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The Necessity in Antitrust Law

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Abstract

Antitrust rarely, if ever, gives primacy to a dispute's subject matter. For instance, exclusionary conduct that raises the price of a lifesaving drug receives the same analysis as a restraint of baseball cards. Since antitrust's purpose is to promote consumer welfare, the equal treatment of important and mundane goods might appear perplexing. After all, competition to produce affordable foods, medicines, and other necessities would seem to foster consumer welfare more than inane products do.

In fact, defendants generally win antitrust lawsuits even when monopolizing necessities because the primary method of antitrust review is notably deferential to defendants. To explain this landscape, the high prices available in a monopoly should incentivize rivals to enter the market, creating competition and correcting the market. Additionally, people may presumably mitigate high prices by buying a lesser substitute or nothing at all. Since courts apply the same level of deference regardless of the market's importance, a defendant who cites an efficiency gained from excluding competition can typically survive antitrust scrutiny.

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This Article argues that core pillars of antitrust make little sense with necessities. An exclusionary act in an essential market extracts an added premium reflecting society's vulnerability, making the costs of market power much greater than with mundane goods. The effect is that antitrust courts have systematically underestimated the costs of monopolies and trade restraints in essential markets, causing them to misidentify anticompetitive acts as procompetitive. Indeed, whereas antitrust assumes that consumers enjoy options when faced with monopoly pricing, people who need a necessity such as a life-saving drug will pay the high prices so long as they can. The implications are many. First, a larger spectrum of consumers must pay the monopoly rates. Second, whereas a cartel of artisan belt makers may only charge so much before consumers purchase mass-produced belts, a monopolist can demand a greater premium without losing consumers. Third, this landscape incentivizes collusion since firms can extract more money from more people. Fourth, anticompetitive conduct is more likely to harm marginalized groups who suffer higher switching costs (for example, self-medication over expensive pharmaceuticals) or even complete deprivations of necessities. This Article argues that the concepts of essentialness and inelasticity must be integrated into the substantive analysis of whether conduct is anticompetitive. It provides a logical framework to do so using a seldom employed approach called the "quick look," which would flip the burden onto the defendant and thereby strip the typical analysis of its deference in essential markets. In fact, since confusion over when the quick look is proper has made it a rarity—despite widespread support for its usage—this Article's approach would establish an effective place for the test. Also, recognizing the greater level of harm inflicted on especially marginalized populations, the proposal would enhance welfare by beginning to disaggregate the term "consumers."

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INTRODUCTION

Any company may technically make the non-patented drug Daraprim, which cures a fatal parasitic infection.[1] The drug's

1. *See* Press Release, FTC, Six More States Join FTC and NY Attorney General's Case Against Vyera Pharmaceuticals, Martin Shkreli, and Other

maker, Vyera Pharmaceuticals, entered exclusivity agreements with suppliers of the drug's active ingredient to prevent generic companies from making a rival version.[2] Vyera also induced vendors to withhold Daraprim from competitors who needed samples of it to satisfy the process of approving a generic drug.[3] These tactics sparked an antitrust lawsuit in 2020 alleging that the destruction of competition and creation of monopoly power enabled Vyera to jack up Daraprim's price from $17.50 to $750 per tablet—a *4,286 percent* increase.[4]

A chief reason why Vyera could exponentially raise Daraprim's price involves the drug's importance. Since those who suffer from toxoplasmosis may die without treatment,[5] most patients are willing to pay any amount for a cure.[6] Absent competition, Vyera leveraged the gravity of their patients' situation to increase prices beyond what the typical monopolist could charge.[7]

Given the humanitarian dangers of pricing toxoplasmosis patients out of the market, it seems odd that antitrust cares little about whether society needs the monopolized good. After all, collusion that eliminates competition for a lifesaving drug receives the same level of scrutiny as a restraint of artisan belts.[8] Since antitrust's purpose is to promote "consumer welfare,"[9] the equal treatment of important and mundane goods

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Defendants (Apr. 14, 2020), https://perma.cc/N9L2-TJ7N (discussing the drug's generic manufacturers).

2. *See* Amended Complaint at ¶¶ 5–6, FTC v. Vyera Pharms., LLC, 479 F. Supp. 3d 31 (S.D.N.Y. 2020) (No. 1:20-cv-00706-DLC), https://perma.cc/QE9M-M7A9 (PDF).

3. *See Vyera Pharms.*, 479 F. Supp. 3d at 39.

4. *See* Amended Complaint, *supra* note 2, at ¶ 89.

5. *See id.*

6. *See infra* Part III.A (explaining the economics of monopolizing necessities).

7. *See* Amended Complaint, *supra* note 2, at ¶¶ 295–313.

8. *Compare* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 907 (2007) (using the "rule of reason" to assess a restraint of trade in the artisan belt market), *with* FTC v. Actavis, Inc., 570 U.S. 136, 159 (2013) (applying the "rule of reason" to a restraint in the pharmaceutical market).

9. *See* Energy Conversion Devices Liquidation Tr. v. Trina Solar Ltd., 833 F.3d 680, 685 (6th Cir. 2016) ("At their core, the antitrust laws are a 'consumer welfare prescription.'" (quoting ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 66 (1978))); HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 2 (Harvard Univ. Press ed.

might seem perplexing. As such, wouldn't competition to produce affordable foods, housing, drugs, and other necessities foster consumer welfare more than competition for garden variety goods?

In fact, a monopolist like Vyera can generally evade antitrust liability altogether.[10] This is because the primary method of antitrust review—the rule of reason—is notably deferential to defendants such as Vyera who "virtually always win" competition lawsuits.[11] To explain antitrust's preset against liability, the high prices available in a monopoly should incentivize rivals to enter the market, creating competition and correcting the market.[12] Also, consumers may mitigate high prices; if a cartel raises widget prices, one can presumably buy a lesser substitute or nothing at all, limiting the cartel's effects.[13] Since courts apply the same level of deference regardless of the market's importance, a defendant who cites an efficiency gained from excluding competition can typically survive antitrust scrutiny.[14]

2008) (reciting that after antitrust's "counterrevolution of the 1970s and 1980s . . . . [t]he only articulated goal of the antitrust laws is to benefit consumers, who are best off when markets are competitive").

10. The antitrust case brought against Vyera, according to precedent and the district court, is indeed subject to the rule of reason. *See Vyera Pharms.*, 479 F. Supp. 3d at 46 ("The plaintiffs assert a violation that is assessed under the rule of reason.").

11. *See* Richard D. Cudahy & Alan Devlin, *Anticompetitive Effect*, 95 MINN. L. REV. 59, 87–88 (2010) (explaining antitrust's "total-welfare" and consumer welfare standards where the analysis measures the surplus losses between efficient and inefficient outcomes).

12. *See* Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 35 (2004) [hereinafter Gavil, *Exclusionary Distribution*] (explaining the belief that markets self-correct in the face of supracompetitive prices).

13. *See* George L. Priest, *Bork's Strategy and the Influence of the Chicago School on Modern Antitrust Law*, 57 J.L. & ECON. S1, S7 (2014) (noting that markets tend to self-correct, which influences the narrowing of antitrust's scope); Edward D. Cavanagh, *Antitrust Law and Economic Theory: Finding a Balance*, 45 LOY. U. CHI. L.J. 123, 126–27 (2013) ("Chicago School economists, relying on the neoclassical model and its two basic assumptions that (1) markets are self-correcting; and (2) firms and consumers generally behave rationally and act as profit-maximizers, urged that vertical restraints are rarely, if ever, anticompetitive and almost always serve to promote competition." (footnote omitted)).

14. *See, e.g.*, Staley v. Gilead Scis., Inc., 446 F. Supp. 3d 578, 593–617 (N.D. Cal. 2020) (analyzing a trade restraint of an HIV drug without giving

This Article asserts that excluding competition in essential markets inflicts a greater level of harm which antitrust misses. The added injury is shown to reflect society's *need* for the necessity and thus vulnerability. Key to this analysis is that antitrust has inadequately considered a salient feature of necessities: inelastic demand. As a result, courts have systematically underestimated the costs of monopolies in essential markets, causing them to misidentify anticompetitive acts as procompetitive.

The issue is that the core pillars of antitrust's framework make little sense when applied to necessities. Whereas antitrust assumes that consumers enjoy options when faced with monopoly pricing, people who need a necessity will pay the high prices and thus lack as much cost-sensitivity. For example, a cartel of artisan belt makers may only charge so much before consumers buy mass-produced belts, but people who depend on a life-saving drug will pay whatever the premium (so long as they can).[15] The effect is that a greater spectrum of individuals will pay monopoly prices for necessities than for garden variety goods.[16] Second, without fear of losing consumers, a monopolist can demand an even greater markup; after all, a cartel of artisan belt makers may only raise prices to the point where people lose their *willingness* to buy expensive belts whereas a monopolist like Vyera can escalate prices until people lose the *ability* to

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primacy to the drug's saliency); Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018)

> To determine whether a restraint violates the rule of reason, the parties agree that a three-step, burden-shifting framework applies. Under this framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means. (citations omitted).

15. *See* Rolls-Royce PLC v. United Techs. Corp., No. 1:10cv457, 2011 WL 1740143, at *4 (E.D. Va. May 4, 2011) (suggesting that markets for necessities might always be inelastic).

16. *See infra* Part III.A.

pay.[17] Third, due to the inelasticity of necessities, it incentivizes collusion since firms can extract more money from more people.[18]

In fact, anticompetitive practices in essential markets may disproportionally harm marginalized groups.[19] To illustrate, monopolies have caused certain drug prices to *triple* since 1997,[20] impacting uninsured individuals the most.[21] Likewise, collusive agreements among fast food companies have frozen the salaries of 40 million low-wage workers.[22] And as prices increase due to uncompetitive markets, many companies have abandoned low-income neighborhoods, depriving poorer areas of nutritious food ("food deserts"), financial services

17. *See* Assoc. for Accessible Meds. v. Frosh, 887 F.3d 664, 675–76 (4th Cir. 2018) (Wynn, J., dissenting) (criticizing "unconscionable" drug pricing practices that prey on, physicians' willingness to "continue to prescribe the drug, even in the face of substantial price increases").

18. *See* William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 947 (explaining the inverse relationship between inelasticity and opportunities for collusion).

19. *See Klobuchar Introduces Legislation to Modernize Antitrust Enforcement and Promote Competition*, AMY KLOBUCHAR (Feb. 1, 2019) [hereinafter *Klobuchar Antitrust Legislation*], https://perma.cc/U8KZ-KDJW (remarking that antitrust is "more than price and output" but instead is about "our everyday lives, from the price of groceries at the market to the cost of prescription drugs"); *cf.* Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 285 (2017) (arguing that some monopolies create such substantial harm that courts should condemn even "no-fault" monopolies). *See generally* Brian S. Feldman, *The Decline of Black Business*, WASH. MONTHLY, Mar.–May 2017, https://perma.cc/4HKK-68U6 (explaining the effect of monopoly power on Black-owned businesses).

20. *See* Curtis E. Haas, *Drug Price Increases: Here We Go Again?*, PHARMACY TIMES (Mar. 19, 2019, 1:49 PM), https://perma.cc/MEB6-EG88 ("Drug costs in the United States began steeply climbing in 1997, tripling between 1997 and 2007.").

21. *See, e.g.*, Dean Baker, *End Patent Monopolies*, N.Y. TIMES (Jan. 10, 2016, 2:07 PM), https://perma.cc/27WA-XL2F (discussing the difficulties of monopolies in the pharmaceutical industry); Austin Frakt, *How Patent Law Can Block Even Lifesaving Drugs*, N.Y. TIMES (Sept. 29, 2015), https://perma.cc/Z6QZ-GBX6 (identifying the importance of monopolies in the pharmaceutical industry).

22. *See* Gregory Day, *Anticompetitive Employment*, 57 AM. BUS. L.J. 487, 495 (2020) [hereinafter Day, *Anticompetitive Employment*] (describing the ubiquity of labor cartels among minimum wage employers).

("underbanked"),[23] and technology (the "digital divide").[24] This dynamic was observed as far back as the seventeenth century when the directors of the East India Company noted that a "monopoly of the necessaries of life . . . is liable to the greatest abuses."[25] So given the potential to deepen social and economic inequalities,[26] it is curious that antitrust lacks a meaningful inquiry into the underlying good's importance.[27]

This Article asserts that antitrust law should remedy anticompetitive practices in essential markets with a variation of a seldom used approach called the "quick look." Rather than the current framework in which courts presume that the restraint was justified, the quick look flips the burden onto the defendant who must prove how excluding competition benefitted consumers.[28] It would recognize that the rule of reason's deference is misguided where a necessity's inelastic demand has enabled cartels to extract more wealth from more consumers. And since confusion over when the quick look is proper has made it a rarity—despite widespread support for its usage—this Article's take on the approach would establish a logical place for it.[29]

In essence, the following proposal would improve antitrust's internal logic and better promote consumer welfare in the most important markets. It would accord with case law, which

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23. *See infra* notes 61–64 and accompanying text.

24. *See* Nell Abernathy, *The Effects of Market Power on Women and People of Color*, ROOSEVELT INST. (Mar. 7, 2018), https://perma.cc/8SPH-Y9DN (explaining that technology companies disinvest in underserved neighborhoods to maximize profits).

25. ROY MOXHAM, THE GREAT HEDGE OF INDIA 33 (2001).

26. *See* James A. Schmitz Jr. & David Fettig, *Monopolies: Silent Spreaders of Poverty and Economic Inequality*, PROMARKET (Aug. 14, 2020), https://perma.cc/U4NK-ENL8 (highlighting the economic vulnerabilities of the poor and marginalized).

27. *See* Press Release, Joe Biden, Biden-Sanders Unity Task Force Recommendations 67 (July 8, 2020), https://perma.cc/S4S4-PK9K (PDF) (seeking to add broader criteria to antitrust regulation's analytical consideration, including the impact on the labor market, underserved communities, and racial equity).

28. *See infra* Part III.C.

29. *See* Alan J. Meese, *Farewell to the Quick Look: Redefining the Scope and Content of the Rule of Reason*, 68 ANTITRUST L.J. 461, 463–64 (2000) [hereinafter Meese, *Farewell to the Quick Look*] (describing the support for quick look analyses).

dictates that a more stringent level of review should apply when conduct renders reliably anticompetitive effects.[30] This proposal is far from farfetched. In the realm of merger enforcement under the Clayton Antitrust Act,[31] federal agencies have observed that inelasticity can make anticompetitive conduct "more profitable" and increase "the prospect of harm"[32]—yet this dynamic remains absent in assessing whether conduct is anticompetitive under the Sherman Act.[33] And since restraints of necessities disproportionally harm marginalized groups, this Article shows that antitrust's beneficiary of "consumers" is far from homogenous;[34] indeed, incorporating inelasticity into the test of anticompetitiveness would begin to disaggregate the standard of "consumers" and recognize the disparate impact on at-risk groups.[35] Another benefit is that firms would more cautiously exclude competition in essential markets unless they can ex ante justify the effects of doing so.[36]

This Article proceeds in four parts. Part I describes the concept of a necessity and provides examples suggesting that monopolies in essential markets create heightened economic and social costs. Part II reviews the history of the Sherman Act to explore the role of economics in enforcement as well as the unimportance of the underlying good. Because antitrust law has evolved in a manner where enforcement seldom condemns exclusionary conduct, the discussion explains why defendants enjoy broad latitude in suppressing competition regardless of market. Part III argues that antitrust must incorporate the economic concept of elasticity into the substantive analysis of whether exclusionary conduct is net anticompetitive. If the monopolized or restrained good's demand is inelastic, the potential for abuse is reliably great enough that the rule of

30. *See infra* Part III.B; cases cited *infra* note 191 and accompanying text.

31. *See* 15 U.S.C. § 18 (recognizing that a company can anticompetitive before a merger-to-monopoly).

32. DOJ & FTC, HORIZONTAL MERGER GUIDELINES 26 (2010) [hereinafter HORIZONTAL MERGER GUIDELINES], https://perma.cc/PF6T-8DKZ (PDF).

33. Sherman Anti-Trust Act, 15 U.S.C. §§ 1–7; *see* Gregory J. Werden, *Demand Elasticities in Antitrust Analysis*, 66 ANTITRUST L.J. 363, 406–07 (1998) (exploring inelasticity in merger enforcement).

34. *See infra* Part III.C.

35. *See infra* Part III.C.1.

36. *See infra* Part III.D.

reason's deference would no longer make sense; instead, the quick look would effectively flip the burden to deter the heightened rates of abuse. It would also establish a rigorous role for the quick look analysis, which has so far languished due to fears of arbitrary or populistic enforcement. This position receives support from microeconomics, critical race theory, and the Sherman Act's legislative history. The last Part discusses implications—ranging from merger enforcement and scholarly debate over antitrust's purpose, to harmonizing antitrust with the idiosyncratic areas of enforcement in which the good's saliency or inelasticity does matter. As examples, courts have scrutinized inelastic demand to define the market, impose criminal penalties, as well as target certain cases for government enforcement.

I. MODERN CONCERN FOR MONOPOLIES

A monopoly is not illegal unless it was achieved via illicit means.[37] Due to this framework, anxiety is mounting about the prevalence of monopolies in essential markets.[38] Problems include not only higher prices but also a panoply of non-economic injuries affecting social welfare, democracy, inequality, and national security. In light of America's "monopoly problem,"[39] Part I.A reviews the concept of a necessity. Then, Part I.B canvasses essential markets in which monopolies may pose greater risks in terms of conventional antitrust injuries like high prices as well as non-antitrust concerns like social or political harms.

37. *See* Pac. Bell Tel. Co. v. LinkLine Commc'ns, Inc., 555 U.S. 438, 447–48 (2009) (explaining that the Sherman Act targets "the willful acquisition or maintenance" of a monopoly power, not its "development as a consequence of a superior product, business acumen, or historic accident" (quoting United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966))).

38. *See infra* Part I.B.

39. *See, e.g.*, *Klobuchar Antitrust Legislation*, *supra* note 19 (advocating legislation to protect consumers by limiting monopolies); Ryan Grim, *Bernie Sanders Vows to Revive Criminal Prosecutions of CEOs for Unfair Trade Practices*, INTERCEPT (Oct. 23, 2019, 4:18 PM), https://perma.cc/4URA-M2VT (noting that monopolies in the pharmaceutical industry have caused serious health problems).

A. *Necessities*

Identifying a necessity (or "essential" good) may initially appear like a tricky task, but economic theory provides an effective template. To start, some commentators characterize necessities as "[c]ommodities such as food, water, and health care [that] *are essential to life*."[40] Because this description involves social constructions based on one's perception of essential[41]—e.g., electricity—it is helpful to conceive of necessities as existing on a spectrum. For instance, while some scholars list housing and health care as necessities, many people live without these commodities.[42] This suggests that a necessity is not entirely required for survival. A better description is goods and services "that make possible social and economic well-being."[43]

In economics—which is central to antitrust law—the hallmark of a necessity is inelastic demand.[44] Goods with inelastic demand are those that consumers buy at roughly the same rates even when prices rise.[45] Although no good is perfectly inelastic, people who need a certain good will generally purchase

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40. Gregory M. Stein, *Inequality in the Sharing Economy*, 85 BROOK. L. REV. 787, 810 (2020) (emphasis added).

41. *See id.* at 810–11 (contrasting the relative essentiality of certain commodities depending on the circumstances).

42. *See* Martha B. Coven, *The Freedom to Spend: The Case for Cash-Based Public Assistance*, 86 MINN. L. REV. 847, 849 (2002) ("What seems like a luxury to one person often ends up being a necessity to another."); K. Sabeel Rahman, *Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities*, 118 COLUM. L. REV. 2447, 2448–49 (2018) (listing healthcare, housing, and water as necessities).

43. Rahman, *supra* note 42, at 2450.

44. *See* Sean T. Murray, *Comparative Approaches to the Regulation of Electromagnetic Fields in the Workplace*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 177, 183 n.39 (1995)

> The demand for electricity is inelastic because it is such an irreplaceable fixture in modern society. In other words, people "need" electricity and will, therefore, pay much more for the good, allowing utilities to extract monopoly profits. While this use of the term "need" may not comply with the strict economic definition of "necessity," it reflects the inelastic nature of the demand for electricity. (internal citations omitted).

45. *Id.*

it regardless of price, hence making its demand inelastic.[46] For instance, if gasoline prices increase, consumers in the aggregate will buy similar amounts; not only must people still commute to work, but airlines and other businesses cannot easily diminish their purchasing in the present.[47] While inelastic goods involve more than necessities—luxuries and vices are often inelastic[48]—it is seldom difficult to identify when people have bought a good out of necessity.[49] The concept of essentialness may thus bely a perfect definition. Yet antitrust scholars and economists would likely agree that a necessity is a good or service that society values as salient to our collective wellbeing, reflected by a significant level of inelastic demand.

In important part, attempts to exclude competition in essential markets may generate an array of socioeconomic problems beyond high prices. It seems that restraints of necessities can particularly target and harm marginalized populations.[50] The next discussion illustrates this point using examples from the labor, financial services, and similar markets.

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46. *See* Jerry Hausman & Howard Shelanski, *Economic Welfare and Telecommunications Regulation: The E-Rate Policy for Universal-Service Subsidies*, 16 YALE J. ON REGUL. 19, 35 (1999) (providing examples of inelastic goods, for which demand does not change significantly, regardless of price changes).

47. *See* Eliana Eitches & Vera Crain, *Using Gasoline Data to Explain Inelasticity*, BEYOND NOS. (Mar. 8, 2016), https://perma.cc/3KN9-KMAU (showing that the volume of gasoline purchases remains constant, regardless of the price of gas, because individual households' demand for gas stays constant due to the lack of available substitutes and the necessity for gas in many citizens' daily lives).

48. *See* Smith v. Philip Morris Cos., 335 P.3d 644, 668 (Kan. Ct. App. 2014) (reviewing evidence that the demand for cigarettes is "highly inelastic"); *see also* Neil Gormley, *Greening the Law of Advertising: Prospects and Problems*, 42 TEX. ENV'T L.J. 27, 48 (2011) ("Lower courts have not always followed the Court in its skepticism of supply and demand, perhaps out of suspicion that the demand for alcohol is exceptionally price inelastic.").

49. *See* Thane N. Rosenbaum, *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*, 41 U. MIA. L. REV. 729, 785 (1987) (differentiating necessities and luxuries as inelastic).

50. *See infra* Part III.C.1.

B. *Modern Anxiety over Monopoly Power in Essential Markets*

Few types of monopolies present as much danger as the pharmaceutical industry. While market power may seem like a natural effect of patent rights,[51] allegations persist about the tactics used by drug companies to impede generic competition (such as Vyera in the Introduction),[52] extend patent rights beyond twenty years,[53] and prevent development of competing drugs.[54] This landscape has reportedly limited society's access to lifesaving pharmaceuticals,[55] evidenced by those who struggle to afford EpiPens,[56] as well as critical drugs used to treat HIV,[57] cancer,[58] and other diseases.[59] And since low-income groups tend to lack insurance and suffer from more health issues, society's

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51. *See* SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1203 (2d Cir. 1981) ("[P]atent laws reward the inventor with a temporary monopoly that insulates him from competitive exploitation of his patented art.").

52. *See, e.g.*, *In re* Suboxone Antitrust Litig., 64 F. Supp. 3d 665, 680–84 (E.D. Pa. 2014) (discussing how drug companies "product hop" to block competition, potentially violating antitrust law).

53. *See* FTC v. Actavis, Inc., 570 U.S. 136, 154–60 (2013) (ruling that "reverse payments" by drug companies to extend their patent rights beyond twenty years can offend antitrust law).

54. *See In re* Loestrin Antitrust Litig., 261 F. Supp. 3d 307, 348–54 (D.R.I. 2017) (analyzing whether the pharmaceutical company engaged in sham litigation to impede generic competition).

55. *See* Press Release, FTC, FTC and NY Attorney General Charge Vyera Pharmaceuticals, Martin Shkreli, and Other Defendants with Anticompetitive Scheme to Protect a List-Price Increase of More than 4,000 Percent for Life-Saving Drug Darapim (Jan. 27, 2020), https://perma.cc/WM3L-G2EK (stating that the increase in price "significantly impacted access" to the life-saving treatment).

56. *See* Sydney Lupkin, *A Decade Marked by Outrage over Drugs Prices*, NPR (Dec. 31, 2019, 1:16 PM), https://perma.cc/VPK3-K6KZ (noting that Mylan raised EpiPen prices more than twelve times over six years, to prices as expensive as $300).

57. *See* Gregory Day, *Competition and Piracy*, 32 BERKLEY TECH. L.J. 775, 811–15 (2017) (explaining how patent rights kept AIDS treatments from consumers).

58. *See* Mustaqeem Siddiqui & S. Vincent Rajkumar, *The High Cost of Cancer Drugs and What You Can Do About It*, 87 MAYO CLINIC PROCS. 935, 935–38 (2012), https://perma.cc/UJ42-L7AL (PDF) (crediting the high prices of cancer drugs to monopolies).

59. *See id.* at 941 ("As long as we have a for-profit system involved in the manufacture of lifesaving drugs, we will always run the risk of high costs.").

most vulnerable have unevenly incurred the effects of drug monopolies.[60]

Perhaps as worrisome is the absence of competition in the market for financial services. Research has found that anticompetitive bank mergers impair consumer welfare in the traditional sense—e.g., higher fees, lower interest rates, and reduced credit availability—as well as levy unique injuries on lower-income groups.[61] Given the saliency of financial services, anticompetitive mergers have reportedly deprived poorer areas of banks, enabling check-cashing shops and predatory lenders to fill their void.[62] And when large banks acquire local ones, the underbanked "have been more likely to experience evictions and have debts sent to collection agencies."[63]

One of the more troubling forms of monopoly power among industry insiders—though scholarship is just beginning to notice—involves food.[64] Oligopolies in the beef, pork, wheat,

60. *See* Wendy Rogers, *Evidence-based Medicine and Equity: The Exclusion of Disadvantaged Groups*, *in* EVIDENCE-BASED PRACTICE IN MEDICINE & HEALTH CARE 129, 129 (Ruud ter Meulen et al. eds., 2005) (discussing the link between poor health and poverty).

61. *See, e.g.*, Mark J. Garmaise & Tobias J. Moskowitz, *Bank Mergers and Crime: The Real and Social Effects of Credit Market Competition*, 61 J. FIN. 495, 509–14 (2006) ("[B]orrowers appear to receive bank financing less frequently when banking markets become less competitive . . . ."); VITALY M. BORD, BANK CONSOLIDATION AND FINANCIAL INCLUSION: THE ADVERSE EFFECTS OF BANK MERGERS ON DEPOSITORS 6–9 (Dec. 1, 2018), perma.cc/RLC9-TESN (PDF) (establishing how bank consolidation can negatively impact low-income depositors); Robin A. Prager & Timothy H. Hannan, *Do Substantial Horizontal Mergers Generate Significant Price Effects? Evidence from the Banking Industry*, 46 J. INDUS. ECON. 433, 442–49 (1998) (showing that mergers exceeding Department of Justice guidelines may have caused interest rates less favorable to consumers).

62. *See* BORD, *supra* note 61, at 23–25 (explaining that "acquisitions of small banks by large banks cause an increase in the number of check cashing facilities in the zip code"); Rohit Chopra & Jeremy Kress, Comment of FTC Commissioner Rohit Chopra and Professor Jeremy C. Kress (Oct. 16, 2020), perma.cc/SHZ5-GSKJ (stating that check-cashing companies and other predatory institutions proliferate in low-income neighborhoods after bank consolidations).

63. Chopra & Kress, *supra* note 62; *see* Garmaise & Moskowitz, *supra* note 61, at 496 ("[N]eighborhoods that experience greater reductions in bank competition . . . are subject to future higher interest rates, diminished local construction, lower real estate prices, and an influx of poorer households.").

64. *See Cartels Beware: The Antitrust Division Launches Criminal Investigations in Key Industries*, DOJ (Apr. 10, 2018) [hereinafter *Cartels*

eggs, and similar markets have shared information to monitor each other's output to keep supply low and prices high.[65] One cannot overstate the dangers of food cartels, as almost everyone must pay the high prices.[66] In 2019, Pilgrim's Pride fixed and increased chicken prices by 50 percent—affecting 98 percent of chickens sold in the United States—as the company generated $11.4 billion in revenue.[67] And as low-income communities lose

Beware], perma.cc/PJ7Z-J44H (asserting that the DOJ intends to target "key industries" such as food markets); PHILIP H. HOWARD, CONCENTRATION AND POWER IN THE FOOD SYSTEM: WHO CONTROLS WHAT WE EAT? 4–5 (David Goodman & Michael K. Goodman eds., 2016) (describing negative impacts of monopoly power in the food industry, including "consumers paying higher prices, suppliers receiving lower prices, or reduced innovation").

65. *See In re* Pork Antitrust Litig., No. 18-1776, 2019 WL 3752497, at *3 (D. Minn. Aug. 8, 2019) (explaining that pork producers allegedly used a data program, Agri Stats, to monitor each other's behavior to limit output and raise prices); *In re* Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772, 781 (N.D. Ill. 2017) (describing the use of Agri Stats by chicken producers); *In re* Processed Egg Prods. Antitrust Litig., 206 F. Supp. 3d 1033, 1040 (E.D. Pa. 2016) (reviewing allegations of anticompetitive behavior in the egg market); *US: Beef Packers Seek Dismissal of Antitrust Suit*, COMPETITION POL'Y INT'L (Jan. 14, 2020), perma.cc/QGA5-SM5E (explaining allegations of beef packers conspiring to inflate profits by depressing price of fed cattle); Jonathan Stempel, *Lawsuit Claims U.S. Pork Companies Conspired to Inflate Prices*, REUTERS (June 28, 2018, 6:20 PM), perma.cc/2NDB-G92M (reporting that U.S. pork companies were accused of conspiring to inflate pork prices).

66. *See Cartels Beware*, *supra* note 64 ("The Antitrust Division will continue to protect American consumers and taxpayers by investigating and prosecuting criminal antitrust violations across all sectors of the economy."); Nina Lakhani et al., *Revealed: The True Extent of America's Food Monopolies, and Who Pays the Price*, GUARDIAN (July 14, 2021, 6:00 AM), perma.cc/K8BL-MLUD (stating that supermarkets are quick to increase prices to maintain profit margins, "but when commodities go down, consumer prices are often much slower to decrease").

67. *See* Eshe Nelson & Carlos Tejada, *Pilgrim's Pride to Pay $110 Million to Settle Charges of Fixing Chicken Prices*, N.Y. TIMES (Oct. 14, 2020), perma.cc/B57X-JU28 (describing Pilgrim's Pride's chicken-pricing scheme); David Yaffe-Bellany, *Why Chicken Producers Are Under Investigation for Price-Fixing*, N.Y. TIMES (June 25, 2019), perma.cc/DK7Z-3XSB (stating that chicken companies including Pilgrim's Pride shared detailed information with Agri Stats in order to increase the consumer price of chicken as the "cost[] of chicken breeding" fell); *see also* Jacob Bunge & Brent Kendall, *Pilgrim's Pride Reaches Plea Deal with Justice Department on Chicken Price-Fixing Allegations*, WALL ST. J. (Oct. 14, 2020, 12:36 PM), perma.cc/YQ3D-SH9S (commenting that Pilgrim's Pride's guilty plea "will make it the first company to admit in court to what prosecutors have alleged was a roughly seven-year effort across much of the U.S. chicken industry to inflate prices").

the ability to afford monopoly prices, dollar stores have replaced grocery stores, resulting in increased obesity, malnutrition, and related ailments.[68] In fact, the dangers of food cartels have taken new meaning as COVID-19 ravages meat processing plants, compelling low-income labor like undocumented workers to toil in contaminated facilities.[69]

Speaking of labor, the employment market has only recently emerged as a pressing antitrust issue.[70] This is because antitrust courts had historically failed to recognize labor as an economic commodity.[71] Another reason is that labor appears unrelated to consumer welfare since lessening labor costs can theoretically allow companies to offer cheaper goods, *benefiting* consumers.[72] This framework had long enabled firms to enter no-poaching agreements or otherwise collude in ways meant to suppress laborers' salaries and mobility.[73] But in actuality, labor is an essential commodity because individuals cannot easily switch jobs due to the necessity of working.[74] It was only when

68. *See* Jo Moses, *America Runs on Poverty: How Food Monopolies Exploit the Poor*, CAMPANIL (Jan. 29, 2020), perma.cc/5U2P-MRCG ("The biggest contributor to America's poor health is the fact that for most people, healthy food is simply too expensive to buy because America's agriculture is run by monopolies.").

69. *See* Ron Knox, *Monopolies in Meat: Endangering Workers, Farmers, and Consumers*, AM. PROSPECT (May 4, 2020), perma.cc/NCK2-PQZ3 (describing how slaughterhouses became hubs for COVID-19 infections in their communities).

70. *See, e.g.*, *No-Poach Approach*, DOJ (Sept. 30, 2019), perma.cc/LSZ9-LY97 ("Robbing employees of labor market competition deprives them of job opportunities, information, and the ability to use competing offers to negotiate better terms of employment.").

71. *See* Day, *Anticompetitive Employment*, *supra* note 22, at 492 (discussing why courts and enforcers had historically ignored anticompetitive acts in labor markets).

72. *See id.* at 491–92 (explaining that courts typically allow labor cartels as long as "their agreement achieves a goal other than wage fixing").

73. *See* Rachel Abrams, *Why Aren't Paychecks Growing? A Burger-Joint Clause Offers a Clue*, N.Y. TIMES (Sept. 27, 2017), perma.cc/23UL-DNZN (describing how fast-food chains often have agreements prohibiting franchise owners from hiring workers away from other franchises); Mike Leonard, *Jimmy John's No-Poach Suit Merits Class Status, Plaintiff Says*, BLOOMBERG L. (Jan. 6, 2020, 5:08 PM), perma.cc/3V5M-26NF ("The suit claims the no-poach clauses, which bar Jimmy John's and its franchises from soliciting one another's workers, reduce employee mobility and depress wages.").

74. *See* Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 314 (1991)

the *New York Times* published an article in 2017 showing that no-poaching agreements dominate *minimum wage* markets that the Department of Justice ("DOJ") focused on their anticompetitive dangers.[75] It is striking that no-poaching agreements affect a quarter of fast-food workers by imperiling their already below-subsistence wages.[76]

Curiously, though, antitrust courts have largely deferred to cartels and monopolists even when necessities are involved.[77] In light of the above evidence, shouldn't antitrust law increase scrutiny in the most important markets? After all, if monopolizing a necessity imposes costs beyond high prices—delivering an extra blow to democracy, social welfare, and marginalized groups—shouldn't this entail a facet of consumer welfare? Part II examines why courts have, in referencing the Sherman Act's legislative history, embraced microeconomic theory, eroded antitrust's potency, and disregarded any concern for the degree to which society depends on the restrained good, no matter the effects on disenfranchised communities.

> Labor is an extremely perishable commodity—an hour not worked today can never be recovered. Although professional athletes have alternative occupations, those with real talent are so scarce that their wages as athletes are generally well above the wages available in their next most lucrative endeavor. Accordingly, the supply of labor effort for each individual athlete is quite inelastic. Collusion among employers can drive the wage down to the individual's reservation wage.

75. *See* Abrams, *supra* note 73 (explaining how the no-poaching rules did not face DOJ scrutiny until two suits challenged their legality); Leonard, *supra* note 73 (stating that the suit against Jimmy John's is part of a greater trend of suits challenging no-poaching agreements).

76. *See* Abrams, *supra* note 73 ("The no-hire rules affect more than 70,000 restaurants . . . ."); James Doubek, *Eight Restaurant Chains Agree to End "No-Poach" Agreements Under Threat of Lawsuit*, NPR (Aug. 22, 2018, 3:45 AM), perma.cc/TV29-MAZP (explaining how the no-poaching agreements disincentivize franchises to offer raises by restricting competition).

77. *See* Day, *Anticompetitive Employment*, *supra* note 22, at 492 ("[C]ourts and antitrust agencies have largely refused to condemn labor cartels, asserting that employers may collude so long as their agreement achieves a goal other than wage fixing.").

II. ANTITRUST LAW'S INDIFFERENCE TO NECESSITIES

Modern enforcement has been called "antitrust minimalism" because it seldom condemns cartels and monopolists.[78] This landscape arose in the 1970s when courts and scholars sought to reform antitrust law based on two sources of authority: the Sherman Act's legislative record[79] and microeconomic theory.[80] Under this framework, courts scrutinize the exclusionary conduct—not monopolized good—which has largely enabled firms to erect barriers to entry in critical markets.[81] This Part reviews the Sherman Act's history to explain why antitrust enforcement is so deferential to exclusionary conduct as well as the enterprise's failure to inquire into the degree to which consumers depend on the monopolized good.

A. *The Historical Rise of Antitrust's Deference*

1. The Evolution of the Sherman Act

Antitrust's deference is attributable to the lack of guidance in the Sherman Act's text, which has given non-statutory sources of authority a key role in defining enforcement's scope.[82] Because courts had supposedly "over enforced" the Sherman Act

78. *See* Eleanor M. Fox, *Monopolization, Abuse of Dominance, and the Indeterminacy of Economics: The U.S./E.U. Divide*, 2006 UTAH L. REV. 725, 728 (2006) (discussing antitrust minimalism).

79. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940) ("[C]ourts should interpret [the Sherman Act] in the light of its legislative history . . . .").

80. *See* ROBERT H. BORK, THE ANTITRUST PARADOX 7 (1978) ("A consumer-oriented law must employ basic economic theory to judge which market structures and practices are harmful and which beneficial."); Cont'l T. V., Inc. v. GTE Sylvania, 433 U.S. 36, 57–58 (1977) ("Such restrictions, in varying forms, are widely used in our free market economy. . . . [T]here is substantial scholarly and judicial authority supporting their economic utility.").

81. *See In re* Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772, 784 (N.D. Ill. 2017) (describing how the defendants used contracts that allowed prices to fluctuate with the market in order to drive prices up); *In re* Pork Antitrust Litig., No. 18-1776, 2019 WL 3752497, at *7 (D. Minn. Aug. 8, 2019) (explaining how the defendants colluded to cut pork production and increase prices through public statements and sharing non-public information).

82. *See* Priest, *supra* note 13, at S14–15 (describing Robert Bork's influence on the Supreme Court's antitrust jurisprudence).

for generations after the statute's enactment, a movement sought to narrow antitrust's scope.[83] This analysis sets the stage for the next discussion explaining why antitrust courts seldom impose liability as well as ignore the underlying market's importance.

Consider the broad language in the Sherman Act: Section 1 bans "*every*" restraint of trade[84] while Section 2 makes it illegal to "monopolize . . . *any* part of the trade or commerce."[85] The problem, according to the Supreme Court, is that a literal reading of these sections would condemn nearly all forms of business.[86] Rather than adopting such an absurd approach, the Supreme Court noted that the drafters of the Sherman Act intended to codify the common law of competition, which the judiciary was later supposed to define.[87] And that's exactly what happened. In 1911, for example, the Supreme Court reviewed the common law to rule that enforcement may only condemn "unreasonable" restraints of trade—as opposed to all exclusionary acts—even though the Sherman Act lacks this language.[88]

Antitrust fully integrated microeconomic theory and thereby took its modern shape in the 1970s when courts and scholars sought again to limit enforcement based on its

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83. *See* Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. 75, 79 (2010) ("[T]he law seeks to err on the side of underenforcement.").

84. 15 U.S.C. § 1.

85. *Id.* § 2 (emphasis added).

86. *See* 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 338 (2d ed. 2003) ("We cannot realistically hope to know and to weigh confidently all that bears on competitive impact."); Gavil, *Exclusionary Distribution*, *supra* note 12, at 38 ("To be effective in combating exclusionary strategies by dominant firms . . . courts must be armed with the tools to act quickly to preserve the competition of new entrants."); Myron C. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1, 13 n.59 (1983) ("The *Brown Shoe* decision . . . could, by misconstruing the proper purpose of antitrust laws, produce the same adverse effect on economic growth as any clear congressional statement that the antitrust laws serve multiple yet inconsistent policies.").

87. *See Apex Hosiery*, 310 U.S. at 489 ("[C]ourts should interpret [the Sherman Act] in the light of its legislative history and of the particular evils at which the legislation was aimed.").

88. *See* Standard Oil Co. v. United States, 221 U.S. 1, 59–62 (1911).

statutory history.[89] Before this reform, antitrust was criticized as adrift because—given the Sherman Act's vagueness—courts would often punish welfare *enhancing* acts such as efforts of companies to corner the market by offering superior goods at low prices.[90] This inspired, most notably, "the Chicago School"[91] to advocate for a more limited vision of antitrust.[92] At the movement's head was Robert Bork, who argued that the Sherman Act's drafters intended to enact a "consumer welfare prescription" defined in microeconomic terms.[93] If antitrust was reduced to economic goals, as he asserted, it would more rigorously foster competition and align enforcement with the drafters' goals.[94] The Supreme Court adopted a form of Bork's consumer welfare vision in 1977 when it embraced microeconomics in *Continental T. V., Inc. v. GTE Sylvania.*[95]

89. *See* Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1312 (1999) ("Today's courts, by requiring plaintiffs to demonstrate an anticompetitive effect, preserve the framers' focus on competition. . . . The initial threshold of anticompetitive effect is firmly ensconced in the legislative history.").

90. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) ("But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. *Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets*." (emphasis added)); *see also* Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 620 (2012) (noting that courts should blend social and political goals into clearer rules and legal presumptions for antitrust).

91. *See* Priest, *supra* note 13, at S7 (describing the Chicago School as a group of scholars who "disdained antitrust law . . . on the grounds that the market itself would correct any exercise of market power more effectively than the law and the courts").

92. *See* Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 133–34 (2011) ("All antitrust lawyers and economists know that the stated instrumental goal of antitrust laws is 'consumer welfare,' which is a defined term in economics.").

93. BORK, *supra* note 80, at 66 (explaining that even though consumer protection is not as clearly a goal of later statutes, it is still present in the debates).

94. *See id.* at 61 ("The legislative history of the Sherman Act, the oldest and most basic of the antitrust statutes, displays the clear and exclusive policy intention of promoting consumer welfare."); Alan J. Meese, *Monopolization, Exclusion, and the Theory of the Firm*, 89 MINN. L. REV. 743, 773–93 (2005) (describing the perfect competition model).

95. 433 U.S. 36 (1977); *see id.* at 49 ("Under this rule, the fact-finding weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on

Under the modern consumer welfare approach, nearly all restraints of trade (specifically, Section 1 lawsuits) are addressed under the rule of reason, which gauges whether an act has unreasonably caused an economic injury like high prices or restricted output.[96] This approach has typically allowed defendants to justify excluding competition by citing the procompetitive benefits of doing so.[97] However, courts condemn as per se illegal a small list of restraints, such as horizontal price-fixing, that render reliably anticompetitive effects—no justification can save the defendant.[98] A similar analysis of anticompetitive and procompetitive effects is used to resolve Section 2 claims involving the market's (attempted) monopolization.[99]

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competition."); *see also* Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2406 (2013) (discussing the importance of *GTE Sylvania*).

96. *See* Deborah Heart & Lung Ctr. v. Penn Presbyterian Med. Ctr., No. 11-1290, 2011 WL 6935276, at *7 n.8 (D.N.J. Dec. 30, 2011) ("In all cases, the relevant question is instead whether there has been an adverse effect on price, output, quality, choice, or innovation in the market as a whole."); *see also* Cudahy & Devlin, *supra* note 11, at 75–77 (explaining the processes by which economic theory permitted more conduct that was once considered anticompetitive).

97. *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018) (describing a burden-shifting analysis where defendants can shift the burden to plaintiffs by showing procompetitive rationales for their restraint); *see also* John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 506 (2019) [hereinafter Newman, *Procompetitive Justifications*] (explaining the use and questions of procompetitive justifications in the rule of reason); Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co., 926 F. Supp. 2d 36, 42 (D.D.C. 2013) (elaborating on how plaintiffs can succeed in a Section 1 claim).

98. *See* Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289 (1985) ("This *per se* approach permits categorical judgments with respect to certain business practices that have proved to be predominantly anticompetitive."); Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006) ("*Per se* liability is reserved for only those agreements that are 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'" (quoting Nat'l Soc. of Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978))); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221–22 (1940) (ruling that price-fixing is a per se illegal activity); *In re* Blue Cross Blue Shield Antitrust Litig., 308 F. Supp. 3d 1241, 1277–78 (N.D. Ala. 2018) (stating that "certain group boycotts" are considered per se illegal).

99. Akin to Section 1, the defendant must have committed an exclusionary act resulting in economic harm. And like Section 1, the defendant can typically justify the anticompetitive effects with evidence of

So if antitrust affords most defendants the opportunity to justify exclusionary conduct, how do courts assess whether a firm has successfully done so? This inquiry is critical because it explains why antitrust courts not only defer to defendants but also ignore whether anticompetitive practices in essential markets have especially impaired consumer welfare.

2. The Defendant "Virtually Always Wins"

The rule of reason is far from a fifty-fifty gambit since defendants "virtually always win[]."[100] Under the rule of reason, a court questions whether the exclusionary act produced market failure or, alternatively, procompetitive efficiencies.[101] This is accomplished by comparing consumer behaviors in the

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procompetitive benefits. *See* Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004)

> [Section] 2 of the Sherman Act . . . declares that a firm shall not "monopolize" or "attempt to monopolize." It is settled law that this offense requires, in addition to the possession of monopoly power in the relevant market, "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. . . ." To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*. (internal citations omitted)

Trans Sport, Inc. v. Starter Sportswear, Inc., 775 F. Supp. 536, 541 (N.D.N.Y. 1991) ("At the very least, willful maintenance of monopoly power requires the plaintiff to prove that the monopolist has acted in an unreasonably exclusionary manner, that is, that the monopolist's challenged practice has yielded unreasonable anticompetitive effects."); United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001) (stating that a defendant can offer procompetitive justifications to overcome a Section 2 lawsuit).

100. Albert A. Foer, *The Political-Economic Nature of Antitrust*, 27 ST. LOUIS U. L.J. 331, 337–38 (1983).

101. Market failure is when the economy systematically misallocates resources. For instance, sometimes market failure arises when firms exploit an existing gap in the law, like when a chemical company legally dumps waste into local rivers. *See* Karl S. Coplan, *The Missing Element of Environmental Cost-Benefit Analysis: Compensation for the Loss of Regulatory Benefits*, 30 GEO. ENV'T L. REV. 281, 284 (2018) (explaining market failure as a negative externality in the environmental context); Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 4 F. Supp. 3d 1123, 1137 (D. Ariz. 2014) ("The purpose of antitrust law is not to protect market participants from the market; it is to protect the public from market failure."); *see also* Newman, *Procompetitive Justifications*, *supra* note 97, at 510, 512–13 (discussing the role of surplus in antitrust law).

restrained market to a hypothetically competitive version of it.[102] When a cartel increases a good's price, some people will spend more to buy it while others will purchase a substitute item or nothing at all; the harm is the gap between one's first choice (for example, the preferred good at a competitive price) and second choice (e.g., spending more on the same item or buying a less-desirable good).[103] The defendant may then justify an act's anticompetitive effects by noting its procompetitive efficiencies (the next subpart offers examples).[104] In important part, few defendants suffer liability so long as they can identify some procompetitive benefit achieved from restraining trade.[105]

At the core of antitrust's deference is that procompetitive outcomes are thought to underlie most business arrangements.[106] The theory is that firms would struggle to

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102. *See* Newman, *Procompetitive Justifications*, *supra* note 97, at 506–08 (describing the two different roles procompetitive justifications play in a rule of reason analysis).

103. *See* Day, *Anticompetitive Employment*, *supra* note 22, at 521–22

> [C]onsumers are expected to abandon those [artificially high-priced] goods for cheaper products that should correct the market. For example, if firms colluded to increase the price of their cherries, consumers would likely purchase cheaper cherries from other sellers, or even substitute fruit, which would drive the cartel out of business.

104. *See* Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 895–96 (2007) (reviewing whether the restraint type may offer procompetitive benefits, making it more proper to fall under the reason of reason).

105. *See* Foer, *supra* note 100, at 338 ("The information necessary to defeat a reasonableness defense usually is very difficult to obtain, it is expensive to obtain, and generally there is enough of a basis on which to show some business rationale that the plaintiff has a very hard and lengthy fight.").

106. *See* Carrier, *supra* note 89, at 1318

> [C]ontracting parties that pursued their own interests provided the "just cause or excuse" necessary to protect their behavior. . . . [W]here the public was not "serious[ly] inconvenience[d]" by the parties' control of the market, the combination would be sustained as long as "the advantages of the combination to the parties thereto seemed to be of a legitimate character." (footnotes omitted).

innovate,[107] resolve litigation,[108] create efficiencies,[109] or achieve other legitimate goals without excluding some competition.[110] Another concern is that antitrust's overenforcement may deter beneficial forms of competition if firms feared "false positives" (such as the suffering of antitrust liability for an act that was actually welfare enhancing).[111] Also, firms and consumers may presumably navigate around monopolies, which can correct the market without antitrust enforcement.[112]

In fact, not only do the vast majority of exclusionary acts receive deference under the rule of reason, but the number is growing.[113] Since *GTE Sylvania*, the Supreme Court has increasingly removed cases from the per se illegal grouping in favor of the rule of reason.[114] For example, in *Leegin Creative*

107. *See, e.g.*, Mylan Pharms., Inc. v. Warner Chilcott Pub. Ltd., Civ. No. 12-3824, 2015 WL 1736957, at *15 (E.D. Pa. Apr. 16, 2015) ("Once the branded drug manufacturer offered a procompetitive justification for the product change that the generic manufacturer could not rebut, courts and juries would have to determine which product changes were 'sufficiently innovative' to justify their anticompetitive effects.").

108. *See id.* at *16 ("The prospect of costly and uncertain litigation every time a company reformulates a brand-name drug would likely increase costs and discourage manufacturers from seeking to improve existing drugs.").

109. *See* Carrier, *supra* note 89, at 1303–04 (explaining that the Chicago School would seldom impose liability given that most practices are, on balance, efficient).

110. *See* State Oil Co. v. Khan, 522 U.S. 3, 17 (1997) (stating that courts could determine when setting maximum prices acted as a mask for the per se illegal act of setting minimum prices).

111. *See* Devlin & Jacobs, *supra* note 83, at 84 (stating that "false positives" are deliberately siphoned off resulting in "many consumer-injuring acts" going unpunished); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 4 (1984) ("Antitrust is costly. The judges act with imperfect information about the effects of the practices at stake. The costs of action and information are the limits of antitrust. I ask in this essay how we should respond to these limits.").

112. *See supra* notes 10–14 and accompanying text.

113. *See In re* ATM Fee Antitrust Litig., 554 F. Supp. 2d 1003, 1010 (N.D. Cal. 2008) (remarking that the rule of reason determines the majority of cases).

114. *See* Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 VAND. L. REV. 1753, 1757–58 (1994) ("The history of antitrust analysis since *GTE Sylvania* has been, with only a few exceptions, a steady erosion of the per se approach to analyzing Section 1 conduct and an expanded use of the rule of reason to consider a restraint's economic impact."); Richard M. Steuer, *Indiana Federation of Dentists: The Per Se-Rule of Reason Continuum (and a Comment*

Leather Products, Inc. v. PSKS, Inc.,[115] the Supreme Court ruled that lower courts must now assess vertical price restraints under the rule of reason rather than the old way of per se illegality.[116] This trend away from per se illegality has notably eroded antitrust's bite, empowering firms to exclude competition provided that the rule of reason applies (which it almost always does).[117]

In important part, antitrust lacks safeguards for essential markets. Each level of review scrutinizes the specific *conduct* alleged to have caused harm rather than *the good* monopolized or restrained.[118] Under either the rule of reason or per se approach, the relative importance of gasoline and baseball cards is irrelevant.[119] Note, however, that the rule of reason could implicitly give more (negative) weight to restraints of essential goods if courts actually compared the costs and benefits of excluding competition—but in practice, almost all restraints are declared procompetitive.[120] That said, the same is also true of procompetitive justifications: an act could especially benefit consumers in an essential market.[121]

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on State Action), 8 CARDOZO L. REV. 1101, 1103 (1987) (explaining that the Supreme Court has increasingly determined that cases should be judged under the rule of reason).

115. 551 U.S. 877 (2007).

116. *See id.* at 907 ("Vertical price restraints are to be judged according to the rule of reason.").

117. *See* Abbe Gluck, Case Note, *Preserving Per Se*, 108 YALE L.J. 913, 915 (1999) ("By importing the jurisdictional effects requirement into the elements of the substantive offense, the court dispossessed the per se rule of its powerful presumptions.").

118. *See In re* Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772, 784 (N.D. Ill. 2017) (evaluating antitrust violations by considering food producers' anticompetitive practices, but not the necessity of the food).

119. *See* Rahman, *supra* note 42, at 2461 (explaining how monopolies in essential markets could have extremely detrimental effects on consumers).

120. *See* Foer, *supra* note 100, at 337–38 ("[W]hen the rule of reason is applied, the defendant virtually always wins.").

121. *See* Newman, *Procompetitive Justifications*, *supra* note 97, at 513 ("[I]f a challenged restraint somehow benefits the competitive process, the defendant may avoid antitrust liability.").

One could argue that the process of measuring damages can redress anticompetitive conduct in essential markets.[122] The theory is that courts may calculate the heightened damages of restraining or monopolizing necessities into the plaintiffs' award, which would ostensibly account for the elevated injuries.[123] However, so long as antitrust offenses are rarely found, the levying of damages is more or less irrelevant. After all, the threat of elevated punishment is hardly effective if no one is actually punished.[124]

This landscape has endured because pinning liability to the challenged act provides clear rules.[125] For example, if a firm engages in horizontal price-fixing, it can expect to incur per se liability.[126] The efficiency of predicting one's risks has thus sustained antitrust's framework.[127]

But has the rule of reason produced equitable results with respect to essential goods? Consider the labor, pharmaceutical, and broadband markets. In each instance, rather than raising the defendant's bar due to the market's importance, courts have generally deferred to the defendant in finding that the exclusionary conduct was procompetitive.[128] It is notable that marginalized groups have, as the next subpart explains, tended to suffer heightened or specialized injuries.

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122. *See* HERBERT J. HOVENKAMP, A PRIMER ON ANTITRUST DAMAGES 27–28 (2011), https://perma.cc/HP9P-CGT5 (PDF) (describing the "overcharge" method of calculating damages when there is a monopoly).

123. *See id.* at 28 ("The overcharge 'caused' by a particular antitrust violation could be considerably less if the market was not performing competitively before the violation occurred." (internal citations omitted)).

124. *See id.* at 6 (noting a relationship between "underdeterrence and socially costly antitrust violations").

125. *See* Newman, *Procompetitive Justifications*, *supra* note 97, at 506–07.

126. *See* nFinanSe, Inc. v. Interactive Commc'ns Int'l, Inc., No. 1:11-CV-3728-AT, 2012 WL 13013003, at *1–2 (N.D. Ga. Oct. 15, 2012) (explaining that horizontal price fixing is per se illegal under the antitrust laws).

127. *See* Newman, *Procompetitive Justifications*, *supra* note 97, at 513 (explaining that the rule-of-reason analysis fits comfortably within the framework of antitrust law).

128. *See infra* Part II.B.

B. *Examples of Procompetitive Justifications in Essential Markets*

1. Labor

Courts have often cited the benefits enjoyed *by employers* in justifying collusion against workers. In *Ogden v. Little Caesars Enterprises Inc.*,[129] Little Caesars franchisees secretly refused to hire each other's managers who could have earned higher wages in a fair labor market.[130] As the complaint noted, entry-level workers in the fast food industry receive about $7 billion per year in public assistance due to their low wages, restrained by no-poaching pacts.[131] The court declared that the collusion was procompetitive—even though assistant managers earn only about $11.57 per hour[132]—because Little Caesars could better compete against rival chains like Pizza Hut by freezing salaries.[133]

Other courts have reached the same conclusion.[134] One opinion likened no-poaching deals to noncompete clauses,

129. 393 F. Supp. 3d 622 (E.D. Mich. 2019).

130. *Id*. at 627–30.

131. Complaint at 29, Ogden v. Little Caesars Enters., Inc., 393 F. Supp. 3d 622 (E.D. Mich. 2019) (No. 2:18-cv-12792).

132. *Little Caesars—Management Salaries in the United States*, INDEED, perma.cc/6B9H-CL9P.

133. *See Ogden*, 393 F. Supp. 3d at 632 (agreeing with the defendant's argument that a vertical agreement between a franchisor and franchisee "that only restricts 'intrabrand' competition" actually promotes competition among businesses).

134. *See, e.g.*, Haines v. VeriMed Healthcare Network, LLC, 613 F. Supp. 2d 1133, 1137 (E.D. Mo. 2009) (finding a noncompete agreement was not per se anticompetitive); Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc., No. 17CV205-MMA (MDD), 2017 WL 6059145, at *5 (S.D. Cal. Dec. 6, 2017) (finding no unreasonable restraint to trade when defendant entered into noncompete agreements with a subcontractor who took on defendant's spillover work); *see also* Hiba Hafiz, *Labor Antitrust Paradox*, 87 U. CHI. L. REV. 381, 383 (2020) (describing the difficulty of demonstrating harm to consumers); Suresh Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 549 (2018) (noting "the paucity of antitrust cases involving labor markets" and urging more substantial enforcement); Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1038 (2019) (indicating that, despite anticompetitive labor markets not receiving a great deal of antitrust enforcement until recently, "a growing body of empirical evidence indicates that labor market monopsony is a real issue"); Eric A. Posner, *The Antitrust Challenge to Covenants Not to*

ignoring the fact that an employee must assent to a noncompete whereas a no-poaching arrangement is clandestinely imposed on workers.[135] In *Eichorn v. AT & T Corp.*,[136] AT&T sought to sell a subsidiary by agreeing not to rehire former workers, which caused wages to decline; here, the United States Court of Appeals for the Third Circuit insisted that AT&T had *primarily* intended to effectuate a merger and labor's injuries were ancillary, justifying whatever burdens were levied on workers.[137] In a case before the United States Court of Appeals for the Ninth Circuit, the notion that people enjoy watching unpaid student-athletes entailed a procompetitive justification supporting a cartel agreement among universities not to pay them.[138] In each case, the court emphasized the benefits inured

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Compete in Employment Contracts, 83 ANTITRUST L.J. 165, 171 (2020) (identifying different courts' approaches to noncompete agreements in the antitrust context).

135. *See Haines*, 613 F. Supp. 2d at 1139

> She was, in effect, subjected to a non-compete agreement to which she was never made aware. Rather than tell Haines directly that she could not seek work from VeriMed's clients, VeriMed chose only to tell its clients that they could not hire Haines. . . . Haines' injury did not arise from an unlawful market restraint; it arose from her own lack of knowledge and VeriMed's failure to disclose material information. The antitrust laws are not designed to redress this type of "informational" injury to a single plaintiff.

136. 248 F.3d 131 (3d Cir. 2001).

137. *See id.* at 146

> The primary purpose of the no-hire agreement was to ensure that Texas Pacific Group, as the purchaser of Paradyne, could retain the skilled services of Paradyne's employees. Although the no-hire agreement precluded the employees from seeking employment at an AT & T affiliate for 245 days, the primary purpose of the agreement was not anti-competitive. Contrary to plaintiffs' assertions, we can find no evidence to support their claim that the no-hire agreement was executed for the improper purpose of restraining trade and the cost of labor in the telecommunications industry. The primary purpose of the no-hire agreement was to ensure the successful sale of Paradyne to Texas Pacific Group which required workforce continuity.

138. *See* O'Bannon v. NCAA, 802 F.3d 1049, 1073 (9th Cir. 2015) ("[T]he district court found, and the record supports that there is a concrete procompetitive effect in the NCAA's commitment to amateurism: namely, that the amateur nature of collegiate sports increases their appeal to consumers."); *e.g.*, Oliver Connolly, *Trevor Lawrence Is Already Great at 19. Money Is Keeping Him Out of the NFL*, GUARDIAN (Jan. 9, 2019, 8:03 AM),

to colluding employers and ignored the leverage gained from exploiting the necessity of working and saliency of paying fair wages.[139]

2. Pharmaceuticals

In *Mylan Pharmaceuticals Inc. v. Warner Chilcott Public Ltd.*,[140] Warner Chilcott allegedly manipulated the process of approving a generic drug in order to suppress competition.[141] Before the Hatch-Waxman Act,[142] a generic firm could only begin the multiyear process of developing a generic drug after the drug's patent—which is typically owned by a "branded" company like Warner Chilcott—expired.[143] The effect is that cheaper generics were barred from entering the market, extending the brand's exclusivity beyond the twenty years granted in its patent.[144] This inspired the Hatch-Waxman Act, which empowers a generic company to start the approval process during a patent's term so that generics can interject competition into the market at the moment when the patent

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https://perma.cc/8M7C-TB8A (outlining the case of a college football star whose amateur status precluded him from earning millions).

139. *See Eichorn*, 248 F.3d at 146–47 (finding the no-hire agreement procompetitive, the court nevertheless recognized that "[w]hile the no-hire agreement essentially barred the plaintiffs' ability to retain their desirable AT & T pension benefits, Section 1 of the Sherman Antitrust Act is not the appropriate vehicle here for redress"); *O'Bannon*, 802 F.3d at 1073 ("[T]he NCAA's compensation rules serve the two procompetitive purposes identified by the district court: integrating academics with athletics, and 'preserving the popularity of the NCAA's product by promoting its current understanding of amateurism.'" (citation omitted)).

140. 838 F.3d 421 (3d Cir. 2016).

141. *See id.* at 429 ("[I]t appears that Defendants took a number of steps regarding the capsules that, in conjunction, Mylan claims violated the Sherman Act.").

142. Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (codified as amended in scattered sections of 35 U.S.C.).

143. *See Mylan Pharms.*, 838 F.3d at 427 ("The Act loosened the approval rules for generics by creating an Abbreviated New Drug Application ('ANDA') process."); FTC v. Actavis, Inc., 570 U.S. 136, 152–53 (2013) (recounting the landscape of the patent process before the Hatch-Waxman Act).

144. *See Actavis*, 570 U.S. at 152–53 (citing the Hatch-Waxman Act's legislative history to show that the bill was introduced to reduce the delay in introducing cheaper generics).

expires.[145] A key condition of the Hatch-Waxman Act, though, is that the generic drug must constitute a bioequivalent of a drug *currently* on the market.[146] Knowing this, Warner Chilcott altered nominal aspects of its drug, Doryx (which treats painful skin conditions, sexually transmitted diseases, and even anthrax)[147] and pulled old versions from the market.[148] This forced generic companies to restart or abandon the approval process, allowing Warner Chilcott to charge monopoly prices beyond the lifespan of its patent.[149] The court deferred to Warner Chilcott in characterizing its "product hop" and "hard switch" as procompetitive acts without questioning the degree to which people need Doryx.[150]

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145. *See id.* at 142 ("The Hatch-Waxman process, by allowing the generic to piggy-back on the pioneer's approval efforts, speed[s] the introduction of low-cost generic drugs to market, thereby furthering drug competition." (alteration in original) (citation omitted)).

146. *See* Gregory R. Day, *Innovative Antitrust and the Patent System*, 96 NEB. L. REV. 829, 854–55 (2018) (explaining the manner in which generics can enter the approval process during a patent's tenure).

147. Complaint at 11, Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd., 2015 WL 1736957 (E.D. Pa. Apr. 16, 2015) (No. 2:12CV03824), 2012 WL 2927119

> Doxycycline hyclate is a tetracycline-class oral antibiotic that is widely prescribed for the adjunctive treatment of severe acne, and that is also indicated for (1) rickettsial infections, (2) sexually transmitted infections, (3) respiratory tract infections, (4) specific bacterial infections, (5) ophthalmic infections, (6) anthrax, including inhalational anthrax (post-exposure), (7) alternative treatment for selected infections when penicillin is contraindicated, (8) adjunctive therapy in acute intestinal amebiasis, and (9) prophylaxis of malaria.

148. *See Mylan Pharms.*, 838 F.3d at 429 ("Defendants made a number of other changes to the existing Doryx product and thereafter pulled older versions from the market.").

149. *See id.* ("Each of these changes would have required generic manufacturers to file, and await approval of, a new ANDA demonstrating the similarities between their product and the reformulated Doryx product in order to continue selling generics that were AB-rated to the newest Doryx product.").

150. Mark A. Ford et al., *Doryx: Third Circuit Affirms Dismissal of Product Hopping Claim*, WILMERHALE (Sept. 29, 2016), perma.cc/M35U-R6RJ (explaining that the allegedly anticompetitive conduct increased prices).

3. The Digital Divide

Broadband firms have successfully cited their ability to make money as a procompetitive justification despite the anticompetitive effects felt by especially disaffected groups.[151] In one case, Comcast and rivals divided the broadband market so that each could monopolize a region.[152] Comcast justified colluding based on its newfound largeness, which the district court affirmed.[153] Although the cartel raised prices—to the tune of about $875 million[154]—the plaintiffs did not survive summary judgement.[155] By ruling in Comcast's favor, the court prioritized telecom monopolists and affluent consumers over those who need, yet can't access, reliable internet.

Illustrating the effects of broadband monopolies, roughly 114 million Americans lack internet services,[156] nearly half of

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151. *Cf.* Gary Wax, Note, *Cable Company Monopoly: Comcast and Time Warner Control the Board*, 28 LOY. L.A. ENT. L. REV. 159, 198 (2008) ("[B]ecause Comcast and Time Warner are accomplished monopolists, they are able to cloak their anticompetitive conduct so that opponents are unable to prove actual evidence of dramatic anticompetitive behavior.").

152. Behrend v. Comcast Corp., No. 03-6604, 2012 WL 1231794, at *1 (E.D. Pa. Apr. 12, 2012).

153. *See id.* at *21

> [C]lustering enabled Comcast to realize marketing efficiencies by increasing its presence across a DMA (thereby enabling its self-advertising to reach a wider audience), and to realize other efficiencies . . . . The economies of scale associated with clustering enabled cable providers to compete with satellite companies with a national footprint, and telephone companies possessing vastly larger resources and clusters, who were emerging as competitors in multiple product markets—video, data, and telephone.

154. *See* Comcast Corp. v. Behrend, 569 U.S. 27, 31–32 (2013) (calculating $875,576,662 in damages for the class as a whole).

155. *See Behrend*, 2012 WL 1231794, at *23 ("The Class's evidence that Comcast raised prices does not refute the claim of efficiency.").

156. Twenty million Americans live in regions with no broadband services and a large portion of the country has been priced out of the market. *See, e.g.*, *How Increasing Broadband Competition Can Address the Adoption Gap*, VOQAL (Aug. 18, 2020), perma.cc/L6GF-769N (citing FCC data that shows 5.6 percent of, or 18.3 million, Americans lack access to fixed broadband); Karl Bode, *As Pandemic Exposes US Broadband Failures, FCC Report Declares Everything Is Fine*, TECHDIRT (Apr. 29, 2020, 6:42 AM), perma.cc/NX7E-QDSA (explaining that millions of Americans simply "can't afford broadband because the monopolized US telecom sector suffers from a dire lack of competition in most markets").

whom are people of color.[157] As the internet becomes an essential service, the digital divide has fostered other forms of inequalities. While the ability to work or participate in school from home has become essential for many[158]—a privilege denied to those on the wrong end of the digital divide[159]—a lesser known consequence involves the internet's role in healthcare.[160] As hospitals and clinics embrace telehealth, especially during the pandemic, a pair of doctors described the problem as "many of our patients could not access the online system."[161] To the former Secretary General of the United Nations, Kofi Anan, "being cut off from basic telecommunications services is a hardship almost as acute as [deprivations of jobs, shelter, food, health care, and drinkable water], and may indeed reduce the chances of finding remedies to them."[162] The effect is that broadband monopolies have limited the availability of adequate

157. *See* S. DEREK TURNER, DIGITAL DENIED: THE IMPACT OF SYSTEMIC RACIAL DISCRIMINATION ON HOME-INTERNET ADOPTION 2 (2016), perma.cc/XZ57-ATZK (PDF) ("[C]ommunities of color find themselves on the wrong side of the digital divide for home-internet access . . . in a manner that income differences alone don't explain.").

158. Herman G. van de Werfhorst et al., The Digital Divide in Online Education. Inequality in Digital Preparedness of Students and Schools Before the Start of the Covid-19 Pandemic (Aug. 18, 2020) (unpublished manuscript), https://perma.cc/7G7W-8ZS2 (PDF) (studying the effects of "forced and rapid digitalization" of the learning process by the COVID-19 pandemic).

159. *See* Christopher G. Reddick et al., *Determinants of Broadband Access and Affordability: An Analysis of a Community Survey on the Digital Divide*, CITIES, Nov. 2020, at 1, 1 (exploring the digital divide among races in San Antonio).

160. *See* Anita Ramsetty & Cristin Adams, *Impact of the Digital Divide in the Age of COVID-19*, 27 J. AM. MED. INFORMATICS ASS'N. 1147, 1147 (2020) (explaining that in the early transition to telehealth, a large population lacked access to needed medical help due to lack of internet access).

161. *Id.*

162. PIPPA NORRIS, DIGITAL DIVIDE: CIVIC ENGAGEMENT, INFORMATION POVERTY, AND THE INTERNET WORLDWIDE 40 (W. Lance Bennett & Robert M. Entman eds., 2001); *see* Emily Stewart, *Give Everybody the Internet*, VOX (Sept. 10, 2020, 8:30 AM), perma.cc/V82R-GM5C ("For millions of kids, it means access to an education. For many workers, it means doing their jobs. For patients, it means talking to a doctor."); Sam Gustin, *Systemic Racial Discrimination Worsens the US Digital Divide, Study Says*, VICE (Dec. 14, 2016, 11:30 AM), perma.cc/G24L-EQDN (describing internet services as a necessity); Andrew M. Cohill, *Breaking Telecom Monopolies*, BROADBAND CMTYS., Mar./Apr. 2017, at 32, 32–33 (describing the challenges imposed by the current state of broadband internet).

services to higher-income areas, ignoring the heightened socioeconomic costs inflicted on marginalized groups.[163]

Given the above examples, it is noteworthy that antitrust lacks an inquiry into whether a necessity's monopolization or restraint may especially degrade welfare or harm vulnerable populations. Antitrust's presumption is that the monopoly was procompetitive.[164] But as the next Part argues, if exclusionary practices in essential markets were subject to elevated scrutiny, it would significantly improve consumer welfare in the traditional sense as well as remedy predatory behaviors aimed at marginalized populations.

III. REVISITING ESSENTIAL GOODS IN MODERN ENFORCEMENT

This Part argues that monopolists can extract a greater premium in essential markets equal to society's vulnerability, which should trigger heightened scrutiny—curiously, though, necessities have so far lacked a meaningful place in antitrust's framework. The key of this analysis involves inelasticity, which is a core feature of necessities.[165] Part III.A explains that the monopolization or restraint of necessities poses a greater risk to consumer welfare and, based on this, courts and enforcers should account for essentials in the framework to analyze anticompetitive effects. Part III.B proposes a remedy, and III.C supports this analysis by referencing additional sources of authority such as critical race theory and antitrust's legislative history.

A. *The Hidden Importance of Essential and Inelastic Goods*

Anticompetitive practices in essential markets levy a greater degree of harm, affect more people, and

163. *See* Reddick et al., *supra* note 159 (hypothesizing that "[t]he greater the competition among internet service providers the greater the pressure to lower broadband costs and create more affordability" among lower income groups).

164. *See, e.g.*, O'Bannon v. NCAA, 802 F.3d 1049, 1079 (9th Cir. 2015) (finding the NCAA's amateurism rules procompetitive).

165. *See* Daewoo Elecs. Co. v. United States, 15 Ct. Int'l Trade 124, 129 (1991) (outlining the relationship between necessities and inelasticity of demand).

disproportionally injure marginalized groups.[166] Recall that, under the rule of reason, consumers are presumed to have options of buying a substitute item or nothing at all; essential goods, however, upset this assumption due to their inelastic demand.[167] For example, the monopolization of a necessity such as a life-saving drug is likely to injure a greater sum of consumers because almost everyone who needs the drug will pay the higher prices *if they can*.[168] Labor has been called the "pinnacle" inelastic good since a worker who quits her job loses the attendant wages while unemployed.[169] Because an individual can never reclaim a lost hour of work, a cartel of employers may lower wages without suffering much decline in their labor pool.[170] The consequence of leveraging society's vulnerability is that consumers cannot safely withdraw from the market when prices rise, which impacts more people with garden variety goods.[171]

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166. *Cf.* Joshua A. Newberg, *Antitrust for the Economy of Ideas: The Logic of Technology Markets*, 14 HARV. J. L. & TECH. 83, 105 (2000)

> A technology or group of technologies is more likely a relevant market when its derived demand is relatively inelastic, that is, insensitive to price. With relatively inelastic demand, an increase in the royalties charged by the hypothetical monopolist above the competitive level would result in a smaller decrease in the number of licensees or in the use of technology than if the demand were elastic.

167. *See, e.g.*, SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 435 (4th Cir. 2015) (describing "building incentives to innovate" as "decidedly procompetitive").

168. *Cf.* Dan Witters, *Millions in U.S. Lost Someone Who Couldn't Afford Treatment*, GALLUP (Nov. 12, 2019), perma.cc/LW7B-ES75 (providing data of those Americans who could not afford life-saving treatment).

169. *See* ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY: ANTITRUST LAW & ECONOMICS 72 (1993) ("Labor is an extremely perishable commodity—an hour not worked today can never be recovered.").

170. *See id.* (explaining that workers and wages suffer when collusion artificially decreases demand, given labor's inelastic supply curve); Yoram Margalioth, *The Many Faces of Mandates: Beyond Traditional Accommodation Mandates and Other Classic Cases*, 40 SAN DIEGO L. REV. 645, 650 (2003) (describing labor as inelastic).

171. *See Daewoo*, 15 Ct. Int'l Trade at 129

> The responsiveness of these lines to the economic factors which affect them is termed their "elasticity." For example, the demand curves for such things as are considered the necessities of life tend to have relatively *inelastic* demand curves, that is to say, the

Second, exclusionary practices enable firms to charge an even greater premium for a necessity than with garden variety products. If makers of artisan belts collude, they lose "marginal consumers" with each extra dollar charged.[172] Producers of essentials, however, can worry less about whether increasing prices will jettison consumers from the market.[173] Whereas the typical firm is restrained by the willingness of consumers to pay high prices, a firm operating in an essential market can raise prices until consumers lose the ability to pay.[174] This allows firms to ratchet up prices to a much greater degree than with mundane goods.[175]

In fact, the current landscape creates powerful incentives for firms to monopolize or restrain necessities. Colluding firms in essential markets can extract a premium from a larger scope

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> demand will not fall off significantly in response to price increases or rise much in response to price decreases.

172. *See* Alan J. Meese, *Tying Meets the New Institutional Economics: Farewell to the Chimera of Forcing*, 146 U. PA. L. REV. 1, 26 (1997) [hereinafter Meese, *Tying*]

> Some, so-called "marginal" customers, view other products as close substitutes and have relatively elastic demands for the product in question. Others are so-called inframarginal customers, who, because they view other items as poor substitutes for the product sold by the monopolist, have an inelastic demand for it, and thus will pay a higher price for it. . . . If the monopolist in question had perfect information, it could "price discriminate," that is, charge different prices to different customers: high prices to those with inelastic demands and low prices to those with elastic demands. If, however, the monopolist could not distinguish "elastic" from "inelastic" consumers . . . it would be compelled to set one price for its product, thereby forgoing some of the profits theoretically available from its position. (footnotes omitted).

173. DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 94 (Denise Clinton et al. eds., 4th ed. 2015) (stating that a monopolist in an essential market will indefinitely raise prices until consumers lose the ability to pay).

174. *See* Meese, *Tying*, *supra* note 172, at 143 (explaining that consumers seek substitutes when demand is elastic, but not when demand is inelastic—as is the demand for necessities).

175. *See, e.g.*, Sebastian Zimmeck, *A Game-Theoretic Model for Reasonable Royalty Calculation*, 22 ALB. L.J. SCI. & TECH. 357, 385 (2012) ("Similar as in a monopoly, firms in monopolistic competition face negative sloping demand curves because demand for a product decreases when price increases.").

of people, which creates greater economic rewards and thus incentives to do so.[176]

The enhanced damages suffered in essential markets are described herein as "human costs." This is because monopolists and colluding firms can charge an even greater premium equal to society's vulnerability.[177] And since consumers cannot safely purchase a substitute good or forgo buying the necessity, monopolists may exploit their heightened leverage by raising prices on more consumers.[178] The effect is that a greater sum of deadweight loss is generated, reflecting society's need for the necessity.[179]

Formal models of this dynamic may help. Let's compare three situations: a competitive market, standard monopoly market, and monopoly in an essential market. The Y-axis is a good's price and the X-axis is the quantity produced. Under competition, the equilibrium price of p is where quantity supplied equals quantity demanded, reflecting the point at which sellers and consumers jointly maximize their utility (see Figure 1). A typical demand curve slopes downward because consumers tend to purchase less of a good as prices increase. The area above p and below demand, D, represents consumer surplus because some individuals were willing to pay the higher per-unit price of D but actually paid the lower amount of p. This reflects competition's ability to supply efficiently priced goods.

176. *See id.* at 381 ("[T]he profit of a monopolist depends on price, cost, and quantity of a product. However, . . . in a monopoly market the price of a product increases with decreasing quantity.").

177. *See* CARLTON & PERLOFF, *supra* note 173, at 99 (explaining that at a monopoly equilibrium, a firm creates welfare harms when it increases "its equilibrium price and earns a larger monopoly profit").

178. *See id.* ("As the demand curve becomes less elastic at the monopoly equilibrium, people are less willing to do without [the] good . . . .").

179. *See id.* at 95 ("If a monopoly restricts its output and raises its price above marginal cost, society suffers a deadweight loss.").

Figure 1.

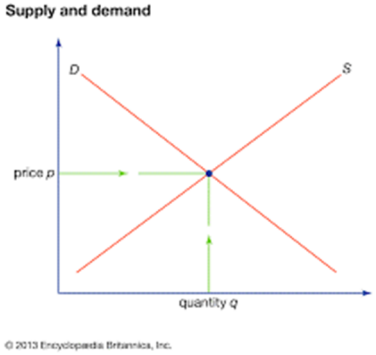
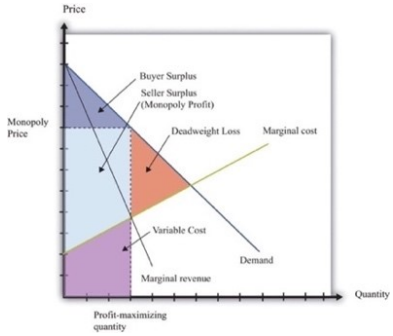


Figure 2.



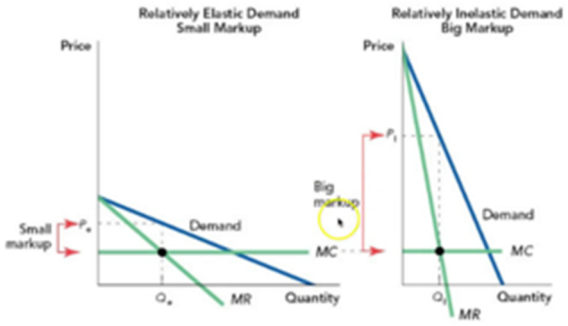
Left, a typical demand curve. Right, the effects of monopolization.

Before modeling the problems of monopolizing essentials, consider how the typical monopolist decreases output and increases prices. The line reflecting marginal revenue is adjusted further left on the demand curve than the competitive price of *p*, signifying reduced output (see Figure 2). This is because, if the monopolist increased output, the good's price would fall more than the monopolist's marginal revenue would increase. So rather than pricing the good at *p*, the price is set where the monopolist reaps the highest total profit. Demand and output decline as people want fewer units of a good as its price increases. The area between the monopoly output and competitive output is called the deadweight loss because it reflects the value destroyed by eliminating competition.

Here is what's especially problematic: welfare losses are even greater in essential markets. With inelastic demand, the line representing marginal revenue lays even flatter against the Y-axis since one who monopolizes a necessity is more untethered from consumer demand (see Figure 3). This permits the monopolist to produce fewer units and charge even higher prices than with mundane goods, increasing supracompetitive profits and deadweight loss. Stated another way, a firm that monopolizes an essential item will seldom work on the inelastic part of the demand curve because the firm can continuously increase prices without fear of losing marginal consumers until

it approaches the elastic portion.[180] Consumers are especially vulnerable when firms monopolize essential markets.

Figure 3.



The heightened markup in a monopolized market with inelastic demand

Many necessities are only essential for certain groups of people, but this can actually make the landscape more dire.[181] For example, Daraprim is only essential for those who suffer from Toxoplasmosis.[182] This form of monopoly poses a graver danger because small subsets of people will generally lack the leverage to lobby for a remedy.[183] In fact, anticompetitive

180. CARLTON & PERLOFF, *supra* note 173, at 94

> [A] monopoly never operates on the inelastic portion of its demand curve. If a monopoly were operating in the inelastic portion of its demand curve, it could increase its profits by raising its prices until it was operating in the elastic portion of its demand curve. In the inelastic portion of the demand curve, a 1 percent increase in the monopoly's price causes the quantity sold to fall by less than 1 percent, so that revenues increase. With reduced output, however, the monopoly's costs must fall, so that total profits must rise. Thus, if the monopoly is operating in the inelastic portion of the demand curve, it should keep increasing its price, obtaining ever more profits, until it is in the elastic portion of the demand curve.

181. *See* Andrew Pollack, *Drug Goes from $13.50 a Tablet to $750, Overnight*, N.Y. TIMES (Sept. 20, 2015), perma.cc/4R5X-76VX (reporting that "[s]ome hospitals say they now have trouble getting the drug" needed to treat low-income patients).

182. *See id.*

183. Naturally, the only people in need of a cure of Toxoplasmosis suffer from Toxoplasmosis. For everyone else, the drug is extraneous. *See id.*

practices have allegedly targeted minority groups *intentionally*, given their paucity of power (this dynamic is explored in Part III.C).

Furthermore, antitrust assumes that consumers are homogenous, yet disenfranchised groups tend to suffer elevated harms. While even affluent parties must pay supracompetitive prices when a necessity is monopolized, low-income populations are more likely to lack the means to buy, for instance, a life-saving drug and thus suffer a complete deprivation.[184] Also, switching costs can disproportionally affect disenfranchised populations.[185] As examples, marginalized groups must often sacrifice other necessities such as food or housing in order to purchase the monopolized drug.[186] In a similar vein, low-income groups incur the brunt of socioeconomic harm when check-cashing shops replace banks, dollar stores take the place of grocery stores, and self-medication supplants high-priced pharmaceuticals.[187]

If welfare losses are greater in essential markets, how should antitrust respond? After all, the deference embodied in the rule of reason seems misplaced when the monopolization or restraint of trade imposes a greater magnitude of harm.[188] The next subpart argues that the remedy is to flip the presumption. Instead of assuming that a cartel promoted consumer welfare as the rule of reason does, antitrust should account for this

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(explaining that "Daraprim is the standard first treatment for toxoplasmosis" and is rarely used to treat other maladies).

184. *See, e.g.*, Rachana Pradham, *For Insulin and Other Medications, Rising Costs Aren't Slowing Down*, WASH. POST (Sept. 21, 2020, 11:34 AM), perma.cc/T7C4-Z6KS (describing the difficulty of some to purchase critical drugs).

185. *See* Reddick et al., *supra* note 159 (finding minority groups in San Antonio suffered from a disproportionate lack of access to broadband internet).

186. *See, e.g.*, Seth A. Berkowitz et al., *Treat or Eat: Food Insecurity, Cost-Related Medication, Underuse, and Unmet Needs*, 127 AM. J. MED. 303, 303–04 (2014) (examining the poverty-caused relationship between underuse of medication and food insecurity).

187. *See* Moses, *supra* note 68 (discussing the relationship between food monopolies and food deserts); Richard Bookstaber, *Risk and the Structure of the Black Market for Addictive Drugs*, 20 AM. ECONOMIST 26, 26–29 (1976) (explaining the black market for drugs); Lisa J. Servon, *The High Cost, for the Poor, of Using a Bank*, NEW YORKER (Oct. 9, 2013), perma.cc/GF5H-VTY8 (discussing the role of check-cashing institutions).

188. *See supra* Part II.A.2.

dynamic by compelling the defendant to prove the procompetitive effects.

B. *The Longstanding Promises and Challenges of the Quick Look*

Antitrust should address exclusionary conduct in essential markets with a variation of a seldom employed level of review known as the quick look. Recall that antitrust has long known two speeds of scrutiny: deference under the rule of reason in most scenarios and plenary condemnation as per se illegal in some others.[189] This has typically made the test applied to an exclusionary act dispositive in assessing its legality.[190] Due to this all-or-nothing framework, courts have sought wiggle room by establishing a derivative of the rule of reason known as the quick look, which condemns conduct that can't be punished as per se illegal yet creates obviously anticompetitive effects.[191] The Supreme Court explained when the quick look is appropriate:

> In each of these cases, which have formed the basis for what has come to be called abbreviated or "quick-look" analysis

189. *See* Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 50 (2007) (describing the "dichotomy" of the traditional application of either the rule of reason or per se illegality).

190. *See id.* at 57 (discussing the "absolutist nature" of the per se test).

191. *See, e.g.*, Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999) (describing the quick-look analysis); *see also* Law v. NCAA, 134 F.3d 1010, 1020 (10th Cir. 1998) ("[T]he court is justified in proceeding directly to the question of whether the procompetitive justifications advanced for the restraint outweigh the anticompetitive effects under a 'quick look' rule of reason."); Edward Brunet, *Antitrust Summary Judgment and the Quick Look Approach*, 62 SMU L. REV. 493, 496 (2009)

> With this background of uncertainty regarding the use of summary judgment in antitrust litigation and the history of controversial application of the per se and rule of reason labels, the so-called quick look approach originated. Born in a series of briefs to the United States Supreme Court in the 1980s, the quick look methodology was essentially the effort of antitrust specialist litigators to articulate a sort of middle-ground, efficient way to avoid overly complex trials. The idea of the quick look might have evolved from Professor Phillip Areeda's observation that the rule of reason need not be overly lengthy and could be "applied in the twinkling of the eye."

> under the rule of reason, an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.[192]

Currently, a court applies the quick look when it initially assesses that the restraint doesn't qualify as per se illegal, yet is "inherently suspect."[193] Upon this finding, *a court would typically declare the restraint to be anticompetitive* unless the defendant can provide evidence of net procompetitive efficiencies.[194] An important way in which the quick look differs from the rule of reason is that it shifts the burden onto the defendant who must prove how the restraint benefited consumers whereas the rule of reason assumes that the act was procompetitive.[195] And while per se illegality condemns restraints creating anticompetitive effects in almost every scenario,[196] the quick look would—rather than foreclosing all avenues of justification—place the onus on the defendant to explain the concrete benefits inured to consumers.[197] To illustrate, the court in *North Carolina State Board of Dental*

192. *Cal. Dental*, 526 U.S. at 770.

193. *See, e.g.*, Polygram Holding, Inc. v. FTC, 416 F.3d 29, 32–33 (D.C. Cir. 2005) (inquiring into whether the restraint is "inherently suspect").

194. *See* Alan J. Meese, *In Praise of All or Nothing Dichotomous Categories: Why Antitrust Law Should Reject the Quick Look*, 104 GEO. L.J. 835, 858–89 (2016) [hereinafter Meese, *In Praise of All or Nothing*] (explaining the defendant's burden to articulate a plausible and legally cognizable competitive justification for the restraint).

195. *See In re* Ry. Indus. Emp. No-Poach Antitrust Litig., 395 F. Supp. 3d 464, 480 (W.D. Pa. 2019) ("A *complete* rule of reason analysis in those circumstances is not always warranted; rather, a 'quick look' analysis may be conducted. The Third Circuit Court of Appeals has explained: 'A quick look "presum[es] competitive harm without detailed market analysis" because the anticompetitive effects on markets and consumers are obvious.'"(alteration in original) (citations omitted)); Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 777 (2012) [hereinafter Gavil, *Moving Beyond Caricature and Characterization*] ("The defining characteristic of the quick look, however, is its ability to shift a burden from the plaintiffs to the defendants without 'elaborate industry analysis.'").

196. *See supra* note 98 and accompanying text.

197. *See* Meese, *In Praise of All or Nothing*, *supra* note 194, at 858 (explaining that the defendant must "articulate a plausible and legally cognizable competitive justification for the agreement").

Examiners v. FTC[198] relied on the quick look to rule that "[i]t is not difficult to understand that forcing low-cost teeth-whitening providers from the market has a tendency to increase a consumer's price for that service."[199]

Confusion about when the quick look is proper has substantially depressed its usage. This is due to the difficulties of determining what makes an act facially suspect without delving into the greater analysis.[200] If a restraint is supposed to be reviewed under the rule of reason but seems anticompetitive, for what reason would a court opt for the quick look rather than a conventional method?[201] One scholar insisted that reliance on the quick look might even threaten populistic enforcement in light of the judiciary's freedom to apply the approach to notorious actors.[202] Said differently, there's currently no principled way of identifying when to use the quick look.[203] Given these concerns, courts have seldom opted for the quick look, choosing instead to permit conduct under the rule of reason or prohibit it as per se illegal.[204] As a result, the quick look is

198. 717 F.3d 359, 374 (4th Cir. 2013); *see also In re* Se. Milk Antitrust Litig., 739 F.3d 262, 274–75 (6th Cir. 2014) ("Applying this test is useful when the anticompetitive nature of an agreement is so blatant that a detailed review of the surrounding marketplace would be unnecessary." (citing Cal. Dental Ass'n v. FTC, 526 U.S. 756, 769–70 (1999))).

199. *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 374 (concluding that the plaintiff's behavior would likely cause significant anticompetitive harms).

200. *See* Gavil, *Moving Beyond Caricature and Characterization*, *supra* note 195, at 758 (discussing doctrinal difficulties in apply the quick look approach).

201. *See* Meese, *In Praise of All or Nothing*, *supra* note 194, at 839

> Restraints do not announce themselves as inherently suspect. Instead, tribunals implementing the quick look must examine all restraints that survive per se condemnation as an initial matter to determine whether such restraints are inherently suspect or, instead, subject to full-blown analysis. Because the result of this threshold evaluation is generally outcome determinative, plaintiffs and defendants will rationally expend significant resources attempting to influence the tribunal.

202. *See id.* (challenging the claim that the quick look approach "enhances the accuracy of judicial and administrative assessments of challenged restraints").

203. *See id.* ("[T]he current definition of inherently suspect is far from precise.").

204. *See* Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 123 (2018) ("Only three Supreme Court decisions have explicitly acknowledged the

quickly becoming extinct despite widescale support for its usage.[205]

But this confusion creates opportunity. An effective way of enhancing antitrust's efficacy without risking populistic enforcement or overenforcement would derive from applying a test based on the quick look whenever an exclusionary practice impairs a necessity animated by inelastic demand. This would improve antitrust's logic since the presumption of procompetitiveness makes little sense when a firm has excluded competition in an essential market. After all, the rule of reason ignores the greater surplus loss.[206] Another benefit is that this proposal would increase efficiency and predictability since the quick look obviates the needs for litigants to engage in complex analysis of the greater market.[207] Furthermore, it would recognize that restraints have often targeted marginalized groups[208] even though antitrust assumes that people are largely homogenous (as discussed in the next subpart).[209] Flipping the

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quick look, and then only to reject it under the circumstances."); Edward D. Cavanagh, *Whatever Happened to Quick Look?*, 26 U. MIA. BUS. L. REV. 39, 56 (2017).

205. *See* Lumber Liquidators, Inc. v. Cabinets To Go, LLC, 415 F. Supp. 3d 703, 712 (E.D. Va. 2019)

> It is unclear what staying power, if any, the quick-look approach retains today, or how much the quick-look differs from an ordinary rule of reason analysis. The Supreme Court has trended towards not including the quick-look approach when determining which antitrust standard should apply, instead preferring the traditional rule of reason and *per se* dichotomy. Recently, when the Court has mentioned quick-look as a possible mode of inquiry, it has found it inapplicable. Perhaps because of this uncertainty, "lower courts appear to have largely abandoned the quick look approach." (internal citations omitted)

see also Meese, *In Praise of All or Nothing*, *supra* note 194, at 838 ("Support for the quick look is universal within the antitrust community.").

206. *See* Newman, *Procompetitive Justifications*, *supra* note 97, at 510 (explaining that when it comes to determining which market participants' surplus is relevant to antitrust analysis, courts prefer to focus solely on consumer surplus, disregarding situations in which a monopolist's surplus is so large that it could hypothetically compensate for consumers' losses).

207. *See* California *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118, 1134 (9th Cir. 2011) (explaining the lack of need for a complex analysis of the underlying market where the anticompetitive effects of a restriction are clear).

208. *See infra* notes 222–225 and accompanying text.

209. *See infra* note 212 and accompanying text.

burden would also force firms to consider ex ante how restraining a necessity would likely harm consumers. And finally, the approach is tenable because the common law nature of antitrust enables courts to reinterpret the broad text of the Sherman Act without requiring an act of Congress.

To determine when a quick look trained on necessities rather than conduct makes sense, recall that a necessity's hallmark is inelastic demand; as such, courts should apply the quick look when the underlying good is *inelastic* and *essential*. But if the good's demand is elastic, welfare losses would partially abate to the normal level since consumers can select a substitute item, mitigating the anticompetitive effects. For example, with most non-patented over-the-counter drugs, a price increase by one company would prompt consumers to purchase a substitute version—even if the drug is a necessity—which would likely correct the market to some degree. The restraint must therefore affect an *inelastic* good to create the presumption that the restraint of trade was especially harmful.

The commodity must also benefit society. Consider the consequences of enhancing scrutiny for inelastic items like vices: condemning a cartel of tobacco companies might actually harm consumers (in the social welfare sense, not antitrust) if enforcement made cigarettes more affordable and thus boosted the rate of smoking.[210] Another area of inelasticity where the rule of reason is superior involves mundane goods. In *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*,[211]—a case in which Chrysler tied low-quality stereos to its cars—the dissent favored elevated scrutiny since consumers would seldom notice or mitigate the high prices stemming from pre-installed stereos.[212] It's counterintuitive, however, for courts to care more

210. *See* Barak Orbach, *Foreword: Antitrust's Pursuit of Purpose*, 81 FORDHAM L. REV. 2151, 2155 n.27 (2013) ("To illustrate the difference, consider the consumer choice to purchase cigarettes. The surplus differs from the welfare because of health effects. This is true both for the consumer welfare and the total surplus because of externalities. Similar analysis applies to most products.").

211. 959 F.2d 468 (3d Cir. 1992).

212. *See id.* at 502 (Sloviter, C.J., concurring and dissenting) ("The fact that particular consumers may be uninformed or lazy, as the majority posits, does not forfeit their statutory right to buy in a market which is free of artificial obstacles.").

about consumer welfare than consumers, making the rule of reason more appropriate.[213] That is not to say that antitrust should avoid competition disputes arising in vice or mundane markets, but that the deferential rule of reason suffices unless the good benefits society.

C. *Further Evidence*

Other forms of evidence supporting this proposal concern antitrust's errant assumption that consumers are homogenous and thereby suffer the effects of exclusionary conduct uniformly.[214] But as we've seen, people of color, undocumented workers, lower-income groups, and other disaffected communities have especially incurred the costs of anticompetitive practices, which antitrust has *predictably* missed.[215] The first discussion asserts that if essentialness was incorporated into enforcement, it would promote the welfare of disaffected groups and improve antitrust's internal logic by disaggregating the term "consumers." The second discussion delves into antitrust's congressional record—given the longstanding importance of this authority—to support this Article's stance.

1. Power and Anticompetitive Conduct

The monopolization of necessities may especially harm marginalized groups, though antitrust law has predictably

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213. *Id.*

> Chrysler's ability to force what may have been or is an inferior or overpriced autosound system on its car buyers need not have come solely from market dominance. To most car purchasers, the autosound system is viewed as a small and relatively inexpensive component of the total car purchase. In economic terms, the demand for autosound systems may be highly inelastic. If that is proven, then it is illusory for the majority to conclude that competition at the automobile level will ensure competition in the autosound product market. (footnote omitted).

214. *See* Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727, 729–30 (2000) (explaining that the traditional economic theory suggests that an efficient market is not a race-conscious market).

215. *See supra* Part II.B.

failed to recognize racism and oppression.[216] A feature of antitrust's premise is that competition benefits "consumers" in a homogenous fashion akin to the adage that a "rising tide lifts all boats."[217] Even when exclusionary conduct appears to have harmed disenfranchised groups, antitrust ignores issues of race and power since market forces should ostensibly correct inefficiencies like discrimination—it makes little sense, after all, for a firm to deny selling a good to a person willing to pay for it.[218]

Scholars have long noted that dominant groups design legal systems to enhance their power at the behest of people of color, women, indigenous groups, and others.[219] Even if discriminatory

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216. *See* Roithmayr, *supra* note 214, at 732 (stating that conventional neoclassical theory teaches that, absent barriers to entry, market forces will eliminate both racism and monopoly profits because of the inefficiencies they create).

217. *See* Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897, 1911 (2007) (discussing the theory that competition incentivizes individual efforts that both produce individual rewards and "make the proverbial Pie bigger for all"); Day, *Anticompetitive Employment*, *supra* note 22, at 506 (discussing the notion that a lack of competition results in high prices across the market).

218. *See* Roithmayr, *supra* note 214, at 730 ("Conversely, race-conscious distribution is understood to be anticompetitive and inefficient, because race is not thought to be related to productivity. According to the conventional story, the colorblind market will produce the most efficient outcome, because it distributes opportunities and resources exclusively on the basis of ability." (footnote omitted)).

219. *See, e.g.*, Michael Siegel, *Racial Disparities in Fatal Police Shootings: An Empirical Analysis Informed by Critical Race Theory*, 100 B.U. L. REV. 1069, 1073 (2020) ("The first basic tenet of critical race theory is that racism is structural—that is, it is built into our systems, institutions, and culture—yet most conceptions of racism do not recognize this."); I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 23–24 (2019)

> Critical Race Theory, after all, is committed to confronting "the historical centrality and complicity of law in upholding white supremacy (and concomitant hierarchies of gender, class, and sexual orientation)," and transforming the relationship between law and white supremacy to reshape American jurisprudence in a project of racial emancipation and antisubordination. CRT demonstrates a "commitment to radical critique of the law . . . and . . . radical emancipation by the law." And it aims "to develop a jurisprudence that accounts for the role of racism in American law and that works toward the elimination of racism as

beliefs were eradicated, critical race theory states that little would change so long as the law is *structurally* designed to privilege white people.[220] For instance, the anticompetitive effects of redlining have persisted in that much of America's most valuable forms of real estate remain in white hands.[221]

With this in mind, antitrust law is structured to defer to dominant groups like monopolists while, at the same time, lacking care for how anticompetitive practices injure marginalized groups at greater rates. It is hardly coincidental that: (1) no-poaching deals have primarily harmed low-income workers;[222] (2) anticompetitive practices in housing markets

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> part of a larger goal of eliminating all forms of subordination." (footnotes omitted).

220. *See* Osagie K. Obasogie, *Foreword: Critical Race Theory and Empirical Methods*, 3 U.C. IRVINE L. REV. 183, 183 (2013)

> This opposition entails a systematic articulation of the persistence of White racial dominance that occurs not only in spite of social and legal developments that attempt to facilitate greater equality, but specifically because these developments contain residual privileges and limitations that nonetheless continue to structurally benefit Whites and subordinate people of color and other marginalized communities.

DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 46–52, 66–69 (6th ed. 2008) (discussing the law's role as a structural impediment to racial equality).

221. *See* DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE 34–35 (2014) (discussing cartel behavior among white homeowners in which they created and enforced real estate contracts forbidding the sale of property to African Americans); Robert W. Emerson, *Franchise Selection and Retention: Discrimination Claims and Affirmative Action Programs*, 40 ARIZ. L. REV. 511, 559–60 (1998)

> Minority franchisees long have argued that franchisors often engage in "redlining." Redlining is a pattern of racial discrimination in which businesses or financial institutions refuse to do business with persons in certain, usually inner-city, areas due to a perceived higher level of risk. For example, some studies indicate that mortgage lenders discriminate against minorities at a level that "shocks the conscience." The evidence, though, is inconclusive, as some scholars infer that the rate of mortgage approvals is actually much higher for qualified black applicants than for comparable whites. (footnotes omitted).

222. *See* Day, *Anticompetitive Employment*, *supra* note 22, at 495 ("In fact, DOJ leadership acknowledged that it only became alarmed about labor cartels after a *New York Times* article exposed employer collusion in 2017. The article found that over 70,000 fast food restaurants have entered no-poaching agreements (more than twenty-five percent of the industry), imperiling wages." (footnotes omitted)).

have targeted and excluded people of color;[223] (3) the lack of competition in the banking sector has enabled abusive tactics like exorbitant overdraft fees, impacting low-income individuals the most;[224] and (4) barriers to generic drug competition have overwhelmingly affected uninsured patients.[225] The reality is that, while antitrust assumes that market forces should correct inefficiencies like racism, dominant groups can lock in their power, reap above-market profits, and exploit markets in ways that wouldn't occur if people of color could freely compete.[226] Due to the inertias of positive feedback loops and transaction costs, it is noteworthy that markets do not naturally self-correct for the anticompetitive effects of racism.[227]

In fact, dominant groups have *consciously* relied on anticompetitive practices to exclude people of color, immigrants, and other disaffected groups. For instance, Erika Wilson examined social closure to explain school segregation.[228] Social closure is a subordination theory about the ways dominant groups rely on in-group characteristics to prevent outsiders from competing for scarce resources.[229] She found that dominant

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

224. *See* Marco Di Maggio et al., Life Below Zero: Predatory Overdrafts, Payday Lending and the Underbanked 10 (May 11, 2020) (unpublished manuscript), https://perma.cc/5Q5W-AQ4H (PDF) ("In recent years, in an effort to force banks to refrain from potentially predatory overdraft practices, retail customers have sued financial institutions arguing that aggressive overdraft practices disproportionally impact low income clients.").

225. *See* Hosp. Auth. v. Momenta Pharms., Inc., 333 F.R.D. 390, 407–08 (M.D. Tenn. 2019) (discussing a quarter-billion-dollar anticompetitive scheme that specifically harmed the uninsured); *see also* Mike Leonard, *Momenta, Sandoz Get $120 Million Lovenox Settlement Approved*, BLOOMBERG L. (June 1, 2020, 11:26 AM), https://perma.cc/K5K6-6PKP (noting that group hospitals, insurers, pension funds, and uninsured consumers filed an antitrust lawsuit against Momenta and Sandoz).

226. *See* Roithmayr, *supra* note 214, at 735 ("A market lock-in analogy frames racism in antitrust terms, as deliberately anticompetitive conduct that foreclosed competition and created continuing barriers to entry. Moreover, the model explains the intuition that when it comes to race, the country's history of slavery and segregation continues to matter.").

227. *See id.* at 764–69 (explaining how positive feedback loops stymie diversity in the legal profession).

228. Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2388–2414 (2021).

229. *See id.* at 2390

groups have long steered resources to their local schools while raising barriers to entry for people of color.[230] To Wilson, white populations have sought to monopolize education, despite its essential qualities, and thereby exclude people of color.[231]

Similarly, Daria Roithmayr's research has found that dominant racial groups have historically acted as cartels.[232] One example that she uncovered is barriers preventing people of color from entering the legal market. Before the turn of the century, white men established exclusionary rules governing entry into the legal profession via law schools.[233] For example, some law schools refused to admit people of color and, when the Fourteenth Amendment intervened, inferior law schools were created.[234] While legal training *could* have come from other

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> Social closure occurs when there is competition for scarce resources such as power, prestige, or material wealth. It involves the construction of an in-group and an excluded group. In-groups are likely to form when individuals see an advantage in identifying and competing for resources as a collective. The in-group often sees themselves as socially similar in ways that limits their desire to associate with the excluded group. The success of social closure depends upon clearly defining membership in the in-group and policing the sanctity of the in-group's boundaries. (footnotes omitted).

230. *See id.* at 2396

> Resources that exhibit characteristics of scarcity—like high quality schools—provide fertile ground for the process of exclusionary social closure to take place. State laws that required racial segregation in schools were an obvious form of horizontal differentiation that facilitated exclusionary social closure. In the seventeen states that had de jure school segregation, whites were able to attend better resourced schools, which helped them to achieve better educational outcomes. (footnotes omitted).

231. *See id.* at 2447 ("Owing to the historical and modern alignment of whiteness with power and resources, [this article] argued that social closure leads to predominantly white school districts monopolizing high-quality schools. It further argued that the monopolization creates stark racial disparities between school districts within metropolitan areas.").

232. *See* ROITHMAYR, *supra* note 221, at 50–51 (discussing the rise of racially exclusive political parties).

233. *See* Roithmayr, *supra* note 214, at 754 ("First, they enacted both formal Jim Crow segregation laws and informal exclusionary policies to preclude nonwhites from attending law school. Second, they adopted admissions standards and moved legal education to the university setting, in order to drive out alternative forms of legal education serving people of color and immigrants.").

234. *Id.* at 757–58.

sources, white elites "moved legal education to the university setting, in order to drive out alternative forms of legal education serving people of color and immigrants."[235] The legacy of this anticompetitive structure remains today, as African Americans face barriers to entry as lawyers and as consumers of legal services.[236]

The problem is that antitrust law promotes consumer welfare in the aggregate without questioning whether at-risk groups face heightened harm. Not only is it predictable that in this landscape, disenfranchised groups have disproportionally suffered the costs of anticompetitive conduct, but also that antitrust's design would ignore this dynamic. Whereas theorists urge courts and commentators to scrutinize the effects felt by the disaffected, antitrust's framework elevates privileged populations.[237] Instead of self-correcting markets—as antitrust assumes—structural oppression has proven enduring.[238] If heightened review applied in essential markets, it would begin to disaggregate "consumers" by acknowledging that certain monopolies create greater levels of harm suffered by especially vulnerable populations.

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235. *Id.* at 755.

236. *Id.* at 756.

> White cartels succeeded in barring entry to the legal profession for people of color—blacks, Latino/as, Asian-Americans, American Indians, "immigrant agricultural workers . . . and recent political and economic refugees from the Caribbean, Latin America, and Asia"—until the 1960s. At the turn of the century, most law schools formally or informally excluded all nonwhites. As late as 1939, thirty-four of the eighty-eight accredited law schools had formal policies excluding blacks and other nonwhite groups. (alteration in original) (footnotes omitted).

237. *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 386–87 (1987) (noting that damages awarded in antitrust lawsuits tend to lack exactitude, thereby denying some victims, often minority victims, the benefits they are owed). *See generally* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992).

238. Roithmayr, *supra* note 214, at 731–32.

> But concepts from antitrust doctrine and economic theory can be used to tell another, far more radical, market failure story about persistent racial disparity—a story of monopoly, in which whites anticompetitively excluded people of color to monopolize competition, and then used that monopoly power to lock in standards of competition that favored whites. (footnote omitted).

In fact, the elevated anticompetitive effects in essential markets were recognized by the Sherman Act's drafters who used such dangers as evidence to enact the statute in the first place.[239] Given the longstanding role of antitrust's history in defining enforcement, the next discussion reviews the congressional record and other historical sources to assert that the "necessaries of life" should entail a meaningful facet of antitrust.

2. Historical Support for the "Necessaries of Life"

As background, when the Sherman Act was enacted in 1890, it was common for leaders of an industry to form a trust by placing controlling shares of their firms into a holding company, governed by a trustee or board of directors.[240] Those who ran the trust could raise prices, set output levels, divide markets, and forego competing.[241] Notable trusts were organized by magnates such as J.P. Morgan and J.D. Rockefeller.[242] As Americans increasingly blamed the trusts for high prices, unemployment and other ills, Congress debated the enactment of an "Anti-Trust" statute.[243] The following discussion traces the debates to show how necessities motivated the Sherman Act's passage, which is imperative given the role of antitrust's enactment process throughout the history of enforcement.

For example, Senator John Sherman asserted, "we should not endure a king over the production, transportation, and sale of any of the *necessaries of life*," warning that the trusts wielded "a kingly prerogative, inconsistent with our form of

239. *See* SUSAN BERFIELD, THE HOUR OF FATE: THEODORE ROOSEVELT, J.P. MORGAN, AND THE BATTLE TO TRANSFORM AMERICAN CAPITALISM 111–12 (2020) (explaining that the Sherman Act was Congress's second attempt to limit big business).

240. *See id*. at 113 ("The only power that can protect the public from companies that want to control the production of such essentials as sugar, salt, flour, cotton, even oil, Harlan wrote, is national power.").

241. *See id.* at 211 (explaining the public outrage over price fixing and other political favoritism by the railroad trusts).

242. *See* James F. Rill & Stacy L. Turner, *Presidents Practicing Antitrust: Where to Draw the Line?*, 79 ANTITRUST L.J. 577, 579–80 (2014) (discussing President Franklin Roosevelt's views of trusts owned by Morgan and Rockefeller).

243. *See* BERFIELD, *supra* note 239, at 111–12.

government . . . ."[244] Lawyers and politicians at the Sherman Act's enactment described essentials as the "necessaries of life."[245] In paying heightened attention to necessities, Senator Sherman asserted that "all combinations among persons or corporations for the purpose of raising or controlling the prices . . . of *the necessaries of life* are monopolies and intolerable, and ought to receive condemnation."[246] He urged further that the "trusts and combinations are great wrongs to the people" because "[t]hey increase beyond reason the cost of the necessaries of life," enabling powerful firms to "aggregate to themselves great, enormous wealth by extortion which makes the people poor."[247] The issue, to Senator Sherman, was that certain monopolies can levy a greater degree of harm, causing the "mind" to be "agitated with problems that may disturb social order."[248]

244. 21 CONG. REC. 2457 (1890) (emphasis added).

245. For example, nineteenth century statutes made it illegal for a man to deprive his wife of the necessaries of life, *see, e.g.*, Evans v. Noonan, 128 P. 794, 795 (Cal. Ct. App. 1912) (concluding that medical services were "necessaries of life"); Wagner v. Wagner, 37 P. 935, 936 (Cal. 1894) ("Civ. Code, § 105, makes the willful neglect of the husband to provide for his wife the common necessaries of life, when he has the ability so to do, a ground for divorce, if such neglect continues for one year."), stores to operate on Sundays unless selling the necessaries of life, *see, e.g.*, State v. Jacques, 40 A. 398, 398 (N.H. 1898) (articulating that "Pub. St. c. 271. § 5," which prohibited keeping a shop, restaurant, or similar place open on Sunday, did not prevent "the sale of milk, bread and other necessaries of life"), and that a husband must answer for his wife's debts when incurred in purchasing the necessaries of life, *see, e.g.*, Lenhoff v. Fisher, 48 N.W. 821, 822 (Neb. 1891) (discussing a Nebraska law requiring payment of "any debt contracted by any person in the purchase of the actual necessaries of life for himself and family"). At this time, courts defined the necessaries of life as "not only primitive physical needs, [but also] things absolutely indispensable to human existence and decency, but those things, also, which are in fact necessary," including food, medicines, shelter, and clothing, among others. State v. Waller, 136 P. 215, 215 (Kan. 1913); *see Evans*, 128 P. at 795 (describing the necessaries of life as "such things as are proper and requisite for the sustenance of man"); *Jacques*, 40 A. at 398 (identifying milk, bread, drugs, and medicines as necessaries of life).

246. 21 CONG. REC. 2458 (1890) (emphasis added).

247. *Id.* at 2461.

248. *Id.* at 2460.

In fact, the trusts that inspired the Sherman Act involved essential goods such as steel,[249] oil,[250] and wheat.[251] While federal enforcers had initially sought to bust the sugar trust in 1894, the government's first major victory occurred when the DOJ broke up Morgan's railroad trust in *Northern Securities Co. v. United States*.[252] This case was especially important because the railroads provided the only viable means to travel the country.[253]

Historical evidence can also be found in the writings of judges and politicians at the turn of the century. Justice Harlan stated in 1895 that antitrust must prevent the monopolization of "essentials"[254] and "articles *necessary* to the comfort and well-being of the people in all the states."[255] To Presidents Taft and Roosevelt,[256] the trusts threatened wage-earners by controlling and inflating the prices of essentials.[257] As one jurist

249. *See* United States v. U.S. Steel Corp., 251 U.S. 417, 457 (1920) (rejecting the government's attempt to dissolve U.S. Steel under the Sherman Anti-Trust Act).

250. *See* Standard Oil Co. v. United States, 283 U.S. 163, 183 (1931) (reversing the district court's ruling and rejecting the government's contention that Standard Oil violated the Sherman Anti-Trust Act).

251. *See* Kan. Wheat Growers' Ass'n v. Oden, 257 P. 975, 975–76 (Kan. 1927) (holding that a wheat delivery contract between the Kansas Wheat Growers' Association and one of its members did not violate Kansas's anti-monopoly statute).

252. 193 U.S. 197 (1904); *see id.* at 360 (concluding that allowing Morgan's railroad trust to survive a Sherman Act challenge would defeat Congress's intent in enacting the Act).

253. *See* Rick Ewig, *The Railroad and the Frontier West*, 3 ORG. AM. HISTORIANS MAG. HIST. 9, 9–10 (1988) (discussing the Transcontinental Railroad's significance in the second half of the 19th century).

254. *See* BERFIELD, *supra* note 239, at 224 (stating that Justice Harlan was the lone dissenter from the Supreme Court's decision to dismiss the government's prosecution of the Sugar Trust).

255. United States v. E. C. Knight Co., 156 U.S. 1, 44 (1895).

256. *See* WILLIAM HOWARD TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 89–96 (1914); *see also* James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918*, 50 OHIO ST. L.J. 257, 302 (1989) ("Taft characterized the Sherman Act as an important safeguard for basic economic rights and political freedom and heavily stressed that recent Sherman Act jurisprudence had developed within the larger context of judicial concerns and methodology embodied in contemporary constitutional adjudication.").

257. *See* BERFIELD, *supra* note 239, at 224 ("Roosevelt himself later wrote of the Knight case: 'This decision left the National Government, that is the

remarked in 1903, "Pools, trusts, and conspiracies to fix or maintain the prices of the *necessaries of life* strike at the foundations of government . . . ."[258] He also implied that the monopolization of necessities may elevate switching costs, asserting that the trusts "raise the cost of living and lower the price of wages; take from the average American freeman the ability to supply his family with necessary, adequate and wholesome food . . . because the head of the house cannot earn enough to feed and clothe his family."[259]

In light of history's role throughout the course of enforcement, courts and politicians were intent on promoting social and economic welfare in especially essential markets.[260] To the degree that antitrust is meant to align with its historical purpose, courts and enforcers should prioritize the ways in which competition in essential markets promotes consumer welfare.

D. *Conclusions*

Since welfare losses are reliably greater in essential markets, a variation of the quick look offers an effective tool on several fronts. Recalling that antitrust relies on microeconomic theory, the greater incorporation of inelasticity into the analysis would improve antitrust's internal logic as well as accord with case law in which heightened scrutiny should apply where anticompetitive effects are reliably greater. Given the courts' freedom to (re)interpret enforcement due to the paucity of text in the Sherman Act, the proposal is tenable.[261] And rather than significantly raising the risk of liability, the approach would encourage firms to take more ex ante steps to guarantee that

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people of the Nation, practically helpless to deal with the large combinations of modern business.'").

258. State *ex rel.* Crow v. Armour Packing Co., 73 S.W. 645, 652 (Mo. 1903) (emphasis added).

259. *Id.* (internal quotation omitted).

260. *See* Khan & Vaheesan, *supra* note 19, at 277 (discussing Congress's vision in enacting antitrust laws and the Supreme Court's acknowledgement of Congress's aims).

261. *See* Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 697 (1975) (explaining that the case law on predatory pricing has been characterized by vagueness and a scarcity of economic analysis).

consumers would benefit. This proposal would even recognize that disaffected groups suffer heightened costs in rebutting antitrust's assumption that consumers are largely homogenous. Another benefit is that the quick look would provide an efficient remedy by allowing parties to litigate antitrust disputes without engaging in complex and costly analyses of the underlying market. While the deference in the rule of reason may make sense when applied to garden variety markets, courts should impose a heightened level of review whenever the underlying good is inelastic and socially beneficial.

IV. IMPLICATIONS

Incorporating necessities into antitrust's framework would produce additional benefits. First, it would assuage a debate between the new and old guards of antitrust scholarship. Second, the proposal would add a meaningful consideration to merger enforcement, especially if done retroactively. Third, it would harmonize aspects of antitrust's framework by recognizing that the enterprise does, in fact, scrutinize subject matter in a few situations, including agency enforcement and criminal sanctions.

A. *Resolving Policy Debate*

Antitrust's evolution toward minimalism has inspired a scholarly movement—known as "Neo-Brandeisians" or even "hipster antitrust"—which has been met by a forceful rebuke.[262] Neo-Brandeisians assert that antitrust's *laissez-faire* framework has allowed firms in the technology, pharmaceutical, and similar industries to dominate commerce.[263] Their claim is that antitrust enforcers must conduct real investigations and impose actual penalties on today's trusts, given the deferential

262. *See* John M. Newman, *Reactionary Antitrust*, 4 CONCURRENCES REVUE 66, 66 (2019) (discussing the desire for more antitrust enforcement); *see also* Christopher S. Yoo, *Hipster Antitrust: New Bottles, Same Old W(h)ine*?, CPI ANTITRUST CHRON., Apr. 2018, at 2 ("In the midst of these developments, a recent outcry over what is sometimes called 'Neo-Brandeis' or more often and more colorfully, 'Hipster Antitrust' has come to the forefront.").

263. *See, e.g.*, John M. Newman, *Antitrust in Digital Markets*, 72 VAND. L. REV. 1497, 1502 ("[D]igital markets facilitate uniquely durable market power, in ways that reach far beyond what previous analyses have imagined.").

approach in the consumer welfare era.[264] But to the old guard, this movement threatens to set antitrust back decades to when the enterprise obliged populist demands in imposing unruly liability.[265] At the heart of this debate is the embrace of the rule of reason, which has placed microeconomic theory at the center of enforcement as well as evolved antitrust law into a notoriously deferential body of law.[266]

Use of the quick look to scrutinize essential goods would bridge a gap between the two schools of antitrust thought. The approach would preserve the deference in the rule of reason and protect Chicago's desire for minimal enforcement.[267] It would also assuage concerns of Neo-Brandeisians regarding the depth of actual harms suffered by consumers in critical markets. By recognizing the saliency of essential goods, it would prioritize the concerns of both Neo-Brandeisians and the Chicago School as they jostle over antitrust's trajectory.

In fact, the quick look in essential markets would resolve concerns of populism expressed by, especially, the Chicago School. As discussed in Part III, courts and scholars favor greater usage of the quick look yet critics contend that no bright line indicates when it should apply. The fear is that courts are

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264. *See id.* ("Digital defendants have received, and continue to receive, a free pass in the form of de jure and de facto immunity and leniency. This Article proposes an immediate reversal of that mistaken course." (footnote omitted)); Jonathan B. Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 YALE L.J. 2176, 2201–02 (2018) (arguing for enhanced antitrust enforcement).

265. *See* Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 294 (2019)

> But this revolution is a blast from antitrust's past in many ways. It calls for the return of populism in antitrust enforcement. It declares the modern antitrust era—and the consumer welfare standard itself—a failure. This new revolution lays at antitrust law's feet a myriad of perceived socio-political problems, including, but not limited to, rising inequality, employee wage concerns, and the concentration of political power.

266. *See, e.g.*, *id.* at 358 ("These critics reveal a profound lack of understanding of the consumer welfare model and the rule of reason framework. In reality, the consumer welfare approach to antitrust analysis already considers a variety of factors including, quality, variety, and innovation.").

267. *See supra* note 92 and accompanying text (discussing the Chicago School); *see also* Khan & Vaheesan, *supra* note 19, at 277 (stating that the Chicago School led the counterrevolution in antirust).

more likely to condemn a defendant under the quick look—not due to a clear standard—but when the public demands the head of a notorious villain.[268] This fear has notably prevented the quick look from taking root.[269] Given the divide between Neo-Brandeisians and Chicago School, use of the quick look in essential markets would provide a clear standard based on inelasticity yet avoid the concerns of populism voiced by adherents to the Chicago School. It could indeed harmonize factions of antitrust scholarship. This proposal could also affect merger enforcement.

B. *Retroactive Review*

Two federal agencies, the DOJ and Federal Trade Commission ("FTC"), have authority under the Clayton Antitrust Act to contest mergers that overly concentrate market power and degrade consumer welfare.[270] Over the past few decades, the agencies have deferentially reviewed mergers in a manner akin to Section 1 and 2 enforcement.[271] Due to the risks of overenforcement, federal agencies have largely avoided blocking mergers unless they can fairly accurately predict the anticompetitive effects.[272] However, given the dangers of

268. *See* Meese, *In Praise of All or Nothing*, *supra* note 194, at 852 (explaining the quick look approach's "populist notions").

269. *See* Meese, *Farewell to the Quick Look*, *supra* note 29, at 464 ("The quick look is an artifact of a bygone Populist era in which courts and enforcement agencies protected the freedom of traders from contractual restraints deemed 'monopolistic' by the applied price theory school of industrial organization.").

270. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 32, at 1 (outlining DOJ and FTC's "principal analytical techniques, practices, and the enforcement policy . . . with respect to mergers and acquisitions"); Ass'n of the Bar of N.Y.C. Comm. on Antitrust & Trade Regul., *Recent Developments in Four Areas of Antitrust Law: Merger Enforcement; Criminal Enforcement and Health Care Initiatives; Exclusionary Conduct, and the Noerr-Pennington Doctrine and State Action Immunity,* 2003 COLUM. BUS. L. REV. 451, 453 (2003) (outlining the agencies' authority to contest anticompetitive mergers).

271. *See* Lawrence M. Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, 2008 UTAH L. REV. 159, 177 (2008) (explaining that the agencies receive little deference in enforcing mergers).

272. *See id.* at 179 (stating that when a judge cannot make a reliable prediction regarding the consequences of a merger, the judge will conclude that the case is "not proven" and will rule against the plaintiff).

mergers in essential markets—such as bank mergers[273]—federal enforcers should increase scrutiny via an effective and controversial strategy: the FTC and DOJ should wait to review a merger's effects on an essential market until some period *after* the merger closes.

By viewing a merger retroactively, enforcers could assess whether the reduction of competition allowed the surviving firm to extract human costs or, alternatively, create efficiencies.[274] To do so, the inquiry should ask whether the merger has especially harmed marginalized populations. If a merger later proves to have deprived disaffected groups of, as examples, critical drugs, financial services, or housing, the agencies could rectify this harm by retroactively reviewing the acquisition. Antitrust enforcers may also scrutinize whether the anticompetitive effects include unreasonably high switching costs as discussed in Part III. This would entail a modest reconfiguration of merger policy, as federal agencies have already recognized the heightened dangers of anticompetitive acquisitions in inelastic markets.[275]

Critics may contend that revisiting a merger after agency approval appears unfair. After all, firms depend on the agencies' blessing to effectuate acquisitions.[276] However, Menesh Patel has shown that the agencies should ideally ramp up ex post investigations of anticompetitive combinations where justice dictates.[277] To Patel, the agencies labor under such incomplete information, and the dangers of anticompetitive mergers are so

273. *See supra* notes 60–61 and accompanying text (outlining the problems of monopoly power in the financial services industry).

274. See Brian A. Facey, *The Future of Looking Back: The Efficient Modeling of Subsequent Review*, 44 ANTITRUST BULL. 519, 523 (1999) (stating that agencies may incorrectly predict a merger's efficiencies because the claims are asserted by self-interested parties and it is difficult for both the agencies and the merging parties to predict outcomes).

275. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 32, at 6–7 (discussing targeted customers and price discrimination).

276. *See* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 201, 90 Stat. 1383, 1390 (1976) (establishing the notification and review process for mergers).

277. *See* Menesh Patel, *Merger Breakups*, 2020 WIS. L. REV. 975, 1011 (2020) (stating that expansion of agency challenges to previously reviewed and cleared mergers could generate substantial competitive benefits).

great, that ex post enforcement would make good policy.[278] Moreover, as Patel found, the FTC and DOJ enjoy the power to review a merger before and after its consummation without question.[279] The benefit of emphasizing essentialness in merger enforcement is that it would achieve the benefits identified by Patel as well as make retroactive review foreseeable, restrained, and equitable. The agencies should therefore consider challenging combinations which diminish the welfare of vulnerable populations, given the difficulties of doing so prior to the merger.

C. *Caveats*

It is worth mentioning a few caveats; the importance of the underlying good does, in fact, affect antitrust in a few idiosyncratic ways. These areas involve indirect mechanisms such as how federal agencies pick antitrust cases, how competitors must provide an essential facility, and how antitrust courts impose criminal penalties as well as define the relevant market. Given the importance of incorporating necessities into the actual analysis and the value of harmonizing substantive facets of enforcement, the following discussion reviews certain areas in which necessities do currently affect enforcement.

1. Picking a Target

The subject matter's saliency has influenced how the FTC and DOJ choose litigation targets.[280] In 2019, for example, the DOJ investigated mergers in the marijuana industry.[281] This

278. *See id.* at 995–96 *(*discussing constraints on information available to agencies).

279. *See id.* at 977 ("These merger challenges and potential breakups would occur within the existing federal merger review scheme, the Hart-Scott-Rodino Act. That scheme has guided federal merger antitrust review since 1976 and obligates the antitrust agencies to evaluate mergers for their expected competitive effects prior to consummation.").

280. *See* D. Daniel Sokol & Roisin Comerford, *Antitrust and Regulating Big Data*, 23 GEO. MASON L. REV. 1129, 1130 (2016) (stating that "big is bad" has been a "bogeyman" of antitrust since the time of Standard Oil).

281. *See* Betsy Woodruff Swan, *Senior DOJ Official Pushes Back against Former Top Aide's Testimony*, POLITICO (July 1, 2020, 10:01 PM),

caused confusion among observers and even attorneys in the DOJ because the marijuana market seemed adequately competitive.[282] Whistleblower testimony soon alleged that the investigation stemmed from the Attorney General, William Barr, who personally detests the marijuana industry.[283] Similarly, the DOJ announced its intention to contest telecommunication mergers because increased concentration in the telecommunications industry would raise prices and erode free speech.[284]

Given the agencies' limited resources, it stands to reason that the agencies would target certain types of anticompetitive practices based, in part, on the necessity of the underlying market.[285] This also suggests that the biases of government actors may influence enforcement even if the importance of subject matter lacks an official place in the analysis. Thus, while courts apply the same analysis regardless of industry, the type of industry may inspire the federal agencies to act.

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https://perma.cc/R94L-6PH6 (recounting the DOJ's involvement in "an unusually thorny legal issue: marijuana mergers").

282. *See* Karl Bode*, Barr DOJ Weaponized Antitrust to Launch Flimsy Inquiries into Legal Weed Companies*, TECH DIRT (June 25, 2020, 10:45 AM), https://perma.cc/7KRH-HP99 (reporting on a whistleblower's claims that "Barr's DOJ launched inquiries into marijuana companies and smaller mergers that *in no way posed competitive or monopolistic threats*").

283. *See* Swan, *supra* note 281 ("[The whistleblower] testified that Attorney General William Barr called Antitrust Division leaders to his office for a meeting and then ordered them to scrutinize mergers of marijuana companies because he himself held personal animus toward the industry."); Ben German, *DOJ Whistleblower to Allege Political Interference in Antitrust Probes*, AXIOS (June 23, 2020), https://perma.cc/HQ7E-RF7S (sharing claims that the DOJ reviewed marijuana company mergers "because [Barr] did not like the nature of their underlying business" (alteration in original)).

284. *See* Proposed Final Judgment and Competitive Impact Statement, United States v. Deutsche Telekom AG, 84 Fed. Reg. 39862, 39875 (Aug. 12, 2019) ("The market for retail mobile wireless service in the United States is highly concentrated and would become more so if T-Mobile were allowed to acquire Sprint."); Makan Delrahim, *". . . And Justice for All": Antitrust Enforcement and Digital Gatekeepers*, DOJ (June 11, 2019), https://perma.cc/8USB-434K (warning of the risks of consolidations in the telecommunications industry)..

285. *Cf.* Samuel Weinstein, Anticompetitive Merger Review 39 (June 29, 2021) (unpublished manuscript) (asserting that the agency's finite resources and attention demand careful selection of cases).

2. Essential Facilities

One of the most controversial—and fledgling—antitrust doctrines concerns "essential facilities."[286] A firm that owns a forum, venue, or platform may not exclude rivals if the facility is essential for competition.[287] Over the years, courts have invoked the doctrine with respect to sports stadiums,[288] railroad terminals,[289] telecommunication networks,[290] and other venues in which a company dominates the market by refusing to offer access to its facility.[291] To assert the doctrine, a plaintiff must establish "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."[292]

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286. *See* Salil K. Mehra, *Competition Law for a Post-Scarcity World*, 4 TEX. A&M L. REV. 1, 28–29 (2016) ("[T]he United States Supreme Court, if not foreclosing [the essential facilities doctrine] outright, has at least kept a wary distance."); *see also* Lina M. Khan, Note*, Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 801 (2017) ("In 2004, however, the Court disavowed the essential facilities doctrine in dicta, leading several commentators to wonder whether it is a dead letter.").

287. *See* Allen Kezsbom & Alan V. Goldman, *No Shortcut to Antitrust Analysis: The Twisted Journey of the "Essential Facilities" Doctrine,* 1996 COLUM. BUS. L. REV. 1, 1–2 (1996)

> As originally conceived, when a monopolist or near-monopolist controlling what is deemed an 'essential facility' denies an actual or potential competitor access to that facility, where the facility cannot reasonably be duplicated and where there is no valid technical or business justification for denying access, then the doctrine is applied.

288. *See* Hecht v. Pro-Football, Inc., 570 F.2d 982, 992 (D.C. Cir. 1977) ("Hecht contends that the District Court erred in failing to give his requested instruction concerning the 'essential facility' doctrine. We agree.").

289. *See* United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383, 406–07 (1912) (explaining the essential facilities doctrine in the railroad context).

290. *See* MCI Commc'ns Corp. v. AT & T, 708 F.2d 1081, 1133 (7th Cir. 1983) ("Finally, the evidence supports the jury's determination that AT & T denied the essential facilities, the interconnections for FX and CCSA service, when they could have been feasibly provided.").

291. *See generally* Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1189 (1999) (explaining the essential facilities doctrine).

292. Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 569 (2d Cir. 1990) (quoting *MCI Commc'ns Corp.*, 708 F.2d at 1132–33).

The saliency of the essential facilities doctrine is that it suggests a way to value characteristics of an antitrust dispute beyond conduct. Under this doctrine, courts have declared that certain forums play an elevated role in competition.[293] The theory heightens a monopolist's duty to preserve competition due to the vital nature of its facility.[294]

That said, the essential facilities doctrine has rapidly fallen out of favor.[295] It is a longstanding tenet of antitrust that firms owe no duty to help their rivals, making the doctrine a glaring departure from the rule.[296] Given that the essential facility doctrine lies in tension with core antitrust principles, courts and scholars have described the doctrine as "on the ropes."[297] As one court remarked in quoting the leading treatise: "The so-called 'essential facility' doctrine is one of the most troublesome, incoherent and unmanageable of bases for Sherman § 2 liability. The antitrust world would almost certainly be a better place if it were jettisoned . . . ."[298] In light of this criticism, few courts have found a plausible offense based upon the denial of an essential facility.

A significant part of the problem is that the essential facilities doctrine is geared to favoring competitors rather than consumers.[299] The question is hardly about whether consumers

293. *See* Mary L. Azcuenaga, *Essential Facilities and Regulation: Court or Agency Jurisdiction?*, 58 ANTITRUST L.J. 879, 881, 883 (1989) (explaining that courts assess test whether a forum is essential by evaluating how long it would take a competitor to duplicate the forum).

294. *See* Robert Pitoksfky et al., *The Essential Facilities Doctrine Under United States Antitrust Law,* 70 ANTITURST L.J. 443, 452 (2002) (emphasizing the importance of ensuring competition).

295. *See* Diane P. Wood, *The Old New (or Is It the New Old) Antitrust: "I'm Not Dead Yet!!"*, 51 LOY. U. CHI. L.J. 1, 5 (2019) (discussing the obsolescence of the essential facilities doctrine).

296. *See* Pitoksfky et al.*, supra* note 294, at 458–59 (explaining that a firm rarely has a duty to aid its competitor's ability to survive in the market).

297. *See* Geoffrey A. Manne, *The Problem of Search Engines as Essential Facilities: An Economic & Legal Assessment*, *in* THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 419, 433 (Berin Szoka & Adam Marcus eds., 2010).

298. Z-Tel Commc'ns, Inc. v. SBC Commc'ns, Inc., 331 F. Supp. 2d 513, 540 (E.D. Tex. 2004) (quoting HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 305 (2d ed. 1999)).

299. *See MCI Commc'ns Corp.*, 708 F.2d at 1132–33 (stating that under the essential facilities doctrine, a monopolist who controls the gateway to a

would benefit if the doctrine was applied, but whether competitors need it. This is significant because antitrust courts have recited *ad nauseum* that antitrust's purpose is to promote the welfare of consumers, not competitors.[300] Since the doctrine creates a duty to help one's rival—an antitrust anomaly in several ways—plaintiffs cannot possibly bank on winning a lawsuit based on this doctrine even though it technically remains good law.[301]

However, courts could promote the essentialness of certain goods without running into the same problems created by the essential facilities doctrine. Whereas the doctrine creates friction by seeking to benefit competitors, the recognition that certain markets are essential would apply the economic theories at antitrust's heart to inure the benefits of competition to consumers. This would indeed foster consumer welfare regardless of what competitors want or need, squaring the proposal with contemporary antitrust and in stark contrast to the fledgling essential facilities doctrine.

3. Imposing Criminal Liability

Another example illustrating the importance of the underlying good concerns the sentencing portion of criminal antitrust enforcement. In 2020, the former CEO of Bumble Bee Tuna was sentenced to three years in prison for orchestrating a conspiracy to fix canned tuna prices.[302] Judge Edward Chen of the U.S. Northern District of California imposed a stiff sentence—prison time is a rarity in antitrust cases—lamenting

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second market may be required to grant competitors access to that facility, favoring competitors).

300. *See* Razorback Ready Mix Concrete Co. v. Weaver, 761 F.2d 484, 488 (8th Cir. 1985) ("[A]ntitrust laws exist for 'the protection of competition, not competitors.'" (quoting Brunswick Corp. v. Pueblo-Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977))).

301. *See* Dealer Comput. Servs., Inc. v. Ford Motor Co., No. Civ. A. H-06-175, 2006 WL 801033, at *2 (S.D. Tex. Mar. 28, 2006) ("The essential facilities doctrine has been described by Judge Lake as 'often criticized . . . [,but] nevertheless . . . a viable part of the federal antitrust laws.'" (quoting David L. Aldridge Co. v. Microsoft Co., 995 F. Supp. 728, 751 (S.D. Tex. 1998))).

302. *See* Dave Sebastian, *Former Bumble Bee CEO Sentenced for Role in Tuna Price-Fixing Scheme*, WALL ST. J. (June 17, 2020, 9:37 AM), https://perma.cc/JMZ8-7CL9.

the harm of collusion in food markets: "This is food, food for people who, I think it's fair to assume, include those at the lower end of the socioeconomic scale based on the pricing of the product. So the impact has particular meaning."[303] The DOJ's antitrust chief agreed with the court's logic, asserting that courts must especially deter price-fixing in food markets via criminal penalties.[304]

4. Defining the Market

It should also be noted that whether a good is inelastic can affect the market definition question. To show that the defendant harmed market competition, plaintiffs must adequately define the relevant market to prove such a harm.[305] For instance, if two gas stations in Chicago colluded to fix gas prices, consumers would likely visit other gas stations thereby keeping prices low; in turn, the antitrust claim would likely fail because the overall market remained intact. With this in mind, a plaintiff must generally define the market in order to show whether the restraint did in fact harm it.[306] Elasticity enters the calculus when the plaintiff endeavors to show that the proffered market is inelastic and thus concerns only the monopolized good[307]—but if a good's demand is elastic, the market's

303. Malathi Nayak, *Ex-Bumble Bee CEO Gets Prison Term, a Rarity in Antitrust*, BLOOMBERG (June 16, 2020, 6:17 PM), https://perma.cc/85SD-4BAK.

304. *See* Press Release, DOJ, Former Bumble CEO Sentenced to Prison for Fixing Prices of Canned Tuna (June 16, 2020), https://perma.cc/4ZZX-F2CX ("Executives who cheat American consumers out of the benefits of competition will be brought to justice, particularly when their antitrust crimes affect the most basic necessity, food.").

305. *See* Cont'l Airlines, Inc. v. United Air Lines, Inc., 120 F. Supp. 2d 556, 566 (E.D. Va. 2000) ("In demonstrating that allegedly anticompetitive conduct imposes an unreasonable restraint of trade, a plaintiff must prove what market . . . was restrained and that the defendants played a significant role in the relevant market. It follows that relevant market definition is central to the analysis . . . ." (citations omitted)).

306. *See* Integrated Sys. & Power, Inc. v. Honeywell Int'l Inc., 713 F. Supp. 2d 286, 298 (S.D.N.Y. 2010) ("In order to plead an antitrust violation under the rule of reason, a plaintiff must allege a relevant market, including both a product market and a geographic market.").

307. *See, e.g.*, Mooney v. AXA Advisors, L.L.C., 19 F. Supp. 3d 486, 499 (S.D.N.Y. 2014) (analyzing whether the underlying good is inelastic for purposes of defining the market).

definition must include all interchangeable products.[308] By effect, plaintiffs face a tougher task of substantiating a claim in elastic markets due to the substitutability of items whereas plaintiffs in inelastic markets can more easily show monopoly power as the defendant controls and operates the entire market.

The point is that antitrust has incorporated matters of essentialness and inelasticity into certain parts of enforcement. It's missing, however, in the substantive analysis of whether an exclusionary act should be considered anticompetitive or procompetitive. If antitrust's framework applied the quick look whenever a necessity was restrained, it would harmonize aspects of enforcement rather than creating an entirely new analysis.

CONCLUSION

This Article explored the heightened magnitude of harms suffered by consumers when firms monopolize or otherwise restrain trade in essential markets. Since consumers lack the power to mitigate damages when purchasing necessities—as they cannot safely buy substitutes or nothing at all—the monopolist can restrict supply and increase prices to a greater degree than with garden variety goods.[309] The added premium in essential markets entails a human cost of collusion, as it equates to the need of vulnerable consumers. Antitrust courts should no longer apply the same analysis to inelastic necessities like certain drugs, labor, and food as it does to garden variety goods like baseball cards. The human cost is indeed much greater for the former than the latter.[310]

Another takeaway is the disparate effects on marginalized populations. Antitrust law pays little or no attention to whether people of color, women, undocumented workers, and other disaffected groups suffer greater costs.[311] The uneven effects

308. *See* Paladin Assocs., Inc. v. Mont. Power Co., 328 F.3d 1145, 1163 (9th Cir. 2003) ("For antitrust purposes, a market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." (internal quotation omitted)).

309. *See supra* notes 15–18 and accompanying text.

310. *See* Khan & Vaheesan, *supra* note 19, at 285–86 (emphasizing the harm some monopolies create).

311. *See supra* Part I.A.

come as little surprise since, according to critical race theory, dominant groups have historically relied on anticompetitive practices to exclude people of color and monopolize scarce resources.[312] It is also predictable that antitrust misses this dynamic, as antitrust's framework tends to view markets as self-correcting and consumers as homogenous.[313] This Article endeavors to disaggregate this concept of consumers by incorporating inelasticity and essentialness into the substantive analysis. In understanding the ways exclusionary practices in essential markets are especially likely to injure marginalized groups via high-priced foods or drugs, the analysis could better foster consumer welfare by acknowledging the disproportional costs imposed on historically marginalized populations.

To do so, courts could simply apply the quick look analysis to suspect acts arising in inelastic markets for necessities. This would, in effect, swap the burden of persuasion from the plaintiff to the defendant, who would then be required to prove that the restraint was ultimately procompetitive.[314] It would resolve longstanding confusion about when the quick look is appropriate, assuaging the hesitancy of courts to apply the standard despite overwhelming support shown to it by scholarship. This approach could also help to resolve the emerging debate between Neo-Brandeisians—who assert that antitrust has deferentially allowed powerful monopolies to form in the most important markets—and the old guard who claim that "hipster antitrust" threatens to revive antitrust's historic problem.[315] Targeting necessities under the quick look could largely keep antitrust in place as the old guard prefers, but also redress the concerns of Neo-Brandeisians who receive much of their motivation from monopolies in the tech, pharmaceutical, labor, and other critical markets.

312. *See supra* notes 219–220 and accompanying text.

313. Gavil, *Exclusionary Distribution*, *supra* note 12, at 460–61.

314. Meese, *Farewell to the Quick Look*, *supra* note 29, at 463 n.16.

315. *See supra* Part IV.A.