that reduced producer costs substantially, but marginally increased prices. That no court today would reach that conclusion is a clear benefit of the CWS.[72]

The producer/consumer tradeoff question is trickier when it comes to conduct or mergers that defendants argue will generate efficiencies, such as combining complementary assets or eliminating expensive redundancies. Antitrust analysis under the Sherman and Clayton Acts routinely accounts for pro-competitive benefits or efficiencies that redound to defendant firms in the

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67. *See id.* at 91 (arguing that "[o]ne significant advantage the consumer welfare standard has over alternative approaches focused on general welfare is that it does not require a tradeoff between higher consumer prices and efficiency gains").

68. *See id.* at 68 (stating that the "concept of 'consumer welfare' included the sum of welfare enjoyed by producers and consumers," but minimal attention to the welfare effects on third parties).

69. *See id.* at 70–71.

70. *See id.* at 68 (noting that the "general welfare" model "is said to require a welfare 'tradeoff' between producer gains and consumer losses").

71. *See id.* at 71 (describing the "administrability problem" a general welfare test poses and asserting that "in most close cases estimating consumer welfare effects is far easier than measuring general welfare effects that require a tradeoff").

72. *See* Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 166–67 (2018) ("The triumph of the consumer welfare principle in antitrust has served to limit the query to consumer harm rather than attempting to measure the much more difficult tradeoffs involved in assessing welfare generally.").

first instance.[73] Indeed, a standard approach to analyzing claims under Sections 1 and 2 of the Sherman Act requires courts in some cases to balance any claimed pro-competitive benefits against whatever anticompetitive effects plaintiffs assert.[74] But to the extent courts engage in this kind of balancing, they still are not effecting a producer/consumer tradeoff. The ultimate question under the CWS remains whether defendants' conduct harms consumers. Therefore, defendants must show that any claimed efficiencies are likely to counteract the anticompetitive effects of their conduct.[75] To this end, only efficiencies that will be passed on to consumers (usually in the form of increased output and lower prices) are cognizable.[76] Benefits retained solely by the defendants should be discarded from the analysis.

By rejecting the producer/consumer tradeoff, the contemporary CWS focuses the analysis on harm to consumers, specifically on claims that firm conduct or mergers will reduce output, leading to higher prices or lower quality goods. Not only does this approach make antitrust cases more administrable, but it also avoids a regime in which firms have free rein to act in ways that harm competition if they can show that their resulting gains equal or exceed losses to their customers.

Another thorny challenge courts often can avoid when applying the CWS is analyzing welfare tradeoffs among a defendant firm's trading partners, and especially between consumers on one side and suppliers, including workers, on the other. That this type of tradeoff is typically unnecessary is perhaps easiest to appreciate with mergers that would benefit consumers but harm workers. Consider a merger of two small firms in an unconcentrated market, which will allow the merged firm to eliminate redundant departments—thereby lowering its labor costs—and charge lower prices for its products.

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73. *See, e.g.*, Ohio v. Am. Express Co., 585 U.S. 529, 541–42 (2018) (holding that once plaintiff satisfies its prima facie burden, "then the burden shifts to the defendant to show a procompetitive rationale for the restraint").

74. *See, e.g.*, Epic Games v. Apple, Inc., 67 F.4th 946, 994 (9th Cir. 2023) (holding that, in cases where plaintiff fails to show that defendant's claimed efficiencies could be achieved via less restrictive means, the final step in the rule-of-reason inquiry requires a court to "balance the restriction's anticompetitive harms against its procompetitive benefits").

75. *See, e.g.*, *Am. Express*, 585 U.S. 541 (stating that under the rule-of-reason framework, once a plaintiff has proven that a restraint has substantial anticompetitive effect, the "burden shifts to the defendant to show a procompetitive rationale for the restraint"); *see also* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES 33 (2023) [hereinafter 2023 MERGER GUIDELINES] ("To successfully rebut evidence that a merger may substantially lessen competition, cognizable efficiencies must be of a nature, magnitude, and likelihood that no substantial lessening of competition is threatened by the merger in any relevant market.").

76. *See* 2023 MERGER GUIDELINES, *supra* note 75, at 33 ("To the extent efficiencies merely benefit the merging firms, they are not cognizable.").

This transaction benefits consumers and would likely survive antitrust scrutiny. The loss of jobs resulting from the transaction is not an antitrust injury, in the sense that it does not result from a meaningful increase in the merged firm's monopsony power.[77] A court hearing a challenge to the transaction does not have to take account of the harm to workers when determining if the deal is anticompetitive.

The benefits of avoiding trading-partner tradeoffs might be less intuitive in cases involving buyer power. Indeed, as Laura Alexander and Steven Salop have observed, when evaluating anticompetitive restraints that harm workers, some courts trade off such harms against benefits to downstream consumers.[78] Other courts do not require this type of tradeoff. To appreciate the stakes, consider the Department of Justice's successful challenge against the proposed Penguin Random House/Simon & Schuster merger. This deal would have combined the largest (by far), and the third largest, of the five major book publishers in the United States.[79] The government's theory in the case was that the merger would result in authors of "anticipated top-selling books" receiving lower advances from book publishers.[80] The court agreed and found that the merger violated § 7 of the Clayton Act because it likely would have resulted in substantial suppression of competition for the rights to the most popular books.[81]

If the government's theory in *Penguin Random House* is correct, blocking this merger means that author advances for top-selling books will remain stable or increase, whereas had the merger been consummated, those advances likely would have fallen. One way to think about this outcome is that the price of inputs for book publishers will now increase (or at least not drop), and that this might raise prices for book purchasers. In other words, the most successful authors might profit at the expense of average consumers. Now, there are reasons to believe that book purchasers also might have benefited from the merger being blocked. As the court mentioned, lower advances might have resulted in fewer books being written, and this reduced

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77. *See* C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078, 2083 (2018) (discussing the effects of monopsony power on workers).

78. Alexander & Salop, *supra* note 16.

79. United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 10–11 (D.D.C. 2022).

80. *Id.* at 11 (explaining the government's allegation that the proposed merger will increase concentration in book publishing, allowing the publishers "to pay certain authors less money for the rights to publish their books"); *id.* at 24 ("The government defines the relevant product market as the one for publishing rights to anticipated top-selling books.").

81. *Id.* at 12.

output would have harmed book buyers.[82] The point is, the effects on consumers of blocking the merger on monopsony grounds were, properly, irrelevant to the court's determination. The trial judge was not required to trade off gains to authors against potential losses to book purchasers in making her decision. Indeed, it would have been inappropriate for her to do so.[83] As the court pointed out, in response to defendants' argument that there were other relevant markets that the court could have defined in which the merger would not have had anticompetitive effects, § 7 "prohibits mergers that may substantially lessen competition 'in *any* line of commerce or in any activity affecting commerce.'"[84] Courts are limited to adjudicating the claims before them, which in antitrust cases typically means evaluating allegations brought by one set of trading partners involving a relevant market or markets in which they participate. So, unless the alleged harm to competition would affect both consumers and suppliers, the effects on other sets of trading partners are most often outside the scope of inquiry.[85]

In sum, by allowing courts to avoid certain types of challenging welfare tradeoffs—between consumers and producers and among defendant's trading partners—the CWS simplifies a court's task in antitrust cases. Requiring courts to compare and weigh benefits and harms to these various groups would create considerable administrability issues and likely would raise significant barriers to recovery. As Herbert Hovenkamp has observed, "[t]he triumph of the consumer welfare principle in antitrust has served to limit the

82. *Id.* at 23 ("The defendants do not dispute that if advances are significantly decreased, some authors will not be able to write, resulting in fewer books being published, less variety in the marketplace of ideas, and an inevitable loss of intellectual and creative output.").

83. *See* Delandes v. McDonald's USA, LLC, 81 F.4th 699, 704 (7th Cir. 2023) (critiquing lower court holding because it "treats benefits to consumers (increased output) as justifying detriments to workers (monopsony pricing)" and concluding "[t]hat's not right; it is equivalent to saying that antitrust law is unconcerned with competition in the markets for inputs, and *Alston* establishes otherwise"); *see also* Alexander & Salop, *supra* note 16, at 278 (arguing that when "a buyer-side competitive restraint in the labor market harms workers through a reduction in competition . . . the restraint violates the Sherman Act" and "[e]ven if the restraint benefits downstream purchasers, those benefits should neither be considered a cognizable justification nor be balanced against the competitive harms suffered by the workers from the restraint").

84. *Bertelsmann*, 646 F. Supp. 3d at 28 (quoting 15 U.S.C. §18 (emphasis added by court)).

85. In some cases, plaintiffs attack conduct involving a firm's suppliers that they allege will ultimately harm the firm's customers. For example, a plaintiff that brings an exclusive dealing claim against a firm with market power must show that the exclusive dealing arrangement will allow the firm to reduce output and raise prices to end-users. *See, e.g.*, FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25 (D.D.C. 1999) (denying defendants' motion to dismiss § 2 monopolization claim in case involving exclusive supply agreements).

query to consumer harm rather than attempting to measure the much more difficult tradeoffs involved in assessing welfare generally."[86]

But the CWS, as courts apply it currently, does not free courts from all tradeoffs. Far from it. Indeed, in many cases, the CWS requires courts to effect tradeoffs among consumers that often are just as challenging as these other tradeoffs would be. As the next Part shows, these consumer tradeoffs both reduce plaintiffs' chances to prevail at the liability stage and prevent some plaintiffs from remedying their harm altogether.

II. CONSUMER TRADEOFFS

The prevailing view of antitrust law as applied through the lens of the CWS is that it focuses solely on the effects of conduct and transactions on consumers (and other trading partners) and that it treats consumers as a unified class, with identical interests.[87] This view of current antitrust doctrine is, at best, incomplete. In practice, antitrust case law often favors some groups of consumers over others, and in many settings requires courts, explicitly or implicitly, to make consumer tradeoffs.

To date, scholarship on consumer tradeoffs under the CWS is limited, though some scholars have recognized aspects of the problem. Michael Katz and Jonathan Sallet have analyzed the application of consumer tradeoffs in cases involving multisided platforms, like credit-card networks.[88] They argue that when a firm's conduct harms consumers on one side of a platform, courts should not be required to balance that harm against any gains from the conduct to participants on the other side of the platform.[89] Laura Alexander and Steven Salop have addressed trading-partner tradeoffs in cases involving restraints affecting workers.[90] They contend that when plaintiffs demonstrate

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86. Hovenkamp, *supra* note 72, at 166–67.

87. *See* Bork, *supra* note 12, at 838 (contending that "[o]utside the per se area, the courts consider only the benefits of consumers as a class"); Hovenkamp, *supra* note 3, at 66 (noting that the "affected classes" in a CWS analysis—"producers, consumers, and labor—are very broad. Everyone who purchases is a consumer, and everyone who contributes something to the economy is a producer, including producers of labor").

88. Katz & Sallet, *supra* note 13.

89. *Id.* at 2161–62 (advocating "the use of separate-effects analysis, which rejects the view that anticompetitive conduct harming users on one side of a platform can be justified so long as that harm funds benefits for users on another side of [a] platform"). Katz and Sallet observe that this consumer/consumer tradeoff problem arises in other contexts, like predatory pricing and rules barring indirect purchasers from recovering for antitrust injuries. *Id.* at 2164.

90. Alexander & Salop, *supra* note 16, at 278 ("Even if the restraint benefits downstream purchasers, those benefits should neither be considered a cognizable justification nor be balanced against the competitive harms suffered by the workers from the restraint.").

anticompetitive conduct that harms workers, courts should not be required to take into account any downstream consumer benefits arising from that conduct nor balance any such benefits against harms in the labor market. Rebecca Haw Allensworth has observed that courts applying antitrust's rule of reason analysis often must implicitly "elevat[e] the interests of one kind of consumer over another," especially in cases involving changes in product quality or variety, which consumers might value differently.[91]

These are important examples of the types of consumer tradeoffs the CWS requires. But the problem is widespread and affects many corners of antitrust law.[92] A taxonomy of these tradeoffs is helpful to appreciate the scope of the issue.

A. Taxonomy

We can separate antitrust's consumer tradeoffs into three categories. The first is case law that establishes liability rules requiring courts *explicitly* to weigh harms and benefits to two distinct customer (or trading partner) groups. Examples include cases involving two-sided transaction platforms, the law of predatory pricing, and restraints that have out-of-market effects. In these contexts, liability often hinges on whether benefits to one customer group (platform consumers with high price-elasticity, consumers who purchase a product during a price war, consumers or trading partners outside a relevant market) outweigh harms to another customer group (platform consumers with lower price-elasticity, consumers who purchase during the recoupment period, consumers or trading partners in a relevant market).

The second category of tradeoffs includes liability rules that, while not explicitly requiring courts to weigh disparate consumer interests, implicitly favor certain types of consumers over others. Cases involving addictive products and aftermarkets for durable goods (like smartphones) fit into this bucket. In addictive products cases, by relying entirely on output as a proxy for consumer welfare, courts applying the CWS always favor the welfare of non-addicted consumers over that of addicted consumers. Similarly, in some, but not all, aftermarket cases, courts implicitly favor more sophisticated consumers who are better able to estimate the lifecycle price of a product, including aftermarket costs, over less sophisticated consumers who might not be in a position to identify or accurately estimate such costs.

91. *See* Allensworth, *supra* note 16, at 22–24.
92. *See supra* Section II.A.

The third category of tradeoffs includes rules that explicitly bar certain consumers from access to remedies even in cases where there is no question that an antitrust violation has occurred and that those consumers have been harmed. Examples include prohibitions on recovery by indirect purchaser plaintiffs and by plaintiffs whom a court determines lack "antitrust standing." In both these contexts, antitrust case law explicitly favors consumers who are considered to have a more direct injury over those whose harm, while often real, is somewhat more remote from the antitrust violation.

These different types of consumer tradeoffs have a range of effects on outcomes in specific cases and, more broadly, on antitrust law's societal impact. Liability rules that explicitly require weighing benefits and harms to separate sets of consumers create administrability challenges for courts and typically serve to reduce plaintiffs' chances to prevail in individual cases. Rather than merely showing competitive harm to one set of consumers, in predatory pricing and two-sided transaction platform cases, plaintiffs also must demonstrate that alleged benefits to other consumers do not outweigh that harm. This additional hurdle is often insurmountable.[93] Liability rules that implicitly favor more sophisticated, "rational" consumers over less sophisticated consumers tend to redistribute wealth upward. Limitations on plaintiffs' ability to recover for demonstrated harms are likely to disfavor individual consumers and likewise redistribute income upward. In many cases, such rules also will eliminate plaintiffs who actually suffered harm, and in other cases will eliminate the plaintiffs most likely to sue.

The following Sections explore in more detail the consumer tradeoffs antitrust law currently requires and the ways those tradeoffs undermine the stated goals of the CWS.

B. Explicit Tradeoffs

1. Two-Sided Platforms

Sometimes antitrust case law explicitly demands consumer tradeoffs. The Supreme Court's decision in *Ohio v. American Express* ("*Amex*"), which established the law governing claims involving "two-sided platforms," is a prime example.[94] *Amex* involved an allegation that contractual provisions

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93. *See, e.g.*, Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695, 1740–41 (2013) (noting that, since the Supreme Court established its recoupment test for predatory pricing claims, lower courts "routinely grant[] summary judgment to . . . defendants because recoupment seemed unlikely").

94. 585 U.S. 529 (2018).

American Express ("Amex") entered with its merchant customers, prohibiting them from steering shoppers away from using their Amex cards once they entered a store, violated § 1 of the Sherman Act.[95] The Supreme Court held that in cases involving two-sided platforms it is not enough for plaintiffs to show harm to consumers on one side of the platform.[96] They also must show that such harm outweighs any benefits to consumers on the other side of the platform.[97]

Credit-card networks provide inter-related services to two classes of customers: cardholders and merchants.[98] Amex and its competitors (Visa and MasterCard) extend credit and allow cardholders to make purchases without using cash. Many cards additionally offer some form of rewards program, which provides cardholders perks like airline miles, hotel credits, or cash back, based on spending.[99] Credit-card networks also provide payment processing services to merchants. Accepting credit cards typically allows merchants to increase their sales and shift credit risk to the credit-card company.[100] None of these services are provided for free, of course. Credit-card companies make money in two main ways: they charge merchants fees for processing transactions and they charge cardholders interest on unpaid balances.[101]

Two-sided platforms like credit-card networks are subject to indirect network effects. The value to cardholders of a particular card depends at least in part on the number of merchants who accept that card, and the value to merchants depends at least in part on the number of cardholders.[102] Due to these network effects, credit-card companies must carefully decide how much to charge merchants or cardholders so that their pricing does not result in defections that make the platform significantly less valuable to one side or the other.[103] A price-hike to cardholders, for example, might cause them to switch to other cards or cash, reducing the value of the network to merchants. Because customers on one side of a platform sometimes display a higher price sensitivity than customers on the other side, two-sided platforms often charge

95. *Id.* at 534.

96. *Id.* at 547 ("Evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power.").

97. See *id.* (stating "plaintiffs must prove that Amex's antisteering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market").

98. *Id.* at 534.

99. *Id.*

100. *Id.*

101. *Id.* at 538. Some cards also charge an annual fee. *Id.* at 555.

102. *Id.*

103. *Id.* at 535.

lower prices to one set of customers.[104] In the credit-card market this means that cardholders, who are thought to be more price-sensitive, are typically charged less than merchants.[105] Sometimes credit-card companies even lose money on cardholders when cardholder perks are accounted for.[106]

Amex's business model was to charge merchants higher fees and offer cardholders more valuable perks than its main competitors, Visa and MasterCard.[107] The idea was that these perks would attract wealthier consumers who would spend more at stores accepting Amex.[108] Merchants bristled at Amex's fees, however, and in some cases would have preferred to steer customers to other forms of payment.[109] Amex's anti-steering provisions, though, prohibited merchants from guiding customers to competing cards with lower fees.[110]

The Department of Justice and several states sued Amex, asserting that its anti-steering provisions were an unreasonable restraint on trade. Plaintiffs prevailed at trial.[111] The district court determined that the relevant market was the market for card network services—that is, the market for merchants—and that the market for card issuance to consumers, while "deeply interrelated," was separate.[112] It then concluded that Amex's anti-steering provisions violated § 1 of the Sherman Act because they raised merchant fees.[113] The Second Circuit, however, reversed the district court.[114] Instead of focusing solely on price increases to merchants, the appellate court noted that the analysis should have "consider[ed] the two-sided net price[,] accounting for the effects" of the anti-steering provisions "on both merchants and cardholders."[115] The district court had "erroneously elevated the interests of merchants above those of cardholders."[116]

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104. *Id.* at 536.

105. *Id.*

106. *Id.* at 537.

107. *Id.* at 538.

108. *Id.*

109. *Id.* at 539.

110. *Id.* The anti-steering provisions did not bar merchants from urging customers to pay with cash, checks, or debit cards. *Id.*

111. U.S. v. Am. Express Co., 88 F. Supp. 3d 143, 238 (E.D.N.Y. 2015) (concluding that Amex's merchant restraints violated § 1 of the Sherman Act).

112. *Id.* at 151 ("[T]he court concludes that the relevant market for its antitrust analysis in this case is the market for GPCC card network services.").

113. *See id.* at 151–52 ("[M]erchant prices have risen dramatically in the absence of merchant steering.").

114. U.S. v. Am. Express Co., 838 F.3d 179, 207 (2d Cir. 2016).

115. *Id.* at 204.

116. *Id.*

In affirming the Second Circuit, the Supreme Court focused on market definition. Because of the indirect network effects at play with the Amex platform, the Court reasoned that higher prices on one side of the platform "do not suggest anticompetitive effects [unless] . . . they have increased the overall cost of the platform's services."[117] According to the Court, the relevant market must include both merchants and cardholders.[118] The government's reliance on evidence of higher merchant fees, therefore, was insufficient to prove that Amex's conduct was anticompetitive.[119] Instead, the Court stated that the plaintiffs' burden was to show that Amex's anti-steering provisions "increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market."[120] Because, according to the Court, the plaintiffs offered no "evidence that the price of credit-card transactions was higher than the price one would expect to find in a competitive market," they failed to prove anticompetitive effects, and did not satisfy the first step of the rule-of-reason analysis.[121]

The Court's opinion has garnered extensive criticism.[122] Indeed, it is shot through with analytical errors. To begin, the plaintiffs did show that the price of Amex's credit-card transactions had risen.[123] As the Court conceded, the government produced evidence that Amex's increase in merchant fees from 2005 to 2010 "was not entirely spent on cardholder rewards."[124] Therefore, the price of Amex transactions went up, and Amex pocketed the difference.

Further, as the dissent observed, because plaintiffs had supplied direct evidence of competitive harm, there was no need for them also to demonstrate that Amex had market power, and therefore no need to define a relevant market to satisfy their initial burden under step one of the rule-of-reason analysis.[125] Once the burden shifted to defendant to show procompetitive effects, Amex would have had the opportunity to produce evidence that cardholders benefitted from higher merchant fees. But, as Justice Breyer noted, Amex "might face an uphill battle," because courts rarely find that

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117. Ohio v. Am. Express Co., 585 U.S. 529, 544 (2018).

118. *See id.* at 545.

119. *Id.* at 547.

120. *Id.*

121. *Id.* at 547–48, 552.

122. *See, e.g.*, Newman, *supra* note 3, at 580 (describing flaws in the *Amex* decision, especially its "fixation on output" as a proxy for consumer welfare).

123. *Am. Express Co.*, 585 U.S. at 572 (Breyer, J., dissenting) ("[A]s the majority is forced to admit, the plaintiffs *made* the factual showing that the majority thinks is required.").

124. *Id.* at 549.

125. *Id.* at 564–65.

procompetitive benefits in one market outweigh anticompetitive effects in another market.[126] Indeed, the Supreme Court observed in *Topco* that, "[i]f a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion," it is up to Congress, not "private forces" or the courts to do so.[127] Courts are "ill-equipped and ill-situated for such decisionmaking."[128]

By folding merchant and cardholder services into a unified market, the *Amex* holding requires courts confronting cases involving two-sided platforms to calculate tradeoffs among consumer groups.[129] In doing so, the holding erects a significant barrier to recovery for plaintiffs; even when a plaintiff can demonstrate clear harm to a defined group of consumers, that will be insufficient to make a prima facie showing. Just as it is difficult for defendants to persuade courts that any procompetitive benefits of their conduct outweigh demonstrated anticompetitive effects, it will be hard for plaintiffs to convince courts that harm on one side of a platform outweighs benefits on the other side, especially if—as was the case in *Amex*—direct evidence of higher prices overall is not sufficient to make that showing.

At first blush, it might appear that the Supreme Court's determination that the relevant market should include consumers on both sides of the platform would help ensure that neither set of consumers is disadvantaged. But that is unlikely to be the decision's effect. By raising an additional bar to liability, *Amex* makes it less likely that *any* consumers will recover in this type of case. As a result, the decision favors consumers with more price sensitivity over those with less. From a distributive point of view, shifting costs from individual consumers to merchants might seem preferable. But merchants are likely in many cases to simply pass through these extra costs to individual consumers via higher retail prices. This will raise prices to Amex card holders and all other retail customers too, harming the majority of consumers who do not even hold an Amex card. And it won't always be the case that the customers with lower price sensitivity will be businesses rather than individual purchasers.

Amex's anti-steering provisions prohibit merchants from informing consumers about the advantages of cards that charge lower merchant fees,[130]

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126. *Id.* at 574.

127. U.S. v. Topco Assocs., Inc., 405 U.S. 596, 611 (1972).

128. *Id.*

129. *See* Katz & Sallet, *supra* note 13, at 2162 (observing that cases involving multisided platforms "raise the question of whether—and if so, how—one should balance welfare gains enjoyed by one group of users against welfare losses caused by anti-competitive conduct suffered by another").

130. *See Am. Express Co.*, 585 U.S. at 539.

potentially resulting in missed savings on both sides of the platform. By requiring courts to perform a consumer tradeoff analysis, where such an analysis was unnecessary for determining whether Amex's conduct was anticompetitive, the Court raised an additional barrier to recovery in these types of platform cases. When merchants can pass on to end users the higher fees Amex's conduct protects, individual consumers lose.

2. Predatory Pricing

Predatory pricing is another arena in which case law has developed to require consumer tradeoffs in some circumstances. The theory behind predatory pricing claims is straightforward. A large and powerful firm sets its prices below its own cost in an effort to eliminate or discipline a smaller rival or rivals. Once the smaller firm is chased out of the market or forced to raise its prices, the monopolist hikes its prices above the competitive level, recouping its losses and more. Predatory pricing claims are actionable under § 2 of the Sherman Act and the Robinson-Patman Act.[131] In the period between the Robinson-Patman Act's passage in 1936 and the 1960s, predatory pricing was a viable theory of recovery on which plaintiffs sometimes prevailed.[132]

Beginning in the 1950s, however, Chicago School economists developed an effective critique of predatory pricing theory. They argued that the strategy is irrational, unlikely to succeed, and therefore rarely attempted in the real world.[133] Among the many reasons that predatory pricing is irrational, according to these critics, is that it would be difficult for the monopolist to recoup its losses.[134] Even if the monopolist could successfully force rivals from the market—by no means a sure thing—any attempt to raise prices above the competitive level would be met by new entrants offering lower

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131. *See, e.g.*, De Soto Cab Co. v. Uber Techs., Inc., No. 16-cv-06385, 2021 WL 5860917, at *3–4 (N.D. Cal. Nov. 18, 2021) (§ 2 of the Sherman Act); Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 216, 221 (1993) (Section 13(a) of the Robinson-Patman Act).

132. *See* Matthew T. Wansley & Samuel N. Weinstein, *Venture Predation*, 48 J. CORP. L. 813, 826 (2023).

133. *See, e.g.*, Roland H. Koller II, *The Myth of Predatory Pricing: An Empirical Study,* 4 ANTITRUST L. & ECON. REV., Summer 1971, at 105, 105 ("[T]he standard theoretical analysis in this area treats predation as a form of non-maximizing (irrational) behavior and thus as an unlikely occurrence in the real world."); John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137, 168 (1958) (arguing that Standard Oil did not engage in systematic predatory pricing and "[t]o do so would have been foolish").

134. *See* McGee, *supra* note 133, at 140.

prices to steal share from the incumbent.[135] Indeed, the intended target of the predatory pricing campaign itself could withdraw from the market temporarily and re-enter once its larger rival begins charging supracompetitive prices.[136] Even if a monopolist engaged in predatory pricing, according to this theory, consumers are unlikely to be harmed.

This re-examination of the economics of predatory pricing prompted in the 1970s a re-evaluation of the law of predatory pricing. In 1975, Phillip Areeda and Donald Turner published an influential critique of predatory pricing doctrine.[137] While they agreed with the Chicago School economists that predatory pricing "seems highly unlikely," they did not conclude that rules barring the strategy should be abandoned altogether.[138] Instead, they advised that "extreme care be taken in formulating such rules" so that the threat of litigation does not chill lawful, aggressive pricing which benefits consumers.[139] Areeda and Turner observed that "predatory pricing would make little economic sense" unless the would-be predator could prevail in a price war and there existed "a very substantial prospect that" its losses in that price war "will be exceeded by the profits to be earned after his rivals have been destroyed."[140] Recoupment, they noted, would be possible primarily in markets with "very high" entry barriers.[141]

The Areeda-Turner article quickly proved highly influential in the courts. Soon after its publication, judges began relying on its reasoning to dismiss predatory pricing claims.[142] Plaintiffs' success rate in predatory pricing cases dropped precipitously, though they subsequently rebounded somewhat when courts began applying a slightly modified version of the Areeda-Turner test.[143] By the mid-1980s, skepticism about the validity of predatory pricing claims reached the Supreme Court, which declared in *Matsushita Electric*

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135. *See id.* at 142.

136. *See id.* at 140.

137. Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

138. *Id.* at 699.

139. *Id.*

140. *Id.* at 698.

141. *Id.* at 699. The authors asserted that "[i]n many markets, however, and especially in those having a number of small rivals, entry barriers may be nonexistent or at least too low to preclude entry." *Id.*

142. *See* William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 1 COLUM. BUS. L. REV. 1, 46 (2007) ("Within months of the [Areeda-Turner] article's publication, two courts of appeals relied heavily on the paper to dismiss predatory pricing allegations.").

143. *See* Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2253–54 (2000) (discussing augmented Areeda-Turner formulation with factors like "cost-based presumptions, intent, and market structure").

Industrial Co. v. Zenith Radio Corp. that "predatory pricing schemes are rarely tried, and even more rarely successful."[144]

In 1993, the Supreme Court crafted a new, restrictive standard for analyzing predatory pricing claims. *Brooke Group v. Brown & Williamson Tobacco* involved a price war in the economy segment of the cigarette market.[145] The plaintiff, Liggett, was a pioneer in marketing low-cost generic cigarettes.[146] Liggett claimed that Brown & Williamson had targeted Liggett by pricing below its own costs on generics in an effort to force Liggett to raise its prices, thereby closing the gap between the price of generics and the price of more lucrative branded cigarettes.[147] Building on the skepticism it had expressed in *Matsushita* about the real-world incidence of predatory pricing, the Court held that a plaintiff must make two showings to prevail on a predatory pricing claim brought under either the Robinson-Patman Act or § 2 of the Sherman Act.[148] First, a plaintiff must prove that the defendant's prices fell "below an appropriate measure" of its costs.[149] Second, it must show that defendant had "a reasonable prospect" or, in a § 2 case, "a dangerous probability" of recouping its losses from the price war.[150]

Recoupment is critical, the Court observed, because "[w]ithout it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced."[151] While the Court conceded that "unsuccessful" predatory pricing can damage a market by "encourage[ing] some inefficient substitution" to the below-cost product, it asserted that a failed predatory pricing campaign "is in general a boon to consumers."[152] Satisfying the recoupment element is challenging by design. It requires plaintiffs to show, first, that a defendant's below-cost pricing will succeed in either driving its rivals from the market or forcing them to raise their prices above the competitive level.[153] Next, plaintiffs must prove that the defendant would be able to maintain its supracompetitive pricing for long enough "to

144. 475 U.S. 574, 589 (1986).

145. 509 U.S. 209, 212 (1993).

146. *Id.* at 214.

147. *Id.* at 217; *see also id.* at 227 (explaining that Liggett did not allege that Brown & Williamson wanted to eliminate Liggett as a competitor, but rather that Brown & Williamson "sought to preserve supracompetitive profits on branded cigarettes by pressuring Liggett to raise its generic cigarette prices").

148. *See id.* at 222 (stating that "the essence of" a predatory pricing claim under either the Robinson-Patman Act or the Sherman Act "is the same").

149. *Id.*

150. *Id.* at 224.

151. *Id.*

152. *Id.*

153. *Id.* at 225.

compensate for" the money spent on its below-cost pricing.[154] Simply proving defendant priced below cost is not enough to allow a court to infer that recoupment is probable; plaintiffs also must demonstrate that "the structure and conditions of the relevant market" are conducive to "sustained supracompetitive pricing."[155] Factors like high entry barriers, market concentration, and a defendant's ability to absorb its rivals' market shares are key to satisfying the recoupment prong.[156] The Court conceded that its new two-element test would be difficult for plaintiffs to meet, but insisted that the elements "are not artificial obstacles to recovery."[157] In practice, the *Brooke Group* test has proved insurmountable for plaintiffs.[158]

Brooke Group's recoupment requirement is problematic for several reasons. First, the Court underplays the damage that predatory pricing can cause by shifting consumer demand to what might be a lower-quality product. Rather than the most efficient firm with the best product prevailing in a market contest, the firm with the ability to subsidize below-cost pricing captures market share. If more efficient firms exit the market, consumers are harmed by a reduction in product quality and choice, even if the predator never fully recoups its losses from the price war.[159] Second, as Christopher Leslie has argued, courts have failed to recognize the various ways in which firms can recoup their below-cost prices by raising prices in adjacent markets, such as a market for replacement goods.[160] As a result, courts have rejected plaintiffs' predatory pricing claims even in cases where recoupment is

154. *Id.*

155. *Id.* at 226.

156. *See id.*

157. *Id.* ("These prerequisites to recovery are not easy to establish . . . .").

158. C. Scott Hemphill & Philip J. Weiser, *Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing*, 127 YALE L.J. 2048, 2049 (2018) (observing that due to *Brooke Group*, "[o]ver the past twenty-five years, antitrust claims alleging a predatory price cut have fallen into disuse").

159. *See id.* at 2054 ("The conclusion that unsuccessful predation [i.e., below-cost pricing that either is unlikely ex ante to be recouped or that the firm was unable to recoup ex post] is harmless is not quite right, because below-cost prices are distortive even when they do not exclude, a point the Court quietly acknowledged in part."); Wansley & Weinstein, *supra* note 132, at 860 (arguing that when predatory pricing excludes rival firms "all consumers, even those who never pay supracompetitive prices, might also be harmed because a less efficient firm won out").

160. Leslie, *supra* note 93, at 1720–39 ("[R]ecoupment can happen in markets for complements, substitutes, and replacement goods.").

possible.[161] Third, and most relevant here, the Court's recoupment test requires a tradeoff among consumers in some cases.[162]

If a firm prices below its own costs and succeeds in driving its rival out of the market, some consumers will have benefited from the price war (though, as mentioned, many consumers might suffer from the elimination of a rival, especially if that rival produced the superior good). Should the predator then raise its prices above the competitive level, some consumers will be harmed. The *Brooke Group* test asks a court to weigh the gains to consumers during the predation period against the losses consumers suffer or are likely to suffer in the recoupment period.[163] If the former outweigh the latter, the defendant's below-cost pricing is lawful; if the outcome is reversed, the conduct violates the Sherman Act.[164] By requiring a consumer tradeoff, *Brooke Group* creates the possibility that a group of consumers who have been harmed by a monopolist's predatory conduct nonetheless will be unable to recover for their injuries. Imagine, for example, if consumer plaintiffs could demonstrate that a firm had engaged in a campaign of below-cost pricing that forced a rival to raise its prices to the oligopoly level. Further, suppose that the plaintiffs adduced compelling evidence that the firm and its rival both charged supracompetitive prices for the relevant product in the post-predation period. If a court nonetheless was persuaded that continued supracompetitive pricing was unlikely, due to the difficulties of maintaining tacit collusion, it could determine that there was no Sherman Act violation. Consumers harmed during the post-predation period would be out of luck.

Brooke Group's recoupment element creates an all-but insurmountable burden on plaintiffs in these cases. As Justice Stevens argued in his *Brooke Group* dissent, proof that a defendant burned significant sums in a below-cost pricing campaign designed to harm competition ought to be enough for plaintiffs to prevail on a predatory pricing claim.[165] But even if one were to

161. *See id.*

162. *See* Katz & Sallet, *supra* note 13, at 2164 (stating that predatory pricing analysis "can raise a[n] . . . issue regarding balancing because consumers buying during the predatory period benefit from lower prices, while consumers buying during the recoupment period suffer harms from higher prices").

163. *See* Leslie, *supra* note 93, at 1742 (explaining that "there are two separately identifiable categories of consumers who are affected by predatory pricing," those who buy during the predation phase and those who buy during the recoupment phase).

164. *See id.* at 1705–06 (holding that to recoup, predators must be able to sustain supracompetitive prices "'long enough to earn in excess profits what they earlier gave up in below-cost prices'" (quoting Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225–26 (1993))).

165. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 256–57 (1993) (Stevens, J., dissenting) ("When a predator deliberately engages in below-cost pricing targeted at

believe that sustained below-cost pricing, plus intent evidence, should not suffice to satisfy plaintiff's burden without direct evidence of net consumer harm, a showing of subsequent supracompetitive prices should alleviate any doubt. To require plaintiffs also to prove that the "losers'" harms outweighed the "winners'" gains will deny recovery in almost all cases and incentivize firms to engage in predatory pricing.

3. Out-of-Market Effects

Most antitrust litigation requires defining a relevant market or markets that serve as the focus for the court's competitive effects inquiry.[166] This predominant approach is applied in both merger and civil non-merger cases. In some instances, defendants will argue that any harms plaintiffs demonstrate within the relevant market must be balanced against gains to consumers or other trading partners outside the relevant market. The extent to which such out-of-market efficiencies should be considered is disputed, especially in the Sherman Act context.

In merger law, the trend is for courts to disregard out-of-market efficiencies in most cases. This approach stems in the first instance from the text of § 7 of the Clayton Act, which prohibits mergers that would substantially harm competition "in any line of commerce."[167] Daniel Crane refers to the idea that the text of § 7 bars consideration of out-of-market efficiencies as the "market-specificity rule";[168] Gregory Werden calls it the "any-market rule."[169] The Supreme Court appeared to endorse this principle in *Brown Shoe* and *Philadelphia National Bank*. In the former case, the Court interpreted the language of § 7 to mean that "it is necessary to examine the effects of a merger in each . . . economically significant submarket to determine if there is a reasonable probability" that it will "substantially lessen

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a particular competitor over a sustained period of time, then price cutting raises a credible inference that harm to competition is likely to ensue.").

166. *See, e.g.*, Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 268 (2d Cir. 1979) ("It is . . . a basic principle in the law of monopolization that the first step in a court's analysis must be a definition of the relevant markets.").

167. 15 U.S.C. § 18.

168. *See* Daniel A. Crane, *Balancing Effects Across Markets*, 80 ANTITRUST L.J. 397, 397 (2015).

169. *See* Gregory J. Werden, *Cross-Market Balancing of Competitive Effects: What Is the Law, and What Should It Be?*, 43 J. CORP. L. 119, 120 (2017) ("The any-market rule is the generally accepted plain meaning of the text of Section 7 . . . .").

competition."[170] If a court finds such a reasonable probability in any market, it must block the merger.[171]

In the latter case, which involved a merger of Philadelphia-area banks, the government argued that the combination would harm competition in commercial banking in a four-county area centered on Philadelphia.[172] The Court accepted this relevant market and determined that the transaction was "so inherently likely to lessen competition" in it that the deal must be blocked absent "evidence clearly showing that the merger is not likely to have such anticompetitive effects."[173] In an effort to provide such evidence, the defendants argued that the combination would be procompetitive because it would allow the merged firm to compete with bigger New York banks to provide loans to the largest companies in the Philadelphia area.[174] In dismissing this argument, the Court appeared to endorse the "market-specificity rule." It "reject[ed] th[e] application of the concept of 'countervailing power[,]'" and reasoned that, "[i]f anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader."[175]

Crane has argued that the "market-specificity rule" should not be strictly applied to bar all evidence of out-of-market effects in merger challenges.[176] A rebuttable presumption against such evidence is a better approach, he contended, with the burden on defendant to show that any out-of-market efficiencies outweigh anticompetitive effects in the relevant market.[177]

The federal antitrust enforcement agencies typically follow the "market-specificity rule" in determining which mergers to challenge.[178] However, in the past they also have stated that they are willing to consider out-of-market efficiencies when they are "so inextricably linked with" the relevant market "that a partial divestiture or other remedy could not feasibly eliminate the

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170. Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

171. *Id.*

172. *See* Brief for the United States at 28–38, United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963) (No. 83) (proposing the relevant market).

173. United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963).

174. *Id.* at 370–71.

175. *Id.*

176. *See* Crane, *supra* note 168, at 397.

177. *Id.* at 410–11.

178. *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 30 n.14 (2010) [hereinafter 2010 MERGER GUIDELINES] ("The Agencies normally assess competition in each relevant market affected by a merger independently and normally will challenge the merger if it is likely to be anticompetitive in any relevant market.").

anticompetitive effect in the relevant market without sacrificing" identified out-of-market efficiencies.[179] This exception to the general rule was narrow: it was applicable only when the out-of-market efficiencies were "great" and the merger's anticompetitive effect in the relevant market was "small."[180] In the revised 2023 Merger Guidelines, however, the agencies eliminated this "inextricably linked" language and stated that they will not "credit benefits outside the relevant market that would not prevent a lessening of competition in the relevant market."[181]

While the genesis of the "market-specificity rule" is in § 7 of the Clayton Act, it is often thought to apply to Sherman Act cases too, based on the Supreme Court's holding in *United States v. Topco*.[182] There, the Court stated that the Sherman Act guaranteed "the freedom to compete," and observed that "[i]mplicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy."[183]

Nonetheless, some scholars have argued for consideration of out-of-market effects in the Sherman Act context. Werden has asserted that the "any-market rule" should not extend to rule-of-reason cases under the Sherman Act.[184] He contended, however, that courts should consider out-of-market efficiencies only after the first step of a rule-of-reason analysis, once a plaintiff has made out its prima facie case, so that defendants bear the burden of persuasion.[185] Like the antitrust agencies' former approach to "inextricably linked" merger efficiencies, Werden's proposal is modest: a court should find that out-of-market efficiencies overcome plaintiff's prima facie case only when that case is relatively weak, and there is "clear and convincing

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179. *Id.*

180. *Id.*

181. 2023 MERGER GUIDELINES, *supra* note 75, at 32.

182. *See, e.g.*, 1 ABA SECTION OF ANTITRUST L., ANTITRUST LAW DEVELOPMENTS 80 n.478 (8th ed. 2017) ("The [Supreme] Court also has said [in *Topco*] that procompetitive effects in one market may not be balanced against anticompetitive effects in another market."); Werden, *supra* note 169 at 127 (stating that while the "Sherman Act is never read to impose the any-market rule, [] the Supreme Court's *Topco* decision sometimes is read to adopt it"). *But see* John M. Yun, *Reevaluating Out of Market Efficiencies in Antitrust*, 54 ARIZ. ST. L.J. 1261, 1270 (2022) (arguing that "there is little basis to suggest that" the out-of-market efficiencies principle "has been adopted outside of § 7" cases).

183. United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

184. *See* Werden, *supra* note 169, at 141 ("[N]either the text of Section 1 of the Sherman Act nor Supreme Court jurisprudence bars cross-market balancing in rule-of-reason cases.").

185. *See id.* at 132–40 (arguing that the "any-market rule" applies to plaintiffs' initial burden in rule-of-reason cases, but not to subsequent steps in the analysis).

evidence" that the conduct's "predominant competitive effect . . . [is] to protect a distinct competitive process in a separate relevant market."[186]

Similarly, John Yun has asserted that the case for limiting consideration of out-of-market efficiencies in Sherman Act litigation is "exceedingly weak."[187] In both merger and non-merger contexts, Yun has advocated revising the out-of-market efficiencies doctrine to allow courts to consider what he terms "interdependent efficiencies."[188] Yun specified four categories of out-of-market efficiencies that he believes courts should take into account. These include, on the demand side, efficiencies in complementary products and those involving multisided platforms "with indirect, cross-group network effects."[189] On the supply side, Yun pointed to efficiencies stemming from economies of scope in production, and "upstream and downstream markets within the same supply chain."[190]

To see how Yun's proposal would work, we can focus on his discussion of interdependent efficiencies in cases involving multisided platforms. For instance, consider a situation where a court determines that a platform is not subject to *Amex's* two-sided platform rule, and that transactions on one side of the platform constitute a relevant market. Yun used the example of an app store, with developers on one side and users on the other.[191] A strict application of the out-of-market efficiencies principle would mean conduct that harms developers cannot be saved by resulting efficiencies enjoyed by users.[192] Yun categorized such user efficiencies as "interdependent," and advocated for courts to take them into account in determining whether a defendant can counter a plaintiff's prima facie case.[193]

Alexander and Salop have rejected the Werden/Yun approach. They have argued that merger law's restriction on consideration of out-of-market efficiencies ought to extend to Sherman Act cases.[194] Their focus is on monopsony claims brought by workers. They have contended that courts should reject calls to balance competitive harms to workers against any related gains to downstream consumers.[195] Alexander and Salop proposed

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186. *Id.* at 142.

187. Yun, *supra* note 182, at 1285.

188. *Id.* at 1268.

189. *Id.*

190. *Id.*

191. *Id.* at 1266–67.

192. *See id.* at 1267.

193. *See id.* at 1266–68.

194. Alexander & Salop, *supra* note 16, at 287 (arguing that courts applying the consumer welfare standard should "extend the longstanding approach of merger law and reject claims that out-of-market benefits can justify" unlawful restraints that harm workers).

195. *Id.*

that if courts do permit such balancing, they should impose a heavy burden on defendants to show any claimed benefits from their restraint "disproportionately exceed the harms" to workers.[196] The authors observed that while some courts have declined to balance harms to workers in a relevant labor market against purported benefits to downstream consumers, this approach is not uniform; other courts have weighed out-of-market benefits in evaluating anticompetitive restraints imposed on workers.[197]

In its 2021 *Alston* decision, the Supreme Court entertained the NCAA's out-of-market efficiencies argument in defense of its restrictions on compensation to student athletes.[198] Plaintiffs contested the NCAA's position on the facts but did not object to the concept of balancing out-of-market efficiencies against competitive harm in the relevant market.[199] The NCAA did not dispute that its rules decreased student-athlete compensation below a competitive level.[200] But it contended that its restrictions enhanced consumer demand by maintaining the appearance of amateurism in college sports.[201] The trial court rejected the NCAA's argument on the facts, finding that the NCAA had failed to show that, collectively, "the challenged compensation rules . . . have any direct connection to consumer demand."[202] However, the trial court determined that certain of the NCAA's rules—those intended to limit payments to student-athletes "unrelated to education"—"may have some effect in preserving consumer demand."[203] At the third step of the rule of reason analysis, the district court concluded that the plaintiffs had shown there were "substantially less restrictive alternative[s]" to some of the NCAA's rules (restrictions on education-related compensation) but not to others (restrictions on non-education-related compensation).[204]

Because the *Alston* plaintiffs did not contest the propriety of balancing harm in the input market against purported benefits in the output market, the

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196. *Id.* at 310. The authors also would require defendants to show that the downstream benefits could not be achieved in a less restrictive manner. *Id.*

197. *See, e.g.*, *id.* at 314–16 (discussing the Ninth Circuit's decision in *Aya Healthcare Services, Inc. v. AMN Healthcare, Inc.*, in which the court found that a restraint that harmed workers was procompetitive because it benefitted consumers in a downstream market).

198. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 87 (2021).

199. *See id.*

200. *Id.* at 86.

201. *See id.* at 82 ("The NCAA's only remaining defense was that its rules preserve amateurism, which in turn widens consumer choice by providing a unique product—amateur college sports as distinct from professional sports.").

202. *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1070 (N.D. Cal. 2019).

203. *Id.* at 1082.

204. *Id.* at 1104–07.

Supreme Court was not called upon to decide whether such balancing is permissible in Sherman Act § 1 cases.[205] Future cases might bring this issue squarely before the Court. In the meantime, at least in Sherman Act cases involving purported out-of-market effects, some courts are likely to continue explicitly trading off harms and benefits among trading partners.

C. *Implicit Tradeoffs*

In the cases discussed above, current doctrine requires courts explicitly to balance harms and benefits among distinct groups of a defendant's trading partners. In other types of cases, including those involving aftermarkets for durable goods and addictive products, courts often effect implicit tradeoffs among different categories of consumers. These tradeoffs are not spelled out in the doctrine but are the by-product of the ways courts decide such cases under the CWS.

1. Aftermarkets

Some purchases are relatively simple. A consumer buying a hammer or a frozen pizza pays the listed price and uses or consumes the good. These products might have some terms and conditions attached to them but require no additional purchases or consumption decisions. The buyer need consider only the price and quality of the good itself. Other types of purchases are more complicated. Some involve multiple transactions that take place over time. A consumer buying a cell phone, for example, will consider the upfront price of the phone, but the amount the consumer ultimately pays to use the phone will also include the price of apps and maybe the cost of repairs. In markets like these, courts will sometimes refer to a "foremarket" for the initial purchase (here, a cell phone) and an "aftermarket" for related purchases (apps and repairs).[206] Whether the aftermarket for a particular good is competitive is mostly up to the manufacturer. For example, some producers make available to third-party firms parts necessary to repair their products, so that the market for service is competitive.[207] Other producers want to ensure that

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205. *Alston*, 594 U.S. at 87 ("Some *amici* argue that . . . a court should not 'trade off' sacrificing a legally cognizable interest in competition in one market to better promote competition in a different one . . . . [T]he parties before us do not pursue this line.").

206. *See, e.g.*, Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 976 (9th Cir. 2023) ("[T]he relevant market for antitrust purposes can be an *aftermarket*—where demand for a good is entirely dependent on the prior purchase of a durable good in a *foremarket*.").

207. *See* Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 458 (1992).

they are the only firm to provide service over the life of a product, so they might bar the sale of parts to third-party repair companies or state that third-party service will void a warranty.[208]

Once consumers have purchased an expensive piece of durable equipment, they might find that they are locked into whatever arrangement the equipment manufacturer has made for repairs and other aftermarket services. Allegations that an equipment manufacturer has engaged in anticompetitive conduct to attain or maintain a monopoly in these aftermarket services can lead to tricky market definition questions. In a 1992 case, *Eastman Kodak Co. v. Image Technical Services*, the Supreme Court grappled with these questions.[209] In doing so, the Court established a framework for analyzing antitrust claims involving aftermarket goods and services.

Kodak manufactured copiers and provided aftermarket parts and service to its customers. The company produced some parts itself and arranged with third-party manufacturers to have other parts made to order.[210] A trade developed in servicing Kodak copiers. Third-party independent service organizations (ISOs) initially were able to obtain Kodak parts and repair Kodak equipment.[211] In the mid-1980s, Kodak attempted to exclude the ISOs by cutting off their access to parts.[212] Kodak enacted a policy of selling parts only to customers who used Kodak service, or who serviced their own machines.[213] Kodak also agreed with its third-party parts manufacturers that they would stop selling to the ISOs.[214] As a result of these policies, many ISOs lost customers and some were forced to quit the business.[215] Some customers had to switch to Kodak service, even if they preferred the ISOs.[216] Subsequently the ISOs sued, claiming that Kodak had illegally "tied the sale of service . . . to the sale of parts" for its equipment, and had unlawfully monopolized the market for servicing Kodak machines.[217]

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208. *See id.* (describing Kodak's efforts to ensure that third-party service providers were denied access to Kodak parts); *Official Rolex Website*, ROLEX, https://www.rolex.com/en-us/legal-notices/terms-of-use [https://perma.cc/3GMX-Y4AJ] ("[A]ny alteration, modification or other material change made to or on Rolex products by a third party not authorised by Rolex cancels the warranty.").

209. *See Eastman Kodak*, 504 U.S. at 458.

210. *See id.* at 457.

211. *See id.* at 458.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 459.

On summary judgment, the central question was whether Kodak had market power in its parts. Kodak argued that even if it had a dominant share in the sale of its parts, it could not exercise market power over parts and service because the market for copiers was competitive.[218] If Kodak tried charging supracompetitive prices for parts and service, it argued, it would lose copier sales to its competitors. As Kodak put it, "equipment competition precludes any finding of monopoly power in derivative aftermarkets."[219] The ISOs challenged Kodak's theory, characterizing it as an unrealistic portrayal of how consumers behave in the market for copiers. For Kodak's theory to hold up—that is, for the price of parts and service to affect copier sales—buyers of copiers would need to be able to accurately predict at the time of purchase the total "lifecycle price" of the machine.[220] The Supreme Court observed that this type of lifecycle pricing is difficult, if not impossible, to do, especially for less sophisticated buyers.[221]

Kodak responded that sophisticated, large-volume customers had the means and incentive to lifecycle price copiers, and that these buyers would act to restrain Kodak's pricing for other customers.[222] On this view, the interests of sophisticated and unsophisticated customers were aligned, and the former group would use their purchasing power to protect the latter group. The problem with this theory was that it seemed inconsistent with market realities. In practice, Kodak could charge its large-volume and lower-volume customers different prices for the package of copier, parts, and service.[223] Or, if their numbers were limited, Kodak could sacrifice its sophisticated customers altogether and compensate for their loss by locking in less sophisticated customers to Kodak copiers and extracting supracompetitive prices for parts and service. Considering the information costs involved in lifecycle pricing and Kodak's potential ability to price discriminate between sophisticated and less sophisticated consumers, the Court concluded that it "makes little sense to assume" a link between many consumers' initial

218. *See id.* at 464–66.

219. Petitioner's Brief on the Merits at 33, Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S.451 (1992) (No. 90-1029).

220. *Eastman Kodak*, 504 U.S. at 473.

221. *Id.* ("Lifecycle pricing of complex, durable equipment is difficult and costly."). "[T]o arrive at an accurate" lifecycle price, the Court explained, "a consumer must acquire a substantial amount of raw data and undertake sophisticated analysis." *Id.* Further, "[m]uch" of the information necessary to determine lifecycle price "is difficult—some of it impossible—to acquire at the time of purchase." *Id.*

222. *Id.* at 475.

223. *Id.* ("[I]f a company is able to price discriminate between sophisticated and unsophisticated consumers, the sophisticated will be unable to prevent the exploitation of the uninformed.").

decision to buy a Kodak copier and the long-run cost of parts and service for that copier.[224] Based on this conclusion and evidence of high switching costs for consumers who had already bought a copier, the Court rejected Kodak's argument that the ISOs' allegation of market power in service and parts was unreasonable.[225]

In dissent, Justice Scalia accepted the general proposition that copier consumers fall into two groups, according to their purchasing habits. He termed these groups "rational consumers" and "irrational consumers," and asserted that the latter were the exception.[226] The rational consumer evaluating a copier purchase will, according to Justice Scalia, "inevitably" consider "the expected cost of aftermarket support."[227] It is only the "occasional irrational consumer," including, evidence in the case showed, the federal government, that will look only at the price of the copier itself when deciding which machine to purchase.[228] And, Justice Scalia contended, "we have never before premised the application of antitrust doctrine on the lowest common denominator of consumer."[229] Nor was Justice Scalia swayed by the majority's discussion of the information costs involved in lifecycle pricing. He contended that such costs or, "more accurately, gaps in the availability and quality of consumer information, pervade real-world markets."[230]

In Justice Scalia's view it is appropriate in aftermarket cases like *Eastman Kodak* to trade off harm to "irrational consumers" against benefits to "rational consumers." This position might make sense if one agreed with Justice Scalia's assertion that the vast majority of consumers are "rational," in the sense that they are able and willing to lifecycle price in a way that would prevent a manufacturer from charging sustained supracompetitive prices for aftermarket services. But substantial research in behavioral economics has demonstrated that consumers are subject to significant cognitive biases and limitations that cast serious doubt on their ability to navigate complex pricing calculations in a way that Justice Scalia would consider "rational."[231]

The majority opinion recognized the potential tradeoffs between sophisticated and less sophisticated consumers and assumed that the latter

224. *Id.* at 475–76.
225. *Id.* at 477.
226. *See id.* at 495 (Scalia, J., dissenting).
227. *Id.*
228. *Id.*
229. *Id.* at 496.
230. *Id.*
231. *See* Rosenquist, Scott Morton & Weinstein, *supra* note 14, at 456 (discussing various consumer behavioral biases identified by behavioral economists).

category is much larger than the former.[232] As noted, the majority believed that a decision allowing Kodak to maintain allegedly supracompetitive prices in aftermarket parts and services might have resulted either in sophisticated customers getting a better deal from Kodak than less sophisticated customers or in Kodak driving away its sophisticated consumers while extracting supracompetitive prices from its remaining customers.[233] By denying Kodak summary judgment and acknowledging the possibility of relevant aftermarkets for durable goods, the Court aligned consumers' interests and eliminated the tradeoff. A ruling that led to increased competition in copier service likely would result in lower prices for both sophisticated and less sophisticated consumers.

Subsequent aftermarket case law has tended to interpret *Eastman Kodak* narrowly. Some courts read the decision to apply only to situations in which a defendant changed its aftermarket policies after consumers had already purchased the foremarket good, so that consumers were, by definition, unaware that they would be locked into using the defendant's aftermarket goods and services.[234] This approach reduces a court's analysis of information and switching costs to an inquiry about whether consumers knew about the relevant aftermarket policy, and it ignores the broader question the Court raised in *Eastman Kodak* about whether less sophisticated consumers are able and willing to make complex lifecycle-pricing calculations before purchasing the foremarket good. Courts resting their analysis on whether the defendant changed its policy midstream are implicitly approving a tradeoff between sophisticated and less sophisticated consumers in cases where no policy change was made.

In a recent high-profile case involving smartphones, Epic Games, creator of the popular game Fortnite, alleged that Apple had monopoly power in two single-brand aftermarkets: "iOS app distribution" and "iOS in-app payment solutions."[235] Both of these alleged markets were downstream of a foremarket

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232. *Eastman Kodak*, 504 U.S. at 475.

233. *Id.*

234. *See, e.g.*, Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 439–40 (3d. Cir. 1997) (contrasting the situation in *Eastman Kodak*, where Kodak's decision to push ISOs out of the "repair market and to force copier purchasers to obtain service directly from Kodak, at higher cost . . . was not foreseen at the time of sale" so that "buyers had no ability to calculate these higher costs at the time of purchase and incorporate them into their purchase decision[,]" with the facts of this case, where plaintiffs were aware when they entered a franchise agreement that Domino's "retained significant power over their ability to purchase cheaper supplies from alternative sources" and therefore they could "assess the potential costs and economic risks at the time they signed the franchise agreement").

235. Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 970 (9th Cir. 2023).

for "smartphone operating systems."[236] The district court rejected Epic's proposed aftermarkets, and the Ninth Circuit affirmed that decision.[237] In doing so, the appellate court held that plaintiffs asserting the existence of a single-brand aftermarket must show a lack of consumer awareness when purchasing a product about restrictions in the alleged aftermarket.[238] Plaintiffs can meet this burden by showing a change of policy, but that is not the only way to do so.[239] The lack of consumer awareness was the ultimate question for the Ninth Circuit.[240] This more nuanced approach to *Eastman Kodak* still gives short shrift to the Supreme Court's caution about information costs, however, and results in a rule that ignores the possibility that even if consumers understand Apple's "walled garden" approach to its App Store, at the time of purchase many will still be unable to accurately estimate the life-time costs of owning an iPhone, including App Store costs and repair costs.

A minority of lower courts have hewed more closely to the *Eastman Kodak* opinion, by allowing plaintiffs alleging a single-brand aftermarket to rely on evidence of, for example, "some limitation on information" which "undermined [customers'] ability to know that the aftermarket goods and services were being sold at high prices."[241] Another lower court listed four elements a plaintiff must show to demonstrate a single-product aftermarket, including "[h]igh 'information costs,'" meaning that "[a] substantial number of . . . customers must be too ignorant of 'lifecycle' prices to protect themselves by judicious interbrand comparisons."[242] This court also required

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236. *Id.*

237. *Id.* at 966, 970.

238. *Id.* at 978–79.

239. *Id.* at 979.

240. *Id.* at 980; *see also* Newcal Indus., Inc. v. IKON Off. Sol., 513 F.3d 1038, 1045-46 (9th Cir. 2013) (holding that plaintiffs had alleged a legally cognizable aftermarket for "replacement Copier Equipment" and "Copier Service" for "IKON [] customers with flexed IKON contracts"). In *Newcal* the Ninth Circuit stressed the significance of allegations of "market imperfections" that "prevent[ed] consumers from realizing that their choice in the initial market will impact their freedom to shop in the aftermarket." *Newcal Indus., Inc.*, 513 F.3d at 1050. These allegations could serve to "rebut the economic presumption" that defendants' customers made a "knowing choice to restrict their aftermarket options when they decide[d]" to contract with defendants in the foremarket. *Id.* Therefore, the court concluded, "[c]ompetition in the initial market" did not "necessarily suffice to discipline anticompetitive practices in the aftermarket." *Id.*

241. Xerox Corp. v. Media Scis., Inc., 660 F. Supp. 2d 535, 547 (S.D.N.Y. 2009). In addition, this court would require plaintiffs to show that consumers are locked into the foremarket product by "prohibitive" switching costs. *Id.* In crafting this test, including the prong allowing plaintiffs to satisfy their burden by showing that limited information made it difficult for consumers to evaluate aftermarket prices, the court relied on Herbert Hovenkamp's (correct) interpretation of *Eastman Kodak* in *The Rationalization of Antitrust*, 116 HARV. L. REV. 917, 934 (2003). *Id.*

242. Universal Avionics Sys. Corp. v. Rockwell Int'l. Corp., 184 F. Supp. 2d 947, 955 (D. Ariz. 2001).

a showing that any "knowledgeable customers who can protect themselves must either be unimportant to the defendant or be protected by effective price discrimination from above market prices paid by the ignorant."[243] Further, the defendant's "resulting ability to exploit the ignorant must be 'substantial.'"[244]

This last test is most faithful to the Supreme Court's nuanced analysis in *Eastman Kodak*, and especially to the key distinction between sophisticated and unsophisticated consumers. The court's four-element approach is designed to avoid requiring a tradeoff between these consumer groups.

2. Addictive Products

Courts applying the CWS in antitrust cases often rely on output as a measure of consumer harm.[245] Practices that suppress output are typically considered anticompetitive; practices that expand it are thought to be procompetitive.[246] Scholars have criticized this reliance on output as the key measure of consumer welfare. John Newman, for example, has argued that there are many scenarios in which output and consumer welfare "move in conflicting directions."[247] One context in which the output proxy often is at odds with the welfare of consumers is in cases involving harmful and addictive products. Consider tobacco products. Courts applying the antitrust laws typically would treat a new production efficiency that would increase cigarette output as procompetitive. A merger that likely would reduce cigarette output would be found anticompetitive and might be blocked. As Daniel Crane has observed about antitrust enforcement in the tobacco industry, "[t]he current antitrust paradigm generally has no capacity for taking into account a market's harmful nature."[248]

For the reasons Crane suggested, using output as a proxy for consumer welfare often won't make sense in antitrust cases involving harmful and addictive products. Few legal products and services are purely harmful, however—though tobacco certainly comes close. When a product is purely harmful, courts applying the CWS do not have to implement consumer tradeoffs. Increased output will harm all consumers of the product, and reduced output will improve the welfare of all consumers. Courts applying

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243. *Id.*

244. *Id.*

245. *See* Newman, *supra* note 3, at 574–75.

246. *See id.* at 570.

247. *Id.* at 567.

248. Daniel A. Crane, *Harmful Output in the Antitrust Domain: Lessons from the Tobacco Industry*, 39 GA. L. REV. 321, 325 (2005).

the CWS in tobacco cases are likely to reach results that harm consumers, but all consumers will be harmed as a class.

Addictive products that harm some users but benefit others present a more complicated problem. As Niels Rosenquist, Fiona Scott Morton, and I have argued, social media is one such product.[249] In these markets, "a more precise approach to evaluating consumer welfare than courts typically employ" is required.[250] Some social media consumers benefit from their use of these products—they connect with old friends, find out about events, perhaps keep up on the news. However, substantial medical evidence has shown that social media harms other users, especially teenagers.[251] For these users, social media consumption can lead to addiction, depression, and other mental health harms.[252] In this sense, social media consumers are not a unified class, with identical interests. Nonetheless, under the typical implementation of the CWS, which employs output as a proxy for consumer welfare, a court analyzing conduct involving social media (or products with similar effects) will find for a defendant if the evidence shows that the relevant conduct will increase output. This outcome implicitly favors users or potential users who benefit or would benefit from their social media interactions and disfavors addicted, depressed users for whom more exposure to social media is harmful.

To avoid disfavoring vulnerable consumers, courts in cases involving social media or similar products could require defendants relying on evidence of increased output in defense of their conduct to show that this additional output would actually benefit consumers. In a case involving social media, a defendant could make this showing with evidence that its conduct will increase use (output) among new users making new connections, rather than expand the hours that already-addicted teens spend on the service.[253] Only the former type of output enhances consumer welfare; the latter sort of increase is harmful to consumers and should not be credited. Of course, in some cases, output will increase among both new users and addicted users. In that situation, a court should reject the efficiency defense. It would be difficult for a court to balance harm to addicted consumers against gains to non-addicted consumers, and there is no need to do so. Only compelling evidence that any increased output is beneficial to consumers should give defendants the chance

249. Rosenquist, Scott Morton & Weinstein, *supra* note 14.
250. *Id.* at 474.
251. *Id.* at 442–52.
252. *Id.* at 450-52.
253. *See id.* at 474–75.

to overcome a plaintiff's prima facie showing that a transaction or conduct is anticompetitive.

D. Remedial Tradeoffs

The consumer tradeoffs discussed so far take place at the liability stage of antitrust litigation. These tradeoffs disfavor certain groups of consumers and in some cases raise barriers to recovery for plaintiffs. Some of the most significant consumer tradeoffs under current antitrust law take place at the remedy stage, however. Doctrines governing indirect purchaser recovery and antitrust standing strictly limit the types of plaintiffs that can recover in antitrust cases. These doctrines tend to disfavor individual end-user consumers and smaller firms, barring their recovery even when they have been harmed.

1. Indirect Purchasers

The CWS has its least complicated application in cartel cases. Price-fixing raises prices for all direct purchasers of the price-fixed goods or services. Wealth is transferred from those purchasers to sellers. Prohibiting this conduct does not require trade-offs among groups of consumers and it does not harm any consumers. However, even in price-fixing and bid-rigging cases, antitrust doctrine favors certain consumers over others. This is because, under the Supreme Court's *Illinois Brick* decision, only direct purchasers of price-fixed goods and services can recover damages from defendants, even in situations where the direct purchaser passes through to its customers the overcharges.[254] This result seems to contradict the explicit language of § 4 of the Clayton Act, which states that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . ." and recover treble damages.[255]

The Supreme Court characterized its holding in *Illinois Brick* as the necessary outgrowth of its decision in an earlier case, *Hanover Shoe*.[256] There the Court had rejected defendant's argument that a direct purchaser plaintiff had not been harmed for purposes of § 4 because it had passed on the overcharges to subsequent indirect purchasers.[257] Two considerations

254. Ill. Brick Co. v. Illinois, 431 U.S. 720, 728 (1977).

255. 15 U.S.C. § 15.

256. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).

257. *Id.* at 489 ("We hold that the buyer is equally entitled to damages if he raises the price for his own product.").

supported the Court's conclusion in *Hanover Shoe*. The first was administrability. Adjudicating the "passing-on defense" would be difficult and time-consuming, and "[t]reble-damages actions would often require additional long and complicated proceedings involving massive evidence and complicated theories."[258] Second, if the right to recover damages were to be pushed down the distribution chain to ultimate consumers—in that case buyers of single pairs of shoes—who "would have only a tiny stake in a lawsuit and little interest in attempting a class action," firms violating the antitrust laws might not pay any damages at all.[259]

In *Illinois Brick*, the Court characterized indirect purchasers' attempt to recover overcharges passed through to them by direct purchasers of price-fixed concrete block as "the offensive use of pass-on."[260] In contemplating the rights of indirect purchasers to recover damages—here the State of Illinois and local governments—the Court started with the proposition that whatever it decided to do about pass-on damages, that rule had to "apply equally to plaintiffs and defendants."[261] This meant that the Court either had to overrule *Hanover Shoe* or bar indirect purchasers from recovery. It chose the latter course. In doing so, the Court referred again to the administrative difficulties of trying to apportion damages among different types of plaintiffs.[262] According to the Court, allowing indirect purchasers to recover damages in antitrust cases "essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge . . . ."[263] In addition, the Court was concerned that if it did not bar indirect purchaser suits, defendants would be subject in many cases to duplicative liability for their actions.[264] With limited exceptions, even in cases where a direct purchaser passed on all overcharges to indirect purchasers, because *Hanover Shoe* prohibited defendants from using a pass-through defense, defendant would be liable to both sets of plaintiffs.[265]

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258. *Id.* at 493.

259. *Id.* at 494.

260. Ill. Brick Co. v. Illinois, 431 U.S. 720, 728 (1977).

261. *Id.*

262. *Id.* at 737 ("However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.").

263. *Id.*

264. *Id.* at 730 ("[A]llowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants.").

265. In *Hanover Shoe*, the Supreme Court noted that there could be an exception to its prohibition on the use of a passing-on defense in cases where the overcharged direct purchaser had a pre-existing cost-plus contract with indirect purchasers, making it clear that the direct

The *Illinois Brick* Court conceded that its rule would deny recovery to indirect purchasers who suffered harm as a result of defendants' illegal conduct.[266] But the Court argued that many indirect purchasers will "have such a small stake" in a given case that even if they were permitted to recover as part of a class action, "only a small fraction would be likely to come forward to collect their damages."[267] On this view, the rule would cause indirect purchasers only limited harm.

Even if that reasoning was correct, it is clear that *Illinois Brick* enforced a consumer tradeoff. The decision "elevat[ed] direct purchasers to a preferred position."[268] Because of the way many markets work, this tradeoff disfavors the end users of goods and services, often individual consumers. And it does so even though the direct purchasers, typically wholesalers, retailers, or other intermediaries, can pass on any overcharges to these individual end users. Recognizing the impact of this rule, several states have enacted "*Illinois Brick* repealer" statutes that permit indirect purchasers to recover in actions brought under state antitrust laws.[269] While the Supreme Court has held that federal law does not preempt these state statutes,[270] their reach is limited to state law claims; federal claims are still subject to the limits of *Illinois Brick*.[271]

The Supreme Court's indirect purchaser jurisprudence explicitly disfavors individual consumers in many cases. In markets subject to price-fixing conspiracies, consumers up and down the distribution chain are harmed. But the antitrust laws protect only some consumers; indirect purchasers have no redress. While the Court's administrability and double-recovery concerns are not trivial, this carve-out from the protections of the CWS is concerning.

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purchaser passed through all the supracompetitive prices it paid and therefore suffered no injury. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968). The *Illinois Brick* Court suggested that this exception might also apply to allow indirect purchasers to sue in situations where they had a pre-existing cost-plus contract with a direct purchaser. *Illinois Brick*, 431 U.S. at 736.

266. *Illinois Brick*, 431 U.S. at 746 ("It is true that, in elevating direct purchasers to a preferred position as private attorneys general, the Hanover Shoe rule denies recovery to those indirect purchasers who may have been actually injured by antitrust violations.").

267. *Id.* at 747.

268. *Id.* at 746.

269. *See, e.g.*, CAL. BUS. & PROF. CODE § 16750(a) (West 2009) (providing cause of action for indirect purchasers); KAN. STAT. ANN. § 50-161(b) (2000) (same).

270. *See* California v. ARC Am. Corp., 490 U.S. 93, 101 (1989) ("[T]he Court of Appeals erred in holding that the state indirect purchaser statutes are pre-empted.").

271. *Id.* at 100 ("[T]here is no claim here that state law could provide a remedy for the federal violation that federal law forbids.").

2. Antitrust Standing

The Supreme Court's indirect purchaser jurisprudence is a specific example of a broader judicially created doctrine, antitrust standing, that limits the types of consumers who can recover damages under the antitrust laws. As noted, the language of § 4 of the Clayton Act is broad. It explicitly guarantees the right to recover damages to "any person" injured by an antitrust violation.[272] Nonetheless, the Supreme Court and lower courts have determined that even though antitrust violations often have far-reaching effects, there must be "a point beyond which the wrongdoer should not be held liable."[273] Plaintiffs whom courts consider to be too remote from a violation therefore lack antitrust standing and are barred from recovering damages even if injured. The Supreme Court's *Associated General Contractors* decision provided guidance on how courts should determine if a plaintiff is too remote from the violation to have standing to sue under § 4.[274] In that case, the plaintiffs were unions that asserted they had been injured when a multiemployer association coerced third parties and some association members to work with nonunion firms.[275] This coercion, according to the unions, had harmed unionized companies and, ultimately, the unions themselves.[276]

The Court conceded that the unions' complaint properly alleged that the antitrust violation had harmed the unions and that such harm was intentional.[277] But those allegations alone were not sufficient to provide antitrust standing.[278] Instead, "[a] number of other factors may be controlling," including the "directness or indirectness of the asserted injury."[279] Here, the Court adjudged the unions' injury to be indirect, whereas the victims of the alleged coercion and union contractors that lost jobs had been directly injured. Where there are plaintiffs "whose self-interest would

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272. 15 U.S.C. § 15.

273. Blue Shield of Va. v. McCready, 457 U.S. 465, 476–77 (1982) ("An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but 'despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable.'") (quoting Ill. Brick Co. v. Illinois, 421 U.S. 720, 760 (1977) (Brennan, J., dissenting)); *see also* Hawaii v. Standard Oil Co., 405 U.S. 251, 262 n.14 (1972) ("The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.").

274. Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535–42 (1983).

275. *Id.* at 520.

276. *Id.* at 520–21.

277. *Id.* at 537.

278. *Id.* at 545–46.

279. *Id.* at 538, 540.

normally motivate them" to bring an antitrust suit, the Court found less need to grant a more remote victim, like the unions, standing to sue.[280] Other factors militated against the unions' claim, including the possibility of duplicative damages, the difficulty of apportioning overlapping damages claims, and the "tenuous and speculative" causal link between the alleged antitrust violation and the unions' injury.[281]

Courts often apply antitrust standing principles to deny recovery in cases involving plaintiffs who are neither customers nor competitors of the defendant. This was the situation in *Associated General Contractors*.[282] Other types of plaintiffs that have alleged indirect harms and were denied standing include employees, creditors, shareholders, and suppliers of firms directly harmed by an antitrust violation.[283] However, courts also sometimes deny antitrust standing to consumer plaintiffs whose injuries they consider indirect. For example, plaintiffs who claim that defendants' illegal conduct priced them out of a market are routinely denied relief.

Consider the Tenth Circuit's decision in *Montreal Trading Ltd. v. Amax Inc.*[284] There, plaintiff asserted that potash producers had conspired to limit supply, raising prices to the point that plaintiff claimed it could not buy potash and profitably resell it.[285] Defendants argued that plaintiff lacked antitrust standing because it had never purchased potash from them and there were more direct victims—the firms that had actually bought potash at the allegedly inflated prices.[286] While the court noted that purchasers of price-fixed goods suffer injuries that are "more direct and more proximately caused than those who are unable" to buy the goods due to "product scarcity," it conceded that non-purchasers also can suffer a direct injury in some cases.[287]

However, the court was reluctant to grant standing to non-purchaser plaintiffs who had never before dealt with the defendants because to do so

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280. *Id.* at 542.

281. *Id.* at 545.

282. *Id.* at 539 ("In this case . . . the Union was neither a consumer nor a competitor in the market in which trade was restrained.").

283. *See, e.g.*, Static Control Components, Inc. v. Lexmark Int'l, Inc., 697 F.3d 387 (6th Cir. 2012) (denying standing to supplier); Vinci v. Waste Mgmt., Inc., 80 F.3d 1372, 1375 (9th Cir. 1996) (denying standing to shareholder); Sw. Suburban Bd. of Realtors, Inc. v. Beverly Area Plan. Ass'n, 830 F.2d 1374, 1378 (7th Cir. 1987) ("Merely derivative injuries sustained by employees, officers, stockholders, and creditors of an injured company do not constitute 'antitrust injury' sufficient to confer antitrust standing.") (dictum); Adams v. Pan Am. World Airways, 828 F.2d 24, 28–30 (D.C. Cir. 1987) (denying standing to employees).

284. 661 F.2d 864 (10th Cir. 1981).

285. *Id.* at 867.

286. *Id.* at 866–67.

287. *Id.* at 867.

would potentially open the door to "a seemingly unlimited number of plaintiffs [who] could assert a virtually unlimited quantity of lost purchases."[288] Combined with the availability of treble damages, the court observed that non-purchaser standing could "easily bankrupt[]" a defendant.[289] Further, it reasoned that claims by non-purchaser plaintiffs who had never before dealt with the defendants "would be inherently speculative."[290] When a non-purchaser has "no prior course of dealing" with the defendants, the court stated, "we will remain unsure about many things," including whether the non-purchaser would have purchased from the defendants or other firms, how much they would have bought, what the purchase price would have been, and what the resale price would have been.[291]

The Ninth Circuit employed this type of reasoning to deny standing to the City of Oakland in a suit alleging that the National Football League ("NFL") and its member teams conspired to "artificially restrict the supply" of NFL franchises.[292] This restriction, the City argued, raised the prices host cities were required to pay to keep or acquire teams.[293] The City alleged that it lost the Raiders (and was prevented from acquiring another team) because it was unable to pay the NFL's supracompetitive prices.[294] Characterizing this theory as a claim that the City "was priced out of the market," the court observed that these types of buyers typically lack antitrust standing and denied standing to the City.[295] Citing *Montreal Trading*, the Ninth Circuit noted that Oakland's alleged injuries were "less direct than those of actual purchasers," like Las Vegas, which ultimately acquired the Raiders, and Los Angeles, another city that recently had acquired a team.[296] Further, Oakland's damages claim was "too speculative" because "there is no way of knowing [] what would have occurred in a more competitive marketplace."[297]

In antitrust standing jurisprudence, plaintiffs who claim they were priced out of a market as a result of defendant's unlawful conduct are disfavored consumers. Their right to recover damages is traded off against that of more direct victims. This is a sensible rule in some situations. Courts are right to

288. *Id.* at 867–68.
289. *Id.* at 868.
290. *Id.* at 867.
291. *Id.* at 868.
292. City of Oakland v. Oakland Raiders, 20 F.4th 441, 450 (9th Cir. 2021).
293. *Id.*
294. *Id.* at 450–51.
295. *Id.* at 448–49.
296. *Id.* at 459.
297. *Id.*

be concerned about the risks of allowing all parties that assert they were priced out of a market to claim damages. In markets where there are many potential buyers and frequent transactions, damages claims by allegedly frustrated purchasers could swamp defendants, and such claims would be difficult to adjudicate and measure. The *Montreal Trading* rule that grants standing to sue only to those non-purchasers that had some prior course of dealing with defendants is a rough attempt to address this problem, but it works well only some of the time.[298] In a case involving the sale of commodities where there are many potential buyers—which seems to have been the situation in *Montreal Trading*[299]—this type of rule is probably necessary, even if some plaintiffs that would have purchased and resold the commodity but for the illegal conduct are unable to recover their actual damages.

The rule makes much less sense in a case like *City of Oakland*. Even if one accepts the court's perplexing conclusion that the City had no prior course of dealing with the NFL, applying the *Montreal Trading* rule in the context of competition for NFL franchises does more harm than good. First, unlike commodities markets, the market for NFL franchises has a very small pool of potential purchasers and an even smaller number of transactions.[300] Concerns that defendants will be swamped by the claims of frustrated cities contending that they were priced out of the market carry much less weight in this setting. Second, the "direct" victims of the alleged conspiracy are unlikely to sue the NFL. Perhaps the last thing cities and ownership groups that have successfully lured a team from another city want to do is sue the other thirty-one NFL teams for antitrust damages. Therefore, denying plaintiffs like the City of Oakland antitrust standing is likely to result in defendants retaining any ill-gotten gains and never having to defend their actions. Third, the priced-out plaintiffs' injuries are likely to be more severe than those of the "direct" victims. Under plaintiff's theory, Las Vegas and Los Angeles will have paid supracompetitive prices to acquire their teams. Oakland, however, lost its team altogether, likely a much more significant economic blow than overpaying for a new team. For all these reasons, the consumer tradeoff entailed in the antitrust standing ruling in *City of Oakland* makes for bad policy. By disqualifying the most likely plaintiff, it all but eliminates the reach of the antitrust laws in this setting. And it disadvantages

298. *See* Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864, 866–67 (10th Cir. 1981).

299. *See generally id.*

300. *See* N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249, 1260 (2d Cir. 1982) ("[O]n the supply side of the sports capital market the number of investors willing to purchase an interest in a franchise is sharply limited . . . .").

a less prosperous city, Oakland, in favor of cities with more money and power.

III. IMPACT & IMPLICATIONS

As the previous Part shows, antitrust law is currently rife with consumer tradeoffs. These tradeoffs have significant implications for the conduct of antitrust litigation and its impact on consumers. We have seen the many ways that courts applying the CWS explicitly or implicitly favor certain groups of consumers over others. This Part analyzes the distributive effects of these tradeoffs by identifying the types of consumers whom antitrust doctrine disfavors. It then proposes doctrinal changes to address the twin problems of consumer tradeoffs and disfavored consumers.

A. Disfavored Consumers

Over the past decade, scholars have begun to analyze the role antitrust law plays in reinforcing prevailing power dynamics within society. Some of these studies have focused on the relationship between antitrust law and wealth inequality. Eric Posner and Cass Sunstein have argued, for example, that antitrust could play a more effective role in reducing economic inequality in the United States.[301] Other scholars have centered their attention on the interplay between antitrust law and race. Hiba Hafiz has argued that antitrust's "color-blind" approach to enforcement has entrenched racial inequality, as firms often exercise their market power in ways that harm racial minorities.[302] Bennett Capers and Gregory Day have similarly posited that antitrust law has "failed people of color."[303] Research by Jennifer Sturiale has

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301. Eric A. Posner & Cass R. Sunstein, *Antitrust and Inequality*, AM. J.L. & EQUAL. 190 (2022); *see also* Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1, 11 (2015), https://www.law.georgetown.edu/georgetown-law-journal/submit/glj-online/104-online/antitrust-competition-policy-and-inequality [https://perma.cc/QE2P-MS53] (arguing that "[t]he adoption of more permissive antitrust rules during the past quarter century . . . likely increased the prevalence of market power," the returns from which "go disproportionally to the wealthy"). *But see* Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171, 1174 (2016) (contending that "it is far from certain that antitrust violations . . . systematically redirect wealth from the poor to the rich").

302. Hiba Hafiz, *Antitrust and Race*, 100 WASH. U. L. REV. 1471, 1473 (2023) ("[C]ourts and enforcers have shaped antitrust doctrine and regulation in ways that have *de facto* granted firms rights to discriminate against people and communities of color through the acquisition and exercise of market power.").

303. Bennett Capers & Gregory Day, *Race-ing Antitrust*, 121 MICH. L. REV. 523, 524 (2023).

explored underenforcement of the antitrust laws in markets that primarily affect females.[304]

This growing body of work makes important contributions to understanding the differential impact of antitrust law and enforcement on various groups within society. I focus here on a related question: whether it is possible to characterize the types of consumers who tend to lose when antitrust courts effect consumer tradeoffs. In other words, who are antitrust's disfavored consumers? I argue that the consumer tradeoffs discussed in this Article can be placed in two general categories: some have what appear to be random distributional effects; others tend to privilege more powerful, sophisticated, and wealthier consumers over their less powerful, less sophisticated, and poorer counterparts.

Tradeoffs with seemingly random effects include those involving predatory pricing, two-sided markets, and out-of-market efficiencies. In predatory pricing cases, plaintiffs must show that consumers will lose more during the recoupment period than they gained during the predation period.[305] When a predation campaign allows a firm to charge some consumers higher prices, but not necessarily to recoup every last dollar lost in the predation period, those consumers will have no way to remedy their harm. Who are these later consumers? Sometimes they are the same people who benefitted from low prices during the predation period. In that scenario it might be appropriate to ask whether this group's losses during recoupment outstripped or were likely to outstrip their earlier gains. Other times the later consumers are new customers of the predatory firm who entered the market after the predation period ended and made all their purchases during the recoupment period. Those consumers suffer a pure loss, with no off-setting gain from earlier, below-cost purchases.

Consider the ride-hailing market. As Matthew Wansley and I have argued, Uber appears to have engaged in predatory pricing to eliminate taxi companies.[306] During the salad days of the "millennial life-style subsidy," riders could get an Uber for a price that was sometimes half of what taxis were charging.[307] But recently, Uber and Lyft appear to have settled into a

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304. *See* Jennifer E. Sturiale, DeGendering Antitrust 40 (May 17, 2025) (unpublished manuscript), https://ssrn.com/abstract=5087861 [https://perma.cc/DHQ7-ZRUZ].

305. *See supra* Section II.B.2.

306. *See* Wansley & Weinstein, *supra* note 132, at 841.

307. *See* Kevin Roose, *Farewell, Millennial Lifestyle Subsidy*, N.Y. TIMES: THE SHIFT (June 8, 2021), https://www.nytimes.com/2021/06/08/technology/farewell-millennial-lifestyle-subsidy.html; Bill Gurley, *How to Miss by a Mile: An Alternative Look at Uber's Potential Market Size*, ABOVE THE CROWD (July 11, 2014), https://abovethecrowd.com/2014/07/11/how-to-miss-by-a-mile-an-alternative-look-at-ubers-potential-market-size [https://perma.cc/C4GQ-2JNZ]

stable duopoly.[308] Both firms have raised their prices significantly in certain markets, and it is at least possible that they are charging above the competitive level in those areas.[309]

Now imagine two consumers. The first lived in New York City or San Francisco in the early 2010s. Finding Uber to be a much cheaper alternative than taxis, they relied on Uber for their intra-city travel. In the late 2010s—before Uber began raising its prices—this consumer moved to suburban New Jersey or Contra Costa County, purchased a car, and stopped using Uber. The second consumer made the reverse life decisions. They started out in suburbia, where they owned a car and did not need Uber, but in the early 2020s they moved to the urban core and began relying on Uber or Lyft for some trips, paying prices above the competitive level. Were a court to determine that the Uber/Lyft duopoly was unstable and unlikely to be able to sustain its supracompetitive pricing, our second consumer probably would be unable to recover their losses from the ride-hailing companies' supracompetitive prices. That this would be the outcome, despite abundant evidence that Uber waged a price war against the taxi-cab companies in which it charged prices below its costs for years, and in the face of evidence that Uber was later able to charge prices above the competitive level, demonstrates *Brooke Group's* anti-consumer logic. *Brooke Group* creates an unnecessary consumer tradeoff which can result in a group of disfavored consumers being harmed without the possibility of redress.

Characterizing the disfavored consumers in predatory pricing cases is challenging. As mentioned above, sometimes the winners and losers will be identical. Ongoing consumers of goods subject to a predatory pricing scheme will gain during the predation period and lose once prices rise above the competitive level.[310] Like the example of the two Uber customers, however, often consumer harm will be seemingly random, as buyers enter and leave the market for reasons independent of price, making the identity of disfavored consumers a matter of timing and happenstance. Nonetheless, we can expect that more sophisticated consumers will generally be better able to detect and take advantage of below-cost prices more quickly than their less sophisticated counterparts. And savvy consumers are also more likely to detect and avoid supracompetitive prices when it is possible to do so. With technology

(featuring a 2014 Uber advertisement claiming that Uber's fares were 50% cheaper than taxis' fares).

308. Wansley & Weinstein, *supra* note 132, at 845.

309. *See* Roose, *supra* note 307 (noting in 2021 that the "average Uber and Lyft ride costs 40 percent more than it did a year ago").

310. *See supra* Section II.B.2.

companies, like Uber, it is also possible that more sophisticated and wealthier early adopters are more likely to gain and less sophisticated late adopters to be disfavored.

In cases involving two-sided transaction platforms, the *Amex* decision requires plaintiffs to show that harm on one side of the platform exceeds gains to consumers on the other side.[311] Typically, the platform operator will raise prices to the side of the platform that is less price sensitive and lower them to the side of the platform that is more price sensitive. In *Amex*, American Express judged merchants to be less price sensitive than cardholders and so placed its restrictions on the merchant side.[312] Price sensitivity likely is platform-specific, and it is difficult to draw any meaningful conclusions about the types of consumers the *Amex* rule disfavors.

The out-of-market efficiencies principle also will tend to have a random impact on consumers. If a plaintiff succeeds in demonstrating that a defendant's conduct or a proposed merger violates the Sherman or Clayton Acts, consumers within a properly defined relevant market will be protected from competitive harm.[313] If that conduct or merger would have benefitted consumers (or other trading partners) outside the relevant market, those consumers will be denied those benefits. The identities of the consumers who are inside or outside the relevant market in any specific case is driven by the details of the industries involved and the intricacies of the market definition exercise. It would be difficult to identify any useful patterns in these outcomes.

Other consumer tradeoffs, including those involving aftermarkets, addictive products, indirect purchasers, and antitrust standing tend to disfavor consumers who are less wealthy, less powerful, and less sophisticated than the groups who are favored in these tradeoffs. When a court determines that a proposed aftermarket is not a relevant antitrust market due to competition in the foremarket, it assumes that consumers are able to accurately lifecycle-price products at the time of purchase.[314] More sophisticated consumers might have the incentive, resources, and experience to estimate follow-on costs for products like phones and copiers that will need aftermarket add-ons and service, but many average consumers will lack these resources and are less likely to be able to accurately comparison shop. More powerful consumers are also more likely to be in a position to use their leverage to avoid excessive prices on aftermarket services in a way that most average consumers will not.

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311. *See supra* Section II.B.1.
312. *See* Ohio v. Am. Express Co., 585 U.S. 529, 536–37 (2018).
313. *See supra* Section II.B.3.
314. *See supra* Section II.C.1.

Courts' treatment of cases involving addictive products similarly favors the welfare of the non-addicted consumer over that of the addicted consumer. Antitrust law's reliance on the CWS's output proxy means that defendants in cases involving addictive and harmful products can nonetheless use evidence of increased output as a defense to a plaintiff's prima facie case. That this increased output is certain to harm vulnerable consumers is of no moment to courts' antitrust analysis under prevailing doctrine.

Finally, antitrust's indirect purchaser and standing case law, which restricts who can seek recovery for competitive harm, explicitly disfavors end consumers and less wealthy purchasers in favor of companies and wealthier consumers. While the *Illinois Brick* indirect purchaser rule stemmed from reasonable concerns about the administrability of a more liberal damages regime, its impact in many cases is to limit recovery mostly to companies and municipalities that purchase directly from price-fixing and bid-rigging sellers.[315] These victimized companies and municipalities are likely to have passed on the inflated prices to their customers or to taxpayers. Despite ultimately having to bear the brunt of the harm from price-fixing conspiracies, individual consumers often will have no way to remedy their losses. Similarly, antitrust standing doctrine developed in response to legitimate concerns about the need to shield defendants from what could be an almost boundless set of plaintiffs in some cases.[316] But the rule comes at the cost of denying recovery to plaintiffs who, while at one or more removes from the competitive misconduct, nonetheless are injured. When antitrust standing is used to eliminate potential plaintiffs who were priced out of a market, it explicitly disfavors poorer consumers in favor of wealthier and more powerful victims.

Which consumers antitrust doctrine directly disfavors, therefore, is random in some kinds of cases but tends to include less powerful, more vulnerable purchasers in others. But even where outcomes appear random, doctrines that require explicit consumer tradeoffs almost always favor defendants. So, while the direct effects of the *Brooke Group* and *Amex* decisions on specific groups of consumers seem somewhat haphazard, both these tests make it more difficult for plaintiffs to prevail in litigation. As such, both doctrines favor sellers over consumers. Sometimes those consumers will be other firms, as in *Amex*, but even there, higher prices likely were passed on to retail customers of the affected merchants. The net result of all these doctrines, therefore, is to shift wealth from end consumers to sellers, the opposite of what the CWS is supposed to achieve.

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315. *See supra* Section II.D.1.
316. *See supra* Section II.D.2.

B. Doctrinal Implications

Considering the extent and effect of consumer tradeoffs in current antitrust law, what are the doctrinal implications? The strength of the CWS is supposed to be its relative ease of administration and its exclusive focus on consumers, but these tradeoffs undercut those advantages. Indeed, the best way to understand the areas where even defenders of the CWS concede that it comes up short is through the lens of consumer tradeoffs.[317] The CWS is at its most effective, and hews most closely to its claimed goals, in cases where the doctrine does not require those tradeoffs. Where the case law does require them, consumers are much less likely to find protection in the antitrust laws.

This insight has several doctrinal implications. First, antitrust case law that explicitly requires consumer tradeoffs should be overturned or pared back. This would mean, for example, reforming predatory pricing doctrine, rejecting or strictly limiting *Amex*, and cabining defendants' use of out-of-market efficiencies to counter demonstrated anticompetitive harm. Second, any movement in the case law and in academic commentary toward increased reliance on consumer tradeoffs is potentially counterproductive and should be treated with caution. Third, courts should acknowledge situations in which the CWS results in implicit consumer tradeoffs, as in aftermarket cases and cases involving addictive products, and should attempt to craft analysis that is sensitive to or eliminates these tradeoffs. Fourth, the indirect purchaser and antitrust standing doctrines—remedial rules that favor some consumers over others—should be reconsidered and reformed. I discuss each of these in turn.

Current doctrine that explicitly requires consumer tradeoffs presents the clearest case for reform. The most charitable view of predatory pricing doctrine and the *Amex* rule is that they are attempts to finely measure overall consumer impact by weighing benefits to one group of consumers against harms to another group. But in most cases, this type of precision is simply unattainable.[318] What these tests do instead (and what is perhaps their goal), is to raise essentially insuperable barriers to recovery for plaintiffs. The *Brooke Group* rule, for instance, has effectively wiped predatory pricing from the books as a viable antitrust claim. The quest for ever more accurate measures of net competitive harm risks making the theoretically perfect the

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317. *See, e.g.*, Hovenkamp, *supra* note 3, at 93 (acknowledging that the CWS "could do better than it has protecting consumer interests" and listing as areas that "need to be re-examined," *inter alia*, "predatory pricing, law's recoupment requirement, and the status of indirect purchaser plaintiffs").

318. *See* Tim Wu, *supra* note 5 (describing the "'idealized' consumer welfare standard" where "we can measure the costs and benefits of everything we'd need to know" as "a beautiful vision" but "obviously not the world we live in").

enemy of the good and undercuts the CWS. As the Supreme Court has observed, in antitrust cases, "[r]ules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve."[319]

Addressing this problem requires judicially or legislatively overruling, reforming, or limiting the reach of *Brooke Group* and *Amex*. One approach to *Brooke Group* might be to eliminate its recoupment requirement, which implicates the consumer tradeoff.[320] It should be sufficient for plaintiffs to show sustained below-cost pricing, indicating that a rational firm believed recoupment to be possible. Or the doctrine could be revised to allow plaintiffs to prevail if they can show both sustained below-cost pricing and subsequent supracompetitive pricing that harmed some consumers. This test is perhaps within the spirit of *Brooke Group*, but it eliminates the consumer tradeoff. It does not require plaintiffs to demonstrate that the consumer harm they identify outweighs the benefits to consumers who purchased during the predation period.

The most realistic and effective approach to *Amex* is likely for lower courts to restrict it to its facts. This would mean limiting the universe of so-called two-sided transaction platforms to which the *Amex* rule applies. The majority opinion itself suggested some limits on its analysis, explaining that "it is not always necessary to consider both sides of a two-sided platform."[321] Where the "impacts of indirect network effects and relative pricing . . . are minor," the Court stated that "a market should be treated as one-sided."[322] This portion of the opinion allows lower courts to exclude platforms from the *Amex* rule, and they should take this invitation whenever possible.

The use of out-of-market efficiencies evidence also should be strictly limited. Recall that in merger litigation, plaintiffs can satisfy their prima facie burden by showing that a transaction may substantially lessen competition in any relevant market.[323] Courts and enforcers analyzing mergers will typically not account for efficiencies that might be realized outside a properly defined relevant market unless those efficiencies are "inextricably linked" to the relevant market.[324] In the 2023 Merger Guidelines, the agencies stated that

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319. Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 99 (2021) (quoting Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983)).

320. *See* Leslie, *supra* note 93, at 1744 ("[I]t is time to abandon the recoupment requirement in section 2 predatory pricing cases.").

321. Ohio v. Am. Express Co., 585 U.S. 529, 544 (2018).

322. *Id.*

323. *See supra* text accompanying notes 19–21.

324. *See supra* notes 178–81 and accompanying text.

they will not consider out-of-market efficiencies at all in merger analysis.[325] This approach has much to recommend it. It is anchored in the plain language of § 7 of the Clayton Act. And it avoids tradeoffs among consumers or other trading partners that increase plaintiffs' litigation burden.[326] While the statutory basis is different in the Sherman Act context, the logic of avoiding in-market/out-of-market tradeoffs remains compelling.

This logic is also supported by Supreme Court precedent. In *Philadelphia National Bank* the Court appeared explicitly to reject cross-market balancing in merger cases.[327] Similarly, as Alexander and Salop have noted, in *Mandeville Island Farms v. American Crystal Sugar*, a Sherman Act § 1 price-fixing case, the Court declined to balance harms to plaintiff against gains to plaintiff's competitors.[328] The Court stated that even if other firms tended to benefit from defendants' illegal scheme, "[i]t is enough that" plaintiffs "have suffered the injuries for which the statutory remedy is afforded."[329] While this case involved tradeoffs within the same relevant market, the Supreme Court's language reveals a general skepticism toward balancing of competitive effects when a proper plaintiff has demonstrated competitive harm.

Absent a complete bar on considering out-of-market effects in the merger and civil non-merger contexts, strict limits on the use of this type of evidence are necessary. In merger cases, the approach to inextricably linked efficiencies taken in the 2010 Horizontal Merger Guidelines was sensible.[330] It reflected appropriate caution about this type of cross-market balancing while accounting for the possibility that, in some small set of cases, remedying anticompetitive harm in one relevant market will cause severe harm outside that market.[331] To further safeguard against the abuse of out-of-market efficiencies evidence in merger litigation, Daniel Crane's suggestion

325. 2023 MERGER GUIDELINES, *supra* note 75.

326. *See* Crane, *supra* note 168, at 409–10 (observing that "[t]he most convincing justification for a market-specificity rule is that balancing pro- and anticompetitive effects across market boundaries unduly increases the complexity of antitrust decision making," and noting that such increased complexity "may [] bias decision making in favor of anticompetitive mergers").

327. United States v. Phila. Nat'l Bank, 374 U.S. 321, 370 (1963); *see also* Crane, *supra* note 168, at 397 (stating that the Court in *Philadelphia National Bank* held "that it is improper to weigh a merger's procompetitive effects in one market against the merger's anticompetitive effects in another").

328. Alexander & Salop, *supra* note 16, at 298; Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219, 242–43 (1948) ("It does not matter . . . that the growers contracting with the other two refiners may have been benefited, rather than harmed, by the combination's effects . . . .").

329. *Mandeville Island Farms*, 334 U.S. at 243.

330. *See supra* notes 178–81 and accompanying text.

331. *Id.*

that the merging parties bear the burden of proving that cross-market balancing weighs in favor of allowing a transaction to proceed is a good one.[332] Placing this burden on defendants mitigates one of the most serious problems with antitrust's consumer tradeoffs—their tendency to erect additional barriers to plaintiffs' success. Similarly, if courts were to require in-market/out-of-market tradeoffs in Sherman Act cases, Gregory Werden's proposal for treatment of out-of-market effects evidence makes sense: strictly limit the type of out-of-market evidence defendants can offer and allow them to present it only at the second stage of the rule-of-reason inquiry, where they bear the burden of production.[333]

In addition to eliminating, paring back, or strictly limiting existing doctrine that requires consumer tradeoffs, identifying and resisting efforts to broaden the use of such tradeoffs (or create new ones) is also important. The debate about the reach of the "out-of-market" efficiencies principle is an example.[334] The recognized exceptions to limits on the use of out-of-market evidence are narrow, but some have proposed broadening them. As described earlier, John Yun has argued for expanding the use of out-of-market efficiencies in both merger and non-merger cases.[335] His "interdependent efficiencies" approach would require courts to consider a wider range of out-of-market effects in a wider variety of cases. In other words, Yun is proposing adding consumer tradeoffs to the case law. Even if there is a theoretical argument that in some cases, accounting for interdependent efficiencies will produce a more precise answer to the question of whether consumers on net are harmed by a particular transaction or conduct, in practice opening the door to broader consideration of out-of-market efficiencies is likely to erect yet another obstacle to plaintiffs' recovery in antitrust cases.

Brooke Group, *Amex*, and a permissive out-of-market efficiencies doctrine explicitly require courts to balance gains and harms to different sets of consumers or other trading partners.[336] Other doctrines, like those governing cases involving addictive products and aftermarkets, require implicit consumer tradeoffs that courts often ignore. In these settings, courts that recognize the implicit tradeoff can protect consumers in many cases without pitting one group against the other. In litigation involving addictive products, courts should not reflexively rely on the output measure to evaluate consumer

332. Crane, *supra* note 168, at 410.

333. *See* Werden, *supra* note 169, at 132–42.

334. *See supra* Section II.A.3.

335. Yun, *supra* note 182.

336. *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993); Ohio v. Am. Express Co., 585 U.S. 529, 537 (2018).

welfare. Rather, they should require from defendants more compelling and specific evidence about the source of any claimed increase in output. Only increases that benefit non-addicted users should be cognizable. In a social-media case, this likely would mean that increased use of a service among new users would be cognizable output evidence, whereas increased use among already heavy users would not.[337] One can imagine a similar approach to a service like on-line gambling. Of course, this approach will not work in every addictive products case. For example, in a challenge to a merger involving companies that produce alcoholic beverages, it likely would be too difficult for defendants relying on evidence of increased output to show that the additional output will be consumed only by non-addicted customers. But where this type of granular evidence exists, courts should demand it.

The *Eastman Kodak* Court demonstrated how lower courts can approach aftermarket cases to avoid consumer tradeoffs.[338] By recognizing that many consumers lack the ability or resources to lifecycle-price durable goods, the Court protected from supracompetitive aftermarket pricing not only these less sophisticated consumers, but their more sophisticated counterparts too.[339] Recognizing a cognizable aftermarket in settings where lifecycle pricing would be difficult avoids this implicit consumer tradeoff and benefits all consumers, consistent with the goals of the CWS.

The final doctrinal implication of the consumer tradeoff analysis is that Congress or the courts should eliminate *Illinois Brick's* prohibition on indirect purchaser recovery and seriously consider limiting the antitrust standing principle. The Supreme Court in *Illinois Brick* asserted that a bar on indirect purchaser recovery was necessitated by its rejection of the pass-on defense in *Hanover Shoe*.[340] But nothing requires that conclusion.[341] Courts could continue to reject the pass-on defense and nonetheless allow indirect purchasers to recover. Concerns about duplicative recovery should be much reduced in price-fixing and bid-rigging cases, where the threat of false positives or chilling desirable pro-competitive conduct is minimal. Indeed, expanding the population of plaintiffs to include indirect purchasers would enhance deterrence of these most serious antitrust violations.[342] As it is, little

337. *See* Rosenquist, Scott Morton & Weinstein, *supra* note 14, at 474–75.

338. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 476 (1992).

339. *See id.* at 481.

340. Ill. Brick Co. v. Illinois, 431 U.S. 720, 746–747 (1977).

341. *See* Edward D. Cavanagh, *Illinois Brick: A Look Back and a Look Ahead*, 17 LOY. CONSUMER L. REV. 1, 43 (2004) (stating that the argument for overruling *Illinois Brick*, but not *Hanover Shoe*, "may have legs").

342. *See* Barak D. Richman & Christopher R. Murray, *Rebuilding Illinois Brick: A Functionalist Approach to the Indirect Purchaser Rule*, 81 S. CAL. L. REV. 69, 103 (2007)

objection has been made to the current arrangement, in which the government exacts criminal fines from price-fixing defendants who must also compensate private plaintiffs.[343] A compromise approach to the issue would be to rule out treble damages in cases where indirect purchasers are permitted to recover.[344] That approach, while less desirable than simply overturning *Illinois Brick*, would at least eliminate the current consumer tradeoff that disfavors end purchasers.

Similarly, antitrust standing doctrine should be liberalized, especially in cases involving plaintiffs priced out of a market. A sensible application of the *Montreal Trading* rule—that priced-out plaintiffs can recover if they have transacted with the defendants in the past[345]—would be a good start. The Ninth Circuit's crimped reading of what constitutes past transactions resulted in excluding the most likely plaintiff to pursue what appeared to be a potential price-fixing or bid-rigging violation in the *City of Oakland* case.[346] Courts also should consider allowing priced-out plaintiffs to sue even if they have not transacted with the defendants in the past, if there is persuasive evidence that they planned to purchase but were prevented from doing so due to artificially high, fixed prices. These tweaks would limit the consumer tradeoffs in this setting and reduce the likelihood that less wealthy, less powerful plaintiffs will be unable to recover damages while wealthier, more powerful consumers can remedy their harms.

IV. CONCLUSION

The high-profile battle that has raged in recent years over the proper goals of antitrust has had important consequences, not the least of which has been to raise public consciousness of the key role that antitrust law plays in our economic system. When it comes to antitrust litigation, though, not much has changed. Courts continue to decide cases by applying the CWS. But a standard that was intended to help all consumers increasingly fails to do so.

(proposing updating the Clayton Act to provide for a consolidated action in antitrust cases allowing both direct and indirect purchasers to sue and arguing that the "greatest gain[]" from allowing both direct and indirect purchasers to sue would be enhancing deterrence by "expand[ing] substantially" the "pool of potential plaintiffs").

343. *See* Cavanagh, *supra* note 341, at 43 ("The federal courts today seem less concerned about multiple liability and appear to have no problem in exacting large criminal fines on top of civil treble damage awards . . . .").

344. *Id.* at 44 (suggesting that if *Illinois Brick* was overturned, "concerns about multiple liability could be ameliorated by limiting indirect purchasers to actual damages").

345. Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864, 868 (10th Cir. 1981).

346. City of Oakland v. Oakland Raiders, 20 F.4th 441, 448–50 (9th Cir. 2021).

The proliferation of explicit and implicit consumer tradeoffs in antitrust law has made it more difficult for plaintiffs to win cases and has created classes of disfavored consumers, sometimes with unfortunate distributional consequences. Reform is called for. Limiting the reach of existing consumer tradeoffs and preventing the adoption of new ones will move the CWS closer to the role its proponents claim for it. Efforts in this direction could restore the benefits of competition to a broader population of consumers and do so without leaving any consumers out in the cold.