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# Unraveling the Chicago/Harvard Antitrust Double Helix: Applying Evolutionary Theory to Guard Competitors and Revive Antitrust Jury Trials

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# UNRAVELING THE CHICAGO/HARVARD ANTITRUST DOUBLE HELIX:

## APPLYING EVOLUTIONARY THEORY TO GUARD COMPETITORS

### AND REVIVE ANTITRUST JURY TRIALS

Thomas J. Horton<sup>†</sup>

#### I. INTRODUCTION

One of the most striking and shocking antitrust paradigms in the United States today is an extreme judicial tolerance of monopolies and predatory conduct.<sup>1</sup> Turning Section 2 of the Sherman Act<sup>2</sup> on its

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1. *See, e.g.*, *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004) (defending monopoly pricing as “an important element of the free-market system”); KENNETH M. DAVIDSON, *REALITY IGNORED: HOW MILTON FRIEDMAN AND CHICAGO ECONOMICS UNDERMINED AMERICAN INSTITUTIONS AND ENDANGERED THE GLOBAL ECONOMY*, at xviii (2011) (“[Arguing that,] [o]ver time, . . . the concern with undue business power as a threat to freedom [has] shifted to a concern with undue government regulation of business as a threat to individual political freedoms.”); Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497, 498 (2009) (“The Court’s view on monopolies has become forgiving.”); Spencer Weber Waller, *The Past, Present, and Future of Monopolization Remedies*, 76 ANTITRUST L.J. 11, 12 (2009) (“[M]onopolization cases and abuse of dominance cases (particularly successful ones) are relatively rare birds.”); Spencer Weber Waller, *The Role of Monopolization and Abuse of Dominance in Competition Law*, 20 LOY. CONSUMER L. REV. 123, 124 (2008) (“In the United States, at least, it seems the balance has tipped solidly in favor of viewing monopolies as less problematic than cartels and similar anticompetitive agreements.”).
2. 15 U.S.C. § 2 (2006). Section 2 of the Sherman Act provides: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .” *Id.* Possessing monopoly power by itself does not violate Section 2; a plaintiff must also

head,<sup>3</sup> a majority of today's Supreme Court views monopolies as "an important element of the free market system" and believes that monopoly pricing allows dominant firms to engage in "risk taking that produces innovation and economic growth."<sup>4</sup> Furthermore, this belief is coupled with a strong antipathy toward antitrust jury trials and an eager willingness to keep monopolization cases away from juries.<sup>5</sup> Consequently, for the increasingly rare plaintiff's jury verdict that may sneak through the expanding arsenal of judicial blockades, such as dismissal and summary judgment, outright reversal likely awaits.<sup>6</sup>

How did we get to such a point? In his groundbreaking 2007 article, *The Intellectual DNA of Modern U.S. Competition Law for*

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show "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966). For an excellent overview of Section 2 of the Sherman Act and relevant cases, see AM. BAR. ASS'N, SECTION OF ANTITRUST LAW, 1 ANTITRUST LAW DEVELOPMENTS 225–323 (6th ed. 2007) [hereinafter ANTITRUST LAW DEVELOPMENTS].

3. See RUDOLPH J. R. PERITZ, COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW 239 (1996) ("[Seventh Circuit Judge Richard Posner's view that] 'whenever monopoly would increase efficiency it should be tolerated, indeed encouraged' . . . turns on its head the traditional view that competition is important both in and of itself, as a fair, meritocratic process, and in light of a whole ensemble of expected benefits including not only efficiency but also low prices to consumers, product innovation, and a preference for independent entrepreneurs.") (quoting RICHARD A. POSNER, ANTITRUST LAW 28 (2d ed. 2001).
4. *Trinko*, 540 U.S. at 407; see also, Stucke, *supra* note 1, at 498 ("[In *Trinko*, the Court] surmised for the first time that charging monopoly prices is 'an important element of the free-market system,' and that monopoly pricing serves as an inducement to 'attract [] "business acumen" in the first place' and engage in 'risk taking that produces innovation and economic growth.'" (alteration in original) (quoting *Trinko*, 540 U.S. at 407).
5. See, e.g., DAVIDSON, *supra* note 1, at 85 (arguing that the Supreme Court has relied on the alleged risks of "chilling effects," "false positives," and "wrong factual conclusions" in antitrust cases to conclude that juries should be stripped of their traditional fact finding functions).
6. See, e.g., *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007) (reversing jury verdict for sawmill operator against Weyerhaeuser for monopolizing Pacific Northwest input market for alder sawlogs); *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (reversing plaintiff cigarette manufacturer's jury verdict against competitor under the Robinson-Patman Act). The government also has shown a great reluctance to file suits under Section 2 of the Sherman Act during the last ten years. See Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1453–54 (2009).

*Dominant Firm Conduct: The Chicago/Harvard Double Helix*,<sup>7</sup> then Federal Trade Commissioner, William E. Kovacic, traced the genesis and development of America's current judicial tolerance for monopolies and intolerance for antitrust jury trials.<sup>8</sup> Applying the creative metaphor of a genetic double helix,<sup>9</sup> Commissioner Kovacic argued that "the intellectual DNA of U.S. antitrust doctrine governing single-firm conduct today . . . is chiefly a double helix that consists of two intertwined chains of ideas, one drawn from the Chicago School of Robert Bork, Richard Posner, and Frank Easterbrook, and the other drawn from the Harvard School (HS) of Phillip Areeda, Donald Turner, and Stephen Breyer."<sup>10</sup>

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7. William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1 (2007).

8. *Id.* at 2–16.

9. Commissioner Kovacic credited "Francis Crick's and James Watson's discovery of the structure of DNA" for the "double helix imagery" used in his paper. *Id.* at 14 n.35. See generally JAMES D. WATSON, *DNA: THE SECRET OF LIFE* (2003). "Genes are sequences of DNA letters that when activated by the cell make a particular protein." Matt Ridley, *Modern Darwins*, in *THE BEST AMERICAN SCIENCE AND NATURE WRITING* 115 (Freeman Dysan ed., 2010). For easy-to-follow discussions of DNA base pairs, see FRANCIS CRICK, *LIFE ITSELF: ITS ORIGIN AND NATURE* (1981), reprinted in *THE OXFORD BOOK OF MODERN SCIENCE WRITING*, 30, 31–33 (Richard Dawkins ed., 2008) and CHARLES SEIFE, *DECODING THE UNIVERSE: HOW THE SCIENCE OF INFORMATION IS EXPLAINING EVERYTHING IN THE COSMOS, FROM OUR BRAINS TO BLACK HOLES*, 91–92 (2006). For an excellent analysis of how DNA works, see Francis J. Ayala, *Molecular Evolution*, in *EVOLUTION: THE FIRST FOUR BILLION YEARS* 132, 150 (Michael Ruse & Joseph Travis eds., 2009). Ayala explains:

In all organisms, from bacteria to humans, the instructions that guide the development and functioning of organisms are encased in the same hereditary material, DNA, which provides the instructions for the synthesis of proteins. The thousands of diverse proteins that exist in organisms consist of the same 20 amino acids in all organisms, from bacteria to plants and to animals. The genetic code, by which the information contained in the DNA of the cell nucleus is passed on to proteins, is shared by all sorts of organisms. All organisms use similar metabolic pathways—sequences of biochemical reactions—to produce energy and to make up the cell components.

*Id.*

10. Kovacic, *supra* note 7, at 13–14 (footnote omitted). Interestingly, when the two schools have clashed, the Supreme Court generally has followed the Harvard, rather than the Chicago School, approach. Daniel A. Crane, *Chicago, Post-Chicago, and Neo-Chicago*, 76 U. CHI. L. REV. 1911, 1918–20 (2009) (reviewing *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST* (Robert Pitofsky ed., 2008)). See generally 8 PHILLIP E.

The first Chicago/Harvard philosophical antitrust chain is built around the idea that monopolies are generally efficient and procompetitive.<sup>11</sup> This chain was constructed methodically by employing Darwinian “survival of the fittest” metaphors<sup>12</sup> essentially to argue that in a laissez-faire economic world, “there is struggle and competition, and the weakest go to the wall.”<sup>13</sup> As stated by Judge Frank Easterbrook, “it is through the process of weeding out the weakest firms that the economy as a whole receives the greatest boost.”<sup>14</sup> The ultimate contention of this philosophical chain is that we should be cautious about trying to apply the antitrust laws to regulate a monopoly firm’s size, structure, or conduct because “[t]he cost of false positives counsels against undue expansion of § 2 liability.”<sup>15</sup>

The second intertwined Chicago/Harvard philosophical antitrust chain involves “cautions about the administrability of legal rules and the capacity of the institutions entrusted with implementing them . . . .”<sup>16</sup> Under this chain, a “prominent focal point for criticism by Areeda and Turner was the availability of jury trials in private antitrust cases.”<sup>17</sup> Indeed, “[t]he inadequacies of juries constituted a recurring justification for the restrictions that Areeda and Turner wished to impose on the prosecution of Section Two theories of liability.”<sup>18</sup> Professor Turner even “recommended that jury trials for private cases be eliminated.”<sup>19</sup> He worried that antitrust issues required “an analysis of economic and business factors beyond the

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AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATIONS* ¶ 1604 (3d ed. 2010).

11. Kovacic, *supra* note 7, at 14–15. Commissioner Kovacic views this helix as “Chicago’s main contribution to the double helix.” *Id.* at 14.
12. See Thomas J. Horton, *The Coming Extinction of Homo Economicus and the Eclipse of the Chicago School of Antitrust: Applying Evolutionary Biology to Structural and Behavioral Antitrust Analyses*, 42 LOY. U. CHI. L.J. 469, 479 (2011); Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645, 683 (1985).
13. Michael Ruse, *The History of Evolutionary Thought*, in *EVOLUTION: THE FIRST FOUR BILLION YEARS* 1, 29 (Michael Ruse & Joseph Travis eds., 2009).
14. Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 COLUM. BUS. L. REV. 345, 346 (2003).
15. *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 414 (2004). Professor Herbert Hovenkamp brilliantly has characterized such purported concerns as “[t]he fake problem of false positives in competitor lawsuits.” Herbert Hovenkamp, *Antitrust’s Protected Classes*, 88 MICH. L. REV. 1, 33 (1989).
16. Kovacic, *supra* note 7, at 14. Commissioner Kovacic considers this to be “Harvard’s main contribution to the double helix.” *Id.*
17. *Id.* at 53.
18. *Id.*
19. *Id.* at 54.

competence of most jurors,”<sup>20</sup> and that the use of intent standards created “a high likelihood that jury decisions [would] be influenced by emotional and other irrational factors.”<sup>21</sup>

It is time to unravel and replace the Chicago/Harvard antitrust double helix. Building upon the evolutionary analyses in previous papers,<sup>22</sup> this article recommends a new philosophical antitrust double helix that will generate increased enforcement of and compliance with the language and spirit of Section 2 of the Sherman Act and Section 7 of the Clayton Act.<sup>23</sup> Following Commissioner Kovacic’s metaphor, a new evolutionary antitrust double helix should be built around the genetic base pairs G-C and A-T.<sup>24</sup> In the recommended new evolutionary antitrust double helix, G-C bases will “guard competitors,”<sup>25</sup> and A-T bases will revive “antitrust [jury] trials.”<sup>26</sup>

First addressing the proposed guarding competitors (“G-C”) base pairs, the author discusses in Part II how the oft-used normative cliché that “antitrust laws protect competition, not competitors”<sup>27</sup> has

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20. Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CALIF. L. REV. 797, 813 (1987).

21. *Id.*

22. See Thomas J. Horton, *Competition or Monopoly? The Implications of Complexity Science, Chaos Theory, and Evolutionary Biology for Antitrust and Competition Policy*, 51 ANTITRUST BULL. 195 (2006); Horton, *supra* note 12.

23. A DNA double helix carries information that can be translated by RNA in a transcription process to make the complex proteins of life. See Ridley, *supra* note 9, at 115. Similarly, our antitrust laws are transcribed and interpreted by our antitrust enforcers and courts to set the rules of economic competition. While recognizing that “there is a general skeptical attitude of a large sector of the legal scholarship towards the evolutionary approach,” Mauro Zamboni, *Making Evolutionary Theory Useful for Legal Actors*, in LAW, ECONOMICS, AND EVOLUTIONARY THEORY 270 (Peer Zumbanson & Galf-Peter Calliess eds., 2011), the author believes that it is time for the antitrust enforcers and courts to begin transcribing and interpreting our antitrust laws from a new philosophical and information template.

24. In DNA, the double helices are held together by hydrogen bonds between guanine (G), which always pairs with cytosine (C); and adenine (A), which always pairs with thymine (T). See CRICK, *supra* note 9, at 31–32. Thus, the alternating individual base pairs, which collectively encode genes, are denoted as G-C or A-T.

25. See *infra* Part II.

26. See *infra* Part III.

27. See, e.g., *ZF Meritor L.L.C. v. Eaton Corp.*, 769 F.Supp.2d 684, 691 (D. Del. 2011). In a famous passage in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), Chief Justice Warren observed that “[t]aken as a whole, the legislative history illuminates congressional concern with the protection of competition, not competitors . . .” *Id.* at 320. For a discussion of how Harvard’s Phillip Areeda selectively used the above language to ultimately “recast the philosophy of *Brown Shoe* from what previously had been seen to be a position of acute concern for the well-being of individual firms to a position of indifference to their fate,” see Kovacic, *supra* note 7, at 58.

been twisted and distorted from its original benign legal use into a dangerous indifference to the welfare of competitors and a strong bias in favor of dominant firms and predatory conduct. Applying an evolutionary analysis, this article contends that a diversity and variety of economic competitors at all levels is crucial to a healthy economic system.<sup>28</sup> Therefore, we should reform the misappropriated and misapplied “protect competition, not competitors” cliché, and return to protecting competition by guarding competitors against unfair and malicious predatory conduct.<sup>29</sup>

Turning to the proposed antitrust jury trials (“A-T”) base pairs in Part III, this article addresses how the Chicago/Harvard antitrust double helix has been successfully employed to neutralize and negate the issue of intent in Section 2 cases,<sup>30</sup> and how the right to and importance of jury trials has been overridden by anti-democratic judicial overreaching.<sup>31</sup> Following evolutionary theory, this article asserts that a jury is well-equipped to determine issues of fairness and predatory intent in a monopolization case, and to reach a meaningful conclusion.<sup>32</sup> We should therefore begin returning monopolization cases to juries and allow jurors to fully consider evidence of intent, purposefulness, and fairness.

## II. UNRAVELING THE CHICAGO/HARVARD APPROACH TO DOMINANT FIRMS

The first Chicago/Harvard antitrust helix boldly accepts, and even lionizes, dominant firms and monopolies.<sup>33</sup> As explained by FTC Commissioner Kovacic, Justices Scalia and Breyer joined forces in the Supreme Court’s 2004 *Trinko* decision, which includes “cautions about the costs of wrongly condemning benign or procompetitive conduct, warnings about the dangers of rules that would mandate cooperation between competitors, and reminders of the institutional limitations of antitrust tribunals.”<sup>34</sup>

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28. See *infra* Part II.B.

29. As explained by Commissioner Kovacic, prior to the evolution of the Chicago/Harvard antitrust double helix, American antitrust doctrine was much less forgiving of dominant firm predatory conduct across a wide breadth of behaviors, including predatory pricing and denying access to essential facilities. See Kovacic, *supra* note 7, at 42–45.

30. See *infra* Part III.

31. See *infra* Part III.

32. See *infra* Part III.A–C.

33. See Kovacic, *supra* note 7, at 35.

34. Kovacic, *supra* note 7, at 67 (footnotes omitted) (citing *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 392, 407–15 (2004)). Commissioner Kovacic observes that the “majority opinion bears the name of Justice Scalia, but the

The first strand of the Chicago/Harvard antitrust double helix presumes:

[t]hat overinclusive applications of antitrust law to control dominant firm conduct pose greater hazards to economic performance than underinclusive applications. This presumption assumes that the likelihood that entry and adaptability by competitors, customers, and suppliers more often than not will blunt dominant firm efforts to exercise market power.<sup>35</sup>

This helix therefore “discourage[s] consideration of [supposed] non-efficiency objectives such as . . . the preservation of opportunities for smaller enterprises to compete.”<sup>36</sup>

Fairness also is anathema under this helix. Indeed, in one passage of their famous joint antitrust textbook, Professors Areeda and Turner argued that “[a]s a goal of antitrust policy, ‘fairness’ is a vagrant claim applied to any value that one happens to favor.”<sup>37</sup>

It is time to reassess the philosophical presumptions of the first Chicago/Harvard antitrust helix, which lionizes dominant firms and monopolies and tacitly lauds and encourages predatory conduct.<sup>38</sup> As stated in the Introduction, a new evolutionary antitrust model built around the G-C base pairs should replace the outmoded and discredited theoretical Chicago/Harvard bases.<sup>39</sup> The new G-C base

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text unmistakably is the product of a Scalia–Breyer (Chicago/Harvard) collaboration. . . . To study the *Trinko* majority opinion is to see that Justice Scalia relied heavily on Justice Breyer’s ideas to state the decision’s rationale.” *Id.* at 68.

35. Kovacic, *supra* note 7, at 72. To satisfy the exclusionary conduct element of Section 2 of the Sherman Act, a plaintiff must establish the element of “anticompetitive conduct.” *Trinko*, 540 U.S. at 407. The courts have long wrestled with the issue of what acts constitute anticompetitive conduct, and a full discussion is beyond the scope of this article. However, exclusionary conduct can include “vertical restrictions limiting competitor access to customers or suppliers, denials of rivals’ requests for access, product design and new product introduction, predatory pricing, misuses of government and standard-setting processes, and tortious conduct.” ANTITRUST LAW DEVELOPMENTS, *supra* note 2, at 245; see also Oliver E. Williamson, *Delimiting Antitrust*, in REVITALIZING ANTITRUST IN ITS SECOND CENTURY: ESSAYS ON LEGAL, ECONOMIC, AND POLITICAL POLICY 211, 228–29 (Harry First et al. eds., 1991) (listing thirteen “[s]pecific examples of strategic behavior that is problematic”).

36. *Id.* at 35.

37. 4 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW 21 (1980).

38. See Kovacic, *supra* note 7, at 6–7 (describing the philosophical roots that spurred insulation of and permissiveness regarding dominant firm conduct).

39. As noted by Kenneth M. Davidson, the Chicago/Harvard double helix’s “unrealistic and narrow view of human nature . . . has led to the formulation of bad antitrust law



pairs recommend that the best way to protect competition is to guard competitors against unfair and predatory dominant firm conduct.<sup>40</sup>

Section II.A addresses the misunderstood origins of the Supreme Court's normative "protecting competition, not competitors" language in *Brown Shoe*,<sup>41</sup> which has been zealously invoked by the Chicago/Harvard theoreticians to block the proper translation of our antitrust laws.<sup>42</sup> The author concludes that the phrase, as currently applied, lacks meaningful historical or statutory support.<sup>43</sup> Applying an evolutionary analysis, Section II.B then discusses how diversity and variation are natural states that allow evolution in a healthy biological ecosystem or, by analogy, in a competitive economic system.<sup>44</sup> Giantism is not natural, and monopolies are not favored in nature.<sup>45</sup> We should not, therefore, favor or rationalize them economically. Section II.C then explains how a lack of diversity in a complex system generally results only from outside constraints, which can include death and extinction from predation.<sup>46</sup> Based on these discussions, Section II concludes that it makes evolutionary and competitive sense to protect and promote economic diversity and variation by guarding competitors against unfair, predatory conduct by dominant firms or monopolies.<sup>47</sup>

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and bad public policy." DAVIDSON, *supra* note 1, at xiii; *see also* John B. Kirkwood & Robert E. Lande, *The Chicago School's Foundation Is Flawed: Antitrust Protects Consumers, Not Efficiency*, in *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK* 89, 90 (Robert Pitofsky ed., 2008) ("[T]he Chicago School is wrong, as to both congressional intent and to recent case law."); RICHARD A. POSNER, *A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION*, at xiv (2009) (asserting that ideology driven by self-interested decisions from the business community can distort economic policy and give rise to depression); YVES SMITH, *ECONNED: HOW ENLIGHTENED SELF INTEREST UNDERMINED DEMOCRACY AND CORRUPTED CAPITALISM* 93 (2010) (condemning market assumptions of neoclassical economics); JOSEPH E. STIGLITZ, *FREEFALL: AMERICA. FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY* 260 (2010) (attacking Chicago School economics).

40. *See infra* notes 177–178 and accompanying text.

41. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

42. *See Kovacic, supra* note 7, at 56–59 (discussing how Harvard's Phillip Areeda recast the antitrust-policy language of *Brown Shoe* from that of strong protectionism to relative indifference).

43. *See generally id.*

44. *See infra* notes 112–121 and accompanying text.

45. *See infra* notes 115–121 and accompanying text.

46. *See Horton, supra* note 12, at 488.

47. *See id.* at 521.

*A. Are the Antitrust Laws Really Indifferent to Competitors?*

The simple normative mantra supporting the first strand of the Chicago/Harvard antitrust double helix is that the antitrust laws protect “competition, not competitors.”<sup>48</sup> As Commissioner Kovacic aptly notes:

The [Brunswick] decision’s admonition that antitrust protects “competition, not competitors” has become one of the most heavily quoted aphorisms in the field of competition law. Incessant, often mechanical repetition by commentators, corporate defendants, and public officials has made it an antitrust cliché. . . . Whether one enjoys or detests the “competition, not competitors” phrase, the magnitude of the antitrust injury doctrine it heralded is indisputable.<sup>49</sup>

One need not look far to see verbatim citation after citation of this mantra<sup>50</sup> to support the Chicago/Harvard agenda of blessing dominant

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48. See Kovacic, *supra* note 7, at 56–58.

49. *Id.* at 60–61 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); see also Harry S. Gerla, *Discounters and the Antitrust Laws: Faces Sometimes Should Make Cases*, 12 J. CORP. L. 1, 34 (1986) (“[T]he saying ‘the antitrust laws protect competitors, not competition’ is the leading aphorism of modern antitrust law.”); Mark E. Roszkowski, *The Sad Legacy of GTE Sylvania and its “Rule of Reason”: The Dealer Termination Cases and the Demise of Section 1 of the Sherman Act*, 22 CONN. L. REV. 129, 184 n.252 (1989) (quoting the relevant “competition, not competitors” language and arguing that “[t]his unfortunate statement has acquired a life of its own, often used to support broad statements that the fate of individual competitors, such as small dealers or discount stores, is of no concern to antitrust law”); Transcript, *The Antitrust Marathon: A Roundtable Discussion, Part IV: Remedies-How Far and How Much?*, 20 LOY. CONSUMER. L. REV. 197, 200 (2008) (Statement of Christopher Leslie) (“Unfortunately, in the United States, it seems to me that standing doctrine is being constrained in a way that’s reducing the viability of private enforcement . . . . With competitors, you’ve got this mantra of antitrust protects competition, not competitors. And some courts are misinterpreting that to suggest antitrust doesn’t protect competitors at all. There is sometimes a lack of understanding regarding the relationship between the existence of competitors and the process of competition.”).

50. Recently, in a court filing in an antitrust case, the United States blithely stated that “[t]he antitrust laws are concerned with the protection of competition, not individual competitors.” Supplemental Statement of the United States in Support of Entry of Final Judgment at 7, *United States v. Comcast Corp.*, No. 11-106-RJL (D.D.C. Aug. 5, 2011), ECF No. 26.

firms and predatory conduct.<sup>51</sup> For example, in 2001, then Assistant Attorney General for Antitrust Charles James stated simply without citation or support: “. . . no principle is more central to U.S. law than that antitrust protects competition, not competitors.”<sup>52</sup> One would suspect that such a compelling and seemingly fact-based mantra would have extensive historical foundations. Indeed, the mantra generally appears as a clear statement of fact unequivocally supported by the legislative history of the antitrust laws.<sup>53</sup> Yet citations to precise portions of the antitrust laws’ legislative histories supporting the statement never seem to appear. Perhaps the simple reason for this is that the emperor has no clothes.

The actual origins of the phrase can be seen in a pro-big business 1952 *Fortune Magazine* editorial titled, *The New Competition and Antitrust Policy*.<sup>54</sup> The *Fortune* editorial began by lauding big business and argued that under an economics-based antitrust policy, “rivalry of a few large sellers [does not] necessarily mean[] economic injustice.”<sup>55</sup> The editorial then turned to the Clayton Act,<sup>56</sup> which had

51. For example, in a January 31, 2003, note submitted by the United States “under Session I (Part I) of the Global Forum on Competition” held February 10–11, 2003, the United States stated without citation:

Market competition enhances consumer welfare and promotes an efficient allocation of society’s resources because those firms that best meet the needs of consumers with the lowest prices or best service will prosper. It is therefore a basic principle of U.S. antitrust law that antitrust laws should protect competition, not competitors. The mere fact that a particular competitor is injured by a practice does not mean that the practice is or should be prohibited. In fact, it is inherent in the process of competition and some firms prosper and others do not. It is the process of competition that U.S. law protects.

- OECD, *THE OBJECTIVES OF COMPETITION LAW AND POLICY AND THE OPTIMAL DESIGN OF A COMPETITION AGENCY* 3 (2003); see also Thomas O. Barnett, *Section 2 Remedies: What to Do After Catching the Tiger by the Tail*, 76 ANTITRUST L. J. 31, 35 (2009) (“[C]ompetitor well-being, in itself, is not the purpose of our antitrust laws.”).
52. Charles A. James, Assistant Attorney Gen., U.S. Dep’t. of Justice Antitrust Div., *International Antitrust in the 21st Century: Cooperation and Convergence* (Oct. 17, 2001).
53. See *infra* text accompanying notes 70–78.
54. *The New Competition and Antitrust Policy*, FORTUNE, June 1952, reprinted in *MONOPOLY POWER AND ECONOMIC PERFORMANCE: THE PROBLEM OF INDUSTRIAL CONCENTRATION* 164, 164 (Edwin Mansfield ed., 1968).
55. *Id.*
56. 15 U.S.C. § 18 (2006). Section 7 of the Clayton Act prohibits mergers or acquisitions “where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition . . . may be substantially to lessen competition, or to tend to create a monopoly.” *Id.* For a solid overview of section 7

been amended two years earlier based on “a fear of what was considered to be a rising tide of economic concentration.”<sup>57</sup> The editorial argued:

A good case can be made for tightening up some parts of antitrust law and enforcing it more vigorously. But an even better case can be made for the proposition that the law applies the classic model too literally. In general, it lacks an economic approach to what are essentially economic problems. In its preoccupation with “maintaining” competition, as ordained in the various amendments to the Clayton Act, it has tended to produce an opposite result, i.e., *to protect competitors from the effects of competition*.<sup>58</sup>

Despite its strong tone, the editorial did not go so far as to assert that the purpose of the antitrust laws is “to protect competition, not competitors.”<sup>59</sup>

Over the next several years, several other *Fortune* editorials criticizing aggressive antitrust enforcement included variations of the phrase.<sup>60</sup> For example, in a June 1957 *Fortune* essay, Charles E.

of the Clayton Act and relevant cases, see ANTITRUST LAW DEVELOPMENTS, *supra* note 2, at 325–431.

57. *Brown Shoe Co. v. United States*, 370 U.S. 294, 315 (1962) (“The dominant theme pervading congressional consideration of the [Clayton Act’s] 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy.”). See generally, e.g., 95 CONG. REC. 11500–07 (1949). For a more extensive discussion of the legislative history of the 1950 amendments, see Thomas J. Horton, *Fixing Merger Litigation ‘Fixes’: Reforming the Litigation of Proposed Merger Remedies Under Section 7 of the Clayton Act*, 55 S.D. L. REV. 165, 191–94 (2010).

58. *The New Competition and Antitrust Policy*, *supra* note 54, at 167 (emphasis added).

59. Further presaging the Chicago/Harvard antitrust double helix, the 1952 *Fortune* editorial concluded:

[Economic] tests place a heavy responsibility on the discretionary powers of the authorities, and may assume more intelligence and all-around judgment than the authorities possess. But the tests are apt and carefully thought out, and should not be overlooked. They or similar economic tests will have to be applied if antitrust law is to shape competition to benefit the people whom the creators of the classic model themselves intended it to benefit: the consumers.

*Id.* at 168.

60. See *Creeping Cartelism, U.S. Model*, FORTUNE, June 1954, at 99 (“[H]ow far can the U.S. go in protecting competitors from the effects of competition without doing away with the competition itself?”); Does “Small Business” Get a Fair Shake?, FORTUNE,

Silberman stated: “A fundamental paradox of American antitrust policy . . . is whether to protect competitors or competition.”<sup>61</sup> Mr. Silberman did not go so far as to suggest that the legislative history of the antitrust laws supported protecting only “competition, not competitors.” Indeed, recognizing “clear statements” to the contrary, he stated that “some lawyers and judges question whether *any* law’s legislative history is relevant to its interpretation.”<sup>62</sup>

In 1958, Assistant Attorney General for Antitrust Victor Hansen picked up the phrase, but used it to support an aggressive application of Section 7 of the Clayton Act.<sup>63</sup> After breaking up a deal that would have given Lever Bros. Co. 21% of the detergent market, Mr. Hansen explained that the United States was rejecting Lever’s argument that it needed the detergent brand All to better compete against Proctor & Gamble, another industry leader.<sup>64</sup> Mr. Hansen stated: “We aim to protect competition, not the competitor; to support the process, no matter who gets hurt or who benefits.”<sup>65</sup>

A subsequent legal adoption of the phrase appeared in a 1960 FTC decision finding the acquisition of Rawlings Manufacturing Company by A. G. Spalding & Brothers, Inc. to have violated Section 7 of the Clayton Act.<sup>66</sup> In a decision overturning the Hearing

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Oct. 1953, at 163, 164 (“Most of the rules of the game between businesses of different sizes are covered by anti-monopoly laws, and other laws, such as Fair Trade and the Robinson-Patman Act, protecting small business from rigorous competition.”).

61. Charles E. Silberman, *The Coming Assault on Bigness*, FORTUNE, June 1957, at 142–43.
62. *Id.* at 178. For an excellent overview of FORTUNE’s critiques of antitrust enforcement in the 1950s and 1960s, see Tony A. Freyer, *What Was Warren Court Antitrust?*, 2009 SUP. CT. REV. 347, 349–59 (2010) (characterizing FORTUNE’s “antitrust dialogue” during the 1950s and 1960s as “dynamic”).
63. See Op-Ed, *Confusion in Trustbusting*, TIME, July 21, 1958, at 74. At the time of Assistant Attorney General Hansen’s statement, several court opinions supporting aggressive antitrust enforcement included iterations of the phrase. For example, in *FTC v. National Lead Co.*, 352 U.S. 419 (1957), the Supreme Court expressly stated that Section 2(b) of the Clayton Act was “designed to protect competitors in individual transactions.” *Id.* at 431; see also *William Goldman Theatres v. Loew’s, Inc.*, 150 F.2d 738, 743 (3d Cir. 1945) (“We do not believe it our function to enter into the strife of the competitive markets to protect the unfortunate. . . . But, plaintiff does have the right to have its business protected if there is a concert of action directed at plaintiff, which results in its removal from competition.”); *Pep Boys-Manny, Moe & Jack, Inc. v. FTC*, 122 F.2d 158, 161 (3d Cir. 1941) (“The Commission, provided there is a specific and substantial public interest, can protect competitors against such methods or consumers against such acts or practices.”).
64. *Confusion in Trustbusting*, *supra* note 63.
65. *Id.*
66. *In re A. G. Spalding & Bros.*, No. 6478, 1960 FTC LEXIS 219, at \*88–89 (Mar. 30, 1960).

Examiner's dismissal of the FTC's complaint, the Commission addressed the Hearing Examiner's "plac[ing] considerable emphasis on the fact that neither of the officials of Wilson and MacGregor [two competitors] who had testified was questioned as to whether his company had been adversely affected by the acquisition."<sup>67</sup> Finding that to be "an unsound basis for his conclusion," the Commission simply stated without any legal citation or support, "The statute [Sec. 7 of the Clayton Act] refers to lessening of competition and not to injury to competitors. Moreover, it requires only that there be a reasonable probability that the acquisition have the proscribed effect on competition."<sup>68</sup> Again, the phrase was used to support an aggressive application of Section 7 of the Clayton Act.<sup>69</sup>

As often happens in the evolution of the law, however, unsupported language appearing in one judicial context is cited as legal precedent in a much different context.<sup>70</sup> The Commission's seemingly benign phrase was thus utilized by the Brown Shoe Company in its appeal to the Supreme Court in *Brown Shoe Co. v. United States*.<sup>71</sup> In their June 4, 1960, Brief in Opposition to Motion to Affirm, Brown Shoe's lawyers cited the Commission's language in a footnote to support their argument that:

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67. *Id.* at \*87–89.

68. *Id.* at \*88. The Commission added:

Even if there had been testimony that Wilson and MacGregor had not been adversely affected, it would not alter the significant fact that competition which formerly existed among various manufacturers in the sale of higher priced gloves and mitts to Spalding has been virtually eliminated by the merger.

*Id.*

69. *A. G. Spalding & Bros. v. FTC*, 301 F.2d 585, 625 (3d Cir. 1962). In upholding the Commission's decision, the Third Circuit never even mentioned the relevant language. Instead, the Third Circuit emphasized that Section 7 of the Clayton Act "was contrived as a preventive measure to eliminate the proscribed activities before they became operative." *Id.*

70. Mauro Zamboni has noted how legal scholars:

can actually directly influence the choice of patterns of future development of the law. . . . For example, law professors, by claiming the existence of a certain legal principle of efficiency inside tort law as an established 'fact,' can actually force future generations of law-makers and law-applying actors to introduce this principle, even if the original claim was false.

*Zamboni, supra* note 23, at 278; *see also Horton, supra* note 57, at 171–73 (discussing how unsupported language allowing courts to accept unilaterally proposed fixes in merger litigation evolved and took "on a prolific [organic] life").

71. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

The district court directed its attention to possible effects on certain manufacturers and retailers. However, even if the merger would harm a particular competitor, it does not follow automatically that “competition” will thereby be lessened.<sup>72</sup>

The Brown Shoe Company lawyers basically repeated this argument in their Brief for Appellant, arguing that “it is not possible harm to a particular competitor, but probable harm to competition, which is critical.”<sup>73</sup>

Interestingly, the United States’ reply brief in *Brown Shoe* never directly addressed the “competition, not competitors” language cited by Brown Shoe Company.<sup>74</sup> Instead, the United States argued that the district court “did not concern itself with the effect of the merger upon any particular competitors of Brown and Kinney to the exclusion of others of the same class.”<sup>75</sup> The United States then observed that:

[I]f appellant’s point is that the judge’s analysis of the merger is deficient because he did not analyze its immediate impact upon the other large integrated manufacturer-retailers . . . the short answer is that . . . the elimination of small competitors and the concentration of an industry into the hands of a few large concerns as a result of stock or asset acquisitions was exactly what Congress intended to prevent.<sup>76</sup>

Given the lack of compelling judicial precedent or meaningful legislative history before the Supreme Court in *Brown Shoe*, it is not surprising that the majority opinion did not cite any specific authority (other than the broad phrase “the legislative history”) the two times it used the phrase “competition, not competitors”.<sup>77</sup> Moreover, since it

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72. Brief in Opposition to Motion to Affirm at 11–12, *Brown Shoe Co.*, 370 U.S. 294 (1962) (No. 4), 1960 WL 98806 at \*11–12.

73. Brief for Appellant at 116, *Brown Shoe Co.*, 370 U.S. 294 (1962) (No. 4), 1961 WL 101889 at \*116 (emphasis omitted). Again, the sole support cited for the argument was the previously quoted language from the Commission’s decision in *A. G. Spalding & Bros.* *Id.*

74. See Brief for the United States, *Brown Shoe Co.*, 370 U.S. 294 (1962) (No. 4), 1961 WL 101890.

75. *Id.* at \*94–95.

76. *Id.* at \*95.

77. See *Brown Shoe Co.*, 370 U.S. 294. As noted by Commissioner Kovacic, the Court first used the phrase in *Brown Shoe Co.* when it observed: “Taken as a whole, the

used the phrase in a strongly protectionist passage, it is impossible to read the unanimous Court as prescribing the complete and utter indifference to (and even disdain for) competitors that the mantra now connotes.<sup>78</sup> Indeed, “the Court dismissed the view that solicitude for the fate of individual firms should play no role—or even merely a minor role—in antitrust decision-making.”<sup>79</sup>

Furthermore, in referencing “the Act,” it was clear that the Court was discussing Section 7 of the Clayton Act and not the Sherman Act or the antitrust laws as a whole.<sup>80</sup> And there is little question that the 1950 Amendments to the Clayton Act resulted from a consensus that it was time to stem what was considered to be a frightening new

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legislative history illuminates congressional concern with the protection of *competition*, not *competitors*, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition.” Kovacic, *supra* note 7, at 58 n.196 (quoting *Brown Shoe Co.*, 370 U.S. at 320).

Later in the opinion, the Court used the phrase in discussing the importance of promoting competition through “the protection of viable, small, locally-owned businesses”:

A third significant aspect of this merger is that it creates a large national chain which is integrated with a manufacturing operation. The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers. Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress’ desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

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

78. History and Law Professor Tony A. Freyer has chronicled the Court’s *Brown Shoe* decision drafting process in detail. Freyer, *supra* note 62, at 369–84. The phrase at issue was not a major point of discussion or contention, and “both the activists and moderates agreed unanimously upon an expansive reading of the Clayton Act’s section 7, overturning a controversial merger.” *Id.* at 370.
79. William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413, 1424 (1990).
80. This reference to “the Act” is in a section of the opinion construing the 1950 amendments to Section 7 of the Clayton Act. *Brown Shoe Co.*, 370 U.S. at 335, 344.



growth of economic concentration.<sup>81</sup> Indeed, the Senate Report observed that:

While there may exist many differences of opinion on other aspects of the monopoly problem, there is substantial agreement that the level of economic concentration is extremely high.

....

The enactment of the bill will limit further growth of monopoly and thereby aid in preserving small business as an important competitive factor in the American economy.<sup>82</sup>

Further evidence that the *Brown Shoe* Court was not solely focused on the protection of competition comes from the firestorm of criticism from Robert Bork and other Chicago School adherents, who argued that the decision protected competitors, not competition.<sup>83</sup>

Ironically, despite the strongly protectionist message of *Brown Shoe*, which has been scorned by Chicago/Harvard academics like Robert Bork,<sup>84</sup> *Brown Shoe's* "competition, not competitors" language has become the foundation for the Chicago/Harvard antitrust double helix protecting dominant firms and monopolies.<sup>85</sup>

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81. See *id.* at 315; Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 234–36 (1960); Horton, *supra* note 57, at 192.
  82. S. REP. NO. 81-1775 (1950), *reprinted in* 2 U.S. Code. Cong. Service 4293, 4295 (1950); see Comment, *The Amendment to Section 7 of the Clayton Act*, 46 ILL. L. REV. 444, 445 (1951) ("It may be stated that the purpose of the Amendment's proponents was clearly to halt what they considered to be a rising tide of economic concentration.").
  83. See, e.g., Freyer, *supra* note 62, at 382–84; Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, FORTUNE, Dec. 1963, at 138–40, 192, 197–98, 201.
  84. See ROBERT BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 210 (1978) (criticizing *Brown Shoe* as "the worst antitrust essay ever written"); Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 373 (1965).
  85. Much of the application of the cliché has appeared in the context of erecting antitrust injury and standing barriers to efforts by competitors of monopolists or dominant firms to pursue Section 2 cases. For an excellent discussion of the evolution of the antitrust injury concept, which is beyond the scope of this article, see William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221 (1989). For several strong criticisms of the antitrust injury and standing doctrines as door closing devices to thwart private remedies, see John J. Gibbons, *Antitrust, Law & Economics, and Politics*, 50 L. & CONT. PROBS. 217, 221–22 (1987); S. Sussman, *Business Judgment vs. Antitrust Justice*, 76 GEO. L.J. 337, 344 (1987). In the words of Judge Gibbons, "[i]t is one thing, however, to overrule a demonstrably erroneous substantive interpretation of an open-textured statute. It is quite another to attempt to repeal a

This stunning mutation and organic metamorphosis from a normative statement of opinion in a 1952 *Fortune* editorial to the bedrock foundation of Chicago/Harvard competition philosophy and current American antitrust jurisprudence is well-chronicled by Commissioner Kovacic.<sup>86</sup> In 1976, fourteen years after *Brown Shoe*, Harvard Professor Phillip Areeda authored a thirteen-page law review comment<sup>87</sup> addressing two upcoming Supreme Court decisions: *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*<sup>88</sup> and *United States Steel Corp. v. Fortner Enterprises, Inc.*<sup>89</sup> As Commissioner Kovacic recounts, Professor Areeda's article selectively quoted the *Brown Shoe* "competition, not competitors" language, and sought to "recast the philosophy of *Brown Shoe* from what previously had been seen to be a position of acute concern for the well-being of individual firms to a position of indifference to their fate."<sup>90</sup>

The rest is history. As aptly noted by Commissioner Kovacic, "[t]he Supreme Court in *Brunswick* replicated the subtle, significant reinterpretation of *Brown Shoe* that Areeda had undertaken in his law review comment."<sup>91</sup> Worse yet, selectively citing only the first "competition, not competitors" phrase from *Brown Shoe*, and no other support, the Supreme Court ascribed the phrase not to Section 7 of the Clayton Act, but to the antitrust laws generally!<sup>92</sup> Suddenly, the antitrust laws as a whole protected only competition, not competitors.<sup>93</sup> From such a thin evolutionary mutation, a judicial counterrevolution metastasized.<sup>94</sup>

Today, many of the most reasonable commentators and enforcers seem to be seduced by the Chicago/Harvard rhetoric that by justifying monopolies and dominant firms, one strikes a blow for

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statute by the judicial invention of procedural barriers to its enforcement." Gibbons, *supra*, at 222.

86. See Kovacic, *supra* note 7, at 71–73; Kovacic, *supra* note 79, at 1415.

87. Phillip Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127 (1976).

88. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

89. *U.S. Steel Corp. v. Fortner Enters.*, 429 U.S. 610 (1977).

90. Kovacic, *supra* note 7, at 56, 58.

91. *Id.* at 59.

92. *Brunswick*, 429 U.S. at 488; Kovacic, *supra* note 7, at 56–58.

93. See BORK, *supra* note 84, at 203–04. Robert Bork characterized the protection of small business as an "ancient and disreputable" theory of antitrust. *Id.* at 203.

94. For a discussion of "[t]he powerful impact upon private antitrust litigation of the doctrine of *Brunswick*," see Kovacic, *supra* note 7, at 59 n.200; Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. PITT. L. REV. 437 (2001).

economic efficiencies and free markets.<sup>95</sup> Meanwhile, federal courts never seem to tire of citing *Brown Shoe* and *Brunswick* for the broad proposition that the antitrust laws were “enacted to protect competition, not competitors.”<sup>96</sup> Ironically, the courts never seem concerned that their broad normative statements about “the antitrust laws” might be historically inconsistent with the “legislative history leading to the enacting of the Sherman Act and [with] the amendment of Section 7 of the Clayton Act in 1950 showing that Congress was concerned with the disappearance of small independent entrepreneurs and their displacement by massive corporations.”<sup>97</sup> As is well-chronicled by Professor Herbert Hovenkamp, the legislative history of the Sherman Act strongly suggests that “everyone agreed that competitors should be entitled to sue,” and that “[a]lthough the drafters of the Sherman Act were concerned about injury to consumers, they were at least as concerned with various kinds of injury to competitors.”<sup>98</sup> As Professor Hovenkamp concluded: “Competitors were the principal protected class of the Sherman Act.”<sup>99</sup>

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95. See Kovacic, *supra* note 7, at 59, 67, 70–73, 80; Robert F. Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1058 (1979). No serious commentator, including this author, contends that inefficient small businesses should be protected against the rigors of fair competition. But predatory conduct by monopolists and dominant firms is a much different matter. Professor Pitofsky presents an objective view of the debate and concludes:

Such considerations as the fear that excessive concentration of economic power will foster antidemocratic political pressures, the desire to reduce the range of private discretion by a few in order to enhance individual freedom, and the fear that increased governmental intrusion will become necessary if the economy is dominated by the few, can and should be feasibly incorporated into the antitrust equation.

*Id.* at 1075.

96. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007); *Atlanta Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990); *Warrior Sports, Inc. v. Nat’l Collegiate Athletic Ass’n*, 623 F.3d 281, 286 (6th Cir. 2010); *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 76 (3d Cir. 2010); *Jebaco, Inc. v. Harrah’s Operating Co.*, 587 F.3d 314, 320 (5th Cir. 2009); *Reudy v. Clear Channel Outdoors, Inc.*, 693 F. Supp. 2d 1091, 1128 (N.D. Cal. 2010); *Wood v. Archbold Med. Ctr., Inc.*, 738 F. Supp. 2d 1298, 1364–65 (M.D. Ga. 2010); *Fido’s Fences, Inc. v. Canine Fence Co.*, 672 F. Supp. 2d 303, 309 (E.D.N.Y. 2009).

97. Pitofsky, *supra* note 95, at 1058–59; see Kovacic, *supra* note 7, at 80–81.

98. Herbert Hovenkamp, *Antitrust’s Protected Classes*, 88 MICH. L. REV. 1, 23–24 (1989).

99. *Id.* at 29. Professor Hovenkamp included detailed summaries of the Sherman Act’s legislative history expressing “concern with competitor injuries.” *Id.* at 44–46; see also Andreas Koutsoudakis, *Antitrust More Than a Century After Sherman: Why*

The courts also do not explain their views in light of the 1936 passage of the Robinson-Patman Act<sup>100</sup> and the continued congressional refusals to repeal it.<sup>101</sup> As noted by Professor Andrew I. Gavil in Sections 2 and 3 of the Clayton Act, “concern for the fate of individual ‘competitors’ is unambiguous, albeit on the assumption that as goes the fate of competitors, so goes the fate of competition.”<sup>102</sup> Is it really so hard to believe that the antitrust laws’ framers recognized that competition *and* competitors had to be protected against unfair and predatory conduct by monopolies and dominant firms?<sup>103</sup>

Another point that seems to get lost in the obsessive deference to the “competition, not competitors” cliché is that Professor Areeda never condoned “anticompetitive activity” by dominant firms,<sup>104</sup> although he came perilously close to blessing anticompetitive acquisitions.<sup>105</sup> Furthermore, the Supreme Court, in *Cargill, Inc. v.*

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*Protecting Competitors Promotes Competition More Than Economically Efficient Mergers*, 34 U. DAYTON L. REV. 223, 230 (2009) (“[P]rotecting competitors is one main purpose for which Congress enacted antitrust legislation.”).

100. Robinson-Patman Act, 15 U.S.C. §§ 13, 21a (1936). The Robinson-Patman Act currently is the principal federal statute directed at price discrimination. A detailed discussion of the Act’s six basic provisions is beyond the scope of this article. However, the first provision generally “prohibits a seller from discriminating in price between different buyers when the discrimination adversely affects competition.” The second provision then “establishes an affirmative defense if the discrimination arises from meeting competition.” ANTITRUST LAW DEVELOPMENTS, *supra* note 2, at 483.
101. See, e.g., DAVIDSON, *supra* note 1, at 53 (2011) (“Congress, confident in the virtue of its intent and responding to the continuing claims by smaller businesses that they need protection from the economic power of larger businesses, has steadfastly refused to amend or abolish the law.”).
102. Andrew I. Gavil, *Secondary Line Price Discrimination and the Fate of Morton Salt: To Save It, Let It Go*, 48 EMORY L.J. 1057, 1118 (1999); see also *FTC v. Nat’l Lead Co.*, 352 U.S. 419, 431 (1957) (holding that Section 2(b) of the Clayton Act “protect[s] competitors in individual transactions”).
103. See, e.g., F. M. Scherer, *Posnerian Harvest: Separating Wheat from the Chaff*, 86 YALE L.J. 974, 981 (1977) (reviewing RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976)) (“[I]f the courts have strayed beyond the bounds of the efficiency criterion [the Chicago/Harvard philosophy] considers so important, and if this is not what Congress wants, one wonders why Congress has not intervened.”).
104. Phillip Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127, 1134 (1976). In a 1976 law review article, Professor Areeda expressly stated that “as long as there is no anticompetitive injury, the fact of injury to a competitor is *not* a concern of the antitrust laws.” *Id.*
105. See, e.g., 1 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATIONS 24–29 (1978) (“The arbitrary preservation of a few firms here or there cannot contribute significantly to the dispersion of power or to the protection of political democracy.”).

*Monfort of Colorado*, went out of its way to note that “*Brunswick* holds that the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits *from practices forbidden by the antitrust laws*.”<sup>106</sup>

Even if the cliché that the “antitrust laws protect competition, not competitors” had more historical or legislative support than the flimsy reed it was built upon, should we further leverage the mantra to essentially immunize dominant firms and monopolies from Sherman Act Section 2 liability or greatly decrease the reach of Clayton Act Section 7? A small but growing number of commentators believe that the answer is no.<sup>107</sup> For example, Michael Ferrill, Leslie Hyman, and Caleb Rackley argue that “there can be no competition without competitors, and it often is the case that a competitor is the market participant most likely to recognize and have the incentive to challenge conduct that threatens the competitive process.”<sup>108</sup> As is discussed in Sections B and C below, evolutionary theory supports these critics’ position.

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106. *Cargill, Inc. v. Monfort of Colo.*, 479 U.S. 104, 116 (1986) (emphasis added).

107. See, e.g., Louis B. Schwartz, “Justice” and Other Non-Economic Goals of Antitrust, 127 U. PA. L. REV. 1076, 1076 (1979) (“I would not yield . . . to the dogma that the antitrust laws protect ‘competition not competitors,’ because the goals of justice and the antitrust laws sometimes demand protection of competitors.”). Schwartz further argued that we should amend the phrase to include “unless individual competitors must be protected in the interests of preserving competition.” *Id.* at 1078; see also John J. Flynn & James F. Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. REV. 1125, 1126 n.4 (1987) (“The cliché implicitly asserts that one can have competition without competitors, contains no definition of ‘competition,’ and is frequently used to deny the congressionally defined goals of antitrust policy in favor of the narrow goals assumed by the neoclassical model.”); Dimitri Giotakos, GE/Honeywell: *A Theoretic Bundle Assessing Conglomerate Mergers Across the Atlantic*, 23 U. PA. J. INT’L. ECON. L. 469, 498 (2002) (“Where competitors are squeezed out, marginalized or driven out of the market, they cannot oppose any credible competitive constraint to the dominant merged firms.”); Bryce J. Jones, *Maximum Vertical Price Fixing: Making the Rule “Right”*, 17 MIDWEST L. REV. 69, 83 (2000) (criticizing the quote “that antitrust is designed to protect competition, not competitors”).

108. A. Michael Ferrill et al., *Antitrust and Consumer Protection*, 62 SMU L. REV. 855, 875 (2009). The authors add:

*Brunswick* does not imply a necessary conflict between the goals of protecting competition and protecting competitors, but rather instructs antitrust courts to be alert to the possibility that such a conflict may be present in individual cases. Nonetheless, it has become fashionable for antitrust *cognoscenti* to single out for disapprobation antitrust claims brought by a competitor of the

*B. Increasing Variation and Diversity Are Natural States*

This author previously has discussed in detail why evolutionary theory has much to teach us about antitrust regulation in our complex, free-market economy.<sup>109</sup> Indeed, “[e]conomists have long been fascinated by evolutionary and biological competition theories.”<sup>110</sup> Evolutionary biology has a great deal to offer us concerning the importance of variation, diversity, and complexity in competitive economic systems.<sup>111</sup>

Increasing variation, diversity, and complexity are natural states.<sup>112</sup> “[N]atural selection requires variation in order to effect change.”<sup>113</sup>

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defendant. Antitrust scholars of a certain disposition argue that competitors should be foreclosed from bringing antitrust claims, while others draw upon the same scholarship to argue that the private antitrust remedy be abolished. And then there are those who take laissez faire theology to its logical conclusion, insisting that the antitrust laws be repealed altogether.

*Id.* (footnotes omitted); see also Edward T. Swaine, “*Competition, Not Competitors*,” *Nor Canards: Ways of Criticizing the Commission*, 23 U. PA. J. INT’L. ECON. L. 597, 625 (2002) (“At the same time, competitors may provide probative information that consumers lack the incentive or ability to obtain, or that otherwise would be prohibitively difficult for the agency to obtain on its own.”). But see POSNER, *supra* note 3, at 280–82 (advocating that the states be stripped of their authority to bring antitrust suits save in defense of their own proprietary interests, in part because “they are excessively influenced by interest groups that may represent a potential antitrust defendant’s competitors”).

109. See Horton, *supra* note 12, at 469–71, 477–84; Horton, *Competition or Monopoly?*, *supra* note 22, at 197–201.
110. Horton, *supra* note 12, at 477; see also ERIC D. BEINHOCKER, *THE ORIGIN OF WEALTH: EVOLUTION, COMPLEXITY, AND THE RADICAL REMAKING OF ECONOMICS* 187 (2006) (“Businesspeople, journalists, and academics all gravitate quite naturally to using images of ecosystems and evolution when they speak about the economy.”).
111. See BERT HÖLLDOBLER & EDWARD O. WILSON, *THE ANTS* 395 (1990) (observing that intense head-to-head competition in natural ecosystems results in “the diversification of closely related species occupying the same locality”); GEERAT J. VERMEIJ, *NATURE: AN ECONOMIC HISTORY* 3–4 (2009) (“[T]he human species and the human economy do not differ fundamentally from units encountered in the rest of the biosphere.”); *id.* at 170 (“[E]conomic spatial divisions of the world, whether they be forests and fields of nature or the nations of human civilization, result from competition and the responses of living things to it.”).
112. DANIEL W. MCSHEA & ROBERT N. BRANDON, *BIOLOGY’S FIRST LAW: THE TENDENCY FOR DIVERSITY AND COMPLEXITY TO INCREASE IN EVOLUTIONARY SYSTEMS* 3 (2010); see also WILLIAM D. CASEBEER, *NATURAL ETHICAL FACTS: EVOLUTION, CONNECTIONISM, AND MORAL COGNITION* 150 (2003) (“[V]ariation among population of species members is something to be expected and something that modern synthesis successfully explains.”).

At all biological levels, long-term health and stability are augmented by variation,<sup>114</sup> which is the essence of diversity.<sup>115</sup> Healthy species therefore consist “not of solely the fittest genome but instead of a distribution of genomes in a mutation-selection balance.”<sup>116</sup> Living ecosystems therefore “are organized for functions that at least incidentally maintain diversity and productivity . . . .”<sup>117</sup> Biological studies increasingly show that variation within species and populations is both common and adaptive.<sup>118</sup> The “long-term value” of diversity is coming to be understood as more than political correctness.<sup>119</sup> Instead, it is part of a long-term adaptability and survivability portfolio.<sup>120</sup> Indeed, ecological diversity is viewed as a “yardstick of biological success.”<sup>121</sup>

The astonishing array of natural diversity is built around an “unexpected and startling degree of order.”<sup>122</sup> Such order is inevitable, since nature is limited by a host of physical and chemical constraints.<sup>123</sup> One of nature’s most fundamental limitations is

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113. Egbert Giles Leigh, Jr., *Adaptation, Adaptationism and Optimality*, in ADAPTATIONISM AND OPTIMALITY 358, 362 (Steven Hecht Orzack & Elliott Sober eds., 2001); see also MARTIN A. NOWAK, EVOLUTIONARY DYNAMICS: EXPLORING THE EQUATIONS OF LIFE 24 (2006) (“[V]ariability [is] needed for natural selection. If variability disappears, then natural selection has nothing upon which to act.”).
  114. James E. Lovelock, *The Earth as a Living Organism*, in BIODIVERSITY 486, 488 (Edward O. Wilson ed., 1988); Horton, *supra* note 13, at 488 and citations therein.
  115. MCSHEA & BRANDON, *supra* note 112, at 26.
  116. NOWAK, EVOLUTIONARY DYNAMICS, *supra* note 113, at 42. Nowak additionally observes that it is possible that the broad distribution of genomes “does not contain the fittest genome at all. Hence ‘survival of the fittest’ is replaced by ‘survival of the quasispecies.’” *Id.* Therefore, “[i]n principle, evolutionary biology can account for the amazing diversity and astonishing complexity of life.” *Id.* at 292.
  117. Leigh, *supra* note 116, at 363 (emphasis omitted).
  118. Kenneth J. Halama & David N. Reznick, *Adaptation, Optimality, and the Meaning of Phenotypic Variation in Natural Populations*, in ADAPTATIONISM, *supra* note 116, at 242, 242–43, 263–64.
  119. JOAN ROUGHGARDEN, THE GENIAL GENE: DECONSTRUCTING DARWINIAN SELFISHNESS 84 (2009).
  120. *Id.*
  121. MICHAEL RUSE, DARWINISM AND ITS DISCONTENTS 199 (2006) (quoting KARL J. NIKLAS, THE EVOLUTIONARY BIOLOGY OF PLANTS 204–05 (1997)).
  122. BRIAN GOODWIN, HOW THE LEOPARD CHANGED ITS SPOTS: THE EVOLUTION OF COMPLEXITY 117 (1994). For example, “[d]espite the profusion of leaf shapes in higher plants, there are basically only three ways in which leaves are arranged on a stem.” *Id.* Thus, “it appears that the different patterns are not fixed characteristics of different species but are a set of alternative states available to the leaf-generating process in the meristem.” *Id.* at 119.
  123. *Id.* at 135–42. Biologist Brian Goodwin further hypothesizes that “what we see in evolution may be primarily an emergence of states generic to the dynamics of living systems.” *Id.* at 186.

physical size. “For every type of animal there is a most convenient size, and a large change in size inevitably carries with it a change of form.”<sup>124</sup> The evolution of body forms therefore seems to follow “some fairly predictable rules common to all forms of life . . . .”<sup>125</sup>

The Chicago/Harvard notion of ever-increasing economies of scale driven by increases in size<sup>126</sup> is inconsistent with nature. In nature, as organisms get larger and larger, they face a host of natural straitjackets that “impose considerable anatomical and physiological diseconomies of scale on their large-bodied carriers.”<sup>127</sup> Thus, as previously noted, giantism is not a natural state.

Nor is nature generally optimal or efficient in the classical economic sense preached by the Chicago/Harvard proponents.<sup>128</sup> “[N]ature and evolution consistently build seemingly inefficient structural, physiological, and chemical redundancies into living systems at all levels as a means of ensuring increased flexibility, adaptability, and stability.”<sup>129</sup> For example, approximately “ninety-seven per cent of our genome does not consist of true genes at all. It consists of a menagerie of strange entities . . . collectively known as ‘junk DNA’ . . . .”<sup>130</sup> This is not as surprising as it may seem because biological systems are essentially “information-processing machines,”<sup>131</sup> and “[i]nformation and redundancy are complementary . . . .”<sup>132</sup> Indeed, redundancies and loosely connected

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124. J. B. S. Haldane, *On Being the Right Size*, in *THE OXFORD BOOK OF MODERN SCIENCE WRITING* 53, 54 (Richard Dawkins ed., 2008). Haldane adds that “it is easy to show that a hare could not be as large as a hippopotamus, or a whale as small as a herring.” *Id.* at 54. Similar limitations exist for organs. For example, “the eye is a rather inefficient organ until it reaches a large size.” *Id.* at 58.

125. HAIM OFEK, *SECOND NATURE: ECONOMIC ORIGINS OF HUMAN EVOLUTION* 91 (2000). Discussing economies of scale related to size, Ofek adds that “[e]ngineers therefore are faced with a delicate balancing act between economies of scale in surface or diseconomies of scale in weight or, more fundamentally, between an invariable law of solid geometry and the law of gravity.” *Id.*

126. See *supra* text accompanying notes 11–15 (discussing the Chicago/Harvard argument that monopolies efficiently weed out weaker firms and allow the economy to grow).

127. OFEK, *supra* note 125, at 92.

128. See, e.g., RUSE, *DARWINISM*, *supra* note 121, at 136–39.

129. Horton, *supra* note 12, at 490 (footnote omitted) (citing Joseph Farrell, *Complexity, Diversity, and Antitrust*, 51 *ANTITRUST BULL.* 165, 167–68 (2006)).

130. MATT RIDLEY, *GENOME: THE AUTOBIOGRAPHY OF A SPECIES IN 23 CHAPTERS* 123–24 (2010); see also Horton, *supra* note 13, at 490–91 (discussing how junk DNA and genetic redundancies help strengthen an organism by promoting adaptability).

131. Sydney Brenner, *Theoretical Biology in the Third Millennium*, in *MODERN SCIENCE WRITING*, *supra* note 9, at 40, 44.

132. SEIFE, *supra* note 9, at 13. Seife adds:



interdependencies help avoid complexity catastrophes if one part of a system breaks down or is injured.<sup>133</sup>

Ecological and genetic redundancies also provide a cornucopia of variety for natural selection to act upon<sup>134</sup> in producing new or different fitness adaptations.<sup>135</sup> As noted by economist Haim Ofek, “[B]iological arms races, as exemplified by the stature of forest trees (and, arguably, by the human brain) are bound to reveal new unintended applications which can be put to good use.”<sup>136</sup> Indeed, “a rich metabolism of diverse reactions [is a] basic characteristic of living systems.”<sup>137</sup> In other words, nature is masterful at exploiting diversity and variety to create new innovations.

Through both instinctual and experiential learning, humans have come to make diversity “the central organizing principle of human consumption.”<sup>138</sup> Our human economies mimic nature in requiring high levels of diversity for long-term health and stability.<sup>139</sup> Thus, a

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Computer scientists are well aware of the redundancy in a stream of bits and bytes for two main reasons. The first is error correction. Humans make mistakes when entering long strings of numbers, so credit cards, serial numbers, bar codes, and numerous other numbers are padded with redundancy so that a computer will be able to detect whether someone has made a data-entry error . . . .

. . . .  
 . . . English and other human languages [also] have a great deal of redundancy built into them.

*Id.* at 69–70.

133. See, e.g., Horton, *supra* note 12, at 491 (citing BEINHOCKER, *supra* note 110, at 150–52).
134. “[N]atural selection operates on the variation in shapes and sizes and forms of organisms created by mutations in their genes . . .” Ruse & Travis, *Introduction*, in *EVOLUTION: THE FIRST FOUR BILLION YEARS*, *supra* note 9, at x. Of course, “natural selection is not the only important evolutionary force.” *Id.* Other forces can include genetic drift, sexual selection, and chance. Ptacek & Hankison, *The Pattern and Process of Speciation*, in *EVOLUTION: THE FIRST FOUR BILLION YEARS*, *supra* note 10, at 177.
135. In the words of Matt Ridley, “Welcome to pleiotropy and pluralism.” RIDLEY, *supra* note 130, at 66. As Ridley further notes: “[G]enes are messy.” *Id.*
136. OFEK, *supra* note 125, at 82.
137. GOODWIN, *supra* note 122, at 188; see also MCSHEA & BRANDON, *supra* note 112, at 42 (“[S]election works by favoring lineages that are more evolutionarily responsive to environmental changes, those that can be modified independently from other lineages, freed from the historical constraints that otherwise limit morphological evolution.”).
138. OFEK, *supra* note 125, at 64.
139. See GOODWIN, *supra* note 122, at 230 (“[W]hen all the multiple yields of diverse crops, the values and outputs of biological systems, are taken in account, agricultural practices based on diversity are more productive, produce higher nutrient value in the food than monoculture farming, and are sustainable. And there are countless

“key to human health and sheer existence is diversity in food intake.”<sup>140</sup>

Similarly, in the economic fields of corporate governance and finance, “a diversity of local response[s] is a sign of health; if there is a major crisis, it will be disastrous if the solutions have been uniform and universal . . . .”<sup>141</sup> Hopefully, we learned that in the wake of the recent banking and financial crisis.<sup>142</sup> Despite Judge Bork’s verbal attacks against Justice Brandeis and his alleged “lack of conceptual clarity,”<sup>143</sup> perhaps Justice Brandeis had it right all along in theorizing that “[t]here are no natural monopolies today in the industrial world.”<sup>144</sup> Instead, nature favors variety, diversity, and complexity.<sup>145</sup>

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other instances that contrast the monoculture mentality of ‘scientific’ Western Agriculture with the robust, supportive, diverse, and sustainable qualities of traditional agroforestry.”); Horton, *supra* note 12, at 489.

140. OFEK, *supra* note 125, at 63. For example, “[t]hrough the most conspicuous, scurvy is only one of a long list of nutritional disorders associated with lack of diversity in food consumption.” *Id.*
141. MARC GOERGEN ET AL., CORPORATE GOVERNANCE AND COMPLEXITY THEORY 79 (2010). The authors add that “[i]f there is local diversity, there are multiple microstrategies already tried out and some of them are likely to fit the new environmental conditions.” *Id.*; see also Joseph Farrell, *Complexity, Diversity, and Antitrust*, 51 ANTITRUST BULL. 165, 167–68 (2006) (discussing benefits of “multiple approaches” by “multiple organizations” to economic issues); Grant Miles et al., *Industry Variety and Performance*, 14 STRATEGIC MGMT. J. 163, 166–72 (1993) (discussing a study finding a positive correlation between industry variety and performance); Maurice E. Stucke, *Reconsidering Antitrust’s Goals*, 53 B.C. L. REV. 551, 613 (2012) (“A low to moderately concentrated industry with diverse competitors can offer greater benefits . . . than a highly concentrated industry.”).
142. See “Too Big to Fail?”: *The Role of Antitrust Law in Government-Funded Consolidation in the Banking Industry: Hearing Before the Subcomm. on Courts & Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 10 (2009) (statement of Albert A. Foer, President, Am. Antitrust Inst.) (discussing how failures of large organizations deeply embedded in the economy cause huge ripple effects throughout the system); JOSEPH STIGLITZ, FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY (2010); ANDREW ROSS SORKIN, TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM—AND THEMSELVES (2009).
143. See, e.g., BORK, ANTITRUST PARADOX, *supra* note 84, at 42.
144. Louis D. Brandeis, *Shall We Abandon the Policy of Competition?*, in THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS 104, 105 (Osmond K. Frankel ed., 1934); see also Horton, *supra* note 12, at 486, n.78; Horton, *supra* note 22, at 205–13.
145. More and more economists are coming to accept that competitive economic diversity provides substantial economic innovation and variety benefits. See WALTER ADAMS & JAMES W. BROCK, THE BIGNESS COMPLEX: INDUSTRY, LABOR, AND GOVERNMENT IN THE AMERICAN ECONOMY 59–62 (2d ed. 2004) (discussing economic studies showing

C. *When Diversity and Complexity Are Diminishing, We Should Look for Outside Constraints, Including Predatory Behavior by Dominant Firms and Anticompetitive Mergers*

Increasing variety, diversity, and complexity are natural. So why are monopolies and dominant firms so prevalent?<sup>146</sup> Duke University Professors McShea and Brandon counsel that when diversity and complexity are diminishing rather than increasing, we should look for unnatural outside limits or constraints being imposed upon the system.<sup>147</sup> They further argue that most of the possible outside factors such as “limits on heredity” and “selection against diversity” probably do not limit diversity much.<sup>148</sup> “[D]eath and extinction,” on the other hand “have the potential to be serious drains on diversity.”<sup>149</sup> Could this explain the unremitting efforts of monopolists and dominant firms to “try to eliminate the competition from their own ranks, sometimes to the point of cut-throat price wars,”<sup>150</sup> or the temptations to acquire aggressive competitors?

The Chicago/Harvard antitrust philosophy counsels that predatory behavior is not to be feared because it allegedly rarely occurs.<sup>151</sup> Judge Easterbrook, for example, has stated, without citation or meaningful legal support, that a predator “is highly sensitive to its costs of doing business; it calculates how much sacrifice it needs to

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how high economic concentration retards technological innovation and development); Michael E. Porter, *Competition and Antitrust: A Productivity Approach*, in *UNIQUE VALUE: COMPETITION BASED ON INNOVATION CREATING UNIQUE VALUE* 161–65 (Charles D. Weller et al. eds., 2004); MICHAEL E. PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 662–69 (1990); Farrell, *supra* note 141, at 167–68.

146. See ADAMS & BROCK, *supra* note 145, at 124 (“[W]hile the *shape* of the monopoly problem has changed, the nature of the problem persists.”); BARRY C. LYNN, *CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION* 16 (2010) (“‘We are in an age of monopolies.’”) (quoting Jim Cramer, MSNBC, Feb. 15, 2006); TED NACE, *GANGS OF AMERICA: THE RISE OF CORPORATE POWER AND THE DISABLING OF DEMOCRACY* 82 (2005) (discussing the “rapidly accelerating trend to concentration” as a result of a “lenient policy on mergers”).

147. See MCSHEA & BRANDON, *supra* note 112, at 29.

148. *Id.* at 29–33.

149. *Id.* at 32. McShea and Brandon further note that “[i]n extreme cases, reductions in diversity due to extinction have been dramatic.” *Id.*

150. OFEK, *supra* note 125, at 139.

151. See DAVIDSON, *supra* note 1, at 85 (observing that, for the Chicago School, “[p]redation is not plausible because theory [allegedly] has shown that it is unlikely to occur”); Eleanor Fox & Lawrence A. Sullivan, *Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, in *REVITALIZING ANTITRUST IN ITS SECOND CENTURY: ESSAYS ON LEGAL, ECONOMIC, AND POLITICAL POLICY* 73, 74 (Harry First et al. eds., 1991).

make (and could bear), and uses that as the basis of its prices.”<sup>152</sup> Moreover, consumers allegedly benefit from predatory conduct, such as predatory pricing, because “[t]he success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator’s losses and to harvest some additional gain,”<sup>153</sup> and “[p]ersistent entry and expansion by other firms at the same time [generally] ensures that recoupment cannot occur.”<sup>154</sup>

Such conclusory economic clichés rationalizing and encouraging predatory conduct<sup>155</sup> completely fail to account for the simple point that throughout our evolutionary history, humans’ most deadly predators have been other human beings.<sup>156</sup> It is part of our

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152. *A. A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989).

153. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986).

154. *A. A. Poultry Farms*, 881 F.2d at 1403.

155. Such conclusions seem tantamount to arguing that we should not worry about an opposing baseball pitcher purposely throwing at a player’s head because the pitcher knows that even if he knocks that player out of the game, someone will come off the bench and replace him. Meanwhile, the fans will ultimately benefit from the super aggressive competition. Similarly, the National Football League should stop worrying about vicious hits that injure or cripple players because spectators will benefit from the increased aggressiveness.

The Chicago/Harvard school may argue that these examples involve successful predation, as opposed to most economic predation, which generally is unsuccessful and therefore unprofitable. See *Matsushita*, 475 U.S. at 595; *A. A. Poultry Farms*, 881 F.2d at 1401.

How exactly does a predator know, however, whether its vicious predation will be unsuccessful in the long-term, especially when it can enjoy the short-term benefits and satisfaction of knowing it successfully destroyed a hated competitor? And why do not all criminals carefully calculate the economic benefits versus potential losses before engaging in vicious and destructive aggression? Recently deceased antitrust giant Alfred E. Kahn observed that “[t]he burden surely rests on the critics of the antitrust laws to demonstrate that those predatory or collusive actions which the law attacks are indeed requisite to good performance. This is something for the most part they have failed to do.” Alfred E. Kahn, *Standards for Antitrust Policy*, in *MONOPOLY POWER AND ECONOMIC PERFORMANCE*, *supra* note 54, at 169, 178. Economist Oliver Williamson similarly has argued that “[e]fforts to derogate strategic behavior have been . . . overdone,” and we need to “take[] strategic behavior in all its forms seriously.” Williamson, *supra* note 38, at 236–37.

156. PAUL SEABRIGHT, *THE COMPANY OF STRANGERS: A NATURAL HISTORY OF ECONOMIC LIFE* 8 (2010); see also DAVIDSON, *supra* note 1, at 86 (“[T]he notion that businesses do not engage in predatory pricing or predation in general is silly and is a conclusion that could only be deduced from theory, not from experience or observation of life. It is too obvious and too trite to dwell on the fact that aggressive behavior is often an effective means of eliminating and deterring competitors, whether one is talking about stags fighting over a doe, bullies dominating a schoolyard, or monopolists or cartels

evolutionary nature to be “strongly disposed against unrelated individuals in the appropriate circumstances”<sup>157</sup>—some would argue to the point that we have an “innate murderousness.”<sup>158</sup> Economist Paul Seabright, for example, points to the “sobering” historical record showing that “where there are no institutional restraints on it, systematic killing of unrelated individuals is so common among human beings that, awful though it is, it cannot be described as exceptional, pathological, or disturbed.”<sup>159</sup> Economist Michael Shermer attributes “evil to our dual dispositional nature and the fact that in addition to being trusting, cooperative, and altruistic, we are also distrusting, competitive, and selfish . . . .”<sup>160</sup>

Given our innate predatory and aggressive instincts, not to mention the history of war, is it really so hard to believe that businesses might be inclined to engage in unfair and predatory conduct designed to eliminate a competitor? “Military strategists have long known that a disparity in strength between rivals—and especially a *growing* disparity in strength—is the most important single reason to expect an outbreak of hostilities.”<sup>161</sup> Thus, our propensity to engage in cooperative commercial activity “has always coexisted with a rival temptation to take, bully, and extort.”<sup>162</sup> Could that be one reason why hostile takeovers are so common even though evidence “suggests that the shareholders of bidders involved in hostile takeovers feel that such transactions destroy shareholder wealth. [And] there is little evidence . . . of the disciplining role of hostile takeovers?”<sup>163</sup>

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disciplining price cutters.”); Horton, *supra* note 12, at 509 (discussing humans’ innate biological propensities for potential viciousness, aggression, and irrationality that constitute our darker side).

157. SEABRIGHT, *supra* note 156, at 59.

158. *Id.* at 60.

159. *Id.* at 61.

160. MICHAEL SHERMER, *THE MIND OF THE MARKET: COMPASSIONATE APES, COMPETITIVE HUMANS, AND OTHER TALES FROM EVOLUTIONARY ECONOMICS* 184 (2008).

161. SEABRIGHT, *supra* note 159, at 280.

162. *Id.* at 288. Professor Seabright characterizes this as “the fragility of the commercial motive in the face of more brutal temptations.” *Id.*

163. GOERGEN ET AL., *supra* note 141, at 76–77. The Chicago/Harvard philosophy, on the other hand, is that promoting mergers is “the way markets regulate inefficient corporate managers.” DAVIDSON, *supra* note 1, at 71. Indeed, Chicago School advocate Michael Jensen went so far as to argue that “the benefits of mergers was to discipline acquiring firms by stripping them of inefficiently used money, free cash flow and credit by payments to the shareholders of the acquired firm. Thereafter, the acquiring firm, stripped of the acquisition resources, would be more subject to market resources.” *Id.* at 72.

Unfortunately, today's laissez-faire business environment, which is a key component of the Chicago/Harvard antitrust philosophy, helps foster an "us versus them" mentality that plays into our evolutionary heritage of "violence between groups, whose individuals cooperate among themselves to inflict violence more lethally and cruelly than they ever could do on their own."<sup>164</sup> Therefore, we should not be shocked that business environments can shape and promote managerial agents who are potential agents of corruption, and predatory attacks against competitors.<sup>165</sup> In the words of Michael Shermer:

When order breaks down, when the rules are no longer enforced, when the normal institutional brakes on evil are lifted, evil is facilitated through the contagious excitement of the group's actions, through the unchecked momentum of the smaller bad steps that came before, and ultimately permission for evil is granted by the system at large.<sup>166</sup>

This is especially likely when corporations are interested in short-term profits and market shares.<sup>167</sup>

It is time, therefore, to start taking seriously again the notion that the destruction of competitors by dominant-firm predatory conduct and aggressive mergers are harmful external constraints on the natural growth of economic variation, diversity, and complexity. The

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164. SEABRIGHT, *supra* note 156, at 290.

165. GOERGEN ET AL., *supra* note 141, at 93–94. As added by Philosophy Professor William D. Casebeer: "Simply put, your environment counts, and it counts for a lot." CASEBEER, *supra* note 112, at 110. Casebeer goes on to describe "morality as an essentially ecological evolutionary phenomenon." *Id.*

166. SHERMER, *supra* note 160, at 213. Shermer additionally observes that "as a social primate species we are remarkably susceptible to the wishes of others, especially alpha males and those in positions of authority." *Id.* And "[b]ecause we evolved to be such social beings, we are hypersensitive to what others think about us, and we are strongly motivated to conform to the social norms of our group." *Id.* at 212. Consequently, if the head of a business "team or group or company has a certain ideology [or philosophy, including engaging in predatory conduct], you have to follow it to get ahead." *Id.* at 214. "Thus, an environment of moral corporate philosophy and leaders establishes a situation that can either accentuate the good disposition of employees or bring out the bad." *Id.* at 215.

167. Marc Goergen et al. argue that "[c]orporations are interested in short-term profitability. This is because shareholders are generally interested in short-term profitability." GOERGEN ET AL., *supra* note 141, at 42. Unfortunately, the Chicago/Harvard antitrust philosophy ignores this in focusing on long-term recoupment of short-term losses as being necessary for dominant-firm conduct to be predatory.

Chicago/Harvard fear of “false positives in dealing with exclusionary-practice claims”<sup>168</sup> completely ignores the risks of lost variation, diversity, and complexity<sup>169</sup> and the attendant harms to our economic system’s health and stability.<sup>170</sup> Unlike the Chicago/Harvard theoreticians, biologists have long appreciated that competitively induced diversity enhances an ecosystem’s overall fitness.<sup>171</sup> Increases in overall diversity directly lead to “increased ecosystem and organism adaptability, resilience and stability.”<sup>172</sup>

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168. Easterbrook, *supra* note 14, at 357–58.

169. See, e.g., Orley C. Ashenfelter, Daniel S. Hosken & Matthew C. Weinberg, *The Price Effects of a Large Merger of Manufacturers: A Case Study of Maytag-Whirlpool* 22 (Nat’l Bureau of Econ. Research, Working Paper No. 17476, 2011), available at <http://ssrn.com/abstract=1857066> (“We observe a large reduction in the number of distinct items (stock-keeping units or SKUs) offered to consumers following the [Maytag-Whirlpool] acquisition, and this reduction is largest in the clothes washer and dryer markets that were the focus of the government’s investigation. If the number of distinct SKUs are a meaningful measure of product variety, this finding suggests that the merger may have resulted in a large, and potentially important, reduction in variety.”); James E. Lovelock, *The Earth as a Living Organism*, in BIODIVERSITY, *supra* note 114, at 486, 488 (“[N]ew ecological models demonstrate that as diversity increases so does stability and resilience.”). But see Michaela Draganska, Michael J. Mazzeo & Katja Seim, *Beyond Plain Vanilla: Modeling Joint Pricing and Product Assortment and Pricing Decisions*, QUANTITATIVE MARKETING & ECON., June 2009, at 105 (discussing papers reaching contrasting conclusions as to whether mergers that result in more concentrated markets tend to display more or less product variety post-merger).

170. See, e.g., STUART A. KAUFFMAN, REINVENTING THE SACRED: A NEW VIEW OF SCIENCE, REASON, AND RELIGION 151 (2008) (“[A]s data confirm—economic growth is positively correlated with economic diversity.”); Horton, *supra* note 12, at 489 (“[I]t should not surprise us to find a correlation between economic diversity and overall economic growth.”).

171. For example, in 1859, Charles Darwin “argued that island ecosystems are more invulnerable because their level of competition is too weak to exclude introduced species.” E. G. Leigh, Jr. et al., *What Do Human Economies, Large Islands, and Forest Fragments Reveal About the Factors Limiting Ecosystem Evolution?*, 22 J. EVOLUTIONARY BIOLOGY 1, 6 (2009); see also EDWARD O. WILSON, THE DIVERSITY OF LIFE 129–30 (1992) (“[I]n nature, dominant groups tend to divide [through adaptive radiation into multiple species] that adopt different ways of life. [And] dominant groups that have diversified to this degree . . . are on average better off than those composed only of a single species; as a purely incidental effect, highly diversified groups have better balanced their investments and will probably persist longer into the future.”).

172. Horton, *supra* note 13, at 488; see also James E. Lovelock, *The Earth as a Living Organism*, in BIODIVERSITY, *supra* note 114, at 488; Bryan Norton, *Commodity, Amenity, and Morality: The Limits of Quantification in Valuing Biodiversity*, in BIODIVERSITY, *supra* note 117, at 200, 203 (“The value of biological diversity is more than the sum of its parts.”); Ruth Patrick, *Biodiversity: Why Is It Important?*, in BIODIVERSITY II: UNDERSTANDING AND PROTECTING OUR BIOLOGICAL RESOURCES 15,

Quite simply, “[t]he more species that live in an ecosystem, the higher its productivity and the greater its ability to withstand drought and other kinds of environmental stress.”<sup>173</sup>

The Chicago/Harvard antitrust philosophy also overlooks the short-term temptations for dominant firms to take the easy competitive way out by knocking out or acquiring competitors rather than focusing on developing better products and creating more innovations.<sup>174</sup> This is especially troublesome because constant innovation and product improvement are critical to our continuing economic growth,<sup>175</sup> and increasing product quality and innovation is a direct result of increasing competition in an environment of diverse competitors.<sup>176</sup>

Consequently, we should begin to recognize the importance of competitor diversity and variation, and stop relying upon the facile, and historically and evolutionarily incorrect statement that it is important only to protect “competition, not competitors.” There is no good reason to allow economically diverse competitors to be annihilated by unfair and exclusionary dominant-firm conduct, or

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17 (Marjorie L. Reake-Kudla et al. eds., 1997) (“[I]t is easy to understand that terrestrial ecosystems are dependent on a high diversity of macro- and microscopic organisms if the functioning of the ecosystem is to be efficient.”).

173. EDWARD O. WILSON, *CONSILIENCE: THE UNITY OF KNOWLEDGE* 294 (1998) [hereinafter *CONSILIENCE*]; see also Horton, *supra* note 12, at 488 (“On the other hand, ecosystems with a ‘relative lack of diversity’ and variability are inherently unstable and subject to invasion by species from outside the ecosystem.”) (citing Peter M. Vitousek, *Diversity and Biological Invasions of Oceanic Islands*, in *BIODIVERSITY*, *supra* note 114, at 181, 184 (discussing why isolated species are more susceptible to extinction caused by biological invasions)).

174. See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1, 72–81 (1911) (finding Standard Oil guilty of monopolizing the petroleum industry by using its size to vertically integrate, acquiring ownership of entities from the oil exploration stage through service stations offering their refined products to consumers, which allowed Standard Oil to undercut competitors’ costs to the point of bankruptcy or a sellout); Horton, *supra* note 12, at 501 (“Unfortunately, history has shown over and over that monopolies and dominant firms can and do, behave badly and cannot be trusted.”).

175. See, e.g., DAVIDSON, *supra* note 1, at 63–65, 149–53 (discussing importance of small firms and individuals to economic innovation and how important innovation is to “increased productivity and economic growth”).

176. *Id.* at 149–66. See generally BURTON H. KLEIN, *DYNAMIC ECONOMICS* (1977); MICHAEL E. PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* (1990); Thomas L. Friedman, Op-Ed., *Start-Ups, Not Bailouts*, N.Y. TIMES, Apr. 4, 2010, at WK9 (“Between 1980 and 2005, virtually all net new jobs created in the U.S. were created by firms that were 5 years old or less.”) (quoting Robert Litan of the Kauffman Foundation, “which specializes in promoting innovation in America”).



aggressive mergers.<sup>177</sup> Instead, we should protect healthy and stable competition by guarding competitors against such antitrust violations, and by pursuing merger policies that promote and protect variation and diversity rather than concentration.<sup>178</sup>

A recent ray of sunshine and hope emerged on August 19, 2010, when the United States Department of Justice and the Federal Trade Commission released comprehensive revisions ("New Merger Guidelines") to their 1992 Horizontal Merger Guidelines, which had last been revised in April of 1997.<sup>179</sup> One dramatic change is the signaling of "a commitment toward more aggressive horizontal merger enforcement driven by a renewed emphasis on the Clayton Act's incipency standard."<sup>180</sup> In addition, "they indicate heightened concerns about potential unilateral effects, including exclusionary conduct, and impacts on non-price competition such as quality, variety, and innovation."<sup>181</sup> As part of this approach, the New Merger Guidelines state in Section 6.4 that the "Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger."<sup>182</sup> "The New [Merger] Guidelines add that curtailed innovation could take the form of reduced incentives to continue with existing product-development efforts or the development of new products."<sup>183</sup>

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177. See Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497, 500 (2009) (citing *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428 (2d Cir. 1945)); Geerat J. Vermeij, *Comparative Economics: Evolution and the Modern Economy*, 11 J. BIOECONOMICS 105, 128 (2009) ("[P]olicies of [economic] concentration are both risky and inconsistent with the lessons from the economies of nature.").
  178. See, e.g., CONSILIENCE, *supra* note 173, at 294 ("Recent experimental studies on whole ecosystems support what ecologists have long suspected: The more species that live in an ecosystem, the higher its productivity and the greater its ability to withstand drought and other kinds of environmental stress.").
  179. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.
  180. Thomas J. Horton, *The New United States Horizontal Merger Guidelines: Devolution, Evolution, or Counterrevolution?*, 2 J. EUR. COMPETITION LAW & PRAC. 158, 158 (2011); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 179, at 1, 25.
  181. Horton, *supra* note 180, at 158; U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 179, at 2.
  182. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 179, § 6.4, at 23.
  183. Horton, *supra* note 180, at 162; see also Herbert Hovenkamp, *Harm To Competition Under the 2010 Horizontal Merger Guidelines*, 39 REV. INDUS. ORG. 3, 6-8 (2011) (observing that the New Merger Guidelines have concluded that in many instances non-dominant firms have greater incentives to innovate, but that acquisition by a dominant firm could eliminate these incentives); TIM WU, *THE MASTER SWITCH: THE*

While the New Merger Guidelines offer some hope, a new conservative administration could quickly seek to rescind or modify them.<sup>184</sup> Furthermore, the New Merger Guidelines “are not law and the American courts are not therefore bound to follow or defer to them.”<sup>185</sup> Nevertheless, they represent a potential beginning in the process of unraveling the Chicago/Harvard antitrust double helix and replacing its first strand with an evolutionarily-based philosophy consistent with the antitrust laws’ framers’ intent.<sup>186</sup>

### III. UNRAVELING THE CHICAGO/HARVARD APPROACH TO ANTITRUST JURY TRIALS

A key component of the second strand of the Chicago/Harvard antitrust double helix has been an all-out attack against jury trials in Section 2 monopolization and attempted monopolization cases.<sup>187</sup> Professor Donald F. Turner did not mince words in 1987 when he argued that “[t]here would be significant gains from eliminating jury trials in private antitrust actions.”<sup>188</sup> Turner believed that “substituting court trials for jury trials would reduce the private and public costs of antitrust litigation . . . [and] facilitate both the narrowing of the issues to be put to full trial and the granting of summary judgment.”<sup>189</sup> Without citing any support, Professor Turner added that “elimination of juries would increase the probability of accurate results.”<sup>190</sup>

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RISE AND FALL OF INFORMATION EMPIRES (2010) (documenting how innovation in the telecommunications industry has come primarily from nondominant and outsider firms).

184. Conservative economist Jerry Hausman, for example, quickly criticized the New Merger Guidelines as devolutionary. See Jerry Hausman, *2010 Merger Guidelines: Empirical Analysis*, ANTITRUST SOURCE (Oct. 2010), [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/Oct10\\_FullSource.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct10_FullSource.authcheckdam.pdf).
185. Horton, *New Horizontal Merger Guidelines*, *supra* note 183, at 163; see, e.g., *New York v. Group Health, Inc.*, No. 06-Civ. 13122, 2010 U.S. Dist. LEXIS 60196, at \*16–19 (S.D.N.Y. May 11, 2010) (rejecting efforts by antitrust plaintiff to amend its complaint to include the upper pricing pressure test, which appears in the New Merger Guidelines).
186. See *supra* Part II.
187. See DAVIDSON, *supra* note 1, at 79, 85–87 (discussing how Chicago School antitrust theories have “eliminated the fact finding role of the jury”); Kovacic, *supra* note 7, at 51–52.
188. Turner, *supra* note 20, at 812.
189. *Id.*
190. *Id.*

Professor Turner recognized that there was a slight “problem” with his anti-democratic proposal: the Seventh Amendment to the United States Constitution.<sup>191</sup> He therefore recommended “a congressional statute eliminating jury trial of private antitrust actions.”<sup>192</sup>

Congress, of course, never seriously took up Professor Turner’s anti-democratic suggestion to try to override the Seventh Amendment in antitrust cases. Nevertheless, academic and judicial disciples of the Chicago/Harvard antitrust philosophy have pressed forward and implemented Professor Turner’s recommendation that “[s]o long as private antitrust actions are triable to juries, it is important that the bases for summary judgment be expanded . . . .”<sup>193</sup> Their success has nearly eliminated the Seventh Amendment’s protections in monopolization cases today.<sup>194</sup> As any seasoned antitrust lawyer can tell you today, procuring a Section 2 plaintiff’s jury verdict and seeing it successfully through the appeals process is akin to getting “a camel to go through the eye of a needle . . . .”<sup>195</sup>

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191. *Id.* at 813. The Amendment states in part, “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.” U.S. CONST. amend. VII. The Supreme Court additionally expanded the Seventh Amendment’s coverage to actions enforcing statutory rights “if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.” *Curtis v. Loether*, 415 U.S. 189, 194 (1974).

192. *Turner*, *supra* note 22, at 814.

193. *Id.* Professor Turner cited aspirationally to *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986); *Anderson v. Liberty Lobby*, 106 S. Ct. 2505 (1986); and *Celotex Corp. v. Catrett*, 106 S. Ct. 2548 (1986).

194. See, e.g., ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 672, 699–700 (2d ed. 2008) (Observing that “[t]ogether, *Matsushita* and *Brooke Group* have proven to be formidable hurdles to the successful prosecution of predatory pricing cases. Since *Matsushita* was decided in 1986, no plaintiff, including the Department of Justice, has succeeded in satisfying the two prong ‘below cost + recoupment’ standard.” [Furthermore, “no plaintiff, public or private, has prevailed in a case controlled by *Brooke Group*. In contrast, the few recent cases in which plaintiffs have prevailed under Section 2, cases like *LePage’s* and *Microsoft* [non-jury], the Court relied on *Aspen Skiing* dominant firm defendants see in *Brooke Group* a deferential standard that provides them with significant discretion to structure their primary competitive conduct free from any serious threat of antitrust liability.”).

195. *Mark* 10:25 (King James); see Kovacic, *supra* note 7, at 73–80, for an excellent analysis of how “assumptions about the asserted dangers of overdeterrence from private enforcement in the United States ought not be accepted as a matter of faith and ought to be tested vigorously in light of modern experience and empirical study.” *Id.* at 75 (citing Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U.S.F. L. REV. 651 (2006)).

A key lynchpin of the Chicago/Harvard school's practical negation of plaintiffs' Seventh Amendment rights in antitrust cases has been a flank attack designed to nullify and eliminate the use of intent evidence in Section 2 cases.<sup>196</sup> In a 1987 *California Law Review* article complementary to Professor Turner's, Professor Areeda argued that even "accepted uses of intention can ultimately mislead courts and juries."<sup>197</sup> Areeda added: "[E]vidence of intention is often extremely prejudicial because the language of businessmen in the heat of competitive battle may sound predatory in the legal calm of the courtroom."<sup>198</sup> He then concluded that allowing jurors to rely on intent evidence "can interfere with efficient operation of business enterprises and that, by creating enormous uncertainty, burdens a firm and the legal system with unnecessary costs."<sup>199</sup>

Professor Areeda's and Turner's flank attack on the use of intent evidence in Section 2 cases has succeeded. Following the second strand of the Chicago/Harvard antitrust double helix, "the focus of recent cases has been on the propriety of the monopolist's conduct, not its subjective desire to win the competitive battle."<sup>200</sup> Over and over, the courts have used forgiving language to rationalize and neuter strong evidence of dominant firms' predatory intent toward competitors.<sup>201</sup> For example, in *A.A. Poultry Farms v. Rose Acre*

196. See Kovacic, *supra* note 7, at 53.

197. Phillip Areeda, *Monopolization, Mergers, and Markets: A Century Past and the Future*, 75 CALIF. L. REV. 959, 963 (1987).

198. *Id.*; see also *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983) ("'[I]ntent to harm' without more offers too vague a standard in a world where executives may think no further than 'Let's get more business' . . ."). Tellingly, the First Circuit never explained how its logic that executives may think only in the short-term squares with the rationale that business predators carefully and rationally calculate the long-term implications of their aggressive conduct. See *id.* at 230–36.

199. Areeda, *supra* note 197, at 965; see also Kovacic, *supra* note 7, at 53. The Supreme Court has "relied extensively" on Areeda-Turner in analyzing predatory pricing allegations. *Id.* at 45–46 n.139.

200. ANTITRUST LAW DEVELOPMENTS, *supra* note 2, at 243.

201. See, e.g., *Endsley v. City of Chicago*, 230 F.3d 276, 283 (7th Cir. 2000). While monopoly power is not unlawful without the element of predatory intent, "[b]y intent, we do not mean intent to obtain a monopoly or to capture an ongoing increase in market share. This of course is the aim of every business endeavor." *Id.*; see also *Int'l Travel Arrangers v. NWA, Inc.*, 991 F.2d 1389, 1394–96 (8th Cir. 1993); *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1113 (1st Cir. 1989) ("[T]he desire to crush a competitor, standing alone, is insufficient to make out a violation of the antitrust laws."); *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986) ("'[I]ntent to harm rivals' is not a useful standard in antitrust."); *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986) ("[I]f conduct is not objectively

*Farms*, 881 F.2d 1396 (7th Cir. 1989), Judge Frank Easterbrook and the Seventh Circuit upheld a district court's overturning of plaintiff egg producing and processing competitors' Section 2 jury verdict. Judge Easterbrook stated that even though overwhelming evidence of predatory intent "impressed the jury,"<sup>202</sup> it had no real probative value under *Matsushita*<sup>203</sup> or Professor Areeda's and Turner's recommendations.<sup>204</sup>

It is time to unravel and discard the philosophical assumptions of the second Chicago/Harvard antitrust helix strand dedicated to keeping Section 2 antitrust cases away from jurors by glorifying judges' alleged abilities to better understand and apply so-called objective economic theory while ignoring evidence of actual intent. Applying an evolutionary approach, we should rely upon the base pairs A-T, which will stand for reviving antitrust jury trials. The new A-T base pairs will protect our Seventh Amendment jury trial rights

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anticompetitive the fact that it was motivated by hostility to competitors . . . is irrelevant.").

202. *A. A. Poultry Farms v. Rose Acre Farms*, 881 F.2d 1396 (7th Cir. 1989).

203. *Id.* at 1401 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 595(1986)). Judge Easterbrook explained:

Reference to intent could not help the court determine whether recoupment is possible, and unless recoupment is possible, and unless recoupment lies in stone even the most vicious intent is harmless to the competitive system.

. . . .

Almost all evidence bearing on 'intent' tends to show both greed-driven desire to succeed and glee at a rival's predicament. . . . [A] desire to extinguish one's rivals is entirely consistent with, often is the motive behind competition. . . . [S]tatements of this sort readily may be misunderstood by lawyers and jurors, whose expertise lies in fields other than economics.

Intent does not help to separate competition from attempted monopolization and invites juries to penalize hard competition. It also complicates litigation. Lawyers rummage through business records seeking to discover tidbits that will sound impressive (or aggressive) when read to a jury. Traipsing through the warehouses of business in search of misleading evidence both increases the costs of litigation and reduces the accuracy of decisions. Stripping intent away brings the real economic questions to the fore at the same time as it streamlines antitrust litigation. . . . [W]e [therefore] now hold that intent is not a basis of liability (or a ground for inferring the existence of such a basis) in a predatory pricing case under the Sherman Act.

*Id.* at 1401-02.

204. *Id.* at 1404.

in monopolization cases, and allow juries to assess and evaluate evidence of predatory intent.<sup>205</sup>

This section discusses why jurors are better equipped than “judges constrained by technical analyses and captured by the economic theories before them”<sup>206</sup> to engage successfully in the “difficult business”<sup>207</sup> of separating dangerous predatory behavior from aggressive pro-competitive conduct. Section III.A first discusses why jurors are especially well-equipped to meaningfully assess and evaluate evidence of predatory intent, and apply community standards of morality and fairness.<sup>208</sup> Section III.B then explains how juries provide a robust evolutionary means for evaluating complex economic issues and reaching meaningful consensuses in antitrust cases concerning potential predatory and unfair anti-competitive conduct by dominant firms and monopolies.<sup>209</sup> Section III.C discusses how reviving antitrust jury trials will help restore and revitalize a valuable and necessary community-based investment in our antitrust laws and their enforcement.<sup>210</sup>

*A. Jurors Are Evolutionarily-Equipped to Meaningfully Assess Predatory Intent and Apply Community Standards of Morality and Fairness in Section 2 Cases*

Our most basic behavioral dispositions are the results of millions of years of evolution, and “cannot be understood without recourse to

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205. See *infra* Part III.A.

206. Horton, *supra* note 12, at 522.

207. *A. A. Poultry Farms*, 848 F.2d at 1400. Ironically, Judge Easterbrook characterizes the separation of predatory and pro-competitive conduct as a “difficult business.” Yet his simplistic theoretical conclusions turn it into a “simple business” with an inevitable result: the dominant firm or monopolist wins. See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 36–37 (1984) (“[In merger cases, t]he identity of the plaintiff is all the court needs to know . . . [and challenges] by a business rival against a merger or joint venture should be dismissed.”); Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 COLUM. BUS. L. REV. 345, 357–58 (arguing that predation and exclusion should be “governed by a wait-and-see attitude” because the economic costs of false positives are so high); Roszkowski, *supra* note 49, at 195 (arguing that in dealer termination cases, “a plaintiff is virtually assured defeat” under Chicago School economic theories); *id.* at 165 (“By permitting all defendants using whatever variety or combination of vertical restraints to parade the same Chicago School laundry list of ‘coulds,’ ‘mights,’ and ‘mays’ in justification before the trier of fact, and requiring the plaintiff to prove their inapplicability, the plaintiff is guaranteed defeat.”).

208. See *infra* Part III.A.

209. See *infra* Part III.B.

210. See *infra* Part III.C.

evolutionary theory.”<sup>211</sup> It is therefore not surprising that we are witnessing increasing efforts to apply evolutionary theory to human economic behavior.<sup>212</sup> In the words of legal theorist Bart Du Laing: “[T]he time has come for evolutionary minded legal scholars to replenish from the original source, being *biological* evolutionary theory, as currently applied in a variety of ways to our own species.”<sup>213</sup>

Chicago/Harvard economic models based on solitary individual economic maximizers are inconsistent with our evolutionary history, which “has ensured that we are able to get more from social living than from the pursuit of a solitary, selfish life.”<sup>214</sup> “[G]reed is good’ . . . is a childish and unethical rhetoric, however popular it has been on Wall Street and in the Department of Economics.”<sup>215</sup> Our dynamic economic system is dependent upon our unique evolutionary history of successful cooperation—not greed.<sup>216</sup> Future economic

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211. WOJCIECH ZALUSKI, *EVOLUTIONARY THEORY AND LEGAL PHILOSOPHY*, at ix (2009).

212. See, e.g., BEINHOCKER, *supra* note 110, at 187 (“[O]rganizations, markets, and economics are not just like evolutionary systems; they truly, literally are evolutionary systems . . . .”); Horton, *supra* note 12, at 469–71 (recommending that we look to evolutionary biology for guidance in applying the antitrust laws).

213. Bart Du Laing, *Gene-Culture Co-Evolutionary Theory and the Evolution of Legal Behavior and Institutions*, in *LAW, ECONOMICS AND EVOLUTIONARY THEORY*, *supra* note 23, at 248, 264.

214. MARTIN A. NOWAK & ROGER HIGHFIELD, *SUPER COOPERATORS: ALTRUISM, EVOLUTION, AND WHY WE NEED EACH OTHER TO SUCCEED* 272 (2011); see also DAVIDSON, *supra* note 1, at 128 (“Chicago theory lacks an explanation of the administrative dynamics of organizations.”).

215. DEIDRE N. MCCLOSKEY, *BOURGEOIS DIGNITY: WHY ECONOMICS CAN’T EXPLAIN THE MODERN WORLD* 446 (2010).

216. See, e.g., SEABRIGHT, *supra* note 156, at 4–5.

*Homo sapiens sapiens* is the only animal that engages in elaborate task-sharing—the division of labour as it is sometimes known—between genetically unrelated members of the same species.

. . . Nowhere else in nature do unrelated members of the same species—genetic rivals incited by instinct and history to fight one another—cooperate on projects of such complexity and requiring such a high degree of mutual trust as human beings do.

*Id.*

theories must therefore be based as much on ethics and morality<sup>217</sup> as on domination, greed, and selfishness.<sup>218</sup>

Our long history of economic cooperation has enabled and required us to construct social rules and habits that appropriately constrain our “violent and unreliable instincts.”<sup>219</sup> Maximally robust moral reasoning has evolved in humans to enable us to appropriately balance our cooperation and selfish instincts.<sup>220</sup> Our social rules and habits have further enabled us to develop “a rich network of facilitating relationships” based upon “cooperation, mutual support, and enrichment.”<sup>221</sup> As stated by Harvard mathematics and biology Professor Martin A. Nowak: “[I]f conscience and empathy were impediments to the advancement of self-interest, then we would have evolved to be amoral sociopaths. But we have not.”<sup>222</sup>

Evidence from a host of fields shows that “fairness evolved as a stable strategy for maintaining social harmony” in our economic relationships.<sup>223</sup> Neurobiological studies have found that “the sense

217. See Du Laing, *supra* note 213, at 255 (“[C]ulture appears more as a part of the solution than as a part of the problem. . . . [T]his emphasis on a plausible evolutionary theory of social norms and institutions is of particular relevance for an evolutionary analysis in law aiming at incorporating regulating behavior in its analyses.”).

218. See, e.g., GOODWIN, *supra* note 122, at xii–xiii.

Darwinism sees the living process in terms that emphasize competition, inheritance, selfishness, and survival as the driving forces of evolution. . . . But Darwinism shortchanges our biological natures. We are every bit as cooperative as we are competitive; as altruistic as we are selfish . . . And we are biologically grounded in relationships . . . .

*Id.*; see also RUSE, *supra* note 121, at 2 (“[Economic Darwinism and ‘survival of the fittest’ have] reflect[ed] and justify[d] the grossest sins in our society—domination, greed, selfishness, sexism, and more002E”).

219. SEABRIGHT, *supra* note 156, at 6.

220. CASEBEER, *supra* note 112, at 6, 59–61, 71; see also RUSE, *supra* note 121, at 279 (“Humans are not all bad. We cooperate and work together. Humans are not all good. We are selfish and serve our own ends rather than the needs of others. This is our nature . . .”).

221. GOODWIN, *supra* note 122, at 188.

222. NOWAK & HIGHFIELD, *supra* note 214, at 89–90. “*Homo economicus*,” on the other hand, “is a sociopath.” Lynn Ann Stout, *Taking Conscience Seriously*, in *MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY* 157, 158–59 (Paul J. Zak ed., 2008). Stout adds, “The hallmark of sociopathy is extreme selfishness as shown by a willingness to lie, cheat, take advantage, [and] exploit.” *Id.* at 159 (quoting BENJAMIN WOLMAN, *THE SOCIOPATHIC PERSONALITY* 42 (1987)).

223. SHERMER, *supra* note 160, at 11. Similarly, “[a]mong chimpanzees, a rudimentary sense of right and wrong, related to what serves their group’s common good, plays a



of fairness fundamental to distributive justice” is rooted in humans’ emotional processing.<sup>224</sup> In short, human morality helps us to mediate the inherent tensions between our cooperative and competitive, and altruistic and selfish instincts.<sup>225</sup> Indeed, “diverse faiths are united by the reciprocity of the Golden Rule.”<sup>226</sup>

As a function of our robust moral capacities, we are well-equipped, from an evolutionary and social perspective, to fairly evaluate the predatory intent of dominant firms and monopolists.<sup>227</sup> Humans have developed keen abilities to quickly figure out who can be trusted in ongoing economic interactions.<sup>228</sup> “Brain imaging seems to support the view that part of our cortex is specialized to deal with the ceaseless computations required to keep count of what we give and what we receive, and to respond emotionally to perceived imbalance.”<sup>229</sup> In other words, humans are evolutionarily hard-wired to quickly judge others’ intentions.<sup>230</sup>

Humans have to be good at reading others’ intentions<sup>231</sup> because our evolutionary development of languages has dramatically increased the opportunities for manipulation and deception when we seek to cooperate with others.<sup>232</sup> We understand “that a mix of

crucial role in maintaining a chimpanzee group’s integrity.” Leigh, *supra* note 113, at 381.

224. ROUGHGARDEN, *supra* note 119, at 160.

225. See GOODWIN, *supra* note 122, at xiii; RUSE, *supra* note 121, at 252–54.

226. See NOWAK & HIGHFIELD, *supra* note 214, at 273.

227. See Horton, *supra* note 12, at 505, 510.

228. See KARL SIGMUND, *THE CALCULUS OF SELFISHNESS* 19 (2010) (“[P]layers [in a Prisoner’s Dilemma game] who are allowed to briefly talk with each other . . . can predict very accurately, after a short conversation, whether their co-players will cooperate or not. Even without knowing which type of experiment is in store for them, they quickly pick up the relevant clues for summing up their partner.”); EDWARD O. WILSON, *THE FUTURE OF LIFE* 151 (2002) (“People by and large are natural geniuses at spotting deception in others.”); Horton, *supra* note 13, at 518 (“The human brain has evolved masterful abilities to calculate fairness. Parallel with this evolution, we have developed keen abilities to detect cheating.” (footnote omitted)).

229. See SIGMUND, *supra* note 228, at 9. For an interesting discussion of human brains as “extremely complex information-processing machines,” see SEIFE, *supra* note 9, at 211–15.

230. See NOWAK WITH HIGHFIELD, *supra* note 214, at 55.

231. See *id.* (“We require, in the parlance of the psychologists, a ‘theory of mind,’ that remarkable capacity that enables us to understand the desires, motivations, and intentions of others. This mind-reading ability allows us to infer another’s perspective—whether emotional or intellectual.”).

232. See *id.* at 187 (“[L]anguage, brainpower, and society became entwined in a three-way dance. What resulted as each component moved in step with one another was coevolution, a spiral toward more and more social complexity as language allowed for

cooperators (law-abiding citizens) and defectors (criminals) will always persist in human societies.”<sup>233</sup> Consequently, we have developed acute sensitivities toward others’ intentions.<sup>234</sup> We are therefore evolutionarily well-equipped to meaningfully evaluate and react to others’ maxims and intentions.<sup>235</sup>

The reason that juries have been “impressed”<sup>236</sup> by evidence of predatory intent is that such evidence strikes deep evolutionary chords.<sup>237</sup> On the other hand, the so-called rational Chicago/Harvard economic models that eschew fairness and intent lack meaningful biological, evolutionary, or historical foundations.<sup>238</sup> Consequently, we should welcome evidence and information about the motivations and intentions that lie behind the actions of dominant firms and monopolists.<sup>239</sup> We should allow antitrust juries to assess such evidence fully in judging predatory behavior.<sup>240</sup>

Jurors are also well-prepared to meaningfully apply and enforce community standards of morality and fairness in antitrust cases.<sup>241</sup>

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even more manipulation and deception, and even more collaboration and cooperation too.”); RIDLEY, *supra* note 130, at 116 (“The notion that our brains grew big to help us make tools or start fires on the savannah has long since lost favour. Instead, most evolutionists believe in the Machiavellian theory—that bigger brains were needed in an arms race between manipulation and resistance to manipulation.”).

233. NOWAK & HIGHFIELD, *supra* note 214, at 37.

234. See CHARLES DARWIN, *THE EXPRESSION OF THE EMOTIONS IN MAN AND ANIMALS* 357–59 (Univ. Chi. Press 1965) (1872) (“As most of the movements of expression must have been gradually acquired, afterwards becoming instinctive, there seems to be some degree of *à priori* probability that their recognition would likewise have become instinctive. . . . [A]ll the chief expressions exhibited by man are the same throughout the world.”); WILSON, *supra* note 173, at 171–72 (“[O]ne capacity, the detection of cheating, is developed to exceptional levels of sharpness and rapid calculation.”); WILSON, *supra* note 228, at 151 (“Psychologists . . . have discovered a hereditary tendency to detect cheaters and to respond to them with intense moral outrage.”).

235. In this sense, unlike the Chicago/Harvard theoreticians, we rely less on consequences and more on states of mind and intentions in making our moral evaluations. See CASEBEER, *supra* note 112, at 131 (“Our maxims and intentions are what counts, not the outcomes of our actions.”).

236. See *A. A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1398–99 (7th Cir. 1989).

237. See ZALUSKI, *supra* note 211, at xi.

238. See DAVIDSON, *supra* note 1, at 128–31.

239. See PRASANTA K. PATTANAIK, *ESSAYS ON INDIVIDUAL DECISION-MAKING AND SOCIAL WELFARE* 14 (2009) (“While the game form approach provides a flexible framework for the analysis of rights, I now believe that it needs to be supplemented by information that lies behind people’s actions.”).

240. See *id.*

241. See DU LAING, *supra* note 213, at 248, 254–55; ZALUSKI, *supra* note 211, at 123.

Humans' willingness to enforce community standards is a product of natural selection and is critical in supporting economic cooperation.<sup>242</sup> Jurors are willing to apply community morality standards and punish defectors (or antitrust violators) in the hopes of reforming them and to retaliate on behalf of and protect third parties (such as injured competitors).<sup>243</sup>

The threat of societal retaliation is crucial in protecting economic cooperation.<sup>244</sup> The threat of revenge sharply reduces the incidence of cheating in economic game simulations.<sup>245</sup> Antitrust juries provide an ideal "threat point" against predatory conduct<sup>246</sup> because jurors are willing to apply community standards to protect injured parties. Furthermore, juries are not intimidated because a dominant firm or monopolist cannot realistically retaliate against individual jurors.<sup>247</sup>

Dominant firms and monopolists are far more likely to act fairly and procompetitively if they face a realistic possibility of a jury finding out about their predatory conduct and holding them accountable for it.<sup>248</sup> Such firms understand that their goodwill and positive business reputations come at a great economic cost and can

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242. See, e.g., ZALUSKI, *supra* note 215, at 114 ("It seems that the instinct for retaliation is a product of natural selection: generally speaking it is evolutionarily advantageous for a victim of immoral treatment to punish a person who violated the norms of the first-order morality with regard to her, as it shows the wrongdoer and other potential violators of these norms that the person who displays this emotion cannot be easily exploited. One should also add that altruistic punishment is regarded as a component of strong reciprocity.").

243. See SIGMUND, *supra* note 228, at 15.

244. See, e.g., NOWAK & HIGHFIELD, *supra* note 214, at 29 ("It seem[s] that the prospect of vengeful retaliation paves the way for amicable cooperation.").

245. See, e.g., SEABRIGHT, *supra* note 156, at 68.

246. See, e.g., ROUGHGARDEN, *supra* note 119, at 148.

247. On the other hand, the temptations to engage in predatory behavior seem overwhelming in a legal system that offers no countervailing credible threat to such behavior (like the current Chicago/Harvard system). See *id.* at 148–49 ("For computation purposes [in determining what the optimal bargain is], Nash showed that the optimal compromise is uniquely found by maximizing the product of the individual's net payoffs relative to their threat point.").

248. See NOWAK & HIGHFIELD, *supra* note 214, at 54 ("By the same token, our behavior is endlessly molded by the possibility that somebody else might be watching us or find out what we have done. We are often troubled by the thought of what others may think of our deeds. . . . Our behavior is [therefore] affected by the possibility that somebody else might be watching us."); *id.* at 217 ("When people behave in a charitable way, it reveals much about the fact that their behavior has been honed down the generations by ancestors wanting to make a good impression whenever they find themselves in circumstances where they suspect they are being watched. This need to impress was felt as keenly in a close-knit hunter-gatherer clan as in today's surveillance society.").

be sullied, compromised, or destroyed through public trials and jurors' exposure to evil and anticompetitive intent.<sup>249</sup> As Harvard evolutionary biologist and mathematical theoretician Martin Nowak observes: "Whenever individual behavior is relevant to the public good, it should itself be made public to help avert tragedy."<sup>250</sup> Indeed, "a simple mathematical model reveals how concerns for reputation can lead to the establishment of fairness norms."<sup>251</sup>

The Chicago/Harvard theorists concede that, in monopolization cases:

[t]he defendant's stated purpose can often point the tribunal's analysis in the correct direction: toward a determination of whether that purpose is legitimate in principle and, if so, whether the challenged conduct is reasonably necessary to serve that purpose. Intention may also help to classify otherwise ambiguous behavior.<sup>252</sup>

It is time to hold them to this concession. Since jurors are evolutionarily well-equipped to meaningfully assess predatory intent and apply community standards of morality and fairness in Section 2 cases,<sup>253</sup> we should let them return to doing the jobs that our nation's founders intended they do. The time has come to revive antitrust jury trials in monopolization cases.

#### *B. Juries Provide a Robust Evolutionary and Democratic Means for Evaluating Complex Economic Issues and Reaching Meaningful Consensuses in Section 2 Cases*

Why do we have nine justices on our Supreme Court? Why do we have 100 senators and 435 congressmen? Why does our President have a cabinet? Why did our nation's founders include a right to jury trials in our Constitution? The simple answer is that "[t]he more complex the problem and the more complex the environment, the

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249. See *id.* at 55 ("Indirect reciprocity relies on what others think of us. . . . [I]f you have been a cad and a rotter, I am less likely to trust you to deliver."); SIGMUND, *supra* note 228, at 13 ("Under natural circumstances, an emotional response is likely to attract some attention. Anger is loud.").

250. NOWAK & HIGHFIELD, *supra* note 214, at 218. Nowak adds that "[w]e need new ways to advertise how people behave." *Id.* Antitrust jury trials offer us one of the best ways to gain insights into dominant firms' and monopolies' real goals and intentions.

251. SIGMUND, *supra* note 228, at 13.

252. Areeda, *supra* note 197, at 963.

253. See *supra* notes 227–230 and accompanying text.

more diverse points of view you need.”<sup>254</sup> Moreover, the “vigorous discussion characteristic of diverse decision making bodies also promotes fact-finding.”<sup>255</sup>

A jellybean contest can help us “understand the extraordinary potential of combined brainpower.”<sup>256</sup> When individuals try to guess the number of jelly beans in a jar, their initial estimates inevitably are off the mark.<sup>257</sup> Amazingly, however, when one averages their guesses, “the average of everyone’s guess[es] in a jelly bean contest will come significantly closer than any one person’s guess.”<sup>258</sup> Moreover, “the greater the number of people participating, the closer the collaborative guess becomes.”<sup>259</sup>

Could our founding fathers therefore have gotten it right in our Seventh Amendment? After all, juries, like any biological system, “are information-processing machines and this must be an essential part of any theory we may construct.”<sup>260</sup> More than a century ago, our Supreme Court seemed to agree. For example, in *Sioux City & Pacific Railroad v. Stout*,<sup>261</sup> the Court observed:

Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. . . . It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer

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254. JEFFREY KLUGER, *SIMPLEXITY: WHY SIMPLE THINGS BECOME COMPLEX (AND HOW COMPLEX THINGS CAN BE MADE SIMPLE)* 39 (2008) (quoting Brooke Harrington, sociologist and professor of public policy); see also CASEBEER, *supra* note 112, at 144 (“The epistemology of discovering proper functions is essentially scientific—it requires experimentation and a toleration of a certain diversity of approaches, as well as a communitarian commitment to constant criticism and improvement. This inquiry-based epistemology fits in well with our softly fixed natures . . .”).

255. Valerie P. Hans, *Judges, Juries, and Scientific Evidence*, 16 J. L. & POL’Y 19, 45 (2007); see also Phoebe Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205, 217 (1989) (noting that the “counterbalancing of various biases” is a benefit of the jury system (quoting *Ballew v. Georgia*, 435 U.S. 223, 234 (1978))).

256. KLUGER, *supra* note 254, at 37.

257. *Id.*

258. *Id.* at 37.

259. *Id.* at 38.

260. See Brenner, *supra* note 131, at 40, 44.

261. *Sioux City & P. R.R.*, 84 U.S. (17 Wall.) 657 (1873).

conclusions from admitted facts thus occurring than can a single judge.<sup>262</sup>

Eschewing our Supreme Court's earlier democratic reasoning, Professor Turner argued that "elimination of [antitrust] juries would increase the probability of accurate results."<sup>263</sup> Juries, the Chicago/Harvard theorists contend, are simply unable "to arrive at a rational decision because the nature and complexity of the factual and legal issues raised in most antitrust cases are beyond their competence."<sup>264</sup>

The Chicago/Harvard approach represents anti-democratic paternalism at its worst. Why are we so certain that juries cannot fairly assess and evaluate predatory conduct? As noted by Professor Adam J. Hirsch, "[T]he cognitive deficiencies of judges themselves—being every bit as human as the persons whose suits they hear—suggest that they, too, are apt to make imperfect

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262. *Id.* at 664. Approximately twenty years later, the Indiana Court of Appeals concurred, explaining:

The jurors, in their callings and experiences, have usually come in contact with, and observed, the conduct of men under varied conditions. It is this diversity which gives value to their unanimous judgment. Collectively, they are more capable of determining how an ordinarily prudent man would act under given conditions than judges of courts, whose experiences are usually confined to one calling, and who are proverbially prone to generalize and follow precedents.

Louisville, Evansville & St. Louis Consol. Ry. v. Berry, 36 N.E. 646, 650 (Ind. App. 1894). For an excellent discussion of these cases, see Paul F. Kirgis, *The Right to a Jury Decision and Questions of Fact Under the Seventh Amendment*, 64 OHIO ST. L.J. 1125, 1166–67 (2003).

263. Turner, *supra* note 20, at 812. See also Neil Komesar, *Stranger in a Strange Land: An Outsider's View of Antitrust and the Courts*, 41 LOY. U. CHI. L.J. 443, 444 (2010) ("There is little doubt that juries have limited technical expertise and sophistication.").

264. Turner, *supra* note 20, at 812. Professor Turner's sentiments have also been followed by our current Supreme Court in questioning jurors' abilities to decide factual claims in patent cases. See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388–90 (1996) (considering "relative interpretive skills of judges and juries" and finding judges better suited to interpret patent claims); Kirgis, *supra* note 262, at 1129; David B. Pieper, *The Appropriate Judicial Actor for Patent Interpretation: A Commentary on the Supreme Court's Decision in Markman v. Westview Instruments, Inc.*, 51 ARK. L. REV. 159 (1998); Theresa M. Seal, Casenote, *The Jury Is Out: Supreme Court Confirms Construction of Patent Claim Falls Within Exclusive Province of the Court*, 22 S. ILL. U. L.J. 785 (1998).

choices.”<sup>265</sup> Could it be that the real fear of the Chicago/Harvard theorists is that juries will decide monopolization cases on the evidence before them rather than biased and misguided Chicago/Harvard economic theories?<sup>266</sup>

We do not live in the simple bright-line world idealized by the Chicago/Harvard theoreticians. “Modern physicists realize that even the most solid laws—even the second law [of thermodynamics]—have a statistical element to them.”<sup>267</sup> Since “[e]ven simply determined systems can behave chaotically,” the precise details of any complex systems are not, as the Chicago/Harvard theoreticians would have us believe, predictable.<sup>268</sup> But the collaborative hunches of jurors, based on seeing real witnesses and documents, pushes toward “the complexities of moderation” rather than “the simplicity of extremism.”<sup>269</sup> Thus, juries are well-prepared to evaluate and analyze “surprises due to the emergence of unexpected behavior,” such as dangerous and unfair predatory conduct by dominant firms

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265. Adam J. Hirsch, *Evolutionary Theories of Common Law Efficiency: Reasons for (Cognitive) Skepticism*, 32 FLA. ST. U. L. REV. 425, 425 (2005). More fully, Professor Hirsch observed:

From a behavioral perspective, recognition of the potential for irrationality by citizens can serve to justify paternalistic rules that operate to limit choice, and thereby to protect citizens from the regret that would accompany poor decisions. Yet the cognitive deficiencies of judges themselves—being every bit as human as the persons whose suits they hear—suggest that they, too, are apt to make imperfect choices. As concerns their lawmaking function, judges’ efforts to craft ideal common law rules are doomed to failure—a failure that (by analogy) paternalistic mechanisms can forestall only in limited respects.

Accordingly, scholars who posit that judges generally aspire to establish efficient rules cannot thereby conclude that the common law tends ineluctably in that direction. Those scholars must take into account the pressures of time and shortcomings of ability that degrade judicial decisionmaking. Anything concocted by the human mind—including law—betrays the infirmities of that mind.

*Id.* at 425–26 (footnotes omitted).

266. As noted by Flynn and Ponsoldt, the “law and economics movement tends in the direction of rigid formalism.” Flynn & Ponsoldt, *supra* note 107, at 1139 n.58. They list possible explanations to include “a desire to impose disguised normative values for unstated political reasons, protection of the status quo, or fear that undue judicial discretion would lead to multivalued rules of decision.” *Id.* at 1139 (footnotes omitted).
267. SEIFE, *supra* note 9, at 53.
268. RIDLEY, *supra* note 130, at 311–12.
269. KLUGER, *supra* note 254, at 93; *see also* GOODWIN, *supra* note 122, at 78 (“[T]he study of complex systems goes beyond reductionism, which focuses on the analysis of the components out of which a system is made.”).

and monopolies.<sup>270</sup> And they are just as well, if not better, equipped than judges straitjacketed by biased economic theories to sort out and meaningfully assess the endless mathematical possibilities in our complex economic environment.<sup>271</sup>

Perhaps most importantly, jurors are evolutionarily “wired for justice.”<sup>272</sup> Neural regions in our brain activated by unfairness “are the same ones activated by feelings of disgust. That’s not just a dispassionate reaction to an inequitable bargain, that’s a primal recoiling.”<sup>273</sup> Our “sense of fairness is not a thing calculable in a physics equation,”<sup>274</sup> but it is rooted in our evolutionary core.<sup>275</sup>

In *In re Japanese Electronic Products Antitrust Litigation*,<sup>276</sup> the Third Circuit vacated a district judge’s order holding that a plaintiff had a right to trial by jury in an action for treble damages under the antitrust and antidumping laws.<sup>277</sup> Characterizing the case as “too complex for a jury,” the Third Circuit ruled that “due process precludes trial by jury when a jury is unable to perform this task with a reasonable understanding of the evidence and the legal rules.”<sup>278</sup> Dissenting, Circuit Judge Gibbons presciently noted:

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270. See GOODWIN, *supra* note 125, at 78.

271. See NOWAK & HIGHFIELD, *supra* note 214, at 49 (“Despite the thousands of papers written on the repeated Prisoner’s Dilemma, the mathematical possibilities in this model of direct reciprocity are open-ended, like chess, and not closed, like the strategies for playing tic-tac-toe. Our analysis of how to solve the Dilemma will never be completed. This Dilemma has no end.”).

272. KLUGER, *supra* note 254, at 43 (quoting Samuel Bowles, professor of economics).

273. *Id.*

274. *Id.*

275. See, e.g., ROUGHGARDEN, *supra* note 119, at 160 (“Indeed, neurobiological study has found that the sense of fairness fundamental to distributive justice ‘as suggested by moral sentimentalists, is rooted in emotional processing.’” (citing Ming Hsu, Cedric Anen & Steven R. Quartz, *The Right and the Good: Distributive Justice and Neural Encoding of Equity and Efficiency*, 320 SCIENCE 1092, 1092 (2008))).

276. *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980).

277. See *id.* at 1086, 1090.

278. *Id.* at 1084.

Courts have disagreed as to whether a party’s jury demand may be stricken if the complexity of the case would make it impossible for a jury to render a fair decision. The Ninth Circuit concluded . . . that there is no complexity exception to the Seventh Amendment right to jury trial. The Second, Fifth, and Tenth Circuits have rejected arguments that particular cases were so complex as to justify denying a jury trial without reaching the question whether there is a complexity exception.

ANTITRUST LAW DEVELOPMENTS, *supra* note 2, at 975–76 (footnotes omitted).



[A]ttempts to objectify the factors that bear upon complexity . . . will permit the exercise of trial court discretion. I fear that the exercise of that discretion will sometimes be influenced by unarticulated sympathies for or hostilities toward the underlying policies sought to be advanced in the lawsuit.<sup>279</sup>

Judge Gibbons continued:

Part of my difficulty with the majority's position probably results from a perception of the nature of the judicial process and the role of juries in that process. It is often said that the judicial process involves the search for objective truth. We have no real assurance, however, of objective truth whether the trial is to the court or to a jury. The judicial process can do no more than legitimize the imposition of sanctions by requiring that some minimum standards of fair play, which we call due process, are adhered to. In this legitimizing process, the seventh amendment is not a useless appendage to the Bill of Rights, but an important resource in maintaining the authority of the rule of law. . . .

In light, therefore, of the important functions served by the seventh amendment's protection of the right to a trial by jury, I would hold that there is no case in which properly separated claims for relief cognizable at common law would be so complex that trial by jury would amount to a violation of due process.<sup>280</sup>

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279. *Id.* at 1093 (Gibbons, J., dissenting).

280. *Id.* After the district judge's ruling permitting a jury trial was vacated and remanded by the Third Circuit, the district court eventually granted summary judgment for the defendant Japanese television manufacturers. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1114 (E.D. Pa. 1981). The Third Circuit then affirmed in part, and reversed in part, the district court's summary judgment ruling. *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 251 (3d Cir. 1983). The Supreme Court then reversed and remanded the Third Circuit's ruling in a famous 5-4 antitrust decision. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Commissioner Kovacic notes that in the Supreme Court's *Matsushita* decision, "Areeda and Turner are the most frequently cited commentators." Kovacic, *supra* note 7, at 46 n.139.

We should follow Judge Gibbons' prescient reasoning and embrace and trust jurors' communal senses of fairness and justice<sup>281</sup> by reviving antitrust jury trials.

*C. Reviving Antitrust Jury Trials Will Help Restore and Revitalize a Valuable and Necessary Community-Based Investment in Our Antitrust Laws and Their Enforcement*

Citizen participation in public decision-making is the hallmark of American democracy.<sup>282</sup> Our American citizens bring to the jury pool their diverse heritages, backgrounds, and experiences "honoring a balance of virtues."<sup>283</sup> They also bring a deep "sense of moral responsibility."<sup>284</sup> Thrown together as jurors, they produce "a combinatorial explosion" that represents democracy in action.<sup>285</sup>

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281. As noted by economist Oliver Williamson:

The *Matsushita* case dragged on for over a dozen years. Although a complex case, the core theory espoused by the plaintiff apparently was that Japanese television manufacturers engaged in collusion and dumping. . . .

. . . .

The Supreme Court, however, did not evaluate the plausibility of the case by assessing the plaintiff's theory. Rather, the Court examined the plausibility of the defendant's case [and embraced Judge Easterbrook's predation theories].

Williamson, *supra* note 38, at 211, 233–34. With all due respect to the Supreme Court, a jury of twelve citizens could have more fairly and objectively reviewed the factual evidence and applied the relevant legal theories, and it would not have taken anything close to twelve plus years to get a final resolution. Moreover, since *Matsushita*, "[t]he study of strategic behavior has been elaborated" to show the economic plausibility and substantial benefits of defendants' conduct. *Id.* at 234.

282. See THOMAS CHRISTIANO, *PHILOSOPHY AND DEMOCRACY: AN ANTHOLOGY* 3 (Thomas Christiano ed., 2003); cf. *New York v. County of Schoharie*, 82 F. Supp. 2d 19, 23 (N.D.N.Y. 2000) ("Unquestionably, the right to vote in an election is [a] hallmark of our democracy.").

283. See McCLOSKEY, *supra* note 215, at 438.

284. See Phillip Clayton, *Biology and Purpose: Altruism, Morality, and Human Nature in Evolutionary Perspective*, in *EVOLUTION AND ETHICS: HUMAN MORALITY IN BIOLOGICAL & RELIGIOUS PERSPECTIVE* 318, 331 (Phillip Clayton & Jeffrey Schloss eds., 2004) (emphasis omitted).

285. *Id.* at 330. Chicago–Harvard theoreticians would, of course, disagree with this assessment. At least one evolutionary scientist believes that the "combinatorial explosion" may not necessarily be a good thing. Professor Richard Dawkins believes that "[t]rial by jury may be one of the most conspicuously bad good ideas anyone ever had." RICHARD DAWKINS, *A DEVIL'S CHAPLAIN: REFLECTIONS ON HOPE, LIES, SCIENCE, AND LOVE* 38 (2003). Dawkins argues that in practice, "twelve assessments of the evidence" does not really happen because "juries are massively swayed by one or two vocal individuals." *Id.* at 40. Dawkins adds, "There is also strong pressure to

It is a mistake to view economic competition as divorced and distinct from our societal culture and fundamental values.<sup>286</sup> Adam Smith himself long ago recognized that “justice comprehends all the social virtues.”<sup>287</sup> Our “human sense of justice explicitly addresses communitywide issues,” and imposes constraints on social and economic behavior that we “agree[] on and enforce[] collectively.”<sup>288</sup> In enforcing our social and economic virtues and norms, we juggle a complicated set of shared norms and values.<sup>289</sup> Adam Smith further recognized that it is futile, as the Chicago/Harvard theoreticians have attempted, “to direct by precise rules what it belongs to feeling and sentiment only to judge of.”<sup>290</sup>

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conform to a unanimous verdict, which further undermines the principle of independent data.” *Id.* It is important to recognize that Dawkins’s opinion rests upon “the three juries that it has been [his] misfortune to serve on.” *Id.* Based on having closely watched dozens of mock juries in real and educational cases, this author’s experience does not match Professor Dawkins’s.

286. See, e.g., FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 6–7 (1995) (“Although economic activity is inextricably linked with social and political life, there is a mistaken tendency, encouraged by contemporary economic discourse, to regard the economy as a facet of life with its own laws, separate from the rest of society. . . . [E]conomic activity represents a crucial part of social life and is knit together by a wide variety of norms, rules, moral obligations, and other habits that together shape the society.”).
287. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS*, reprinted in *THE GLASGOW EDITION OF THE WORKS AND CORRESPONDENCE OF ADAM SMITH* (D. D. Raphael & A. L. Macfie, eds.) (photo. reprint 1982) (Oxford University Press 1976) (1759).
288. Frans B. M. de Waal, *The Chimpanzee’s Sense of Social Regularity and Its Relation to the Human Sense of Justice*, in *THE SENSE OF JUSTICE: BIOLOGICAL FOUNDATIONS OF LAW* 241, 254 (Roger D. Masters & Margaret Gruter eds., 1992).
289. See STEPHEN S. HALL, *WISDOM: FROM PHILOSOPHY TO NEUROSCIENCE* 207 (2010) (“[A]lthough *Homo economicus* insists by definition on a narrow and material definition of ‘preference,’ *Homo sapiens* ultimately juggles a much more complicated set of values.”).
290. SMITH, *supra* note 287, at 339. Smith observed:

It may be said in general of the works of the casuists that they attempted, to no purpose, to direct by precise rules what it belongs to feeling and sentiment only to judge of. How is it possible to ascertain by rules the exact point at which, in every case, a delicate sense of justice begins to run into a frivolous and weak scrupulosity of conscience? What is the highest pitch of freedom and ease of behaviour which can be regarded as graceful and becoming, and when it is that it first begins to run into a negligent and thoughtless licentiousness? With regard to all such matters, what would hold good in any one case would scarce do so exactly in any other, and what constitutes the propriety and happiness of behavior varies in every case with the smallest variety of situation. Books of casuistry, therefore, are generally as

History has proven over and over that businesses sometimes lie, disseminate disinformation, and engage in predatory conduct designed to crush competitors.<sup>291</sup> To best protect ourselves against such manipulation, we must acknowledge and pinpoint “the vulnerabilities of our faculties of categorization, language, and imagery,” rather than deny or fear their complexity.<sup>292</sup> Fortunately, our “strongly ingrained rules about fairness and reciprocity”<sup>293</sup> and our evolutionarily-programmed “resistan[ce] to attack by free riders and cheaters”<sup>294</sup> are ideal for communally sorting out and evaluating allegations of predatory conduct by dominant firms and monopolies.

Rather than fearing jurors’ cultural norms and values, we should welcome their contributions in helping to create and enforce higher norms of business ethics and conduct.<sup>295</sup> Instead of obsessing about false positives, we should focus on the societal and economic dangers of predatory conduct.<sup>296</sup>

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useless as they are commonly tiresome. . . . None of them tend to soften us to what is gentle and humane. Many of them, on the contrary, tend rather to teach us to chicanery with our own consciences, and by their vain subtilties serve to authorise innumerable evasive refinements with regard to the most essential articles of our duty.

*Id.* at 339–40. A more recent critic might label the Chicago/Harvard theories as “greedy reductionism,” which can “lead us to deny the existence of real levels, real complexities, real phenomena.” GEORGE LEVINE, *DARWIN LOVES YOU: NATURAL SELECTION AND THE RE-ENCHANTMENT OF THE WORLD* 104 (2006) (quoting DANIEL C. DENNETT, *DARWIN’S DANGEROUS IDEA: EVOLUTION AND THE MEANING OF LIFE* 82 (1995)); see also Robert Pitofsky, *Setting the Stage*, in *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK*, *supra* note 39, at 5 (noting that concerns today about antitrust “include current preferences for economic models over facts”).

291. See Horton, *supra* note 12, at 500–02.

292. STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* 217 (2002).

293. BEINHOCKER, *supra* note 110, at 121.

294. *Id.* at 269.

295. See, e.g., FUKUYAMA, *supra* note 286, at 26 (“Trust is the expectation that arises within a community of regular, honest, and cooperative behavior, based on commonly shared norms, on the part of other members of that community. . . . [W]hile contract and self-interest are important sources of association, the most effective organizations are based on communities of shared ethical values. These communities do not require extensive contract and legal regulation of their relations because prior moral consensus gives members of the group a basis for mutual trust.” (citation omitted)).

296. See, e.g., BEINHOCKER, *supra* note 110, at 270. Beinhocker observes: “The local tuning of reciprocity norms can create very complex dynamics at the level of populations. High-cooperation societies can see collapses in cooperation if cheating reaches a critical mass; low cooperation societies can get stuck in uncooperative, economically impoverished dead ends. . . .” *Id.* Indeed, “[a] frightening ‘lack of

It is easy for dominant firms and monopolies to claim that hard evidence of predatory intent is merely the meaningless musings of enthusiastic middle-level managers. After all, humans and businesses both have enormous capacities for self-deception. Indeed, given humans' hard-wired skills in mind-reading and deciphering intentions, "it is to your advantage to sincerely believe in your own innocence. Biologically as well as socially, it's often advantageous to deceive yourself into believing that you are fully innocent, since others are then more likely to believe you as well."<sup>297</sup>

Furthermore, even though corporations enjoy many of the rights of individuals through the interpretation of the Fourteenth Amendment to our constitution, "corporations are neither susceptible to the standards of accountability nor the deterring effects of punishment to which people are subject."<sup>298</sup> For example, a corporation cannot be put in jail. This has "greatly increase[d] the power of corporations and [broken] the ties of accountability that attach it to a society as a whole."<sup>299</sup>

We need to demand more public accountability from our businesses, especially dominant firms and monopolies. "The nature of the human commitment to morality is that all people in a community—dominant as well as subordinate—must be held accountable to the same standards of ethical behavior."<sup>300</sup>

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moral purpose' has been a fundamental problem in our recent economic debacles." Horton, *supra* note 12, at 513. Interestingly, in the field of genetics, Matt Ridley has observed: "Arguably, more damage has been done by false negatives (true genes that have been prematurely ruled out on inadequate data) than by false positives (suspicions of a link that later proved unfounded)." Ridley, *supra* note 130, at 73.

297. Clayton, *supra* note 284, at 328; *see also* PINKER, *supra* note 292, at 111 ("[T]he best liar is one who believes his own lie."); *id.* at 325 ("Since the most effective bluffer is the one who believes his own bluff, a limited degree of self-deception in hostile escalations can evolve. It has to be limited, because . . . when the limits are miscalibrated and both sides go to the brink, the result can be a human disaster.").

298. GOERGEN ET AL., *supra* note 141, at 103. For an excellent discussion of the constitutional rights of corporations and their judicial origins, *see* TED NACE, *supra* note 146, at 11–85.

299. GOERGEN ET AL., *supra* note 141, at 103. The authors add that "corporations should be expected to obey the law" to help "foster[] a realistic perspective from which corporate governance can be expected to improve." *Id.* at 104. The authors note that their "normative arguments are based on the perspective that a corporation is a social citizen and should therefore be made accountable for the social externalities that may ensue from its activities." *Id.* at 46.

300. Lionel Tiger, *The Evolution of Cultural Norms*, in *THE SENSE OF JUSTICE*, *supra* note 288, at 278, 287; *see also* FUKUYAMA, *supra* note 286, at 150 ("Modern institutions are a necessary but not sufficient condition for modern prosperity and the social well-

Accountability to jurors will help augment the economic and social conditions necessary to incentivize and encourage hard-fought but fair economic competition.<sup>301</sup> As noted by Larry Arnhart: “Frederich Hayek understood that a free society can minimize coercion by the state only if there is a high degree of voluntary conformity to moral rules enforced by social pressure.”<sup>302</sup> We should therefore stop seeking to shelter and protect dominant firms and monopolies from exposure to juries.

Adam Smith recognized hundreds of years ago that juries additionally help “curb[] the power of the judge[s]” and act as a societal check on judicial power.<sup>303</sup> Juries also add respectability and authority to our democratic judicial processes. As noted by Third Circuit Judge Gibbons in his dissenting opinion in *In re Japanese Electronics Products Antitrust Litigation*:

In the process of gaining public acceptance for the imposition of sanctions, the role of the jury is highly

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being that it undergirds, they have to be combined with certain traditional social and ethical habits if they are to work properly.”).

301. See Lynn A. Stout, *On the Proper Motives of Corporate Directors (Or Why You Don't Want to Invite Homo Economicus to Join Your Board)*, 28 DEL. J. CORP. L. 1, 1 (2003) (“A variety of factors . . . may offer a foundation for building a model of human behavior that is both more accurate and useful than the *homo economicus* model.”); MICHAEL J. COMER, CORPORATE FRAUD 15 (3d ed. 1998) (“Fraud is contagious and corrosive and if supposedly small frauds are allowed to escape they will soon grow.”); Francesca Gino et al., *Contagion and Differentiation in Unethical Behavior: The Effect of One Bad Apple on the Barrel*, 20 PSYCHOL. SCI. 393, 398 (2009); Horton, *supra* note 12, at 510–14.

302. Larry Arnhart, *Darwinian Conservatism*, in PHILOSOPHY AFTER DARWIN: CLASSIC AND CONTEMPORARY READINGS 349, 351 (Michael Ruse ed., 2009). Arnhart continued:

[Hayek] insisted “that freedom has never worked without deeply ingrained moral beliefs and that coercion can be reduced to a minimum only where individuals can be expected as a rule to conform voluntarily to certain principles.” Traditional moral rules arise from the social pressure of public approval or disapproval. A healthy moral order emerges from the spontaneous order of civil society that stands between the individual and the state.

*Id.* (citing FREDERICK HAYEK, THE CONSTITUTION OF LIBERTY 62–63, 146–47 (1960)).

303. See ADAM SMITH, LECTURE ON JURISPRUDENCE OF MARCH 11, 1763, *reprinted in* ADAM SMITH: LECTURES ON JURISPRUDENCE 282, 283 (photo reprint 1982) (R. L. Meek et al., eds., 1978). Smith went on to castigate the courts of France, observing that “we see that the courts at their first institution have allways [sic] taken great liberties. They are neither tied down by the briefes nor encumbered with a jury.” *Id.* at 287.

significant. The jury is a sort of ad hoc parliament convened from the citizenry at large to lend respectability and authority to the process. Judges are often prone to believe that they, alone, can bear the full weight of this legitimizing function. I doubt that they can. Any erosion of citizen participation in the sanctioning system is in the long run likely, in my view, to result in a reduction in the moral authority that supports the process.<sup>304</sup>

We live today in a “society in which individualism and community are precariously joined.”<sup>305</sup> The Chicago/Harvard theorists proclaim their utter trust in a free market of consumers.<sup>306</sup> Yet when a representative panel of those consumers is selected as citizen jurors, the Chicago/Harvard theorists ironically claim that the panel is incapable of grasping and understanding the complexities of business and economic competition, which, in the Chicago/Harvard model, can be fairly understood only by appointed judges.<sup>307</sup> This is the height of anti-democratic arrogance and folly,<sup>308</sup> and it is time to summarily reject it. By reviving antitrust juries, we can begin the process of restoring community-based moral authority to the enforcement of our antitrust laws.<sup>309</sup>

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304. *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1093 (3d Cir. 1980) (Gibbons, J., dissenting).

305. ROBERT WESSON, *BEYOND NATURAL SELECTION* 137 (1991). Francis Fukuyama further observes that “[b]oth American democracy and American business have been successful because they partook of individualism and community simultaneously.” FUKUYAMA, *supra* note 286, at 308.

306. *See supra* Part III.A.

307. *See supra* Part III.B.

308. Some might go so far as to portray the Chicago/Harvard distrust of juries as part of “an elitist and at length a fascist rhetoric against free public opinion itself.” *See* MCCLOSKEY, *supra* note 215, at 439. Professor McCloskey believes that the principal seven virtues of prudence, temperance, justice, courage, love, faith, and hope are crucial to successful long-term innovation. *Id.* at 443–44. Juries, of course, present a more representative sampling of these seven virtues than any individual judge.

309. *See* Arnhart, *supra* note 302, at 351 (discussing JAMES Q. WILSON, *THE MORAL SENSE* (1993)). Arnhart examined Wilson’s claim that:

[M]any of the most urgent problems in public policy show the importance of moral character. For example, violent crime is a problem because a few people lack the self-control and the sympathy for the feelings of others that keep most people from becoming violent criminals. Good citizens obey the law because they have a moral sense that makes them law-abiding. Societies become disorderly when too many people fail to show the virtuous traits of good moral character.

*Id.*

## IV. CONCLUSION

The current Chicago/Harvard antitrust double helix, and its enthusiastic embrace by the Supreme Court, has led to a shocking decrease in antitrust enforcement over the last three decades. The first strand of the double helix has adopted as its mantra the normative cliché that “the antitrust laws protect competition, not competitors.” This mantra has been lionized far beyond its humble normative origins to laud and encourage the growth of dominant firms and monopolies while remaining indifferent to the effects of predatory conduct on competitors. The end result has been a striking reduction in the enforcement of Section 2 of the Sherman Act, Section 7 of the Clayton Act, as well as the Robinson-Patman Act, over the past three plus decades.

The second strand of the Chicago/Harvard double helix has essentially counseled us to shield dominant firms and monopolies from antitrust juries through anti-democratic and paternalistic judicial interventions. The ostensible cover for this reduction of antitrust plaintiffs’ Seventh Amendment jury rights has been the unsupported assertion that antitrust cases and Chicago/Harvard economic theories are too complex for jurors. To further buttress their goals, the Chicago/Harvard theoreticians have convinced the courts to rationalize and keep away from juries hard-core evidence of predatory intent.

Applying an evolutionary approach to our antitrust laws and their enforcement, it is time to unravel and replace the Chicago/Harvard antitrust double helix. We should substitute its philosophic strands with base pairs dedicated to guarding competitors against predatory conduct and aggressive mergers by dominant firms and monopolies, and reviving antitrust jury trials.

In guarding competitors, we need not and should not protect economically unfit competitors from the rigors of fair competition. We should, however, eschew the normative cliché that “the antitrust laws protect competition, not competitors,” by reinvigorating and revitalizing the enforcement of our Sherman and Clayton Acts. Guarding competitors against predatory conduct and aggressive mergers will protect the competitive diversity and variety necessary for a stable, thriving, and innovation-oriented economic ecosystem.

In reviving antitrust jury trials, we will reverse the anti-democratic shielding of dominant firms and monopolies from effective public oversight, and restore a proper regard for our Seventh Amendment. As part of this strategy, we should allow antitrust juries to fully evaluate and assess evidence of dominant firms’ and monopolies’ predatory intent in carrying out strategic and exclusionary activities.



From an evolutionary standpoint, juries are far better-equipped than judges straitjacketed by Chicago/Harvard economic theories<sup>310</sup> to assess and resolve predatory conduct issues.

The Chicago/Harvard antitrust double helix has provided the philosophical bases for the diminished enforcement of our antitrust laws for more than thirty years. The overall economic results have not matched the Chicago/Harvard rhetoric<sup>311</sup> while the growth of economic institutions “too big to fail”<sup>312</sup> is of grave concern. It is therefore time to begin basing the interpretation and enforcement of our antitrust laws upon a new philosophical double helix that will protect and promote our long-term economic diversity and innovation opportunities by guarding competitors; and reinvigorate our community-based morals and ethics by reviving antitrust jury trials.

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310. If Chicago/Harvard economic theories are “too complex” for juries to understand and apply, the primary reason may be that they do not comport with jurors’ common sense and evolutionary notions of justice and fairness. Nor do such theories represent or comport with our community-based standards of moral authority. *See, e.g.*, Robert C. Solomon, *Business Ethics*, in *A COMPANION TO ETHICS* 354, 358 (Peter Singer ed., 1991) (“However competitive a particular industry may be, it always rests upon a foundation of shared interests, and mutually agreed-upon rules of conduct, and the competition takes place not in a jungle but in a community, which it presumably both serves and depends upon.”).

311. *See* ADAMS & BROCK, *supra* note 145, at 303 (“[W]hen economic performance is actually examined, we have seen, it casts serious doubt on the assertion that bigness is the guarantor of operating efficiency, innovation efficiency, or social efficiency.”); DAVIDSON, *supra* note 1, at 54, 149–56 (discussing a variety of historical, behavioral, and game theory reasons why innovation is likely to be reduced in markets that are more concentrated); ZOLTAN J. ACS & DAVID B. AUDRETSCH, *INNOVATION AND SMALL FIRMS* (1990) (“[C]ontrary to much of the conventional wisdom, innovative activity is apparently hindered, not promoted, in concentrated markets.”); Spencer Weber Waller, *Corporate Governance and Competition Policy*, 18 *GEO. MASON L. REV.* 833, 873–74 (2011) (“[T]here is mounting evidence from corporate finance communities that suggests entire categories of deals are more fraught with peril and more likely to destroy, rather than enhance, shareholder value. Together, these sources and studies suggest that certain categories of mergers destroy shareholder value and do little, if anything, to create meaningful efficiencies or to enhance market competition.”).

312. *See* ADAMS & BROCK, *supra* note 145; DAVIDSON, *supra* note 1; LYNN, *supra* note 146; SORKIN, *supra* note 142; Foer, *supra* note 145.