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The Sword of Damocles:

The Slender of Thread of Expanded Antitrust Conduct Claims

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"If the threat of [an antitrust action] is going to help us more with their programming than doing it, then keep the threat."

~President Richard Nixon[1]

"[K]eeping this case in a pending status gives us one hell of a club on an economic issue that means a great deal to those three networks ... something of a sword of Damocles."

~Charles W. Colson, advisor to President Nixon[2]

Many thanks to Sean Heather and the Chamber of Commerce for hosting me today. I greatly appreciate the opportunity to share my thoughts with you on proposals to alter the standards by which we assess business conduct under the antitrust laws.

We gain useful perspective when we place current events within the arc of history. Today, I would like to roll back the clock several centuries. Shortly after his father died in 367 BCE, Dionysius the Younger inherited control over the ancient city of Syracuse. When Damocles, a member of his royal court, commented on the ruler's wealth and good fortune, Dionysius offered to switch places with him. Damocles accepted and assumed his place on a bed of gold. Before he could get too comfortable, Dionysius hung a sword from the ceiling by a single horse hair right above Damocles' head. The stress of the impending fall of the sword became so great that Damocles begged Dionysius to allow him to leave. Dionysius, having proven his point, allowed Damocles to go back to his normal life.[3]

You might be wondering how Damocles' sword is relevant to antitrust. In 1971, then-President Richard Nixon and his senior advisor Chuck Colson may have been the first to make the connection. According to transcripts of White House tapes, President Nixon understood that the threat of an antitrust action against the three major television networks was a powerful tool.

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[1] Walter Pincus & George Lardner Jr., *Nixon Hoped Antitrust Threat Would Sway Network Coverage*, WASH. POST (Dec. 1, 1997), https://www.washingtonpost.com/wp-srv/national/longterm/nixon/120197tapes.htm ("The best way to intimidate the nation's three major television networks, President Richard M. Nixon concluded in 1971, was to keep the constant threat of an antitrust suit hanging over them. 'If the threat of [an antitrust action] is going to help us more with their programming than doing it, then keep the threat,' Nixon told a White House aide in a tape-recorded Oval Office conversation recently transcribed for the first time. 'Don't [sue] them now. [Otherwise] they'll figure that we're done.'").

[2] *Id.* ("Nixon's previously unpublished pronouncements about the television networks occurred during a July 2, 1971, discussion with aide Charles W. Colson, who played a central role in pressuring the news media to change their critical coverage of the Nixon administration. Colson told Nixon that whether filing an antitrust case against ABC, NBC and CBS 'is good or not is perhaps not the major political consideration. But keeping this case in a pending status gives us one hell of a club on an economic issue that means a great deal to those three networks ... something of a sword of Damocles.'").

[3] CICERO'S TUSCULAN DISPUTATION, BOOK V 186-87 (C. D. Yonge trans., Project Gutenberg ed. 2005), https://www.gutenberg.org/files/14988/14988-h/14988-h.htm#page-209.

He recommended preserving the threat rather than bringing an antitrust action, and Colson agreed, calling that threat "something of a sword of Damocles."[4] I believe this popular anecdote, often used as a reminder that there is always danger for those in a position of power,[5] provides a unique perspective on recent proposals to expand antitrust conduct enforcement. But before we jump forward a few millennia to today's discussion, I must give the standard disclaimer that the views I will share today are my own and do not necessarily reflect the views of the Federal Trade Commission or of any other Commissioner.

Antitrust law enforces against "the willful acquisition or maintenance of" monopoly power.[6] This unlawful conduct is "distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[7] This distinction "induces risk taking that produces innovation and economic growth. 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."[8] To that extent, the sword should not hang over the head of business when the "opportunity to charge monopoly prices—at least for a short period—is what attracts business acumen in the first place."[9]

Consider Damocles and recent proposals to expand certain conduct claims under Section 2 of the Sherman Act. Is it possible that punishing success under the antitrust laws will cause businesses to fear attracting too many consumers with popular products and services? Or is it possible that increased uncertainty under the antitrust laws will cause businesses to reduce investment due to fear of too much success? The answer depends on the future of antitrust law. If enforcers treat success gained through business acumen the same as dominance gained through anticompetitive conduct, then the answer is yes—the incentive to be successful is diminished. The House Judiciary Committee's Majority Staff Report[10]—published last fall after the committee's investigation of the GAFA companies—argues for proposals that threaten to treat success as an antitrust violation. The sword should be in the firm grip of enforcers, ready to fall on those who create or maintain a monopoly through anticompetitive conduct, not precariously placed to threaten those who succeed by delighting consumers.

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[4] *See supra* notes 1-2.

[5] *See generally* Connor Mortell, *The Sword of Damocles Hangs over Every Property Owner*, MISES WIRE (Apr. 20, 2021), https://mises.org/wire/sword-damocles-hangs-over-every-property-owner (using the sword of Damocles anecdote in the context of state redistribution of property).

[6] United States v. Grinnell Corp., 384 U.S. 563, 570–571 (1966).

[7] *Id.*

[8] Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

[9] *Id.*

[10] MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGIT. MKTS. 397-398 (2020) [hereinafter MAJORITY STAFF REPORT], https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

While the Majority Staff Report contains many proposals governing conduct, I will focus on three: (1) expanding the essential facilities doctrine; (2) removing the current predatory pricing recoupment standard; and (3) finding antitrust violations in product design changes that benefit consumers.

First, I will take a close look at the essential facilities doctrine, including the Supreme Court's role—or lack thereof—in its creation. I then question the impact this doctrine has on incentives to invest and innovate.

I will then discuss proposed changes to our predatory pricing framework that will discourage businesses from offering low prices and question the outcome that proponents of this proposal hope to achieve.

And finally, I will provide a warning about proposals to disregard consumer benefits when analyzing design changes. Here, I question the intended beneficiaries of these proposals.

1. <u>Essential Facilities Doctrine</u>

I will start with proposals to breathe new life into the essential facilities doctrine. The Majority Staff Report recommends revitalizing the essential facilities doctrine.[11] Proponents are concerned that "denial of access in one market can undermine competition across adjacent markets, undermining the ability of market participants to compete on the merits."[12] This perspective is flawed because it is static; the essential facilities doctrine does not view the economy as dynamic or industries as innovative. The doctrine identifies a "facility" controlled by one competitor and concludes access would be helpful for other competitors.

It is for this reason that commentators have described the essential facilities doctrine as a "taking."[13] The Takings Clause of the Fifth Amendment to the U.S. Constitution provides that

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[11] MAJORITY STAFF REPORT, *supra* note 10, at 397-398 ("[T]he Subcommittee recommends that Congress consider revitalizing the 'essential facilities' doctrine, the legal requirement that dominant firms provide access to their infrastructural services or facilities on a nondiscriminatory basis. To clarify the law, Congress should consider overriding judicial decisions that have treated unfavorably essential facilities- and refusal to deal-based theories of harm.").

[12] *Id.*

[13] *See, e.g.*, Robert Pitofsky et. al., *The Essential Facilities Doctrine Under United States Antitrust Law*, 70 Antitrust L.J. 443, 443 (2002) ("On the other hand, a policy that defines access generously encounters the rather ideological complaint that it represents a government "taking" of private property, and the more practical concern that it will be likely to reduce incentives to innovate."). *See also* Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1225 ("Mandatory competitor access to the Windows platform would crisply present the question whether, under existing precedent, the government's desired form of injunctive remedy—which would seem to be the necessary result of any successful antitrust claim expressly predicated on the essential facilities doctrine—would constitute a permanent physical invasion of Microsoft's property that would be a per se taking under the Takings Clause of the Fifth Amendment."). Outside of antitrust scholarship, the essential facilities doctrine has been referenced as a type of taking as an example for other disciplines to consider. *See* Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 541 ("Viewing takings in this way enables us to see that the power of eminent domain is not quite so alien to the private market as we might suspect. Pliability rules are hardly unknown

private property shall not be taken for public use without just compensation.[14] It is established that regulation can be classified as a taking.[15] But the extent to which these "takings" are allowed depends, at least partially, on the identification of "important public interests."[16] Unsurprisingly, these takings can lead to backlash, as displayed in *Kelo v. City of New London*[17] and the resulting political response to the unpopular decision.[18] Thus, the Takings Clause provides one final reason to tread lightly in this area. Once antitrust law determines that a facility is "essential," the government is allowing rivals to seize access. To avoid antitrust violations, a firm with a popular good or service will have no choice but to share the benefit of its success with its competitors.

a. <u>Incentive to Invest</u>

But what effect does this mandated access have on the incentive to construct facilities that risk being designated essential? Some critics argue that small firms need access to certain facilities so that they can develop their own infrastructure. An economic examination of countries that mandated access to unique facilities showed reductions in investment.[19] A study of these policies found that they do not create a so-called "ladder of investment" that leads small firms to build their own facilities.[20]

By adopting a static perspective and failing to consider future investment, antitrust policy can actually harm innovation. The incentive to risk investment in research and development is weakened with the threat that rivals successfully could demand access to costly developments. In this context, competitors would no longer need to out-compete their rivals because they could take some of what their competitors built. "Faced with this potential onslaught, a company

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to the private sector. Indeed, they are a ubiquitous feature of the legal landscape of private entitlements. … Businesses can be forced to allow competitors use of 'essential facilities' under antitrust law.").

[14] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[15] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

[16] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987) ("Unlike the Kohler Act, which was passed upon in Pennsylvania Coal, the Subsidence Act does not merely involve a balancing of the private economic interests of coal companies against the private interests of the surface owners. The Pennsylvania Legislature specifically found that important public interests are served by enforcing a policy that is designed to minimize subsidence in certain areas.").

[17] Kelo v. City of New London, 545 U.S. 469 (2005) (upholding New London's taking of private residences for a plan that included the transfer of the land to private developers for office space).

[18] *See* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2101-03 (2009) (describing the response in state legislatures to the *Kelo* decision that resulted in 43 states' enacting legislation to curb eminent domain).

[19] Michal Grajek & Lars-Hendrik Roller, *Regulation and Investment in Network Industries: Evidence from European Telecoms*, 44 J. OF L. AND ECON. 189 (2012).

[20] Maya Bacache et al., *Dynamic Entry and Investment in New Infrastructures: Empirical Evidence from the Fixed Broadband Industry*, 44 REV. OF INDUSTRIAL ORGANIZATION 179 (2014).

understandably might question the value of investing in new assets and technologies."[21] With the sword of Damocles–here, the threat of compulsory sharing–hanging over its head, a company may conclude that average assets and technologies look like a better option than vigorous competition.

Some courts find that a legitimate business justification is a defense to an essential facilities claim.[22] But as the late Professor Phillip Areeda explained, businesses refuse to share with competitors because they want to win customers[23] and required sharing disincentivizes investments that would benefit consumers.[24] In other words, the refusal itself is a business justification because the defendant never would have built the facility in the first place if he had known he would be required to share it.[25]

b. History and Supreme Court "Precedent"

To understand the modern essential facilities doctrine, it is helpful to examine its history. The problems of access to a unique facility—and the specific legal principles to address these issues—date back to the Middle Ages. Both common law and statutes to address access issues developed based on many factors, including what facility is deemed essential, the access recipient, the nature of the relationship between the recipient and provider, and the circumstances impeding accessibility.[26] Obligations to provide access to products or services deemed essential can be traced back to the rules imposed on common carriers from the English common law of public callings dating back to 1349.[27] Similar obligations were imposed on public utilities when they emerged in the nineteenth century.[28] These private corporations were granted—by the

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[21] Christine S. Wilson, Opinion, *A Court's Dangerous Antitrust Overreach*, WALL ST. J. (May 28, 2019), https://www.wsj.com/articles/a-courts-dangerous-antitrust-overreach-11559085055 (suggesting this concern in the context of an expansion of *Aspen Skiing*).

[22] *See, e.g.*, City of Anaheim v. S. California Edison Co., 955 F.2d 1373, 1380 (9th Cir. 1992) ("It should also be pointed out that the fourth [essential facilities] element basically raises the familiar question of whether there is a legitimate business justification for the refusal to provide the facility, as application of the doctrine in *MCI* itself demonstrates.").

[23] Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 849-50 (1990) ("Of course, the reason any business declines to share the fruits of its labor with competitors is because it wants to win in the marketplace.").

[24] *Id.* at 851 ("Required sharing discourages building facilities such as this, even though they benefit consumers.").

[25] *Id.* ("For example, the justification for refusing to share a research laboratory does not focus on the practical infeasibility of letting another use the laboratory, but on the general concern that the defendant never would have built a laboratory of that size and character in the first place if he had known that he would be required to share it.").

[26] Barbara A. Cherry, *Utilizing 'Essentiality of Access' Analysis to Mitigate Risky, Costly and Untimely Government Interventions in Converging Telecommunications Technologies and Markets*, 11 COMMLAW CONSPECTUS 251, 252 (2003), https://scholarship.law.edu/cgi/viewcontent.cgi?article=1268&context=commlaw.

[27] *Id.* at 255-57 (discussing the history of legal principles put in place to address the problem of access to essential services or facilities).

[28] *Id.* at 257.

government—the privilege to provide a service of public importance.[29] This privilege came with an affirmative duty for the utility to provide its service to any member of the public.[30]

In the U.S, the essential facilities doctrine has never been expressly applied by the Supreme Court.[31] Proponents of the doctrine, however, cite four Supreme Court cases as providing precedent for its creation well before circuit courts put the doctrine into practice.[32] The first cases involve concerted action, not unilateral conduct. Of course, allegations of coordination among competitors receive the closest antitrust scrutiny.[33] It is questionable whether cases rightfully scrutinizing concerted action can act as informative precedent when considering unilateral conduct cases. These cases, along with two unilateral conduct cases, were twisted and convoluted until an essential facilities doctrine was created by lower courts. I hope that by examining how the Supreme Court led us to where we are, this knowledge can lead us to a sensible solution for the future of the essential facilities doctrine.

The earliest case cited as supporting the essential facilities doctrine is *United States v. Terminal Railroad Association* from 1912.[34] This case involved notorious financier Jay Gould,[35] who organized a coalition of 14 railroads lines to acquire every railroad facility at an important junction where 24 railroads lines terminated.[36] The Supreme Court found that the combination of

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[29] *Id.* ("A public utility is a private corporation that provides a service of public importance, or necessity, under a government grant of privilege.").

[30] *Id.* ("This grant of privilege imposes an affirmative duty to render service demanded by any member of the public.").

[31] *See* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 428 (1999) (Breyer, J., concurring).

[32] The term is first identified in a circuit court in 1977. Gregory Sidak & Abbott B. Lipsky, Jr., *Essential Facilities*, 51 STAN. L. REV. 1187, 1195 (1999) (citing *Hecht v. ProFootball, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977)) The factors that are still used to analyze the essential facilities doctrine were established at the circuit court level by 1982. *See* MCI Commc'ns Co. v. AT&T, 708 F.2d 1081, 1132 (7th Cir. 1982).

[33] PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1902 (5th ed. 2020) ("Horizontal agreements are antitrust's most 'suspect' classification, which as a class provoke harder looks than any other arrangement. … [H]orizontal agreements as a class deserve stricter scrutiny than (a) unilateral acts, (b) horizontal mergers, or (c) vertical agreements.").

[34] 224 U.S. 383 (1912). *See also* Pitofsky, *supra* note 13, at 445 ("Generally seen as originating in the Supreme Court's 1912 decision in *United States v. Terminal Railroad Ass'n*[.]").

[35] BRITANNICA, Jay Gould, https://www.britannica.com/biography/Jay-Gould ("Gould remained ruthless, unscrupulous, and friendless to the end[.]").

[36] Terminal Railroad, 224 U.S. at 398-99 ("There are twenty-four railroads converging at St. Louis. The relation of the terminal company is not one of impartiality to each of them. It was organized in 1889, at the instance of six of these railroad companies, for the purpose of acquiring all existing terminal instrumentalities for the benefit of the combination, and such other companies as they might thereafter admit to joint ownership by unanimous consent, and upon a consideration to be agreed upon. From time to time other companies came to an agreement with the original proprietors until, at the time this bill was filed, the properties unified were held for the joint use of the fourteen companies made defendants.").

every facility under control of only some of the competitors violated Sections 1 and 2 of the Sherman Act as a combination in restraint of trade and attempted monopolization.[37]

The DOJ suggested dissolution of the coalition,[38] a seemingly appropriate remedy for concerted action among competitors. But the Supreme Court sought to preserve the procompetitive efficiencies of the arrangement.[39] The Court was inclined to dissolve the coalition only if an equally acceptable fix could not be found.[40] Instead of dissolution, the Supreme Court concluded that a reasonable fix was to require that the coalition admit every competitor on equal terms or grant each competitor reasonable access to the facilities if they did not want to be admitted to the group.[41] The forced access here can be seen as analogous to deeming a coalition of competitors through a concerted action an "essential facility," but this was not a unilateral conduct case and this idea was not articulated by Supreme Court in 1912.

In 1945, the Supreme Court decided another group boycott case that—despite not involving unilateral conduct—has since been considered foundational to the essential facilities doctrine. In *Associated Press v. United States*,[42] a joint venture consisting of 1,200 news organizations agreed to a bylaw that allowed each member to block competitors from joining the association.[43] The Court struck down the bylaw under Section 1 of the Sherman Act.[44] The decision prohibited the AP's members from vetoing a prospective member's admission based on

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[37] *Id.* at 409 ("But when, as here, the inherent conditions are such as to prohibit any other reasonable means of entering the city, the combination of every such facility under the exclusive ownership and control of less than all of the companies under compulsion to use them violates both the first and second sections of the act, in that it constitutes a contract or combination in restraint of commerce among the states, and an attempt to monopolize commerce among the states which must pass through the gateway at St. Louis.").

[38] *Id.* ("The government has urged a dissolution of the combination[.]").

[39] *Id.* at 409-11 ("If, as we have pointed out, the violation of the statute, in view of the inherent physical conditions, grows out of administrative conditions which may be eliminated and the obvious advantages of unification preserved, such a modification of the agreement between the terminal company and the proprietary companies as shall constitute the former the bona fide agent and servant of every railroad line which shall use its facilities, and an inhibition of certain methods of administration to which we have referred, will amply vindicate the wise purpose of the statute, and will preserve to the public a system of great public advantage.").

[40] *Id.* at 409 ("That remedy may be necessary unless one equally adequate can be applied.").

[41] *Id.* at 411 ("By providing for the admission of any existing or future railroad to joint ownership and control of the combined terminal properties, upon such just and reasonable terms as shall place such applying company upon a plane of equality[.] … [M]ust also provide definitely for the use of the terminal facilities by any other railroad not electing to become a joint owner, upon such just and reasonable terms…").

[42] 326 U.S. 1 (1945).

[43] *Id.* at 4 ("The heart of the government's charge was that appellants had by concerted action set up a system of By-Laws which prohibited all AP members from selling news to non-members, and which granted each member powers to block its non-member competitors from membership.").

[44] *Id.* at 21 ("Having adjudged the By-Laws imposing restrictions on applications for membership to be illegal, the Court enjoined the defendants from observing them, or agreeing to observe any new or amended By-Law having a like purpose or effect.").

whether it was a competitor.[45] The majority acknowledged that it would be impossible to know whether members considered competition when deciding on a new member's application, but trusted the AP to "faithfully" follow the decision.[46]

The first unilateral conduct case often considered fundamental to the development of the essential facilities doctrine was decided by the Supreme Court three years later in 1948. In *United States v. Griffith*, a movie theater owner with a monopoly in some towns was accused of using his bargaining power to force producers to impose unfavorable terms on competing theaters in towns where the defendant had competitors.[47] No claim was made that the defendant had anything "essential" or even needed to supply anything to a competitor. But commentators view the case as relevant to the essential facilities doctrine because of broad dicta that stated, "the use of monopoly power, however lawfully acquired, to foreclose competition, *to gain a competitive advantage,* or to destroy a competitor, is unlawful."[48] Taken literally, this proclamation could prohibit any company that achieves market power to use its advantage to vigorously compete through lower prices or innovation.

The second unilateral conduct case that laid the foundation for the essential facilities doctrine is *Otter Tail Power Co. v. United States*, decided in 1973.[49] Here, the defendant electric utility company held a monopoly[50] in wholesale electricity supply (i.e., selling power to other utilities) and wheeling of power (i.e., transmitting power over its network from a different

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

[46] *Id.* ("Some of appellants argue that this decree is vague and indefinite. They argue that it will be impossible for the Association to know whether or not its members took into consideration the competitive situation in passing upon applications for membership. We cannot agree that the decree is ambiguous. We assume, with the court below, that AP will faithfully carry out its purpose. Interpreting the decree to mean that AP news is to be furnished to competitors of old members without discrimination through By-Laws controlling membership, or otherwise, we approve it.").

[47] 334 U.S. 100, 107–08 (1948) ("A man with a monopoly of theatres in any one town commands the entrance for all films into that area. If he uses that strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade weapon against his competitors. … Though he makes no threat to withhold the business of his closed or monopoly towns unless the distributors give him the exclusive film rights in the towns where he has competitors, the effect is likely to be the same where the two are joined. When the buying power of the entire circuit is used to negotiate films for his competitive as well as his closed towns, he is using monopoly power to expand his empire. And even if we assume that a specific intent to accomplish that result is absent, he is chargeable in legal contemplation with that purpose since the end result is the necessary and direct consequence of what he did.").

[48] *Id.* at 107 (emphasis added).

[49] 410 U.S. 366 (1973).

[50] *Id.* at 369 ("Each town in Otter Tail's service area generally can accommodate only one distribution system, making each town a natural monopoly market for the distribution and sale of electric power at retail.").

wholesaler to an independent utility).[51] The Supreme Court upheld a Section 2 violation against the defendant for refusing to supply power at wholesale to municipality power systems that competed with it for retail customers and for refusing to wheel power from other wholesale providers to those municipalities.[52] The defendant argued that because it was regulated the antitrust laws should not apply.[53] Regulation did act to encourage interconnections,[54] but the law did not fully regulate the wholesale provision of electricity and did not regulate at all the wheeling of electricity.[55]

The District Court that initially decided *Otter Tail* provided the foundation for the essential facilities argument, but the Supreme Court did not consider this line of thinking. The lower court explained a "bottleneck theory" of antitrust law, which it described as illegal conduct when a party forecloses others from a "scarce facility."[56] This theory was applicable, according to the District Court, because "control over transmission facilities in much of its service area gives it substantial effective control over potential competition from municipal ownership."[57] The opinion relied on secondary source scholarship that stated: "The Sherman Act requires that where facilities cannot practically be duplicated by would-be competitors, those in possession of

[51] *Id.* at 359 ("The principal means employed were (1) refusals to sell power at wholesale to proposed municipal systems in the communities where it had been retailing power; (2) refusals to 'wheel' power to such systems, that is to say, to transfer by direct transmission or displacement electric power from one utility to another over the facilities of an intermediate utility[.]").

[52] *Id.* at 370-71 (1973) ("When Otter Tail's franchise in each of these towns terminated, the citizens voted to establish a municipal distribution system. Otter Tail refused to sell the new systems energy at wholesale and refused to agree to wheel power from other suppliers of wholesale energy.").

[53] *Id.* at 373 ("Otter Tail maintains here that its refusals to deal should be immune from antitrust prosecution because the Federal Power Commission has the authority to compel involuntary interconnections of power pursuant to s 202(b) of the Federal Power Act.").

[54] *Id.* ("The essential thrust of s 202, however, is to encourage voluntary interconnections of power. … Only if a power company refuses to interconnect voluntarily may the Federal Power Commission, subject to limitations unrelated to antitrust considerations, order the interconnection.").

[55] *Id.* at 373–75 ("Only if a power company refuses to interconnect voluntarily may the Federal Power Commission, subject to limitations unrelated to antitrust considerations, order the interconnection. … There is nothing in the legislative history which reveals a purpose to insulate electric power companies from the operation of the antitrust laws. … As originally conceived, [the law] would have included a common carrier provision making it the duty of every public utility to . . . transmit energy for any person upon reasonable request . . . In addition, it would have empowered the Federal Power Commission to order wheeling if it found such action to be necessary or desirable in the public interest. … These provisions were eliminated to preserve the voluntary action of the utilities. … When these relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws. … Thus, there is no basis for concluding that the limited authority of the Federal Power Commission to order interconnections was intended to be a substitute for, or to immunize Otter Tail from, antitrust regulation for refusing to deal with municipal corporations.") (internal quotations omitted).

[56] United States v. Otter Tail Power Co., 331 F. Supp. 54, 61 (D. Minn. 1971), *aff'd in part, vacated in part*, 410 U.S. 366 (1973).

[57] *Id.*

them must allow them to be shared on fair terms."[58] The District Court viewed that statement as "epitomiz[ing]" the holdings in *Terminal Railroad* and several circuit court decisions.[59] Despite this analysis, the Supreme Court did not consider this theory of harm. In other words, in 1973, before Bork and the Chicago School allegedly shifted antitrust policy toward permissive standards,[60] the Supreme Court in *Otter Tail* refused to embrace the essential facilities doctrine.

The Supreme Court does have a history of rejecting a broad duty to deal that dates back over 100 years to at least the same decade as *Terminal Railroad*. In *United States v. Colgate & Co.*, the Supreme Court acknowledged the "long recognized right" of a private business to "exercise [its] own independent discretion as to parties with whom [it] will deal."[61] While rejecting a broad duty to deal, the Supreme Court has never repudiated the essential facilities doctrine.[62] But many of the concerns pertaining to essential facilities arise in the refusal to deal context. In deciding refusal to deal cases, the Supreme Court has punted the discussion of essential facilities to a later date even where the circuit courts analyzed the doctrine.[63] Two refusal to deal cases highlight the thin application, but nevertheless survival, of the essential facilities doctrine.

First, in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[64] the Tenth Circuit held that a multiday, multi-slope ticket jointly marketed by competitors was an "essential facility."[65] As in *Otter Tail*, the lower court analyzed the "essential facilities or bottleneck doctrine[,]" which—by

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[58] *Id.* (citing A. D. Neale, The Antitrust Laws of the U.S.A., Cambridge University Press at 67 (1960)).

[59] *Id.* ("This statement epitomizes the holdings in federal cases which have established the principle: United States v. Terminal Railroad Assoc., 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912); Gamco, Inc. v. Providence Fruit & Produce Building Inc., 194 F.2d 484 (1st Cir. 1952); Packaged Programs Inc. v. Westinghouse Broadcasting Co., 255 F.2d 708 (3rd Cir. 1958); Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc., 365 F.2d 478 (5th Cir. 1966).").

[60] *See generally* William E. Kovacic, *The Chicago Obsession in the Interpretation of US Antitrust History*, 87 U. CHI. L. REV. 459, 459-60 ("Many commentators attribute to Chicago School scholars—most notably, Judge Robert Bork—the decisive role in gaining broad acceptance for permissive standards governing mergers, vertical restraints, and dominant firm behavior. In numerous treatments, the Chicago School is seen to be the intellectual foundation for US antitrust policy, including its acceptance of a 'consumer welfare' standard that is said to focus exclusively on efficiency considerations to the exclusion of other policy objectives.") (internal citations omitted); *id.* at 471 ("In 1978, Robert Bork published *Antitrust Paradox*, and Professors Phillip Areeda and Donald Turner released the first three volumes of their treatise, *Antitrust Law*. These works immediately became intellectual pillars of the US antitrust system").

[61] 250 U.S. 300, 307 (1919) ("In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.").

[62] *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 411 (2004) ("We have never recognized such a doctrine … and we find no need either to recognize it or to repudiate it here.").

[63] *See supra* notes 56-60, *infra* notes 66-80, and accompanying text.

[64] 472 U.S. 585 (1985).

[65] *Id.* at 599 ("[T]he Court of Appeals held that the multiday, multiarea ticket could be characterized as an 'essential facility' that Ski Co. had a duty to market jointly with Highlands.").

the time this case was decided in 1985—had been fleshed out by other lower courts.[66] The Supreme Court affirmed that the defendant had a duty to market jointly with the plaintiff but declined to discuss the essential facilities doctrine other than to note it was unnecessary to consider it.[67] Again, as in *Otter Tail*, the Supreme Court was given an essential facilities analysis by a lower court and refused to entertain the doctrine.

The Supreme Court held that antitrust law may require a company to aid a competitor if it unilaterally terminates a pre-existing, voluntary, and profitable course of dealing to acquire or maintain monopoly power.[68] The Supreme Court reasoned that "[t]he jury may well have concluded that [the defendant] elected to forgo these short-run benefits because it was more interested in reducing competition ... over the long run by harming its smaller competitor."[69] The defendant notably turned down an offer from its competitor to offer access at the defendant's retail price.[70] I have previously made known my distaste for this decision;[71] in fact, if there were one antitrust case I could erase from the map, it would be this one.[72]

Almost 20 years later, the Supreme Court further commented on general duties to deal and placed guardrails around Aspen Skiing.[73] In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, Verizon enjoyed an exclusive franchise in its local service area as the local exchange carrier, or "LEC."[74] Telecom regulations required incumbents to share their network

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[66] Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1520 (10th Cir. 1984) ("The essential facilities or bottleneck doctrine has been applied in a variety of circumstances. … The Seventh Circuit identified four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability to duplicate the facility; (3) denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."), *aff'd*, 472 U.S. 585 (1985).

[67] *Id.* at 611 n.44 ("Given our conclusion that the evidence amply supports the verdict under the instructions as given by the trial court, we find it unnecessary to consider the possible relevance of the 'essential facilities' doctrine, or the somewhat hypothetical question whether nonexclusionary conduct could ever constitute an abuse of monopoly power if motivated by an anticompetitive purpose. If, as we have assumed, no monopolist monopolizes unconscious of what he is doing, that case is unlikely to arise.").

[68] *Id.* at 610–11 ("Thus the evidence supports an inference that Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival.").

[69] *Id.* at 608.

[70] *Id.* at 593 ("[Defendant] also refused to sell Highlands any lift tickets, either at the tour operator's discount or at retail.").

[71] Christine S. Wilson, Opinion, *A Court's Dangerous Antitrust Overreach*, WALL ST. J. (May 28, 2019), https://www.wsj.com/articles/a-courts-dangerous-antitrust-overreach-11559085055 (describing *Aspen Skiing* as discredited).

[72] The prohibition on multi-market balancing contained in the Supreme Court's decision in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370 (1963), runs a close second.

[73] Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004) ("Aspen Skiing is at or near the outer boundary of § 2 liability.").

[74] *Id.* at 402.

with competitors.[75] Competing LECs complained that Verizon was not fulfilling its obligations, which led to an investigation by communications regulators and a consent decree.[76]

This behavior also led to Section 2 Sherman Act claims. The Supreme Court differentiated this conduct from *Aspen Skiing* by highlighting that in *Trinko* there was no prior voluntary course of dealing.[77] Further, Verizon's refusal to interconnect at the regulated rate told the Supreme Court nothing about its intentions.[78] The Court found that the allegations were insufficient to support a refusal-to-deal antitrust claim,[79] and that the decision would be the same under the essential facilities doctrine as crafted by some lower courts.[80]

The Supreme Court explained that antitrust analysis must pay attention to particular market dynamics and noted that regulation is part of the economic context.[81] The Court differentiated between regulations designed to deter and remedy anticompetitive harm, on the one hand, and regulations that do not perform an antitrust function, on the other.[82] In the latter category, the Supreme Court observed that an expansion of Section 2 liability may be necessary

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[75] *Id.* ("The 1996 Act sought to 'uproo[t]' the incumbent LECs' monopoly and to introduce competition in its place. … Central to the scheme of the Act is the incumbent LEC's obligation … to share its network with competitors, … including provision of access to individual elements of the network on an "unbundled" basis. … [C]ompetitive LECs resell these unbundled network elements (UNEs), recombined with each other or with elements belonging to the LECs.").

[76] *Id.* at 403 ("In late 1999, competitive LECs complained to regulators that many orders were going unfilled, in violation of Verizon's obligation to provide access to OSS functions. The PSC and FCC opened parallel investigations, which led to a series of orders by the PSC and a consent decree with the FCC.").

[77] *Id.* at 409 ("The complaint does not allege that Verizon voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion.").

[78] *Id.* ("Verizon's reluctance to interconnect at the cost-based rate of compensation available under § 251(c)(3) tells us nothing about dreams of monopoly.").

[79] *Id.* at 410 ("We conclude that Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents.").

[80] *Id.* at 410-11 ("This conclusion would be unchanged even if we considered to be established law the 'essential facilities' doctrine crafted by some lower courts, under which the Court of Appeals concluded respondent's allegations might state a claim. … We have never recognized such a doctrine … and we find no need either to recognize it or to repudiate it here.").

[81] Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004) ("Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation.").

[82] *Id.* at 412 ("One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. Where, by contrast, [t]here is nothing built into the regulatory scheme which performs the antitrust function, the benefits of antitrust are worth its sometimes considerable disadvantages.") (internal citation omitted).

to protect competition.[83] The nature of the regulatory framework in *Trinko* diminished antitrust harm because the regulations and commitments were enforced and continuously overseen by the Federal Communications Commission.[84] Failure to comply was met with corrective punishment, suggesting the regulator here was an effective steward of the antitrust function."[85] In fact, the Court found that the communications law and regulations at issue were "much more ambitious than the antitrust laws."[86]

We now benefit from wise analyses and correct conclusions in practice, policy, and law. In practice, economic analysis shows us that mandated access can reduce investment and does not necessarily lead small firms to build their own facilities.[87] In policy, Professor Areeda's analysis explained that businesses refuse to share the fruits of their investments precisely for the purpose of winning customers and that forced access will disincentivize these investments that benefit consumers.[88] And finally, the Supreme Court in *Trinko* reached similar legal conclusions. It correctly limited the reach of *Aspen Skiing* as "at or near the outer boundary of [Section] 2 liability."[89] The Supreme Court highlighted that a firm is allowed to acquire monopoly power through infrastructure that makes it better suited to serve consumers and that forced sharing may lessen the incentives for the firm and its competitors to invest.[90] For this reason, *Trinko* acknowledged that antitrust law only punished monopoly power that is accompanied by

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[83] *Id.* ("Just as regulatory context may in other cases serve as a basis for implied immunity, see, e.g., United States v. National Assn. of Securities Dealers, Inc., it may also be a consideration in deciding whether to recognize an expansion of the contours of § 2.") (internal citation omitted).

[84] *Id.* at 412-13 ("Those commitments are enforceable by the FCC through continuing oversight[.]").

[85] *Id.* at 413 ("[A] failure to meet an authorization condition can result in an order that the deficiency be corrected, in the imposition of penalties, or in the suspension or revocation of long-distance approval. … The regulatory response to the OSS failure complained of in respondent's suit provides a vivid example of how the regulatory regime operates. When several competitive LECs complained about deficiencies in Verizon's servicing of orders, the FCC and PSC responded. The FCC soon concluded that Verizon was in breach of its sharing duties under § 251(c), imposed a substantial fine, and set up sophisticated measurements to gauge remediation, with weekly reporting requirements and specific penalties for failure. The PSC found Verizon in violation of the PAP even earlier, and imposed additional financial penalties and measurements with daily reporting requirements. In short, the regime was an effective steward of the antitrust function.").

[86] *Id.* at 415-16 ("The 1996 Act is, in an important respect, much more ambitious than the antitrust laws. It attempts to eliminate the monopolies enjoyed by the inheritors of AT & T's local franchises. Section 2 of the Sherman Act, by contrast, seeks merely to prevent unlawful monopolization. It would be a serious mistake to conflate the two goals. The Sherman Act is indeed the Magna Carta of free enterprise, but it does not give judges carte blanche to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition") (internal citation omitted).

[87] *See supra* notes 19-20 and accompanying text.

[88] *See supra* notes 23-25 and accompanying text.

[89] Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004).

[90] *Id.* at 407–08 ("Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.").

anticompetitive conduct.[91] Judicially enforced sharing would instead put courts in the role of central planners, abandoning markets as the best method of reaching the proper price and quantity of goods and services.[92]

2. Predatory Pricing

Similar concerns apply to calls to reform the predatory pricing standard. The Majority Staff Report recommends overriding Supreme Court precedent to clarify that it is not necessary to prove that losses were or could be recouped.[93] I question the report's recommendation because it mischaracterizes the standard and discourages low prices and innovation.

First, the standard is misunderstood. Current Supreme Court precedent does not require proof that actual recoupment be possible. Instead, it requires a "close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market" to determine whether a "reasonable prospect" or "dangerous probability" of recoupment exists.[94] Showing that something could happen and showing that something has a prospect or probability of happening is not the same thing. The standard is lower than the report implies.

Second, this standard was adopted so as to encourage low prices and innovation. The report provides a prime example in citing Amazon as having "adopted a predatory-pricing strategy across multiple business lines at various stages in the company's history," including at the earliest stages before Amazon turned a profit.[95] This strategy is exactly how an entrant convinces people to take a chance on a new company or business model. Amazon offered low prices and low-cost or free delivery to encourage consumers to try its platform. Critics would prefer to hang the sword of Damocles–here, the threat of antitrust enforcement for prices that are "too low"–over any company that considers attracting consumers with low prices.

This concern about low prices is not new. In the 1930s, Congress passed the Robinson–Patman Act to target the buying power of large chain stores that drove down prices, thereby making it more difficult for smaller operations lacking scale to offer competing prices to

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[91] *Id.* at 407 ("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.").

[92] *Id.* at 408 ("Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited.").

[93] MAJORITY STAFF REPORT, *supra* note 10, at 397 ("Courts, however, have introduced a "recoupment" requirement, necessitating that plaintiffs prove that the losses incurred through below-cost pricing subsequently were or could be recouped. Although dominant digital markets can recoup these losses through various means over the long term, recoupment is difficult for plaintiffs to prove in the short term. Since the recoupment requirement was introduced, successful predatory pricing cases have plummeted. The Subcommittee recommends clarifying that proof of recoupment is not necessary to prove predatory pricing or predatory buying, overriding the Supreme Court's decisions[.]") (citations omitted).

[94] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993) (citations omitted).

[95] MAJORITY STAFF REPORT, *supra* note 10, at 297 n.1845.

consumers.[96] But it is not a concern that I have experienced during my decades of practice. In fact, I have seen quite the opposite. In many circumstances, I have seen enforcers demonstrate a ruthless determination to bring low prices to consumers regardless of the impact on companies and their rivals. One antitrust enforcer at DOJ described in glowing terms the benefits of rock-bottom prices that passengers received as airlines spiraled downward into bankruptcy. These low prices made the enforcer reluctant to permit the acquisition of a failing airline by a competitor that could keep the assets in the market. In another instance, a different enforcer expressed his desire for a faltering airline (Midwest Air) to be purchased by a low-cost carrier focused on cost-cutting rather than my client (Northwest Airlines) that would preserve the leather seats and fresh baked cookies for which Midwest Air was known. In other words, the former civil aeronautics board (CAB) bureaucrat, who became an antitrust enforcer following dissolution of CAB, sought low prices at the expense of differentiated products and a focus on quality.

I was surprised by the focus of these enforcers on price to the exclusion of all else.[97] But I have been even more surprised to learn from the neo-Brandesians that low prices are now bad. In a *New York Times* op ed, Tim Wu, at the time a professor at Columbia Law School, chastised an economic model that seeks to make "production as cheap as possible" and keep prices low.[98] Wu, now a member of the National Economic Council, praised companies that "manage to sell their product at higher prices" and escape the "pressures of commodity pricing."[99]

To make his point, Wu highlighted the virtues of small flour companies like King Arthur Baking Company while bemoaning the existence of large ones. But it is a feature, not a bug, of our market economy that product differentiation exists, that large low-cost companies can offer affordable mass-market products, and that some small companies like King Arthur can compete successfully by offering better services and unique products.[100] And congratulations to those small companies if they are able to charge a premium. Some consumers may desire these products and these innovative offering are increasing consumer welfare–I have friends and colleagues who sing the praises of King Arthur's higher-end flour products. But Wu is not praising these companies for competing and innovating to gain customers. Instead he suggests

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[96] *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2302 (5th ed. 2020) (analyzing the history leading to the passage of the Robinson-Patman Act).

[97] My surprise should serve as confirmation that the consumer welfare standard has long taken into account not just price but other factors, including quality of service and choice.

[98] Tim Wu, Opinion, *That Flour You Bought Could Be the Future of the U.S. Economy*, N.Y. TIMES (July 24, 2020), https://www.nytimes.com/2020/07/24/opinion/us-grain-industry.html.

[99] *Id.*

[100] *Id.* ("King Arthur is probably best known for connecting with people who are learning to bake. Its website introduces them to new challenges, like building a sourdough starter and folding dough for baguettes, and the company has a hotline for bakers in distress. … These mills produce not only whole wheat flours but also distinctive grains, such as yecora rojo, heritage red fife and spelt.").

that more parts of the American economy should "operat[e], on a more reasonable, human scale" and these companies "show us the way to a better, fairer economy."[101]

If you are confused by what "better," "fairer," and "reasonable human scale" means in the antitrust context, you are in good company. As Professor Herbert Hovenkamp highlighted in a recent article, the neo-Brandesians have a "problem of transparency" and if they communicate their goals in advance, it "could spell political suicide." [102] Professor Hovenkamp notes that their attack on low prices will harm consumers, especially the most vulnerable who rely on low prices to feed their families and meet other essential needs.[103]

3. <u>Product Design</u>

Another call for reform in the Majority Staff Report "recommends that Congress consider whether making a design change that excludes competitors or otherwise undermines competition should be a violation of Section 2."[104] If this criterion is satisfied, the recommendation suggests finding an antitrust violation "regardless of whether the design change can be justified as an improvement for consumers."[105] This proposition elevates competitors over consumers to protect businesses that do not offer a desired product or service.

These calls for reform seemingly reject *Microsoft*, which found an exclusionary conduct violation under Sherman Act Section 2 for design changes.[106] *Microsoft* warned courts to be skeptical of claims that competition was harmed due to design changes,[107] but applied the consumer welfare standard and the rule of reason to analyze the specific facts closely.[108] The reformers instead prefer a blanket condemnation of design changes that cause a consumer to pick the innovator over a competitor. The sword of Damocles–here again, the threat of antitrust enforcement–will hang over companies that contemplate innovation, inhibiting improvements that may be too successful in luring consumers away from rivals.

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[101] *Id.*

[102] Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 101, 130 (2019) ("As a result, to the extent that it is communicated in advance, it could spell political suicide. Setting aside economic markets, a neo-Brandeis approach whose goals were honestly communicated could never win in an electoral market, just as it has never won in traditional markets.").

[103] *Id.* ("The neo-Brandeisian attack on low prices as a central antitrust goal is going to hurt consumers, but it is going to hurt vulnerable consumers the most.").

[104] MAJORITY STAFF REPORT, *supra* note 10, at 398.

[105] *Id.*

[106] United States v. Microsoft Corp., 253 F.3d 34, 65-67 (D.C. Cir. 2001).

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

[108] *Id.* ("Judicial deference to product innovation, however, does not mean that a monopolist's product design decisions are per se lawful.").

As Professor Areeda described, gaining market share through innovating, cutting costs, and discovering customer preferences is the exact behavior that antitrust policy, in its current formulation, encourages.[109] Banning product improvements that harm a competitor—even if those improvements are good for consumers—will dampen the incentives of rivals to innovate in response to competitive pressures. For example, if a competitor offers a service as a third party and a rival integrates this service into its own product, the competitor might be harmed through lower sales. If consumers prefer the ease of integration and the lower—or even free—price offered through integration, the competitor is likely to be harmed through lower sales. This design change, which improves quality and lowers price, would be illegal under these new proposals.

Consider the three-point seat belt invented by Volvo in 1959 that estimates suggest has saved hundreds of thousands of lives.[110] Every major car company copied this invention after Volvo, which begs the question whether this innovation would run afoul of antitrust laws under the Majority Staff Report's recommendation.[111] Could other car companies have sued Volvo instead of implementing this change themselves by arguing that Volvo's safety innovations hurt their ability to compete?

Wu has advocated for antitrust standards that protect competitors.[112] His proposal examines "dynamic harms"[113] and "important non-economic values, particularly political values."[114] The key question is: Who are the neo-Brandesians trying to help, and to what end? In the absence of a clear explanation, I can only assume that the goal is for college professors and other elites to have ready access to expensive, artisanal flour. But I submit that this goal is not one that should be pursued through our antitrust laws.

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In closing, I would like to underscore my concern about the rejuvenation of the essential facilities doctrine, doctrinal changes to facilitate predatory pricing cases, and condemnation of

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[109] Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 845 (1990).

[110] VOLVO, *3-point safety belt from Volvo - the most effective lifesaver in traffic for fifty years* (Jan. 8, 2009), https://www.media.volvocars.com/us/en-us/media/pressreleases/18405.

[111] *See* William E. Kovacic & Daniel Sokol, *Understanding the House Judiciary Committee Majority Staff Antitrust Report*, CPI ANTITRUST CHRONICLE SPECIAL 6 (Jan. 2021), https://bear.warrington.ufl.edu/centers/purc/docs/papers/2101_Sokol_understanding_the_house_judiciary_committee_antitrust_report.pdf.

[112] Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice*, 1 ANTITRUST CHRON. 12, 13 (2018) ("[T]he protection of competition standard puts the antitrust law in the position of protecting the competitive process, as opposed to trying to achieve welfare outcomes.").

[113] *Id.* (arguing that "as a policy matter, [focusing on the competitive process rather than consumer welfare] would do much to give antitrust room to achieve its historic goals, and generally make antitrust far more attentive to dynamic harms.").

[114] *Id.* at 9 (suggesting consideration of whether "the complained-of conduct or merger tend to implicate important non-economic values, particularly political values.").

beneficial product changes. My concern flows from the fact that these proposals will hang the sword of Damocles over every business that contemplates developing uniquely desirable assets, offering low prices, and improving its products and services for consumers. I submit that few proponents of antitrust reform would enjoy being viewed as emulating President Nixon. Let's leave the sword of Damocles hanging in the fourth century B.C., where it belongs.

Thank you again to Sean Heather and the Chamber of Commerce for giving me an opportunity to share these concerns with you today.