

## AFTERWORD: PUTTING MONOPOLY LAW INTO PRACTICE

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Forty-three years ago, Lewis F. Powell, Jr., before becoming a Justice of the U.S. Supreme Court, gave a speech to financial executives in Williamsburg, Virginia in which he underscored “the influence that antitrust laws have on the day-to-day operations of many businesses.”<sup>1</sup> After observing that “the antitrust laws are a trap for the unwary and naïve” and threatened “crippling liabilities” and “criminal penalties . . . against the business executive himself,” he was forced to confess to his no doubt appreciative audience that “the guidelines are so nebulous . . . that even skilled counsel is often not able to give definitive advice.”<sup>2</sup>

Despite the passage of four decades since Justice Powell’s discouraging summary, it is not clear that we have made much progress in shedding light on the guidelines for dominant firm conduct. While much ink has been spilled, the legal language of dominance (or monopolization) has tended toward the poetic—in both eloquence and ambiguity. Thus, under U.S. law “[t]he successful competitor, having been urged to compete, must not be turned upon when he wins,”<sup>3</sup> and in consequence “the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*”<sup>4</sup>—conduct that will “reveal[ ] a distinctively anticompetitive bent”<sup>5</sup> so as to “tell us

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<sup>1</sup> Lewis F. Powell, Jr., Trends in Antitrust, Address Before the Conference of Financial Executives (June 17, 1967) (transcript).

<sup>2</sup> *Id.*

<sup>3</sup> United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945).

<sup>4</sup> Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

<sup>5</sup> *Id.* at 409.

[something] about dreams of monopoly.”<sup>6</sup> Unfortunately, however, “the means of illicit exclusion, like the means of legitimate competition, are myriad,”<sup>7</sup> and “[t]he big problem lies in this: competitive and exclusionary conduct look alike.”<sup>8</sup>

In trying to tell these “look-alikes” apart, antitrust lawyers, economists, scholars, and judges in recent years have developed an esoteric array of analytical approaches. But, while hotly debated inside the antitrust world, the distinction among, say, the “consumer welfare effect” test,<sup>9</sup> the “profit sacrifice” test,<sup>10</sup> and the “no economic sense” test<sup>11</sup> may well be lost on the business executives and non-antitrust corporate counsel who have to make decisions and “give definitive advice”—“definitive” in the sense that real actions, with real consequences, will be taken based on that advice. And it seems unlikely that they will be comforted by the view that there is no single underlying definition of anticompetitive conduct, as “the few clear guideposts in Section 2 case law demonstrate that courts properly apply different Section 2 legal tests to different conduct.”<sup>12</sup>

Nor is it likely that business executives and their corporate counsel will gain much useful day-to-day guidance from the increasing dominance in antitrust theory of microeconomic modeling and analysis (a development FTC Commissioner Rosch has described as rendering antitrust impenetrable even to many of its most seasoned cognoscenti<sup>13</sup>). This is particularly true when many of the sophisticated models employed today not only are expressed in mathematical rather than verbal form, but also, as former FTC Chairman Timothy Muris observed in a

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<sup>6</sup> *Id.*

<sup>7</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc).

<sup>8</sup> Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 COLUM. BUS. L. REV. 345, 345.

<sup>9</sup> See Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311 (2006).

<sup>10</sup> See A. Douglas Melamed, *Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal*, 20 BERKELEY TECH. L.J. 1247, 1266 (2005).

<sup>11</sup> See Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The “No Economic Sense” Test*, 73 ANTITRUST L.J. 413 (2006).

<sup>12</sup> Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435, 437 (2006).

<sup>13</sup> See, e.g., J. Thomas Rosch, Commissioner, Fed. Trade Comm’n, *Antitrust Law Enforcement: What to Do About the Current Economics Cacophony?*, Remarks Before the Bates White Antitrust Conference (June 1, 2009), available at <http://www.ftc.gov/speeches/rosch/090601bateswhite.pdf>.

recent article about bundled discounts, lack empirical testing and require strict assumptions unlikely to exist in the real world.<sup>14</sup>

Moreover, today—unlike the situation forty years ago—antitrust law, including the law of dominance and monopolization, has spread across the globe. It is hardly news that businesses operating globally, as more and more do every day, must conform their conduct to “abuse of dominance” principles that not only suffer from infirmities similar to those that plague U.S. monopolization law, but also may call for different results, and accept or punish different conduct, than would be the case in the United States. And, as Michal Gal and Jorge Padilla explain, it seems likely that those principles will diverge even among various countries adopting identical language, such as the EU’s “abuse of dominance” formulation.<sup>15</sup>

The scholarly debate on monopolization and dominance, though often abstruse, is meaningful and important.<sup>16</sup> But as we engage in that debate, it will be vital to step back and consider what any given proposal, test, or analytical framework will mean to the businesses and consumers who ultimately will have to shape their conduct to conform to the law (or, on the other hand, bear the brunt of harmful conduct insufficiently checked by the law). Only by keeping this ultimate question in mind will we be able to evolve toward a world in which “skilled counsel” may be “able to give definitive advice.”

The essays and articles in this Symposium touch on the application of monopolization law to real-world conduct in a variety of different ways. Some highlight institutional concerns that affect the creation of practical guidelines for dominant firms (and the firms that deal with them). Some raise important new substantive issues that will increasingly factor into the assessment of exclusionary, or abusive, conduct; and some offer new tests for such conduct that may offer both increased clarity and increased complexity. The essays and articles can be categorized accordingly.

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<sup>14</sup> See Timothy J. Muris & Vernon L. Smith, *Antitrust and Bundled Discounts: An Experimental Analysis*, 75 ANTITRUST L.J. 399 (2008).

<sup>15</sup> Michal S. Gal & A. Jorge Padilla, *The Follower Phenomenon: Implications for the Design of Monopolization Rules in a Global Economy*, *supra* this issue, 76 ANTITRUST L.J. 899 (2010).

<sup>16</sup> And, in the interest of full disclosure, it is a debate in which I have participated, so I cannot claim outsider status. See, e.g., Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker & Ernest A. Nagata, *Cheap Exclusion*, 72 ANTITRUST L.J. 975 (2005).

## I. INSTITUTIONS MATTER

Michal Gal, Avishalom Tor, and Spencer Weber Waller discuss some of the global implications of changing monopolization and dominance standards in the United States and the European Union, as those changes “spill over” into jurisdictions across the globe.<sup>17</sup> They describe monopolization laws’ near simultaneous geographic expansion (in terms of its global proliferation along with antitrust law in general) and conceptual contraction (under the sting of economic critiques and skepticism from courts and enforcers), and suggest that “these seemingly contradictory trends are at least partly complementary.”<sup>18</sup>

David Gerber takes a slightly different tack when he argues that structural institutional factors impose limits on substantive antitrust convergence, specifically in the context of the influence of economics on monopolization and dominance law.<sup>19</sup> Noting that in the United States “economics has become pivotal in the analysis of unilateral conduct . . . and this has reshaped the law in the area in important ways,”<sup>20</sup> Gerber expresses considerable skepticism about the likelihood that economics will play such a role in Europe because of fundamental structural differences between the EU’s antitrust enforcement institutions and those in the United States—notably, the role of U.S. courts and the adversarial system in antitrust decision making. Interestingly, while a failure of convergence has obvious consequences for businesses and consumers caught up in the toils of global antitrust, Gerber points out that the enforcement approach favored in the European Union, which he characterizes as focusing more on specific rules for specific forms of conduct than is the case in U.S. antitrust law, is “thought to provide reasonable predictability and foreseeability, and greater reliance on economics [as in the United States] appears to be a move toward increased ambiguity. . . .”<sup>21</sup>

Josef Drexler similarly contends that antitrust enforcement institutions are better suited, for institutional and philosophical reasons, to use the preservation of consumer choice, rather than the avoidance of con-

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<sup>17</sup> Michal Gal, Avishalom Tor & Spencer Weber Waller, *Introduction: Expansion and Contraction in Monopolization Law*, *supra* this issue, 76 ANTITRUST L.J. 653 (2010).

<sup>18</sup> *Id.* at 654.

<sup>19</sup> David J. Gerber, *Convergence in the Treatment of Dominant Firm Conduct: The United States, the European Union, and the Institutional Embeddedness of Economics*, *supra* this issue, 76 ANTITRUST L.J. 951 (2010).

<sup>20</sup> *Id.* at 956.

<sup>21</sup> *Id.* at 972.

sumer harm, as their guiding paradigm in innovation-related matters.<sup>22</sup> He argues that this approach would be geared to “protecting the competitive process, to reliance on foreclosure effects particularly in the framework of unilateral conduct rules, and to protecting the openness of markets and rivalry among firms rather than to reliance on the future effects on predefined consumer interests.”<sup>23</sup>

However, while there may be a perception that form-based enforcement—such as preserving specified numbers of competitors and consumer choices and prohibiting or restricting specified forms of conduct—is inherently predictable, it would be illuminating to consider the extent to which pre-Chicago School U.S. antitrust enforcement, which also was form- and rule-based, achieved predictability and foreseeability. Certainly, though perhaps somewhat outside the “dominance” category, it is not at all clear that one of the longest-surviving vestiges of a form-based model—the prohibition on minimum resale price maintenance—did so. Instead, it seems to have engendered pervasive and risky avoidance through the adoption of inefficient and costly measures to achieve the same result as the prohibited conduct through different mechanisms (such as suggested resale prices accompanied by unilateral terminations, MAP policies, and others).<sup>24</sup>

Michal Gal and Jorge Padilla’s cautionary assessment of the effects of the “follower” phenomenon on global abuse of dominance law has implications for practical compliance.<sup>25</sup> This phenomenon, which includes the adoption of other jurisdictions’ explicit legal rules and also of their interpretations of and conceptual approach to those rules, is readily observable in antitrust. Gal and Padilla describe potential positive and negative effects of “following” on both the followed and the following jurisdictions, and present a model to assess some of those effects. One of their important observations, from the perspective of the non-antitrust world, is that the outcome of “following” is not inherently predictable: the mere fact that one jurisdiction “follows” another does not mean that

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<sup>22</sup> Josef Drexler, *Real Knowledge Is to Know the Extent of One’s Own Ignorance: On the Consumer Harm Approach in Innovation-Related Competition Cases*, *supra* this issue, 76 ANTITRUST L.J. 677 (2010).

<sup>23</sup> *Id.* at 708.

<sup>24</sup> This points to another concern about form-based enforcement systems. Whatever one may think about the benefits or harms of resale price maintenance, the *per se* rule against it seems in large part to have simply caused businesses to engage in suboptimal (i.e., more costly) behaviors to achieve the same result but avoid the prohibited form. Thus, it produced essentially the same substantive outcome as rule of reason treatment, but with higher transactions costs. Substance-based enforcement is less likely to produce this result, though it has other costs.

<sup>25</sup> Gal & Padilla, *supra* note 15.

it will do so perfectly. This is because different jurisdictions are just that—different: in their norms and institutional capabilities, and in other important respects.

Moreover, as the authors explain, “abuse of dominance prohibitions are often articulated as broad and unclear standards . . . . The application of such broad standards carries the potential to create significant error costs, especially when applied in jurisdictions with low institutional capacity.”<sup>26</sup> While accurate, this is likely to be of little comfort to those facing enforcement of “broad and unclear” dominance standards, who not only are expected to apply those standards to their own conduct regardless of their own “institutional capability” but also to predict the likely interpretation of those standards in varying jurisdictions with varying capabilities.

## II. SUBSTANCE MATTERS

While institutions strongly influence the laws they enforce, the substance of those laws obviously is important in and of itself. FTC Commissioner William Kovacic and Marc Winerman connect institutional and substantive issues in their discussion of the troubled history of Section 5 of the FTC Act<sup>27</sup> (when that Act has been applied to competition issues beyond the scope of the Sherman Act).<sup>28</sup> The authors point, among other things, to the courts’ reluctance to embrace a legal theory that seems to lack clarity or limiting principles, and the FTC’s (remediable) failure to establish its institutional competence to develop and enforce administrable guidance for the stand-alone application of Section 5. Unclear as Section 2 of the Sherman Act<sup>29</sup> might be from the standpoint of a business attempting to discern the limits on its (or its rivals’) behavior, the scope of Section 5 has been and is even more obscure, at least to date.

Four articles call for increased clarity in, respectively: (1) an arguably underdeveloped area of antitrust concern; (2) a relatively new area; (3) an area that the author contends has evolved in an overly lenient direction; and (4) an area the author asserts has become overly stringent.

Avishalom Tor observes that in both the United States and the European Union relatively little attention has been paid to the acquisition, as opposed to maintenance, of monopoly power (to use the U.S. terminol-

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<sup>26</sup> *Id.* at 903–04.

<sup>27</sup> 15 U.S.C. § 45.

<sup>28</sup> William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, *supra* this issue, 76 ANTITRUST L.J. 929 (2010).

<sup>29</sup> 15 U.S.C. § 2.

ogy).<sup>30</sup> He concludes that statutory limitations in the European Union, and enforcement philosophy in the United States, have produced this result, and suggests (among other things) that the United States more vigorously police exclusionary conduct by non-dominant firms.<sup>31</sup>

This is an interesting suggestion that puts directly at issue the question of what constitutes exclusionary conduct. If exclusionary conduct would be harmful in ways beyond its tendency to allow the acquisition of monopoly power—as, for example, some types of cheap exclusion, such as certain forms of tortious conduct—that conduct might be subject to attack under various common-law or statutory theories. In such cases, it might make sense to leave liability there, with the more severe penalties available under antitrust law limited to situations where the harmful conduct actually resulted (or was substantially likely to result) in the acquisition (or maintenance) of monopoly power.<sup>32</sup> Nevertheless, if exclusionary conduct were clearly defined, it would be easier for businesses to avoid, perhaps mitigating the potential expansion of liability Tor’s article recommends.

Former FTC Commissioner Pamela Jones Harbour and Tara Isa Koslov point U.S. antitrust law squarely at the new world of privacy and data in the “Web 2.0” world, and call for the incorporation of these concepts into market definition.<sup>33</sup> It seems clear that privacy and data issues, including data ownership and data security, will loom large in antitrust (and other legal arenas) for the foreseeable future, and more scrutiny of these issues in antitrust theory is not only likely to be helpful but also seems practically inevitable. How exactly this would be done—for example, how, as a practical matter, one would apply the hypothetical monopolist test to define a privacy or data market (much less how one would counsel a client concerning whether it, or its competitors, possessed market power in such a market)—seems less clear, and merits careful consideration as these issues continue to percolate.

Maurice Stucke suggests that antitrust law in the United States has become unduly tolerant of deceptive conduct by monopolists and aspir-

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<sup>30</sup> Avishalom Tor, *Unilateral, Anticompetitive Acquisitions of Dominance or Monopoly Power*, *supra* this issue, 76 ANTITRUST L.J. 847 (2010).

<sup>31</sup> *Id.* at 871.

<sup>32</sup> This is so because, in such cases, the harm caused by the exclusionary practice injures consumers at large, not just particular rivals, and this greater scope of harm justifies harsher penalties. “Exclusionary” conduct by firms that lack monopoly power and that do not achieve it by that conduct is less likely to have negative effects outside of the harm it causes directly to rivals.

<sup>33</sup> Pamela Jones Harbour & Tara Isa Koslov, *Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets*, *supra* this issue, 76 ANTITRUST L.J. 769 (2010).

ing monopolists.<sup>34</sup> Pointing to incongruities between the treatment of deception in some antitrust courts and views of deception in other legal and factual contexts, Stucke contends that the lenient treatment of deception in antitrust lacks both a sound empirical and theoretical foundation. In this area, there would seem to be little tension between enhanced antitrust enforcement and business guidance. It requires neither econometric expertise nor rare legal acumen to counsel against—or, for executives, to avoid—deceptive conduct.

Daniel Crane's culinary assessment of antitrust theory addresses the confusion over when and how to determine that a collection of allegedly exclusionary acts adds up to more than the sum of the parts, i.e., to a viable monopolization claim.<sup>35</sup> He suggests that, as a general matter, acts that would be individually lawful cannot be aggregated, while acts whose illegality depends on cumulative foreclosure should be, and acts that would be independently illegal can be—if the plaintiff can articulate a coherent theory of how those independently illegal acts are part of a single monopolistic scheme. Thus, predatory pricing that turned out not to be predatory (because it was above cost) could not be aggregated; loyalty discounts that (individually) failed an appropriate price-cost test should be; and misrepresentations about a competitor's products could be, if there was a coherent factual theory explaining how the misrepresentations were part of a scheme to monopolize, as opposed to random acts of "business malice."<sup>36</sup>

Crane's approach offers helpful clarity to a confused area of the law. It does, however, leave one significant area of business conduct subject to simple aggregation in a way likely to lead to considerable uncertainty: exclusive contracts. Crane says that "[i]t is easy to apply the aggregation principle in exclusive dealing cases because, there, foreclosure is the entire story."<sup>37</sup> I am not sure this is so easy. Exclusive dealing is ubiquitous and generally procompetitive. Crane's approach, as I understand it, could lead to the result that all other forms of conduct must, before being aggregated, be shown to be exclusionary under some test other than the arithmetic sum of their market impacts. Thus, predatory pricing must be predatory, loyalty discounts must be excessive, and even incontestably harmful conduct, such as fraud or misrepresentation,

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<sup>34</sup> Maurice E. Stucke, *When a Monopolist Deceives*, *supra* this issue, 76 ANTITRUST L.J. 823 (2010).

<sup>35</sup> Daniel A. Crane, *Does Monopoly Broth Make Bad Soup?*, *supra* this issue, 76 ANTITRUST L.J. 663 (2010).

<sup>36</sup> *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993), *cited in* Crane, *supra* note 35, at 672.

<sup>37</sup> Crane, *supra* note 35, at 671.

must fit into an overall plan to monopolize. Why should exclusive dealing alone be deemed exclusionary solely because of the percentage of the market it occupies, without some threshold determination that the exclusive contracts at issue each cause some harm to the competitive process? Treating exclusive dealing differently would seem to require an assumption that it is inherently less likely to be efficient than other forms of conduct, and there seems little basis for such an assumption.

Finally, four articles propose specific analyses for specific forms of potentially exclusionary conduct.

Adi Ayal notes that while some products—say, telephone networks—have inherent network effects, others can have network effects added to them by investments in improving technology (for example, taking video games online) or financial incentives (for example, offering friend and family calling plans).<sup>38</sup> Because network effects can create nonlinear market outcomes and “tip” systems into monopoly outcomes, Ayal calls for antitrust scrutiny of firm investment in creating “voluntary network effects,” particularly when that investment is financial rather than technological. He recognizes, however, that such scrutiny would be analytically challenging and, because investing in voluntary network effects benefits consumers at least in the short run, “might overly deter socially efficient firm strategy.”<sup>39</sup> Counseling clients on this issue would be extraordinarily challenging as well. It is not obvious how any test for illegality of investment in enhancing technology or providing financial benefits to consumers could be applied *ex ante* to business decisions.<sup>40</sup>

Ariel Ezrachi and David Gilo examine the litigation in South Africa over Mittal Steel South Africa Ltd.’s pricing practices and call for continued scrutiny of “excessive” prices.<sup>41</sup> In the process, they further develop their prior analysis that excessive prices are not necessarily self-correcting and probe different forms of (and reasons for) excessive pricing.

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<sup>38</sup> Adi Ayal, *Monopolization via Voluntary Network Effects*, *supra* this issue, 76 ANTITRUST L.J. 799 (2010).

<sup>39</sup> *Id.* at 815.

<sup>40</sup> Ayal suggests a market power screen might be useful in this context; in other words, while introducing voluntary network effects might be deemed exclusionary, the effects would still need to rise to the level of creating a monopoly or a dangerous probability of monopolization. *Id.* at 817. The problem with this, from a practical perspective, is that it is unlikely that a business will be able to predict, in advance, that investment in some technological enhancement or financial incentive would be likely to produce a monopoly outcome. Thus, there does not seem to be any obvious way for a business to know ahead of time whether this sort of consumer-benefiting conduct might subject it to antitrust liability.

<sup>41</sup> Ariel Ezrachi & David Gilo, *Excessive Pricing, Entry, Assessment, and Investment: Lessons from the Mittal Litigation*, *supra* this issue, 76 ANTITRUST L.J. 873 (2010).

While not an issue for companies selling products in the United States, prohibitions on “excessive” pricing are well-entrenched in the EU “abuse of dominance” model that has gained extensive international traction. It is not clear how difficult it is for businesses to adjust to “excessive pricing” regimes, and we in the United States lack experience with them. The authors’ statement that “an excessive price is defined as a price excessively above the price that would evolve under viable competition”<sup>42</sup> might be challenging for businesses to apply in practice because defining an “excessive” price as one that is “excessive” may not provide much practical guidance. Also, absent anticompetitive conduct, it would seem that the price charged even by a monopolist would be the price that evolved under viable competition—competition that happened to produce a monopoly outcome.

Steven Salop, on the other hand, proposes a very specific test, the “Protected Profits Benchmark” (PPB), for a very specific form of conduct—unilateral refusals to deal and price squeezes by a monopolist.<sup>43</sup> Antitrust enforcement in this area has steadily been curtailed. Drawing on the well-established test for predatory pricing and the Efficient Component Pricing Rule (ECPR), Salop suggests that his test would reverse that trend in a way that would identify anticompetitive conduct while protecting procompetitive conduct. He also contends that the PPB test would be relatively easy to administer, even by business executives making ex ante decisions, because in general it requires information only on the defendant’s own price and costs, and establishes a safe harbor threshold at which a defendant uninterested in achieving (or maintaining) monopoly power should be indifferent between selling or not selling its input to a downstream rival.<sup>44</sup>

An interesting question for further exploration here might be the effect of the PPB standard in the context of litigation, because the possibility (or existence) of litigation affects bargaining.<sup>45</sup> Since a plaintiff would presumably not know a defendant’s PPB, it is unclear how bargaining would occur and how it would be treated in litigation. Suppose that a plaintiff offered some price well below a defendant’s PPB. It would appear that the test would require the defendant to counter-offer, since the point of the test is that the defendant would no longer be

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<sup>42</sup> *Id.* at 895.

<sup>43</sup> Steven C. Salop, *Refusals to Deal and Price Squeezes by an Unregulated, Vertically Integrated Monopolist*, *supra* this issue, 76 ANTITRUST L.J. 709 (2010).

<sup>44</sup> Whether the *Brooke Group* predatory pricing test and the ECPR are, in fact, easy for businesses to follow might be a worthwhile subject of discussion in itself.

<sup>45</sup> See generally Daniel A. Crane, *Bargaining in the Shadow of Rate-Setting Courts*, 76 ANTITRUST L.J. 307 (2009).

free simply to refuse to deal. But at what price? If the defendant offered anything more than its PPB in response, and litigation ensued, would the defendant automatically lose—or at least be unable to obtain summary judgment? If so, would all counter-offers by a defendant be immediately driven to PPB? And, if so, would vertically integrated companies with large market shares need to constantly track their PPBs, so as to be able to quickly offer their inputs at the PPB in order to avoid litigation? Further development of the PPB test could consider these questions.

Finally, Spencer Weber Waller and William Tasch propose drawing on the favorable global treatment of that most famous antitrust epithet, the essential facilities doctrine, to inform a revitalized version of it in the United States.<sup>46</sup> Waller and Tasch argue that the risk of over-enforcement, while real, does not justify the near irrelevance to which essential facilities claims have been reduced in the United States in light of what they describe as the harm that denials of access can cause. They then make a number of proposals for harmonizing U.S. law on this point with prevailing international norms.

Intellectually coherent as the authors' proposals may be, they could be challenging for business people to understand and apply. For example, drawing on infrastructure theory, the authors propose applying their test to refusals to provide access to “traditional and modern infrastructure,” and suggest that definition would encompass not only such things as “roadways, telephone networks, and electricity grids,” but also “lakes, ideas, certain software platforms, and the Internet.”<sup>47</sup> They then suggest treating “unilateral refusals to deal” in these forms of infrastructure “the same as concerted refusals to deal”<sup>48</sup>—thus transforming a rule of near per se legality into a (modified) form of per se illegality. This could be quite a sweeping proposal. It would seem to treat as nearly per se illegal refusals to grant access to, for example, software platforms. How, as a practical matter, businesses considering investing in “modern infrastructure” should determine whether they will be forced to offer compulsory access to rivals under this proposal would be a good topic for future analysis.

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<sup>46</sup> Spencer Weber Waller & William Tasch, *Harmonizing Essential Facilities*, *supra* this issue, 76 ANTITRUST L.J. 741 (2010).

<sup>47</sup> *Id.* at 764; *see also id.* at 765; (calling for “infrastructure based on intellectual property rights,” such as “technological standards, software platforms, and interconnection information” to be treated “the same as physical or traditional infrastructure”).

<sup>48</sup> *Id.*

The essays and articles in this Symposium provide sophisticated academic analyses of challenging issues in monopolization law. Those analyses are crucial to advancing our understanding of the law in this controversial area of antitrust enforcement. But as we continue down this road, it is important to always keep clearly in mind that the ultimate audience for any antitrust analysis is not the sophisticated world of antitrust experts, but rather the business executives and counselors who must apply antitrust standards in day-to-day decisions.