

STRUCTURING COMPETITION TO FOSTER SOCIALLY BENEFICIAL INNOVATION



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INNOVATION AND U.S. ANTITRUST LAW

By George L. Priest



ANTITRUST POLICY TOWARD INNOVATION COMPETITION: MEASURING DYNAMIC EFFICIENCY

By Daniel F. Spulber



CAPTURING INNOVATION FOR ANTITRUST PURPOSES

By Viktoria H.S.E. Robertson & Klaudia Majcher



INNOVATION, INVENTION, AND STANDARDS

By Michael A. Carrier



STRUCTURING COMPETITION TO FOSTER SOCIALLY BENEFICIAL INNOVATION

By Daniel A. Hanley



DEFINING AND MEASURING INNOVATION FOR COMPETITION ENFORCEMENT

By Aura Garcia Pabon



MERGERS AND INNOVATION

By Giovanni Morzenti



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By Daniel A. Hanley

Daniel A. Hanley comments on how targeted antitrust enforcement can structure market competition to promote socially beneficial innovation.

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I. INNOVATION IS A NOT A UNIVERSAL SOCIETAL GOOD

The structure of market competition is determined by the governing legal regime enacted by the state. Among other things, all property rights, contracts, and methods of competition defined as tortious are explicitly or implicitly determined by the state. By structuring the terms of market competition away from some methods of competition toward others, the state inherently determines whether firms are engaging in socially beneficial or harmful innovation.

Socially beneficial innovations can include firms implementing technologies that lead to genuine efficiency gains, such as the introduction of superior methods of production and distribution that increase quality and decrease prices for goods. Other kinds of socially beneficial innovation can include significant improvements in public health, such as developing new drugs or introducing new products and services that make our work easier. Such innovations can create fairer, more competitive markets and provide the public with more wealth, leisure, and time to invest in other professional endeavors.

Many innovations today, however, have not led to these genuine social improvements. Instead, they often involve firms employing new tactics to coerce suppliers and distributors, and flagrant lawbreaking, with the explicit intent to undermine labor rights, privacy rights, and increase worker exploitation. Consider how Amazon's routinely marketed innovation of two-day shipping is actually the result of Orwellian surveillance of its workers,² draconian productivity standards,³ and the pervasive misclassifying of thousands of workers as independent contractors so the corporation can regulate worker's wages and workflow at-will without bearing the traditional responsibilities firms have toward their employees (such as providing a minimum wage).⁴ Or that Amazon's often asserted low prices result from repeated instances of predatory pricing and the usage of restrictive contracts with third-party sellers that demand prices on its platform be the lowest.⁵

It becomes clear that not all inventions, discoveries, processes, or methods of competition are universally *per se* good; indeed, many are socially harmful. Given the inseparable relationship between the governing legal regime and the conduct corporations use to succeed in the marketplace, it becomes prudent to examine how the law can be used to shape corporate behavior to engage in socially beneficial innovation. Antitrust law deserves attention as it is a powerful legal instrument for policymakers to realign corporate operations to foster socially beneficial innovation.⁶

II. HOW ANTITRUST LAW STRUCTURES SOCIALLY BENEFICIAL CORPORATE CONDUCT AND INNOVATION

Antitrust law structures the coordination rights between economic actors in part by delineating which methods of competition are fair, and therefore permissible, and those that are unfair, and therefore impermissible.⁷ For example, during the zenith of antitrust law's legal potency between the 1940s and the 1970s, the Supreme Court faithfully carried out Congress's legislative command by interpreting them to tightly restrict corporations from using their sheer financial power or dominance to succeed in the market. Firms could not just engage in certain forms of "hard" competition by any means necessary. Concerning mergers, in one case, the Court blocked the merger of the 10th and 18th largest beer sellers, which would have resulted in a combined market share of 4.5 percent.⁸ The Supreme Court also established multiple bright-line rules that substantially limited or prohibited entirely a range of conduct, including exclusive deals, tying agreements, and territorial allocation agreements.⁹

2 Daniel A. Hanley & Sally Hubbard, *Eyes Everywhere: Amazon's Surveillance Infrastructure and Revitalizing Worker Power*, OPEN MARKETS INST. (Sept. 2019).

3 *In Denial: Amazon's Continuing Failure to Fix Its Injury Crisis*, STRATEGIC ORG. CTR. (Apr. 2023), https://thesoc.org/wp-content/uploads/2023/04/SOC_In-Denial_Amazon-Injury-Report-April-2023.pdf.

4 Brian Callaci, *Entrepreneurship, Amazon Style*, AM. PROSPECT (Sept. 27, 2021), <https://prospect.org/power/entrepreneurship-amazon-style/>; Sandeep Vaheesan, *The Shadow Empire That Fuels Amazon's Dominance*, NEW REPUBLIC (Feb. 28, 2023), <https://newrepublic.com/article/170708/contracts-surveillance-amazon-anti-trust/>.

5 Daniel A. Hanley, *Per Se Illegality of Exclusive Deals and Tying as Fair Competition*, 37 BERKELEY TECH. L.J. 1057, 1089 (2023) (detailing Amazon's tying) [hereinafter Hanley-Tying and Eds]; Stacy Mitchell & Ron Knox, *How Amazon Exploits and Undermines Small Businesses, and Why Breaking It Up Would Revive American Entrepreneurship*, INST. FOR LOC. SELF-RELIANCE 4 (June 2021) (detailing Amazon's predatory pricing); David McCabe, Karen Weise & Cecilia Kang, *D.C. Accuses Amazon of Controlling Online Prices*, N.Y. TIMES (May 25, 2021), <https://www.nytimes.com/2021/05/25/business/amazon-dc-lawsuit.html> (detailing a D.C. lawsuit against Amazon's "most favored nation" contracts).

6 *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d. Cir. 1945) ("rivalry is a stimulant to industrial progress").

7 See Sanjukta Paul, *Antitrust As Allocator of Coordination Rights*, 67 UCLA L. Rev. 378 (2020).

8 *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966).

9 *Standard Oil Co. of Cal. v. United States (Standard Stations)*, 337 U.S. 293 (1949); but see *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961). *N. Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379, overruled by *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

The Supreme Court's favorable holdings were also generated from and supported by vigorous enforcement from the Department of Justice, the Federal Trade Commission, and private parties.¹⁰

During the same era, antitrust also acted as a check on intellectual property so that rather than patents operating as a government-sanctioned means to exploit and coerce firms, it was a narrow privilege that had to operate in the public interest and within the fair competition limits established by the antitrust laws. For example, in a series of decisions, the Supreme Court limited patents to their explicit terms and imposed restrictions on how patents could be licensed and used as part of other contractual agreements.¹¹

As detailed in some of the examples below, the restrictions imposed by the antitrust laws structured corporate conduct to channel a firm's limited resources to publicly beneficial activities such as investments in productive capacity, the hiring of workers, investments in worker training, and increased expenditures in their own research and development.¹²

While the implicit notions of fair competition remain, primarily due to a reactionary Supreme Court that became extraordinarily sympathetic to the demonstrably false history promoted by the Chicago School of Economics,¹³ significant portions of the robust antitrust apparatus have been eroded since the 1970s. Rather than being reviewed under bright-line rules, conduct like territorial restraints are reviewed under the rule of reason – effectively a demarcation of de facto legality.¹⁴ Indicative of this conservative trend, federal enforcers also chose to significantly restrict enforcement. For example, average enforcement actions from the DOJ dropped from 40 between 1970 and 1979 to 14 in the following decade.¹⁵

Since the 1970s, patent law has also taken precedence over antitrust law, leading to perverse usages of patents that actively suppress socially beneficial innovation.¹⁶ For example, drug manufacturers now routinely and intentionally delay patent submissions to effectively extend the intellectual property protection of a drug well beyond the 20-year grant.¹⁷

With these changes, corporations like Amazon were able to either engage in conduct that was previously illegal or avoid prosecution due to sympathetic enforcers abdicating their duty to enforce the law. Disruptive innovations certainly still took place, but the incentives to make continued investments have been reduced. Firms, like Amazon, are now heavily emboldened to use restrictive contracts and their sheer dominance to succeed rather than engaging in productive activities that produce socially beneficial innovation in the first place. Markets have also become heavily consolidated, leaving little competition.¹⁸ As a result, antitrust enforcement actively suppresses socially beneficial and promotes socially harmful innovation. But changes in enforcement can re-tailor antitrust policy to reverse this circumstance.

10 Willard F. Mueller, *The Celler-Kefauver Act: The First 27 Years*, A Study Prepared for the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, H.R. Doc. No. 243, 96th Cong., 1st Sess. 11, at 7 (1979) (between 1951 and 1977, the Department of Justice and Federal Trade Commission issued 437 complaints that challenged over 1,400 mergers); see also Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & Econ. 365, 371 (1970) (detailing the vigorous private enforcement between the 1940s and 1970s).

11 DAVID M. HART, FORGED CONSENSUS: SCIENCE, TECHNOLOGY, AND ECONOMIC POLICY IN THE UNITED STATES, 1921-1953, at 94-96 (1998); see also Bruce Wilson, *Department of Justice Luncheon Speech, Law on Licensing Practices: Myth or Reality?* (Jan. 21, 1975), in Abbot B. Lipsky, *Current Antitrust Division Views on Patent Licensing Practices*, 50 ANTITRUST L.J. 515, 518-24 (1981) (detailing nine prohibited practices of patent licensing).

12 See generally MANSEL G. BLACKFORD & K. AUSTIN KERR, *BUSINESS ENTERPRISE IN AMERICAN HISTORY* 180, 346-408 (2d ed. 1990); HART, *supra* note 11, at 94-96, 153.

13 See Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, 64 ANTITRUST BULL. 1, 11-15 (2019).

14 See Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 14 (1977) (stating the rule of reason is a "euphemism for nonliability"); see also Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827 (2009).

15 *Antitrust Division Workload Statistics FY 1970-1979*, U.S. DEP'T JUSTICE ANTITRUST DIVISION, <https://www.justice.gov/atr/antitrust-division-workload-statistics-fy-1970-1979> (last visited Aug. 8, 2022); *Antitrust Division Workload Statistics FY 1980-1989*, U.S. DEP'T JUSTICE ANTITRUST DIVISION, <https://www.justice.gov/atr/antitrust-division-workload-statistics-fy-1980-1989> (last visited Aug. 8, 2022).

16 For a brief overview of the changes to patent law and its relationship to antitrust enforcement, see Spencer W. Waller & Noel J. Byrne, *Changing View of Intellectual Property and Competition Law in the European Community and the United States of America*, 20 BROOK. J. INT'L L. 1 (1993).

17 *Overpatented, Overpriced: How Excessive Pharmaceutical Patenting is Extending Monopolies and Driving up Drug Prices*, I-MAK 4-5 (Aug. 2018), <https://www.i-mak.org/wp-content/uploads/2018/08/I-MAK-Overpatented-Overpriced-Report.pdf>.

18 Gustavo Grullon et al., *Are US Industries Becoming More Concentrated*, 23 REV. FIN. 697 (2019).

III. ENFORCEMENT PRIORITIES TO REVERSE THE CURRENT ANTI-INNOVATION ANTITRUST PARADIGM

A. The Power of Enforcement

By merely enforcing the antitrust laws, firms are put on notice that the federal government could challenge their behavior. Such a threat deters a firm from engaging in unlawful behavior and therefore incentivizes firms to structure their operations to engage in socially beneficial and lawful conduct.¹⁹

Consider IBM and the development of its personal computer in the 1970s. Before 1970, IBM tightly controlled and integrated its products – hardware, software, and services alike. Its unfair practices repeatedly drew the ire of the federal government, which launched antitrust lawsuits against the company in 1936, 1952, and 1969.²⁰ To avoid further antitrust scrutiny, IBM adopted an open, decentralized development system for its then-new personal computer, the IBM PC, in the 1970s.²¹ Under this system, IBM only developed certain parts of the computer in-house, and other components would be built by other firms and integrated at a later stage.²² The level of decentralization was exceptionally high. For example, IBM specifically did not retain the rights or ownership of the operating system it licensed from Microsoft when it was building its PC.²³ IBM also licensed computer chips from Intel.²⁴

IBM's actions laid the groundwork for the modern computing revolution because it created an open system that others could improve upon to make new products and software.²⁵ Other examples show that vigorous enforcement of the antitrust laws channels a firm's resources into productive activities such as in-house research and development.²⁶

Historian Richard Hofstadter described the effect of robust antitrust enforcement during this era on corporate behavior when he stated that “[A]nybody who knows anything about the conduct of American business knows that the managers of the large corporations do their business with one eye constantly cast over their shoulders at the Antitrust Division[.]”²⁷

Critically, federal enforcement also facilitates private enforcement because Section 5 of the Clayton Act allows private plaintiffs to use final judgments against a defendant in a lawsuit brought by the Department of Justice as prima facie evidence against the same defendant in their own lawsuit.²⁸

B. Targeting Mergers

Enforcers should use existing law to significantly restrict mergers to promote socially beneficial innovation. Mergers suppress potential innovation, in part, because they are financially wasteful. Mergers inherently divert financial expenditures that can be put toward more productive,

19 Jonathan B. Baker, *The Case for Antitrust Enforcement*, 17 J. ECON. PERSP. 27, 40 (2003); Rory Van Loo, *In Defense of Breakups: Administering A “Radical” Remedy*, 105 CORNELL L. REV. 1955, 1997-98 (2020).

20 *Int'l Bus. Machines Corp. v. United States*, 298 U.S. 131 (1936); Final Judgment, *United States v. Int'l Bus. Machines Corp.*, No. 72-344 (S.D.N.Y. 1956) (consent decree); Amended Complaint, *United States v. Int'l Bus. Machines Corp.*, No. 69-200 (S.D.N.Y. 1969).

21 IBM also took other actions specifically to avoid antitrust scrutiny. Lawrence A. Sullivan, *Monopolization: Corporate Strategy, the IBM Cases, and the Transformation of the Law*, 60 TEX. L. REV. 587, 600 (1982); JAMES W. CORTADA, *IBM: THE RISE AND FALL AND REINVENTION OF A GLOBAL ICON* 310 (2019).

22 Watts S. Humphrey, *Software Unbundling: A Personal Perspective*, 24 IEEE ANNALS HIST. COMPUTING 59 (2002).

23 CORTADA, *supra* note 21, at 303-04.

24 *Id.*

25 See Jimmy Maher, *The Complete History of the IBM PC*, ARS TECHNICA (Jul. 31, 2017), <https://arstechnica.com/gadgets/2017/06/ibm-pc-history-part-1/>; Jimmy Maher, *The Complete History of the IBM PC, Part Two: The DOS Empire Strikes*, ARS TECHNICA (Jul. 31, 2017), <https://arstechnica.com/gadgets/2017/07/ibm-pc-history-part-2/>.

26 HART, *supra* note 11, at 96 (detailing how DuPont spent more money into research and development as a response to vigorous antitrust enforcement in the post-World War II era).

27 Richard Hofstadter, *What Happened to the Antitrust Movement*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 192-93 (1979).

28 15 U.S.C. § 16(a).

socially beneficial use, such as spending that expands a firm's industrial capacity.²⁹ Between 1985 and 2022, firms spent more than \$47 trillion on mergers and acquisitions, \$3 trillion of which was spent in 2021 alone.³⁰ As Walter Adams and James Brock aptly stated in a 1986 law review article:

Billions of dollars spent on shuffling ownership shares are, at the same time, billions of dollars not spent on productivity-enhancing plant, equipment, and research and development. The millions of dollars absorbed in legal fees and investment banking commissions are, at the same time, millions of dollars not plowed directly into the nation's industrial base.³¹

Mergers also harm innovation because they base competition on a firm's market power and privileged access to capital rather than internal investment. When mergers are unavailable as a method of competition, firms can instead invest in their own operations to compete and produce socially beneficial innovation. For example, in 2011, the Obama administration prevented the merger between AT&T and T-Mobile, two of the top four wireless carriers in the United States.³² Supporters of the merger asserted that it was necessary to increase innovation and ensure vigorous competition,³³ despite the merger resulting in one corporation that would control more than 40 percent of the U.S. wireless carrier market.³⁴ Without being able to merge its way to success in the marketplace, T-Mobile implemented a series of policies that transformed the industry. For example, T-Mobile abolished long-term consumer contracts, then the industry standard, which locked consumers into a specific carrier and mobile plan for a set period. T-Mobile also aggressively cut prices for its wireless plans.³⁵

To take another example of a firm innovating after a blocked merger, after Bethlehem Steel was prevented from acquiring a rival in 1958,³⁶ the company proceeded to build a state-of-the-art steel-making plant – a project the company had repeatedly asserted was infeasible.³⁷ Other evidence, principally in the healthcare and technology sector, has shown that firms often use mergers to destroy potential and existing innovations to entrench or expand the acquirer's market position.³⁸

C. Targeting Unfair Contracts

Restrictive contracts should be a prime target for antitrust enforcers to promote socially beneficial innovation. Particular attention should be given to pay-for-delay agreements, noncompetes, and tying contracts.

First, a corporate practice known as pay-for-delay is particularly harmful to potential innovation and should be aggressively litigated.³⁹ The practice involves a drug company exchanging cash or other consideration for a rival drug manufacturer to delay the entry of a generic drug. Pay-for-delay agreements suppress the incentive to innovate because a firm can use its monopoly profits to stymie potential competition that might result in lower costs or the emergence of new drugs, instead extending its ability to extract profits from existing drug

29 WALTER ADAMS & JAMES W. BROCK, *THE BIGNESS COMPLEX: INDUSTRY, LABOR, AND GOVERNMENT IN THE AMERICAN ECONOMY* 80-81 (1986); Melissa A. Schilling, *Potential Sources of Value from Mergers and Their Indicators*, 63 ANTITRUST BULL. 183 (2018); 95 CONG. REC. 11,493 (1949) (statement of Rep. Yates).

30 *United States - M&A Statistics*, INST. FOR MERGERS, ACQUISITIONS & ALLIANCES, <https://imaa-institute.org/mergers-and-acquisitions-statistics/united-states-ma-statistics/> (last visited Aug. 10, 2023); Vijay Sekhon, *2022 Emerging trends in U.S. Mergers and Acquisitions*, WOLTERS KLUWER (Mar. 22, 2022), <https://www.wolterskluwer.com/en/expert-insights/2022-trends-in-us-mergers-and-acquisitions>.

31 Walter Adams & James W. Brock, *The Proposed Emasculation of Section 7 of the Clayton Act*, 65 NEB. L. REV. 813, 819 (1986).

32 Jesse Eisinger & Justin Elliott, *These Professors Make More Than a Thousand Bucks an Hour Peddling Mega-Mergers*, PROPUBLICA (Nov. 16, 2016), <https://www.propublica.org/article/these-professors-make-more-than-thousand-bucks-hour-peddling-mega-mergers>.

33 See e.g. Philipp Humm, *Merger of T-Mobile and AT&T Will Provide More Benefits for Customers*, SEATTLE TIMES (Sept. 29, 2011), <https://www.seattletimes.com/opinion/merger-of-t-mobile-and-att-will-provide-more-benefits-for-customers/> (Humm was the CEO of T-Mobile at the time of the proposed merger).

34 Allen P. Grunes & Maurice E. Stucke, *Antitrust Review of the AT&T/T-Mobile Transaction*, 64 FED. COMM'NS L.J. 47, 52 (2011).

35 Sandeep Vaheesan, *American Prosperity Depends on Stopping Mega-Mergers*, FIN. TIMES (Apr. 25, 2019), <https://www.ft.com/content/7709cfe4-557e-36c7-9404-11eb4785ba54>.

36 *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958).

37 Adams & Brock, *supra* note 31, at 817.

38 Colleen Cunningham et al., *Killer Acquisitions*, 129 J. POL. ECON. 649 (2021); Daniel A. Hanley, *A Topology of Multisided Digital Platforms*, 19 CONN. PUB. INT. L.J. 271, 313-15 (2020); Kurt M. Saunders & Linda Levine, *Better, Faster, Cheaper - Later: What Happens When Technologies Are Suppressed*, 11 MICH. TELECOMM. & TECH. L. REV. 23, 57-59 (2004).

39 This course of action should be pursued despite heightened substantive barriers imposed by the Supreme Court. *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013) (holding that pay-for-delay agreements cannot be determined to be per se illegal). Joshua P. Davis & Ryan J. McEwan, *Deactivating Actavis; The Clash Between the Supreme Court and (Some) Lower Courts*, 67 RUTGERS U. L. REV. 557, 559 (2015); see also Michael A. Carrier, *Unsettling Drug Patent Settlements: A Framework for Presumptive Illegality*, 108 MICH. L. REV. 37, 72 (2009).

products. These agreements effectively operate as a form of market allocation between rivals, a practice long condemned under the antitrust laws.⁴⁰

The public also pays a heavy price for these agreements. A 2010 study conducted by the Federal Trade Commission revealed that pay-for-delay agreements raise the cost of prescription drugs by nearly \$3.5 billion per year.⁴¹ Research has found that these agreements have practically no countervailing benefits.⁴²

Second, antitrust enforcement should be directed at restrictive contracts that inhibit worker mobility and competition for workers. Contractual restrictions like noncompetes forcibly bind a worker to their employer, blocking them from obtaining ostensibly better employment at another firm.⁴³ Between 36 and 60 million workers are bound by non-competes and it is estimated to deprive workers of nearly \$300 billion in wages.⁴⁴ Such contracts also heavily suppress socially beneficial innovation because they inhibit the formation of new firms and the competition for workers.⁴⁵ The lack of noncompetes, for example, was a contributing factor in the rise of Silicon Valley as an economic center of worker talent and business innovation.⁴⁶ Evidence also shows that states with strict enforcement of noncompetes adversely afflict the number of patents businesses file.⁴⁷

Third, antitrust enforcement should be directed at tying arrangements. Tying involves the forced usage or purchase of a product or service along with the purchase or use of another product or service.⁴⁸ Such agreements are used to stifle innovation, suppress competition, and unfairly extend a dominant firm's power in one market to another.⁴⁹ For example, Apple and Google tie their smartphone operating systems (iOS and Android, respectively) to their application payment system and their application store – meaning users and application developers must use both the operating system, payment system, and application stores collectively. The restrictions stifle innovation for alternative services that can have additional features and lower costs to developers and consumers.

Litigating tying arrangements is notably critical since they can be evaluated under a near-per se test of illegality.⁵⁰ Importantly, despite the changes in patent and antitrust law since the 1970s, firms can still violate the antitrust law through illegal tying with their patents as long as enforcers show they have market power.⁵¹

D. Targeting Dominant Firms and Selecting Potent Remedies

Antitrust enforcement should be directed at conduct by dominant corporations with at least a 20 percent share in a relevant market.⁵² Besides being the entities predominantly engaging in the conduct described above and being the intended targets of the antitrust laws,⁵³ dominant corporations have less incentive to innovate in general. Economist Kenneth Arrow made such an observation in the 1960s.⁵⁴

40 Davis & McEwan, *supra* note 39, at 559.

41 FED. TRADE COMM'N, PAY-FOR-DELAY: HOW DRUG COMPANY PAY-OFFS COST CONSUMERS BILLIONS 8 (2010).

42 Michael A Carrier, *Payment After Actavis*, 100 IOWA L. REV. 7, 19-25 (2014).

43 Daniel A. Hanley, *Ending Corporate America's Coercive Contracts*, DEM. (Dec. 21, 2021), <https://democracyjournal.org/arguments/ending-corporate-americas-coercive-contracts/>.

44 U.S. DEP'T OF TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 3 (2016); Non-Compete Clause Rule, 88 Fed. Reg. 3482, at 164-65 (Fed. Trade Comm'n proposed Jan. 19, 2023).

45 Hanley, *supra* note 43 (citing studies).

46 Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants not to Compete*, 74 N.Y.U. L. REV. 575, 594-619 (1999).

47 Matthew S. Johnson et al., *Innovation and the Enforceability of Noncompete Agreements* (Nat'l Bureau of Econ. Rsch., Working Paper 31487, 2023), <https://www.nber.org/papers/w31487>.

48 *N. Pac. Ry.*, 356 U.S. at 5-6.

49 See Hanley-Tyings and Eds, *supra* note 5.

50 *Id.* at 1069-70 (collecting case law and detailing that the per se test for tying involves the forced purchase of two separate products or services, that creates foreclosure of a substantial volume of commerce in the tied market, and created by a firm with appreciable economic power).

51 Robin Feldman, *Patent and Antitrust: Differing Shades of Meaning*, 13 VA. J.L. & TECH. 1, 6 (2008) (detailing the 1988 Patent Act only requires alleged violators of patent misuse based on tying to have market power).

52 This figure is dependent on the targeted violation.

53 See e.g. 21 CONG. REC. 2561 (1890) (statement of Sen. Hoar).

54 Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 619-21 (Richard Nelson ed., 1962).

To promote innovation, enforcers must also request the right kinds of remedies from reviewing courts. The selection of remedies is a critical part of antitrust litigation because “once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor.”⁵⁵ The selection of ineffective remedies has been cited as a reason for lackluster results with antitrust enforcement.⁵⁶ The Government can seek practically any remedy so long as it “represents a reasonable method of eliminating the consequences of the [defendant’s] illegal conduct.”⁵⁷ Two remedies remain heavily underutilized by the federal government that can directly increase the conditions for socially beneficial innovation in the economy – corporate breakups and compulsory licensing.

Besides being an administrable remedy that enhances competition by creating newly competing firms that, but for the remedy, would not exist,⁵⁸ breakups can release innovation that was otherwise being suppressed. History is replete with dominant corporations withholding or suppressing technologies that would undermine their dominant position.⁵⁹ For example, in 1909 employees at Standard Oil, the infamous corporation owned by robber baron John Rockefeller, developed a more efficient process for converting oil into gasoline (known as “thermal cracking”). However, corporate management claimed that the idea was too risky and prohibited the practice from being implemented. Only after Standard Oil was broken up in 1911 was the technology able to be widely implemented.⁶⁰

Using another example, AT&T in the 1920s, the then-dominant telephone service provider before 1982, deliberately withheld technology to record telephone calls because the company believed it would deter customers from using the telephone and thus hurt its bottom line.⁶¹ AT&T took a similar approach with its development of wireless communications.⁶² The breakup of AT&T in 1982 unleashed a wave of innovation in the industry. Research shows that after the breakup, the number of patents in the telecommunications sector grew by 19 percent.⁶³ Considering the last mandated corporate breakup was in 1982 and,⁶⁴ before the antitrust lawsuit against Google in 2022,⁶⁵ the last attempted breakup was in 2000,⁶⁶ such a remedy has remained dormant for far too long.

Second, compulsory licensing is a remedy that should be pursued in antitrust cases to promote competition and innovation. Once a routine element of successful antitrust litigation,⁶⁷ compulsory licensing involves the forced licensing of a corporation’s intellectual property, typically at reasonable prices, to all those who seek to use them. Since the 1970s, however, compulsory licensing has fallen out of favor with enforcers.⁶⁸

Compulsory licensing immediately stimulates the competitive landscape by allowing current and potential competitors to access requisite technology to engage in meaningful competition and therefore start on a similar competitive footing. Compulsory licensing, therefore, lowers structural barriers to competition. In some cases, compulsory licensing operates as a form of restitution to the public as it forces a corporation to share the spoils that a corporation was able to accumulate while using unfair methods of competition.

The most notable and arguably important use of compulsory licensing was the 1956 settlement with AT&T. To ensure that AT&T would not use its dominant control in the telecommunications industry to foreclose potential competitors or leverage itself into the then-nascent com-

55 *Ford Motor Co. v. United States*, 405 U.S. 562, 575 (1972) (quoting *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961)).

56 See generally William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act As A Tool for Deconcentration*, 74 *IOWA L. REV.* 1105 (1989).

57 *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 697-98 (1978).

58 William E. Kovacic, *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 *CONN. L. REV.* 1285, 1294 (1999) (“Divestiture orders offer the possibility of swiftly dissipating the defendant’s market power by introducing new competitors into the market.”); *United States v. E.I. Du Pont de Nemours & Co.*, 366 U.S. 316, 330-31 (1961).

59 Kurt M. Saunders & Linda Levine, *Better, Faster, Cheaper - Later: What Happens When Technologies Are Suppressed*, 11 *MICH. TELECOMM. & TECH. L. REV.* 23 (2004).

60 F.M. Scherer, *Standard Oil as a Technological Innovator*, 38 *REV. INDUS. ORG.* 225, 232-33 (2011).

61 See Mark Clark, *Suppressing Innovation: Bell Laboratories and Magnetic Recording*, 34 *TECH. & CULTURE* 516, 520-24, 531-37 (1993).

62 Kurt M. Saunders & Linda Levine, *Better, Faster, Cheaper - Later: What Happens When Technologies Are Suppressed*, 11 *MICH. TELECOMM. & TECH. L. REV.* 23 (2004).

63 Martin Watzinger & Monika Schnitzer, *The Breakup of the Bell System and its Impact on US Innovation*, CEPR (Press Discussion Paper No. 17635, Nov. 2, 2022), <https://cepr.org/publications/dp17635>.

64 *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), aff’d sub nom. *Maryland v. United States*, 460 U.S. 1001 (1983).

65 Complaint, *United States v. Google LLC*, No. 23-cv-00108 (E.D. Va. 2023).

66 *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59, 64 (D.D.C. 2000), vacated, 253 F.3d 34 (D.C. Cir. 2001).

67 HART, *supra* note 11, at 95-96 (detailing between 1941 and 1959, 107 judgments required the licensing of approximately 40,000 to 50,000 patents).

68 See Jorge Contreras, *A Brief History of FRAND: Analyzing Current Debates in Standard Setting and Antitrust Through a Historical Lens*, 80 *ANTITRUST L.J.* 39 (2015).

puter industry, the Department of Justice prohibited the corporation from providing any service other than common carriage telephone services. Bolstering these restrictions was that AT&T was required to license its massive patent portfolio.⁶⁹

After the courts imposed the remedy on AT&T, pioneering research has confirmed that a wave of innovation occurred in the economy.⁷⁰ For example, after smaller companies were able to utilize AT&T's patents, researchers showed that firms created approximately \$5.8 billion in today's dollars of patent value.⁷¹ Other evidence has also shown that when enforcers force firms to share their patents, firms spend even more on research and development, upwards of 30 percent more.⁷² Additional research has confirmed similar findings.⁷³ Critically, other research has shown that compulsory licensing has "little to no unfavorable impact" on a firm's decisions to invest in research and development.⁷⁴

Compulsory licensing can even jumpstart innovation by facilitating the creation of new industries. Gordon Moore, the founder of computer chip maker Intel, stated that compulsory licensing of AT&T's patents allowed the semiconductor industry "to really get started" in the United States.⁷⁵ Semiconductors are now viewed as a vital and necessary component of national security and economic development.⁷⁶

E. Modify Enforcement Policy Concerning Certain Horizontal Collaborations

Promoting vigorous competition between firms to foster socially beneficial innovation is not always desirable. In certain circumstances, increased coordination and collaboration between firms (including rivals) is prudent. Two practices, in particular, are worth emphasizing. Specifically, anti-trust agencies should update their guidelines and enforcement protocols detailing how standard-setting organizations and joint ventures should be structured.⁷⁷

Standard-setting organizations, groups of firms agreeing to establish market wide standards for products, and joint ventures, an agreement between firms to combine resources to undertake a specific task or project, are business collaborations that can provide corporations with the ability to diffuse risk as well as sufficient scale, capital, and information that is sometimes necessary to produce socially beneficial innovation.⁷⁸ Of course, such collaborations can facilitate other unlawful and unfair conduct.⁷⁹ But heightened oversight protocols can be instituted to ensure compliance with the law and create fair and open markets. Such conduct is also preferable to other methods of competition and integration, such as mergers or other methods of collusion that can stifle competition and unfairly restrict markets.

Concerning joint ventures, enforcement agencies currently take too much of a deferential approach. Joint ventures often operate as partial mergers and, thus, disincentivize firms from engaging in socially beneficial internal expansion. Joint ventures can also extend the power of already dominant firms.

Concerning standard-setting organizations, if they are open and democratically structured, such arrangements can "facilitate the integrating processes necessary to large-scale production and distribution."⁸⁰ Therefore, they should be encouraged but with strict requirements to ensure they are operating fairly in line with the purpose of the antitrust laws.

69 Final Judgment, *United States v. Western Elec. Co.*, No. 17-49, (D.N.J. Jan. 24, 1956).

70 Martin Watzinger et al., *How Antitrust Can Spur Innovation: Bell Labs and the 1956 Consent Decree*, 12 AM. ECON. J.: ECON. POL'Y 328 (2020).

71 *Id.* at 346.

72 Joerg Baten et al., *Compulsory Licensing and Innovation--Historical Evidence from German Patents After WWI*, 126 J. DEV. ECON. 231, 232 (2017).

73 RICHARD J. GILBERT, INNOVATION MATTERS: COMPETITION POLICY FOR THE HIGH-TECHNOLOGY ECONOMY 139-166 (2020).

74 F. M. Scherer, *The Political Economy of Patent Policy Reform in the United States*, 7 J. TELECOMM. & HIGH TECH. L. 167, 172 (2009) (citing FREDERICK M. SCHERER ET AL., PATENTS AND THE CORPORATION: A REPORT ON INDUSTRIAL TECHNOLOGY UNDER CHANGING PUBLIC POLICY (2d ed. 1959)).

75 BD. ON SCI., TECH. & ECON. POLICY, NAT'L RESEARCH COUNCIL, CAPITALIZING ON NEW NEEDS AND NEW OPPORTUNITIES: GOVERNMENT-INDUSTRY PARTNERSHIPS IN BIOTECHNOLOGY AND INFORMATION TECHNOLOGIES 86 (Charles W. Wessner, ed., 2001).

76 See generally CHRIS MILLER, CHIP WAR: THE FIGHT FOR THE WORLD'S MOST CRITICAL TECHNOLOGY (2022).

77 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000).

78 SANFORD V. BERG ET AL., JOINT VENTURE STRATEGIES AND CORPORATE INNOVATION 1 (1982).

79 See e.g. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

80 P. G. Agnew, *Standards in Our Social Order*, 11 INDUS. STANDARDIZATION 141, 146 (1940).



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