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Post-Profit Antitrust

ABSTRACT. Antitrust leans heavily on the assumption that businesses aim to maximize their profits. But across the economy, the antitrust system is grappling with behavior that defies that assumption. Much of this behavior involves the same conduct, and causes the same harm, as traditional antitrust wrongdoing. From sustainability-driven coordination to online-safety boycotts, and from scale-chasing tech startups to nonprofit-hospital mergers, antitrust can no longer neglect behavior outside the profit paradigm.

This Feature introduces "post-profit antitrust": a comprehensive theoretical and doctrinal framework that allows plaintiffs to allege and prove, and courts to analyze, non-profit-maximizing behavior in antitrust cases. While broadening antitrust's imagination along lines suggested by scholarship in behavioral economics, corporate governance, and psychology, it also imposes two key limitations: a mechanism of harm, grounded in antitrust theory; and some asymmetry of treatment between plaintiffs and defendants, grounded in the institutional realities of litigation.

The Feature sketches two alternative ways to operationalize post-profit antitrust: a plaintiff-choice principle for inferences and predictions across the antitrust enterprise, and a new use case for the FTC Act's elusive prohibition on unfair methods of competition. The Feature thus charts two pathways to reform—one broad, one narrow—to ensure that the antitrust system can reach harmful conduct, whatever its motivation.

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INTRODUCTION

Antitrust leans heavily on the assumption that businesses aim to maximize their profits. Courts, enforcers, and economic experts use this assumption every day to predict the effects of practices and transactions, to construct "counterfactual" alternatives, and to infer hidden facts. When two businesses plan to merge, for example, courts and agencies assume the merged firm will aim to maximize its profits, and then ask whether the resulting behavior would harm consumers.[1] Likewise, when a plaintiff alleges an anticompetitive conspiracy or a scheme of monopolization, courts often resist—or reject out of hand—arguments, evidence, inferences, or predictions that defendants might try to do anything but maximize profits.[2]

The assumption is often expressed in strong, even categorical, terms. In recent years, the Department of Justice (DOJ) has argued, and the D.C. Circuit has held, that business profit maximization is a principle of antitrust *law*, not a question of fact.[3] The leading treatise states that "[a]s a general proposition business firms are (or must be assumed to be) profit maximizers."[4] In 2005, a Federal Trade Commission (FTC) Commissioner declared that "[*t*]*he*

1. *See, e.g.*, U.S. Dep't of Just. & Fed. Trade Comm'n, Merger Guidelines 16-17 (2023) [hereinafter 2023 Merger Guidelines], https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf [https://perma.cc/AHR6-V9TB] ("The Agencies' assessment will be consistent with the principle that firms act to maximize their overall profits and valuation rather than the profits of any particular business unit."); *see also* U.S. Dep't of Just. & Fed. Trade Comm'n, Horizontal Merger Guidelines 2 (2010) [hereinafter 2010 Horizontal Merger Guidelines], https://www.ftc.gov/system/files/documents/public_statements/804291/100819hmg.pdf [https://perma.cc/2KAX-AB32] (withdrawn 2023) ("In evaluating how a merger will likely change a firm's behavior, the Agencies focus primarily on how the merger affects conduct that would be most profitable for the firm.").

2. *See, e.g.*, United Rentals Highway Techs., Inc. v. Ind. Constructors, Inc., 518 F.3d 526, 532 (7th Cir. 2008) ("[A]n antitrust claim 'that simply makes no economic sense' cannot 'by itself support a finding of antitrust liability.'" (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986))); Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc., 818 F.2d 1530, 1534 (11th Cir. 1987) (holding that a plaintiff can survive summary judgment only by "satisfy[ing] the court that the conspiracy which he alleges is, objectively, an economically reasonable one").

3. United States v. AT&T, Inc., 916 F.3d 1029, 1043-44 (D.C. Cir. 2019); Brief of Appellant United States of America at 53, *AT&T*, 916 F.3d 1029 (No. 18-5214) ("Evidence not consistent with corporate-wide profit maximization must be disregarded as so 'implausible on its face that a reasonable factfinder would not credit it' . . . ." (quoting Anderson v. Bessemer City, 470 U.S. 564, 575 (1985))).

4. Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application 144 (2024).

fundamental assumption of current antitrust analysis is that a business enterprise is a unitary entity dedicated to the maximization of profit."[5] And so on.

But the principle is elusive. On some occasions, it takes the form of a mere presumption, and at other times it seems to disappear entirely.[6] And in a handful of cases, nonprofit hospitals and schools have succeeded in using a kind of inverted profit presumption: persuading a court that they should enjoy special antitrust license because, as they are not for-profit enterprises, they will not exploit market power harmfully.[7] But such departures are sporadic, generally untheorized, and often highly controversial.

In reality, the proposition that businesses aim to maximize profits is a rough simplification at best, and in some cases it is obviously wrong. For decades, scholars of economics, psychology, and management have studied the many ways in which real businesses, led by real managers, deviate from strict profit maximization. But efforts to integrate those teachings into antitrust doctrine—to create a "behavioral antitrust"[8] or a more expansive account of antitrust rationality[9]—have been resisted, lest antitrust analysis become an unstructured free-for-all. Traditionalists have argued that profit maximization is a good enough guide to serve antitrust's needs—and that the profit presumption is vastly better than rudderless speculation.[10] The result has been deadlock in the academy, while courts have doubled down on profit maximization.

But today antitrust's profit paradigm is under pressure. The policy agenda is jammed with allegations and evidence that, at least sometimes, something other than tractable profit maximization is going on. Competitors cooperate to pursue environmental, social, and governance (ESG) goals; market participants engage in social-media boycotts to express their values; digital startups aim to make a

5. Thomas B. Leary, *The Bipartisan Legacy*, 80 TUL. L. REV. 605, 609 (2005) (emphasis added).

6. *See, e.g.*, Knutson v. Daily Rev., Inc., 548 F.2d 795, 812 (9th Cir. 1976) ("[W]e assume that, *absent evidence to the contrary* . . . dealers are profit maximizers." (emphasis added)); United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 74 (D.D.C. 2011) (crediting evidence that a rival was a "lifestyle company" rather than a vigorous competitor).

7. *See, e.g.*, FTC v. Butterworth Health Corp., 946 F. Supp. 1285, 1296-97 (W.D. Mich. 1996) (nonprofit-hospital merger); United States v. Brown Univ., 5 F.3d 658, 672 (3d Cir. 1993) (college-aid cartel).

8. *See, e.g.*, Avishalom Tor, *Understanding Behavioral Antitrust*, 92 TEX. L. REV. 573, 590-606 (2014); Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527, 1553-85 (2011).

9. Christopher R. Leslie, *Rationality Analysis in Antitrust*, 158 U. PA. L. REV. 261, 338-52 (2010).

10. *See, e.g.*, Alan Devlin & Michael Jacobs, *The Empty Promise of Behavioral Antitrust*, 37 HARV. J.L. & PUB. POL'Y 1009, 1014 (2014); Joshua D. Wright & Judd E. Stone II, *Misbehavioral Economics: The Case Against Behavioral Antitrust*, 33 CARDOZO L. REV. 1517, 1526 (2012); Douglas H. Ginsburg & Derek W. Moore, *The Future of Behavioral Economics in Antitrust Jurisprudence*, 6 COMPETITION POL'Y INT'L 89, 97 (2010).

splash, go viral, and be acquired rather than turn a steady profit; religious hospitals acquire rivals and terminate reproductive services, sacrificing profits for reasons of faith; and so on.[11] And economic theory teaches that, whatever their motivation, such practices can lead to all the harms with which antitrust is traditionally concerned, including higher prices and the loss of output and innovation.

Sometimes, to be sure, such practices may "really" be provably profit maximizing: for example, a play for value-driven customers.[12] But what about the other cases? The ones driven, in whole or part, by values like environmentalism; by metrics like firm scale or managerial compensation; by mistakes; or by the special nature of entities like nonprofits and emanations of government. What should litigants, agencies, and courts do when the link between conduct and profit is uncertain, implausible, or unknowable?

These cases are a puzzle. A mountain of theoretical and empirical scholarship shows that they exist. And they often implicate deeply difficult questions of policy and politics. Can businesses pursue ESG goals, or content-moderation objectives, jointly? How should antitrust courts approach Big Tech acquisitions of startups that show little or no interest in building a sustainable profit stream? Should antitrust enforcers distinguish between faith-based and secular healthcare providers in merger reviews—for example, by considering religious doctrine when predicting what a merged firm will do?

Whatever one thinks about the answers, these questions cannot easily be framed within the bounds of a profit-maximizing imagination. And it is far from obvious that antitrust's best response to non-profit-maximizing behavior is simply to deny that it can happen in the first place. As value-driven conduct becomes more salient and controversial, the time is ripe for an explicit and principled account of antitrust's role outside the profit paradigm.

This Feature proposes a comprehensive framework for relating antitrust to profit maximization, and charts a way forward past the deadlocked debate between behavioralists and traditionalists. Its core claim is that—within some important bounds—antitrust can and should entertain allegations, evidence, inferences, and predictions that businesses will engage, or have engaged, in non-profit-maximizing behavior.

It builds on a formidable literature. Scholars of economics, psychology, and organizations have advanced our understanding of business behavior. Many legal scholars have written about the power, limits, and deficiencies of a rational-actor model. And, within antitrust, scholars like Christopher R. Leslie, Avishalom Tor, Maurice E. Stucke, and others have urged reform of antitrust's

11. *See infra* Section I.B.

12. *See infra* note 76 and accompanying text.

relationship with rationality in general and profit maximization in particular.[13] This Feature attempts to take the next step: showing that antitrust's imagination can be expanded without disturbing its conceptual foundations, without requiring courts to accept affirmative and controversial behavioral theories, and without inviting a free-for-all.

To that end, this Feature makes three main claims.

The first claim is that, despite the views of many courts and scholars, antitrust is not, as a matter of law, committed to a specific behavioral paradigm, including the presumption that businesses maximize profits. Nor, as a matter of principle, does it need one. Antitrust violations are creatures of the short run and the individual case, and they need not live within any particular grand theory of behavior. And, as other areas of law demonstrate, prediction and inference can be undertaken just fine in individual cases without a strict behavioral model in hand.

The second claim is that there is a strong, but bounded, case for "post-profit antitrust"—that is, an antitrust system that takes the profit motive seriously but accepts allegations, evidence, inferences, and predictions of non-profit-maximizing behavior. The core of that case is identical to the traditional case for antitrust itself. Non-profit-maximizing behavior may involve the very same conduct, and inflict the very same harms, as traditional antitrust wrongdoing. Cartels, monopolization, and mergers may all harm consumers without maximizing their participants' profits, whether motivated by ethical values, vindictive animus, religious faith, or some other goal. Moreover, courts have often emphasized that the presence of a profit motive does not strengthen the case for antitrust liability; it follows that the absence of that motive does not weaken it.

But the bounds of the post-profit paradigm, which help preserve antitrust's coherence and predictability, are equally important. One such bound arises from antitrust's characteristic mechanism of ultimate harm. I will suggest, in what I will call the "Spear-Tip Rule," that any well-framed antitrust theory of harm must culminate in the harmful suppression of rival ability or incentive to contest trading relationships (broadly speaking, collusion or exclusion) that contributes to pricing power. This conception of harm rules out post-profit liability for practices that cause harm in other ways, or not at all. But it allows harmful, non-profit-maximizing conspiracies, exclusion, and mergers to be alleged, inferred, predicted, and remedied.

The other bound on antitrust's imagination is a prudential and practical one. I will suggest that, despite the appeal of symmetry, there is a better general case for allowing plaintiffs to set aside the profit paradigm than for allowing defendants to do so. As doctrine and practice in other fields demonstrate, fears of a free-

13. *See infra* Section II.C.

for-all are misplaced so long as a plaintiff must prove, according to the regular rules of evidence, that particular non-profit-maximizing behavior has happened or likely will happen. By contrast, allowing defendants to put their own objective functions at issue in a traditional case would turn antitrust litigation into a quagmire, given defendants' unique ability and incentive—as the authors of their own records and the beneficiaries of their own conduct—to manipulate the process.

The third claim is that there are at least two ways in which we might reconstruct antitrust doctrine to put the profit paradigm in its proper place. I offer a broad proposal and a narrow one. The broad proposal is that a plaintiff in any civil antitrust action should be entitled to offer a "traditional" theory, with predictions and inferences constructed subject to a strict profit-maximization principle, or a post-profit one, to which no such constraint would apply. Or, as always, the plaintiff may plead both in the alternative. Recognizing the asymmetry described above, a defendant would not be entitled to argue that post-profit predictions and inferences should be drawn *except* in response to a post-profit theory offered by a plaintiff. (This exception reflects, among other things, the observation that concerns about gamesmanship are muted when both parties agree that a strong presumption of profit maximization is inappropriate.) This framework would apply to all antitrust suits, whether brought by the government or a private plaintiff, and whether alleging unlawful restraint of trade, monopolization, or merger.

The narrower proposal—for incrementalists, those who fear a free-for-all of meritless claims, or courts constrained by appellate authority—is to treat post-profit antitrust as a use case for the most mysterious of antitrust rules: the prohibition of "unfair methods of competition" in Section 5 of the FTC Act. This approach offers several advantages, including the presence of a government gatekeeper and remedial modesty, but some mild reforms would be necessary to make it genuinely effective.

* * *

To illustrate the value of a post-profit perspective, the Feature offers four hypotheticals and argues that a court should be willing to infer and predict non-profit-maximizing behavior in three of them.

In the Altruistic Boycott case, a plaintiff alleges that competitors have agreed to refrain from a profitable trading relationship for reasons of value, ethics, or mission, under circumstances in which doing so harms consumers and causes a *loss* of profits to each participant. For example: a group of airlines might agree to switch from a low-cost, high-emission fuel to a higher-cost, lower-emission one, increasing prices and reducing profits but protecting the environment. The Altruistic Boycott recalls cases like *Matsushita Electric Industrial Co. v. Zenith Radio*

Corp.,[14] in which the alleged conspiracy may have been motivated in whole or part by the objective of growth as such, as well as modern allegations about collusion to pursue goals like sustainability.

In the Vindictive Excluder case, a plaintiff alleges that a monopolist has harmed consumers by engaging in exclusionary practices at the cost of bottom-line profits. For example: the CEO of an automobile-component manufacturer with monopoly power in one kind of component might decide to tie that component to another (that is, sell it only as part of a package), *even at the cost of overall profits*, in order to punish a rival making the second component. Perhaps the rival hired away a valued employee, or perhaps the rival's CEO simply made an offensive remark at a drinks party. The Vindictive Excluder recalls malicious business torts, as well as antitrust cases in which scholars and courts have concluded that, if the challenged conduct were harmful to consumers, it would not be profit maximizing (including for single-monopoly-profit reasons[15]), and that the conduct therefore could not possibly be harmful.

And in the Catholic Hospital Merger case, a plaintiff alleges that a hospital merger will harm consumers because the merged firm will stop providing certain services (for example, terminations and sterilizations) for religious reasons. It recalls the many such acquisitions chronicled by scholars and journalists.

Each of these cases—grounded in real-world examples—involves consumer harm. Each defies the assumption that market participants seek to maximize their profits. And each would meet something between an outright bar and a very stiff headwind from agencies and courts today.

Accepting post-profit antitrust means recognizing that antitrust needs neither the bar nor the stiff headwind. In these and other appropriate cases, a court should be willing to infer or predict that the relevant businesses did or will engage in the relevant harmful conduct despite the resulting loss of profits. Plaintiffs of all kinds should be permitted to allege and prove such theories of harm, and the antitrust-enforcement agencies should be willing to advance such theories in appropriate cases. The Altruistic Boycott, Vindictive Excluder, and Catholic Hospital Merger are all unlawful, absent a special immunity like the First Amendment.

But the asymmetric approach offered here closes the door on a fourth hypothetical. Discount Dave is the CEO of a firm pursuing a merger. He is earnestly and credibly committed to charging low prices and refusing to foreclose his rivals, despite the incentives to cause harm that the merger would create. I will argue that the costs of entertaining such arguments—including the risks that Discount Dave might be lying or mistaken, change his mind, or be replaced—

14. 475 U.S. 574 (1986).

15. *See infra* notes 63-69 and accompanying text.

justify declining to spend resources ventilating such claims, even through a post-profit lens. Only if the plaintiff is itself offering a post-profit case should a court try to grapple with Discount Dave's representations.

* * *

The Feature proceeds in four Parts. Part I describes the problem: antitrust's profit paradigm and the harmful practices that challenge it. Part II explains how we got here, through a short intellectual history of the profit presumption in antitrust analysis, including scholarly efforts to qualify it. Part III argues that courts can and should be willing, in some cases, to depart from the profit-maximization paradigm. Part IV prescribes two alternative paths to operationalize post-profit antitrust: a plaintiff-choice principle across the antitrust enterprise and a modest expansion of Section 5 of the FTC Act.

I. ANTITRUST AND THE PROFIT PARADIGM

This Part introduces antitrust's robust, if inconsistent, adherence to the profit model, as well as the harmful practices that challenge it.

A. Antitrust's Profit Principle

Courts and enforcers routinely say that antitrust analysis assumes that businesses aim to maximize their profits.[16] So do antitrust scholars, whether they favor that assumption or not.[17] And although "profit maximization" is seldom

16. *See, e.g.*, United States v. AT&T, Inc., 916 F.3d 1029, 1043 (D.C. Cir. 2019) (stating that "the principle of . . . profit maximization" is "a principle of antitrust law"); United Food & Com. Workers Loc. 1776 v. Teikoku Pharma USA, 296 F. Supp. 3d 1142, 1162 (N.D. Cal. 2017) (noting that "[i]n the antitrust context . . . but-for worlds are considered and profit-maximizing goals assumed"); Leary, *supra* note 5, at 609 ("The fundamental assumption of current antitrust analysis is that a business enterprise is a unitary entity dedicated to the maximization of profit."); Carl Shapiro, *Mergers with Differentiated Products*, 10 ANTITRUST 23, 24 (1996) (describing merger analysis and noting that, "[a]s usual in economics, we assume that each firm seeks to maximize its own profits").

17. *See, e.g.*, Elizabeth M. Bailey, *Behavioral Economics and U.S. Antitrust Policy*, 47 REV. INDUS. ORG. 355, 356 (2015) ("[T]he standard model of firm decision-making used in an antitrust analysis assumes that a firm makes choices . . . to maximize profits."); Leslie, *supra* note 9, at 266 ("[C]ourts have imported the profit-maximizing rationality assumption into substantive antitrust law . . . ."); Ernest Gellhorn, *An Introduction to Antitrust Economics*, 1975 DUKE L.J. 1, 6 (describing antitrust's theory of the business firm as a profit maximizer).

carefully defined, it generally seems to mean something like maximization of total revenue net of total costs over the foreseeable future.[18]

Antitrust leans on this assumption in many ways. The most basic is found in the bedrock idea that competition is valuable and that antitrust violations cause harm. The classic case for "competitive markets" rests on the idea that sellers and buyers will do valuable things — including supplying desirable products and discovering useful innovations — in an effort to maximize profits.[19] If businesses did not generally seek profit, it is not obvious in what sense "competition" would take place, or why antitrust would be desirable.

The profit-maximization principle is also often used to help determine socially optimal rules for antitrust doctrine. Many economists believe that profit maximization is a fairly good guide to most business conduct,[20] and as a result courts and scholars often draw on it when formulating optimal rules.[21] For example, the per se rule against price-fixing turns in part on the bet that when competitors set prices jointly, they will be higher, not lower, than under competition, harming consumers. That proposition, in turn, is grounded in the observation that price fixers maximize their profits by increasing prices above competitive levels.

But, in addition to these background functions, courts and enforcers also use the assumption *in individual cases* when applying antitrust rules. Often, they do so robustly, with strong resistance or hostility to arguments or evidence that, in a particular case, antitrust's profit principle might not hold. By way of demonstration, the following discussion reviews four different ways in which the profit principle plays a central role in traditional antitrust analysis.

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18. *See, e.g.*, *In re* Text Messaging Antitrust Litig., 782 F.3d 867, 877 (7th Cir. 2015) ("[A] rational profit-maximizing seller does not care about the number of customers it has but about its total revenues relative to its total costs."); Palmyra Park Hosp. Inc. v. Phoebe Putney Mem'l Hosp., 604 F.3d 1291, 1300 (11th Cir. 2010) ("[H]ospitals and insurance companies operate like any other business — they seek to maximize profits by increasing revenues and minimizing costs . . . ."); Michael Cragg, Patrick Holder, David Hutchings & Bin Zhou, *The Proper Measure of Profits for Assessing Market Power*, 37 ANTITRUST 48, 48 (2023) (using revenue net of costs).

19. *See* 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 26-27 (R.H. Campbell, A.S. Skinner & W.B. Todd eds., Liberty Fund 1981) (1776) ("It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest."); *see also* Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1073 (10th Cir. 2013) ("[A]ntitrust evinces a belief that independent, profit-maximizing firms and competition between them are generally good things for consumers.").

20. *See infra* Section II.A.

21. *See, e.g.*, Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 56 (1977); Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 267-68 (1981).

1. *Predicting Effects and Measuring Damages*

Antitrust analysis often requires a court or agency to evaluate the harmful and beneficial effects of a practice or transaction.[22] This usually involves comparing the world in which the practice or transaction will (or did) take place to a "counterfactual" world without it.[23]

These hypothetical worlds are built on the assumption of profit-maximizing conduct. For example, if a business merges with an actual or potential rival (a "horizontal" merger), courts and agencies often ask whether the merged firm would find it profitable to increase price, or take equivalent harmful action.[24] If so, the deal is usually illegal.[25] Likewise, if a business merges with a firm at a different level of the supply chain (a "vertical" transaction), courts and agencies often rely on complicated math and other evidence to determine whether the merged firm would find it profitable to foreclose rivals' access to inputs, distribution, customers, or complements, thus causing harm.[26] Courts and agencies often reject arguments that a merged firm will not profit maximize.[27]

The leading modern example can be found in the D.C. Circuit's adjudication of DOJ's challenge to the acquisition of Time Warner by AT&T.[28] The district court had appeared to doubt that the merged firm would maximize its overall profits, indicating that instead individual business units would maximize their own revenues.[29] On appeal, DOJ objected strongly: "The Supreme Court has adopted corporate-wide profit maximization as a *principle of antitrust law* . . . rather than treating the issue as one of fact. . . . [B]usiness executives' denials that they act to maximize profits *should not be credited* . . . ."[30] As a result, "[e]vidence

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22. *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 58-59 (D.C. Cir. 2001) (en banc); Coronavirus Rep. v. Apple, Inc., 85 F.4th 948, 957 (9th Cir. 2023); FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 349 (3d Cir. 2016).

23. *See, e.g.*, Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 233 (1993); Rambus Inc. v. FTC, 522 F.3d 456, 463-67 (D.C. Cir. 2008); 2010 Horizontal Merger Guidelines, *supra* note 1, at 1. The 2023 Merger Guidelines do not clearly make this point. *See* 2023 Merger Guidelines, *supra* note 1.

24. 2023 Merger Guidelines, *supra* note 1, at 16-17; Tor, *supra* note 8, at 587.

25. *See, e.g.*, United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 81 (D.D.C. 2011).

26. *See, e.g.*, Illumina, Inc. v. FTC, 88 F.4th 1036, 1051 (5th Cir. 2023).

27. *See, e.g.*, United States v. AT&T, Inc., 916 F.3d 1029, 1044 (D.C. Cir. 2019); *see also* Elizabeth M. Bailey, *Behavioral Firms: Does Antitrust Economics Need a Theoretical Update?*, CPI Antitrust Chron. 3 (Jan. 2019) (explaining that antitrust agencies regularly "rely on a profit maximization assumption for assessing competitive effects").

28. *AT&T*, 916 F.3d at 1031.

29. United States v. AT&T Inc., 310 F. Supp. 3d 161, 222-23 (D.D.C. 2018).

30. Brief of Appellant United States of America, *supra* note 3, at 51-52 (emphasis added).

not consistent with corporate-wide profit maximization must be disregarded as so 'implausible on its face that a reasonable factfinder would not credit it.'"[31]

The D.C. Circuit agreed with DOJ about the law but insisted that the district court had correctly applied "the *legal principle* of corporate-wide profit maximization" and had merely recognized an unusual path to that end.[32] The circuit court explicitly held that profit maximization had been "adopted as a principle of antitrust law" by the Supreme Court in the *Copperweld* decision of 1984.[33] At most, it allowed, "the district court could have made clearer that it understood *the principle was not a question of fact*."[34] The lesson is clear. If antitrust's imagination cannot even stretch to divisional profit or revenue maximization, more esoteric objective functions are surely even further out of bounds. Other courts routinely take the same approach.[35]

In conduct cases, too, courts and agencies typically evaluate a practice's effects by comparing a profit-maximizing hypothetical world in which the practice takes place with one in which it does not.[36] And efforts to quantify antitrust damages work the same way: courts often ask how much better off the plaintiff

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31. *Id.* at 53 (quoting Anderson v. Bessemer City, 470 U.S. 564, 575 (1985)).

32. *AT&T*, 916 F.3d at 1044 (emphasis added).

33. *Id.* at 1043 (citing Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771 (1984)).

34. *Id.* at 1044 (emphasis added).

35. *See, e.g.*, Illumina, Inc. v. FTC, 88 F.4th 1036, 1052 (5th Cir. 2023); FTC v. Tempur Sealy Int'l, Inc., 768 F. Supp. 3d 787, 834-39 (S.D. Tex. 2025); United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 50 (D.D.C. 2022); Grumman Corp. v. LTV Corp., 527 F. Supp. 86, 95 (E.D.N.Y.), *aff'd*, 665 F.2d 10 (2d Cir. 1981).

36. *See, e.g.*, United States v. Google LLC, 747 F. Supp. 3d 1, 62, 117-18 (D.D.C. 2024) (predicting behavior by reference to profit maximization); Oliver v. Am. Express Co., No. 19-CV-566, 2024 WL 100848, at *22 (E.D.N.Y. Jan. 9, 2024) (invoking the proposition that "in equilibrium, merchants are profit-maximizing"); *In re* Zetia (Ezetimibe) Antitrust Litig., No. 18-MD-2836, 2022 WL 4362166, at *9 (E.D. Va. Aug. 15, 2022) ("The relevant question is how a reasonable profit-maximizing company would behave without the alleged anti-competitive conduct. . . . Plaintiffs' theory-of-the-case requires proof that it would have been economically rational for Merck and Glenmark to agree to an earlier entry date without the alleged no-AG agreement."); *In re* HIV Antitrust Litig., 656 F. Supp. 3d 963, 1006 (N.D. Cal. 2023) (stating that "the inquiry should focus on what a rational generic manufacturer would have done if it were in Teva's position," and following *In re Zetia*); *In re* Seroquel XR Antitrust Litig., No. 20-1076, 2022 WL 2438934, at *13 (D. Del. July 5, 2022) ("[T]here are no non-conclusory factual allegations in the operative complaint that plausibly imply that it would have been economically rational for [the defendant to agree to earlier generic entry]."); United Food & Com. Workers Loc. 1776 v. Teikoku Pharma USA, 296 F. Supp. 3d 1142, 1179-80 (N.D. Cal. 2017) ("[I]n the experts' competing testimony about the but-for world, only opinions that are economically rational may be provided. . . . [T]o the extent that . . . any expert intends to opine that even though other economically rational settlements could have been reached, economically irrational factors (*e.g.*, a general but irrational reticence to settle) would have foundered any settlement, that testimony will not be admissible.").

would have been in a profit-maximizing world in which the violation had not taken place, and they limit the scope of permissible evidence to that end.[37]

2. *Inferring Agreement*

Courts routinely lean heavily on the profit-maximization assumption when invited to infer an "agreement": an element of any restraint-of-trade case under Section 1 of the Sherman Act.[38] Some courts require elevated proof when plaintiffs allege a non-profit-maximizing agreement; others categorically refuse to entertain such claims.

The leading Supreme Court case is *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, in which American television manufacturers alleged that a group of their Japanese rivals had formed a cartel in Japan to fund below-cost price-fixing in the United States, with a long-term goal of driving the U.S. firms out of business.[39] The Third Circuit, below, had held that evidence of the cartel in Japan, combined with parallel conduct in the United States, was sufficient to infer the alleged conspiracy.[40]

But the Supreme Court reversed, emphasizing that the alleged conspiracy would result in the participants losing money for many years, and that they did not appear to be anywhere close to recouping those losses.[41] This was "strong evidence that the conspiracy [did] not in fact exist."[42] The attenuated connection between the conspiracy and profitability raised the bar of proof—requiring "more persuasive evidence . . . than would otherwise be necessary"—to a height

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37. *See, e.g.*, Dolphin Tours, Inc. v. Pacifico Creative Serv., Inc., 773 F.2d 1506, 1511-12 (9th Cir. 1985) ("Dolphin has attempted to establish its lost profits by projecting the market share that it would have attained absent the anticompetitive activity. In using this approach, Dolphin must presume the existence of rational economic behavior in the hypothetical free market . . . [in light of] all competitors['] attempts to maximize their own profits."); Murphy Tugboat Co. v. Crowley, 658 F.2d 1256, 1262 (9th Cir. 1981) ("A reasonable jury could not . . . indulge in the assumption that a competitor would follow a course of behavior other than that which it believed would maximize its profits. . . . In a hypothetical economic construction, such as the one underlying Murphy's theory on lost past profits, economic rationality must be assumed for all competitors, absent *the strongest evidence of chronic irrationality*. Otherwise it will be impossible to keep speculation in check." (emphasis added)); Apotex, Inc. v. Cephalon, Inc., 321 F.R.D. 220, 235 (E.D. Pa. 2017) ("[A]ntitrust lost profits damages scenarios must presume the existence of rational economic behavior in the hypothetical free market . . . .").

38. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984).

39. 475 U.S. 574, 577-78 (1986).

40. *In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 308-09, 314 (3d Cir. 1983).

41. *Matsushita*, 475 U.S. at 590-91.

42. *Id.* at 592.

that the plaintiffs had failed to clear.[43] Scholarship before and after the decision has suggested that the Japanese firms may well have been motivated by goals like growth that made sufficient sense to them.[44]

Courts and scholars have disagreed about *Matsushita*'s meaning and scope.[45] Some courts have taken a "hard" view.[46] The Seventh Circuit, for example, has cited *Matsushita* for the rule that "an antitrust claim 'that simply makes no economic sense' cannot 'by itself support a finding of antitrust liability.'"[47] The Eleventh Circuit has understood it to mean that a plaintiff must "satisfy the court that the conspiracy which he alleges is, *objectively*, an economically reasonable one. . . . [I]f the alleged conspiracy is economically infeasible or irrational then, as a matter of law, summary judgment must be entered against the plaintiff."[48] And the Supreme Court has itself paraphrased *Matsushita* as holding that "[i]f [a] plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted."[49] Other courts have read *Matsushita* for the softer proposition that allegations of agreements that are not

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43. *Id.* at 587.

44. *See, e.g.*, Leslie, *supra* note 9, at 295; Kozo Yamamura & Jan Vandenberg, *Japan's Rapid-Growth Policy on Trial: The Television Case*, *in* LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY: AMERICAN AND JAPANESE PERSPECTIVES 238, 267 (Gary R. Saxonhouse & Kozo Yamamura eds., 1986); David Schwartzman, Matsushita v. Zenith*: An Economic Analysis*, 9 REV. INDUS. ORG. 57, 66 (1994); *see also Matsushita*, 475 U.S. at 604 (White, J., dissenting) (criticizing the majority for "assum[ing] that [the defendants] valued profit-maximization over growth").

45. *See, e.g.*, Leslie, *supra* note 9, at 269 (noting more and less "stringent" readings).

46. *See, e.g.*, Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1342 (11th Cir. 2010) ("Jacobs had the burden to present allegations showing why it is more plausible that [the defendants]—*assuming they are rational actors acting in their economic self-interest*—would enter into an illegal price-fixing agreement . . . ." (emphasis added)); Cascades Comput. Innovation LLC v. RPX Corp., No. 12-CV-01143, 2013 WL 316023, at *11 (N.D. Cal. Jan. 24, 2013) ("Where the facts alleged in the complaint demonstrate that an alleged conspiracy makes no economic sense, the claim must be dismissed. . . . At the motion to dismiss stage, the determination turns [among other things] on whether the defendants had 'any rational motive' to join the alleged conspiracy . . . ." (first citing Adaptive Power Sols., LLC v. Hughes Missile Sys. Co., 141 F.3d 947, 952 (9th Cir. 1998); and then quoting *Matsushita*, 475 U.S. at 574)).

47. United Rentals Highway Techs., Inc. v. Ind. Constructors, Inc., 518 F.3d 526, 532 (7th Cir. 2008) (quoting *Matsushita*, 475 U.S. at 587).

48. Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc., 818 F.2d 1530, 1534 (11th Cir. 1987); *see also In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 614 (7th Cir. 1997) ("But [the defendants] argue, pointing to *Matsushita* and other decisions . . . that summary judgment for a defendant is proper, even if there is some evidence of an antitrust violation, if the plaintiff's theory of violation makes no economic sense. . . . This has to be the right rule . . . ." (citing *Matsushita*, 475 U.S. at 587)).

49. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 468-69 (1992). But even *Eastman Kodak* is ambiguous. *See id.* at 468 ("*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury . . . .").

profit maximizing face a heightened, but not insuperable, burden of proof.[50] In 2007, the then-Director of the FTC's Bureau of Economics summed up *Matsushita*'s practical impact:

> For an economist, [*Matsushita*'s] requirement that a claim in a case make economic sense means that one can construct a formal economic model of the claim. The Court might not have explicitly intended the statement to refer to mathematical models, but *the implication is unavoidable*. To demonstrate that an antitrust claim makes economic sense, one must show that *the defendant would have found the alleged anticompetitive behavior to be profitable*.[51]

3. Identifying Monopolization

Section 2 of the Sherman Act prohibits "monopolization," but the statute does not define the term, and its meaning is contested.[52] The profit-maximization assumption plays a series of subtle but important roles in applying this rule.

Most obviously, profit maximization plays a role in certain "micro-rules" that govern specific subcategories of monopolization claims.[53] For example, the rule against predatory pricing tests for a two-act story: first, the defendant charges below-cost prices to drive out rivals; second, the defendant enjoys monopoly power and raises prices.[54] Courts specifically require that the expected profits in the second act exceed the losses in the first.[55] If the plaintiff cannot prove that

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50. *See, e.g.*, Advo, Inc. v. Phila. Newspapers, Inc., 51 F.3d 1191, 1195-97 (3d Cir. 1995); R.B. Ventures, Ltd. v. Shane, 112 F.3d 54, 58 (2d Cir. 1997) (holding that the district court erred when, in light of *Matsushita*, it required a "'heightened' standard of proof" when evaluating the defendant's motion for summary judgment). *But see* Leslie, *supra* note 9, at 345 (noting that some courts make this hurdle "virtually insurmountable").

51. Michael A. Salinger, *The Legacy of* Matsushita*: The Role of Economics in Antitrust Litigation*, 38 Loy. U. Chi. L.J. 475, 478 (2007) (emphasis added).

52. *See, e.g.*, Thomas A. Lambert, *Defining Unreasonably Exclusionary Conduct: The "Exclusion of a Competitive Rival" Approach*, 92 N.C. L. Rev. 1175, 1177 (2014).

53. *See* Daniel Francis, *Monopolizing by Conditioning*, 124 Colum. L. Rev. 1917, 1948-50 (2024) [hereinafter Francis, *Monopolizing by Conditioning*] (discussing micro-rules); Daniel Francis, *Making Sense of Monopolization*, 84 Antitrust L.J. 779, 780 (2022) [hereinafter Francis, *Making Sense*] (same).

54. Daniel Francis & Christopher Jon Sprigman, Antitrust: Principles, Cases, and Materials 380-81 (3d ed. 2025); Steven C. Salop, *The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test*, 81 Antitrust L.J. 371, 374-76 (2017).

55. *See, e.g.*, Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993) ("The plaintiff must demonstrate that there is a likelihood that the predatory scheme alleged

the defendant is sufficiently likely to recoup its losses, there is no liability.[56] The Supreme Court has defended this test, stating that "without a dangerous probability of recoupment, it is highly unlikely" that a business would engage in predation.[57]

The profit-maximization principle also helps to underpin the "no economic sense" test that has influenced monopolization law and scholarship. This is, broadly, the proposition that conduct may constitute monopolization if it makes "economic sense" for a profit-maximizing defendant only by virtue of a tendency to exclude rivals and create market power.[58] Some courts use this test as a general definition of monopolization;[59] others use it in certain categories of cases, such as challenges to a defendant's refusal to deal.[60] In either version, it can be understood to reflect the confluence of two ideas: the descriptive claim that businesses pursue only economically sensible behaviors, meaning those motivated by long- or short-run profit; and the normative claim that monopolization liability should be reserved for cases in which we are sure that the defendant is trying to do

would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it."); Clark v. Flow Measurement, Inc., 948 F. Supp. 519, 526 (D.S.C. 1996). *See generally* Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695 (2013) (discussing the evolution of and shortcomings in the recoupment requirement of the two-part predatory-pricing scheme); C. Scott Hemphill, *The Role of Recoupment in Predatory Pricing Analyses*, 53 STAN. L. REV. 1581 (2001) (proposing a "narrow-but-deep" recoupment test to determine whether a predator's expected profits are likely to exceed the costs of predation).

56. *See, e.g.*, C.B. Trucking, Inc. v. Waste Mgmt., Inc., 944 F. Supp. 66, 69 (D. Mass. 1996), *aff'd*, 137 F.3d 41 (1st Cir. 1998) (granting summary judgment for the defendant where recoupment was "economically implausible").

57. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 319 (2007); *see also* Easterbrook, *supra* note 21, at 267-68 (arguing that courts need only fear profitable predation).

58. *See* Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 ANTITRUST L.J. 413, 413-14 (2006); Power Analytics Corp. v. Operation Tech., Inc., 820 F. App'x 1005, 1016 (Fed. Cir. 2020); *In re* Adderall XR Antitrust Litig., 754 F.3d 128, 133 (2d Cir. 2014).

59. *See, e.g.*, *In re Adderall XR*, 754 F.3d at 133; Morris Commc'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1295 (11th Cir. 2004); Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 523 (5th Cir. 1999).

60. *See, e.g.*, Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1075 (10th Cir. 2013) ("Just as in predatory pricing cases, [in refusal-to-deal cases] we *also* require a showing that the monopolist's refusal to deal was part of a larger anticompetitive enterprise, such as . . . seeking to drive a rival from the market . . . . Put simply, the monopolist's conduct must be irrational but for its anticompetitive effect."); *see also* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608 (1985) (noting that the defendant "did not persuade the jury that its conduct was justified by any normal business purpose").

something undesirable.[61] The test does not appear to make room for the possibility that the behavior might not make "economic sense" in this sense at all—even taking the exclusion of rivals into account.[62]

4. Inferring Harms

Courts and scholars have often been heavily influenced by the idea that, if a practice could not be harmful without also being unprofitable, it therefore could not possibly be harmful.

The most famous example of such reasoning in antitrust is the single-monopoly-profit theorem. This is the proposition that, under appropriate circumstances, a business holding market or monopoly power in product *A* cannot extract greater profits by tying[63] product *A* to product *B* (or otherwise leveraging between them[64]) if *A* and *B* are strict complements used in fixed proportion.[65] If the business were to force consumption of a less desirable *B* under such circumstances, it would simply depress demand for the *A*-*B* combination, harming its overall profits.

Courts—including Justice O'Connor's influential concurrence in a leading tying case—have explicitly endorsed the single-monopoly-profit theorem as a

61. *See* A. Douglas Melamed, *Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal*, 20 Berkeley Tech. L.J. 1247, 1256-57 (2005) (noting the error-cost effects of the closely related "sacrifice test" and indicating that it "ensures that the antitrust laws condemn only conduct from which an anticompetitive intent can unambiguously be inferred"). It may be harder than it looks to define the undesirable effect.

62. *See* Leslie, *supra* note 9, at 272.

63. "Tying" in antitrust parlance is the conditioning of access to one product or service on the purchase of another. Francis & Sprigman, *supra* note 54, at 306-09.

64. *See* Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 Antitrust L.J. 1, 15-17 (2015).

65. *See* Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 Harv. L. Rev. 397, 403-04 (2009).

tool of antitrust analysis,[66] and agencies use it in deciding which cases to bring.[67] But, even when its demanding conditions are satisfied, the theorem does not strictly imply that tying *A* to *B* cannot be harmful.[68] Instead, it teaches that if the tie harms consumers, it would also harm the tying business. The use of the single-monopoly-profit theorem is premised on the idea that, because a harmful tie under these circumstances would not be profitable, it cannot be *possible*. Therefore any observed tie must be motivated by unobserved benefits (like cost savings), and hence poses no antitrust concern. But if we admit the possibility that businesses might sometimes do things that do not maximize their profits, the theorem provides much less comfort.[69]

We can discern a similar approach in antitrust's treatment of "intrabrand" competition, such as competition among distributors of a single manufacturer's goods. Modern antitrust law takes a hands-off approach to such restraints, approaching per se legality.[70] The usual rationale is not that restraints of such competition cannot in principle be harmful, but rather that harmful restraints would reduce the manufacturer's profits, making them implausible, as in the single-monopoly-profit example—and further that "interbrand" competition among

66. *See, e.g.*, Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 36 (1984) (O'Connor, J., concurring) ("The existence of a tied product normally does not increase the profit that the seller with market power can extract from sales of the *tying* product."); E&L Consulting, Ltd. v. Doman Indus. Ltd., 472 F.3d 23, 29-30 (2d Cir. 2006); G.K.A. Beverage Corp. v. Honickman, 55 F.3d 762, 767 (2d Cir. 1995); Town of Concord v. Bos. Edison Co., 915 F.2d 17, 23-24 (1st Cir. 1990); *see also* Schor v. Abbott Lab'ys, 457 F.3d 608, 611-12 (7th Cir. 2006) ("The problem with 'monopoly leveraging' as an antitrust theory is that the practice cannot increase a monopolist's profits. . . . [I]f a manufacturer cannot *make itself better off* by injuring consumers through lower output and higher prices, there is no role for antitrust law to play." (emphasis added)); Elhauge, *supra* note 65, at 399 ("[The single-monopoly-profit] theory helped talk generations of students and judges out of the usual intuition that tying can be anticompetitive.").

67. The agencies have not brought a case to which the theorem would apply in decades.

68. *See* Elhauge, *supra* note 65, at 477 (noting that, under the single-monopoly-profit theorem, "tying and bundled discounts cannot increase monopoly profits").

69. *See, e.g.*, Christopher R. Leslie, *Cutting Through Tying Theory with Occam's Razor: A Simple Explanation of Tying Arrangements*, 78 TUL. L. REV. 727, 768-69 (2004) (noting that some ties may be motivated by goals "unrelated to profitability").

70. *See, e.g.*, D. Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, The Rule of Reason, and Per Se Legality*, 79 ANTITRUST L.J. 1003, 1008-15 (2014); Eleanor M. Fox, *Parallel Imports, the Intrabrand/Interbrand Competition Paradigm, and the Hidden Gap Between Intellectual Property Law and Antitrust*, 25 FORDHAM INT'L L.J. 982, 982 (2002); *see also* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 881-82 (2007) (rejecting per se illegality for vertical price restraints); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59 (1977) (rejecting per se illegality for vertical nonprice restraints).

manufacturers will correct inefficient distribution practices.[71] And while in principle antitrust doctrine allows that a manufacturer might impose a restraint that does not maximize its profits (for example, a restraint that benefits retailers but harms consumers, or one that harms everyone[72]), in practice, courts are highly reluctant to believe that this is taking place.[73]

In other words, intrabrand antitrust is dominated by a strong presumption that manufacturers do not impose or retain unprofitable restraints. But scholars have argued that manufacturers may systematically and harmfully overuse such restraints.[74] Can it really be that virtually no meritorious cases are filed? Or might it be that the profit presumption prevents courts from seeing that manufacturers sometimes injure both consumers and themselves?

B. Harms Without Profit

The profit-maximization assumption is a pretty good guide to most business conduct, most of the time.[75] But scholars have furnished ample grounds to

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71. *See, e.g.*, *E&L Consulting*, 472 F.3d at 29-30; *In re* McCormick & Co., 217 F. Supp. 3d 124, 133-34 (D.D.C. 2016).

72. *See, e.g.*, Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 Iowa L. Rev. 1019, 1061-65 (1989) (noting resale-price-maintenance policy that supported the operation of a large drug-retailer cartel).

73. *See* Tor, *supra* note 8, at 585-86.

74. *See, e.g.*, Avishalom Tor & William J. Rinner, *Behavioral Antitrust: A New Approach to the Rule of Reason After* Leegin, 2011 U. Ill. L. Rev. 805, 819-39; Marina Lao, *Free Riding: An Overstated, and Unconvincing, Explanation for Resale Price Maintenance*, *in* How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust 196, 201 (Robert Pitofsky ed., 2008).

75. Leslie, *supra* note 9, at 273; Areeda & Hovenkamp, *supra* note 4, at 144; *see also* United States v. Falstaff Brewing Corp., 410 U.S. 526, 568 (1973) (Marshall, J., concurring) ("[C]orporations are . . . profit-making institutions, and, absent special circumstances, they can be expected to follow courses of action most likely to maximize profits."). Of course, it is ferociously hard to figure out just *how* often businesses aim for, or achieve, profit maximization. Case studies have yielded mixed results. *See* Christopher P. Chambers & John Rehbeck, *Testing Profit Maximization in the U.S. Cement Industry*, 231 J. Econ. Behav. & Org. 1, 1 (2025) (finding significant deviations from profit maximization); Yacob A. Zereyesus & Allen M. Featherstone, *Empirical Analysis of Profit Maximization and Cost Minimization Behaviour of Kansas Farms*, 24 Applied Econ. Letters 1255, 1258 (2017) (noting "progress" toward profit maximization in recent decades); Carole E. Scott, *An Empirical Look at the Assumption that Small Businesses Maximize Profits*, 8 S. Bus. Rev. 21, 24-25 (1982) (noting that more than seventy-five percent of Atlanta-area certified public accountants believe that the typical small business owner "does not know what his or her rate of return on equity really is" and that less than eleven percent believe all small businesses aim to maximize profit); William Lin, G.W. Dean & C.V. Moore, *An Empirical Test of Utility vs. Profit Maximization in Agricultural Production*, 56

believe that, at least sometimes, businesses do things that do not maximize profits, including things that look an awful lot like they are, or should be, antitrust violations. And some such practices and transactions may cause real harms, even if neither repeated nor habitual.

Sometimes, of course, the apparent pursuit of an objective other than profit can be shown to be profit maximizing after all. Consumers may prefer "green" or "fair-trade" products, or suppliers that profess certain values, such that it is profit maximizing for businesses to follow suit.[76] And some profit-maximizing behaviors may make sense only over a long time horizon, or in light of the behavior of other actors.[77] Such behaviors fit within the profit paradigm and thus fall outside this Feature's zone of concern. So too do behaviors that are consistent with *both* profit maximization *and* some non-profit-maximizing policy or objective.[78] The puzzle arises only with practices that are harmful and that cannot be shown to be profit maximizing, either because they are not "really" such, or because the path to profit appears speculative or implausible.

Such practices are in fact observed, and they may be widespread. The following discussion identifies five sets of circumstances in which businesses may engage in harmful conduct, of a kind that at least facially raises antitrust concerns, that might appear inconceivable or implausible within a strong profit-maximization paradigm. And it highlights lines of scholarship charting the existence and salience of such practices.

1. *Expressing Values*

Businesses, like other organizations, may have a "mission" or a substantive value agenda that they pursue, even at the expense of profit. Chick-fil-A, for example, is closed on Sundays, honoring the Christian faith.[79] Ben & Jerry's

Am. J. Agric. Econ. 497, 497 (1974) (finding better support for Bernoullian utility than for profit maximization); R.H. Court & Mary J. Woods, *Testing for Profit Maximization in an Empirical Situation*, 11 Int'l Econ. Rev. 412, 422 (1970) (finding evidence tending to reject profit maximization in New Zealand fertilizer markets).

76. *See, e.g.*, Susan Rose-Ackerman, *Altruism, Nonprofits, and Economic Theory*, 34 J. Econ. Literature 701, 721 (1996) (explaining that firms can sometimes maximize profits by convincing consumers that they have "artistic or humanitarian motives").

77. *See, e.g.*, Gulf States Reorganization Grp., Inc. v. Nucor Corp., 721 F.3d 1281, 1287 n.4 (11th Cir. 2013) ("[C]onduct that appears unprofitable . . . may actually be rational and profit maximizing because it is part of a large and/or long-term anticompetitive scheme to drive competitors from the market or enforce cartel discipline.").

78. I owe this observation to Einer Elhauge.

79. *See Our Purpose*, Chick-fil-A, https://www.chick-fil-a.com/careers/culture [https://perma.cc/7VKD-F7BF] (noting the Sunday closure policy in connection with the chain's Christian

expresses advocacy positions that may not appeal to all customers.[80] REI closes its stores on Black Friday to encourage outdoor activity.[81] Workers of all kinds may pursue substantive professional ethics.[82] And so on. Some have even argued that businesses should pursue "prosocial" goals.[83] But, of course, an organizational mission or value may well be "antisocial": businesses have long expressed invidious values in their treatment of consumers and employees based on race, religion, sexual orientation, or other characteristics.[84]

Whether appealing or not, missions and values may lead market participants to do things that may not be profit maximizing but resemble traditional antitrust violations. The highest-profile example in recent years is probably the zone of activity sometimes labeled "ESG collusion." Around the world, many businesses

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values); Caleb Parke, *Chick-fil-A CEO Promised Dad He'd Uphold Christian Values, Stay Closed on Sundays*, Fox News (Aug. 3, 2019, 11:57 AM EDT), https://www.foxnews.com/faith-values/chick-fil-a-christian-values-closed-sundays [https://perma.cc/Y8CD-ASGV] (same); *see also* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Hum. Servs., 724 F.3d 377, 404 n.18 (3d Cir. 2013) (Jordan, J., dissenting) ("There is absolutely no evidence that Conestoga exists solely to make money. It is operated, rather, to accomplish the specific vision of its deeply religious owners. While making money is part of that vision, the government has effectively conceded that Conestoga has more than profit on its corporate agenda."), *rev'd sub nom.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

80. *See Our Values, Activism and Mission*, Ben & Jerry's, https://www.benjerry.com/values [https://perma.cc/6Q3G-NSS4].

81. *The History of #OptOutside*, Rei Co-op, https://www.rei.com/blog/social/the-history-of-opt-outside [https://perma.cc/8REM-HCEY].

82. *See generally AMA Principles of Medical Ethics*, AMA Code Med. Ethics (June 2001), https://code-medical-ethics.ama-assn.org/principles [https://perma.cc/5BSP-PJHV] (describing professional ethical standards for physicians); *Code of Ethics for Engineers*, Nat'l Soc'y of Pro. Eng'rs (July 2019), https://www.nspe.org/sites/default/files/resources/pdfs/Ethics/CodeofEthics/NSPECodeofEthicsforEngineers.pdf [https://perma.cc/5CNS-XHAZ] (describing professional ethical standards for engineers).

83. *See, e.g.*, Steven Salop, *Why Business Should Be More Prosocial, and Ten Guidelines for How*, ProMarket (Feb. 13, 2024), https://www.promarket.org/2024/02/13/why-business-should-be-more-prosocial-and-ten-guidelines-for-how [https://perma.cc/VZ2J-5EJW]; Oliver Hart & Luigi Zingales, *The New Corporate Governance*, 1 U. Chi. Bus. L. Rev. 195, 197 (2022); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. Rev. 733, 733-34 (2005); *see also* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 Harv. L. Rev. 1145, 1153-63 (1932) (giving a cautiously supportive account of the case that corporate managers can and perhaps should serve the interests of shareholders, workers, customers, and the general public).

84. *See, e.g.*, Suja A. Thomas, *The Customer Caste: Lawful Discrimination by Public Businesses*, 109 Calif. L. Rev. 141, 143 (2021); Christopher R. Leslie, *The Gay Perjury Trap*, 71 Duke L.J. 1, 42-44 (2021); Ciarán McFadden, *Discrimination Against Transgender Employees and Jobseekers*, *in* Handbook of Labor, Human Resources and Population Economics 1, 2 (Klaus F. Zimmermann ed., 2020); Geraldine Rosa Henderson, Anne-Marie Hakstian & Jerome D. Williams, Consumer Equality: Race and the American Marketplace 1-8 (2016).

and policy advocates are exploring ways to pursue ESG objectives, like emissions reduction and the development of sustainable technologies.[85] Some critics charge that some businesses have gone beyond the promotion of awareness and issue advocacy, engaging in collusion that drives up prices, including agreements to refrain from certain kinds of trading.[86] Such practices do not, at least facially, appear motivated by profit alone.[87]

Allegations of such conduct have been circulating for some time. A report by the U.S. House of Representatives Majority Staff alleges harmful collusion relating to investment in high-emission businesses.[88] (One of the few points of agreement between the dueling majority and minority staff was the observation that participation in the alleged practices would be contrary to the participants' economic self-interest.[89]) In withdrawing from climate-action groups, some investors have raised concerns about investor independence.[90] In September 2019,

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85. The relationship between environmental, social, and governance (ESG) commitments and firm behavior is complex. *See, e.g.*, Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VA. L. REV. 1163, 1174, 1191 (2022).

86. Agreements not to trade with particular counterparties, either at all or on particular terms, are often analyzed as "group boycotts" under antitrust law and may be per se illegal. FRANCIS & SPRIGMAN, *supra* note 54, at 212-21.

87. *But see* Max Huffman & Jack Parke, *Sustainability and Antitrust—What to Expect from the US*, *in* RESEARCH HANDBOOK ON SUSTAINABILITY AND COMPETITION LAW 535, 553 (Julian Nowag ed., 2024) (noting that ESG coordination may be profitable, for example, where it serves to "greenwash" a traditional cartel).

88. INTERIM STAFF OF H.R. COMM. ON THE JUDICIARY, 119TH CONG., CLIMATE CONTROL: EXPOSING THE DECARBONIZATION COLLUSION IN ENVIRONMENTAL, SOCIAL, AND GOVERNANCE (ESG) INVESTING 1-3 (June 11, 2024) [hereinafter INTERIM STAFF REPORT], https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2024-06-11%20Climate%20Control%20-%20Exposing%20the%20Decarbonization%20Collusion%20in%20Environmental%2C%20Social%2C%20and%20Governance%20(ESG)%20Investing.pdf [https://perma.cc/XLL8-C9JC]. *But see* DEMOCRATIC STAFF OF H.R. COMM. ON THE JUDICIARY, 119TH CONG., UNSUSTAINABLE AND UNORIGINAL: HOW THE REPUBLICANS BORROWED A BOGUS ANTITRUST THEORY TO PROTECT BIG OIL 3 (June 11, 2024) [hereinafter DEMOCRATIC STAFF REPORT], https://docs.house.gov/meetings/JU/JU05/20240612/117415/HHRG-118-JU05-20240612-SD032-U32.pdf [https://perma.cc/2RGL-XWYL] (challenging allegations of collusion).

89. INTERIM STAFF REPORT, *supra* note 88, at 22 (rejecting procompetitive justifications where "companies themselves argue that their self-interest points sharply away from" emissions reduction (quoting Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 31 (2020))); DEMOCRATIC STAFF REPORT, *supra* note 88, at 71 (stating that "a scheme would not make economic sense" for most index funds, for it would "reduce [their] returns . . . and make them less attractive to customers").

90. Simon Jessop & Ross Kerber, *JPMorgan, State Street Quit Climate Group, BlackRock Steps Back*, REUTERS (Feb. 15, 2024, 6:07 PM EST), https://www.reuters.com/sustainability/sustainable-finance-reporting/jpmorgan-fund-arm-quits-climate-action-100-investor-group-2024-02-15 [https://perma.cc/Z6HN-WPZ8].

DOJ controversially investigated emissions-related cooperation among carmakers.[91] And in December 2024, eleven state attorneys general sued asset managers BlackRock, State Street, and Vanguard, alleging that their ESG practices have harmed competition and reduced coal output—although, perhaps with an eye on antitrust's profit principle, the complaint specifically alleged that the conduct was profitable.[92]

Other examples of mission-motivated but harmful conduct abound, many involving horizontal coordination.[93] The Association of Art Museum Directors (AAMD) has a policy that strictly limits the conditions under which museums may sell works of art, and prohibits the use of sale proceeds for anything other than a few specified purposes.[94] The relevant rules appear to be adopted by

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91. Hiroko Tabuchi & Coral Davenport, *Justice Dept. Investigates California Emissions Pact that Embarrassed Trump*, N.Y. Times (Sep. 6, 2019), https://www.nytimes.com/2019/09/06/climate/automakers-california-emissions-antitrust.html [https://perma.cc/CTS7-RGXD]; Off. of the Inspector Gen., U.S. Dep't of Just., 24-079, Preliminary Review of Allegations Concerning the Antitrust Division's Handling of the Automakers Investigation 1 (July 22, 2024), https://oig.justice.gov/sites/default/files/reports/24-079.pdf [https://perma.cc/4VXM-6L8Z].

92. Complaint ¶ 6, Texas v. BlackRock, Inc., No. 24-cv-437 (E.D. Tex. Aug. 1, 2025), 2025 WL 2201071.

93. In addition to the examples in the text, Barak Richman has chronicled the existence of—and seems to have helped to liberalize—"rabbinic cartels" that "restrain the operation of a potentially competitive labor market and prevent congregations from freely expressing their religious practices and beliefs." Barak D. Richman, *Saving the First Amendment from Itself: Relief from the Sherman Act Against the Rabbinic Cartels*, 39 Pepp. L. Rev. 1347, 1347-48 (2013); *see also* Barak D. Richman, *On Rabbis and Mentors*, *in* Harry First Liber Amicorum: A Global Vision for Competition Law 317, 323-24 (Darren Bush, Andrew I. Gavil & Spencer Weber Waller eds., 2025) (discussing his earlier writing on the Sherman Act and rabbinic employment markets).

94. *Professional Practices in Art Museums*, Ass'n of Art Museum Dirs. 9 (2022), https://cms.aamd.org/sites/default/files/document/Professional%20Practices%202011%20rev%202.2.23_0.pdf [https://perma.cc/9P3G-D78S] (providing that "deaccessioning must be governed by the museum's written policy rather than by exigencies of the moment. The museum's policy must conform to the requirements of the AAMD's policy on deaccessioning and disposal"; "[n]o work of art in the collection may be considered for deaccessioning without the recommendation of the director to the board with whom the final decision must rest"; and "[f]unds received from the disposal of a deaccessioned work shall not be used for operations or capital expenses, except as follows. Funds received from the disposal of a deaccessioned work of art including any earnings and appreciation thereon, may be used only for the acquisition of works of art in a manner consistent with the museum's policy on the use of restricted acquisition funds or for 'direct care' . . . of works of art . . . ."); *see also id.* at 24 ("If a museum proposes to dispose of less than all of its interest (sometimes known as fractional deaccessioning) in a deaccessioned work (unless the interest to be retained is insubstantial), the disposal should only be made to an organization or organizations that are open to the public." (footnotes omitted)).

agreement among the AAMD's members[95] and enforced by boycotts and other sanctions.[96] In May 2018, for example, when two museums sold art for prohibited purposes, the AAMD's Board of Trustees "ask[ed] that each of the Association's 243 members refrain from lending or borrowing works of art to either [of the two offenders], and to also refrain from collaborating with either institution on exhibitions."[97] The AAMD's policy does not appear to be profit driven, but it is a collective restraint on sales instituted by a significant group of market participants, likely to reduce output and increase prices. Its stated justification—protection of "relationships between museums, donors and the public"[98]—would not be cognizable in antitrust analysis, which generally denies that professional ethics can justify an anticompetitive restraint that causes economic harms.[99]

Other practices seem to be driven by an uncertain blend of mission and profit. In August 2024, the microblogging platform X sued the World Federation of Advertisers (WFA) and some of its advertiser members for an initiative called the Global Alliance for Responsible Media (GARM).[100] X alleged that GARM was a vehicle for advertisers to boycott digital platforms that did not satisfy

95. Press Release, Ass'n of Art Museum Dirs., Membership of AAMD Approves Change to Deaccessioning Rule, Bringing Policy in Line with American Alliance of Museums (AAM) and Financial Accounting Standards Board (FASB) (Sep. 30, 2022), https://aamd.org/for-the-media/press-release/membership-of-aamd-approves-change-to-deaccessioning-rule-bringing [https://perma.cc/9QJY-GZ7Q] (noting that "a simple majority of AAMD's 199 voting-eligible members was required for this resolution to pass" and that "[a] recommended change [to the *Professional Practices in Art Museums* rules would] need to be reviewed and approved first by the Board of Trustees and then by the membership as a whole").

96. *Professional Practices in Art Museums*, *supra* note 94, at 4, 26.

97. Press Release, Ass'n of Art Museum Dirs., AAMD Statement on Sanction of Berkshire Museum and La Salle University Art Museum (May 25, 2018), https://aamd.org/for-the-media/press-release/aamd-statement-on-sanction-of-berkshire-museum-and-la-salle-university [https://perma.cc/7P3Y-EL9U].

98. *Id.*

99. *See, e.g.*, Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 693-95 (1978) (holding that professional ethics, as such, cannot serve as a justification for a ban on competitive bidding under the rule of reason, and concluding that "petitioner's attempt to [justify a restraint of competition] on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act"); United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1376 (5th Cir. 1980) ("While the Supreme Court has indicated that in some circumstances an association may adopt ethical norms which 'regulate and promote . . . competition,' it has voided restraints of this type when they produce anticompetitive effects and are not reasonable ancillary to procompetitive activity." (alteration in original) (citation omitted)).

100. Complaint ¶ 2, X Corp. v. World Fed'n of Advertisers, No. 24-cv-114 (N.D. Tex. Aug. 6, 2024); Proposed Second Amended Complaint ¶ 2, *X Corp.*, No. 24-cv-114 (N.D. Tex. Feb. 6, 2025).

"brand safety standards."[101] GARM appears to have been motivated by a blend of mission and profit: WFA described it as an effort "to address digital safety,"[102] and staying off the platform appears to have been costly to advertisers,[103] but it also protected brand value from the effects of advertising near controversial content.[104] In the wake of the suit, WFA terminated GARM.[105]

Invidious values, too, may spur harmful collusion or exclusion. In *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, a group of Vietnamese fishermen sued a coalition of fishermen and local Ku Klux Klan (KKK) members for running a campaign of intimidation to drum them out of business.[106] The fishermen, no doubt, had profit motives as well as racist ones, but the KKK members appeared solely motivated by racism—as consumers, they faced harm from the resulting loss of fishing competition.[107]

Missions and values may shape merger effects too. For example, many U.S. hospital systems are Roman Catholic.[108] When they acquire other providers, they often terminate or limit abortions, sterilizations, and contraception.[109] Doing so may leave other providers with increased market power, or even leave no supply at all, harming consumers for reasons unrelated to profit seeking.

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101. Proposed Second Amended Complaint, *supra* note 100, ¶ 3.

102. Will Gilroy, *Statement on the Global Alliance for Responsible Media (GARM)*, World Fed'n Advertisers (Aug. 9, 2024), https://wfanet.org/leadership/garm/about-garm [https://perma.cc/TJE2-ZT67].

103. Proposed Second Amended Complaint, *supra* note 100, ¶ 132 (quoting an advertiser's statement that X is "an important platform for us to reach our audience").

104. Gilroy, *supra* note 102 (emphasizing that GARM helped advertisers avoid "inadvertently support[ing] illegal or harmful content that damages their brands").

105. *Id.*

106. 518 F. Supp. 993, 999-1000 (S.D. Tex. 1981); *see also* Philip Marcus, *Civil Rights and the Anti-Trust Laws*, 18 U. Chi. L. Rev. 171, 188-200 (1951) (highlighting boycotts animated by racism and anti-Communism).

107. *Vietnamese Fishermen's Ass'n*, 518 F. Supp. at 1001-04.

108. Samantha Liss, *How the Spread of Catholic-Owned Healthcare Facilities May Complicate Access to Reproductive Care*, Healthcare Dive (July 13, 2022), https://www.healthcaredive.com/news/catholic-hospitals-abortion-reproductive-care-restrictions/626332 [https://perma.cc/4396-GAHE].

109. *Id.*; *see also* Bailey Sanders, *The Market Limits of Free Exercise*, 124 Mich. L. Rev. (forthcoming 2025) (manuscript at 14) (on file with author) (highlighting the existence of contractual restraints between religious and secular hospitals that restrict the ability of secular hospitals to provide services that raise religious concerns); Jennifer R. Conners, *A Critical Misdiagnosis: How Courts Underestimate the Anticompetitive Implications of Hospital Mergers*, 91 Calif. L. Rev. 543, 554-55 (2003) (explaining how mergers can threaten the availability of abortions and birth control); Judith C. Appelbaum & Jill C. Morrison, *Hospital Mergers and the Threat to Women's Reproductive Health Services: Applying the Antitrust Laws*, 26 N.Y.U. Rev. L. & Soc. Change 1, 3-14 (2000) (same).

2. *Chasing Metrics*

Sometimes businesses act not to maximize profits but to inflate some other metric: scale, market share, revenue, users, visibility, and so on.[110]

Metric-driven practices may reflect the incentives of individual managers, rather than firms.[111] A vast literature demonstrates that, where compensation turns on specific indicators or outcomes, managers may pursue those at the expense of profit.[112] There is considerable evidence that business behavior is inflected by managers' personal goals, incentives, and personalities.[113] And the existence of "malicious" or "vengeful" conduct—driven by a desire to inflict harm, not maximize profit—is a basic premise of some business torts.[114]

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110. *See, e.g.*, Bailey, *supra* note 17, at 361 (revenues and market share); Marcel Kahan, *Securities Laws and the Social Costs of "Inaccurate" Stock Prices*, 41 DUKE L.J. 977, 1028-31 (1992) (stock price); Jeff Shiner, *Profitable Growth Should Not Be a Tech Outlier*, FORBES (Oct. 13, 2023, 8:00 AM EDT), https://www.forbes.com/councils/forbestechcouncil/2023/10/13/profitable-growth-should-not-be-a-tech-outlier [https://perma.cc/2ZLD-8UJS] (scale).

111. *See, e.g.*, Jennifer Arlen, *Evolution of Director Oversight Duties and Liability Under* Caremark*: Using Enhanced Information-Acquisition Duties in the Public Interest*, *in* RESEARCH HANDBOOK ON CORPORATE LIABILITY 194, 195, 219 (Martin Petrin & Christian A. Witting eds., 2023); Harry S. Gerla, *A Micro-Microeconomic Approach to Antitrust Law: Games Managers Play*, 86 MICH. L. REV. 892, 893-94 (1988).

112. PAUL WALKER, THE THEORY OF THE FIRM: AN OVERVIEW OF THE ECONOMIC MAINSTREAM 44-47 (rev. ed. 2023); ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 119-25 (1933); Gerla, *supra* note 111, at 900.

113. *See, e.g.*, Steven C. Salop, *Personality Traits, Private Equity, and Merger Analysis*, CPI ANTITRUST CHRON. 2 (May 2024), https://ssrn.com/abstract=4788882 [https://perma.cc/U93S-PDNR]; Mark Armstrong & Steffen Huck, *Behavioral Economics as Applied to Firms: A Primer*, 6 COMPETITION POL'Y INT'L 3, 5 (2010); Ole-Kristian Hope & Wayne B. Thomas, *Managerial Empire Building and Firm Disclosure*, 46 J. ACCT. RSCH. 591, 595 (2008); Michael C. Jensen, *Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers*, 76 AM. ECON. REV. 323, 323 (1986).

114. *See, e.g.*, Sabre Indus. v. McLaurin, 653 F. Supp. 3d 322, 329 (W.D. La. 2023); Joan Hansen & Co. v. Everlast World's Boxing Headquarters Corp., 744 N.Y.S.2d 384, 390-91 (App. Div. 2002); Giuliano v. Anchorage Advisors, LLC, 19 F. Supp. 3d 1087, 1108-09 (D. Or. 2014); Metcalfe & Sons Invs., Inc. v. Multiquip, Inc., No. 09-CV-0941, 2011 WL 4527432, at *3 (M.D. La. Sep. 27, 2011); *see also* Armstrong & Huck, *supra* note 113, at 19-22 (describing the "vengeance or spite" phenomenon in which managers are willing to incur costs in order to harm others who are perceived to have behaved unfairly towards them).

Investors, too, may have their own goals.[115] Common ownership may decouple managerial incentives from firm performance, encouraging passivity and inflating costs,[116] or may conform business behavior to portfolio profits.[117]

Metric chasing may also reflect an organizational disposition to aim, at least partly, at something other than traditional profit maximization. For example, many tech startups do not focus on profit for some time, focusing instead on maximizing acquisition value,[118] or on developing a successful product, hoping that a path to profitability will be found later.[119] An acquisition price may reflect, among other things, the value of a technology, user base, brand, or employee team as a complement to an incumbent's business or as a component of a differentiated array of products and services, and it may reflect the perceived threat value of competition or acquisition by a rival—and maximizing these things may involve very different behavior from whatever would maximize the target's expected profits in the usual sense.[120]

Behavior driven by such factors may resemble traditional antitrust violations. Managerial imperialism or incentives could drive acquisitions,[121] and there is evidence that they do.[122] Louis Kaplow has recently surveyed the range of "non-neoclassical" merger motivations such as imperialism and hubris, noting that "it

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115. *See* Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. Fin. & Acct. 247, 248 (2017) (noting that shareholders have "ethical and social concerns").

116. Miguel Antón, Florian Ederer, Mireia Giné & Martin Schmalz, *Common Ownership, Competition, and Top Management Incentives*, 131 J. Pol. Econ. 1294, 1349 (2023); Einer Elhauge, *Horizontal Shareholding*, 129 Harv. L. Rev. 1267, 1279-80 (2016).

117. *See, e.g.*, Madison Condon, *Externalities and the Common Owner*, 95 Wash. L. Rev. 1, 5 (2020).

118. *See* Matthew T. Wansley & Samuel N. Weinstein, *Venture Predation*, 48 J. Corp. L. 813, 832-37 (2023) (describing venture-capital practices based on "impression[s]" of future profit); Mark A. Lemley & Andrew McCreary, *Exit Strategy*, 101 B.U. L. Rev. 1, 1 (2021) (criticizing exit-focused strategies as stifling development); D. Daniel Sokol, *Vertical Mergers and Entrepreneurial Exit*, 70 Fla. L. Rev. 1357, 1374 (2018) (describing acquisition-based business models).

119. *See, e.g.*, Shiner, *supra* note 110.

120. *See, e.g.*, Richard J. Gilbert & Michael L. Katz, *Dynamic Merger Policy and Pre-Merger Product Choice by an Entrant*, 81 Int'l J. Indus. Org. art. no. 102812, at 2 (2022) (noting that mergers may reflect the target's competitive impact on the acquirer and/or its post-merger contribution to the acquirer's ability to offer an array of differentiated products); *see also supra* note 18 and accompanying text (discussing the usual sense).

121. *See, e.g.*, Louis Kaplow, Rethinking Merger Analysis 22-27 (2024); Richard Roll, *The Hubris Hypothesis of Corporate Takeovers*, 59 J. Bus. 197, 199-200 (1986).

122. Joseph P. Hughes, William W. Lang, Loretta J. Mester, Choon-Geol Moon & Michael S. Pagano, *Do Bankers Sacrifice Value to Build Empires? Managerial Incentives, Industry Consolidation, and Financial Performance*, 27 J. Banking & Fin. 417, 418, 445 (2003); Hope & Thomas, *supra* note 113, at 622-23, 623 n.35.

is unclear how [they] should be factored into . . . merger assessments."[123] To the extent that executives act "vengefully"—from a desire to inflict defeats on others[124]—exclusionary behavior may be a natural result, as the occasional antitrust case indicates.[125] And Avishalom Tor has suggested that loss-averse incumbents may act in risky ways to defend market share,[126] generalizing an argument Harry S. Gerla made about predatory pricing.[127]

Metric chasing, rather than provable profit maximization, has featured prominently in multiple tech-merger cases. In rejecting the FTC's challenge to Meta's acquisition of virtual-reality startup Within, Judge Davila concluded that "companies in the [relevant] market do not exhibit revenue or profit-maximizing behaviors, such as price competition," instead chasing "growth and penetration—even if they end up operating at a loss"—in order to become "an attractive acquisition target."[128] He confessed that it was "unclear to the Court how this departure from conventional profit-maximization strategies . . . should affect the assessment of genuine competition in this market."[129] Likewise, when Instagram was acquired by Facebook in 2012, NPR pointed out that "[n]ot only does Instagram have no profits, it has no revenue. That's right. It brings in no money at all."[130] And when WhatsApp was acquired in 2014, it reportedly "had no plan to attempt growth in the United States and no plan to . . . obtain revenues aside from its consumer subscription fees."[131] In cases like this, no litigant would be able to prove that the target's current or expected behavior was profit maximizing—making that, at least presumptively, an odd analytical baseline.

123. KAPLOW, *supra* note 121, at 26-27; *see also id.* at 165 & n.24 (discussing scholarship analyzing various "non-neoclassical" merger motives).

124. Armstrong & Huck, *supra* note 113, at 19-20.

125. *See, e.g.*, Fount-Wip, Inc. v. Reddi-Wip, Inc., 568 F.2d 1296, 1301 (9th Cir. 1978) (analyzing an antitrust dispute between estranged brothers-in-law motivated by personal animosity).

126. Tor, *supra* note 8, at 598.

127. Harry S. Gerla, *The Psychology of Predatory Pricing: Why Predatory Pricing Pays*, 39 SW. L.J. 755, 762 (1985).

128. FTC v. Meta Platforms Inc., No. 22-CV-04325, 2023 WL 8629125, at *19 (N.D. Cal. Dec. 13, 2023).

129. *Id.*

130. Steve Henn, *Instagram Sells for $1 Billion, Despite No Revenue*, NPR (Apr. 10, 2012, 3:00 PM ET), https://www.npr.org/2012/04/10/150372288/instagram-sells-for-1-billion-despite-no-revenue [https://perma.cc/C5YW-FFL3].

131. Memorandum in Support of Meta Platforms Inc.'s Motion for Summary Judgment at 6, FTC v. Meta Platforms, Inc., No. 20-cv-3590 (D.D.C. Apr. 5, 2024).

3. Making Mistakes

Time is short and information is limited, so organizations sometimes make mistakes—even big ones.[132] A decision taken to maximize profits may be so hopelessly misguided that, to a court or agency in the cold light of day—with the benefit of extensive discovery, considered briefing, and expert evidence—it does not seem plausibly related to that goal.

An abundant literature demonstrates that businesses make mistakes of all kinds.[133] Some have even suggested that senior managers may be particularly likely to exhibit certain mistake-inducing traits, like overconfidence[134] or undue optimism.[135] Managers may consider sunk costs or experience strategic "lock-in," throwing good money after bad.[136] They may unduly focus on their nearest rivals.[137] Small groups—like leadership teams—may underperform individuals, "exhibit[ing] similar or even more extreme judgmental biases and decision errors."[138] Not all managers work as hard as they can, hindering the processing of information and the making of decisions.[139] And yet other "mistakes" reflect a considered decision not to incur the costs of accuracy but instead to "satisfice" in important respects.[140] Even sophisticated enterprises persevere in mistaken practices and prices.[141]

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132. *See, e.g.*, Leslie, *supra* note 9, at 274; Gerla, *supra* note 111, at 895.

133. Walker, *supra* note 112, at 44; Richard R. Nelson, *Bounded Rationality, Cognitive Maps, and Trial and Error Learning*, 67 J. Econ. Behav. & Org. 78, 79 (2008); Jennifer A. Braverman & J.S. Blumenthal-Barby, *Assessment of the Sunk-Cost Effect in Clinical Decision-Making*, 75 Soc. Sci. & Med. 186, 190 (2012).

134. Tor, *supra* note 8, at 636-37; Ulrike Malmendier & Geoffrey Tate, *Behavioral CEOs: The Role of Managerial Overconfidence*, 29 J. Econ. Persps. 37, 57 (2015).

135. Armstrong & Huck, *supra* note 113, at 26; Braverman & Blumenthal-Barby, *supra* note 133, at 190.

136. Leslie, *supra* note 9, at 275; David Ronayne, Daniel Sgroi & Anthony Tuckwell, *Evaluating the Sunk Cost Effect*, 186 J. Econ. Behav. & Org. 318, 319 (2021).

137. Douglas R. Johnson & David G. Hoopes, *Managerial Cognition, Sunk Costs, and the Evolution of Industry Structure*, 24 Strategy Mgmt. J. 1057, 1058 (2003).

138. Tor, *supra* note 8, at 641; *see* Armstrong & Huck, *supra* note 113, at 5.

139. Harvey Leibenstein, *Allocative Efficiency vs. "X-Efficiency,"* 56 Am. Econ. Rev. 392, 407-08 (1966).

140. Armstrong & Huck, *supra* note 113, at 22-26; Bailey, *supra* note 27, at 2; Scott, *supra* note 75, at 23.

141. Stefano DellaVigna & Matthew Gentzkow, *Uniform Pricing in U.S. Retail Chains*, 134 Q.J. Econ. 2011, 2012 (2019); David Romer, *Do Firms Maximize? Evidence from Professional Football*, 114 J. Pol. Econ. 340, 340 (2006); David Leonhardt, *Caution Is Costly, Scholars Say*, N.Y. Times (July 30, 2003), https://www.nytimes.com/2003/07/30/sports/caution-is-costly-

Mistakes may lead to just about any form of behavior, including behavior that may raise antitrust concerns. Business history is full of mergers that badly failed to achieve the profitability hopes of managers, from AT&T/Time Warner and AOL/Time Warner to Microsoft/Nokia and eBay/Skype.[142] Businesses may fail to appreciate the harmful effects of a practice or transaction or wrongly expect that it will yield overall benefits.[143]

Thus, the making of mistakes—just like the pursuit of values or the chasing of metrics—may lead to practices that cause harms but do not maximize profits. A business may undertake a harmful practice because its leaders wrongly believe the practice will maximize profits (as in the case of a merger that management wrongly expects to generate profitable efficiencies), or because the relevant leaders wrongly believe that the practice will lead to the achievement of some other goal. And such practices, in turn, may look implausible or impossible through the lens of careful, expert-driven ex post analysis that treats profit maximization as axiomatic.

4. Nonprofits

Many market participants are not run for profit. The nonprofit sector contains a wide variety of enterprises, united by the fact that their owners do not enjoy a right to the firm's earnings.[144] Federal income-tax law exempts many enterprises operated "exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster . . . amateur sports competition . . . or for the prevention of cruelty to children or animals,"[145] as well as "[c]ivic leagues or organizations . . . operated exclusively for the promotion of

scholars-say [https://perma.cc/QN4A-4GHB]; Steven D. Levitt, *An Economist Sells Bagels: A Case Study in Profit Maximization* 28 (Nat'l Bureau of Econ. Rsch., Working Paper No. 12152, 2006), https://ssrn.com/abstract=896224 [https://perma.cc/WFG9-544H].

142. *See* Victor Glass, *Culture Clash and the Failure of the AT&T/Time Warner Merger*, 6 RUTGERS BUS. REV. 350, 363 (2021); Tom Warren, *Microsoft Wasted at Least $8 Billion on Its Failed Nokia Experiment*, VERGE (May 25, 2016, 5:20 AM EDT), https://theverge.com/2016/5/25/11766540/microsoft-nokia-acquisition-costs [https://perma.cc/J76X-26C5]; Tim Arango, *How the AOL-Time Warner Merger Went So Wrong*, N.Y. TIMES (Jan. 10, 2010), https://www.nytimes.com/2010/01/11/business/media/11merger.html [https://perma.cc/2AAH-6TSU]; Richard Wray, *Generation Gap: How the $3bn Marriage of eBay and Skype Ended in Divorce*, OBSERVER (Sep. 5, 2009, 7:01 PM EDT), https://www.theguardian.com/technology/2009/sep/06/ebay-skype-recession-donahoe [https://perma.cc/M6D7-XLAP].

143. *See, e.g.*, Louis Kaplow, *Recoupment and Predatory Pricing Analysis*, 10 J. LEGAL ANALYSIS 46, 85 (2018); Tor, *supra* note 8, at 601.

144. Kenneth J. Arrow, *Foreword* to TO PROFIT OR NOT TO PROFIT: THE COMMERCIAL TRANSFORMATION OF THE NONPROFIT SECTOR, at ix (Burton A. Weisbrod ed., 1998).

145. I.R.C. § 501(c)(3) (2024).

social welfare," "chambers of commerce," and "[c]lubs organized for . . . nonprofitable purposes."[146] The nonprofit sector is vast[147] and includes a high proportion of the nation's hospitals and schools.[148]

The existence of a nonprofit sector challenges the profit assumption, in part because it is not obvious how it should apply in this context. On one view, it invites a kind of inverse-profit presumption: if business behavior should normally be explained and predicted by reference to owners' profit interest, nonprofits should plausibly get special treatment by virtue of the *absence* of that relationship. Why should nonprofit owners inflexibly maximize profits that they will not enjoy? Indeed, the choice of a nonprofit form may itself signal "goals other than single-minded profit maximization."[149] In this vein, some have suggested that nonprofits pull their punches in the market, perhaps because they aim to maximize output or to serve communities, goal setters, or employees.[150] For example, William J. Lynk prominently argued in 1995 that nonprofit-hospital mergers may generally lower, rather than raise, prices.[151]

On another view, the profit principle should apply in traditional form. Scholars have offered reasons to believe that nonprofits often seek and exercise market power, including in ways that inflict traditional antitrust harms, despite the attenuated relationship between profits and ownership.[152] Multiple studies have challenged Lynk's conclusions and offered evidence that nonprofit-hospital mergers lead to traditional market-power harms, just like for-profit mergers,[153]

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146. *Id.* § 501(c)(4), (6), (7).

147. Anup Malani, Tomas Philipson & Guy David, *Theories of Firm Behavior in the Nonprofit Sector: A Synthesis and Empirical Evaluation*, *in* THE GOVERNANCE OF NOT-FOR-PROFIT ORGANIZATIONS 181, 181 (Edward L. Glaeser ed., 2003); David A. Macpherson, Barry T. Hirsch & William E. Even, *Nonprofit Earnings and Sectoral Employment in the United States Since 1994*, BUREAU LAB. STAT. (Sep. 2024), https://www.bls.gov/opub/mlr/2024/article/nonprofit-earnings-and-sectoral-employment-in-the-united-states-since-1994.htm [https://perma.cc/4GDN-FBUF].

148. Frank A. Sloan, *Not-for-Profit Ownership and Hospital Behavior*, *in* 1 HANDBOOK OF HEALTH ECONOMICS 1141, 1144 (A.J. Culyer & J.P. Newhouse eds., 2000); Dennis W. Carlton, Gustavo E. Bamberger & Roy J. Epstein, *Antitrust and Higher Education: Was There a Conspiracy to Restrict Financial Aid?*, 26 RAND J. ECON. 131, 133 (1995).

149. Rose-Ackerman, *supra* note 76, at 723.

150. *See, e.g.*, Ryan Bubb & Alex Kaufman, *Consumer Biases and Mutual Ownership*, 105 J. PUB. ECON. 39, 40-55 (2013); Carlton et al., *supra* note 148, at 134.

151. William J. Lynk, *Nonprofit Hospital Mergers and the Exercise of Market Power*, 38 J.L. & ECON. 437, 453 (1995).

152. Tomas J. Philipson & Richard A. Posner, *Antitrust in the Not-for-Profit Sector*, 52 J.L. & ECON. 1, 1 (2009).

153. *See, e.g.*, John Simpson & Richard Shin, *Do Nonprofit Hospitals Exercise Market Power?*, 5 INT'L J. ECON. BUS. 141, 141 (1998); David Dranove & Richard Ludwick, *Competition and Pricing by Nonprofit Hospitals: A Reassessment of Lynk's Analysis*, 18 J. HEALTH ECON. 87, 87 (1999).

resonating with the observation that at least some nonprofits behave just like for-profit firms.[154]

Moreover, profits aside, scholars have argued that nonprofits may be particularly apt to act in some of the non-profit-maximizing ways described above: pursuing values,[155] chasing metrics like scale,[156] slacking,[157] or pursuing employees' own interests.[158]

The point is that, for whatever reason, nonprofits may inflict harms (with respect to either their "core" or "ancillary" activities[159]) in ways that resemble antitrust violations but are not obviously explained as profit maximization. They may collude with rivals, as when schools have colluded on tuition aid.[160] They may exclude competitors, as when dominant sports organizations have tried to squash alternatives.[161] And they may acquire rivals, as when nonprofit hospitals, or even churches, have merged.[162]

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154. *See, e.g.*, Martin Gaynor, Kate Ho & Robert J. Town, *The Industrial Organization of Health-Care Markets*, 53 J. ECON. LITERATURE 235, 265 (2015) ("There is little support for the notion that not-for-profit hospitals price differently than their for-profit counterparts."); Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S., Inc., 646 F.3d 983, 987 (7th Cir. 2011) ("No gulf separates the profit from the nonprofit sectors of the American economy. There are nonprofit hospitals and for-profit hospitals, nonprofit colleges and for-profit colleges, and, as we have just noted, nonprofit sellers of food and for-profit sellers of food. When profit and nonprofit entities compete, they are driven by competition to become similar to each other. The commercial activity of nonprofits has grown substantially in recent decades, fueled by an increasing focus on revenue maximizing by the boards of these organizations, and this growth has stimulated increased competition both among nonprofit enterprises and with for-profit ones." (citations omitted)).

155. *See, e.g.*, Rose-Ackerman, *supra* note 76, at 719.

156. Simpson & Shin, *supra* note 153, at 142; Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 576 (1982) (noting that "prestige" and "influence" may motivate nonprofit conduct).

157. Rose-Ackerman, *supra* note 76, at 717.

158. Simpson & Shin, *supra* note 153, at 142.

159. For example, universities and churches may be active as landowners and healthcare providers.

160. United States v. Brown Univ., 5 F.3d 658, 661 (3d Cir. 1993).

161. Amended Complaint & Demand for Jury Trial at 1-10, Jones v. PGA Tour, Inc., 668 F. Supp. 3d 907 (N.D. Cal. 2023) (No. 22-CV-04486), 2022 WL 19761975.

162. Mark Wingfield, *Maybe Seminaries Should Offer a Class in Mergers and Acquisitions*, BAPTIST NEWS GLOB. (June 23, 2022), https://baptistnews.com/article/maybe-seminaries-should-offer-a-class-in-mergers-and-acquisitions [https://perma.cc/5CG8-W9G6]; Appelbaum & Morrison, *supra* note 109, at 4; Michael G. Vita & Seth Sacher, *The Competitive Effects of Not-for-Profit Hospital Mergers: A Case Study*, 49 J. INDUS. ECON. 63, 64 (2001).

5. State-Owned Enterprise

Some market participants are owned or operated by federal, state, or local governments; others, while private, are subject to close state supervision and mandated to pursue particular goals. Such businesses — broadly, state-owned enterprises (SOEs) — commonly pursue other goals instead of, or in addition to, profit maximization.[163] These may include, for example: ensuring wider access to products and services;[164] the provision of public goods that would never be provided by private entities;[165] pure research;[166] and the generation of public revenue.[167] Other businesses may fear state supervision or intrusive regulation, and may try to avoid that outcome. Thus, the mere threat of state action can itself shape business behavior.

Enforcers and scholars have pointed out that SOEs' distinctive nature may lead them to engage in practices that are not driven by profit maximization but nevertheless cause traditional antitrust harms.[168] They might inflict such harms for virtually any reason: to increase employment, expand access to a service, maximize consumer or taxpayer surplus, or pursue managerial goals.[169] Some SOEs may have the ability to cross-subsidize, set below-cost prices, or use other

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163. D. Daniel Sokol, *State Capitalism in Cuba: The Lessons of the Literature on State Owned Enterprises and Market Liberalization*, 29 FLA. J. INT'L L. 209, 215 (2017); David E.M. Sappington & J. Gregory Sidak, *Competition Law for State-Owned Enterprises*, 71 ANTITRUST L.J. 479, 479-80 (2003); *see also* U.S. Steel Corp. v. United States, 33 Ct. Int'l Trade 1935, 1944 (2009) (noting that the National Mineral Development Corporation, "as a government authority, is free from normal profit-maximization pressures, and it may make pricing decisions based on other, non-commercial criteria").

164. *See, e.g.*, U.S. Postal Serv. v. Flamingo Indus., 540 U.S. 736, 747 (2004) ("[USPS] does not seek profits, but only to break even . . . consistent with its public character."). Examples include USPS, Amtrak, the Tennessee Valley Authority, Fannie Mae, Freddie Mac, and public broadcasters.

165. Examples include the Department of Defense, police and fire departments, and national parks.

166. Examples include the Centers for Disease Control and Prevention, the National Institutes of Health, and the National Science Foundation.

167. Examples include state lotteries, oil companies like Saudi Aramco, sovereign-wealth funds, the Alaska Permanent Fund Corporation, state alcohol-retail systems, and the General Services Administration when acting as a property steward.

168. Noah Joshua Phillips, Comm'r, Fed. Trade Comm'n, Prepared Remarks at the Hudson Institute, Championing Competition: The Role of National Security in Antitrust Enforcement 18 (Dec. 8, 2020), https://www.ftc.gov/system/files/documents/public_statements/1584378/championing_competition_final_12-8-20_for_posting.pdf [https://perma.cc/2TYL-TFLR]; David E.M. Sappington & J. Gregory Sidak, *Incentives for Anticompetitive Behavior by Public Enterprises*, 22 REV. INDUS. ORG. 183, 184 (2003); John R. Lott, Jr., *Predation by Public Enterprises*, 43 J. PUB. ECON. 237, 237 (1990). Antitrust's state-action defense may apply to some, but not all, SOE practices. FRANCIS & SPRIGMAN, *supra* note 54, at 528-37.

169. Sappington & Sidak, *supra* note 163, at 480.

special powers and rights, to such ends.[170] Thus, they may enter into harmful agreements, as a plaintiff alleged in an unsuccessful effort to sue the United States Postal Service for "collusion with Mexican mail sack manufacturers."[171] They may engage in exclusionary practices, with below-cost pricing a perennial concern.[172] And they may buy competitors, as when a state-owned hospital buys a rival.[173]

C. Departures and Derogations

While antitrust courts and enforcers often assume that businesses maximize profits, they do not always do so. For example, courts have accepted direct evidence of certain facts in conflict with the profit assumption—including evidence of agreements[174]—generally reserving the profit paradigm for inference, prediction, and ex ante decisions about the admissibility of allegations and evidence. Some courts have explicitly rejected the idea of a legal axiom of profit maximization, sometimes presenting it as a mere presumption,[175] and sometimes indicating that it is just one reason among others for behavior.[176]

On a handful of other occasions, courts have simply departed from the profit-maximization paradigm. Such deviations tend to be sporadic, untheorized, and often unappealing or controversial. In *United States v. Brown University*, for example, the Third Circuit declined to apply the flat rule of per se

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170. D. Daniel Sokol, *Competition Policy and Comparative Corporate Governance of State-Owned Enterprises*, 2009 BYU L. Rev. 1713, 1749; Timothy J. Brennan, *Cross-Subsidization and Cost Misallocation by Regulated Monopolists*, 2 J. Regul. Econ. 37, 44 (1990); Daniel Francis, *Choices and Consequences: Internationalizing Competition Policy After TPP*, *in* Megaregulation Contested: Global Economic Ordering After TPP 413, 424-25 (Benedict Kingsbury et al. eds., 2019).

171. Flamingo Indus. (USA) v. U.S. Postal Serv., 302 F.3d 985, 988 (9th Cir. 2002), *rev'd*, 540 U.S. 736 (2004).

172. Sokol, *supra* note 170, at 1774; Lott, *supra* note 168, at 237, 249; Brennan, *supra* note 170, at 44.

173. *See, e.g.*, FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 334 (3d Cir. 2016).

174. Rossi v. Standard Roofing, Inc., 156 F.3d 452, 466 (3d Cir. 1998) ("[W]hen the plaintiff has put forth direct evidence of conspiracy, the fact finder is not required to make inferences to establish facts, and therefore the Supreme Court's concerns over the reasonableness of inferences in antitrust cases evaporate." (citation omitted)).

175. *See, e.g.*, Knutson v. Daily Rev., Inc., 548 F.2d 795, 812 (9th Cir. 1976) ("The defendants can attempt to show plaintiffs would have kept their prices beneath a maximizing point despite their violative behavior."); Nw. Publ'ns, Inc. v. Crumb, 752 F.2d 473, 476 (9th Cir. 1985); *see also* FTC v. Tapestry, Inc., 755 F. Supp. 3d 386, 477 (S.D.N.Y. 2024) ("[A]ntitrust courts are *reluctant* to treat . . . internal divisions as meaningful competitive restraints on one another." (emphasis added)).

176. *See, e.g.*, *In re* Packaged Seafood Prods. Antitrust Litig., No. 15-MD-2670, 2023 WL 5344133, at *16 (S.D. Cal. Aug. 18, 2023).

illegality—antitrust's usual standard for price-fixing—to tuition-aid fixing among elite colleges.[177] The court claimed that the "bona fide, non-profit" nature of the participants, and the purported "public service" and "ethical" goals of the collaboration, implied that the conduct was less likely to be harmful.[178] The decision stands in pointed contrast to Supreme Court authority condemning price-fixing regardless of its effects or goals,[179] and refusing to consider noneconomic benefits.[180] A handful of lower courts have emphasized the nonprofit status of merging hospitals as a reason for reduced antitrust concern,[181] inviting academic criticism.[182]

In some cases, courts have silently relaxed the profit assumption, without explanation.[183] In *United States v. H&R Block*, for example, two makers of tax-preparation software proposed to merge and argued that the deal was harmless in part because two small market participants would expand post-merger to discipline the merged firm.[184] The court effectively disregarded the largest of these, TaxHawk, in light of testimony by a cofounder that it was "what [the cofounder] 'like[s] to call a "lifestyle" company . . . . We want our employees to have a life, if you will.'"[185] The court took TaxHawk as it found it: "While TaxHawk's

177. 5 F.3d 658, 672 (3d Cir. 1993).

178. *Id.* at 672, 678.

179. *See, e.g.*, United States v. Trenton Potteries Co., 273 U.S. 392, 401 (1927) (discussing reasonable prices as an effect of price-fixing); FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 424 (1990) (discussing "social justifications" for restraint of trade).

180. Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 688 (1978) (stating that the antitrust rule of reason "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions").

181. United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121, 145-46 (E.D.N.Y. 1997); FTC v. Freeman Hosp., 911 F. Supp. 1213, 1222-23 (W.D. Mo. 1995), *aff'd*, 69 F.3d 260 (8th Cir. 1995); United States v. Carilion Health Sys., 707 F. Supp. 840, 849 (W.D. Va. 1989), *aff'd*, 892 F.2d 1042 (4th Cir. 1989); FTC v. Butterworth Health Corp., 946 F. Supp. 1285, 1296-97 (W.D. Mich. 1996). *But see* FTC v. Univ. Health, Inc., 938 F.2d 1206, 1224 (11th Cir. 1991); United States v. Rockford Mem. Corp., 898 F.2d 1278, 1285-86 (7th Cir. 1990); Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1390-92 (7th Cir. 1986); FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1081 (N.D. Ill. 2012).

182. *See, e.g.*, Simpson & Shin, *supra* note 153, at 142, 154 n.1.

183. *See, e.g.*, *In re* TFT-LCD (Flat Panel) Antitrust Litig., No. M 07-1827 SI, 2013 WL 12311008, at *2 (N.D. Cal. June 14, 2013) (admitting expert testimony regarding the structure and practices of "Asian companies" in opposition to defendant claims that relevant businesses would profit maximize); *see also* Louis Kaplow, *Recoupment, Market Power, and Predatory Pricing*, 82 ANTITRUST L.J. 167, 198-201 (2018) (indicating that the recoupment test in predation law implies the possibility of nonprofitable predation).

184. 833 F. Supp. 2d 36, 73 (D.D.C. 2011).

185. *Id.* at 74.

decision to prioritize a relaxed lifestyle over robust competition and innovation is certainly a valid one, expansion from TaxHawk that would allow it to compete 'on the same playing field' as the merged company appears unlikely."[186]

The antitrust agencies, too, have occasionally looked beyond profit maximization. During the FTC's review of Genzyme/Novazyme—a deal uniting two pharmaceutical companies working on treatment for Pompe disease—the FTC Chair concluded that the merged firm would not have an incentive to delay the development of Novazyme's drug, noting that the executive leading the Pompe program had two children suffering from the disease.[187] Conversely, agencies often require elevated proof that merger efficiencies will be achieved, beyond a mere showing that they are possible and profitable.[188]

Thus, antitrust's profit presumption has occasionally been disapplied or neglected. But these occasions amount to rare, unpredictable, untheorized, and often controversial departures from regular order.[189]

II. THE ROOTS AND RESILIENCE OF THE PROFIT PARADIGM

This Part surveys the intellectual history of antitrust's complex relationship with profit maximization. That history provides some explanatory background for the profit principle's modern dominance and some context for recent "behavioralist" efforts to qualify its analytical role. It also represents, in its own right, an important thread in the long tapestry of antitrust thought. But this material is not necessary to understand or evaluate this Feature's core claims, and readers with no interest in this background may wish to jump to Part III.

A. Profit Maximization in Economic Analysis

Antitrust owes the profit-maximization assumption to economic scholarship, where it has long played a role in "formal modeling" (the use of simplifying assumptions and quantitative methods to illuminate relationships between

186. *Id.* (quoting Chi. Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410, 430 (5th Cir. 2008)).

187. Press Release, Timothy J. Muris, Chairman, Fed. Trade Comm'n, Statement of Chairman Timothy J. Muris in the Matter of Genzyme Corporation / Novazyme Pharmaceuticals, Inc. 15-16 (Jan. 13, 2004), https://www.ftc.gov/system/files/attachments/press-releases/ftc-closes-its-investigation-genzyme-corporations-2001-acquisition-novazyme-pharmaceuticals-inc./murisgenzymestmt.pdf [https://perma.cc/9TFQ-JDJH].

188. *See, e.g.*, U.S. DEPT. OF JUSTICE & FED. TRADE COMM'N, *supra* note 1, at 33.

189. For criticisms of the departures, see, for example, Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 364 (2000); and David A. Balto & Scott A. Sher, *Refining the Innovation Focus: The FTC's* Genzyme *Decision*, ANTITRUST, Spring 2004, at 28, 30.

phenomena).[190] It can be understood as reflecting a combination of two practices: (1) assuming that entities have preferences that they aim to satisfy and (2) modeling firms "thinly" as a gap between costs, prices, and output. To put it crudely: if one thinks of entities as trying to maximize something, and if one thinks of firms as having only costs, prices, and output, then profits are among the few things that there is room to imagine them trying to maximize.

The assumption has often been justified on the ground that business owners generally want to maximize their own profits, so—assuming ownership and control are united—they will direct business operations to that end.[191] Other justifications have been advanced, too, including the idea that businesses that do not maximize profits will be driven out of the market by those that do.[192]

But economists have not generally confused the profit-maximization assumption with a fact about the world. From modeling's earliest days, economists have routinely underscored that, in practice, businesses often do not behave as strict theories and clean models would predict.[193]

Nevertheless, as an important methodological feature of work with policy implications, the assumption helped to fuel what would become one of the most important intellectual battles—a "great war"—in the history of economic thought, beginning in the late nineteenth century.[194] One side in this war was a universalizing, analytically parsimonious, theoretical tradition exemplified by British neoclassicism, with a preference for simple models of general application, and often with a conservative bent and some skepticism of state intervention.[195] The other was a particularizing, richly descriptive, empirical tradition

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190. *See, e.g.*, W. Stanley Jevons, Theory of Political Economy 97-98 (London & N.Y., MacMillan & Co. 1871); Augustin Cournot, Researches into the Mathematical Principles of the Theory of Wealth 44, 56 (W.J. Ashley ed., Nathaniel T. Bacon trans., N.Y., Macmillan Co. 1897) (1838).

191. *See, e.g.*, Walker, *supra* note 112, at 44.

192. *See, e.g.*, Leslie, *supra* note 9, at 266; Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 Calif. L. Rev. 1051, 1070 (2000); Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. Pol. Econ. 211, 213 (1950).

193. *See, e.g.*, John Stuart Mill, Principles of Political Economy with Some of Their Applications to Social Philosophy 239 (J.M. Robson ed., Univ. of Toro. Press 1965) (1848); Simon Newcomb, *The Two Schools of Political Economy*, 14 Princeton Rev. 291, 298 (1884); Wesley C. Mitchell, *The Rationality of Economic Activity*, 18 J. Pol. Econ. 197, 197-98 (1910); Alfred Marshall, Principles of Economics 639-40 (8th ed. 1920).

194. Herbert Hovenkamp, *The Antitrust Movement and the Rise of Industrial Organization*, 68 Tex. L. Rev. 105, 109-12 (1989).

195. Representative works in this tradition include, for example, Marshall *supra* note 193; and Arthur T. Hadley, *Economic Laws and Methods*, 8 Science 46 (1886).

exemplified by German historicism and favoring case studies, often leaning progressive or interventionist.[196]

The neoclassicists charged their opponents with trafficking in anecdotes and neglecting the scientific search for unifying principles.[197] The historicists—and their intellectual successors, the institutionalists[198]—charged the neoclassicists with disengagement from reality and ignoring the importance of "ideology, technology, history, habit, previous investment, and lack of information or difficulty in communication."[199] Much early twentieth-century scholarship criticized the artificiality and limits of neoclassical methods and called for economists to internalize corrective insights from other fields.[200] The profit-maximization assumption was an important target of such writing.[201]

By the 1930s, it was apparent that the neoclassicists would win the battle for the coalescing soul of professional economics. Economic methods became increasingly intricate, specialized, and distinct from general policy analysis.[202] Ronald Coase's *The Nature of the Firm*—a neoclassical, theory-forward, universalizing treatment—offered an immensely generative demonstration of the power of price theory as a tool for the study of firms.[203]

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196. Representative works in this tradition include, for example, Henry Carter Adams, *Economics and Jurisprudence*, 8 SCIENCE 15 (1886); and Edwin R.A. Seligman, *Change in the Tenets of Political Economy with Time*, 7 SCIENCE 375 (1886).

197. *See, e.g.*, Hadley, *supra* note 195, at 46; Frank Hyneman Knight, *The Limitations of Scientific Method*, *in* THE TREND OF ECONOMICS 229, 263-65 (Rexford Guy Tugwell ed., 1930).

198. Representative works in this tradition include, for example, Thorstein Veblen, *Why Is Economics Not an Evolutionary Science?*, 12 Q.J. ECON. 373 (1898); RICHARD T. ELY, 1 PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH (1914); JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (1924); and WALTON H. HAMILTON, THE PATTERN OF COMPETITION (1940).

199. Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993, 1014 (1990).

200. *See, e.g.*, J.M. Clark, *Economics and Modern Psychology*, 26 J. POL. ECON. 1, 3-4, 27 (1918); Walton H. Hamilton, *The Institutional Approach to Economic Theory*, 9 AM. ECON. REV. 309, 311 (1919); Lawrence K. Frank, *The Emancipation of Economics*, 14 AM. ECON. REV. 17, 31-32 (1924); A.J. Snow, *Psychology in Economic Theory*, 32 J. POL. ECON. 487, 495-96 (1924).

201. Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 J.L. & ECON. 163, 172-73 (1983).

202. *See, e.g.*, Edward S. Mason, *Monopoly in Law and Economics*, 47 YALE L.J. 34, 34 (1937) ("Lawyers and economists are . . . rapidly ceasing to talk the same language."); Hovenkamp, *supra* note 72, at 1023 (charting the divergence between law and economics).

203. *See* R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937). Coase himself credited the paper's core move to Marshall's "idea of substitution at the margin." *Id.* at 386-87.

The particularizing critique did not disappear,[204] but, to a great extent, the project of complicating the simple models of first-wave neoclassicism was taken up by neoclassicism itself. The 1930s, '40s, and '50s saw the opening of lines of work that put old price-theory tools—including the profit-maximization assumption—to new uses. These lines, and the rise of a "positivist" school emphasizing the empirical testing of hypotheses built on neoclassical premises,[205] effectively overtook the institutionalist critique.[206] This development was fueled by the charge that institutionalism lacked theory, amounting to a practice of rich description that ultimately went nowhere.[207]

Some of these emerging lines were particularly influential. One dealt with the "agency problem" created when corporations are operated by self-interested managers.[208] Others focused on transaction costs (the proposition that trading

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204. For example, the "marginal cost controversy" in the 1940s, over whether profit-maximizing firms really set prices based on marginal costs, pitted a "neoclassical" theory-first perspective grounded in universalizing principles (and skepticism about the value of empirical work) against an "institutionalist" empirics-first, inductive one that aimed to "objectively" assess industry-specific facts. For a flavor, see, for example, R.L. Hall & C.J. Hitch, *Price Theory and Business Behaviour*, 2 Oxford Econ. Papers 12, 18 (1939); Richard A. Lester, *Shortcomings of Marginal Analysis for Wage-Employment Problems*, 36 Am. Econ. Rev. 63, 67, 81 (1946); and Fritz Machlup, *Marginal Analysis and Empirical Research*, 36 Am. Econ. Rev. 519, 521 (1946). And sustained interest in empirical investigation—case-study analysis from the 1930s to early 1960s, cross-sectional work in the '60s, and industry-specific econometrics in the '70s—was driven in large part by dissatisfaction with basic price theory. *See* Louis Kaplow, *Antitrust, Law & Economics, and the Courts*, 50 Law & Contemp. Probs. 181, 189 (1987); Richard Schmalensee, *The New Industrial Organization and the Economic Analysis of Modern Markets*, *in* Advances in Economic Theory 253, 253-54 (Werner Hildenbrand ed., 1982).

205. *See* Milton Friedman, *The Methodology of Positive Economics*, *in* Essays in Positive Economics 3, 8-9 (1953).

206. *See* Robert E. Prasch, *Professor Lester and the Neoclassicals: The 'Marginalist Controversy' and the Postwar Academic Debate over Minimum Wage Legislation: 1945-1950*, 41 J. Econ. Issues 809, 820-22 (2007).

207. *See* Kitch, *supra* note 201, at 170 (quoting George Stigler—"I would say the institutional school failed in America for a very simple reason. It had nothing in it except a stance of hostility to the standard theoretical tradition. There was no positive agenda of research, there was no set of problems or new methods they wanted to invoke"—and Jesse Markham—"Both [George Stocking and Corwin Edwards, two institutionalist scholars] had, if not a hostility, a deep mistrust for the simplifying models of economics, and yet there was nothing to put in its place other than a tremendous amount of description"). *But see* Kaplow, *supra* note 204, at 189 (emphasizing the value of case studies that falsify or challenge theoretical claims).

208. *See, e.g.*, Berle & Means, *supra* note 112, at 66-112; Coase, *supra* note 203, at 404; Oliver E. Williamson, *A Model of Rational Managerial Behavior*, *in* A Behavioral Theory of the Firm 237, 239-241 (Richard M. Cyert & James G. March eds., 1963); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. Fin. Econ. 305, 309-10 (1976).

is costly),[209] information costs (the proposition that the acquisition of information is costly),[210] and "bounded rationality" (the proposition that perception and judgment are constrained).[211] These streams helped to generate a "new institutional economics": the use of both neoclassical and empirical tools to examine specific institutional settings in search of richer understandings than either pure theory or complete particularization could yield alone.[212] Game theory, too, began to emerge in the midcentury.[213]

Eventually, even the assumption of "rationality" itself, particularly as applied to natural persons, came under systematic theoretical and empirical interrogation. One strand of work underscored that, given uncertainty about the future, it was not obvious what it meant to "maximize" any quantity.[214] And "prospect

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209. *See, e.g.*, Coase, *supra* note 203, at 388; R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15-16 (1960); Oliver E. Williamson, *The Vertical Integration of Production: Market Failure Considerations*, 61 AM. ECON. REV. 112, 112-13 (1971); Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233, 233 (1979).

210. *See generally* George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961) (evaluating the implications of search costs); Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972) (evaluating, among other things, the implications of the costs of monitoring and managing in team production); J. Hirshleifer & John G. Riley, *The Analytics of Uncertainty and Information—An Expository Survey*, 17 J. ECON. LITERATURE 1375 (1979) (providing a survey of the core, and key branches, of the first few decades of scholarly literature on uncertainty and information).

211. *See generally* HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION (1947) (providing a seminal early account of bounded rationality); Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99 (1955) (developing and modeling an account of rationality that reflects limited access to information and limited "computational capacities"); JAMES MARCH & HERBERT SIMON, ORGANIZATIONS (2d ed. 1993) (providing a seminal statement of organizational theory, including the salience of "cognitive limits on rationality"); A BEHAVIORAL THEORY OF THE FIRM, *supra* note 208 (centrally attacking neoclassical foundations of business-firm theory).

212. *See, e.g.*, Douglass C. North, *The New Institutional Economics*, 142 J. INST. & THEORETICAL ECON. 230, 230-31 (1986); Ronald Coase, *The New Institutional Economics*, 88 AEA PAPERS & PROCS. 72, 72-73 (1998).

213. *See, e.g.*, John F. Nash, Jr., *Equilibrium Points in N-Person Games*, 36 PNAS 48, 48-49 (1950); JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR 1 (1944); J. v. Neumann, *Zur Theorie der Gesellschaftsspiele* [*On the Theory of Games and Strategy*], 100 MATHEMATISCHE ANNALEN [MATHEMATICAL ANNALS] 295, 295 (1928) (providing the first widely recognized example of game-theoretic scholarship).

214. *See, e.g.*, Alchian, *supra* note 192, at 212-13; KARL HENRIK BORCH, THE ECONOMICS OF UNCERTAINTY 3 (1968).

theory" examined apparent deviations of perception and judgment from "rational" maximization of expected value.[215]

These lines continue to unfold today.[216] Nevertheless, most mainstream work continues to assume profit-maximizing businesses.[217] Even scholarship strongly influenced by behavioral economics often assumes irrational consumers facing "rational" profit-maximizing firms.[218]

B. Profit Maximization in Antitrust

One of the most important developments in twentieth-century American legal thought was the adoption of ideas and tools from economics.[219] This development was particularly early and clear in antitrust,[220] where the pages of U.S. law reviews and legal texts engaged visibly and meaningfully with academic economic work from at least the 1940s onward.[221] The Court followed. In 1956, the

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215. *See, e.g.*, Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 263 (1979); Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39, 39 (1980). *See generally* RICHARD H. THALER, QUASI RATIONAL ECONOMICS (1991) (examining apparent deviations from rational decision-making with perfect information).

216. *See supra* Section I.B.

217. *E.g.*, Birgit Grodal, *Profit Maximization and Imperfect Competition*, *in* 2 ECONOMICS IN A CHANGING WORLD 3, 3 (Beth Allen ed., 1996).

218. *See, e.g.*, RAN SPIEGLER, BOUNDED RATIONALITY AND INDUSTRIAL ORGANIZATION 1-8 (2011) (describing "asymmetries in rationality" between consumers and firms); Glenn Ellison, *Bounded Rationality in Industrial Organization*, *in* 2 ADVANCES IN ECONOMICS AND ECONOMETRICS: THEORY AND APPLICATIONS 142, 142 (Richard Blundell, Whitney K. Newey & Torsten Persson eds., 2006) ("Common to . . . recent literature is a focus on consumer irrationalities that firms might exploit.").

219. *See* GEORGE L. PRIEST, THE RISE OF LAW AND ECONOMICS: AN INTELLECTUAL HISTORY 1-5 (2020). *See generally* Kitch, *supra* note 201 (presenting a discussion among economists and law professors about the development of the law-and-economics movement).

220. Kaplow, *supra* note 204, at 184.

221. *See generally* Alfred E. Kahn, *Standards for Antitrust Policy*, 67 HARV. L. REV. 28 (1953) (evaluating antitrust law and policy from the perspective of an academic economist); M.A. Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 189 (1948) (same); Eugene V. Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567 (1947) (exemplifying legal scholarship grounded heavily in economic scholarship and analysis); Henry C. Simons, *Economic Stability and Antitrust Policy*, 11 U. CHI. L. REV. 338 (1944) (providing an economist's analysis of the relationship between antitrust policy and economic stability); Mason, *supra* note 202 (directly comparing treatments of the monopoly concept in law and economics). *See also* Maple Flooring Mfrs.' Ass'n v. United States, 268 U.S. 563, 582-83 & 583 n.1 (1925) (referring to "the consensus of opinion of economists" and citing economic analysis). For a leading antitrust text authored by two Ph.D. economists, see generally CARL

Court's monopolization decision in *du Pont* (the famous "Cellophane" case) cited the work of a number of economists,[222] and in 1963 the Supreme Court relied heavily on economic scholarship (and particularly "structure conduct performance" work, which held that concentrated markets led to harmful behavior[223]) in holding that concentrative mergers should be presumed illegal.[224] This structuralist approach, which was highly influential in the 1960s,[225] did not require courts to assume profit maximization to infer or predict specific behaviors.

But even as structuralist ideas were finding a warm reception in the Supreme Court, a revolution was brewing in the academy. In parallel with the broader, midcentury expansion of the domains of neoclassical economic theory,[226] the Chicago School of legal academics associated with the economist Aaron Director was applying the tools of neoclassical price theory to antitrust.[227] Many of this

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Kaysen & Donald F. Turner, Antitrust Policy: An Economic and Legal Analysis (1959). Interactions can be discerned earlier. For example, Herbert Hovenkamp discerns an institutionalist cast in the development of the fact-specific rule of reason. Hovenkamp, *supra* note 194, at 118-19. John Bates Clark testified regarding the Clayton Act in 1914. *Trust Legislation: Hearings Before the H. Comm. on the Judiciary*, 63d Cong. 320-24, 328-33 (1914) (statement of John Bates Clark, Professor of Econ., Columbia Univ.). Kenneth G. Elzinga gives 1920 as the date of the first recognizable economic expert-witness testimony. Kenneth G. Elzinga, *In the Beginning: The Creation of the Economic Expert in Antitrust*, 65 J.L. & Econ. S519, S520 (2022). And economist George Ward Stocking served as an economic advisor to Thurman Arnold at the Justice Department from 1938 to 1943. *See* Willard F. Mueller, *George Ward Stocking*, *in* Pioneers of Industrial Organization: How the Economics of Competition and Monopoly Took Shape 187, 187-88 (Henry W. de Jong & William G. Shepherd eds., 2007). And in a deeper sense, it does not seem possible to undertake a recognizable "antitrust" at all without some use of economic concepts. Francis, *Making Sense*, *supra* note 53, at 822.

222. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 387-88 n.13, 398 n.26, 400 n.28 (1956).

223. *See, e.g.*, Leonard W. Weiss, *The Structure-Conduct-Performance Paradigm and Antitrust*, 127 U. Pa. L. Rev. 1104, 1105-24 (1979); Joe S. Bain, Industrial Organization 430-68 (1968); *see also* Edward S. Mason, Economic Concentration and the Monopoly Problem 16-54 (1957) (considering the state of knowledge and scholarship about the relationship between concentration, monopoly, and "decline in competition").

224. United States v. Phila. Nat'l Bank, 374 U.S. 321, 352, 357, 363 nn.38-39 (1963) (citing economists Carl Kaysen, Donald Turner, Betty Bock, Rosemary Hale, George Stigler, Jesse Markham, Fritz Machlup, Joe Bain, and Edward Mason).

225. *See* Daniel Francis, *The 2023 Merger Guidelines and the Arc of Antitrust History*, 39 J. Econ. Persps. 3, 6-7 (2025) (summarizing the influence of structuralism on merger law in the 1960s).

226. *See supra* notes 204-215 and accompanying text.

227. *See* Kitch, *supra* note 201, at 181, 194-95, 210, 226, 228 (noting the role of price theory and simple modeling).

group's flagship contributions leaned heavily on—among other things—the assumption that businesses will maximize their profits.[228]

The group's own leaders often recognized the centrality to their work of the profit-maximization assumption—and more generally of a strict maximization principle, combined with models in which profits were the only things a business might plausibly maximize. Richard Posner, for example, said of Director that "[e]ach of his ideas was deducible from the assumption that businessmen are rational profit-maximizers."[229] Harold Demsetz identified the "common theme" in the teachings of Director and Coase as the view that "people try to maximize and . . . there is competition" to do so.[230] And Judge Posner's own contributions would later be identified with the application of the claim that "people maximize, markets clear."[231]

The Chicagoans' economic theory was not itself groundbreaking in this or other respects,[232] but their use of it in law was generative and well-timed. By the 1970s, Chicagoan scholarship had been flourishing for two decades, and its law-and-economics method was spreading throughout the legal academy.[233] Simultaneously, commentators were clamoring for antitrust reform, pointing to a string of pro-plaintiff rules, policies, and holdings that seemed harmful and of doubtful economic soundness.[234] As the decade got going, other pieces fell into

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228. *See, e.g.*, Robert Bork, *Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception*, 22 U. CHI. L. REV. 157, 194-201 (1954); John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137, 168 (1958); Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19, 20-21 (1957); Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281, 290 (1956); Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86, 89-91 (1960).

229. Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 928 (1979).

230. Kitch, *supra* note 201, at 204 (statement of Harold Demsetz).

231. Douglas G. Baird, *The Future of Law and Economics: Looking Forward*, 64 U. CHI. L. REV. 1129, 1132 (1997).

232. Kaplow, *supra* note 204, at 189 (calling the Chicago School's version of "price theory" "the earliest and simplest form of economic analysis of industry"); Kitch, *supra* note 201, at 201 (quoting Aaron Director's description of the Chicago School's approach as "an old way of looking at the world").

233. *See* Francis, *supra* note 225, at 8. For some early lines, see Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 170 (1968); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 500-02 (1961); Armen A. Alchian, *Some Economics of Property Rights*, 30 IL POLITICO 816, 817-21 (1965); and Coase, *supra* note 209, at 1-2.

234. *See, e.g.*, Albrecht v. Herald Co., 390 U.S. 145, 146-49 (1968); United States v. Arnold, Schwinn & Co., 388 U.S. 365, 380-82 (1967); United States v. Sealy, Inc., 388 U.S. 350, 355-57 (1967); Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685, 704 (1967); United States v. Von's Grocery Co., 384 U.S. 270, 278-79 (1966); Brown Shoe Co. v. United States, 370 U.S. 294, 346 (1962).

place: a political coalition emerged in support of broad deregulation,[235] five new Justices arrived on the Court between 1969 and 1975,[236] and the structure-conduct-performance paradigm on which the 1960s Court had relied was torpedoed by academic critics.[237]

The result was a profound turn in antitrust doctrine throughout the 1970s.[238] This included, among other things: (1) a turn away from broad per se rules toward case-by-case assessments, (2) a tilt away from strongly pro-plaintiff standards, and (3) a migration toward net welfare effects as the substantive ground of decision, supplanting other goals.[239]

As a result, judges and enforcers started to do much more case-by-case analysis of whether particular practices would harm or benefit consumers—with Chicago methods in the ascendant.[240] The result was increasing recourse to the language and techniques of neoclassical theory to adjudicate individual cases. As part of this package, the profit-maximization assumption became an important tool of prediction and inference in antitrust cases.

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235. *See* Robert W. Crandall, *Deregulation: The U.S. Experience*, 139 J. INST. & THEORETICAL ECON. 419, 432 (1983).

236. The new Justices were Chief Justice Burger (1969), Justice Blackmun (1970), Justice Powell (1972), Justice Rehnquist (1972), and Justice Stevens (1975). *Justices 1789 to Present*, SUP. CT. U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/CG8B-7JUK].

237. *See* Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1, 5 (1973) ("[I]f increased concentration has come about because of the superior efficiency of those firms that have become large, then a deconcentration policy, while it may reduce the ease of colluding, courts the danger of reducing efficiency either by the penalties that it places on innovative success or by the shift in output to smaller, higher cost firms that it brings about."); *see also* Steven Berry, Martin Gaynor & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, 33 J. ECON. PERSPS. 44, 46 (2019) ("Within the field of industrial organization, the structure-conduct-performance approach has been discredited for a long time."). *But see* Matthew T. Panhans, *The Rise, Fall, and Legacy of the Structure-Conduct-Performance Paradigm*, 46 J. HIST. ECON. THOUGHT 337, 348-54 (2024) (giving a nuanced account of the criticism and legacy of the structure-conduct-performance tradition).

238. *See* Francis, *supra* note 225, at 8-9 (summarizing this change); Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent U.S. Supreme Court Decisions?*, 3 COMPETITION POL'Y INT'L 59, 60, 66 (2007) (arguing that the turn was to a moderate middle ground).

239. *See, e.g.*, Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 24-25 (1979); Cont'l TV v. GTE Sylvania, 433 U.S. 36, 49-50 (1977); United States v. Gen. Dynamics Corp., 415 U.S. 486, 497-503 (1974).

240. *See, e.g.*, Christopher S. Yoo, *The Post-Chicago Antitrust Revolution: A Retrospective*, 168 U. PA. L. REV. 2145, 2153-60 (2020) (noting that "[e]ven critics of the Chicago School's price theoretic approach have generally recognized that it has influenced Supreme Court doctrine" and listing examples, while also acknowledging the limits of the influence).

The shift is starkly visible in the agencies' successive Merger Guidelines, including those that bracket the 1970s. The 1968 Merger Guidelines make no reference to profit maximization and do not evince much interest in predicting behavior at all, instead declaring that "[m]arket structure is the focus of the [DOJ's] merger policy."[241] But the next iteration, in 1982, was full of the language of profitability, offering as a "unifying theme" of merger review the concern that a merger would enhance the "ability of one or more firms *profitably* to maintain prices above competitive levels for a significant period of time."[242] The 1984 Guidelines subtly reframed the core "hypothetical-monopolist test" for market definition, replacing a discussion of what would be "profit*able*" with a focus on what a "profit-*maximizing* firm" would do.[243] Later editions made profit maximization even more explicitly foundational.[244]

Courts took the same turn. Many of the Supreme Court's flagship merger cases of the 1960s focused on concentration as such, or as a virtually conclusive indicator of harm, rather than on the prediction by other means of post-merger behavior.[245] The decade's critical vertical-restraint cases likewise made no attempt to predict profit-maximizing conduct.[246] Indeed, the 1960s Court repeatedly doubted the judiciary's ability to conduct case-specific economic analysis.[247]

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241. U.S. Dep't of Just., Merger Guidelines 1 (1968).

242. U.S. Dep't of Just., Merger Guidelines 2 (1982) [hereinafter 1982 Merger Guidelines] (emphasis added).

243. *Compare* U.S. Dep't of Just., Merger Guidelines 3 (1984) [hereinafter 1984 Merger Guidelines] (using a "hypothetical, profit-maximizing firm, not subject to price regulation" as the baseline for the test), *with* 1982 Merger Guidelines, *supra* note 242, at 3 n.6 (describing the test as asking whether a "hypothetical, unregulated firm . . . could increase its profits").

244. U.S. Dep't of Just. & Fed. Trade Comm'n, Merger Guidelines 2 (1992) (explicitly identifying "likely" conduct with conduct "in the actor's economic interest" and emphasizing economic profit); *see also id.* at 17, 21 (emphasizing profitability in the assessment of theories of harm); 2010 Horizontal Merger Guidelines, *supra* note 1, at 2 ("In evaluating how a merger will likely change a firm's behavior, the Agencies focus primarily on how the merger affects conduct that would be most profitable for the firm."). *But see* 2023 Merger Guidelines, *supra* note 1, at 16-17 ("The Agencies' assessment will be consistent with the principle that firms act to maximize their overall profits *and valuation* . . . ." (emphasis added)).

245. United States v. Von's Grocery Co., 384 U.S. 270, 277-78 (1966); Brown Shoe Co. v. United States, 370 U.S. 294, 332, 344-46 (1962); United States v. Cont'l Can Co., 378 U.S. 441, 461-62 (1964) (relying largely but not entirely on structural reasoning). *But see, e.g.*, United States v. El Paso Nat. Gas Co., 376 U.S. 651, 661 (1964) (relying on nonstructural reasoning).

246. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 375-76 (1967); Albrecht v. Herald Co., 390 U.S. 145, 152-54 (1968).

247. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 492-93 (1968); United States v. Topco Assocs., Inc., 405 U.S. 596, 609 & n.10 (1972).

But, as antitrust refocused on the effects of practices and transactions on outcomes like price,[248] the '70s and '80s saw an explosion in the judicial use of formal economic price-theory methods, built on profit maximization.[249] By 1986, the Court could hold in *Matsushita*, as noted above, that a conspiracy affecting the United States was implausible, despite a conceded hardcore cartel overseas, because of its inconsistency with the Court's expectations of profit maximization.[250] And today, profit maximization continues to play a central role—in predicting effects, inferring agreements, shaping rules, and more.[251]

C. Visions of Post-Profit Antitrust

Since the 1980s, scholars have called for a "behavioral law and economics"—that is, for law and scholarship to internalize insights from behavioral economics[252] and to move beyond simple price-theory models.[253] Reactions have been mixed, often emphasizing the need for robust insights that can yield reliable predictions and inferences.[254] A recurrent critique—echoing neoclassicism's attack on institutionalism—has been the charge that behavioral work is "antitheoretical," with little predictive power.[255] But, over time, behavioral work has become

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248. Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 8-9, 19-20 (1979); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58-59 (1977); United States v. Gen. Dynamics Corp., 415 U.S. 486, 498 (1974).

249. Gellhorn, *supra* note 17, at 23; Jonathan B. Baker, *How Economists Influence Antitrust: The Contributions of Tim Bresnahan, Janusz Ordover, Steve Salop, and Bobby Willig*, J. ANTITRUST ENF'T art. no. jnae049, at 16 (2024); John E. Lopatka & William H. Page, *Economic Authority and the Limits of Expertise in Antitrust Cases*, 90 CORN. L. REV. 617, 618-21 (2005); James V. DeLong, *The Role, If Any, of Economic Analysis in Antitrust Litigation*, 12 SW. U. L. REV. 298, 298 (1981).

250. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986).

251. *See supra* Section I.A.

252. *See* Korobkin & Ulen, *supra* note 192, at 1055; Christine Jolls, Cass R. Sunstein & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1522-45 (1998); Thomas S. Ulen, *Rational Choice and the Economic Analysis of Law*, 19 LAW & SOC. INQUIRY 487, 515-20 (1994); Ward Edwards & Detlof von Winterfeldt, *Cognitive Illusions and Their Implications for the Law*, 59 S. CAL. L. REV. 225, 269-76 (1986); W. Kip Viscusi, *Consumer Behavior and the Safety Effects of Product Safety Regulation*, 28 J.L. & ECON. 527, 539 (1985).

253. *See supra* notes 226-233 and accompanying text.

254. *See generally* Jennifer Arlen, *The Future of Behavioral Economic Analysis of Law*, 51 VAND. L. REV. 1765 (1998) (emphasizing the limits and indeterminacy of the teachings of behavioral work).

255. Richard Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1552 (1998).

increasingly important in legal scholarship, particularly in areas like consumer protection that focus on the behavior of natural persons.[256]

Antitrust has long taken empirics seriously when considering the behavior of natural persons, particularly consumers. Among other things, the very foundations of markets—including substitutability and cross-elasticities of demand—are empirical measures derived from behavior. There is no "objective" measure of whether, say, Coke and Pepsi are "really" close substitutes for one another: what matters is what real consumers do.[257] To that end, courts have acknowledged that consumers may not behave "rationally."[258] But, as Part I showed, with few exceptions, modern antitrust has generally treated *businesses* as profit maximizers, often rigidly.[259]

This has not been for want of trying. As early as 1985, pioneering work by Harry Gerla drew on early behavioral work to criticize Chicagoan treatments of predation, invoking prospect theory to suggest that dominant firms may be likely to engage in defensive predation, and competitors to be cowed by it.[260] He later argued that antitrust should grapple with managerial motives, which could operate to make traditional predictions "simply wrong."[261]

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256. For a cross-section of works illustrating the importance of behavioral scholarship in such areas, see generally Oren Bar-Gill & Andrew T. Hayashi, *Present Bias and Debt-Financed Durable Goods*, Am. L. & Econ. Rev. art. no. ahae005 (2024), https://academic.oup.com/aler/advance-article/doi/10.1093/aler/ahae005/7750708 [https://perma.cc/ZQ96-LLKT]; Avishalom Tor, *The Law and Economics of Behavioral Regulation*, 18 Rev. L. & Econ. 223 (2022); Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 Harv. L. Rev. 1593 (2014); Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. Legal Stud. 1 (2014); Oren Bar-Gill, Seduction by Contract: Law, Economics, and Psychology in Consumer Markets (2012); and Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. Chi. L. Rev. 1159 (2003).

257. *See* Francis & Sprigman, *supra* note 54, at 70-71.

258. For prominent examples, see *United States v. Google LLC*, 747 F. Supp. 3d 1, 160 (D.D.C. 2024), which states that "the combination of user habit, Google's brand, and choice friction creates a powerful default effect that drives most consumers to use the default search access points occupied by Google"; and *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 473-76 (1992), which emphasizes the difficulties faced by consumers in "acquiring and processing" information.

259. *See supra* Part I.

260. Gerla, *supra* note 127, at 761-62, 769.

261. Gerla, *supra* note 111, at 894.

Following other important early efforts,[262] "behavioral antitrust" saw a broad surge of interest around 2010.[263] Seminal contributions—including work by Christopher Leslie, Maurice Stucke, Avishalom Tor, and their coauthors—argued, among other things, that antitrust analysis had become hidebound, mistaking simplifying assumptions for empirical truths;[264] that courts and agencies should invest in building deeper understandings of behavior;[265] and that antitrust should absorb insights about systematic deviations from "rationality," including biases and institutional effects.[266] This work urged the value of "real-world" evidence, notwithstanding the teachings of theory.[267]

This "behavioralist" wave triggered a skeptical "traditionalist" response. Traditionalists argued that workable antitrust requires a tractable and coherent basis for prediction and inference, and that behavioral economics cannot furnish one.[268] In the spirit of the refrain that "it takes a theory to beat a theory,"[269] Judge Douglas Ginsburg and Derek Moore wrote that behavioralism does not "even promise to provide a general standard by which to decide . . . [a] case."[270] And if the profit paradigm and neoclassicism were discarded, others warned, "something would have to take their place in sorting through all the proposed mergers and identifying the relative few that violate merger laws."[271]

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262. *See, e.g.*, Avishalom Tor, *The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy*, 101 MICH. L. REV. 482, 485-88 (2002) [hereinafter Tor, *The Fable of Entry*]; Albert A. Foer, *The Third Leg of the Antitrust Stool: What the Business Schools Have to Offer to Antitrust*, 47 N.Y. L. SCH. L. REV. 21, 33 (2003); Avishalom Tor, *A Behavioural Approach to Antitrust Law and Economics*, 14 CONSUMER POL'Y REV. 2, 3-5 (2004) [hereinafter Tor, *Behavioural Approach*].

263. *See, e.g.*, Tor, *supra* note 8, at 576 & n.7 (noting the surge and compiling sources).

264. Reeves & Stucke, *supra* note 8, at 1554-70; Leslie, *supra* note 9, at 264; Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513, 545-75 (2007); *see also* Tor, *Behavioural Approach*, *supra* note 262, at 5 (noting that a behavioral approach "substitutes empirical research into human decision-making for the unrealistic theoretical models which still dominate antitrust law and economics").

265. Reeves & Stucke, *supra* note 8, at 1570-83; Leslie, *supra* note 9, at 285-318; Stucke, *supra* note 264, at 579-82.

266. Tor, *supra* note 8, at 593-94, 616, 619-43; Tor & Rinner, *supra* note 74, at 819-39; Leslie, *supra* note 9, at 274-85.

267. Tor, *supra* note 8, at 651-66; Reeves & Stucke, *supra* note 8, at 1577-81; *see* Leslie, *supra* note 9, at 341.

268. *See, e.g.*, Devlin & Jacobs, *supra* note 10, at 1023, 1041; Wright & Stone, *supra* note 10, at 1526.

269. George J. Stigler, *Nobel Lecture: The Process and Progress of Economics*, 91 J. POL. ECON. 529, 541 (1983).

270. Ginsburg & Moore, *supra* note 10, at 97.

271. Gregory J. Werden, Luke M. Froeb & Mikhael Shor, *Behavioral Antitrust and Merger Control*, 167 J. INST. & THEORETICAL ECON. 126, 131-32 (2011).

The result was, effectively, deadlock. In the following years, the volume of behavioral antitrust scholarship has declined from its peak,[272] and the profit paradigm remains as firmly settled in doctrine as it ever was.[273] If anything, it is more firmly grounded than ever, given the endorsement in *United States v. AT&T* of the "legal principle" of profit maximization by both the D.C. Circuit and the Justice Department.[274] Today, judicial behavioralism in antitrust is largely limited to the occasional recognition that consumers do not always act "rationally"[275] – an observation that long predates the behavioral-antitrust literature.[276]

III. THE LIMITED CASE FOR POST-PROFIT ANTITRUST

This Part argues that antitrust's imagination can and should encompass allegations, evidence, inferences, and predictions of firm behavior outside the profit paradigm. Black-letter law does not preclude doing so, and antitrust principle affirmatively favors it. But the space for post-profit antitrust is limited in ways that reflect antitrust's theoretical core and its institutional realities.

A. Antitrust Without a Paradigm

As Part I demonstrated, antitrust leans on the profit paradigm in many ways, including to infer past or present facts (was the defendant pursuing a harmful purpose? Did it enter an agreement?) and to predict future ones (will the merged firm raise its prices?).[277] And, as Part II showed, courts and scholars have

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272. *But see* Peter O'Loughlin, *The Limits of Behavioral Antitrust*, 52 U. BALT. L. REV. 201, 204-05 (2023); Christopher R. Leslie, *Hindsight Bias in Antitrust Law*, 71 VAND. L. REV. 1527, 1529-30 (2018).

273. Max Huffman, *A Look at Behavioral Antitrust from 2018*, CPI ANTITRUST CHRON. 3-4 (Jan. 2019), https://www.competitionpolicyinternational.com/wp-content/uploads/2019/01/CPI-Huffman.pdf [https://perma.cc/YYT6-3437].

274. *See supra* notes 28-35 and accompanying text. Even the recent "Neo-Brandeisian" enterprise, which included criticism of the role of economics in modern antitrust, does not appear to have included any real effort to challenge the supremacy of the profit principle. In fact, treating corporations as profit-seekers is broadly consistent with the Neo-Brandeisian enterprise. For an appraisal of the enterprise, see Daniel Francis, *After Neo-Brandeis*, PROMARKET (Nov. 25, 2024), https://www.promarket.org/2024/11/25/after-neo-brandeis [https://perma.cc/3WMZ-YR6S].

275. *See, e.g.*, United States v. Google LLC, 747 F. Supp. 3d 1, 45-46, 160 (D.D.C. 2024) (discussing the impact of user habit and concluding that "the combination of user habit, Google's brand, and choice friction creates a powerful default effect that drives most consumers to use the default search access points occupied by Google").

276. *See, e.g.*, Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 495 (1992).

277. *See supra* Section I.A.

defended the centrality of profit maximization, often invoking the need for a consistent theory of firm behavior.[278] But, on a closer look, neither law nor practice makes such a demand. An antitrust system that takes profit seriously but is not exhausted by it—a "post-profit" antitrust—is both lawful and possible.

1. Legality

The antitrust statutes say nothing about profit maximization. As Amanda P. Reeves and Maurice Stucke have observed, Congress did not "dictate[] the application of any particular economic theory" when it shaped the antitrust laws.[279] Congress did not even specify the substantive content of antitrust's key statutory concepts—like "restraint of trade," "monopoliz[ation]," or "substantial[] . . . lessen[ing] [of] competition"[280]—let alone prescribe a methodology for identifying them in individual cases.

What about the Supreme Court? In *AT&T*, as noted above, the D.C. Circuit stated that the "principle . . . that a business with multiple divisions will seek to maximize its total profits" had been adopted by the Court "as a principle of antitrust law in *Copperweld Corp. v. Independence Tube Corp.*"[281] Other courts have also linked *Copperweld* with such a rule.[282]

But *AT&T* misreads *Copperweld*. Neither in *Copperweld* nor in any other case has the Court adopted business profit maximization as an antitrust axiom. In *Copperweld*, the Court held only that a corporation could not enter into an "agreement" in the antitrust sense with its own wholly owned subsidiary because (1) in practice, such businesses have a "unity of purpose or common design," obviating the usual effect of an agreement in fixing or structuring such a common purpose; and (2) in principle, it would be irrational to treat coordination with an unincorporated division (which of course could not workably be described as an "agreement" without effectively penalizing industrial organization itself) differently from coordination with a wholly owned subsidiary—the difference being pure legal form.[283]

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278. *See supra* Section II.C; United States v. AT&T, Inc., 916 F.3d 1029, 1043-44 (D.C. Cir. 2019) (citing Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771 (1984)); Werden et al., *supra* note 271, at 131-32.

279. Reeves & Stucke, *supra* note 8, at 1545.

280. 15 U.S.C. §§ 1, 2, 18 (2024).

281. *AT&T*, 916 F.3d at 1043; *see supra* notes 28-34 and accompanying text.

282. FTC v. Tapestry, Inc., 755 F. Supp. 3d 386, 477 (S.D.N.Y. 2024); United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 49-50 (D.D.C. 2022); United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 149 (D.D.C. 2022).

283. *Copperweld*, 467 U.S. at 771-74 (quoting Am. Tobacco Co. v. United States, 328 U.S. 781, 810 (1946)).

The *Copperweld* principle was subsequently modified in *American Needle*. Implicitly disavowing the remaining element of formalism in *Copperweld* itself, the *American Needle* Court held that economic distinctness for antitrust purposes was possible, contra *Copperweld*, within the apparent unity of a single firm, while, conversely, formally distinct firms might constitute a single economic unit.[284] Economic independence in decision-making, not the number of legal entities, was what mattered.[285]

Thus, *Copperweld* indicated that a single firm has a unity of purpose, as each division pursues "the common interests of the whole,"[286] but it did not purport to prescribe an account of what that purpose was. In fact, the majority opinion says nothing about profit maximization.[287] And if there were any room for doubt, the subsequent holding in *American Needle*—that in "rare cases" the presumption "that the components of the firm will act to maximize the firm's profits" simply "does not hold," as actors within a single firm may be pursuing their own economic interests—is flatly inconsistent with an irrebuttable presumption that firms invariably pursue overall profits.[288]

And while the Court's landmark decisions in *Twombly* and *Matsushita* (articulating the standard for motions to dismiss and motions for summary judgment, respectively) each emphasize the importance of profit maximization,[289] neither establishes it as a behavioral axiom. Instead, each treats the profitability of an action as a relevant, but not dispositive, factor in antitrust fact-finding. In *Twombly*, the Court held that, in a conspiracy case, a plaintiff cannot survive dismissal by pleading only parallel behavior that is fully consistent with the self-interest of each participant.[290] This reflects little more than Occam's Razor: behavior adequately explained by uncontroverted facts does not, without more, support an inference of intricate hidden facts, like a backstage conspiracy. In *Matsushita*, the Court explicitly left the door open, labeling the apparent profitlessness of the alleged conspiracy "strong evidence that [it] does not . . . exist,"[291]

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284. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 191-96 (2010).

285. *Id.* at 195.

286. *Copperweld*, 467 U.S. at 770.

287. The notion of profit maximization appears just once in *Copperweld*, in a single reference buried in a quotation from legislative history in Justice Stevens's dissent. *Id.* at 788 (Stevens, J., dissenting).

288. *Am. Needle*, 560 U.S. at 200-01.

289. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554 (2007); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

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

291. *Matsushita*, 475 U.S. at 592.

and indicating that such conspiracies require "more persuasive evidence."[292] Neither case holds that an unprofitable conspiracy is beyond antitrust's imagination or reach.[293]

2. *Practicability*

But what about the practical objection? Many scholars, including traditionalists reacting to behavioral antitrust work, have emphasized the importance of the profit principle in making inference and prediction tractable.[294] Eliminating it, they suggest, would leave antitrust adrift.[295]

This critique captures an important truth. Complexity and unpredictability come with costs, and optimal antitrust decision rules should reflect that fact.[296] But it overstates the case. Certainly, the profit-maximization assumption helps to regularize and focus fact-finding. But its power comes from the use of a reasonably tractable objective that is in a fairly close relationship to reality—not the fact that it is profit in particular, rather than output or employee satisfaction or something else. Many nonprofit objectives are, or may be, equally clear and tractable. And in appropriate individual cases, they might be a better guide to reality.[297] It is far from obvious that profit maximization is the best guide to what, say, a church or university will do.[298]

Above all, it is worth remembering that predictions and inferences in antitrust litigation are creatures of *individual* cases. It is perfectly sensible to use a strong profit-maximization assumption when designing optimal general rules. In that setting, the task is to optimize across vast and diverse populations of events, and profit maximization is a solid guide to what most businesses do most of the time.[299] But the best inference of facts in an individual case need not have anything to do with what most businesses would do most of the time. The value of a principle of behavior is a function of its clarity and its descriptive fit with the particular matter before an agency or court.

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292. *Id.* at 587.

293. *See, e.g.*, Leslie, *supra* note 9, at 338 (noting that *Matsushita* does not close the door on economically implausible claims).

294. *See supra* notes 268-271 and accompanying text.

295. *See, e.g.*, Devlin & Jacobs, *supra* note 10, at 1023.

296. *See, e.g.*, Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L.J. 269, 280-83 (2015).

297. This need not imply a close fit with the "real" subjective experience of the decision-maker, just a predictive fit with what is likely to happen. *See* FRIEDMAN, *supra* note 205, at 159-61.

298. Bailey, *supra* note 17, at 359.

299. *See supra* note 75 and accompanying text.

The point is that, while it might take a theory to beat a theory, a "theory" is just a proposition about how things are related to one another—and grand theory is not necessarily preferable to petit theory. A court has a sufficient "theory" for the purposes of prediction and inference if it has something to say after "because" to explain its conclusion. And a theory of whether *this* defendant will or will not act in a particular way need not have anything to say about how other, let alone most or all, businesses would act.

Moreover, it is not even clear that there is a relevant difference between predicting future behavior and adjudicating other questions of present or past fact which constitute the stock-in-trade of judicial life, and which are routinely approached without grand theories in hand. In each case, a court or other factfinder is confronted with a record and must gauge the strength of particular inferences from that record.[300] Thus, it is not obvious that the futurity of some kinds of antitrust inference makes them different in kind from other common-or-garden judicial fact-finding.

But even focusing on the specific challenge of inferring future behavior, other areas of law often require courts, and other decision-makers, to engage in prediction and inference in individual cases without a strict behavioral paradigm in hand. A handful of examples will suffice.

In criminal law—where the stakes can be higher, and sometimes much higher, than in the standard antitrust case, for both defendants and potential victims—courts often predict future behavior, particularly the conduct of corporate and natural defendants. The Supreme Court has emphasized that "there is nothing inherently unattainable about a prediction of future criminal conduct,"[301] and that the "prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system."[302]

In this vein, sentencing decisions commonly reflect predictions about whether defendants (including corporate defendants[303]) will commit further crimes.[304] Federal law requires sentencing courts to consider the need "to protect

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300. *See* Barbara D. Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408, 1413 (1979); Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1345-46 (1971).

301. United States v. Salerno, 481 U.S. 739, 751 (1987) (quoting Schall v. Martin, 467 U.S. 253, 264 (1984)).

302. Jurek v. Texas, 428 U.S. 262, 275 (1976) (plurality opinion).

303. *See, e.g.*, United States v. Oceanic Illsabe Ltd., 889 F.3d 178, 201 (4th Cir. 2018); United States v. C.R. Bard, Inc., 848 F. Supp. 287, 293 (D. Mass. 1994).

304. *See, e.g.*, United States v. Watkins, 107 F.4th 607, 634 (7th Cir. 2024); United States v. Vinas, 106 F.4th 147, 154 (1st Cir. 2024).

the public from further crimes of the defendant."[305] Predictions of future conduct are also often central to determinations about pretrial detention,[306] as well as bail pending sentence or appeal.[307] Civil-commitment decisions, too, routinely reflect predictions of future behavior.[308]

But judicial futurism is not limited to criminal and similar settings. Mootness doctrine, for example, must grapple with defendants that have terminated a challenged practice. To determine whether Article III jurisdiction has been destroyed, a court must determine whether it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[309] In cases involving organizational defendants, courts have not thought that this question can be reduced to whether the conduct is profitable.[310]

Remedies doctrine is suffused with behavioral prediction. When awarding damages, courts routinely construct hypothetical futures or alternative presents in order to measure impacts on a plaintiff. The Supreme Court has said that "[e]very anticipatory breach of an obligation, and every appraisal of damage involving the present value of property[,] involves a prediction as to what will occur in the future."[311] Remedial prediction can involve complex calculations: for example, in awarding "front pay" in employment cases, a court must predict the future behavior of both an employee and an employer.[312]

Injunctive relief, too, commonly requires adjudication of whether a defendant will engage in particular acts in the future.[313] Courts routinely do so in cases involving organizational defendants. For example, courts have determined whether: government agencies are likely to engage in future discrimination by examining their past and present conduct and policies;[314] a hedge fund can be reasonably expected to violate securities laws given its lies about securities matters;[315] a business that had engaged in unfair and deceptive practices relating to

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305. 18 U.S.C. § 3553(a)(2)(C) (2024).

306. *Id.* § 3142(f).

307. *Id.* § 3143; *see* United States v. Seefried, 725 F. Supp. 3d 73, 76 (D.D.C. 2024).

308. *See, e.g.*, Rick v. Harpstead, 110 F.4th 1055, 1060 (8th Cir. 2024); *In re* Commitment of R.S., 773 A.2d 72, 88-97 (N.J. Super. Ct. App. Div. 2001); FLA. STAT. § 394.910 (2024).

309. Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 170 (2000) (citing United States v. Concentrated Phosphate Exp. Ass'n, 393 U.S. 199, 203 (1968)).

310. *See, e.g.*, Rd.-Con, Inc. v. City of Philadelphia, 120 F.4th 346, 356-58 (3d Cir. 2024).

311. Palmer v. Conn. Ry. & Lighting Co., 311 U.S. 544, 559 (1941).

312. *See* Whittington v. Nordam Grp. Inc., 429 F.3d 986, 1000-01 (10th Cir. 2005).

313. *See, e.g.*, United States v. Philip Morris USA Inc., 566 F.3d 1095, 1131-32 (D.C. Cir. 2009).

314. *See, e.g.*, Bone v. Univ. of N.C. Health Care Sys., 678 F. Supp. 3d 660, 687-96 (M.D.N.C. 2023); Reyazuddin v. Montgomery County, 754 F. App'x 186, 192 (4th Cir. 2018).

315. CSX Corp. v. Children's Inv. Fund Mgmt. (UK) LLP, 654 F.3d 276, 286 (2d Cir. 2011).

the COVID-19 pandemic had "potential willingness and continued opportunity to engage in violations";[316] and countless similar matters. Exercises of this kind are not limited to defendants. When seeking injunctive relief to protect against future injury involving a third party, a plaintiff may be required to show that the third party "will likely react in predictable ways" to the conduct of a defendant, requiring attention to the statements and conduct of implicated third parties.[317]

Thus, even accepting the uncertain distinction between finding past facts and future ones—and focusing only on the second—courts do it all the time without any apparent need for a strong profit-maximization assumption.

At least three kinds of evidence have often been particularly helpful to courts in the prediction and inference of business behavior: (1) evidence of *purposes and plans* attributable to the business; (2) evidence of *past and present practices* in comparable circumstances; and (3) evidence of *programmatic strategy*, including details of business models, long-term goals, and even managerial character.

First, expressions (and other evidence) of purposes and plans are often probative of what a business will, would, or did do. As one court has noted, "juries frequently predict the outcomes of hypothetical scenarios by assessing individual *or corporate* motive, thought processes, and behavior."[318] Thus, the D.C. Circuit has entered an injunction covering a number of tobacco companies on the ground that they "retain[ed] both the ability and the desire to continue joint activities" of concern, relying on evidence that "[t]he members of [the former joint enterprise] ha[d] decided to create a new organization to continue the work" of the old one.[319] In other cases, courts have highlighted evidence of a business's intention to remain in a particular line of activity;[320] relied on a business's apparent reasons for refraining from a particular activity to determine that that activity could be resumed in the future;[321] and emphasized the intentional and knowing nature of previous violations to infer a risk of recurrence.[322] Antitrust courts have often drawn on such evidence within the profit paradigm, and it is equally useful outside it.[323]

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316. FTC v. QYK Brands LLC, No. 22-55446, 2024 WL 1526741, at *4 (9th Cir. Apr. 9, 2024).

317. *See, e.g.*, Murthy v. Missouri, 603 U.S. 43, 58, 69-74 (2024) (quoting Dep't of Com. v. New York, 588 U.S. 757, 768 (2019)); *Dep't of Com.*, 588 U.S. at 767-68.

318. *In re* Glumetza Antitrust Litig., No. 19-05822, 2021 WL 1817092, at *14 (N.D. Cal. May 6, 2021) (emphasis added).

319. United States v. Philip Morris USA Inc., 566 F.3d 1095, 1133 (D.C. Cir. 2009).

320. *See* SEC v. Genesis Glob. Cap., LLC, No. 23-00287, 2024 WL 1116877, at *16 (S.D.N.Y. Mar. 13, 2024).

321. *See* United States v. Parke, Davis & Co., 362 U.S. 29, 47-48 (1960).

322. *See* U.S. Dep't of Just. v. Daniel Chapter One, 650 F. App'x 20, 24 (D.C. Cir. 2016).

323. *See, e.g.*, FTC v. Microsoft Corp., 681 F. Supp. 3d 1069, 1090-91 (N.D. Cal. 2023); FTC v. Meta Platforms Inc., 654 F. Supp. 3d 892, 932-34 (N.D. Cal. 2023).

Second, evidence of present and past practices may also be probative of unobserved business conduct. For example, courts have relied on the fact of previous conduct (good or bad) under similar circumstances to infer that similar conduct may be likely in the future;[324] a defendant's repeated formation of new corporate entities to infer future willingness to break the law in ways that those entities would facilitate;[325] the existence of a pattern of violations to infer that future ones are more likely;[326] and evidence of prompt corrective action to infer that future violations are unlikely.[327]

Third, evidence of programmatic strategy—including business models, long-term commitments, and even the disposition of senior management—may also be probative of business action. For example, courts have relied on evidence that a defendant's business would "undoubtedly present opportunities to violate [the law] in the future" as evidence of a risk of further violations,[328] and have treated evidence that a business has not accepted the illegality of a practice as evidence that it could recur.[329] In the challenge to the Sprint/T-Mobile merger, for example, the court expressly relied on the competitive aggression of individual managers as evidence that the merger would be beneficial.[330] And, at the other end of the spectrum, as noted above, the court in the H&R Block/TaxACT merger challenge was willing to recognize that a small competitor was unlikely to expand where its cofounder had testified that the business was "what [he liked] 'to call a "lifestyle" company.'"[331]

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In sum, not only does antitrust doctrine permit the post-profit prediction and inference of business behavior, but plenty of court practice from other areas demonstrates that it is possible—even common—and demonstrates how it can be done. What remains to be determined, of course, is whether antitrust's imagination should be opened in this way—whether and to what extent plaintiffs,

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324. *See Philip Morris USA Inc.*, 566 F.3d at 1134 (bad conduct); United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 150 (D.D.C. 2022) (good conduct); *Daniel Chapter One*, 650 F. App'x at 23-24 (bad conduct).

325. *See* FTC v. USA Fin., LLC, 415 F. App'x 970, 975 (11th Cir. 2011).

326. *See* SEC v. First City Fin. Corp., 890 F.2d 1215, 1228 (D.C. Cir. 1989); United States v. Innovative Biodefense, Inc., No. 18-0996, 2020 WL 5035857, at *16 (C.D. Cal. May 4, 2020); United States v. US Stem Cell Clinic, LLC, 403 F. Supp. 3d 1279, 1300 (S.D. Fla. 2019).

327. *See* Masterfile Corp. v. Country Cycling & Hiking Tours by Brooks, Inc., No. 6-6363, 2008 WL 313958, at *5 (S.D.N.Y. Feb. 4, 2008).

328. *US Stem Cell Clinic*, 403 F. Supp. 3d at 1300.

329. Meyer v. Portfolio Recovery Assocs., LLC, No. 11-1008, 2011 WL 11712610, at *8 (S.D. Cal. Sep. 14, 2011).

330. *See* New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 243-46 (S.D.N.Y. 2020).

331. United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 74 (D.D.C. 2011).

defendants, or both should be permitted to plead, and try to prove, non-profit-maximizing business conduct in an antitrust litigation.

B. The Post-Profit Sword

There is a compelling case for allowing an antitrust plaintiff to plead, and try to prove, that a business may behave in ways that do not maximize profits. But that case, though strong, is not unbounded.

1. The Core Case

The heart of the case for post-profit antitrust is simple. As a matter of first principles, whether a particular practice maximizes profits is not of direct concern to antitrust, and there is no reason why a plaintiff should not be entitled to proffer a theory that involves non-profit-maximizing behavior. No case, to my knowledge, holds that "restraint of trade," "monopolization," or a merger that leads to a "substantial[] lessen[ing of] competition" exists only when a defendant profits thereby or expects to do so.[332] Moreover, as a matter of principle, a defendant may certainly engage in the very same conduct (collusion, exclusion, acquisitions, and so on) and cause the very same harms (increased prices, reduced output, and so on) as "regular" profit-maximizing antitrust violations, all without turning or expecting a dime of profit.[333] As a result, the core case for imposing antitrust liability in a non-profit-maximizing case is identical to the case for imposing it the rest of the time.

To illustrate, take three simple exemplars of non-profit-maximizing conduct—one each for antitrust's three main causes of action—inspired by the conduct considered in Part I. We will call them the Altruistic Boycott, Vindictive Excluder, and Catholic Hospital Merger fact patterns. Respectively, they approximate value-motivated collusion, tort-style malicious conduct, and acquisitions by Catholic hospital systems.

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332. 15 U.S.C. §§ 1, 2, 18 (2024). An odd exception, of course, is the recoupment test for predatory pricing. It follows from the argument in this Part that it should be eliminated. *See infra* Section IV.C.

333. *See* Leslie, *supra* note 55, at 1741 ("Whether a monopolist recoups the money that it has spent to acquire monopoly power does not determine whether its anticompetitive conduct has harmed consumer welfare."). Moreover, it is very obvious that, in principle, a defendant may engage in traditional antitrust violations while losing, not gaining, profit. For example, a defendant may price-fix at an unprofitably high or low price point, or may obtain naked exclusivity from an input supplier to protect a monopoly, but significantly pay the input supplier more for such exclusivity than it gains in increased profits.

In the Altruistic Boycott, competitors agree not to use a particular set of low-cost inputs or trading partners for "prosocial" reasons. To fix ideas, suppose that a group of airlines agree to stop buying a low-cost but high-emission fuel, and to switch their respective fleets to a higher-cost, low-emission alternative fuel that generates somewhat less energy. The competitors absorb some of the cost increase and pass on the rest. Costs and prices increase, while profit margins and quality (airplane speed) fall. By hypothesis, the participants are motivated by a laudable purpose—in our example, the project of reducing emissions—and but for joining the collusion, any given airline would have stuck to the low-cost fuel and enjoyed higher profits.

The Altruistic Boycott is not profit maximizing. Its participants lose profits by joining. As a result of the agreement prices rise, while quality and output fall—the standard harms associated with unlawful horizontal coordination. Social benefits, though genuine, are almost certainly noncognizable through the antitrust lens, and in any event they are likely to accrue mostly to persons outside the relevant market.[334] The case for condemning the Altruistic Boycott under Section 1 of the Sherman Act, and for inferring its existence from circumstantial evidence, is unaffected by the absence of defendant profit.[335] (One might similarly imagine an Invidious Boycott motivated by a bad purpose like discriminatory animus.)

The Vindictive Excluder is a business with monopoly power that engages in exclusionary conduct that reduces its overall profits—say, tying under circumstances in which the single-monopoly-profit theorem applies—but nevertheless harms consumers by excluding rivals. The business does so as a result of sheer animus toward rivals, to improve its market share, to maximize scale, or to further managerial interests. To fix ideas, suppose that AutoCo is a manufacturer of car-brake components. It holds monopoly power in brake drums, but it also makes and supplies brake pedals, brake pads, and brake boosters in more competitive markets. One day, AutoCo's CEO becomes incensed by some real or perceived personal slight committed by the CEO of a rival, CarCo, that sells brake pads. Perhaps CarCo hired a valuable employee away from AutoCo or perhaps the CarCo CEO said something insulting at a trade-association drinks party. Driven by anger, AutoCo's CEO directs that AutoCo will sell brake drums only

334. *See* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 688, 693-95 (1978). *But see infra* note 398 and accompanying text (noting that if consumers or purchasers of the relevant product or service value a production feature, it may constitute a cognizable benefit under traditional antitrust rules, subject to antitrust's usual criteria; this provides an avenue through which genuine consumer preference for the sustainable fuel may, under appropriate circumstances, be incorporated into the analysis).

335. *See* 15 U.S.C. § 1 (2024) (prohibiting contracts, combinations, and conspiracies "in restraint of trade" without facial limitation to those that are also profitable overall).

as part of a package with a set of brake pads. (This is "tying" in antitrust parlance.[336]) The result, as it turns out, is to reduce AutoCo's profits (because the obligation to take AutoCo brake pads effectively taxes those brake-drum consumers who do not prefer those pads), but it takes a hefty bite out of CarCo's profits, as well as those of other brake-pad sellers, and increases their costs by reducing their scale—allowing AutoCo in turn to increase its own pad prices by a modest amount. As a result of the tie, AutoCo earns less overall profit, but it harms CarCo and consumers.

The Vindictive Excluder is not profit maximizing. The business loses profits as a result of the exclusionary practice. Nevertheless, the practice harms consumers by excluding rivals through nonprivileged means without offsetting procompetitive justifications.[337] The case for condemning the practice under Section 2 of the Sherman Act is unaffected by the absence of defendant profit.[338]

In the Catholic Hospital Merger, a Catholic hospital system purchases a target hospital that is one of only two suppliers of abortion, contraception, and sterilization in the region. As a result of the merger, certain reproductive services are terminated, reducing the number of suppliers of such services from two to one. By assumption, consumers are harmed—through increases in price, or reductions in quality, output, or capacity.

At least in the reproductive-services market, the Catholic Hospital Merger is not profit maximizing. The merged firm would have been a duopolist provider of reproductive services had it not exited the market; by exiting, the firm is sacrificing profits. In the core case, the merger harms consumers by eliminating a key competitor and augmenting the remaining supplier's market power.[339] The case for predicting harm and condemning the deal is unaffected by the absence of defendant profit.[340]

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336. *See supra* note 63 and accompanying text.

337. Francis, *Making Sense*, *supra* note 53, at 804-20.

338. *See* 15 U.S.C. § 2 (2024) (prohibiting monopolization, attempted monopolization, and conspiracy to monopolize, without facial limitation to practices that are profitable overall).

339. In the core formulation, the remaining service provider, but not the merged firm, profits from price increases after the deal. For present purposes I assume that this is not a barrier to liability, for the reasons explained in the text: including because merger illegality turns on whether a transaction harms consumers by substantially lessening competition, not whether the defendant in particular happens to be the one profiting from it. But in an alternative formulation there is no third-party service provider, and the deal reduces the number of reproductive-service suppliers from one to zero—from monopoly to "zeropoly." This is one of a few "zeropoly" puzzles in antitrust; I reserve them for another day.

340. *See* 15 U.S.C. § 18 (2024) (prohibiting acquisitions that may substantially lessen competition or tend to create a monopoly, without facial limitation to acquisitions that are profitable overall).

In each of these three cases, the relevant defendants have engaged in the conduct associated with a traditional antitrust violation and have inflicted the same harms. They just happen to have failed to maximize their own profits, like a traditional cartel that inadvertently raised prices above the monopoly point.[341] They might have incurred actual losses, or just less-than-optimal profits.

As Part I demonstrated, there is ample reason to think that in the ordinary course, agencies would decline to allege, and courts would decline to infer, an agreement among the Altruistic Boycotters (perhaps citing *Matsushita*),[342] unprofitable exclusion by a Vindictive Excluder (perhaps on single-monopoly-profit grounds in cases where that theorem would apply),[343] and competitive harm from the Catholic Hospital Merger (perhaps citing *AT&T*).[344] But each of these cases involves a practice of traditional concern to antitrust and a harm that antitrust traditionally abjures. The fact of profit sacrifice is not plausibly exculpatory.

Moreover, these cases are not particularly intractable. A court need not absorb any "teachings of [behavioral economics]" in order to adjudicate them.[345] In fact, nothing requires a court to know about, care about, or read behavioral economics at all, nor even to figure out whether the behavior is "really" profit maximizing in some subtle way. A court can recognize that an Altruistic Boycott exists, or infer its existence, from the same kinds of evidence that it uses to infer other agreements, including the conduct of the participants, evidence of their goals, and their opportunities and incentives to collude.[346] A court can recognize that a Vengeful Excluder is excluding, or will exclude, rivals by reading documents and hearing testimony that says so. A court can recognize that a Catholic Hospital Merger will lead to the loss of a competitor in reproductive-services markets by examining the ethical commitments of the acquirer and its practices after previous deals. And so on. Such adjudication is no more "antitheoretical" than any other ordinary-course, garden-variety judicial fact-finding, whether it involves the prediction of future facts or the inference of present or past ones.

But at least two objections merit serious attention. The first is that non-profit-maximizing conduct is unlikely to occur very much, or persist very long,

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341. *E.g.*, Freedom Holdings, Inc. v. Spitzer, 447 F. Supp. 2d 230, 251 (S.D.N.Y. 2004) (noting that "even an ineffective cartel" can be unlawful).

342. *See supra* Section I.A.2 (describing the role of profit maximization in the inference of agreement).

343. *See supra* Sections I.A.3, I.A.4 (describing the role of profit maximization in judicial acceptance of theories of monopolization).

344. *See supra* Section I.A.1 (describing the role of profit maximization in predicting the effects of mergers).

345. Ginsburg & Moore, *supra* note 10, at 98.

346. *See, e.g.*, Interstate Cir., Inc. v. United States, 306 U.S. 208, 221-27 (1939).

because it is costly to the perpetrator, particularly if it faces competition. This recalls the Chicago claim that unprofitable conduct will not last long because it will be, in effect, sufficiently disciplined by the market.[347]

To be sure, businesses often make, and try to make, profit-maximizing choices. But, as we have already seen, there is abundant evidence that, in at least some cases, businesses are willing and able to bear the costs of non-profit-maximizing harmful behavior, including for reasons of value, animus, faith, managerial incentives, or otherwise.[348] Competition may not preclude such conduct because rivals may face quality or cost disadvantages, or barriers to entry or expansion, or because they may choose to increase their own prices rather than fight for share.[349] Non-profit-maximizing conduct, like any other expense, may be funded by market power, sales in other markets, an unrelated revenue stream, or simple willingness to use reserves.[350]

The second objection is that opening the door to post-profit claims invites plaintiffs to concoct fanciful theories and, by litigating them, impose absurd burdens on defendants and courts. This is a reasonable concern. But—while some abuse is possible—it is not obvious why a plaintiff minded to cook up a false theory would find it easier (rather than harder) to do so in non-profit-maximizing terms. Indeed, on the contrary: as the usual rule is profit maximization, plaintiffs will surely get more skepticism, not less, when advancing a post-profit theory. Moreover, the standard bulwarks against meritless complaints—particularly Rule 12 dismissal, calibrated to preclude "a plaintiff with 'a largely groundless claim' [from] be[ing] allowed to 'take up the time of a number of other people'"[351]—still operate. Courts are well known for taking a skeptical eye to antitrust complaints within the profit-maximization paradigm; there is not much reason to think that they will suddenly become credulous whenever a non-profit-maximizing theory is advanced. And the result will be alignment between antitrust and an array of other areas of law, from tort to crime, that confront allegations about business behavior without a rigid paradigm—an outcome that is evidently sustainable in those settings.

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347. *See, e.g.*, Easterbrook, *supra* note 21, at 267-68.

348. *See supra* Section I.B.

349. For a thoughtful discussion, see Tor, *supra* note 8, at 625-43.

350. Relatedly, Prajit K. Dutta and Roy Radner have argued that there has been "little rigorous analysis" of the market-selection hypothesis and have developed a model suggesting that only *non*-profit-maximizing firms will ultimately avoid failure, with profits defined as withdrawals. Prajit K. Dutta & Roy Radner, *Profit Maximization and the Market Selection Hypothesis*, 66 Rev. Econ. Stud. 769, 770-71 (1999).

351. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007) (quoting Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347 (2005)).

2. *The Limits of Post-Profit Antitrust*

Despite its basic appeal, the case for "post-profit antitrust" is limited. The most important limit flows from antitrust's deepest principles. If antitrust doctrine has a unifying theme, it is that antitrust violations harm consumers, workers, and other trading partners through collusion or exclusion.[352] In my own preferred formulation: such violations suppress the ability or incentive of rivals to contest trading relationships in ways that tend to cause welfare harms.[353]

Antitrust's traditional concern with collusion and exclusion is grounded, in significant part, in the logic of profit maximization. The reason that collusion and exclusion tend to harm consumers is, primarily, because they cause profit-maximizing actors to increase price.[354] Specifically, when the ability or incentive of rivals to contest share is reduced—for example, because a defendant has raised its rivals' costs, or colluded with them—the result is that trading partners' next-best alternatives become less attractive (reducing a defendant's own-price elasticity of demand[355]), or that those alternatives exert less downward pressure on a defendant's profit-maximizing price (e.g., because they are sharing profits). In either case, the punchline is that collusion and exclusion contribute to "pricing power," which means that they make it *profitable* for one or more market participants to increase prices.

Accepting the centrality of this concern commits antitrust to a close relationship with profit maximization—not as an antitrust theory of behavior, but as an element of an antitrust conception of harm. This is a significant limitation. There are plenty of ways in which an agreement, unilateral practice, or merger could result in consumer harm that does not flow through this mechanism. For example, a benevolent and kind owner, with a long history of charging below-cost prices, could sell her company to a mean, exploitative owner who will hike those prices upon taking over. A group of firms that do not compete with one another could agree not to sell to certain categories of consumers (e.g., those in red or

352. *See, e.g.*, Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 19-20 (1979); United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc); Major League Baseball v. Crist, 331 F.3d 1177, 1186 (11th Cir. 2003); *see also* Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527, 532-33 (2013) (discussing collusion and exclusion).

353. Daniel Francis, *Antitrust Without Competition*, 74 DUKE L.J. 353, 435-38 (2024); *see also* Jonathan B. Baker, *Conduct that Increases Market Power Without Lessening Competition: A Challenge for Antitrust Law*, ANTITRUST L.J. (forthcoming) (manuscript at 2), https://ssrn.com/abstract=5113399 [https://perma.cc/RMM5-8ARD] (advancing a related perspective).

354. FRANCIS & SPRIGMAN, *supra* note 54, at 53-54.

355. Own-price elasticity of demand is the responsiveness of demand for a product to a change in its price. Thus, when own-price elasticity of demand is *reduced*, purchasers become *less* responsive to changes in one's own price for it, making a price increase more attractive.

blue states). A monopolist could spontaneously raise prices or reduce quality, either because it was charging less than a profit-maximizing amount to start with, or because it ultimately increased its prices above a profit-maximizing level. In principle, these fact patterns represent mergers, agreements, and unilateral practices that harm consumers, but they lie outside antitrust's traditional zones of concern.[356]

To be sure, some have suggested that at least some practices that tend to harm consumers without involving the suppression of the ability or incentive of rivals to compete should raise antitrust concern. Former FTC Commissioner J. Thomas Rosch once argued that Section 7 should prohibit a seller from selling a business to a buyer that is less concerned with customer goodwill, and that as a result will raise prices.[357] Harry First has argued that monopolization law might condemn excessive pricing.[358] Steven C. Salop has argued, and the Merger Guidelines once stated, that an increased ability to evade price regulation is a cognizable harm in merger analysis.[359] The FTC recently alleged that price-increasing practices by pharmacy benefit managers (PBMs) constitute unfair methods of competition, even though they do not involve collusion among PBMs or exclusion of their rivals.[360] Some years ago, the FTC undertook enforcement action directed at a patent owner for violating a licensing price commitment.[361]

But courts have usually rejected such efforts to impose antitrust liability when they find that a defendant has not suppressed the ability or incentive of

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356. *See* FTC v. Lundbeck, Inc., 650 F.3d 1236, 1238, 1240-43 (8th Cir. 2011) (holding that acquisitions resulting in very significant price increases did not violate Section 7 for want of the traditional mechanism of harm). In *Lundbeck*, the merging parties' drugs were not in the same product market and exhibited limited substitutability, implying that the post-merger price increase did not reflect harm to competition). *Id.*

357. Concurring Statement of Commissioner J. Thomas Rosch: FTC v. Ovation Pharms., Inc., FTC File No. 081-0156, at 1 (Dec. 16, 2008), https://www.ftc.gov/system/files/documents/public_statements/418091/081216ovationroschstmt.pdf [https://perma.cc/4F46-AN98].

358. Harry First, *Excessive Drug Pricing as an Antitrust Violation*, 82 ANTITRUST L.J. 701, 704-05 (2019).

359. Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1975 (2018); 1982 MERGER GUIDELINES, *supra* note 242, at 28-29; 1984 MERGER GUIDELINES, *supra* note 243, at 32.

360. Complaint at 1-3, *In re* Caremark Rx LLC, F.T.C. No. 9437 (F.T.C. filed Sep. 20, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/d9437_caremark_rx_zinc_health_services_et_al_part_3_complaint_corrected_public.pdf [https://perma.cc/8Z2G-G4MT].

361. Negotiated Data Sols. LLC, Analysis of Proposed Consent Order to Aid Public Comment, 73 Fed. Reg. 5846, 5847-48 (Jan. 31, 2008).

rivals to compete, even if consumers are harmed.[362] There are obvious dangers in turning antitrust into a kind of master consumer-protection project, with every price hike and quality hit fair game for challenge. Among other things, an antitrust system that allowed victims to challenge any practice or transaction that harmed trading partners in any fashion would be swamped by litigation, and the threat of such litigation would overshadow every commercial dispute. It would also appear to disconnect antitrust from its central, if ambiguous, relationship with effects on "competition" as such.[363]

The dangers of limitless antitrust are not unique to a post-profit approach, but they do become more acute when antitrust's imagination is decisively opened to the possibility of non-profit-maximizing behavior. Only then, for example, does it become possible to imagine businesses charging both more and less than a profit-maximizing price, and thus to object to the fact that they have started to act in a "mean" way or ceased to act in a "benevolent" one. Among other things, some commentators seem to fear that such (and similar) cases might end up at antitrust's door when they suggest that allowing deviations from profit maximization would tip antitrust into a free-for-all.[364]

But it is possible to accept allegations and evidence of non-profit-maximizing behavior without asking antitrust to dry every glistening eye. The needle can be threaded by disaggregating the elements of an antitrust claim—specifically, by separating the final step in a theory of harm from the preceding ones. Retaining antitrust's characteristic mechanism of harm, while broadly accepting the possibility of non-profit-maximizing behavior, yields the following rule: *a sound antitrust theory of liability must involve the suppression of rivals' ability or incentive to compete (i.e., broadly, collusion or exclusion*[365]*) that tends to harm consumers by contributing to pricing power—but the conduct causing this effect need not be, itself, profit*

362. *See, e.g.*, NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 139 (1998); FTC v. Qualcomm Inc., 969 F.3d 974, 1002 (9th Cir. 2020); Rambus Inc. v. FTC, 522 F.3d 456, 463 (D.C. Cir. 2008).

363. *See* Francis, *supra* note 353, at 363-67 (noting the central but ambiguous role played by the harm-to-competition concept in antitrust doctrine); *see also* United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (per curiam) (noting that to violate Section 2, conduct "must harm the competitive process and *thereby* harm consumers" (emphasis omitted and added)).

364. *See supra* notes 268-271 and accompanying text.

365. Mergers and acquisitions may reduce rivals' ability to compete (for example, by foreclosing their access to inputs, distribution, customers, or complements) or their incentive to do so (for example, by bringing them under common ownership with the acquirer, or by making tacit collusion easier and more effective). *See* FRANCIS & SPRIGMAN, *supra* note 54, at 53 (explaining this point more fully).

maximizing.[366] One might think of this as the "Spear-Tip Rule" on the basis that a theory of harm can involve whatever behavior a plaintiff can successfully prove, but the ultimate harm—the tip of the spear, if you like—must involve increased pricing power from the suppression of rivals' ability or incentive to compete.

The relevant harm must, as always, be assessed against a counterfactual "but-for" world in which the relevant practice or transaction did not take place.[367] Moreover, there are good—perhaps even compelling—reasons to impose a profit-maximization constraint upon the construction of this but-for world (that is, to assume profit-maximizing behavior in it), although a post-profit perspective does not strictly require imposing such a constraint, and reasonable minds might differ about its appeal. Such a constraint would reflect the proposition that trading partners, rivals, and consumers are entitled to be protected against non-profit-maximizing harms but ought not have an antitrust right to the continuation of non-profit-maximizing (and thus likely inefficient) charity, error, or strategy. For example, to anticipate a hypothetical given below, suppose that a vertically integrated company had been supplying inputs at bargain-basement prices to downstream rivals, from sheer goodwill.[368] A prospective acquirer of any kind might reasonably wish to restore profit-maximizing pricing, and it does not seem socially desirable to shackle it with an antitrust obligation not to do so, including because such an obligation would result in suboptimal investment incentives and ultimately consumer harm. The imposition of a profit-maximization constraint on the construction of a but-for world avoids this perverse outcome, ensuring that post-profit antitrust protects against non-profit-maximizing harms without also entrenching non-profit-maximizing benevolence.

The Spear-Tip Rule is consistent with liability in the Altruistic Boycott, the Vindictive Excluder, and Catholic Hospital Merger cases. In each case, the practice tends to harm consumers through the creation or increase of pricing power through collusion with or exclusion of rivals. The fact that the collusion or exclusion is not itself profit maximizing is immaterial.

By way of further illustration, consider a vertical merger that would unite a downstream manufacturer of finished consumer equipment with an upstream manufacturer of components. Suppose that the core concern is input foreclosure—that is, that the merged firm might cut off ("foreclose") rival equipment-makers' access to components. Traditional analysis asks whether, if the merged

366. Antitrust's concept of consumer harm is not limited to literal consumers, and is complicated and controversial. The text above the line here is not intended to disturb debates about its meaning: the reader is encouraged to project any preferred definition onto the text. *See id.* at 4, 5 & n.6 (highlighting some of the complexities).

367. *See supra* note 23.

368. *See infra* note 371 and accompanying text.

firm restricted its downstream rivals' access to inputs, the additional downstream profits resulting from weaker equipment rivals would exceed the upstream losses from selling fewer components. If so, the merger is illegal; if not, it is not.[369]

Some variations on this simple story, involving price increases driven by a vindictive manager (or managerial incentives, or an ethical view that the input is harmful, or anything else except profit), illustrate the consequences and limits of post-profit antitrust applied with the Spear-Tip Rule:

- **Vindictive foreclosure with contribution to pricing power following a vertical merger.** Suppose that foreclosing rivals' access to inputs would enable the merged firm to increase its downstream pricing power, but that doing so would not be profit maximizing because upstream losses would exceed downstream gains. But suppose a plaintiff could prove that the merged firm was going to foreclose anyway (or had already done it). That merger, by hypothesis, would harm consumers by excluding downstream rivals and would therefore satisfy the Spear-Tip Rule. The merger would be unlawful.
- **Vindictive foreclosure without contribution to pricing power following a vertical merger.** Now suppose that there were plenty of very close substitutes for the upstream input but that the merged firm was going to cut off its rivals anyway. In such a case, there would be no consumer harm from the exclusion of downstream rivals because rivals will simply switch to substitutes, leaving consumers unaffected. As a result, the merged firm would not gain pricing power downstream: the characteristic mechanism of harm is absent, and the Spear-Tip Rule is not satisfied. The transaction would therefore be lawful.
- **Vindictive foreclosure with contribution to pricing power without a merger.** The Spear-Tip Rule is a conception of harm and a constraint on theories of liability, not a replacement for all antitrust doctrine. As a result, the regular rules of the antitrust road still apply. To illustrate, suppose that the firm had integrated organically, not by merger. And suppose that the firm had simply decided to foreclose rivals' access to inputs by unprofitably increasing price or reducing supply of inputs to downstream rivals. To the extent that doing so caused harm by contributing to the integrated firm's downstream pricing power, the result would satisfy the Spear-Tip Rule. But the conduct would not be illegal: it would

369. *See* Illumina, Inc. v. FTC, 88 F.4th 1036, 1051 (5th Cir. 2023).

be covered by the privilege that precludes Section 2 liability for most unilateral refusals to deal.[370]

- **Vindictive price increase by an unintegrated input supplier.** Suppose that an unintegrated input supplier with some power over input price simply increases its prices because it is feeling mean. Consumers are harmed, but the Spear-Tip Rule is not satisfied because the harm is not the consequence of collusion with, or exclusion of, rivals. (The conduct is also covered by the same privilege as above.) As a result, post-profit antitrust does not imply liability.
- **Terminating a "benevolent" input-price reduction.** Finally, suppose that an integrated business—consisting of an input supplier and a downstream manufacturer—has historically been owned by a generous soul that insists on selling inputs to downstream rivals at cost, and that the business is to be sold to private equity that plans to raise upstream prices to a profit-maximizing level. Consumers will be harmed. But the Spear-Tip Rule is not satisfied because the merged firm has always been integrated—it will have no more power after the deal than it did beforehand—and, moreover, the transaction inflicts no harm compared to a but-for world in which the integrated firm was simply maximizing its own profits all along.[371]

As a final demonstration of the principle's application—motivated by a live policy effort at the time of writing—consider the FTC's recent expression of concern that tech platforms of all kinds might have acted to "deny or degrade" users'

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370. The "privilege" or "safe harbor" concept under Section 2 is the proposition that some conduct—including most unilateral unconditional refusals to deal—is per se lawful regardless of its effects. *See* Francis, *Monopolizing by Conditioning*, *supra* note 53, at 1982-83, 1992-94; Francis, *Making Sense*, *supra* note 53, at 811-14; Mark S. Popofsky, *Section 2, Safe Harbors, and the Rule of Reason*, 15 GEO. MASON L. REV. 1265, 1278-96 (2008); Werden, *supra* note 58, at 418. Like everything else about Section 2, the existence of such a privilege is contested. *See, e.g.*, Jonathan B. Baker, *What About the Supreme Court? The Lurking Threat to US Antitrust Reform*, 11 J. ANTITRUST ENF'T 154, 157-59 (2023) (arguing that this approach unduly favors defendants).

371. There is a fine line between this bulleted hypothetical and the first one, and reasonable minds might prefer a different treatment of one or the other in order to align their outcomes. But the critical distinction is that the first transaction will cause harm, compared to a profit-maximizing counterfactual, and the second will lead only to the outcome that would have been profit-maximizing in the first place. Moreover, there are clear intuitive reasons to align the first example with "vindictive" exclusivity, in which a downstream firm harmfully forecloses competitors by entering an exclusive agreement with an input supplier: these are two cognate forms of integration. And there are equally clear policy reasons, in addressing the second example, to avoid an interpretation of merger law that would effectively prohibit the sale of vertically integrated businesses to financial acquirers that were likely to seek price increases. *See supra* text accompanying note 368.

access to services based on their viewpoint or political affiliation, including through "anti-competitive conduct."[372] The relevant platforms include, "among others, companies that provide social media, video sharing, photo sharing, ride sharing, event planning, internal or external communications, or other internet services."[373]

The post-profit paradigm provides a helpful analytical framework through which to examine such conduct. It would permit, in principle, a challenge to collective action that harmed consumers and users through a loss of quality or a restriction of output, even if that practice was undertaken not for profit but for a political or social purpose. In such a case, the Spear-Tip Rule would require that any relevant consumer harm must be the result of a contribution to pricing power arising from the hindrance of rival ability or incentive to compete. This would not be the case, for example, if a relevant agreement involved coordination among digital platforms that did not compete with one another, or harm that was not caused by suppression of their ability or incentive to do so.[374] Thus, it would not be sufficient to show that the agreement contributed to the participants' political or strategic willingness to restrict output by simply stiffening their collective resolve—just as a merger that leads to a price increase is not unlawful unless the price increase results from an increase in pricing power.[375]

As these examples illustrate, the Spear-Tip Rule is a conception of antitrust harm. As such, it does not preclude or limit the application of per se rules of illegality or legality that do not turn on harm. The per se rule under Section 1 provides that a naked agreement not to compete, unrelated to the improved satisfaction of consumer demand, is illegal, regardless of its effects.[376] The privilege

372. Press Release, Fed. Trade Comm'n, Federal Trade Commission Launches Inquiry on Tech Censorship (Feb. 20, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/02/federal-trade-commission-launches-inquiry-tech-censorship [https://perma.cc/A4GB-NPJG]; *Request for Public Comment Regarding Technology Platform Censorship*, FED. TRADE COMM'N 1 (Feb. 20, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/P251203CensorshipRFI.pdf [https://perma.cc/37QF-YWPE].

373. *Request for Public Comment Regarding Technology Platform Censorship*, *supra* note 372, at 1 n.1.

374. Antitrust markets in digital settings are often narrowly drawn, as the FTC has emphasized in its digital-markets enforcement. *See, e.g.*, FTC v. Meta Platforms, Inc., No. 20-3590, 2024 WL 4772423, at *9 (D.D.C. Nov. 13, 2024) ("The FTC continues to argue that the market here comprises [personal social-networking] services in the United States, which it defines as online services that possess the 'core functionality' of 'maintaining relationships and sharing with friends and family in a shared space.'" (citations omitted)).

375. *See, e.g.*, FTC v. Lundbeck, Inc., 650 F.3d 1236, 1238, 1240-43 (8th Cir. 2011) (declining to impose liability despite a post-merger price increase, because the price increase did not reflect an increase in pricing power caused by the merger).

376. *See, e.g.*, United States v. Trenton Potteries Co., 273 U.S. 392, 396-98 (1927). As noted below, where the cooperation is reasonably necessary to achieve a benefit that consumers value, per se treatment will often be inappropriate. *See infra* note 398 and accompanying text.

that I and others have identified in Section 2 provides that some unilateral conduct is per se legal, regardless of its effects.[377] Both rules apply without regard to harm; as a result, the Spear-Tip Rule does not affect their application.

C. The Post-Profit Shield

So there is a strong, albeit bounded, case for allowing plaintiffs to plead and prove antitrust violations involving non-profit-maximizing conduct. What about defendants? Some defendants will want to argue that they did not, or will not, inflict harm because they did or will act in a non-profit-maximizing way. Others will want to argue that, even if harm results, a post-profit—and perhaps noble—purpose should be exonerating.

1. Post-Profit Harmlessness

Defendants, like plaintiffs, will sometimes want to plead and prove that businesses will not maximize their profits (or have not done so), and particularly to make that argument about themselves. For example, merging nonprofit hospitals often argue that, given the separation of ownership and profit rights, they will not exploit market power harmfully following the proposed merger.[378] More generally, enforcers routinely hear from firms that they are uniquely committed to low pricing and high quality, even at the expense of profit. ("It's not in our DNA to raise prices" is the usual formulation.) Nor is this always hot air: as Part I demonstrated, on some occasions businesses do pursue missions and values at the expense of profit.[379]

We can concretize this by contemplating one more hypothetical to go along with our Altruistic Boycott, Vindictive Excluder, and Catholic Hospital Merger cases. Discount Dave is the CEO of a firm with some market power that plans to undertake a merger. The merger would generate some cost reductions, but it would ordinarily be unlawful because, if the merged firm were to act in a profit-maximizing fashion, it would cause welfare harms on balance. But Discount Dave, who will direct the operations of the merged firm, testifies that he will run the firm in a non-profit-maximizing way, charging bargain-basement prices, such that the deal will in fact be socially beneficial. Remarkably, all the evidence suggests he is telling the truth.

There are many possible versions of the Discount Dave transaction. In the simplest case, the transaction is a horizontal one: the acquirer is buying a rival

377. *See supra* note 370.

378. *See, e.g.*, FTC v. Univ. Health, Inc., 938 F.2d 1206, 1224 (11th Cir. 1991).

379. *See supra* Section I.B.1.

and will acquire pricing power through the elimination of a close substitute, but Dave testifies that he will keep prices low. In a variation, the transaction is vertical: the acquirer is buying an important input supplier and will have the ability and incentive to increase overall profits by foreclosing rivals, but Dave testifies that he will supply rivals at low prices. (In either case, perhaps the merger is already consummated, and Discount Dave is currently acting just as he promised.) How should post-profit antitrust approach this deal?

The starting point for entertaining a defendant's argument that it will not maximize profit should surely be one of equal treatment with plaintiffs. If no actual harm will result from a practice or transaction—say, because Discount Dave will genuinely charge bargain-basement prices to consumers and rivals regardless of the profit consequences—there is a prima facie case for tolerance. Errors in favor of plaintiffs are, in principle, no more desirable than those in favor of defendants, and the harm from blocking a beneficial transaction is as unwelcome as the harm from allowing a harmful one. So, in an ideal world, defendants would probably have the same ability to use post-profit arguments as shields as plaintiffs to use them as swords.

But on closer investigation, there are a couple of compelling reasons to keep the door closed on Discount Dave and other defendants offering arguments about their own conduct, by limiting inferences and predictions to those that are consistent with profit maximization.

The first and most important reason is a practical one. It does not take much imagination (or cynicism) to believe that defendants will invoke the "but we wouldn't do that" defense as a matter of course, forcing the parties to litigate the defendant's appetite for profit in virtually every antitrust case. (What defendant wouldn't make this argument if it were available?) The regular allocation of the burden of proof to plaintiffs suggests that the resulting litigation burden will fall mainly on plaintiffs. The result would be both to increase the complexity and burden of litigation and to tax antitrust plaintiffs further, at a time when there is widespread agreement that antitrust plaintiffs face an uphill climb.[380]

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380. *See, e.g.*, Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, 35 ANTITRUST 33, 37-38 (2021) ("[P]laintiffs in antitrust cases now face undue burdens in many cases as a result of Chicago School arguments that have been deeply embedded into the case law . . . ."); Herbert Hovenkamp, *The Looming Crisis in Antitrust Economics*, 101 B.U. L. REV. 489, 494 (2021) ("To the extent that courts, including the Supreme Court, have erred in recent years, it has been in ways that favor nonenforcement . . . . Many members of the federal judiciary, including some on the Supreme Court, now exhibit a strong antienforcement bias."); *see also* Mark Meador, *Antitrust Policy for the Conservative*, FED. TRADE COMM'N 25-33 (May 1, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/antitrust-policy-for-the-conservative-meador.pdf [https://perma.cc/H53N-UNLK] (proposing that conservatives should "once more embrace vigorous enforcement of the antitrust laws" and outlining a broad pro-plaintiff reform agenda).

In principle, the regular allocation could be inverted—for example, through a rebuttable presumption that a defendant will act in a profit-maximizing way. But this, too, is vulnerable. Evidence of a defendant's plans and strategy are peculiarly likely to be in a defendant's own hands: its own documents, communications, and testimony. If a favorable record were a basis for an antitrust defense—even one on which defendants bore an initial or ultimate burden—the incentive to "game" the system and generate such evidence as a matter of course would be overwhelming. Every litigation would be flooded with documents evidencing an altruistic low-price strategy. It is hard to think the world would be much better off as a result, or that the cost would be justified by the benefit of additional accuracy in the (likely few) cases in which the defendant will, in truth, not seek to maximize its profits.

Note that this concern does not arise when plaintiffs, rather than defendants, are the ones advancing a post-profit theory. Plaintiffs face the burden of proof anyway and do not seem to have any particularly promising way to try to prebake a record of defendant behavior. It is not obvious why plaintiffs would generally have a distortionary incentive to try to develop a post-profit story in most cases: as noted above, an exotic theory is likely to be somewhat *harder* to prove, and therefore less appealing, than a traditional one. Nor is it obvious why either the parties or an adjudicator would find it more burdensome to engage with a plaintiff advancing a post-profit theory than with a plaintiff advancing a traditional theory. To the contrary: "we won't do that, we'll just profit maximize" may be a particularly easy reply to make and accept.

The second reason to disallow the post-profit shield is that there does not seem to be a way to protect against the risk that defendants may undergo a post-adjudication change of ownership, management, or strategy that results in the defendant ultimately doing the profitable, harmful thing anyway once the litigation is resolved. Because, by hypothesis, the infliction of harm is more profitable than the path of profit-sacrificing altruism, the balance of incentives may often favor such a change. Discount Dave may change his mind, or be replaced, once the antitrust spotlight has moved on to the next transaction.

Formal nonprofit status is no guarantee of enduring good behavior, including because that too can change. To pick a recent high-profile example, in November 2024 OpenAI attempted such a transition.[381] Even entities of a religious

381. *See* Shirin Ghaffary & Malathi Nayak, *OpenAI in Regulator Talks to Become For-Profit Company*, Bloomberg (Nov. 4, 2024, 11:31 PM EST), https://www.bloomberg.com/news/articles/2024-11-04/openai-in-talks-with-california-to-become-for-profit-company [https://perma.cc/G3DK-PGFP]; *Evolving OpenAI's Structure*, OpenAI (May 5, 2025), https://openai.com/index/evolving-our-structure [https://perma.cc/2ZWA-4YWW].

nature may cross this threshold.[382] Thus, even if nonprofit hospitals in fact do not charge profit-maximizing prices, antitrust policy would still face the reality that nonprofit hospitals can give up that status and *become* for-profit competitors.[383]

Creating a class of post-adjudication merged firms with unexercised pricing power—a standing invitation to subsequent changes of ownership or management—does not seem a promising direction for antitrust policy. Every practice that makes consumer harm possible and profitable leaves a loaded gun lying around the economy that someone might later decide to pick up and use.

Third, and finally, a reason of antitrust doctrine, and perhaps of principle, compels the same outcome. Antitrust illegality—"harm to competition," if one likes[384]—is established when a rival's ability or incentive to compete is impaired under circumstances that tend to cause overall welfare harm, even if the actual harm itself may not yet have resulted.[385] Courts have often held that a practice that unlawfully augments market or monopoly power is of no less concern to antitrust simply because the additional power has not yet been used.[386] This presents a blackletter challenge for arguments that antitrust should not be concerned with market or monopoly power, or with increases in it, just because the holder has refrained, or promises to refrain, from using it harmfully.

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382. *See, e.g.*, Michael J. O'Loughlin, *When a Catholic Hospital Becomes For-Profit*, AM.: JESUIT REV. (May 16, 2024), https://www.americamagazine.org/faith/2024/05/16/catholic-hospitals-profit-mission-247913 [https://perma.cc/72D6-VPKG].

383. *See, e.g.*, *FTC Policy Perspectives on Certificates of Public Advantage*, FED. TRADE COMM'N 8 (Aug. 15, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/COPA_Policy_Paper.pdf [https://perma.cc/N7N9-5BSR] (noting the acquisition of the nonprofit Mission Health System in North Carolina by the for-profit HCA Healthcare); Pottstown Sch. Dist. v. Montgomery Cnty. Bd. of Assessment Appeals, 289 A.3d 1142, 1153-54 (Pa. Commw. Ct. 2023) (finding that a hospital operated by a 501(c)(3) was not entitled to a statutory tax exemption under state law because the hospital's executive-compensation scheme meant it did not operate "entirely free from a profit motive"); *see also* Sara Sirota, *The Harms of Hospital Mergers and How to Stop Them*, AM. ECON. LIBERTIES PROJECT 1-3 (Apr. 26, 2023), https://www.economicliberties.us/wp-content/uploads/2023/04/Hospital_QuickTake-0421-002.pdf [https://perma.cc/XP9R-8L7W] (describing increasing mergers of hospitals, including via the purchase of nonprofit hospitals); Michael Wyland, *Hospital Loses IRS Tax Exemption for Noncompliance with ACA*, NONPROFIT Q. (Aug. 18, 2017), https://nonprofitquarterly.org/hospital-loses-irs-tax-exemption [https://perma.cc/237T-3Y6R] (reporting that a nonprofit hospital lost its tax-exempt status for failing to comply with the Affordable Care Act's requirement to conduct a "community health needs assessment").

384. I have suggested that this is an unhelpful formulation. *See* Francis, *supra* note 353, at 417.

385. This is one way to understand the oft-quoted point that antitrust proscribes "harm to the competitive process." *Id.* at 436.

386. *See, e.g.*, Am. Tobacco Co. v. United States, 328 U.S. 781, 811 (1946); United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945); United States v. Am. Airlines, Inc., 743 F.2d 1114, 1117 (5th Cir. 1984); United States v. Google LLC, 747 F. Supp. 3d 1, 117 (D.D.C. 2024).

Together, these three reasons provide strong grounds for declining to allow a defendant to introduce arguments that it will behave in a non-profit-maximizing fashion—at least in cases where the plaintiff is not also making such an argument.[387]

However, as this proviso suggests, the dangers of allowing defendants a post-profit shield are significantly reduced when a plaintiff has already chosen to advance a post-profit case and a defendant is responding to that allegation. This is for at least three reasons. First, the imposition of such a limitation significantly reduces any ex ante incentive for defendants to try to prebake a misleading and self-serving documentary record. Only a small subset of defendants will plausibly expect to be on the receiving end of a post-profit antitrust case, and those defendants are likely to be businesses that are indeed planning to act in non-profit-maximizing ways—the very defendants for whom a strict profit-maximization assumption is least appropriate. Second, if both the plaintiff and the defendant are arguing that a defendant will not behave in a profit-maximizing fashion, that fact alone strongly suggests that the defendant will not in fact strictly maximize its profits. To put it another way: when the parties agree that the defendant will not maximize its profits, a strict assumption of profit maximization no longer seems so sensible. Finally, the prospect of opening the door to defensive post-profit arguments may encourage plaintiffs to choose the post-profit track only in the strongest cases, helping to discourage speculative or bad-faith post-profit lawsuits and theories.

2. *Post-Profit Purpose*

Sometimes, a defendant may wish to make a very different argument: not that it will refrain from inflicting harm, but rather that *even if the conduct will be (or was) harmful*, the fact of a nonprofit purpose is itself exonerating. For

387. In addition to the core case considered in the text—that is, the case of a defendant making an argument about its own conduct—some defendants may wish to argue that a third party will act in a post-profit fashion. For example, a defendant might want to argue that a third party would undertake post-merger entry even if that entry would not be profit maximizing. *See* Avishalom Tor, *Boundedly Rational Entrepreneurs and Antitrust*, 61 ANTITRUST BULL. 520, 522-23 (2016); Tor, *The Fable of Entry*, *supra* note 262, at 488. Such arguments implicate some, if not all, of the concerns described in this Section. Most importantly, a defendant will very often—perhaps almost always—have an incentive to make such arguments (even though it will not usually be in a position to "prebake" evidentiary support in the third party's own documents), and accepting such an argument leaves consumers vulnerable to a change in third-party strategy. As a result, and while there is obviously room for different views within a post-profit framework, my own view is that arguments about third-party conduct should be treated in the same way as arguments about the conduct of a defendant.

example, a boycott might be justified on social, expressive grounds; a church merger might be defended as an exercise of religious freedom; and so on.[388]

This argument is categorically unavailable within the four corners of core antitrust doctrine. In modern law, despite occasional derogations,[389] there is no "nonprofit purpose" exception to antitrust's core rules; a subjective purpose to promote expression,[390] professional ethics,[391] public morale,[392] or any other "uniquely important social objective[]" is of no independent significance.[393] Indeed, the fact that nonprofit purposes are not exculpatory is the flip side of the antitrust axiom that a subjective purpose to profit at rivals' expense is not inculpatory.[394] It also makes practical sense: "[I]t would obviously harm predictability to treat identical practices or transactions differently by reason of subjective occurrent thoughts."[395] More generally, a noble purpose is not normally a defense to other regulatory statutes or crimes: it is no defense to tax evasion or robbery that one plans to donate the proceeds.

It follows that protection for infringing activities that are desirable or tolerable for social reasons must come from elsewhere, such as special exemptions or the First Amendment.[396] Those doctrines lie beyond the scope of this Feature, but as post-profit practices rise to the top of the antitrust agenda, the value of a clear account of their scope will rise in parallel.

Furthermore, while the pursuit of a post-profit purpose does not itself move conduct beyond antitrust's reach, it might play a role in a traditional argument about justification. To the extent that a product or service has been supplied in a manner that promotes a post-profit objective that consumers genuinely value, this, like any other kind of improved demand satisfaction, may constitute a cognizable benefit, subject to all the normal criteria—including antitrust's usual "less restrictive alternative" test and the requirement that benefits are sufficient

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388. *Cf.* Missouri v. Nat'l Org. for Women, 620 F.2d 1301, 1309 (8th Cir. 1980) (reading the Court's pre-1980 cases for the claim that "the activities that were meant to be covered [by the Sherman Act] are competitive activities by competitors with some self-enhancement motivation").

389. *See supra* Section I.C.

390. *See* FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 431-32 (1990).

391. *See* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 695-96 (1978).

392. *See* Council of Def. v. Int'l Mag. Co., 267 F. 390, 405, 411-12 (8th Cir. 1920).

393. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 95 (2021).

394. *See* SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 970 (10th Cir. 1994); Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 380 (7th Cir. 1986).

395. Francis, *Making Sense*, *supra* note 53, at 816.

396. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911-12 (1982); Missouri v. Nat'l Org. for Women, 620 F.2d 1301, 1309-16, 1315 n.16 (8th Cir. 1980); *see also* Sanders, *supra* note 109 (manuscript at 38-45) (considering religious protections under the First Amendment for certain practices).

to offset harms.[397] Thus, for example, if a defendant argued that the customers of the participants in an Altruistic Boycott genuinely valued the altruistic feature of the way in which the product was created, a court would evaluate: (1) the evidence that consumers actually value that feature, (2) the evidence that the challenged collusion was in fact reasonably necessary to provide the relevant benefit, and finally (3) the evidence that the benefits were sufficient in magnitude to outweigh the harms.[398]

IV. CRAFTING POST-PROFIT ANTITRUST

This Part argues that there are at least two plausible and appealing ways in which antitrust can accommodate allegations and evidence that a firm will not, in a given case, maximize profits. A "broad" approach would allow plaintiffs to choose, in framing a theory of harm, whether to invoke a strict profit-

397. In general, when a defendant provides evidence that a practice is justified by particular procompetitive benefits, under the less-restrictive-alternative test "the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means." Geneva Pharms. Tech. Corp. v. Barr Lab'ys Inc., 386 F.3d 485, 507 (2d Cir. 2004). *But see Alston*, 594 U.S. at 98 (emphasizing that courts should not "second-guess degrees of reasonable necessity"(citation and internal quotation marks omitted)). As a result, speaking broadly, antitrust doctrine tolerates practices with harmful effects when they are reasonably necessary to achieve greater overall procompetitive benefits. *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001) (en banc) ("[I]f the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit."); C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927, 929 (2016) ("Courts and agencies apply [the] less restrictive alternative . . . test widely, from agreements in restraint of trade to monopolization to mergers."); 2023 MERGER GUIDELINES, *supra* note 1, at 32-33 (setting out tests of merger specificity and sufficiency); Francis, *Making Sense*, *supra* note 53, at 814-20 (presenting and defending a version of the monopolization-justification test that requires both less-restrictive-alternative analysis and a sufficiency test).

398. *Cf. Alston*, 594 U.S. at 94, 99-102 (analyzing a claimed "amateurism" justification and emphasizing the defendant's failure to connect it to consumer demand). As the text implies, the Court may have been too dismissive in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695-96 (1978), of the notion that the creation of better, safer buildings could not serve in principle as a justification of the challenged practice. To be sure, the defendants should have lost: on the facts of *Professional Engineers*, it seems virtually inconceivable that banning competitive bidding, as the engineers in that case did, actually contributed to quality at all, much less that the ban was reasonably necessary for that purpose or that the practice was beneficial overall as a result. Nevertheless, it seems quite wrong to suggest that the benefit of a safer building is noncognizable in principle, either as such or because of the nature of the challenged practice. Indeed, just a year later the Court would indicate that consumer benefits could redeem what would, on the Court's telling, otherwise be price-fixing. Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 9 (1979).

maximization principle for inferences and predictions. A "narrow" approach would recognize post-profit harms as a domain for Section 5 of the FTC Act.

A. The Broad Approach: Plaintiff Choice

The first approach is the simplest. Non-profit-maximizing conduct can be accommodated in the antitrust system by allowing plaintiffs in an individual case to choose whether to allege, and to try to prove, that a business has engaged in conduct that violates the antitrust laws without maximizing profits.

This approach begins from the proposition that plaintiffs may pick their own theories of harm.[399] As there is no doctrinal rule to the contrary,[400] a plaintiff may try to plead and prove either a "traditional" theory, with inferences and predictions strictly limited by the profit-maximization principle as the D.C. Circuit indicated in the AT&T/Time Warner merger case, or a "post-profit" theory, involving some conduct by a defendant or third party that is not profit maximizing, with no such limitation. As always, a plaintiff may try both in the alternative.[401]

This will not turn antitrust upside down. Most complaints and cases will remain traditional ones. For one thing, most business behavior plays out along, or close to, profit-maximization lines. For another, as noted above, courts tend to approach antitrust complaints with a skeptical eye, and alleging a post-profit theory will probably not be a persuasive litigation choice unless the plaintiff has a good reason to expect that it will be plausible.

Nevertheless, on some occasions — including cases of "harms without profit" like those surveyed above[402] — a plaintiff will prefer to try to plead and prove a theory that turns, in part, on non-profit-maximizing behavior. In such cases, the plaintiff may try to do so, subject to the regular burdens and to the defendant's right to offer whatever alternative account of behavior it likes — including a post-profit account — in rebutting the allegations. This reflects the observation, developed in detail above, that the dangers of allowing a defendant to request an inference or prediction of post-profit behavior are significantly lessened when the plaintiff has already elected to do so.[403]

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399. *See, e.g.*, Dennis v. City of Philadelphia, 19 F.4th 279, 291 (3d Cir. 2021) (noting "the longstanding principle that the plaintiff, as the master of the complaint, is free to choose between legal theories").

400. *See supra* Section III.A.1.

401. *See, e.g.*, United Roasters, Inc. v. Colgate-Palmolive Co., 649 F.2d 985, 990-91 (4th Cir. 1981) (noting the general right to plead alternative theories); Breeding v. Massey, 378 F.2d 171, 178 (8th Cir. 1967) (same).

402. *See supra* Section I.B.

403. *See supra* Section III.C.1.

The broad approach offers a general antitrust paradigm that puts the profit principle in its place and improves antitrust's ability to engage with the complications of the real world. There is no reason to think it any less workable here than it is in other areas: among other things, as we have seen, adjudicators get by just fine outside the antitrust realm without an inflexible theory of organizational behavior for the purposes of inference and prediction.[404]

Moreover, the broad approach is a rough analog of a practice that is already common in antitrust litigation. Under existing law, an antitrust plaintiff is entitled to choose whether to plead and prove a case under the "per se" rule or under the rule of reason. In a per se case, if the practice itself is proved, the defendant may not rebut the proposition that that practice is unreasonably harmful to competition.[405] By contrast, if the plaintiff opts for a rule-of-reason case, it must prove harm, and a defendant may contest that harm will occur.[406] In effect, an antitrust plaintiff may choose whether to invoke an irrebuttable presumption about an economic tendency associated with the challenged practice. If it does so, the relevant tendency is conclusively presumed; if it does not, the plaintiff must take the long road to proving actual or likely effects on competition. The plaintiff may, of course, plead both in the alternative.[407]

The broad approach reflects a similar logic. Just as the per se rule reflects judicial experience that certain practices are generally harmful, under the broad approach, the profit presumption—that is, the use of profit maximization as a strict constraint on predictions and inferences—would reflect judicial experience that businesses generally pursue profit. Under the broad approach, a plaintiff may, but need not, invoke and rely on this presumption.

To see how this might work in practice, return to the Altruistic Boycott, Vindictive Excluder, Catholic Hospital Merger, and Discount Dave cases.

In an Altruistic Boycott case, a plaintiff may have direct evidence of the relevant agreement (e.g., meeting minutes or communications soliciting and expressing acquiescence). If so, there is no need for inference: the agreement itself is proved directly, and whether it is rational or not is beside the point.[408] But if a

404. *See supra* Section III.A.2.

405. United States v. Trenton Potteries Co., 273 U.S. 392, 407 (1927).

406. Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 96-97 (2021).

407. *See e.g.*, United States v. Apple, Inc., 791 F.3d 290, 297 (2d Cir. 2015).

408. As noted in Section I.C. *supra*, courts in antitrust cases do rely on the distinction between direct and circumstantial evidence. *See, e.g.*, Rossi v. Standard Roofing, Inc., 156 F.3d 452, 466 (3d Cir. 1998) ("[W]hen the plaintiff has put forth direct evidence of conspiracy, the fact finder is not required to make inferences to establish facts, and therefore the Supreme Court's concerns over the reasonableness of inferences in antitrust cases evaporate."). I will reserve for another day the deeper theoretical concern that the direct/circumstantial distinction is itself

plaintiff lacks such evidence, it may attempt to offer a theory of what is going on by way of inference. This might be a "traditional" profit-driven theory—for example, alleging that the boycott helps to eliminate the need to compete on costly "green" technology. Or it might be a post-profit theory, explained by reference to a strategy or value, such as a commitment to environmentalism, proved with documents and testimony that illuminate the business's commitment to the strategy or value and its impact on conduct.

The point of the broad approach is that a court would be open to either kind of theory, with the plaintiff entitled to advance either or both. In a traditional case, the court's predictions and inferences would be strictly constrained by profit maximization: a defendant would not be permitted to argue that an alternative objective function should be imputed to it. In a post-profit case, by contrast, the plaintiff would be allowed to try to prove that the defendant had engaged in the relevant collusive conduct for *any* reason, including its ethical commitments, and, once the plaintiff has proffered a post-profit theory, the defendant would be entitled to make any argument it liked about its own objective function.

Likewise, in a Vindictive Excluder case under the broad approach, a plaintiff may choose to plead and prove the elements of monopolization—monopoly power, exclusion, contribution to monopoly, and lack of privilege[409]—even though the scheme would not maximize the defendant's profits. For example, a plaintiff may allege that a defendant is engaging in, say, tying between strict complements, excluding rivals and injuring consumers, and injuring its own bottom line for the reasons implicit in the single-monopoly-profit theorem. If a plaintiff alleges a post-profit case of this kind, the defendant is entitled to argue, and to offer evidence, that it would in fact act (or has acted) in a profit-maximizing fashion, or in some other way.

In a Catholic Hospital Merger case, a plaintiff may attempt to plead and prove that the transaction will harm consumers and violate merger law through its impact on the reproductive-services market, even though that impact would not result from profit-maximizing behavior.[410] (My own view is that under ideal

illusory, and that *all* fact-finding requires inference, such that there can be no "direct" proof of anything. *See, e.g.*, Richard K. Greenfield, *Determining Facts: The Myth of Direct Evidence*, 45 HOU. L. REV. 1801, 1804 (2009) ("There simply is no category of evidence that brings us into direct contact with crucial facts because no such contact is possible. All facts are a function of interpretation, and this unavoidability of interpretation makes all facts a matter of inference and all evidence, whether called 'direct' or 'circumstantial,' nothing more or less than a contribution to that inferential process.").

409. *See* Francis, *Making Sense*, *supra* note 53, at 804-20 (offering and defending this understanding of monopolization).

410. As noted above, this hypothetical is provocative in more ways than one, including because the merged firm is not the one charging the increased prices. *See supra* note 339.

merger law, the transaction might still be lawful because of relevant benefits in other markets, although existing doctrine appears to the contrary.[411])

Finally, in a Discount Dave case, a plaintiff may prevail by showing that profit-maximizing behavior will lead to harm, regardless of the CEO's earnest plan to sacrifice profits through low prices. Even if the acquisition is already consummated and the merger firm is in fact behaving altruistically, a plaintiff can still prevail by showing that profit maximization would lead to harm.

Adopting the broad approach would reframe antitrust's relationship with profit maximization, bringing clarity and appealing outcomes in the cases where it matters. It would allow plaintiffs to elect whether or not to impose the profit-maximization constraint on judicial prediction and inference: thus, for example, if *Matsushita* had been litigated under a post-profit approach, the plaintiff would likely have elected to allege that the agreement was motivated by an industrial-policy goal of growth, rather than profit maximization. Under the broad approach, plaintiffs would no longer be constrained to make tortured allegations that conduct was profitable.[412] And they would be able to plead and prove that third parties—like "lifestyle" competitors—will not in fact protect against harms. Conversely, defendants would not be able to persuade a court to infer or predict that they will pull their punches in dealings with rivals or customers.[413] A plaintiff facing a nonprofit or altruistically managed defendant will be able to choose whether to impose the profit paradigm as a constraint on inferences and predictions, or to leave the field open for competing post-profit theories.

The result will be a simple, coherent, and attractive rule. Antitrust liability will be imposed in cases where a plaintiff can prove *either* that a profit-maximizing defendant would likely cause the kind of harm with which antitrust is concerned or that *this* defendant, idiosyncratically, will likely do so.

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411. United States v. Phila. Nat'l Bank, 374 U.S. 321, 370-71 (1963); *see also* KAPLOW, *supra* note 121, at 114 n.38 (critically noting the unappetizing implications of a strict rule against considering out-of-market efficiencies in a merger case).

412. *See, e.g.*, Complaint ¶ 6, Texas v. BlackRock Inc., No. 24-cv-437 (E.D. Tex. Aug. 1, 2025), https://climatecasechart.com/wp-content/uploads/case-documents/2024/20241127_docket-624-cv-00437_complaint-1.pdf [https://perma.cc/B7GA-PSC4].

413. *Cf.* United States v. Brown Univ., 5 F.3d 658, 672 (3d Cir. 1993) (accepting defendant arguments that collusion by educational institutions is less likely than common-or-garden price-fixing to have harmful effects); FTC v. Butterworth Health Corp., 946 F. Supp. 1285, 1296-97 (W.D. Mich. 1996) (accepting defendant arguments that a nonprofit-hospital merger is less likely than a common-or-garden hospital merger to have harmful effects).

B. The Narrow Approach: Unfair Methods

The broad approach might not be universally appealing. Some commentators may be reluctant to open the court door to allegations and evidence of non-profit-maximizing conduct;[414] some lower courts may understand themselves to be constrained by contrary appellate authority.[415]

For those unwilling or unable to adopt the broad approach, a solution with a narrower gauge is available. Section 5 of the FTC Act prohibits "unfair methods of competition"—an elusive formulation.[416] It includes at least everything the antitrust laws prohibit, plus some additional conduct.[417] There is no agreement on what is in the delta, except invitations to collude.[418]

The core point here is simple, and a version of it has been made by others.[419] Section 5 is a promising tool to prohibit conduct that resembles traditional antitrust violations but does not maximize profits. The nature of such conduct is identical to any other antitrust violation: the only difference is the effect, or anticipated effect, on the defendant's own bottom line. Thus, the "methods of competition," if you like, are equally "unfair."[420] And to the extent that one might be concerned about the second-order consequences of liability for non-profit-maximizing antitrust violations—including the risk of a deluge of meritless private suits—Section 5 is appealingly narrow. It lacks the threat of private enforcement, or treble damages, limited only to injunctive relief.[421]

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414. *See supra* notes 268-271.

415. *See, e.g.*, United States v. AT&T, Inc., 916 F.3d 1029, 1044 (D.C. Cir. 2019); Dolphin Tours, Inc. v. Pacifico Creative Serv., Inc., 773 F.2d 1506, 1511-12 (9th Cir. 1985).

416. *See* FRANCIS & SPRIGMAN, *supra* note 54, at 645-52 (citing 15 U.S.C. § 45(a) (2024)).

417. *See generally* Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227 (1980) (reviewing the function and content of Section 5).

418. *See* FED. TRADE COMM'N, NO. P221202, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT 12 n.71 (2022).

419. *See, e.g.*, Reeves & Stucke, *supra* note 8, at 1583-87.

420. *See supra* Section III.B.2.

421. 15 U.S.C. § 45(b) (2024) (describing the FTC's procedure for issuing a cease-and-desist order); *see also* Daniel A. Crane, *Reflections on Section 5 of the FTC Act and the FTC's Case Against Intel*, 2 CPI ANTITRUST CHRON. 2, 11 (2010) ("Section 5 remedies are prospective and preventative rather than compensatory, punitive, or structural."). This is complicated by the possibility of private litigation under some state-law "little FTC Acts." *See* Samuel Evan Milner, *From Rancid to Reasonable: Unfair Methods of Competition Under State Little FTC Acts*, 73 AM. U. L. REV. 857, 879-84 (2024) (noting that "nineteen states have true Little FTC Acts that expressly declare unfair methods of competition to be unlawful, alongside unfair or deceptive acts or practices" and describing those acts).

Amanda Reeves and Maurice Stucke have suggested that "using section 5 of the FTC Act might be justified in . . . cases where anticompetitive conduct is occurring, but where the current antitrust doctrine does not supply a cause of action."[422] If "anticompetitive conduct" in their formulation means "conduct that would violate the antitrust laws but requires inference or prediction of behavior motivated by something other than profit" (rather than, say, *anything* that harms consumers, however it does so), these proposals are coextensive.

But the Spear-Tip Rule would govern here too: liability would require the suppression of rival ability or incentive to compete that tends to cause overall harm.[423] This is consistent with the judicial directive to tether Section 5's unfair-methods provision to antitrust's traditional core principles.[424]

The prospect of using Section 5 as a tool of post-profit antitrust underscores the value of some mild reforms that would improve its fitness for the job and that would be desirable more generally, too.

First, Congress should eliminate the "nonprofit" exemption to Section 5. The statute currently applies to most "persons, partnerships, or corporations" and defines a "corporation" as an entity "organized to carry on business for its own profit or that of its members."[425] This has long been understood to exclude nonprofits.[426] This odd loophole causes a series of headaches in practice, including the inability of the FTC to examine the conduct of nonprofit hospitals despite its unmatched expertise in hospital competition. If Section 5 is to serve as the primary vehicle for post-profit antitrust enforcement, it should cover nonprofits.

Second, Congress should restore the FTC's power to obtain equitable monetary relief (EMR)—such as disgorgement or restitution—to ensure that victims of post-profit wrongdoing can be compensated for their losses. Today, following the Supreme Court's holding in *AMG Capital Management v. FTC*, no federal enforcer has the legal power to return money to injured consumers for antitrust wrongdoing.[427] If Section 5 is to house post-profit antitrust—remembering that if the Sherman Act and Clayton Act are unavailable to private victims, so too are damages claims[428]—then restoring EMR will permit compensation of victims.

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422. Reeves & Stucke, *supra* note 8, at 1584.

423. *See supra* Section III.B.2.

424. *See* E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 134-35 (2d Cir. 1984); Off. Airline Guides, Inc. v. FTC, 630 F.2d 920, 927 (2d Cir. 1980); Boise Cascade Corp. v. FTC, 637 F.2d 573, 578 (9th Cir. 1980).

425. 15 U.S.C. § 44 (2024).

426. *See, e.g.*, Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38357 (May 7, 2024) (noting "Commission precedent and judicial decisions" holding that the FTC lacks jurisdiction over nonprofits).

427. 593 U.S. 67, 75 (2021).

428. 15 U.S.C. § 15 (2024).

Third, antitrust's "state-action" defense—which rests on the ground that a state government has clearly articulated an alternative policy goal—should be disapplied in Section 5 cases. This principle is a peculiarity of antitrust,[429] and it is purportedly local to the legislative history of the Sherman Act.[430] There are cogent reasons to think that it should not, even today, apply under Section 5 of the FTC Act.[431] But the case is stronger if Section 5 is to become the means of redress for post-profit conduct, including because at least some such conduct reflects state ownership or influence.[432] No congressional action is needed: the state-action doctrine was invented by the courts, and they can curtail it.[433]

C. Other Implications

Accepting post-profit antitrust would, or might, have a range of other implications for antitrust doctrine, beyond the core ones outlined above. In closing—in an illustrative, not exhaustive, register—I will briefly identify a handful of further implications that might flow from a post-profit perspective.[434]

The first is that the recoupment element of predation doctrine should be eliminated.[435] Among the implications of post-profit antitrust is the observation that the legality of conduct that harms consumers should not turn even in part on whether the conduct happened to be profitable—and that the Court was wrong when it said that non-profit-maximizing predation is so unlikely that its possibility should be excluded altogether.[436] Predation that causes overall welfare harms through contribution to monopoly power should be unlawful, regardless of whether or not it is also profitable for the defendant.

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429. *Cf.* Garcia v. S.A. Metro. Transit Auth., 469 U.S. 528, 550 (1985) (finding no "freestanding" state-sovereignty exception to the reach of the Commerce Clause).

430. FTC v. Ticor Title Ins. Co., 504 U.S. 621, 635 (1992) (pointedly raising this issue).

431. *See, e.g.*, Daniel A. Crane & Adam Hester, *State-Action Immunity and Section 5 of the FTC Act*, 115 MICH. L. REV. 365, 367-68 (2016).

432. *See supra* Section I.B.5.

433. Parker v. Brown, 317 U.S. 341, 352 (1943).

434. In addition to the five implications highlighted in the text, the post-profit frame invites reflection on the general rule that a defendant may not be liable for monopolizing a market in which it is not present. *See, e.g.*, N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc., No. 17-5495, 2025 WL 368805, at *2 (E.D.N.Y. Jan. 31, 2025) (noting the apparent rule and citing authority for it). Disturbing this principle would raise a host of thorny puzzles.

435. *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 233 (1993).

436. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 319 (2007) ("[W]ithout a dangerous probability of recoupment, it is highly unlikely that a firm would engage in predatory pricing.").

The second is that the no-economic-sense test, in jurisdictions that use it as part of monopolization doctrine, should be applied in a way that recognizes that the challenged conduct may not "make economic sense" in the usual way *at all*, even as a means of exclusion.[437] If a plaintiff chooses to allege a post-profit theory of harm—that is, that the conduct is unlawful but not profit maximizing—it should then be open to a defendant to advance *any* alternative benign explanation for the conduct, even a non-profit-maximizing one. In effect, in post-profit cases, the test should be a "no-organizational-sense" test.

A third relates to the treatment of merger "fixes" in litigation. An emerging strand of cases establishes that courts should consider partial remedies—such as a commitment not to foreclose rivals following a vertical merger—as part of the rebuttal case in a merger litigation.[438] The foregoing discussion implies that, in a traditional case built on profit maximization, the court should consider such remedies only to the extent that they change what the merged firm will find it profitable to do.[439] Allowing a defendant to argue that it will comply with best-behavior promises, even if enshrined in contract or a public "commitment," amounts to handing out the kind of post-profit shield rejected above.[440]

A fourth implication is that agencies and courts ought not lean too hard on a strong rationality constraint when inferring the effects of a proposed merger or practice. A long line of scholarship—from some of the flagship Chicago works to Louis Kaplow's recent landmark work on merger analysis—have implicitly or explicitly favored adopting a background assumption that the relevant practice

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437. I have suggested elsewhere that the no-economic-sense test is unduly defendant friendly. *See* Francis, *Making Sense*, *supra* note 53, at 789-90. Depending on the formulation, it may also turn on an underspecified conception of "harm to competition." *See* Francis, *supra* note 353, at 417-25.

438. *See, e.g.*, Illumina, Inc. v. FTC, 88 F.4th 1036, 1057-59 (5th Cir. 2023); United States v. AT&T, Inc., 916 F.3d 1029, 1041-43 (D.C. Cir. 2019); FTC v. Microsoft Corp., 681 F. Supp. 3d 1069, 1099 (N.D. Cal. 2023).

439. Conversely, in a post-profit case, it would be fair game for a defendant to try to show that it would take commitments seriously even at the cost of profit.

440. Enforcers and commentators have long expressed similar concerns about behavioral relief (e.g., in consent decrees) that leave the incentive to inflict harm intact while attempting to constrain, with enforceable promises, the ability to do so. *See, e.g.*, D. Bruce Hoffman, Acting Dir., Fed. Trade Comm'n Bureau of Competition, Remarks at the Credit Suisse 2018 Washington Perspectives Conference, Vertical Merger Enforcement at the FTC 8 (Jan. 10, 2018), https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf [https://perma.cc/F4LE-T9W9] ("We are aware that conduct remedies that only address the ability to engage in anticompetitive behavior post-merger may not be sufficient to prevent competitive harm because people are smart—they will still have the incentive to engage in that behavior and they may find other ways to act on that incentive. . . . That is why we prefer structural remedies—they eliminate both the incentive and the ability to engage in harmful conduct, which eliminates the need for ongoing intervention.").

is profitable for defendants, and then asking whether the available evidence is more consistent with the hypothesis that the profit comes from increased pricing power or the hypothesis that the profit comes from cost savings.[441] But a post-profit perspective reminds us that defendants may be mistaken, optimistic, or under-informed, or pursuing a goal other than profit, and thus limits the appeal of this analytical approach.

Fifth and finally, the post-profit perspective—and particularly what I have called the "broad" approach—offers some guidance in the analysis of claimed justifications and the design of remedies. For example, when analyzing a claimed justification, an agency or court typically must analyze whether the relevant benefits would reasonably be achieved through means that are less harmful than the challenged practice or transaction.[442] At least as a starting point, this question—dealing with inferred defendant behavior in a counterfactual world—could profitably be approached with the same post-profit principles. This would imply that a plaintiff may choose to argue and try to prove that, but for the challenged practice or transaction, a defendant will act in a non-profit-maximizing fashion, and that a defendant may make such an argument only if the plaintiff has elected to advance a post-profit case.[443]

Likewise, when designing remedies, courts and agencies often must evaluate the likely behavior of defendants and other market participants under various remedial obligations. The post-profit framework suggests that a court or agency should approach that exercise with a profit-maximization assumption in hand, except to the extent that a plaintiff has alleged and proven that some other behavioral paradigm is appropriate.[444] And when a plaintiff successfully makes such a showing, the public interest may best be served by a remedy that prohibits, or otherwise guards against, conduct that, though not profit maximizing, is nevertheless sufficiently likely.

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441. *See* KAPLOW, *supra* note 121, at 22-23, 109; Bowman, *supra* note 228, at 20-21.

442. *See* Hemphill, *supra* note 397, at 937-42; FRANCIS & SPRIGMAN, *supra* note 54, at 175; 2023 MERGER GUIDELINES, supra note 1, at 32.

443. *See supra* Section IV.A. For a thoughtful treatment of related questions in the context of religious healthcare provision, see Sanders, *supra* note 109 (manuscript at 6-16).

444. As with the other implications discussed in this Section, there is much more that might be said about this. Among other things, there is no reason to split liability and remedy for the purpose of designating a post-profit case: a plaintiff that puts profit maximization at issue by alleging a post-profit theory of liability should not be permitted to turn around and invoke a strict profit-maximization constraint for the purposes of remedial analysis. Note too that remedial analysis, like liability analysis, may require a court to consider the expected behavior of third parties, as well as defendants. *See supra* note 387 (suggesting that post-profit arguments about third-party conduct should be treated like arguments about defendant conduct).

CONCLUSION

Antitrust's resilient profit paradigm offers a sensible baseline for an area of law that is primarily concerned with the behavior of business organizations. But it can also exclude and obscure an important set of practices that involve the same conduct, and the same harm, as traditional antitrust violations but defy the assumption that businesses maximize profits. And today those practices are attracting more attention and concern than ever. Antitrust is long overdue a comprehensive reckoning with "post-profit" conduct—from ESG coordination and online-safety boycotts to vindictive monopolization, acquisitions of cash-burning startups, and nonprofit-hospital mergers.

This Feature has outlined a comprehensive theoretical and doctrinal case for expanding antitrust's imagination to encompass such behaviors. It has demonstrated that as a matter of intellectual history and black-letter law, the profit paradigm is a contingent element of the antitrust enterprise, not a foundational one, and an analytical tool, not an empirical axiom. As a matter of antitrust theory, post-profit practices raise the very same concerns as other antitrust violations—at least so long as they involve antitrust's characteristic mechanism of harm, defined through what I have called the Spear-Tip Rule.

There are at least two ways in which allegations and evidence of non-profit-maximizing conduct can be accommodated within antitrust's existing doctrinal structures. The first is a plaintiff-choice principle under the Sherman and Clayton Acts, which reflects the asymmetric costs and benefits of allowing plaintiffs and defendants to put profit maximization at issue in antitrust litigation. The second is a modest, and more generally desirable, development of Section 5 of the FTC Act.

Post-profit antitrust offers a way forward around the deadlocked debate between antitrust's behavioralist reformers and traditionalist conservatives. It demonstrates that we can make progress by opening antitrust doctrine and softening its relationship with the maximization of profit, even without asking courts to accept alternative grand behavioral paradigms or theories. The search for the deeper, subtler truths of business behavior will be a long and arduous enterprise for economists and psychologists. But with a modest tweak or two to existing law, post-profit antitrust is already within our grasp.