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Competition Upstream of Amazon

*Martin Edwards**

ABSTRACT

The rise of large, market-concentrating technology firms like Amazon, Inc. is driving commentators, regulators, and politicians to rethink the law of antitrust. In particular, “New Antitrust” reformers propose that the narrow focus on consumer welfare has caused antitrust law to stop too short in corralling the broader social and economic consequences of Big Tech’s “bigness.” Proponents of the consumer welfare standard argue that it has worked well to distinguish beneficial competition from harmful aggression and, further, to reduce costly legal uncertainty. There is now momentum for substantial reform to antitrust law and practice and a growing debate about what such reform might include.

This Article contributes to the debate by presenting a modest case study of a market that is evolving on Amazon, Inc.’s Marketplace platform: the market for nonprescription components of continuous positive air pressure (CPAP) machines, medical devices prescribed to patients suffering from sleep apnea. The study reveals two observations. First, the underlying economic and doctrinal logic of consumer welfare antitrust remains sound. Second, the study illustrates positive social consequences beyond just the economic wealth and welfare that the consumer welfare standard uses as its lodestar. This Article focuses on

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the second observation because New Antitrust reformers' core claim is that proponents of the consumer welfare approach are wrong to dismiss indirect negative social and economic consequences of bigness, such as harm to small business, stifling of innovation, and inequality.

This Article follows the New Antitrust reformers into this space by illustrating counterbalancing social and economic consequences from Amazon's consolidation, including a thriving network of small and innovative dealers, other small innovators that serve them, increased employment opportunities, and even lowering of healthcare costs. Amazon has grown large and has concentrated online retail and related logistics, but its largeness has spurred innovation, competition, and social value-creation just upstream.

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I. INTRODUCTION

The rise of large technology companies, including Amazon, Inc. (Amazon), has spurred interest in reinvigorating antitrust law and enforcement.¹ In the last decade or so, scholars and commentators have observed technology companies growing large and concentrating their markets, while antitrust law—the typical avenue for scrutinizing such concentration—has not raised a meaningful barrier.² Congress, federal agencies, and state attorneys general have responded to the rise of Big Tech by initiating various investigative or enforcement actions in the

1. See *infra* Part II.C.

2. See generally Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 716 (2017); TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* ch. 7 (2018).

United States, while EU agencies have carried out similar work within that jurisdiction.³

This torrent of scholarship, popular media, political investigating, and litigation represents a wave of momentum toward reform.⁴ The fundamental argument of today's most prominent New Antitrust reformers⁵ is that lax antitrust enforcement has allowed for vast concentrations of economic power. Further, they argue, these concentrations bear an important connection to numerous other social, economic, and political problems: everything from economic inequality to a troubled political climate.⁶ While granting that facilitating better economic organization and solving social and political problems will require more than antitrust reform,⁷ New Antitrust reformers see antitrust law as a uniquely fruitful place to start.

For most reformers, the “consumer welfare standard,” the leading theoretical approach to resolving most antitrust questions, is the root of antitrust law's present shortcomings.⁸ Then-professor and later Judge Robert Bork's *The Antitrust Paradox: A Policy at War with Itself*⁹ most thoroughly contributed to this approach, which proposed that US antitrust statutes be interpreted as applying only to the question of whether society is or should be expected to be made better or worse off—in economic welfare terms—by any action alleged to

3. See Press Release, House Judiciary Committee, House Judiciary Committee Launches Bipartisan Investigation into Competition in Digital Markets (June 3, 2019), available at <https://judiciary.house.gov/media/press-releases/house-judiciary-committee-launches-investigation-into-competition-in-digital> [perma.cc/27UZ-VCEV]; H.R. Rep. No. 117-8, at 1 (2022); European Commission Press Release IP/19/4291, Antitrust: Commission Opens Investigation into Possible Anti-Competitive Conduct of Amazon (July 17, 2019); see also Amazon Commitments to the European Commission, Case No. AT.40462.

4. Elyse Dorsey, Geoffrey A. Manne, Jan M. Rybnicek, Kristian Stout & Joshua D. Wright, *Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement*, 47 PEPP. L. REV. 861, 865 (2020).

5. See Joshua D. Wright, Elyse Dorsey, Jonathan Klick & Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 294–95 (2019). New Antitrust is also sometimes referred to as “Hipster Antitrust,” “New Brandeis,” or “Neo-Brandeisian.” *Id.*

6. *Id.* at 294.

7. Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 86 U. CHI. L. REV. 595, 596–97 (2020).

8. See *infra* Part II on the consumer welfare standard, including criticisms of it as a legal lodestar and an economic theory. The consumer welfare standard is not literally a legal “standard” or test, but its logic animates rules that permit, for example, antitrust defendants to present “efficiency justifications” for their allegedly anticompetitive conduct. Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2415 (2013).

9. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978).

violate those statutes.¹⁰ Judge Bork argued that real-world markets sometimes involve seemingly aggressive competitive conduct that is, upon further analysis, good and healthy.¹¹ In other cases, however, aggressive competitive conduct may be aimed at cutting competitors out of the market entirely, amassing market power, and using that power to collect unfair gains for the aggressor at the expense of consumers and conquered competitors.¹² Because good competition ostensibly creates innovation, empowers people and businesses, and leads to a more balanced political and social life, the task of courts and regulators applying antitrust law is to carefully discern the difference.¹³ Systematic economic analysis of consumer welfare most heavily influences the way antitrust law works today.¹⁴

Naturally, one of the fundamental pillars of proposed New Antitrust reform is a criticism of the consumer welfare standard.¹⁵ The primary criticism from these reformers is that consumer welfare antitrust abandons analyzing the important relationship between concentrated market structures and broader market outcomes.¹⁶ To reformers, narrowly focusing on consumer prices and output¹⁷ weakens antitrust law's earlier historical role in ensuring competitive market structures¹⁸ and ignores indirect economic harms and broader social harms from concentration.¹⁹ New Antitrust reformers argue that the

10. *Id.* at 90–91; *see* Steinbaum & Stucke, *supra* note 7, at 597–98; Mark Glick, *The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust*, 63 ANTITRUST BULL. 485, 490 (2018).

11. BORK, *supra* note 9, at 134–35.

12. *See id.* at 344–45 (discussing *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951)); *infra* Section II.B (describing Judge Bork's views on *Lorain* as well as *Microsoft*); *cf.* Ramsi Woodcock, *Google and Shifting Conceptions of What It Means to Improve a Product*, TRUTH ON THE MKT. (Dec. 16, 2020), https://uknowledge.uky.edu/law_facpub_pop/56/ [perma.cc/9UK7-D3NV] (“Anticompetitive conduct is only ever one thing in antitrust: denial of an essential input to a competitor. There is no other way to harm rivals.”).

13. *See* BORK, *supra* note 9, at 134–35; *cf.* Khan, *supra* note 2, at 715–16; Steinbaum & Stucke, *supra* note 7, at 596, 620.

14. Wright et al., *supra* note 5, at 305.

15. *See* Steinbaum & Stucke, *supra* note 7, at 599–600; Khan, *supra* note 2, at 710.

16. *See* Steinbaum & Stucke, *supra* note 7, at 600.

17. Glick, *supra* note 10, at 492–93. For example, as Khan describes, where a class of consumers' wealth is transferred to a monopolist, such would not decrease “consumer welfare,” despite clearly being a wealth transfer from consumer to monopolist. Khan, *supra* note 2, at 743–44.

18. *Cf.* Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 1965 COLUM. L. REV. 377, 383–84 (describing political interests of antitrust law). *See generally* Steinbaum & Stucke, *supra* note 7.

19. *See* Khan, *supra* note 2, at 743–44; Steinbaum & Stucke, *supra* note 7, at 599–600. *See* discussion *infra* Part II for greater elaboration on the consumer welfare standard, criticism of

consumer welfare standard has weakened antitrust law, which, in turn, has resulted in ongoing social, economic, and political harm.²⁰

This Article contributes to the debate by presenting a case study in Amazon's concentration of online retail by studying a market that has developed on Amazon's Marketplace platform. Studying markets, including both their structures and outcomes, can reveal evidence of the weakness of the consumer welfare standard or signs of the harms the reformers have purportedly identified.²¹ Furthermore, studying markets can also reveal socially valuable consequences for society that might, at minimum, be useful to know if one is devising reforms to mitigate harm.²² Finally, studying markets directly provides a helpful reminder of the dynamic and contingent processes that shape production and distribution. Even through the course of this study, more than three years in the making, the studied market and Amazon have changed notably.²³

The studied market consists of the sale of nonprescription components and accessories for home-use continuous positive airway pressure (CPAP) machines. Much of the study was created through conversations, interviews, and correspondence with the principals of two third-party seller CPAP businesses. It also consists of original legal and factual research into prices and related aspects of the CPAP market.²⁴

While purchasing a CPAP machine requires a prescription, purchasing the most common CPAP accessories does not.²⁵ This means that dealers can sell accessories to consumers through e-commerce platforms such as Amazon Marketplace.²⁶ Investigation of this market

it, and defense of it. *See also* Blake & Jones, *supra* note 18; Ernest Gellhorn, *An Introduction to Antitrust Economics*, 1975 DUKE L.J. 1, 1–2, 42 (1975).

20. *See* Steinbaum & Stucke, *supra* note 7, at 600.

21. *Cf.* JOSEPH P. BAUER, WILLIAM H. PAGE, EARL W. KINTNER & WILLIAM P. KRATZKE, KINTNER'S FEDERAL ANTITRUST LAW § 10.0; R.H. Coase, *The Problem of Social Cost*, 56 J.L. & ECON. 837, 853 (1960) (“Satisfactory views on policy can only come from a patient study of how, in practice, the market, firms, and governments handle the problem of harmful effects.”).

22. *See generally* Christopher Yoo, *The Post-Chicago Antitrust Revolution: A Retrospective*, 168 U. PA. L. REV. 2145, 2168 (2020) (describing the rise of “Hipster Antitrust” and the growing emphasis on empirical evaluation of market outcomes).

23. *See infra* Part III.

24. *See infra* Section III.D.1.

25. *See infra* Section III.B for further explanation of the legal restrictions applicable to CPAP machines and accessories.

26. *See generally* Marshall Allen, *You Snooze You Lose: How Insurers Dodge the Costs of Popular Sleep Apnea Devices*, NPR (Nov. 21, 2018, 5:00 AM), <https://www.npr.org/sections/health-shots/2018/11/21/669751038/you-snooze-you-lose-how-insurers-dodge-the-costs-of-popular-sleep-apnea-devices> [perma.cc/2NS2-K442] (“Longtime CPAP users say it’s well known that supplies are cheaper when they are purchased without insurance.”).

reveals several notable observations.²⁷ First, it appears that prices for components sold through Amazon are much lower than the prices for the same items sold in durable medical equipment (DME) stores, likely due to insurance cost-sharing that occurs in the DME stores but not on Amazon.²⁸ Nonetheless, lower observed prices are also consistent with the economic logic underpinning the consumer welfare standard: specifically, that concentration or a smaller number of competitors at a given point in the supply chain is not necessarily conclusive of harm—prices could continue to fall and output continue to rise because of productive efficiencies.²⁹ This case appears to be one where Amazon’s market power and concentration are both the result of, and continue to deliver, welfare-enhancing gains in productive efficiency.³⁰

Second, as touted by Amazon³¹ and reflected in this Article’s case, third-party sellers are often small- and medium-sized businesses³² who have tapped into larger markets through Amazon’s platform. In fact, third-party sellers represent approximately half of all sales made through Amazon’s retail platform.³³ Third-party sellers, along with other commentators, describe the Amazon Marketplace platform as an ecosystem.³⁴ As might be expected, numerous entrepreneurs, in the CPAP market and others, are investing in skills and technologies

27. The Author’s investigation consists of numerous informal conversations, one formal in-person interview, one more formal telephone meeting with the principals of an Amazon third-party seller in this market (Seller A), emails and one formal telephone interview with the principal of another Amazon third-party seller (Seller B), as well as independent research on products and prices in the CPAP market. *See infra* Part III.

28. *See* Chris Vasta, *Should You Buy CPAP Supplies Using Insurance or Cash?*, CPAP SHOP (Feb. 13, 2020), <https://www.thecpapshop.com/blog/should-you-buy-cpap-supplies-using-insurance-or-cash/> [perma.cc/87RU-4TT3]. The requirement for a prescription for the CPAP machine and some of its components likely drove emergence of DME stores as the conventional distribution method for all CPAP supplies. *See id.* This suggests that regulatory choices, like private conduct, impact consumer welfare and market structure. *See id.* Such might caution further antitrust intervention that could have harmful effects on both market structure and welfare. Further exploration of that point is beyond the scope of this Article.

29. *See* Dorsey et al., *supra* note 4, at 871.

30. *See* BORK, *supra* note 9, at 104–05.

31. *See Testimony before the Subcommittee on Antitrust, Commercial, and Administrative Law: Hearing Before the H. Comm. on the Judiciary, Antitrust Subcomm.*, AMAZON (July 28, 2020), <https://www.aboutamazon.com/news/policy-news-views/statement-by-jeff-bezos-to-the-u-s-house-committee-on-the-judiciary> [perma.cc/URG6-VEL3] (written statement of Jeffrey P. Bezos, founder of Amazon) [hereinafter *Bezos Testimony*].

32. The “small dealers and worthy men” Justice Rufus Peckham described in an early antitrust case, perhaps. *See* *United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290, 323 (1897).

33. *See* Daniela Coppola, *Amazon Third-Party Seller Share 2007-2022*, STATISTA (Feb. 7, 2003), <https://www.statista.com/statistics/259782/third-party-seller-share-of-amazon-platform/> [perma.cc/GVR4-JPLK].

34. A Seller A principal refers to the Amazon Marketplace platform as the “Wild West.”

specific to using Amazon Marketplace.³⁵ These growth opportunities for small businesses could potentially counteract economic inequality, wage stagnation, and sluggish job growth in the economy as a whole.³⁶

Third, online sales, including those through Amazon, are making substantial inroads into the legacy, brick-and-mortar retail supply chain in the CPAP components market, as buyers forgo insurance cost-sharing for lower prices online.³⁷ Major insurers have cut reimbursements for the nonprescription CPAP supplies because of price competition through sales on Amazon and other online sales outlets.³⁸ Reduced insurance reimbursements can reduce insurance premia costs, which, in turn, can reduce overall healthcare costs.³⁹ This is potentially a positive social outcome from Amazon's consolidation of the online retail market because that consolidation has facilitated increased competition at the manufacturer and dealer levels.

Ultimately, the case illustrates the soundness of the economics underlying the consumer welfare standard. Specifically, a number of different market structures, including even Amazon's heavy concentration of online retail, could still result in lower prices and increased output, and, thus, increased consumer welfare.⁴⁰ Furthermore, and as a point of departure from consumer welfare antitrust, the case illustrates the broader positive social and economic effects arising from Amazon's concentration of online retail that are not always or necessarily captured in consumer welfare analysis.

This Article proceeds in five parts. Following this Introduction, Part II sets forth the basics of antitrust economics, theory, and law. Part III presents the case study of the nonprescription CPAP equipment market, primarily through interviews with market participants and collections of price and sales data from the third-party seller market on

35. See *infra* Section III.C.

36. Cf. Steinbaum & Stucke, *supra* note 7, at 603.

37. See *infra* Section III.B.

38. See *infra* note 275 and accompanying text.

39. See Karyn Schwartz, Jeannie Fuglesten Biniek, Matthew Rae, Tricia Neuman & Larry Levitt, *Limiting Private Insurance Reimbursements to Medicare Rates Would Reduce Health Spending by About \$350 Billion in 2021*, KFF (Mar. 1, 2021), <https://www.kff.org/report-section/limiting-private-insurance-reimbursement-to-medicare-rates-would-reduce-health-spending-by-about-350-billion-in-2021-issue-brief/> [perma.cc/P2K6-MBW8]. It could also increase insurance company profits, another question of competitive markets, that is beyond the scope of this Article. Nonetheless, the cost savings to health insurance customers from reduced reimbursements for nonprescription CPAP components should be expected to be greater than zero. That is, the share of cost savings will not be entirely profit to insurers. Seller A's principal also reports that other Class I medical supplies are beginning to appear on Amazon at lower prices.

40. See generally Dorsey et al., *supra* note 4, at 871; Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 368 (1965) (arguing that a trend toward concentration is prima facie evidence of the efficiency of that concentration).

Amazon with comparisons to suggested retail prices. Part IV sets forth the implications of the case and connects them to the present debate in antitrust law. Specifically, this Article argues that the case reflects the soundness of the economics underlying the consumer welfare standard and also shows the positive economic and social knock-on impacts that flow from the third-party seller market. Part V offers a brief conclusion.

II. AN OVERVIEW OF ANTITRUST ECONOMICS, THEORY, AND DOCTRINE

Antitrust law has a rich and colorful history.⁴¹ Though often perceived as an arcane or narrow field,⁴² the primary concepts underlying modern antitrust—markets, firms, prices, competition, and efficiency—are all much more prominent in broader economic policy debates than the “antitrust” moniker suggests.⁴³ The core economic theories at play involve how competition among firms (and sometimes individuals) in markets impacts prices and output. The fundamental economic notion, shared throughout the history of antitrust, is that competition, generally, leads to lower consumer prices.⁴⁴ Similarly, when different producers compete along different dimensions, such as improved product quality or superior service, consumers get better products, often at lower prices to boot.⁴⁵ When actors in a market act in ways that reduce competition—for example, by monopolizing the market for a commodity, agreeing to maintain certain (higher) prices, merging (to become a monopoly or increase monopoly power), slashing prices to undercut rivals, or aggressively expanding a platform market via network effects⁴⁶—society may not benefit from the lower prices,

41. See generally BAUER ET AL., *supra* note 21, § 2.2 (describing ancient proposed evils such as “forestalling”—i.e., sending a boat out from the harbor to buy all the contents of a ship for resale on land before the ship can land).

42. See Daniel Crane, *Why Are So Few Law Professors Interested in Antitrust?*, PROMARKET (May 17, 2021), <https://promarket.org/2021/05/17/law-school-hiring-professors-interest-antitrust/> [perma.cc/54BD-HEGJ].

43. The word “antitrust” itself is an artifact of the modern era, simply because the preferred organizational form of the largest alleged monopolists at the turn of the twentieth century was the “business trust.” See Barak Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605, 606–07 (2012); see also 15 U.S.C. § 1 (prohibiting restraints “in the form of a trust or otherwise”). See generally Edward B. Rock, *Corporate Law Through an Antitrust Lens*, 92 COLUM. L. REV. 497, 498–99 (1992) (connecting the economic theory of the firm that permeates corporate law theory to antitrust theory).

44. John G. Ranlett & Robert L. Curry, Jr., *Economic Principles: The ‘Monopoly,’ ‘Oligopoly,’ and ‘Competition’ Models*, 1 ANTITRUST L. & ECON. REV. 107, 128–29 (1968).

45. Dorsey et al., *supra* note 4, at 875.

46. This is what Amazon and other big technology companies are alleged to have done. See European Commission Press Release, *supra* note 3.

greater available output, or improved quality that competition supposedly delivers.

Sometimes, however, sharp-elbowed competition involves innovating to save costs, selling to consumers at lower prices that put other sellers out of business, merging to shave redundant costs, collecting network effects that redound to users' benefits, and then passing these efficiency gains to consumers in the form of *lower* prices or greater usefulness. In the case of big technology companies—perhaps not unlike, for example, over-the-air broadcasts⁴⁷—competitive activity can include even giving services away for free to the consumer.⁴⁸ If consumers flock to one seller or platform (whether it grew on its own, merged to its size, or both), other competitors wither and the market consolidates in the hands of the sharp-elbowed competitor.⁴⁹ Because this aggressive competition takes many forms, it can be difficult, if not paradoxical, to distinguish when aggressive acts in competition are a net positive or a net negative for the economy.⁵⁰

For decades, Judge Bork's consumer welfare approach, which directs courts to decide antitrust cases based on economic welfare effects, has driven antitrust doctrine and policy.⁵¹ Even those who do not fully subscribe to the consumer welfare standard as the proper theory of antitrust law still promote systematic, technical, and near-exclusively economic approaches to discern the impact of various business activities.⁵² Nonetheless, the tension between technical economics, on one hand, and the correlation between increased concentration in socially important markets and observed negative social outcomes, on the other, appears to be motivating the resurgence of interest in antitrust law at the current moment.⁵³ The New Antitrust

47. DAVID D. FRIEDMAN, *PRICE THEORY: AN INTERMEDIATE TEXT* ch. 18 (1986) (describing the price theoretic economics of a radio broadcast and how it can be produced profitably to the broadcaster even while being “free” to the listener).

48. See Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 *YALE L.J.* 1952, 1963–64 (2021); H.R. Rep. No. 117-8, at 1 (2022).

49. Lina M. Khan, *The Separation of Platforms and Commerce*, 119 *COLUM. L. REV.* 973, 1035 (2019) (discussing Amazon as a “winner-take-all” firm).

50. Bork & Bowman, *supra* note 40.

51. See Dorsey et al., *supra* note 4, at 866–67, 875; see also Carl Shapiro, *Antitrust in a Time of Populism*, 61 *INT'L J. INDUS. ORG.* 714, 745 (2018) (discussing the benefits of competition to consumers). Cf. Herbert Hovenkamp, *The Looming Crisis in Antitrust Economics*, 101 *B.U. L. REV.* 489, 544–45 (2019) (describing economics as a “powerful, neutral tool” for answering the legal questions in antitrust cases).

52. See Thomas J. Piraino, Jr., *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*, 82 *IND. L.J.* 345, 409 (2007); Hovenkamp, *supra* note 51, at 489–90 (arguing for the application of sound, non-ideological economics to the resolution of antitrust questions).

53. Steinbaum & Stucke, *supra* note 7, at 595–96; Shapiro, *supra* note 51, at 714–15.

reformers propose that consumer welfare antitrust's narrow focus deserves a significant portion of the blame for contemporary economic and social problems.⁵⁴ Perhaps, like the progressives of the turn of the twentieth century, New Antitrust thinkers take a broader view of the relationship between economic organization and social outcomes.⁵⁵

The remainder of this Part traces the economic principles underlying modern antitrust law, presents an overview of the competing scholarly theories that shaped it, and describes its doctrinal development.

A. Antitrust Economics

Antitrust law is fundamentally about organized economic activity—firms and individuals responding to prices and quantities through various institutions and structures.⁵⁶ Goods and services move from person to person via the magnetism of prices, which signal the market about where to allocate scarce resources.⁵⁷ One of the pillars of economics is the notion that competition in markets leads to lower prices, higher quality, and greater output.⁵⁸ This intuition is broadly shared among those enthusiastic about consumer welfare, ambivalent to it, and unimpressed by it.⁵⁹ This Section discusses the economic principles animating antitrust law.

1. Supply, Demand, Competition, and Monopoly

The foundational⁶⁰ economic principles of antitrust involve supply, demand, prices, competition, and monopoly. The laws of supply

54. See Khan, *supra* note 2, at 717; Blake & Jones, *supra* note 18, at 378, 400.

55. Khan, *supra* note 2, at 737; Dorsey et al., *supra* note 4, at 861.

56. Ranlett & Curry, *supra* note 44, at 109; see also Alan J. Meese, *Robert Bork's Forgotten Role in the Transaction Costs Revolution*, 79 ANTITRUST L.J. 953, 958–59 (2014) (surveying the role of transactions costs economics in developing theories of institutional organization of production).

57. Ranlett & Curry, *supra* note 44, at 110; ARMEN A. ALCHIAN & WILLIAM R. ALLEN, UNIVERSAL ECONOMICS 109 (Jerry L. Jordan ed., 2018); see also ADAM SMITH, AN INQUIRY INTO THE CAUSES OF THE WEALTH OF NATIONS, VOL. 1, bk. I, ch. II, 5 (Edwin Cannan et al. eds., Liberty Fund Vol. 1st ed. 1982) (1776).

58. Ranlett & Curry, *supra* note 44, at 127–29.

59. See Herbert J. Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. REV. 1843, 1855 (2020) (describing the conflicting economics of the Chicago and Harvard Schools with respect to the meaning of imperfect competition in and across real-world markets).

60. These foundational principles are at times called “price theory,” “microeconomics,” “neo-classical economics,” or even “partial equilibrium.” Glick, *supra* note 10, at 459–60; Meese, *supra* note 56, at 954–55.

and demand are simply stated: as price goes up, quantity supplied increases and quantity demanded falls.⁶¹ As price goes down, quantity supplied decreases and quantity demanded rises.⁶² The central point is not so much about identifying the “right” price and the “right” quantity, but recognizing the forces that move these variables around.⁶³ All of these assertions are subject to the principle of *ceteris paribus*—“all else being equal”—and the caveat that markets are dynamic processes, not merely the static outcomes of those processes.⁶⁴

In a market with multiple sellers, sellers compete with one another to supply the quantity that consumers demand.⁶⁵ In a “perfectly competitive” market, which does not exist in the real world, the price of a given unit exactly equals the marginal cost the firm must bear to produce that unit.⁶⁶ This is the lowest theoretically possible price because if the cost to produce one more unit is greater than the price for which it can be sold, no one would produce the next unit.⁶⁷ The purpose of assuming a perfectly competitive market is to recognize the way that forces act upon markets, not that they, or even well-considered interventions, will ever cause a real world market to arrive at perfect competition. The assumption of perfect competition, while useful for identifying and describing economic forces,⁶⁸ is perhaps less useful for hashing out conflicting value judgments about the structure or outcomes of real-world markets. This is because real-world markets cannot fairly be compared to non-existent perfectly competitive markets for policy purposes.⁶⁹

Perfect competition, where there are many sellers in competition, may be better considered as one pole of a theoretical spectrum of market structures.⁷⁰ The other pole is monopoly.⁷¹ If there is a single seller in the entire market, it can command a higher price since there is no other seller that anyone could buy from.⁷² That seller

61. ALCHIAN & ALLEN, *supra* note 57, at 62.

62. *Id.*

63. *See generally id.* at 24–26; Gellhorn, *supra* note 19, at 22.

64. Gellhorn, *supra* note 19, at 9 n.10; Peter T. Leeson, *Logic is a Harsh Mistress: Welfare Economics for Economists*, 16 J. INSTITUTIONAL ECON. 145, 147 (2020) (describing that economic analysis is only “comparative statics”).

65. Steinbaum & Stucke, *supra* note 7, at 614–15.

66. Gellhorn, *supra* note 19, at 27, 28.

67. *Id.* at 23, 24; Ranlett & Curry, *supra* note 44, at 133–34.

68. Gellhorn, *supra* note 19, at 25.

69. *Id.* at 22.

70. *Id.* at 22–23.

71. *Id.*

72. Ranlett & Curry, *supra* note 44, at 134–35.

is, then, a monopolist.⁷³ A monopolist can set the price at some point above marginal cost, but only up to the point where the price so reduces demand that gains in revenue would no longer offset losses due to lower quantity sold.⁷⁴ The price the monopolist would choose to maximize its gains is called the “monopoly price,” which would be higher than the competitive price.⁷⁵ This results in two phenomena: (1) a wealth transfer from any consumer that still demands the product at the monopoly price to the monopolist, and (2) a “deadweight loss” that occurs when a consumer who would pay the competitive price but not the monopoly price cannot buy the product.⁷⁶ Yet again, these are concepts for identifying market forces and illustrating the price-setting process, not descriptions of any particular real-world market.⁷⁷

2. Utility and Welfare (and Value?)

Supply, demand, competition, and monopoly all describe market dynamics. Neither perfect competition nor true monopoly exists in the real world. Unanswered above was which real-world circumstances and constraints impact buyers’ demand and sellers’ desire to supply; the previous discussion merely assumes that these actors have preferences that impact the quantity they demand and supply.⁷⁸ To analyze these preferences, economists introduce the concept of “utility,”⁷⁹ which refers to the measure of satisfaction a person obtains from purchasing goods and services.⁸⁰ For lack of a better unit of measurement, economists measure utility by the dollars spent purchasing those goods and services.⁸¹ When everyone is maximizing their utility, the resulting dollars spent are tallied up and the sum total is referred to as “welfare” or “total welfare.”⁸² This deduction about total welfare underpins the

73. Gelhorn, *supra* note 19, at 29.

74. *Id.* at 33–34 fig.16.

75. Ranlett & Curry, *supra* note 44, at 137–39.

76. Gellhorn, *supra* note 19, at 34–35; *see also* Khan, *supra* note 2, at 740.

77. Gellhorn, *supra* note 19, at 29. Moreover, competition does not occur only on the nominal price of a unit in the real world. In the real world, producers compete on quality and numerous other dimensions. *Cf.* Ranlett & Curry, *supra* note 44, at 142.

78. ALCHIAN & ALLEN, *supra* note 57, at 41.

79. Ranlett & Curry, *supra* note 44, at 109. It should probably be made clear at this point that utility is not generally accepted to be measurable in units except by assumption. Frank Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1704 (1986); *see* Herbert J. Hovenkamp, *Competition Policy in Crisis*, 94 MINN. L. REV. 311, 332 n.113 (2009).

80. Ranlett & Curry, *supra* note 44, at 109.

81. *See* FRIEDMAN, *supra* note 47, ch. 4.

82. This is sometimes also referred to as “wealth” or total surplus – the latter term deriving from the more granular description of gains from trade as involving surplus from sales at

contested value judgment that legal rules, including antitrust rules, are or should be oriented toward increasing welfare.⁸³ Given the multitude of limitations that exist on measuring individual utility maximization and the difficulty in connecting that concept to social welfare, whether welfare itself is an appropriate basis for policymaking remains an open question.

3. Efficiency

Perhaps concepts like consumer welfare, total welfare, and total surplus are just stand-ins for the concept of “efficiency,”⁸⁴ which, like competition, has multiple meanings depending on context.⁸⁵ For this reason, this Section attempts to delineate the different meanings and types of “efficiency.”

Economists often use efficiency to refer to “allocative efficiency,” the state where all scarce resources are employed at their highest-valued uses.⁸⁶ The term “allocative” suggests that economic actors make trades to reallocate resources to higher-valued uses.⁸⁷ The two most well-known measures of this are “Pareto” efficiency and “Kaldor-Hicks” efficiency.⁸⁸ Any trade that makes anyone “better off” in welfare terms and no one else “worse off” is a Pareto-efficient trade—i.e., the trade reallocated the resources to their highest-valued uses.⁸⁹ Alternatively, a trade is Kaldor-Hicks efficient if the sum of increased welfare from the trade exceeds the sum of any decreases in welfare borne by anyone made “worse off” from that trade.⁹⁰ Yet again, though, Pareto efficiency and Kaldor-Hicks efficiency only exist on a chalkboard.⁹¹ Nonetheless, the relationship between these two

greater than the price at which the seller was willing to sell (producer surplus) and purchases at a price lower than the price at which the buyer is willing to buy. This is a deductive conclusion from the theory of utility maximization. *See generally id.* at 493.

83. Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 845 (2014). Professor Crane also defends Judge Bork against claims that Judge Bork misled readers by using “consumer welfare” to refer to “total welfare or total surplus.”

84. *See id.*

85. *See* Gary Lawson, *Efficiency and the Individual*, 42 DUKE L.J. 53, 55–56 (1992).

86. Gellhorn, *supra* note 19, at 1.

87. FRIEDMAN, *supra* note 47, ch. 16; ALCHIAN & ALLEN, *supra* note 57, at 135–36.

88. FRIEDMAN, *supra* note 47, at 493 (discussing Pareto); Glick, *supra* note 10, at 474.

89. Glick, *supra* note 10, at 468.

90. Lawson, *supra* note 85, at 89 (quoting JULES L. COLEMAN, *MARKETS, MORALS AND THE LAW* 98 (1988)).

91. Dierdre N. McCloskey, *The Good Old Coase Theorem and the Good Old Chicago School: A Comment on Zerba and Medema*, in *COASEAN ECONOMICS, LAW AND ECONOMICS AND THE NEW INSTITUTIONAL ECONOMICS* 239 (1998).

measures of allocative efficiency complicates value judgments about whether “efficient” should be coextensive with “good.”⁹² For example, a trade that would make society better off but one person worse off would not be Pareto efficient, but a trade that makes one or more individuals worse off could be Kaldor-Hicks efficient.⁹³

The second concept of efficiency that is important in antitrust economics is “productive” efficiency. If an improvement in a production process cuts the price to produce each unit in half, for example, then twice the amount of output can be produced from the same input (or the same output for half the input).⁹⁴ The product is now produced more “efficiently.” Economists view increases in productive efficiency like this favorably for at least two reasons.⁹⁵ First, if a widget-producing firm can produce more widget-containing products at lower prices, the firm—and eventually consumers—can enjoy more of that product, lower costs, or both.⁹⁶ Second, if either that or a different firm can produce more of some other product from the raw materials used for widgets, that firm—and consumers, again—can enjoy more of that other product, lower costs, or both.⁹⁷ The new allocation of resources, therefore, allows more people to enjoy more goods and services at a lower total cost.⁹⁸ Increases in productive efficiency thus lead to increases in allocative efficiency because the increases in productive efficiency free resources that firms and consumers can use to maximize their utility.⁹⁹ This, in turn, increases welfare.¹⁰⁰ Moreover, given an unequal distribution of wealth, greater allocative efficiency benefits those with the lowest wealth the most, as the marginal dollar is more valuable to them than to those with greater wealth. This model underpins much economic thinking about social policy choices. That is, economists view broad swaths of social policy, including legal rules, through the lens of economic efficiency and welfare.¹⁰¹

Antitrust economics might be summarized, then, as follows: competition that supports “improving” resource allocation is socially beneficial, while competition that impedes this process is

92. ALCHIAN & ALLEN, *supra* note 57, at 28–29.

93. Lawson, *supra* note 85, at 90.

94. *See generally* Hovenkamp, *supra* note 79, at 359.

95. *See* Bork & Bowman, *supra* note 40, at 365–69.

96. *See id.*

97. *See id.*

98. *See* ALCHIAN & ALLEN, *supra* note 57, at 82.

99. *See* BORK, *supra* note 9, at 91, 104.

100. *Id.* at 91.

101. *See id.*

socially harmful or unfair.¹⁰² The value judgment is complicated, and society is far too complex to fit neatly into the spectrum of competition and monopoly, the poles of which are almost entirely theoretical in the first place.¹⁰³ Even so, most scholars and practitioners share the fundamental insights described above.¹⁰⁴ Consequently, economics and these core principles drive the development of antitrust legal theory and the application of antitrust doctrine.¹⁰⁵

B. Antitrust Law & Theory

Economic reasoning is and has always been the backbone of antitrust law.¹⁰⁶ Even prior to the passage of the major federal statutes on the subject, common law courts refused to enforce contracts in restraint of trade as a matter of public policy.¹⁰⁷ Courts expressed this public policy primarily in terms of losses to society from restraining firms and people from producing more goods or services.¹⁰⁸ The legal theories underpinning modern¹⁰⁹ antitrust law tend to flow from various views on the underlying economics. This Section describes the development of the primary antitrust statutes, traces related theoretical and doctrinal developments along the way, and develops a view of the present moment and what reform could mean for antitrust theory and doctrine.

102. *See id.*

103. *See id.* at 92.

104. *See id.*

105. *See id.* at 90.

106. BAUER ET AL., *supra* note 21, § 1.1.

107. *Id.* § 2.5.

108. *Id.* Compare to the doctrine of non-competition agreements. RESTATEMENT (SECOND) OF CONTRACTS §§ 186–188 (AM. L. INST. 1981) (describing the basic contours of judicial treatment of agreements not to compete).

109. As noted above, antitrust, or, more accurately, “competition” law existed long before modern antitrust law. *See supra* note 40. As early as 1259, England had laws against, for example, the forestalling described above. *Id.* For the purposes of this Article, the discussion of antitrust history begins with the major antitrust acts passed around the turn of the twentieth century. This is because modern antitrust theory, doctrine, and practice is so fully intertwined with judicial and regulatory interpretation and application of the group of federal antitrust statutes. Dorsey et al., *supra* note 4, at 869. Nonetheless, it should be noted that US states have state antitrust laws and dedicate attorney general’s office resources to enforcement of those laws as well. *See* BAUER ET AL., *supra* note 21, § 4.1.

1. Modern Antitrust Law: The Antitrust Acts

The evolution of modern antitrust law began just before the turn of the twentieth century with the Sherman Antitrust Act of 1890.¹¹⁰ The Sherman Act, broadly, prohibits “restraint[s] of trade” and “monopolization” under its Section 1 and Section 2, respectively.¹¹¹ The statutory language is broad, inviting federal courts to develop a common law of antitrust,¹¹² which has since grown to include the doctrinal principle that not every restraint of trade necessarily violates the Act and, necessarily, the analytical standards for considering alleged restraints, such as the “rule of reason.”¹¹³ Another major antitrust statute is the Clayton Antitrust Act of 1914, best known for introducing a framework for government scrutiny of mergers and acquisitions that may result in reduced competition.¹¹⁴ Moreover, the Federal Trade Commission Act of 1914 (FTC Act) prohibits, on both a general and specific level, various forms of unfair and deceptive acts and practices.¹¹⁵ The FTC Act also empowers the Federal Trade Commission (FTC) to enforce other antitrust violations as unfair or deceptive acts and practices.¹¹⁶ These acts, together, provide for both public and private enforcement mechanisms involving multiple federal agencies and state attorneys general. The next Section briefly describes the common antitrust fouls at a necessarily high level of abstraction for the scope of this Article.

2. Antitrust Fouls and Analytical Standards

The primary conventional antitrust fouls are horizontal and vertical restraints under Section 1 and monopolization under Section 2 of the Sherman Antitrust Act.¹¹⁷ Merger scrutiny arose for the question of whether firms could circumvent antitrust laws against contractual

110. Sherman Act, ch. 647 § 1, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1).

111. 15 U.S.C. §§ 1–2.

112. Dorsey et al., *supra* note 4, at 869.

113. *Id.*

114. Clayton Act, ch. 323, § 7, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12–27). Other objects of scrutiny were tying arrangements, exclusive dealing, price discrimination, and interlocking directorates. BAUER ET AL., *supra* note 21, § 18.1. As to interlocking directorates, see generally LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* Ch. 1 (F.A. Stokes 1914); Yaron Nili, *Horizontal Directors*, 114 NW. L. REV. 1179, 1179 (2020). The Clayton Act has been enlarged twice through the Robinson-Patman Act, 49 Stat. 1526 (1936) and the Hart-Scott-Rodino Act, Pub. L. No. 94-435 (1976).

115. Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58).

116. *Id.*; BAUER ET AL., *supra* note 21, § 43.1.

117. 15 U.S.C. §§ 1–2.

restraints simply by combining their operations within one firm.¹¹⁸ The law developed through a simplified (by modern standards) model of a supply chain. Goods begin as a natural resource somewhere before being extracted, processed, and distributed ultimately to the end consumer. The path from raw material to end consumer is “vertical,” while the relationship between and among extractors, processors, distributors, and retailers at each “level” is “horizontal.”¹¹⁹ Anticompetitive—and thus welfare-decreasing—conduct can occur at or among all levels and players in the supply chain.¹²⁰ For an example of a “vertical restraint,” consider an agreement between a manufacturer and dealer that the dealer will not sell the manufacturer’s product below a certain price.¹²¹ For an example of a horizontal restraint, consider an agreement between two or more sellers of the same product to maintain higher prices—an arrangement often called a “cartel.”¹²² If two companies merge, where prior to the merger each held half of the market share for a given product, the new company will be a monopoly subject to scrutiny under Section 1 of the Sherman Act as a combination in restraint of trade.¹²³ The Department of Justice (DOJ) has the authority to scrutinize proposed mergers before their consummation under the Clayton Act.¹²⁴

Section 2 targets unilateral conduct designed to build or exploit market power.¹²⁵ One example of a Section 2 offense is conduct known as “tying”—an effort by a firm to harm competition for one of its products by “tying” that product to another product for the purpose of damaging a rival producer of one or both of the tied products.¹²⁶ In *United States v. Microsoft*, the DOJ alleged that Microsoft attempted to drive out a competing web browser, Netscape, by preloading Microsoft’s Internet Explorer browser with its disk operating system (DOS).¹²⁷ The DOJ’s theory was that preloading Internet Explorer with the purchase of DOS would discourage consumers from purchasing the competing Netscape browser, thus reducing competition in web browsers.¹²⁸ That

118. *See id.* § 18.

119. BAUER ET AL., *supra* note 21, §§ 3.5, 3.9.

120. *Id.*

121. *See generally* Benjamin Klein & Kevin Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31 J.L. & ECON. 265, 265–67 (1988).

122. BAUER ET AL., *supra* note 21, § 11.1.

123. *See* 15 U.S.C. § 18.

124. BAUER ET AL., *supra* note 21, § 18.6.

125. *Id.* § 10.0.

126. *Id.* § 18.5; *see* *United States v. Microsoft Corp.*, 253 F.3d 34, 85 (D.C. Cir. 2001).

127. *Microsoft*, 253 F.3d at 50.

128. *Id.* at 47.

is, Microsoft was alleged to have “tied” one product (the browser) to the purchase of another product (the operating system).¹²⁹

From the beginning, the breadth of the statutory language, “[e]very contract . . . in restraint of trade . . . is declared to be illegal,” beckoned the judiciary for clarification.¹³⁰ Before long, the US Supreme Court clarified that the broad prohibition on “restraint[s] of trade” should be understood in terms of the reasonableness of the restraint.¹³¹ In turn, this gave rise to the analytical standard of the “rule of reason.”¹³² The modern iteration of rule of reason is a three-step burden-shifting test involving direct evidence of anticompetitive effects or indirect approaches such as market power.¹³³ Its core is still as it has always been—namely, to discern whether a particular agreement unreasonably restricts output in a relevant market.¹³⁴ Again, restricting output in a relevant market means higher prices for consumers and lower welfare.¹³⁵ The courts have considered some restraints so harmful as to be “per se” illegal, while other cases have been clear enough that a “quick look” was enough to discern illegality.¹³⁶ Occasionally, the court will recategorize a type of agreement from one that deserves “per se” treatment to one requiring a rule of reason analysis.¹³⁷ Antitrust lawyers consider a change in judicial treatment such as this as a monument or sea change in the law.¹³⁸

Section 2 of the Sherman Act targets unilateral firm conduct and triggers a similar analysis of the reasonableness of the firm’s conduct or activities.¹³⁹ Conduct may be punishable under Section 2 if the defendant possesses market power and deploys it unreasonably—for example, in a manner designed to eliminate upstart potential competitors.¹⁴⁰ Thus, a critical aspect of Section 2 litigation is defining the relevant market and using sophisticated economic analysis to discern whether the defendant possesses market power.¹⁴¹ Clayton Act

129. *Id.*

130. 15 U.S.C. § 1.

131. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 132 (1910).

132. BAUER ET AL., *supra* note 21, § 9.6.

133. *Id.* § 9.7 (citing *NCAA v. Alston*, 141 S. Ct. 2141, 2155–58 (2021)).

134. *Id.*

135. Dorsey et al., *supra* note 4.

136. BAUER ET AL., *supra* note 21, § 9.6.

137. *Id.* § 9.7.

138. *See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007) (holding that resale price maintenance agreements should be subject to the rule of reason instead of the per se rule), *rev’g Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

139. *See generally* BAUER ET AL., *supra* note 21, § 16.1.

140. *Id.*

141. *See id.* § 16.2.

merger cases look a bit like Section 2 cases in the sense that the court evaluates market power and the expected structure and performance of the market following the merger.¹⁴²

3. Two-Sided or Platform Markets

Two-sided markets, also called platforms, differ from the traditional horizontal-vertical model found at the center of modern antitrust analysis; these markets involve an intermediary contracting with parties on both sides of a platform, while brokering or facilitating transactions between those parties at the same time.¹⁴³ For example, a credit card company contracts with sellers for payment processing services and with credit card holders for payment and other services; in the process, the company facilitates the transaction between the cardholder and the seller.¹⁴⁴ Amazon's core retail¹⁴⁵ business is a platform business—it operates Amazon Marketplace. This means that counterparties approach the Marketplace platform from both the upstream side (third-party sellers selling their wares on Marketplace) and the downstream side (customers shopping for wares on Amazon and Marketplace).¹⁴⁶ On the upstream side, third-party sellers buy access to the platform from Amazon by paying commissions on sales.¹⁴⁷ On the downstream side, consumers buy products through Amazon on its platform. Amazon operates vertically with its third-party sellers, but also horizontally in that it competes with its third-party sellers for customers.¹⁴⁸ Professor Gus Hurwitz aptly describes these as “messy” markets—messy enough to put analytical pressure on the well-developed doctrinal approach to antitrust law.¹⁴⁹ Thus far, the Supreme Court's approach to platform markets is to require that harm be shown on *both* sides of the platform, not just one.¹⁵⁰ Or, perhaps in the broader terms Professor Hurwitz uses, “plaintiffs bear the burden

142. Herbert J. Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 1996 (2018).

143. See Justin (Gus) Hurwitz, *AmEx and Post-Cartesian Antitrust*, 98 NEB. L. REV. 364, 368 (2019) (developing a theory of “messy markets” that do not fit neatly into the vertical/horizontal framework of antitrust law).

144. See, e.g., *Ohio v. Am. Express*, 138 S. Ct. 2274, 2286 (2018).

145. See *Amazon Web Services*, AWS.AMAZON.COM [perma.cc/D8PP-JC6S] (describing Amazon's other core business web hosting and cloud computing, called Amazon Web Services) (last visited Mar. 22, 2023).

146. See *infra* Part III.

147. See *generally infra* Part III (describing Amazon Marketplace).

148. See *infra* Part IV.

149. Hurwitz, *supra* note 143, at 365.

150. *Ohio v. Am. Exp. Co.*, 138 S. Ct. 2274, 2287 (2018).

of accounting fully for the dynamics of novel or messy market structures.”¹⁵¹ In sum, whether the complaint is a traditional allegation of a vertical or horizontal antitrust foul, or whether it involves a two-sided or messy market issue, the antitrust inquiry now involves accounting for harm to consumers—a development owed to the impact of Judge Bork and the Chicago School.

4. Antitrust Policy, Law and Practice—Pre-Bork & Chicago

Much of the theoretical discourse on antitrust involves when the government—i.e., the courts and relevant administrative agencies—should intervene in markets.¹⁵² The appetite for intervention has ebbed and flowed, but today most antitrust scholars have converged upon an ethos of minimal intervention.¹⁵³ New Antitrust reformers seek a reversal of this consensus on minimalist intervention, which would be a substantial shift in antitrust policy, law, and practice.¹⁵⁴ The remainder of this Part summarizes the history of antitrust law, explains how it converged on the minimalist approach, and discusses the New Antitrust’s rejection of that approach.

Commentators have long associated the Sherman Act with a populist rejection of big businesses.¹⁵⁵ This simplistic “big-is-bad” approach has resulted in occasionally aggressive intervention—on behalf of small businesses against larger ones, for example—even when doing so might raise consumer prices.¹⁵⁶ Professor Hovenkamp has observed that antitrust enforcement between the passage of the Sherman Act in 1890 and the Clayton Act in 1914 resulted in inconsistent court decisions that “lacked direction,”¹⁵⁷ even as they evinced an approach that was more interventionist than non-interventionist. The 1911 *Standard Oil*¹⁵⁸ and *Dr. Miles*¹⁵⁹ decisions, for example, involved the Supreme Court breaking up the

151. Hurwitz, *supra* note 143, at 372.

152. Hovenkamp, *supra* note 51, at 498.

153. 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, 81 (2007).

154. Dorsey et al., *supra* note 4, at 861–62.

155. Wright et al., *supra* note 5, at 298; *see also* Crane, *supra* note 83, at 835.

156. Dorsey et al., *supra* note 4, at 300 (evaluating *United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290, 323 (1897)); *see also* *United States v. Alum. Co. of Am.*, 148 F.2d 416, 428 (2d Cir. 1945) (calling big, concentrated businesses “inherently undesirable”).

157. Herbert Hovenkamp, *Progressive Antitrust*, 2018 U. ILL. L. REV. 71, 77 (2018).

158. *Standard Oil Co. of N.J. v. United States*, 226 U.S. 1, 79 (1911).

159. *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911), *rev’d* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007).

Standard Oil Company of New Jersey and establishing the rule that certain vertical restraints should be treated as per se illegal.¹⁶⁰

The government and courts intervened more and more heavily as the New Deal Era took shape, largely seeking to give effect to broad, abstract notions apparently emanating from the antitrust acts.¹⁶¹ Such abstractions included the protection of competition generally, suspicion of combinations (especially vertical integration), and protection of small businesses.¹⁶² This intervention-heavy approach led to, for example, rigorous enforcement against vertical integration in the *Yellow Cab*¹⁶³ and *DuPont/GM*¹⁶⁴ decisions.

As the New Deal era faded into the 1950s and 1960s, the Harvard School of antitrust appeared.¹⁶⁵ Harvard School adherents studied “industrial organization” and developed a more sophisticated economic model that fit nicely with the courts’ now-established interventionist approach.¹⁶⁶ Its most famous contribution, the “structure-conduct-performance” (S-C-P) model, proposed that the structure of a market could predict competitors’ conduct within that market, which, in turn, could predict the prices buyers would ultimately pay in the market.¹⁶⁷ The Brandeisian “big is bad”¹⁶⁸ approach now had a more rigorous theoretical and empirical basis: a straight line from business size to higher consumer prices.

The 1960s saw even more robust enforcement in the Warren Court.¹⁶⁹ The Warren Court’s two most representative decisions are *Brown Shoe* and *Schwinn*, both among the most aggressively interventionist decisions in antitrust law.¹⁷⁰ In retrospect, given that Judge Bork and the Chicago School were already crafting their

160. 226 U.S. at 79; 220 U.S. at 408.

161. Hovenkamp, *supra* note 157, at 80 (associating this with the “Second” New Deal, suggesting that the First was preoccupied with a sort of corporatist mien that did not fit neatly with antitrust models before or since). *See generally* William W. Bratton & Michael L. Wachter, *Shareholder Primacy’s Corporatist Origins: Adolf Berle and The Modern Corporation*, 34 J. CORP. L. 99, 102 (2008) (describing the time surrounding the Presidential administration of Franklin D. Roosevelt as exploring the possibility of corporatist solutions to the perceived structural problems with pluralist capitalism).

162. Hovenkamp, *supra* note 157, at 80.

163. *See United States v. Yellow Cab Co.*, 332 U.S. 218 (1947).

164. *See United States v. E.I. du Pont Nemours & Co.*, 366 U.S. 316 (1961).

165. *See* Laura Philips Sawyer, *US Antitrust Law and Policy in Historical Perspective* 16 (Harv. Bus. Sch. Working Paper No. 19-110, 2019).

166. *See id.*

167. *See* Dorsey et al., *supra* note 4, at 909–10.

168. *See* Orbach & Rebling, *supra* note 43, at 625.

169. *See* Hovenkamp, *supra* note 157, at 85.

170. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 333–34 (1962); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 381 (1967).

criticisms of interventionist antitrust law at the time, the Warren Court's aggressiveness represents the high-water mark in antitrust interventionism.

5. Chicago School Antitrust and *The Antitrust Paradox*

As the Harvard School and the S-C-P framework enjoyed their theoretical ascendance, economists and scholars at the University of Chicago began “chipping away” at the core logic of big-equals-bad and structure-equals-outcome.¹⁷¹ Notably, the Chicago School did not bring forth a novel *general* theory of antitrust right away.¹⁷² Instead, Chicago School scholars began isolating particular unconventional agreements that courts had condemned and developing pro-competitive explanations for them.¹⁷³ For example, Professor Lester Telser theorized that manufacturers sought resale price maintenance agreements with distributors and retailers to encourage them to provide special services, such as demonstrations, to the end users of their products.¹⁷⁴ Thus, such vertical restraints might benefit the end consumer by supplying not only the good itself but services that increase the value of the good to the consumer.¹⁷⁵ Thus, even though the consumer might pay a higher nominal price due to the vertical restraint, the total value to the consumer was higher than in the absence of the vertical restraint. Judge Bork's earliest articles likewise took this approach.¹⁷⁶ The rudiments of consumer welfare antitrust were taking shape: conduct that might appear, on first glance, to portend harm might actually be beneficial.

Judge Bork and Professor Ward Bowman published popular and scholarly commentaries on the state of antitrust law in 1965,¹⁷⁷ planting the seeds of the work that ultimately would become *The Antitrust Paradox*.¹⁷⁸ Judge Bork drew upon work like Professor Telser's and his own to propose that the S-C-P version of industrial organization was

171. See Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 925–33 (1979).

172. See *id.* Arguably its general theoretical framing was consistent with the underlying notion that antitrust law exists to protect consumers from dangers of consolidation; it was just a debate on what was actually dangerous. See *id.* at 932.

173. See *id.*

174. Lester Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 85, 91 (1960).

175. See *id.* at 89–96. But see Klein & Murphy, *supra* note 121, at 266 n.3.

176. See Meese, *supra* note 56, at 953.

177. E.g., Bork & Bowman, *supra* note 40, at 365.

178. See generally BORK, *supra* note 9.

wrong to use mere concentration or size as a proxy for harm.¹⁷⁹ Central to Judge Bork's legal analysis was that antitrust law's "true" purpose was to avoid consumers' having to pay unjustifiably higher prices for goods and services.¹⁸⁰ He reached this conclusion through his own interpretation of the relevant statutes' text, structure, and history, combined with his deployment of Chicago School economics.¹⁸¹ Naturally, Judge Bork concluded, if consumers had to pay higher prices because of monopolization or some other antitrust foul, their welfare would undoubtedly decrease.¹⁸² But, he continued, sometimes business conduct that appears at first glance to be anticompetitive or that leads a firm to grow large does not actually cause social harm at all.¹⁸³ Bringing heavy antitrust enforcement to bear against that sort of conduct may short-circuit activity that makes society better off as a whole.¹⁸⁴ According to Judge Bork, the paradox arises because the stated goal of antitrust—protecting and promoting competition—unavoidably involves using the instrumentalities of government in a manner that can prevent a competitor from competing.¹⁸⁵ This casts the aggressive antitrust enforcement of the 1950s and '60s in a different light, suggesting that the interventions, on the whole, may have resulted in more harm than good.¹⁸⁶

To resolve the paradox, Judge Bork proposed changing the focus of antitrust doctrine from competition qua competition to an analysis of whether some allegedly anticompetitive action harms consumers through higher prices or lower output.¹⁸⁷ He called this the "consumer welfare standard," which is as much a theoretical notion as it is a rule.¹⁸⁸ For example, courts apply the doctrinal rule of reason to many alleged antitrust fouls.¹⁸⁹ The rule of reason is more permissive than,

179. *Id.* at 146, 164.

180. *Id.* at 91.

181. See Steinbaum & Stucke, *supra* note 7, at 597–98.

182. Bork & Bowman, *supra* note 40, at 365.

183. BORK, *supra* note 9, at 134–35.

184. *Id.* at 135.

185. See *id.* at 79.

186. See Hovenkamp, *supra* note 157, at 85–86; *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting) ("The sole consistency that I can find is that, in litigation under § 7, the Government always wins.").

187. BORK, *supra* note 9, at 7; see also Brian Albrecht, *Economic Lessons from Veep*, ECON. FORCES (Jan. 7, 2022) <https://pricetheory.substack.com/p/economic-lessons-from-veep> [perma.cc/VN2G-PC7C] (quoting Frank Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 5–6 (1984)).

188. BORK, *supra* note 9, at 405.

189. *Id.* at 18.

for example, the per se standard of illegality.¹⁹⁰ If the challenged conduct is subject to the rule of reason, the defendant can present evidence that its conduct makes consumers better off.¹⁹¹ If the challenged conduct is subject to per se illegality, the defendant cannot do so.¹⁹² Prior to Judge Bork's work, courts were more likely to apply a stricter standard than the rule of reason.¹⁹³ This suggests that the consumer welfare standard counsels subjecting much more conduct to the rule of reason.

Judge Bork advanced another, more institutional argument for focusing antitrust law on consumer welfare alone—namely, that courts were not the institutions best equipped to bring into equilibrium a broad economic policy to “promote competition.”¹⁹⁴ Similar to his view on the institutional limits of the courts more generally, Judge Bork believed that markets would self-correct for a substantial amount of allegedly anticompetitive conduct.¹⁹⁵ In other words, he thought courts often were not any better than markets at correcting complex economic problems.¹⁹⁶ Judge Bork thought that nearly all alleged anticompetitive conduct, save for horizontal agreements to restrict output (i.e., cartels), was unlikely to survive ordinary market forces.¹⁹⁷ While arguably *all* economic models are static,¹⁹⁸ price theory assumes that prices can incentivize market actors to adjust their behavior, which in turn moves the price, which in turn moves these actors again in a never-ending process.¹⁹⁹ In short, prices absorb and retransmit information about the good or service in the market.²⁰⁰ Of particular relevance to antitrust law, higher prices that emerge from some transient, competitive chicanery would incentivize other producers to increase output.²⁰¹ Then, a party with monopoly power—whether it gained that power through unilateral action or the operation of a cartel—would quickly invite the prospect of competition, if not actual competition, if it dared to raise prices to a monopoly level.²⁰² That markets self-correct in this manner

190. *Id.* at 18–19.

191. *Id.*

192. *Id.* at 18.

193. J. Mark Ramseyer & Eric B. Rasmusen, *Exclusive Dealing: Before, Bork, and Beyond*, 57 J.L. & ECON. 145, 145 (2014).

194. *See* BORK, *supra* note 9, at 80, 83; Easterbrook, *supra* note 187, at 2–3.

195. *See* Khan, *supra* note 2, at 1023.

196. *See id.*

197. Crane, *supra* note 83, at 839.

198. Leeson, *supra* note 64, at 147.

199. *See* ALCHIAN & ALLEN, *supra* note 57, at 109–10.

200. *See id.*

201. *See* Posner, *supra* note 171, at 927.

202. *See id.*

was and remains a hotly contested claim, of course. For example, much of the pre-Bork debate had focused on “barriers to entry” and other frictions that might prevent the self-correcting market forces Judge Bork proposed from actually working to prevent and remedy competitive problems.²⁰³

Judge Easterbrook’s article *The Limits of Antitrust* presents the strongest version of this institutional argument, describing the “error costs” associated with judicial intervention in markets through antitrust law.²⁰⁴ Judge Easterbrook presumed, for the sake of his argument, that the consumer welfare standard helpfully distinguishes efficiency-enhancing competitive conduct from harmful anticompetitive conduct.²⁰⁵ Even so, he ultimately proposed that the cost of courts making errors in their application of consumer welfare would be greater than the reduction in harm that would come from optimal consumer welfare enforcement.²⁰⁶ This insight, along with Judge Bork’s consumer welfare standard, has taken root in antitrust law and reflects the nadir, perhaps, of an interventionist approach to antitrust questions. This theory, that markets generally work and are better at self-correcting than courts would be at correcting them, created a compelling argument against intervention—one that drives antitrust law today.²⁰⁷

Nonetheless, Judge Bork still advanced robust theories on conduct he thought should be vigorously policed in antitrust enforcement.²⁰⁸ He believed cartels should be per se illegal, proposed a robust framework for courts considering whether a challenged merger would result in a monopoly, and engaged in a systematic study of predatory tactics other than predatory pricing.²⁰⁹ Even in *The Antitrust Paradox*, he argued that courts should penalize any firm that acted with the naked intent to defeat a competitor or drive it out of the market.²¹⁰ For example, in the *Microsoft* case discussed above, Judge Bork concluded that Microsoft’s act of preloading its Internet Explorer web browser with its in-house operating system software was a move

203. See *id.* at 929–30.

204. Easterbrook, *supra* note 187, at 10.

205. *Id.* at 3–4.

206. See generally *id.* at 1. For all the talk of Bork’s contributions, Easterbrook’s proposal that the costs of allowing bad competition to continue harming consumers because the cost of fixing it in the courts is too great is possibly a better explanation for why antitrust has been so quiet. *Id.*

207. See *id.* at 2–4, 13–14.

208. Greenfield, *infra* note 210, at 1047, 1068.

209. Posner, *supra* note 171, at 928. See generally BORK, *supra* note 9, at 217–45, 330–64.

210. Leon B. Greenfield, *Afterword: Lorain Journal and the Legacy of Robert Bork*, 79 ANTITRUST L.J. 1047, 1049, 1051 (2014) (quoting BORK, *supra* note 9, who called *Lorain J. Co. v. United States*, 342 U.S. 143 (1951), a case enforcing Section 2 against a publisher who engaged in an unjustified course of conduct designed to destroy a competing radio station, “entirely correct”).

designed purposefully to drive its competitor, Netscape, out of business.²¹¹ Siding with Netscape, Judge Bork concluded that Microsoft's actions lacked a compelling, consumer welfare-enhancing justification and that the court should, therefore, hold Microsoft to account.²¹²

At its most general level, the consumer welfare standard replaced a heavy skepticism of market power with the presumption that power was earned and that observed concentrations enhanced welfare through efficiency gains—i.e., good competitive forces.²¹³ Further, it replaced the categorical concern that firms with market power would likely abuse it with a new skepticism that firms could profitably abuse market power even if they wanted to.²¹⁴

6. Postscript: The Fusion of Chicago and Harvard, Other Contributions

The Chicago School emerged in the 1950s and 1960s as the Harvard School was waning.²¹⁵ If the Harvard School wrapped a more rigorous theory around intervention, the Chicago School rigorously analyzed alleged grounds for intervention for reasons to scale back intervention.²¹⁶ After Judge Bork's revolution, the industrial organization proposed by the Harvard School and the price theory proposed by the Chicago School began to converge.²¹⁷ The Chicago School has fragmented in recent years,²¹⁸ while much prodigious work has emerged in the adjacent thought of so-called "new institutional economics."²¹⁹ Judge Posner and Professor Hovenkamp have both observed that the Harvard and Chicago Schools had more or less

211. See *supra* Section II.B.2; see also David Segal, *In Netscape's Court Free-Marketer Robert Bork is Going Against Microsoft, But Not His Principles*, WASH. POST (June 25, 1998), <https://www.washingtonpost.com/archive/lifestyle/1998/06/25/in-netscapes-court-free-marketeer-robert-bork-is-going-against-microsoft-but-not-his-principles/fdd30101-bb13-42ba-9a4d-6849d66e44ba/> [perma.cc/DE4H-UEYV].

212. Segal, *supra* note 211.

213. See BORK, *supra* note 9 at 90–91; Khan, *supra* note 2, at 217–19.

214. See Khan, *supra* note 2, at 720.

215. See Posner, *supra* note 171, at 925, 931; Daniel A. Crane, *Antitrust Modesty*, 105 MICH. L. REV. 1193, 1196 (2007).

216. See Posner, *supra* note 171, at 947–48.

217. *Id.* at 933–34, 948; Crane, *supra* note 215, at 1194–95.

218. See Crane, *supra* note 215, at 1194–95 (describing "post-Chicago").

219. See Peter G. Klein, *New Institutional Economics*, in *Economics*, in *ENCYCLOPEDIA OF LAW AND ECONOMICS* (Boudewin Bouckaert & Gerrit de Geest eds., 2000). See generally Meese, *supra* note 56, at 1.

merged by the 1980s.²²⁰ By that point, the remaining Harvard School scholars had relinquished their strongest views on market structure, becoming what Professor Crane called “Chicago lite.”²²¹ Professor Hovenkamp describes the convergence as one of a “chastised” Harvard School—relieved, perhaps, of its more interventionist mindset, but not granted as much credit for the strength of its technical analysis and the impact of that analysis on the law.²²²

These theoretical economic debates are inextricably a part of antitrust law and policy.²²³ Since Judge Bork’s revolution, the economic theories he proposed continue to govern the modern legal approach to antitrust questions.²²⁴ Prior to the rise of the New Antitrust movement, the antitrust debate occurred mostly within the framing that Judge Bork set out, with marginal tinkering occurring only around the edges.

C. *The Charges of the New Antitrust*

The New Antitrust’s primary charge is that the narrow, noninterventionist version of antitrust born from Judge Bork’s work is driving social harm.²²⁵ The reformers have exposed correlations between the rise and consolidation of big technology companies with growing negative social factors such as wealth inequality and political instability.²²⁶ The New Antitrust suggests things will only get worse, as technology companies continue dutifully guarding and growing their market power.²²⁷ The New Antitrust reformers make two primary claims about the genesis of this state of affairs. First, they attack the soundness of the consumer welfare standard itself, arguing that it is incoherent, inappropriately narrow in light of the purposes of antitrust law, and insufficient to recognize and correct the negative externalities,

220. See Posner, *supra* note 171, at 933–34; see also Crane, *supra* note 215, at 1194 (citing HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 37 (2005)).

221. Crane, *supra* note 215, at 1194.

222. See generally Herbert J. Hovenkamp, *The Harvard and Chicago Schools and the Dominant Firm*, FAC. SCHOLARSHIP AT PENN L. 1 (2007).

223. See Dorsey et al., *supra* note 4, at 865–67.

224. *Id.* at 876–77.

225. See Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, ROOSEVELT INST. 1 (2018).

226. See JAY B. SYKES, CONG. RSRCH. SERV., R46875, *ANTITRUST REFORM AND BIG TECH* 37–38 (2022).

227. See Clara Hendrickson & William Galston, *Big Technology Firms Challenge Traditional Assumptions About Antitrust Enforcement*, BROOKINGS (Dec. 6, 2017), <https://www.brookings.edu/blog/techtank/2017/12/06/big-technology-firms-challenge-traditional-assumptions-about-antitrust-enforcement/> [perma.cc/T7N9-ZE8E].

economic or otherwise, of market concentration.²²⁸ Second, they argue the consumer welfare standard has, as a consequence, led to a narrow, minimalist program of intervention that is both inconsistent with the underlying purpose of the law and that has permitted firms to concentrate their respective markets past the point of no return.²²⁹ This concentration, in turn, is causing the observed falling wages and increased wealth inequality, stifling competitive forces and innovation, and even leading to increased corporate power in American politics.²³⁰ These conditions, the reformers argue, will only get worse.²³¹

1. Criticism of the Consumer Welfare Standard

The New Antitrust critique of current antitrust law begins with a case against the consumer welfare standard, which the reformers challenge as economically unsound.²³² Professors Steinbaum and Stucke charge, for example, that the very term “consumer welfare” lacks a fixed definition.²³³ The thrust of this charge is that “consumer welfare” suggests benefits to consumers as a class, while using a definition of welfare closer to “total” welfare.²³⁴ Instead, Professors Steinbaum and Stucke argue the consumer welfare standard is merely “a generality that incorporates different social, political, economic, and moral values.”²³⁵ Professor Glick suggests it rests upon a flawed understanding of foundational microeconomic theory.²³⁶ He argues both that consumer welfare is not a meaningful concept and that, no matter what it is, it is not properly the basis for a normative theory of antitrust law.²³⁷

The New Antitrust critique continues by arguing that the consumer welfare standard is inconsistent with the underlying purposes of the antitrust acts themselves, an argument first proposed

228. See Steinbaum & Stucke, *supra* note 225, at 1.

229. See Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMP. L. & PRACT. 131, 132 (2018); SYKES, *supra* note 226, at 38.

230. See Steinbaum & Stucke, *supra* note 225, at 1–2, 7, 43.

231. See Hendrickson & Galston, *supra* note 227.

232. See Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, ANTITRUST BULL., Sept. 18, 2019, at 16.

233. Steinbaum & Stucke, *supra* note 7, at 600; see also Crane, *supra* note 215, at 836 (describing the charge against Judge Bork that he used “consumer welfare” as a shorthand for “total welfare,” a fine distinction with substantial consequences).

234. Crane, *supra* note 215, at 836.

235. MARSHALL STEINBAUM & MAURICE STUCKE, THE EFFECTIVE COMPETITION STANDARD: A NEW STANDARD FOR ANTITRUST 12 (2018).

236. Glick, *supra* note 10, at 457–48.

237. See *id.* at 439.

by the Commissioner of the FTC, Lina Khan.²³⁸ Commissioner Khan proposed that the laws were not a “consumer welfare prescription,”²³⁹ but instead a prescription for maintaining competitive market structures.²⁴⁰ Professors Steinbaum and Stucke echo Commissioner Khan’s argument, arguing that antitrust should “protect a competitive process.”²⁴¹ Their work resurfaces and emphasizes the earliest rejoinder to Judge Bork and Professor Bowman.²⁴² While his overall view of the standard is not as negative, Professor Carl Shapiro proposes the following lodestar for antitrust law: “antitrust is about protecting the competitive process so consumers receive the full benefits of vigorous competition.”²⁴³

The reformers combine these two claims about the consumer welfare standard to conclude that the law should change. Commissioner Khan leads the way on this challenge to the current antitrust doctrine.²⁴⁴ According to her account, the consumer welfare standard’s impact on the doctrine has resulted in courts’ ignoring an important step in evaluating market performance.²⁴⁵ Because the consumer welfare standard suggests looking only at the bottom line, measured in terms of price and output, its prescription for the law ignores potential long-term ill effects from market concentration. The law has thus permitted certain firms—for example, Amazon—to grow large and restructure their respective markets away from competition.

Commissioner Khan’s Amazon-specific claims exemplify her concerns about market structure. Her theory of Amazon’s dominance revolves around the concept of predatory pricing.²⁴⁶ According to Commissioner Khan, Amazon has deployed a sophisticated predatory pricing strategy to drive out smaller competitors in online retail and manufacturing.²⁴⁷ Her illustration is a variation on the paradigmatic case of predatory pricing, in which one manufacturer or distributor sells its product *below* its cost of production to drive out all competitor

238. Khan, *supra* note 2, at 737–38.

239. *Id.* at 73.

240. *Id.* at 739–40.

241. Steinbaum & Stucke, *supra* note 7, at 601.

242. *See id.* at 597; *see also* Khan, *supra* note 2, at 720–21, 726–27; Blake & Jones, *supra* note 18, at 380–81.

243. Shapiro, *supra* note 51.

244. *See* Khan, *supra* note 2, at 710; *see also* Jennifer Saba, *Amazon One-Ups No. 1 Antitrust Critic Lina Khan*, Reuters (Mar. 7, 2022, 8:47 AM), <https://www.reuters.com/legal/litigation/amazon-one-ups-no-1-antitrust-critic-lina-khan-2022-03-04/> [perma.cc/NCQ7-7LKB].

245. *See* Khan, *supra* note 2, at 710, 737–38, 745.

246. *See id.* at 710, 753.

247. *See id.* at 753.

producers or distributors.²⁴⁸ Amazon's model more closely tracks historical cases of high-volume discounters that, while not always selling below cost, sell below the cost or profit margins earned by incumbent dealers—often by reducing retailing costs and pressuring manufacturers for volume discounts.²⁴⁹ The former case—selling products below their cost of production—is the one Judge Bork and the Chicago School believed improbable.²⁵⁰ Aggressive discounting, where the discounter does not sell below its costs, is beneficial under the consumer welfare framework because consumers benefit from the lower prices.²⁵¹ Commissioner Khan argues, however, that this arrangement cannot reach long-term equilibrium because it allows firms like Amazon to consolidate retail markets, obviating competitive forces.²⁵² As she explains, Amazon can execute a predatory pricing strategy without going bankrupt, as Judge Bork might have predicted, because of its ability to subsidize the losses it might suffer from predatory pricing through other means.²⁵³ Specifically, Commissioner Khan argues that investors have continued to invest in Amazon despite low or no profits, and that the profits it makes from its web-hosting services allow it to undersell competitors on the retail side.²⁵⁴

In sum, New Antitrust reformers press that the consumer welfare standard, on dubious economic grounds, leads courts to depart from facilitating and analyzing competition in markets to only measuring consumer welfare by prices and output.²⁵⁵ The consumer welfare standard's impact on antitrust doctrine as a whole, according to the reformers, has been to undermine antitrust law's traditional role in protecting competitive markets, not just efficient outcomes.²⁵⁶

2. Evidence of Negative Outcomes Associated with Lax Antitrust Regulation

Evidence of market concentration itself provides the basis for the claim that the economy—and society at large—is and has been

248. See *id.* at 723.

249. See generally *id.* at 746–83.

250. See *id.* at 727 (citing Jonathan B. Baker, *Predatory Pricing After Brook Group: An Economic Perspective*, 62 ANTITRUST L.J. 585, 586 (1994)).

251. See generally *Predatory or Below-Cost Pricing*, FTC, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/predatory-or-below-cost-pricing> [perma.cc/WY3T-AHA9] (last visited Apr. 5, 2023).

252. See *id.* at 754–56.

253. See *id.* at 768.

254. See *id.* at 748–49, 780–81.

255. See *id.* at 710.

256. See *id.* at 737–39.

subjected to growing harm.²⁵⁷ The evidence on the precise impact of economic structures on economic outcomes is mixed.²⁵⁸ Perhaps unsurprisingly, the broader debate over the propriety of the consumer welfare standard tends to turn on interlocutors' interpretation of the evidence of growing market concentration. The New Antitrust reformers' theoretical claim is that market concentration unavoidably leads, as it always has, to poor social and economic outcomes.²⁵⁹ Consequently, then, observed poor social and economic indicators are attributable to market concentration. The market concentration, in turn, is traceable to reduced antitrust enforcement under the strictures of the consumer welfare standard. The correlation the New Antitrust reformers describe between market concentration and negative social and economic outcomes suggests the former is responsible for the latter; however, the evidence on this point, as described above, remains mixed.²⁶⁰ Of course, this is not necessarily a flaw in their argument; the New Antitrust reformers are skeptical that evidence of competitive harm would fully reveal itself in measurable indicators until well into the future, well after the opportunity has passed for the damage to be undone.²⁶¹

3. Reform More Generally & Proposed Reforms or Actions

The New Antitrust recommends that regulators and courts be granted broad discretion to find and remedy problems of market concentration, not just economic harm, and not just after such harm has occurred.²⁶² Reformers' various proposals include strengthening merger enforcement, returning more conduct to per se illegality, and even breaking up large technology companies. On the subject of Amazon, Commissioner Khan recommended that the company be barred from competing with third-party sellers on its platform and advocated for its regulation as a necessary facility, analogous to a railroad, bridge, or other public utility.²⁶³ Because this is the beginning of a longer program of reform, the shape of a reinvigorated antitrust enforcement regime

257. See *id.* at 742.

258. See Dorsey et al., *supra* note 4 at 886–87, 907–08 (presenting and analyzing numerous empirical studies of market concentration); Shapiro, *supra* note 51, at 718, 721, 726.

259. See Khan, *supra* note 2, at 742; see also Dorsey et al., *supra* note 4, at 886.

260. See Dorsey et al., *supra* note 4, at 907–08.

261. See Khan, *supra* note 2, at 743.

262. See Wright et al., *supra* note 5, at 296, 363–64; Dorsey et al., *supra* note 4 at 865–66, 906, 909.

263. Khan, *supra* note 2, at 793–94, 797–802 (illustrating proposals that would separate Amazon's platform business from its retail business and that would treat Amazon as a necessary facility, respectively).

and the legal doctrine that would ultimately result from the New Antitrust's approach are not entirely clear.²⁶⁴ Ultimately, though, the New Antitrust reformers want to expand the reach of antitrust law and empower enforcement agencies to take a broader view of the problems with concentrated market structures. In doing so, the reformed antitrust law would expand its focus on structural concerns and social consequences, rather than only evaluating bottom-line prices and outputs.

III. THE CASE: AMAZON'S IMPACT ON THE NONPRESCRIPTION CPAP COMPONENTS MARKET

This Article presents a case study of the market for nonprescription CPAP components, focusing specifically on the part of the market that exists on Amazon's Marketplace platform. The purpose of pursuing the case was to look both at²⁶⁵ and behind²⁶⁶ the business operations of real players in a real market to gather evidence related to whether the actions within those markets were (1) inconsistent or consistent with the logic of the consumer welfare standard, (2) inconsistent or consistent with claims about the relationship between concentration and economic or social harm, and (3) generalizable in any sense to other markets or economic or social phenomena. This Part describes the case study and the evidence gathered, describes the market for CPAP supplies as it has evolved before and after the advent of selling CPAP supplies on Amazon, describes the various aspects of Amazon's business necessary to understand the relationship to the CPAP market, and presents observations important to antitrust analysis and the debate about the future goals and purposes of antitrust law and enforcement.

A. Description of the Study

This case study involves interviews, conversations, and correspondence with players in the market for CPAP equipment on Amazon and in DME stores.²⁶⁷ The primary source for this case will be

264. See generally Dorsey et al., *supra* note 4 (highlighting the shortcomings of the New Antitrust legal and regulatory framework); Wright et al., *supra* note 5, at 365–66.

265. Cf. Posner, *supra* note 171, at 929, 931 (describing industrial organization as more or less taking business people's words describing their business decisions at face value).

266. Cf. ALCHIAN & ALLEN, *supra* note 57 (describing the economic and business operations).

267. The portions of the Article that describe the interviews with Sellers A and B were confidential interviews with the Author and remain anonymized as a condition of conducting the interview.

called “Seller A.” Another small business in the CPAP market on Amazon that also provided valuable information will be called “Seller B.” In addition to information collected from Seller A and Seller B principals, the study also consists of original research drawn from publicly available sources pertaining to prices, quantities, and other data about the operation of the market for nonprescription CPAP supplies. It also includes legal research pertinent to ongoing questions about CPAP supplies, insurance reimbursements, and CPAP supplies in e-commerce more generally.

The case study was designed to uncover qualitative information about how the market for nonprescription CPAP supplies works—for example, how the nonprescription CPAP components make their way from manufacturers, through dealers, to Amazon or some other retail outlet, and then to the consumer. The piece of most interest to the broader policy debates about Amazon and big technology companies is the landscape Amazon’s consolidation of e-commerce has created for third-party sellers. To the extent that the New Antitrust claims that Amazon’s consolidation or concentration of the market for e-commerce retail platforms constitutes evidence of harm,²⁶⁸ this study seeks empirical evidence either of harm or of benefit.

While this case study cannot capture the full effect of Amazon’s impact on markets, it can provide insight as to how markets have changed in reaction to Amazon’s concentration of online retail. This Part lays out the primary observations of the market, describes some aspects of the relationship between Amazon and third-party sellers, and supplies some data on pricing. This Part then represents the core of the evidence the case presents and that the following Section will rely upon in evaluating the claims and charges from the New Antitrust about Amazon and market structure more generally.

B. CPAP Supplies, the Legacy Market, and the Current Market

CPAP machines are prescribed to patients suffering from sleep apnea.²⁶⁹ Any individual patient’s CPAP machine setup consists of

268. See Khan, *supra* note 2, at 715, 718 (citing JOE S. BAIN, INDUSTRIAL ORGANIZATION (2d ed. 1968)).

269. See 21 C.F.R. § 868.5273. Sleep apnea is a medical condition where the patient stops breathing for brief periods during sleep. *Sleep Apnea*, JOHNS HOPKINS MMED. HEALTH DICTIONARY, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/sleep-apnea> [perma.cc/PU4P-R4PE] (last visited Apr. 5, 2023). Relaxed muscles in the patient’s throat cause the airways to close. *Id.* The closed airways cause a drop in blood oxygen level, which signals the brain to awaken the person briefly to reestablish airflow. *Id.*

several components.²⁷⁰ The CPAP machine itself is an appliance that creates air pressure with an electric motor.²⁷¹ Attached to the machine is some sort of tubing to carry the forced air to the user's nose through a mask.²⁷² The machines themselves and certain components of the machines are restricted medical equipment,²⁷³ and, therefore, only purchasers with valid prescriptions may purchase the machines, and only from licensed DME sellers.²⁷⁴ Traditionally, CPAP users would buy all relevant components—machines, other prescription components, and nonprescription components—from a brick-and-mortar DME store, a process that includes insurance cost sharing.²⁷⁵ However, many accessories and components do not require a special license to sell or a prescription to purchase; no additional regulatory hurdles prevent dealers from reselling nonprescription components directly to consumers.²⁷⁶ In this environment, there is a burgeoning market for third-party sellers using Amazon's platform to sell various nonprescription CPAP components.

C. Primary Amazon Services: Amazon Marketplace, Fulfilled by Amazon, Logistics

Third-party sellers can begin selling on Amazon after signing up for an account.²⁷⁷ If a seller's product has never been sold on Amazon

270. See generally USER MANUAL, DREAMSTATION CPAP 5 (Koninklijke Philips N.V., 2015) (outlining the goal of the CPAP machine).

271. See *CPAP Machine Motor*, ZHAOWEI, <https://www.zwgearbox.com/medical-technology/cpap-machine-motor> [perma.cc/V46L-2C35] (last visited Mar. 24, 2023).

272. See generally USER MANUAL, DREAMSTATION CPAP, *supra* note 270, at 8 (providing instructions for attaching the tube).

273. See generally 21 C.F.R. § 868.5273 (a), (b).

274. The CPAP Team, *Do You Need a Prescription to Buy a CPAP Machine, Mask, or Supplies?*, CPAP (Oct. 6, 2022), <https://www.cpap.com/blog/cpap-machine-without-prescription/> [perma.cc/DHB3-45K3].

275. See Daniel Noyed, *How Do I Purchase a CPAP Machine?*, SLEEP FOUND., <https://www.sleepfoundation.org/cpap/how-to-purchase-a-cpap-machine> [perma.cc/L3S7-WMKD] (Nov. 8, 2022). Within the CPAP supplies market, there is much controversy and even litigation about the approach major insurers, Medicaid, and Medicare use for reimbursing CPAP machines and supplies. See generally Memo. of Decision on Defs.' Mot. to Dismiss, *Neufield v. Cigna Health & Life Ins. Co.*, No. 3:17-cv-01693 (D. Conn., Aug. 30, 2018), ECF No. 97; Marshall Allen, *You Snooze You Lose: How Insurers Dodge the Costs of Popular Sleep Apnea Devices*, NAT'L PUB. RADIO (Nov. 21, 2018), <https://www.npr.org/sections/health-shots/2018/11/21/669751038/you-snooze-you-lose-how-insurers-dodge-the-costs-of-popular-sleep-apnea-devices> [perma.cc/J8FL-H92W].

276. See generally Allen, *supra* note 275 ("Longtime CPAP users say it's well known that supplies are cheaper when they are purchased without insurance" and instead purchasing from resellers); CPAP Team, *supra* note 274.

277. See *How to Start Selling on Amazon*, AMAZON, <https://sell.amazon.com/sell> [perma.cc/GA2D-86QW] (last visited Mar. 17, 2023).

before, the seller can create a listing for it; if it has, the seller may join the existing listing or listings for the product.²⁷⁸ Once a seller is “in the listing,” buyers can select to purchase the product from that seller by navigating the listing page.²⁷⁹

The “buy box” is the center of the third-party seller experience on Amazon.²⁸⁰ The buy box refers to the space within the listing where the customer can click “Add to Cart” or “Buy Now” and initiate a transaction with the seller Amazon’s programming selects as the best in the listing.²⁸¹ Winning the buy box is crucial for an Amazon third-party seller because possessing the buy box for any given product results in greatly increased sales of that product.²⁸² The formula for how to win the buy box is notoriously secretive but likely accounts primarily for the competitiveness of the seller’s price, as well as for the seller’s provision of Amazon services, the seller’s rating, and similar factors.²⁸³

Amazon collects a commission on each sale made on its platform.²⁸⁴ Third-party sellers have options for shipping and distribution: a seller can be part of the “merchant-fulfilled network” (MFN; sometimes called “fulfilled by merchant” (FBM)) or use “fulfilled by Amazon” (FBA).²⁸⁵ MFN/FBM sellers take orders from Amazon and ship goods to customers themselves or use independent fulfillment centers.²⁸⁶ FBA sellers ship goods to Amazon’s fulfillment centers, where Amazon picks and packs the goods itself when the customer orders them.²⁸⁷ Amazon earns commissions from all third-party sales, but it takes a greater commission from third-party sellers using FBA.²⁸⁸

278. *See id.*

279. *See id.*

280. *See id.*

281. Email from Seller A principal to Martin Edwards, Assistant Professor of L., Belmont Coll. Of L. (Jan. 10, 2022, 10:32 AM) (on file with author); *see How to Start Selling on Amazon*, *supra* note 277.

282. *See* Brian Connolly, *How to Win the Amazon Buy Box in 2021*, JUNGLESCOUT (Nov. 5, 2021), <https://www.junglescout.com/blog/how-to-win-the-buy-box/> [perma.cc/UZ5N-QV4V].

283. *See id.*; Email from Seller A principal to Martin Edwards, *supra* note 281.

284. *Let’s Talk Numbers*, AMAZON, <https://sell.amazon.com/pricing> [perma.cc/3KPF-FFD2] (last visited Mar. 17, 2023); David Dayen, *Amazon Continues Preying on Third-Party Sellers*, AM. PROSPECT (Aug. 23, 2022), <https://prospect.org/power/amazon-continues-preying-on-third-party-sellers/> [perma.cc/SL7C-5WZ6].

285. Amazon Merchant Fulfilled Network, AMAZON, <https://sell.amazon.com/learn/fulfillment-by-merchant> [perma.cc/268S-SPC7] (last visited Mar. 3, 2023).

286. Telephone interview with Seller A principal (Feb. 21, 2023).

287. *Amazon FBA: Let Amazon pick, pack, and ship your orders*, AMAZON, <https://sell.amazon.com/fulfillment-by-amazon> [perma.cc/D2Z7-V8JV] (last visited Mar. 8, 2023).

288. *See generally* Amazon Merchant Fulfilled Network, *supra* note 285; Dayen, *supra* note 284.

The Marketplace platform creates value for third-party sellers by connecting those sellers to consumers. The existence of a large, widely used platform permits third-party sellers to make more sales than they would using individually created and maintained platforms of their own. This both increases sales and reduces the costs of engaging in online commerce. Reductions in cost are at least in part passed on to consumers in the form of lower prices. Fostering these connections is only one part of the sales process, though. For FBA sellers, the largest benefits of Amazon Marketplace are the fulfillment and distribution logistics.²⁸⁹ Amazon's fulfillment and logistics process lowers the cost of fulfilling and shipping orders to customers—another benefit Amazon provides through having a large-scale platform.²⁹⁰ By supplying a less expensive way to fulfill orders, Amazon's FBA program enhances the value of Amazon Marketplace to third-party sellers beyond just the benefits the platform provides for connecting to buyers and making sales. These innovations in fulfillment and distribution are as notable as the increased sales and lower costs of each sale from the use of the Marketplace platform.

D. Observations Relevant to Present or Proposed Antitrust Law and Enforcement

This Section delivers key observations from the case that are germane to both consumer welfare and market structure antitrust analysis. These observations preface the analysis in Part IV that connects these observations to the relevant legal and policy questions in the current antitrust debate. It discusses the prices and output of the market for CPAP supplies, competition and the competitive structure of the market as a whole, how third-party sellers organize their businesses to compete in the market, how third-party sellers provide employment, other Amazon services that improve the market's performance, and the phenomenon of third-third-party sellers who provide additional services to improve market performance.

289. Interview with Seller A principals, at Seller A office (Mar. 9, 2020). He describes the FBA services as crucial to his business. In his view, the key to selling through Amazon is not even the Marketplace itself, but the downstream logistics support Amazon provides after the sale. Telephone interview with Seller B principal (Oct. 13, 2022). Seller B's principal concurs. Despite shifting his focus from reselling other manufacturers' products to selling private-labeled products, Seller B still uses FBA for sales of private-label products.

290. Amazon Merchant Fulfilled Network, *supra* note 285.

1. Prices and Output

Prices are often significantly lower on Amazon for CPAP supplies than for the same products at DME stores, largely because of insurance cost sharing that occurs at the latter.²⁹¹ When a person purchases components at a DME store, she pays part of the price, while her insurance company pays the rest.²⁹² Most insurance reimbursement occurs at or near the manufacturer's suggested retail price (MSRP) or the minimum advertised price (MAP) for an item.²⁹³ In many cases, products sell on Amazon even lower than the MSRP or MAP price.²⁹⁴

Researchers often struggle to turn raw output data into usable empirical evidence.²⁹⁵ When evaluating a market's output, regulators may scour the data for antitrust implications—namely, implications that arise when some producer appears to be restricting that output. A monopolist, for example, may attempt to restrict output to the level that would be supplied and demanded at the monopoly price.²⁹⁶ Evidence from Amazon, at minimum, shows no obvious signs of output restriction; third-party sellers' ability to market their products on Amazon increases the total output that reaches consumers. Prices appear to be generally lower on Amazon, while there is no evidence of output restriction.

291. See generally Allen, *supra* note 275.

292. Medicare coverage for durable medical equipment, HUMANA, <https://www.humana.com/medicare/medicare-resources/durable-medical-equipment> [perma.cc/D8SW-4LEP] (last visited Mar. 8, 2023).

293. Easy Breathe, *CPAP Machine Cost: Are Prices Lower Without Insurance?*, EASY BLOG (Jan. 5, 2021), <https://blog.easybreathe.com/cpap-machine-cost-are-prices-lower-without-insurance-2/> [perma.cc/MMY9-RG8Y]; see also Andrew Senske, *CPAP Prices and Brand Image*, CPAP SUPPLY (Mar. 20, 2013) https://www.cpap-supply.com/CPAP-Prices-and-Brand-Image_b_1015.html [perma.cc/4K3L-KHJB]. A “minimum advertised price” is not technically a vertical restraint but functions similarly to a resale price maintenance agreement, which is a vertical restraint. When carefully designed, such are often treated as *Colgate* policies, which permit manufacturers to establish unilateral policies and to enforce them by future refusals to deal with distributors who do not comply. Michael R. Murphy, Morgan T. Nickerson, Christopher S. Finnerty & Jack S. Brodsky, *Unilateral Policies Are 99 Years Old And Still the Safest And Most Effective Form of Resale Price Maintenance*, K&L GATES HUB (June 3, 2019), available at <https://www.klgates.com/epc/getStdDoc.aspx?MediaID=86966> [perma.cc/FCJ2-7VUA].

294. Email from Seller A principal to Martin Edwards, *supra* note 281.

295. Easterbrook, *supra* note 79, at 1699 n.9.

296. See Gellhorn, *supra* note 19 at 30.

2. Competition and Competitive Structure

At any given time, there are at least ten to fifteen dealers on Amazon selling a given CPAP product.²⁹⁷ Price competition and competition for the buy box are the two most significant ways that CPAP third-party sellers compete with one another.²⁹⁸ One Seller A principal recounts highly competitive “price wars” among larger third-party sellers that caused consumer prices to stay very low for very long stretches of time, enabling these sellers to recover only a few dollars here and there.²⁹⁹ The Seller B principal likewise reports a long stretch of price wars that resulted in very thin margins for sellers.³⁰⁰ Furthermore, since competing for the buy box involves customer satisfaction, and since sellers have easily accessible ratings, third-party sellers compete with one another not only on price, but on ease of the transaction, responsiveness to issues, quality of packaging for units, and similar matters.³⁰¹

It appears that Amazon’s concentration of online retail through its platform and Marketplace facilitates expanded competition among third-party sellers. Without Amazon, each seller would be able to sell only through its own e-commerce websites.³⁰² Running and maintaining a standalone e-commerce platform is costly.³⁰³ Many CPAP third-party sellers also have individual e-commerce sites,³⁰⁴ but a Seller A principal explains that he rarely makes sales through his standalone e-commerce platform. He makes most sales through Amazon and other open platforms.³⁰⁵ The same is largely true for Seller B.³⁰⁶ Participation as a third-party seller on Amazon permits Sellers A and B to attain greater sales than through their own e-commerce outlets.

297. Email from Seller A principal to Martin Edwards, *supra* note 281; Telephone Interview with Seller A (Jan. 31, 2022); Telephone Interview with Seller B principal, *supra* note 289 (describing “five to twenty” sellers).

298. See *supra* notes 298–99 and accompanying text.

299. Interview with Seller A principals, at Seller A office, *supra* note 289.

300. Telephone Interview with Seller B principal, *supra* note 289.

301. Connolly, *supra* note 282.

302. See generally Angus Loten & Adam Janofsky, *Sellers Need Amazon, but at What Cost?*, WALL ST. J. (Jan. 14, 2015, 6:30 PM), <https://www.wsj.com/articles/sellers-need-amazon-but-at-what-cost-1421278220> [perma.cc/J29T-PW5D].

303. See Kimberlee Leonard, *How Much Does A Website Cost? (2023 Guide)*, FORBES (Mar. 6, 2023, 5:07 AM), <https://www.forbes.com/advisor/business/software/how-much-does-a-website-cost/>.

304. Seller A maintains its own e-commerce outlet in addition to sales through Amazon Marketplace and other e-commerce platforms. Telephone Interview with Seller A principal (Jan. 31, 2022).

305. Interview with Seller A principals, at Seller A office, *supra* note 289.

306. Telephone Interview with Seller B principal, *supra* note 289.

Seller A and B principals both described price wars for CPAP supplies on Amazon during the late 2010s and early 2020s. Price wars can be good for consumers for a time, as rigorous price competition and discounting save consumers money. In the long run, however, as both New Antitrust reformers and Chicago School luminaries have observed, a price war might not ultimately lead to a workable equilibrium.³⁰⁷ Manufacturers have tried to use minimum advertised price policies to quell price wars and prevent discounters from using aggressive pricing to drive out competitors. While Amazon may have concentrated the market for e-commerce platforms, the platform it created appears to have facilitated increased competition among distributors in the relevant product markets.

3. Third-Party Seller Business Models

Seller A is a small limited liability company where some of the members are also employees. Seller A is affiliated with a brick-and-mortar store through a one-time Seller A member's separate ownership. This arrangement is true of other sellers as well.³⁰⁸ Seller B is a somewhat larger enterprise with more employees, and Seller B is also affiliated with a brick-and-mortar DME store. Seller B, like Seller A, uses Amazon's FBA program. In contrast to Seller A, Seller B has expanded its business profile to include private-labeled nonprescription CPAP components that it sources from foreign manufacturers and then private-labels for sales through Amazon. Sellers A and B, in the CPAP market, are representative of at least some classes of third-party sellers in other non-CPAP markets on Amazon. Small- and medium-sized dealers such as Sellers A and B use Amazon's platform and logistics resources as one distribution channel among many, including e-commerce platforms of their own.³⁰⁹ There likely are even smaller businesses on Amazon Marketplace that do not have their own e-commerce platforms and rely primarily on Amazon's services to generate sales. Ultimately, Amazon appears to have created space and smoothed frictions associated with running smaller retail and distribution businesses.

307. Cf. Khan, *supra* note 2; Telsler, *supra* note 174.

308. Interview with Seller A principals, at Seller A office, *supra* note 289.

309. Cf. Melissa Repko, *Walmart steps up competition with Amazon by fulfilling orders for third-party vendors*, CNBC (Feb. 25, 2020, 3:40 PM), <https://www.cnbc.com/2020/02/25/walmart-wants-to-make-it-easier-for-third-party-vendors.html> [perma.cc/9N6G-3S7J]; Amazon Merchant Fulfilled Network, *supra* note 285.

4. Employment

Some Amazon CPAP third-party sellers have many employees, especially those that sell through their own in-house DME store, while others have fewer. For example, Seller A employs some of its members as managers and usually has one or two nonmember employees, while Seller B has a larger operation with several more employees. Most of the time, Seller A employs a nonmember employee to assist with various aspects of its operations, from packing goods for shipping to assisting with management. Seller B's somewhat larger business employs more than five individuals. It appears that at least some employment effect should flow from the existence of Amazon third-party seller businesses, even if it is only employment of a particular business's principal or principals.

5. Additional Amazon Services

Amazon's fulfillment and logistics services are substantial features it provides third-party sellers beyond simply granting these sellers the ability to sell their products on Marketplace. Beyond Marketplace access, fulfillment, and logistics, Amazon smooths all kinds of notable business frictions for third-party sellers. As one Seller A principal describes it, Amazon provides translation services for sales in foreign markets,³¹⁰ reduced fulfillment fees, and free account management assistance. Amazon even paid for value-added tax accountant services to assist Seller A in expanding its sales into foreign markets.³¹¹ These additional Amazon services are yet further examples of how Amazon assists small retail and distribution businesses in selling their products.

6. Third-Third-Party Vendors

One of the more remarkable aspects of the Amazon ecosystem is the emergence of third-third-party vendors. These businesses provide catered services to Amazon third-party sellers, including data-mining and interpretation software that can isolate the quantity and margins of sales for products on Amazon. An exemplary business, JungleScout, mines data about sales that third-party sellers, in the CPAP market and otherwise, can use to determine how to optimize inventory

310. Telephone Interview with Seller A principal (July 21, 2021).

311. *Id.*

management.³¹² One Seller A principal recounts that one of his primary software consultants had a better sense of what quantities of inventory to ship to which Amazon fulfillment centers than Amazon's in-house data management recommended.³¹³ As described above, third-party sellers using FBA ship large quantities of inventory to Amazon fulfillment centers in various geographic locations.³¹⁴ Decisions about these quantities and timing are critical to third-party sellers' businesses. Amazon provides basic data about how much inventory the sellers should expect to sell and recommends quantities to ship to each fulfillment center at given times.³¹⁵ In Seller A's experience, third-third-party vendors have more precisely made the predictions about where to send what quantity of inventory than Amazon has.³¹⁶ This suggests that third-third-party vendors and third-party sellers can develop more valuable knowledge about inventory management on Amazon's own platform than Amazon itself.

Other third-third-party vendor services include law firms that specialize in navigating Amazon's internal "legal system." Amazon's internal process for responding to complaints of intellectual property infringement and ensuring its own regulatory compliance—among other legal compliance activities—sometimes results in third-party sellers' losing listings or suffering some other form of penalty. One Seller A principal recounts, for example, occasionally having to engage with Amazon's employees to demonstrate Seller A's compliance with various medical device regulations across different jurisdictions.³¹⁷ To that end, some practicing lawyers have begun to study how Amazon deals with legal and regulatory issues that arise on its platform and have offered representation to third-party sellers in various disputes with Amazon about their products.³¹⁸ Third-third-party vendors are a notable and perhaps surprising feature of the Amazon ecosystem. Naturally, they would not exist nor provide these services in the absence of Amazon's platform.

312. See JungleScout, <https://www.junglescout.com/products/jungle-scout/> [perma.cc/QS78-2G59] (last visited Mar. 17, 2023).

313. Interview with Seller A principals, at Seller A office, *supra* note 289.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. See, e.g., C.J. Rosenbaum & Rob Segall, *Amazon Account Suspended?*, AMAZON SELLERS LAWYER, <https://amazonsellerslawyer.com> [perma.cc/PPA8-9RSN] (last visited Mar. 17, 2023).

7. Postscript on Amazon and CPAP Market

Sometime in late 2021, one of the two largest CPAP distributors with a presence on Amazon Marketplace abruptly pulled all of its listings.³¹⁹ This naturally reduced the availability of CPAP products on Amazon. Within a month, smaller dealers rushed in to fill the gap.³²⁰ Sellers of CPAP supplies on Amazon seem to be able to enter and exit the Amazon Marketplace slice of the CPAP supplies market more or less at will, limited only perhaps by various manufacturer-related agreements. In the three years the Author has been gathering information about the market, dealers' sales and products' prices on the platform have ebbed and flowed. Largely, though, supply has remained high and prices relatively low—and certainly lower than MAP or MSRP.

IV. IMPLICATIONS OF THE CASE

The consumer welfare standard, by focusing on what consumers receive for what they pay for certain products and on whether judges can, with minimal error, evaluate various complex business practices, has resulted in a narrow approach to antitrust scrutiny.³²¹ Supplying more economic evidence of lower consumer prices is unlikely to persuade New Antitrust reformers, who are focused on the broader social consequences that the standard has allegedly brought about.³²² Nonetheless, the analysis of the case study would be incomplete without linking observations about the market to now-conventional consumer welfare economics. In the CPAP market on Amazon, prices remain mostly low and consumers can still consume more CPAP supplies at lower prices than they could in the DME store market structure that existed before Amazon. Such is consistent with consumer welfare antitrust's focus on allocative efficiency.³²³

The case also reveals positive social consequences of Amazon's consolidation of online retail. The analysis of these consequences is more responsive to the reformers' charges that concentration has already caused or always causes broader social harm not captured in an analysis strictly of welfare economics. The case shows at least three important social benefits that flow from Amazon's concentration that support arguments responsive to both historic antitrust arguments and New Antitrust claims about the dangers of concentrated market

319. Telephone Interview with Seller A principal (Jan. 31, 2022).

320. *Id.*

321. *See supra* Section II.C.

322. *See supra* Section II.C.

323. *See Crane, supra* note 215.

structures. First, small businesses—the “small dealers” of Justice Rufus Peckham’s famous majority opinion³²⁴—are growing by complementing Amazon’s platform resources. One of the more unique aspects of this small business growth is the e-commerce skill-building taking place among Amazon third-party sellers. While Amazon’s platform handles, among other things, technological problems, fulfillment, and logistics,³²⁵ third-party sellers are investing in inventory management, manufacturer relations, and similar skills.³²⁶ Seller A’s principal has translated these skills from the Amazon business to other platforms such as Walmart and eBay. Like most businesses, third-party seller businesses hire employees, contributing to employment in the economy. Third-third-party vendors supply valuable, innovative tools and services to third-party sellers and those businesses also employ people. Whether overall employment and innovation occurring because of Amazon’s concentrated platform increases consumer welfare on net, or whether Amazon-related employment and innovation cause net economic growth, is an empirical question not completely answered in this case study. Nonetheless, employment and innovation owing to Amazon’s concentration of online retail must in some way contribute to overall employment and innovation in the economy. At minimum, the employment, innovation, and other valuable activities this case observes on Amazon’s platform has social value in and of itself.

The remainder of this Part is divided into two Sections. The first lays out an economic analysis of the studied market, while the second engages with broader social and economic questions, such as whether Amazon is, on net, socially costly or socially productive. The economic analysis of the former applies the economic philosophy of the consumer welfare standard to the CPAP market. As it is the primary economic paradigm underpinning modern antitrust law, identifying how it applies to new real-world problems deserves treatment here, despite the New Antitrust reformers’ argument that consumer welfare should

324. See *United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290, 323–24 (1897).

325. Though, naturally, third-party sellers can choose not to use all of Amazon’s fulfillment and delivery logistics services. See generally Brian Connolly, *How to Sell & Ship Your Own Products with Amazon FBM*, JUNGLESCOUT (Nov. 8, 2021), https://www.junglescout.com/blog?p=24116&payroll-insurancespayroll-insurancess&payroll-insurances%5B25253Fs%5D=First%2B&payroll-insurances%5B253Fs%5D=First%2B&payroll-insurances%5B3Fs%5D=First%2B&s%5Bwtime%5D=seek_to_second_number?wtime=seek_to_second_number [perma.cc/AQB4-V4DG].

326. See generally Richard D. Wang & Cameron D. Miller, *How Third-Party Sellers Can Make Amazon Work for Them*, HARVARD BUS. REV. (July 15, 2020), <https://hbr.org/2020/07/how-third-party-sellers-can-make-amazon-work-for-them> [perma.cc/74EA-H8GZ] (explaining how third-party sellers can utilize Amazon to enhance a business they have already invested in).

not be the only paradigm applied in antitrust law. The broader social questions addressed in the second Section include, *inter alia*, whether the New Antitrust reformers are correct in claiming that Amazon's market concentration and the new structure of online retail will inevitably cause inequality, reduced innovation, lower employment, and other similar ills.

A. Consumer Welfare in the CPAP Market

The consumer welfare standard asks primarily whether consumers are paying higher prices, or receiving lower quantity or quality, than they would otherwise pay or receive in a market without the alleged antitrust malfeasance.³²⁷ The pricing data from this case, along with the observation that Amazon permits avoiding costly insurance reimbursement models, permits the inference that consumers pay lower prices and, at minimum, enjoy greater access to CPAP supplies because of the existence of the Amazon Marketplace.

1. Prices and Output

Lower prices increase consumer welfare because consumers can consume more products given the same level of income.³²⁸ That is, if CPAP users can pay less for various nonprescription components, they will have more money to spend in other utility-increasing purchases. Amazon has created productive efficiency gains through the Marketplace platform, as well as through its logistics and distribution program. This has, in turn, facilitated third-party sellers' productive efficiency gains in inventory management and manufacturer relations, all of which have combined to give CPAP users greater overall utility.³²⁹

The table above demonstrates significant differences in the Amazon price and the MSRP or MAPs for CPAP supplies that consumers would pay in the absence of availability on Amazon. A consumer could, for example, purchase two Fisher & Paykel CPAP pillows for less than the MAP and three for the MSRP.³³⁰ Some recommendations suggest that users should replace such products as

327. Thomas G. Krattenmaker, Robert H. Lande & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, DEP'T OF JUST., <https://www.justice.gov/atr/monopoly-power-and-market-power-antitrust-law#fn24> [perma.cc/K2QB-KU5Y] (June 25, 2015).

328. See generally BORK, *supra* note 9, at 7; Jason Fernando, *Law of Supply and Demand in Economics: How It Works*, INVESTOPEDIA, <https://www.investopedia.com/terms/l/law-of-supply-demand.asp> [perma.cc/7ZEP-9H7V] (Mar. 13, 2023).

329. See generally BORK, *supra* note 9, at 105.

330. See Email from Seller A Principal to Martin Edwards, *supra* note 281.

often as every month.³³¹ Thus, consumers can change out CPAP pillows more often, increasing the utility derived from use of their machines. Alternatively, consumers can spend far less on products throughout a given time period, instead retaining those resources to satisfy other preferences. This is the essence of allocative efficiency: paying less for CPAP cushions means consumers have more resources to satisfy their preferences and increase their utility by purchasing other goods and services or investing free capital. In theory, this adds up to increased economic welfare. If manufacturers increase output in response to dealers' demands for more product to sell on Amazon, the law of demand suggests prices will fall, thus illustrating further the cost savings from buying CPAP supplies on Amazon. Output data is harder to interpret,³³² but lower prices and greater ease of purchase through Amazon and other e-commerce platforms suggest greater output is likely as manufacturers produce more in response to the greater demand that Amazon's platform facilitates.

2. Convenience

Amazon has created social value by providing a platform on which consumers can shop more conveniently. Notably, this observation applies as much to any product sold on Amazon as it does to the CPAP market. In addition to the price competition that takes place among dealers, buyers on Amazon can save time and search costs³³³ by shopping for and comparing substitute goods on Amazon. By reducing the time consumers spend searching and evaluating products to buy, Amazon provides the public with savings that increase allocative efficiency. Similarly, Amazon offers two-day shipping in most markets and even one-day or same-day shipping in others.³³⁴ These short shipping windows save consumers time and search costs, too. Amazon—and its third-party sellers—are able to do this because of Amazon's investments in its platform, fulfillment, and distribution systems described throughout this case. Amazon and its third-party

331. See, e.g., David Repasky, *How Often Should I Change My CPAP Mask? (Wear, Leaks, and Cleaning)*, CPAP.COM (June 16, 2022), <https://www.cpap.com/blog/change-cpap-mask-wear-leaks-cleaning/> [perma.cc/Z4AN-UA98].

332. See Easterbrook, *supra* note 79, at 1711 (output is “exquisitely hard to measure”).

333. ALCHIAN & ALLEN, *supra* note 57, at 391.

334. See Lisa Davis, *Everything You Need to Know About Amazon Prime Delivery Options*, OFFERS.COM (Mar. 26, 2022), <https://www.offers.com/blog/post/amazon-delivery-options/#:~:text=Where%20is%20Amazon%20Two-Day%20Shipping%20available%3F%20Free%20two-day,What%20can%20I%20order%20with%20Amazon%20Two-Day%20Shipping%3F> [perma.cc/7CDT-7B82].

sellers could not have delivered on these cost savings from shopping and buying convenience if not for the Marketplace platform and FBA.

3. Harm to Consumers?

There are several potential harms to consumers that could come from buying CPAP equipment on Amazon, but these potential harms do not necessarily make the case for or against antitrust intervention. One substantial harm or risk is that unscrupulous third-party sellers may sell counterfeit CPAP equipment to purchasers. A common complaint against Amazon Marketplace over the years is that Amazon has not done enough to police counterfeit goods.³³⁵ This is, perhaps, less consequential when the goods are shoes or clothing, but the risk of injury from an unwitting consumer attaching counterfeit accessories to a restricted medical device is much greater.

CPAP machines are technically complex devices, and selecting appropriate accessories may be beyond the competency of some online consumers. Mismatched, low-quality, broken, or otherwise defective components are more likely to appear for sale on Amazon than in DME stores. This fact of the CPAP market might counsel toward a distribution system where the user receives greater service before and after the sale.³³⁶ For example, DME stores might offer assistance with fitment, with evaluating brand quality, or with confirming compatibility of different components. As with counterfeit products, purchasing a hat or a trunk organizer, to name two examples, is a relatively low risk endeavor compared to a purchase of medical equipment, which suggests that Amazon might not be the best place for the average consumer to buy CPAP supplies. This distinction may also explain the difference between the MAP or MSRP prices at DME stores and other online outlets, on the one hand, and lower Amazon prices, on the other. Of course, some CPAP third-party sellers are—or have some relationship with—professional dealers of CPAP equipment. Seller A and Seller B, for instance, are both positioned to provide some pre- and post-sale services through their Amazon third-party seller accounts, including support for consumers' technical questions and a system for processing returns for items that the consumer selected and purchased by mistake.

335. See, e.g., Letter from David Kahan, Birkenstock CEO, to Birkenstock Retail Partners, Re: Amazon (July 20, 2017); see also Letter from David Kahan, Birkenstock CEO, to Birkenstock Partners, Subject: Birkenstock Products on the Amazon.com Marketplace, CNBC (July 5, 2016).

336. Cf. *supra* text accompanying notes 174–75.

Finally, evidence suggests that prices change, sometimes dramatically and quickly, on Amazon;³³⁷ one day, a particular product might sell lower or higher than on other days, raising consumers' buying costs. Some buyers may have the time or preference for watching prices to obtain lower ones, while others may simply wish to make the purchase during a particular time interval. The latter purchaser would end up paying more. As described above, both New Antitrust reformers and Chicago School economists have observed the benefits associated with avoiding all-out price wars, since an unstable short-term price war may end up harming consumers more than helping them in the long run.³³⁸ In sum, even though there are potential harms to consumers, this does not specifically demonstrate that antitrust intervention is necessary or appropriate.

4. Harm to Third-Party Sellers (and Manufacturers) at the Hands of Amazon

One of the most significant charges New Antitrust reformers levy is that Amazon sometimes behaves aggressively toward third-party sellers, especially of more generic goods.³³⁹ The New Antitrust reformers theorize that Amazon's size and market power, gleaned from consolidating e-commerce and logistics, will lead it to deploy aggressive tactics against its third-party seller competitors.³⁴⁰ As described above, Amazon competes directly with its third-party sellers on its platform and can do so at multiple junctures.³⁴¹ For example, Amazon has, at times, sought to become an authorized distributor of CPAP products, though, according to Seller A's principal, manufacturers have largely rebuffed its efforts. If it were to change the manufacturers' minds, Amazon would be in direct competition with Seller A and Seller B. It could also begin private-labeling CPAP components, as Seller B has done. Certainly, competition from Amazon, with its deep pockets and ability to buy at scale, could dramatically interfere with the ability of Seller A, Seller B, or both, to enjoy profits through sales on Amazon Marketplace.

The other important New Antitrust charge is that Amazon copies generic products and sells them head-to-head in competition with those products' creators or manufacturers.³⁴² According to the

337. Interview with Seller A principals, at Seller A office, *supra* note 289.

338. *See supra* Section III.D.2.

339. *See Khan, supra* note 2, at 781–82.

340. *Id.* at 780–81.

341. *Id.* at 781.

342. *Id.* at 782.

reformers, the ultimate outcome of Amazon's potential competition against its third-party sellers will be to drive them from the market, thus further reducing competition and more firmly solidifying an uncompetitive market structure tilted toward Amazon.³⁴³ For example, in 2020, Amazon was accused of copying a trunk organizer that a third-party seller, Fortem, created.³⁴⁴ While it is common practice for retailers to sell private label items, the New Antitrust reformers argue that Amazon's doing so is uniquely troubling because of how much data it generates from the operation of Marketplace.³⁴⁵ In the Fortem case, Amazon's insiders could reverse-engineer margins on sales from the trunk organizers because Fortem's own seller account made 99.5 percent of the total sales of the Fortem trunk organizers on the platform.³⁴⁶ This allowed Amazon to hone in much more accurately on the potential profitability of selling its own clone. It does not appear that Fortem has been chased from the market for trunk organizers, as its products are still available on Amazon at the time of this Article, and JungleScout data shows that Fortem sold over \$250,000 worth of a single model of trunk organizer in February of 2023.³⁴⁷ This Article's case did not uncover any information suggesting that Amazon is attempting to produce its own unrestricted CPAP supplies, though perhaps this is because cloning more sophisticated medical supplies might not be as simple as copying a trunk organizer.

Furthermore, the New Antitrust reformers have observed that many third-party sellers rely on Amazon for all or most of their sales.³⁴⁸ This gives Amazon a substantial amount of control and, perhaps as the New Antitrust reformers have charged, the ability to greatly hinder these sellers' ability to make a living.³⁴⁹ For example, Seller A's principal has recounted times where Seller A has been suspended from a listing on the basis of an intellectual property complaint or due to Amazon's misunderstanding about whether the products could be sold

343. *Id.*

344. Dana Mattioli, *Amazon Scooped Up Data From Its Own Sellers to Launch Competing Products*, WALL ST. J. (Apr. 23, 2020, 9:59 PM), <https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015> [perma.cc/GPE9-YHEE]. Other examples include shoes, fitness trackers, smart thermostats, and even a drone. See Jon Porter, *Amazon Basics Ripped Off Accessories, Now Amazon is Coming for Gadgets*, THE VERGE (Sept. 30, 2021), <https://www.theverge.com/22701965/amazon-fitbit-ecobee-basics-design-halo-view-smart-thermostat-clone-ripoff-regulators> [perma.cc/6EEZ-4NGX].

345. Khan, *supra* note 2, at 782.

346. Mattioli, *supra* note 344.

347. Jungle Scout Output via Email from Seller A principal (Feb. 22, 2023, 7:23 PM); AMAZON, <https://www.amazon.com/dp/B08B43V29Y?th=1> (last visited June 1, 2023).

348. See Mattioli, *supra* note 348.

349. See Khan, *supra* note 2, at 781.

legally.³⁵⁰ Had he been unable to clear up these disputes, he could have lost his seller account and had his business materially impaired. But, instances in which Amazon has arbitrarily acted in a way that materially damaged a third-party seller's business are not all that common, and it seems as though Amazon has not exercised its power in this way. A cornerstone of the New Antitrust's argument is that concentrated market structure and market power will inevitably lead to firms with market power exercising that power arbitrarily or maliciously against rivals³⁵¹—for example, Amazon could clone a seller's product and undercut the seller on price, or Amazon could suspend a seller's account capriciously. A major part of this Article's contribution is that while Amazon *could* use its market power to cause much greater harm to its third-party sellers, it simply has not done so. Furthermore, as described more thoroughly below, Amazon has numerous incentives not only to treat sellers in a benign way, but to cater to them and offer them benefits for continuing or expanding their sales on the Marketplace platform.

The picture of Amazon's treatment of third-party sellers in this Article's case is mixed. One Seller A principal described feeling as though Seller A, at times, was caught in the morass of a large, lumbering bureaucracy that is quick and sometimes arbitrary in doling out penalties.³⁵² Nonetheless, he also praised Amazon for catering to him and facilitating his sales growth in foreign jurisdictions by smoothing legal and regulatory issues and by greatly discounting seller fees.³⁵³ Seller B's principal found himself frustrated during the height of the price wars among third-party sellers in the CPAP market that took place in the latter half of the 2010s. These price wars greatly undercut minimum advertised price policies and caused Seller B difficulty in inventory management and profit projection. Amazon generally does not assist manufacturers and brands in enforcing MAP policies and similar restrictions. Nonetheless, Seller B considers Amazon's FBA program essential to his business. A limitation of the case study approach of this Article is that the experiences of Sellers A and B with Amazon may or may not be generalizable, stipulating, however, that no dealer-retailer relationship exists without some sort

350. Interview with Seller A principals, at Seller A office, *supra* note 289.

351. *See generally* Khan, *supra* note 2, at 738–39.

352. Email from Seller A principal to Martin Edwards, *supra* note 281; *cf. supra* Section III.D.6 (describing Amazon seller lawyers).

353. *See supra* Section III.D.6.

of frustration or strategic maneuvering.³⁵⁴ Sellers of less sophisticated or more generic products may be at much more risk than Seller A or Seller B of competition from Amazon, since cloning generic products is relatively less costly than cloning sophisticated products like CPAP supplies. This case ultimately did not reveal evidence that Amazon is maliciously or intentionally harming third-party sellers, and the evidence that Amazon was harming them unintentionally or indirectly through its market power is not strong.

Some other prominent manufacturers, such as Birkenstock and Nike, have fought to avoid *any* sales of their products on Amazon.³⁵⁵ These manufacturers refuse to authorize Amazon as a dealer of their products and apparently prohibit authorized dealers from reselling their products on Amazon.³⁵⁶ While this is true of some CPAP supplies manufacturers, Nike and Birkenstock have invested more resources in preventing these sales. Allegedly, Amazon has responded by promising to invest more in policing counterfeit and unauthorized sales of particular brands in exchange for those brands' permitting authorized sales on Amazon.³⁵⁷ Perhaps this is an example of the New Antitrust's theory that Amazon can leverage its platform market power to unfairly pressure brands such Birkenstock and Nike to permit Amazon sales that these brands view as inconsistent with their values.³⁵⁸ Alternatively, vertical relationships and messy markets are products of complicated and expensive problems such as imperfect property rights and contractual governance and are not necessarily evidence, by themselves, of harm attributable to Amazon's concentration of online retail.³⁵⁹

354. See Meese, *supra* note 56, at 977 n.162 (discussing the impact of imperfect property rights and contractual governance in the context of vertical dealings). *But see* Jean Wegman Burns, *The New Role of Coercion in Antitrust*, 60 *FORDHAM L. R.* 375, 387–90 (1991).

355. See, e.g., Letter from David Kahan, Birkenstock CEO, to Birkenstock Retail Partners, Re: Amazon (July 20, 2017); see also Ari Levy, *Birkenstock Quits Amazon in US After Counterfeit Surge*, *CNBC* (July 20, 2016, 1:10 PM), <https://www.cnn.com/2016/07/20/birkenstock-quits-amazon-in-us-after-counterfeit-surge.html> [perma.cc/U5KS-JN3J]; Ben Zimmerman, *Why Nike Cut Ties With Amazon and What It Means For Other Retailers*, *FORBES* (Jan. 22, 2020, 8:00 AM), <https://www.forbes.com/sites/forbesbusinesscouncil/2020/01/22/why-nike-cut-ties-with-amazon-and-what-it-means-for-other-retailers/?sh=38166e5764ff> [perma.cc/8NHS-UU66].

356. *Id.*

357. Jeffrey Dastin, *Amazon to Ramp Up Counterfeit Reporting to Law Enforcement*, *REUTERS* (Jan. 13, 2020, 1:28 PM), <https://www.reuters.com/article/us-amazon-com-counterfeit/amazon-to-ramp-up-counterfeit-reporting-to-law-enforcement-idUSKBN1ZC25U> [perma.cc/GV3D-E2NP].

358. See Lina M. Khan, *The Separation of Platforms and Commerce*, 119 *COLUM. L. REV.* 973, 990–91 (2019).

359. *Cf.* Meese, *supra* note 56, at 977 n.162.

B. Social Value

At the heart of the New Antitrust reformers' case against Amazon is an understanding that, for all the efficiency and welfare benefits that Amazon has brought about, antitrust law should incorporate other considerations, too. These reformers wish to expand antitrust law to emphasize the impact of large firms on smaller competitors, or simply on those that consumer welfare antitrust advocates might dismiss as merely less efficient rivals.³⁶⁰ New Antitrust reformers also raise questions of whether consolidation means fewer jobs or even less market power for workers.³⁶¹ Reformers are also alarmed by the political and social power large technology companies have amassed, though these issues may not be specific to Amazon.³⁶² The evidence from this case paints a different picture of the broader social landscape than the one the New Antitrust movement presents. Specifically, Amazon's concentration of the platform, fulfillment, and logistics aspects of the supply chain have increased growth opportunities for small businesses. Small businesses employ workers and generate wealth for their owners, who, in turn, innovate and develop skills that not only increase the value of Amazon to them, but that they may deploy on alternative platforms, as well.

1. Small Businesses

Many third-party sellers are "small dealers."³⁶³ They find themselves at the point of the supply chain between the manufacturer of a product and the retailers and consumers of that product. Often, third-party sellers like Seller A are distributors who purchase a wholesale quantity of goods and resell those goods through Amazon's platform. Their economic incentive is to generate enough sales at high enough prices to cover the cost of the goods they purchase wholesale and the expenses they incur from transporting and selling them. Seller A's profit consists of its sales less the commissions it pays to Amazon for sales and FBA, wholesale costs, and overhead. Seller A's business is profitable enough to support salaries for owner-employees. Prior to selling on Amazon, Seller A sold almost exclusively through its in-house e-commerce platform. The costs associated with running its own

360. Khan, *supra* note 2, at 803–05.

361. See Steinbaum & Stucke, *supra* note 7, at 602–03, 611, 615.

362. See SYKES, *supra* note 226, at 38.

363. See *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 323 (describing "small dealers and worthy men whose lives [had] been spent" building businesses within a market where a large company moves in and undercuts them on prices).

e-commerce platform, marketing the platform and products, and purchasing logistics and distribution services were substantially greater than the costs it now incurs using Amazon Marketplace. Seller A, Amazon, and consumers all share in the increased wealth created through Amazon's consolidation of the online retail platform market.

Seller B has, throughout its time in business, both acted as an authorized reseller of other manufacturers' products and begun creating private label versions of common nonprescription CPAP components. Seller B has its own e-commerce website as well, both for private label brands and for traditional products. Seller B uses FBA both for reselling other products and for selling private label products. Seller B's principal developed skills and techniques for managing inventory and profit margins on resales and is now translating those skills into selling private-labeled products. Seller B's principal sees the market for CPAP supplies on Amazon converging upon a more stable collection of sellers, pricing, and distribution than exists at present and than existed during earlier periods of significant price wars. The experiences of Sellers A and B in interacting with the Marketplace platform and third-third-party vendors illustrate the way that small businesses can generate skills and innovation within the framework of Amazon Marketplace's platform market.

In fact, third-party sellers and their vendors often know better than Amazon how to maximize sales and earnings from the use of Amazon's platform.³⁶⁴ Indeed, numerous small e-commerce businesses such as those in the CPAP components market could not, as a practical matter, achieve nearly the volume of nationwide and even global sales without leveraging Amazon's resources.³⁶⁵ These dealers, in other words, could not compete with one another *without* the platform and logistics elements of the supply chain Amazon has consolidated. Such positive effects may simply be those generally associated with scale; however, Amazon is not simply exploiting scale itself, but is selling it to the third-party sellers.³⁶⁶ That Amazon sells scale to third-party sellers illustrates that Amazon itself must consider doing so to be, in some significant way, more profitable than keeping the platform all to

364. See *supra* Section III.D.

365. Cf. Khan, *supra* note 2, at 781 (quoting a third-party seller claiming that selling on Amazon is necessary to achieving high volume online sales).

366. See *supra* Section II.B.3. As described above, New Antitrust reformers argue that Amazon usurps scale from third-party sellers by harvesting data on what products sell, then competing with the sellers of those products. See *supra* Section IV.A.4; see also Khan, *supra* note 358, at 987; EU Press Release, *supra* note 3, at 3–4.

itself.³⁶⁷ To be sure, the New Antitrust proposes that this is a short-term strategy to grow Amazon's market power, which Amazon can then use later to earn unfair monopoly profits.³⁶⁸ However, that need not be true. Amazon could be investing in its platform and logistics in order to earn profits from these innovations later. Antitrust law is, indeed, about trying to tease out which is which and what test to use—whether a consumer welfare-based approach, a market structure approach, or some other approach entirely.³⁶⁹

Furthermore, expanded profit opportunities from collecting commissions on third-party sales incentivizes Amazon to not only open its platform to third-party sellers, but to cater to them.³⁷⁰ This is not to claim that Amazon's motivations for suffering third-party sellers on its platform are charitable or magnanimous, only that this Article's case demonstrates that it is in Amazon's interest to treat third-party sellers well. Amazon appears to have chosen to share in the gains it facilitates but perhaps could not produce on its own. This Article suggests that Amazon caters to third-party sellers to maximize the value it enjoys from its Marketplace platform.³⁷¹

2. Skills Investment

According to Seller A's principals, third-party sellers often become inventory management experts, knowing even better than Amazon where to allocate inventory within the FBA system.³⁷² For example, Amazon's internal inventory management software proposes certain allocations of inventory among its geographically distributed warehouses.³⁷³ Seller A uses a third-third-party vendor for software that also presents those allocations based on its customers' data. Seller A's principal finds that his own judgment, combined with the third-third-party software, results in efficiently allocated inventory and, therefore, sizable profits. Among other things, Amazon's consolidation of retail and logistics frees up Seller A's principal to focus on inventory management.

367. See generally Easterbrook, *supra* note 79, at 1697; see also *Bezos Testimony*, *supra* note 31.

368. Hendrickson & Galston, *supra* note 227.

369. See, e.g., Khan, *supra* note 2, at 803.

370. See *Bezos Testimony*, *supra* note 31.

371. See *supra* Section III.D.6 (Seller A principal's account of Amazon's soliciting him to set up businesses on international platforms and offering him incentives to do so, such as, for example, paying the fees of a value-added tax accountant so that Seller A could more profitably sell in foreign markets).

372. Interview with Seller A principals, at Seller A office, *supra* note 289.

373. *Id.*

Seller B's principal also reports that using FBA is more efficient for his business, including his private label business.³⁷⁴ He transferred his experience with FBA as a reseller to use in his private label business. More efficient division of labor—for example, Seller A's principal focusing on inventory management while Amazon focuses on fulfillment—is, of course, a driver of productive efficiency and therefore allocative efficiency. But, Seller A's and Seller B's principals now have transferrable skills that they can deploy both on and off Amazon. Seller A's principal reports transferring his skills to sales on eBay and Walmart. The development of these skills and resources creates social value for entrepreneurs, even when those skills might not translate perfectly into consumer welfare.

3. Third-Third-Party Vendors

A dynamic and growing ecosystem of vendors caters to third-party sellers.³⁷⁵ These third-third-party vendors provide everything from software to legal services for third-party sellers. Seller A has used three different third-third-party sellers in the course of its business and contracts for additional services targeted at e-commerce more generally.³⁷⁶ These businesses exist to facilitate productive efficiencies at the distribution level of the consumer products supply chain. Like third-party sellers themselves, third-third-party sellers are profitable small businesses or startups. They create opportunities for wealth creation, growth, and employment. Notably, the most valuable third-third-party seller that Seller A deploys is the one that crunches Amazon's fulfillment data to determine how to allocate inventory within the FBA system.³⁷⁷ Similar to the skills and innovations associated with Seller A's and Seller B's operation of their respective businesses, third-third-party vendors are also innovative entrepreneurs. While the New Antitrust reformers propose that Amazon's concentration results in stopping or slowing innovation,³⁷⁸ this case shows that Amazon's platform has facilitated substantial innovations in inventory management, even those completely outside of Amazon's own efforts to innovate in this area. Furthermore, Amazon is not using its market power to stop this innovation, and, again, it has

374. Telephone Interview with Seller B principal, *supra* note 289.

375. See *supra* Section IV.A.4.

376. iMessage from Seller A principal to Martin Edwards (Feb. 4, 2022, 4:57 PM).

377. Interview with Seller A principals, at Seller A office, *supra* note 289; see also iMessage from Seller A principal to Martin Edwards, *supra* note 376.

378. See Khan, *supra* note 358, at 973.

incentives to facilitate these innovations by catering to third-party sellers.

4. Employment & Wages

Seller A typically has two to three employees, some of which are LLC member-employees, and has usually employed at least one part- or full-time nonmember employee.³⁷⁹ Seller B has at least five employees across its business lines. Mechanically, this means that Seller A's and Seller B's businesses create more job opportunities. More job opportunities create more demand in the labor market.³⁸⁰ Labor market demand creates more employee choice, which, in turn, offers employees greater bargaining power and higher wages, better benefits, or both.³⁸¹ New Antitrust reformers often decry consolidation or concentration for productive efficiency as a euphemism for terminating workers.³⁸² For example, many efficiencies that merging companies claim when executing the mergers might materialize only by reducing the number of jobs available at the merged enterprise.³⁸³ Analogously, Amazon's consolidation of retail is thought to harm workers because Amazon's scale may require fewer workers to operate the businesses that existed before the consolidation occurred.³⁸⁴ But, because of its scale, many other small e-commerce businesses can now compete with each other at a larger scale. This suggests the possibility of greater employment opportunities within these businesses, which contributes to competition in the labor market as a whole. Dovetailing with the desires of the New Antitrust reformers for competitively structured markets, Amazon's platform arguably hosts more competitively structured markets among distributors of some products than existed before Amazon Marketplace was launched. Not only is this an observable outcome in accord with the reformers' underlying goals, but

379. Interview with Seller A principals, at Seller A office, *supra* note 289.

380. Nicolas A. Pologeorgis, *Employability, the Labor Force, and the Economy*, INVESTOPEDIA, <https://www.investopedia.com/articles/economics/12/employability-labor-force-economy.asp> [perma.cc/W2NG-3MQ3] (last visited Apr. 5, 2023).

381. See Teresa Ghilarducci, *How Do Economists Measure Worker Bargaining Power?*, FORBES (Apr. 18, 2022, 4:28 PM), <https://www.forbes.com/sites/teresaghilarducci/2022/04/18/is-worker-power-rising-despite-big-union-wins-the-answer-may-surprise-you/?sh=330f21773478> [perma.cc/F4P8-7PKL].

382. Wright et al., *supra* note 5, at 345.

383. Glick, *supra* note 10, at 488–89.

384. See Stacy Mitchell & Olivia LaVecchia, *Amazon's Stranglehold: How the Company's Tightening Grip Is Stifling Competition, Eroding Jobs, and Threatening Communities*, INST. FOR LOC. SELF-RELIANCE 32–34 (Nov. 2016), available at https://ilsr.org/wp-content/uploads/2020/04/ILSR_AmazonReport_final.pdf [perma.cc/3M25-6FSQ].

one that might not have been possible in the absence of Amazon's market concentration.

V. CONCLUSION

This Article's case study of a market on Amazon's Marketplace platform demonstrates the socially productive aspects of Amazon's market consolidation. All organizations of production and distribution have socially productive and socially harmful consequences; in the CPAP market as elsewhere, these tradeoffs are inevitable.³⁸⁵ New Antitrust reformers have identified a number of socially harmful consequences—such as wealth inequality, stagnating wages, and reductions in innovation—that they attribute to market concentration, especially via large technology companies.³⁸⁶ Many of their arguments call for greater legal intervention in concentrated markets in an effort to roll back these consequences and stave off further concentration.³⁸⁷ Scholars and commentators have replied with both contrary evidence and arguments favoring consumer welfare antitrust.³⁸⁸ Many of those arguments aptly demonstrate the enduring economic principles that support the consumer welfare standard.³⁸⁹ This Article, while it does accord with those evidence- and economics-based refutations of proposed reform, goes a step further by broadening the scope of socially productive activity that Amazon's market consolidation has supported. It ultimately concludes that there are not only economic benefits, but social benefits, that accrue and compound upstream of Amazon's platform consolidation and market dominance.

385. Khan, *supra* note 358, at 981.

386. Steinbaum & Stucke, *supra* note 7, at 1–2, 7, 43.

387. *Id.*

388. Wright & Ginsberg, *supra* note 8, at 2414.

389. *Id.* at 2406–07.