
APPLE AND AMAZON’S ANTITRUST ANTICS: TWO WRONGS DON’T MAKE A RIGHT, BUT MAYBE THEY SHOULD

Kerry Gutknecht[‡]

I. INTRODUCTION

The exploding market for books of all kinds in the form of digital files (“e-books”), which can be read on mobile devices and personal computers, has attracted aggressive competition between the two leading online e-book retailers, Amazon, Inc. (“Amazon”) and Apple Inc. (“Apple”).¹ While both Amazon and Apple have been accused by critics of engaging in anticompetitive practices with regard to e-book sales,² the U.S. Department of Justice has focused on Apple. In 2012, federal prosecutors brought an antitrust suit against Apple and five of the nation’s largest book publishers—HarperCollins Publishers LLC (“HarperCollins”), Hachette Book Group, Inc. and Hachette Digital (“Hachette”); Holtzbrinck Publishers, LLC d/b/a Macmillan (“Macmillan”); Penguin Group (USA), Inc. (“Penguin”); and Simon & Schuster, Inc. and (“Simon & Schuster”) (collectively, the “Publisher Defendants”)³—for colluding in violation of the Sherman Act to raise the retail prices of e-books.⁴ Each

[‡] J.D. Candidate, May 2014, The Catholic University of America, Columbus School of Law. The author would like to thank Calla Brown for her daily support and the *CommLaw Conspectus* staff for their diligent effort during the writing and editing process. Finally, a special thanks to Antonio F. Perez for providing expert advice during the writing of this paper.

¹ Complaint at 2–3, *United States v. Apple Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013) (No. 12 CV 2826) [hereinafter Complaint].

² Charles E. Schumer, *Memo to DOJ: Drop the Apple E-Books Suit*, WALL ST. J., July 17, 2012, at A15.

³ See Complaint, *supra* note 1, at 1. Random House, Inc. is the other one of the six largest publishing companies, but was not named as a defendant in either the Justice Department’s case or the parallel class action suit. See *id.* (United States Justice Department’s case); see also *In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d 671, 673 (S.D.N.Y. 2012) (parallel class-action lawsuit).

⁴ Complaint, *supra* note 1, at 7, 31–32.

of the Publisher Defendants has settled, leaving Apple the sole defendant in a case that was tried in the Southern District of New York in June of 2013.⁵ That trial resulted in a finding that Apple did conspire with the Publisher Defendants to raise the price of e-books, and an order of injunctive relief was granted against Apple.⁶ The Justice Department's decision to prosecute Apple and the Publisher Defendants has been strongly criticized by Apple, as well as booksellers, authors, lawmakers and policy groups on the grounds that the e-book-selling leader, Amazon, is the real anti-competitive culprit.⁷ Apple and the publishers argued that their actions had supplied consumers with alternative purchase options and had protected consumers from Amazon's "monopolistic grip" over the publishing industry,⁸ evidenced by the company's 90% market share of e-book sales.⁹

This Note examines the history of the Sherman Act and explains why that history led to the DOJ's litigation against Apple, but not against Amazon. Additionally, this Note proposes policy changes for antitrust prosecutions in markets that may have been tainted by a monopoly or market failure, prior to the anticompetitive practices being prosecuted. Part II discusses the history of Sherman Act jurisprudence. Part III lays out the recent trend toward a strict economic basis for antitrust enforcement and the implications of that trend. Part IV discusses the case by the Justice Department against Apple and Apple's defense at trial. Part V examines the arguments made by the critics of the *Apple* case. Finally, Part VI recommends policy changes to address the conflict between the prosecution of Apple and the failure to prosecute Amazon.

⁵ *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 645 (S.D.N.Y. 2013). Thirty-three states and the District of Columbia also joined the Justice Department as plaintiffs in the suit. *Id.*

⁶ *Id.* at 709.

⁷ Andrew Tangel, *Apple Denies Conspiracy on E-book Prices; Antitrust Trial Opens with U.S. Attorneys Saying Firm's Scheme Cost Readers Millions*, L.A. TIMES, June 4, 2013, at B2; Salman Rushdie, *Status*, TWITTER (Mar. 9, 2012, 2:13 PM), <http://commcns.org/1iSrVy0> ("Seems that the US Justice Dept wants to destroy the world of books."); Schumer, *supra* note 2, at A15 ("If [the DOJ pursues the case,] "consumers will be forced to accept whatever prices Amazon sets."); Nicole Ciandella, *Justice Department Should Drop Apple Lawsuit*, COMPETITIVE ENTERPRISE INST. (Apr. 11, 2012), <http://commcns.org/1qJjZ3i> ("[The publishers' collective decision to contract with Apple] appears to have been a normal response to Amazon's deep discounts of e-books below physical book prices. D[OJ]'s solution is presumably to stop free enterprise, and allow Amazon to dominate e-books?"); see also Laura Hazard Owen, *E-Book Smackdown: Who Should Control Pricing—Publishers or Amazon?*, PAID CONTENT (Mar. 10, 2012), <http://commcns.org/1kzkCsp>.

⁸ Aaron Smith, *Apple: We Didn't Stifle E-Book Rivals*, CNNMoney (Apr. 13, 2012), <http://commcns.org/1e8GAB6>.

⁹ Michael Hiltzik, *Government's E-Book Case Helps Amazon Build Toward a Monopoly*, L.A. TIMES (Sept. 12, 2012), <http://commcns.org/1p1cqRM>.

It is important to clarify the controversial aspects of this case and to identify their nexus with economic and legal principles. It is well accepted that Sherman Act antitrust cases depend upon showing that the defendant's activities have frustrated the basic goals of competition¹⁰ and have, therefore, harmed the competitive process.¹¹ Both Amazon and Apple claimed that their practices benefited competition.¹² Amazon argued that it benefited competition by providing e-books at affordable prices.¹³ Apple asserted that its activities provided additional choices to e-book buyers which benefited consumers, given Amazon's prior domination of the e-book market.

At first glance, a major weakness for Apple's policy argument—that its actions were justified by Amazon's pre-existing monopoly—seems to be that Amazon, rather than using its market power to charge higher-than-fair prices for e-books, was charging a predatorily low price of \$9.99 per book for best-sellers, taking a loss of several dollars on each book sold.¹⁴ In fact, according to the Justice Department's complaint, the low prices that Amazon charged for bestsellers was the very motivation the publishers had for colluding with Apple.¹⁵ Amazon's supporters claimed that no harm was done by Amazon's market dominance, because its low prices were a benefit to consumers.¹⁶ The district court judge appears to have agreed with this view, referring to the Amazon-dominated market prior to Apple's entrance as reflecting a state of "retail price competition."¹⁷ An additional charge against Amazon is that its pre-2010 loss-leader pricing strategy resembles predatory pricing, an illegal tool of monopoly maintenance through exclusion.¹⁸

¹⁰ See *Concord v. Bos. Edison Co.*, 915 F.2d 17, 1–22 (1st Cir. 1990) (“[A] practice is ‘anticompetitive’ only if it harms the competitive process It harms that process when it obstructs the achievement of competition’s basic goals—lower prices, better products, and more efficient production methods.”).

¹¹ Gregory J. Werden, *Antitrust’s Rule of Reason: Only Competition Matters* 28 (U.S. Justice Dep’t, Working Paper, Mar. 1, 2013), available at <http://commens.org/1ibECka>.

¹² Phillip Elmer-DeWitt, *The Apple E-Book Anti-Trust Case: The Closing Arguments*, FORTUNE (June 21, 2013), <http://commens.org/1fO8tPR>.

¹³ *Id.*

¹⁴ Complaint, *supra* note 1, at 2–3.

¹⁵ *Id.*

¹⁶ Letter from Mark Cooper, Dir. of Research, Consumer Fed’n of Am., to Senator Herb Kohl, Chairman, Senate Subcomm. on Antitrust, Competition Policy, & Consumer Rights (Apr. 9, 2012) [hereinafter Letter from Mark Cooper to Senator Herb Kohl], available at <http://commens.org/1ghFrny>.

¹⁷ *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 647 (S.D.N.Y. 2013).

¹⁸ K. Craig Wildfang, *Predatory Conduct under Section 2 of the Sherman Act: Do Recent Cases Illuminate the Boundaries?*, 31 J. CORP. L. 323, 327 (2005). Monopolists use predatory prices, that is, prices set below cost, to exclude would-be competitors from entering the market, when they have a reasonable expectation that they can raise the price at a later time above those that would be offered under a true competitive market, in order to

Meanwhile, in the case of Apple the harms of their business activities were easy for the Justice Department to recognize and define in court. The result of Apple's "agency pricing" deal with the Publisher Defendants was immediately felt by retail e-book customers as a hike in the prices of bestselling e-book titles. It is important to keep in mind that an increase in prices to consumers is not, in theory, the primary harm that modern antitrust law seeks to address.¹⁹ As is discussed below, according to prominent voices of the influential "Law and Economics" school of legal thought,²⁰ decreased output—not impact on consumer prices—should be the justification for all government prosecution of antitrust.²¹ At trial, Apple did not present evidence showing that its actions did not decrease output in strict economic terms, but instead asserted that its presence in the e-book marketplace created "healthy competition."²² Thus, Apple sought to prevail by the application of reasonable justification for its actions in the context of the marketplace and to prove that its deals with the Publisher Defendants had a pro-competitive impact on the market for e-books.²³

One possible explanation for the DOJ's decision to charge Apple with anti-

recoup their losses and receive additional profits. Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 703 (1975).

¹⁹ Werden, *supra* note 11, at 1, 39.

²⁰ "Law and Economics" is the legal discipline which advocates that "allocative efficiency" and "social wealth" should be the primary metrics for judging the costs and benefits of legal rules. BLACK'S LAW DICTIONARY 436 (4th ed. 2009). The "Law and Economics" discipline was founded by University of Chicago Law School Professor Aaron Director in the 1950s. See Ronald Coase, *Law and Economics at Chicago*, 36 J.L. & ECON. 239, 243–44 (1993). The "Law and Economics" discipline came to early prominence with publications by Ronald Coase and Guido Calabresi. See, e.g., Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 44 (1960). Coase, in particular, is well known for his important, although long-delayed, impact on American broadcast regulations, having made economic arguments for the allocation of radio spectrum by auction in 1959—a practice adopted by the Federal Communications Commission in 1994. Thomas W. Hazlett et al., *Radio Spectrum and the Disruptive Clarity of Ronald Coase*, 54 J.L. & ECON. 125, 127 (discussing Ronald Coase's influence on the FCC). Additionally, the "Law and Economics" discipline is associated with the Chicago school of economics, a school of economic thought that grew around several noted economists including Milton Friedman and Frederick Von Hayak at the University of Chicago after WWII. See Robert Van Horn, *Chicago's Shifting Attitudes Toward Concentrations of Business Power*, 34 SEATTLE U. L. REV. 1527, 1527 n.1 (2011).

²¹ RICHARD POSNER, ANTITRUST LAW 34 (2d ed. 2001) [hereinafter POSNER, ANTITRUST LAW]; see also Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 365 (1965) (asserting that interpreters of antitrust law should preserve competition, because "competition provides society with the maximum output that can be achieved at any given time with the resources at its command").

²² United States v. Apple Inc., 952 F. Supp. 2d 638, 707–08 (S.D.N.Y. 2013).

²³ *Id.*

trust violations and not Amazon is the difference in treatment of single-party behavior from multi-party behavior under antitrust law. The case law that has developed in the one-hundred-year history of the Sherman Act, and especially in the last four decades, reserves harsh, *per se* liability for cases of collaborative price fixing by market competitors such as Apple and the Publisher Defendants.²⁴ This harsh treatment of horizontal price fixing contrasts with the heavier burden to be met when prosecuting individual companies that pursue and maintain market power on their own, as Amazon is widely accused of doing.²⁵ At trial, Apple faced the overriding presumption that its specific actions fell under an established *per se* category of antitrust, precluding consideration of its fostering-competition argument.²⁶ Apple failed in its defense against the government's *per se* case, and Apple's arguments to justify its actions in light of Amazon's prior market dominance did not persuade the court.²⁷

The Justice Department's decision to pursue an antitrust case against Apple has been controversial.²⁸ The Justice Department's case against Apple has received heavy criticism from industry groups like the Authors Guild, which proclaimed that "our government may be on the verge of killing real competition in order to save the appearance of competition."²⁹ New York Senator Charles Schumer urged the Justice Department to drop the suit, and even accused it of threatening to "wipe out the publishing industry as we know it."³⁰ Meanwhile, *United States v. Apple* has been described by a legal expert as, "as mainstream an antitrust case as you could possibly imagine."³¹ The rest of this Note is intended to explain the difference between such opposing views and to propose bridging this gap with additional steps in the process of preparing cases that would ensure that antitrust is being pursued in the best interest of the

²⁴ See *Cont'l T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50–51 (1977); Werden, *supra* note 11, at 19, 42–44.

²⁵ POSNER, ANTITRUST LAW, *supra* note 21, at 37–38 (discussing *Standard Oil Company of New Jersey v. United States*, 211 U.S. 1 (1911), where the Court distinguished between anticompetitive behavior by means of "fusion"—also known as merger-to-monopoly—and contracts in restraint of trade).

²⁶ *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 706 (S.D.N.Y. 2013).

²⁷ *Id.* at 706–09.

²⁸ Christopher Matthews, *Should Justice Drop the Apple Ebook Lawsuit?*, TIME.COM (July 23, 2012), <http://commens.org/NkXH0K>. For example, when the Final Judgment for the Settling Defendants was opened to public comment, the government received comments that "were both voluminous and overwhelmingly negative," with more than 90% of the commenters opposing the Final Judgment. See *United States v. Apple Inc.*, 889 F. Supp. 2d 623, 629, 633 (S.D.N.Y. 2012).

²⁹ Letter from Scott Turow, President, Authors Guild, to Members (Mar. 9, 2012) [hereinafter Letter from Scott Turow to Members], available at <http://commens.org/1qk1d2d>.

³⁰ Schumer, *supra* note 2, at A15.

³¹ *Should Justice Drop the Apple Ebook Lawsuit?*, *supra* note 28.

public.

II. THE DEVELOPMENT OF THE SHERMAN ACT BY THE COURTS

To understand the possible legal implications of the anticompetitive practices of Apple and Amazon and the policies of antitrust prosecutors regarding prosecution, it is helpful to examine the relevant concepts in the Sherman Act and how they came about. Antitrust law began in America with the passage of the Sherman Antitrust Act of 1890, which makes illegal “every contract . . . or conspiracy, in restraint of trade or commerce.”³² Section 2 prohibits monopolies or attempts and conspiracies to monopolize.³³ The law of antitrust was subsequently expanded by Congress with the Clayton Act of 1914,³⁴ the Robinson–Patman Act of 1936,³⁵ and the Tunney Act of 1974.³⁶ Among other things, the Clayton Act supplemented the Sherman Act’s general ban on anticompetitive cartels and monopolies with bans on specific activities deemed harmful to competition.³⁷ Further, the Clayton Act added regulations as to the merger and acquisition processes.³⁸ The Tunney Act required judicial review and an opportunity for public comment on settlements between the Justice Department and civil antitrust defendants.³⁹ This section will only discuss the Sherman Act’s original two provisions, because they are the bases for the Justice Department’s case against Apple and the Publisher Defendants—raising § 1 issues⁴⁰—and the allegations against Amazon of monopoly—raising § 2 issues.⁴¹ Importantly, the standards by which the company’s actions are to be judged and, especially, what differentiates them, are not actually in the text of the Sherman Act.⁴² Therefore, it is important to begin—before moving on to the particular standards that courts use—with an explanation for why the Sherman

³² 15 U.S.C. § 1 (2012).

³³ *Id.* § 2.

³⁴ *See* Clayton Antitrust Act of 1914, Pub. L. No. 63-212, 38 Stat. 730 (1914).

³⁵ *See* Robinson–Patman Antidiscrimination Act, Pub. L. No. 74-692, 49 Stat. 1526 (1936).

³⁶ *See* Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706 (1974).

³⁷ 15 U.S.C. §§ 13–14. Section 13 bans certain forms of price discrimination. *Id.* § 13. Section 14 bans agreements to not use the goods of a competitor. *Id.* § 14.

³⁸ *Id.* § 18.

³⁹ *Id.* § 16(b)–(h).

⁴⁰ Complaint, *supra* note 1, at 1.

⁴¹ *Apple: We Didn’t Stifle E-book Rivals*, *supra* note 8; *see* 15 U.S.C. § 2.

⁴² George E. Garvey, *The Sherman Act and the Vicious Will: Developing Standards for Criminal Intent in Sherman Act Prosecutions*, 29 CATH. U. L. REV. 389, 390, 417 (1979). The Sherman Act’s legislative history demonstrates that the Sherman Act “was deliberately intended to be indefinite with specificity to be provided by the judiciary.” *Id.* at 417.

Act's standards are overwhelmingly the product of judicial interpretation and not statutory text.

The critical role of jurisprudence in clarifying the boundaries of the Sherman Act was necessitated by the Act's vague text as well as its ambiguous legislative history.⁴³ When it was passed by Congress in 1890, there was little agreement about exactly what the two provisions of the Sherman Act would do or how they would affect anticompetitive activities.⁴⁴ Some scholars have concluded that the Sherman Act was intended to maximize wealth,⁴⁵ while others conclude that it was focused only on the protection of consumers.⁴⁶ Further left unanswered was whether enforcement actions and courts should seek to ensure the provision of lower prices on goods for consumers, even when those lower prices are predatory.⁴⁷ It is clear is that the framers of the Sherman Act were motivated by the public outcry against the "epidemic" problem of the rapid combination of firms to form monopolies, also known as the trusts.⁴⁸ These trusts were massively expanding firms, often exploiting newly developed abilities to buy stock in one another, and using their dominating market position to either undercut competitors with low prices or gouge consumers with high prices.⁴⁹ It was widely understood that cartelization and monopoly were major problems that needed to be addressed, but it was unclear as to how courts and prosecutors would go about accomplishing this through the Sherman Act.⁵⁰

The text of the Sherman Act addresses two main aspects of anticompetitive activity. Section 1 of the Act prohibits the anticompetitive practices that are used to build and maintain market power, by proscribing "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."⁵¹ Section 2 prohibits the end result of such practices, the formation

⁴³ RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW* 17 (rev. ed. 1996) [hereinafter PERITZ, *COMPETITION POLICY IN AMERICA*].

⁴⁴ *Id.*

⁴⁵ See Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7 (1966).

⁴⁶ See, e.g., Robert H. Lande, *Proving the Obvious: The Antitrust Laws Were Passed to Protect Consumers (Not Just to Increase Efficiency)*, 50 HASTINGS L.J. 959, 967 (1999) [hereinafter *Proving the Obvious*]; see also Robert H. Lande, *Wealth Transfers As the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 150 (1982) [hereinafter *Wealth Transfers As the Original and Primary Concern of Antitrust*].

⁴⁷ Areeda & Turner, *supra* note 18, at 706–09 (discussing the administrative difficulty in controlling "predatory pricing" practices).

⁴⁸ PERITZ, *COMPETITION POLICY IN AMERICA*, *supra* note 43, at 23.

⁴⁹ POSNER, *ANTITRUST LAW*, *supra* note 21, at 34.

⁵⁰ PERITZ, *COMPETITION POLICY IN AMERICA*, *supra* note 43, at 17.

⁵¹ 15 U.S.C. § 1 (2012); see *United States v. Am. Tobacco Co.*, 221 U.S. 106, 179 (1911); see also *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 61 (1911).

of monopolies, by making illegal, activities that “monopolize, or attempt to monopolize” trade.⁵² The meaning of these provisions was immediately complicated by several factors. First, the Sherman Act’s statutory prohibitions lacked standards that would have allowed judges to form a “coherent, administrable legal doctrine.”⁵³ Second, the English common law theories on which the Act’s language is based did not contain a strong or consistent monopoly policy or definition.⁵⁴ Third, the Act’s sponsors were inconsistent in their statements regarding the bill’s purpose beyond the need to protect “fair prices.”⁵⁵

With such minimal guidance from the law’s text or legislative history, courts were required to enforce the Sherman Act by constructing their own rules applying reason and economic and civic principles.⁵⁶ Yet, even after courts began to establish the boundaries and standards of the Sherman Act, controversy over the proper framework for identifying “restraint of trade” persisted for years.⁵⁷ Only in recent decades has a consensus formed that courts are to look not to civic or political goals, but solely to economic analysis regarding the “competitive process” as reflected by the overall welfare of society.⁵⁸ Currently, some scholars and practitioners are calling for a return to direct consideration of consumer choice⁵⁹ and consumer prices⁶⁰ amidst a majority view that the “competitive process” and total economic efficiency should be the priority, even when the result is higher prices or fewer choices for consumers.⁶¹

For a statute that is so reliant on clarification by judge-made rules, the history of the Supreme Court’s interpretation of the Sherman Act was slow to start.

⁵² 15 U.S.C. § 2.

⁵³ POSNER, ANTITRUST LAW, *supra* note 21, at 35.

⁵⁴ William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 355–56, 367, 384 (1954). Judge Bork has posited that the framers of the Sherman Act referred to the “common law” of antitrust in the bill’s legislative history as a shorthand for their favored, often cherry-picked legal opinions while they argued that the principles reflected therein were to be codified by the passage of the Act. *Legislative Intent and the Policy of the Sherman Act*, *supra* note 45, at 36.

⁵⁵ POSNER, ANTITRUST LAW, *supra* note 21, at 34. The Sherman Act passed with a mix of legislative intentions: the Act’s authors argued for its passage to ensure economic “liberty” in the form of freedom *from* market power and to have fair prices for consumers. PERITZ, COMPETITION POLICY IN AMERICA, *supra* note 43, at 17; *see also* Garvey, *supra* note 42, at 417 (asserting that the Sherman Act’s vagueness was intended by the Act’s drafters).

⁵⁶ POSNER, ANTITRUST LAW, *supra* note 21, at 35.

⁵⁷ Garvey, *supra* note 42, at 417.

⁵⁸ POSNER, ANTITRUST LAW, *supra* note 21, at 35.

⁵⁹ Neil W. Averitt & Robert H. Lande, *Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law*, 10 LOY. CONSUMER L. REV. 44, 54 (1998).

⁶⁰ *Proving the Obvious*, *supra* note 46, at 962.

⁶¹ Werden, *supra* note 11, at 2 (“In the 1911 *Standard Oil* decision, the Supreme Court first considered in depth the meaning of Section 1 of the Sherman Act.”).

For the first two decades after the original passage of the 1890 Act, even the justifiable outer limits of antitrust enforcement by government prosecutors was left largely unresolved.⁶² The first major decision by the Supreme Court that attempted to define the breadth of the Sherman Act was *Standard Oil v. United States*, in 1911.⁶³ In *Standard Oil*, the Court created a “rule of reason” to limit the prosecution of “contracts in restraint of trade.”⁶⁴ The *Standard Oil* Court clarified that the language of the statute was not to be interpreted as a literal prohibition against any contract which in any way restrains the trade of any person (this would of course include practically all contracts).⁶⁵ The Court explained that the Act would prohibit only those contracts that unduly restrained trade.⁶⁶

Under the *Standard Oil* ruling, courts were instructed in cases of the fusion of competing firms, “to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute.”⁶⁷ Justice Holmes clarified the rule several years later, stating that “only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.”⁶⁸ This standard puts general public welfare at the center of analysis, taking a broad view of an activity’s impact on the market as a whole, and ignores the fortunes of individual market participants.

While the *Standard Oil* opinion and its early progeny⁶⁹ are frequently criticized as lacking specific guidance for courts or business people to follow with any consistency,⁷⁰ modern courts have come to apply a more clearly articulated burden-shifting version of the rule of reason as the default standard by which a plaintiff’s proof is measured in Sherman Act cases where a *per se* rule does not apply.⁷¹ Under “rule of reason” analysis, a plaintiff has an initial burden of proving that the defendant engaged in a restraint that threatens the competitive

⁶² Werden, *supra* note 11, at 36; POSNER, ANTITRUST LAW, *supra* note 21, at 34.

⁶³ See generally *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

⁶⁴ *Id.* at 66.

⁶⁵ *Id.* at 60.

⁶⁶ *Id.* at 61.

⁶⁷ *Id.* at 64.

⁶⁸ *Nash v. United States*, 229 U.S. 373, 376 (1913).

⁶⁹ See *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 239 (1918).

⁷⁰ Andrew Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 733 (2012).

⁷¹ *Id.*; Werden, *supra* note 11, at 43.

process.⁷² If the plaintiff's initial burden is met, the defendant must show that a legitimate objective is served by the defendant's activities which restrained trade.⁷³ Finally, the plaintiff may rebut the defendant's justification by showing that either the defendant's objective can be achieved by a substantially less restrictive alternative or that the challenged behavior is not reasonably necessary to achieve the legitimate objectives claimed by the defendant.⁷⁴ If applied, the rule's openness to hearing out the defendant's reasons for engaging in its activity might have offered Apple a pathway to a successful defense.⁷⁵

At trial, Apple sought to benefit from the rule's openness by claiming that its purpose in dealing with the Publisher Defendants was legitimate and that their activities with the publishers had pro-competitive effects.⁷⁶ Judge Denise Cote believed that a rule of reason analysis was inapplicable, because of the particular nature of Apple and the Publisher Defendants' alleged antitrust activities.⁷⁷ Therefore, Apple faced the harsher *per se* rule against horizontal price fixing.⁷⁸

Much of the jurisprudence in the intervening years since the *Standard Oil* case centers on the recognition that certain practices are too clearly anticompetitive to require the detailed analysis of the "rule of reason" and are, therefore, illegal *per se* under the Sherman Act.⁷⁹ The first of the *per se* rules, which identified practices that almost always result in a restraint of trade, had been issued by the time of the *Standard Oil* ruling.⁸⁰ In 1897, in the *Trans-Missouri*

⁷² United States v. Apple Inc., 952 F. Supp. 2d 638, 688 (S.D.N.Y. 2013); see P. AREEDA, ANTITRUST LAW ¶ 1507 (3d ed. 2010) [hereinafter AREEDA, ANTITRUST LAW]; see also *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) ("[T]his Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful.").

⁷³ AREEDA, ANTITRUST LAW, *supra* note 72, ¶ 1502; see also *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1021 (10th Cir. 1998) ("Under a rule of reason analysis, an agreement to restrain trade may still survive scrutiny under section 1 if the procompetitive benefits of the restraint justify the anticompetitive effects.").

⁷⁴ AREEDA, ANTITRUST LAW, *supra* note 72, ¶ 1502; see *White Motor Co. v. United States*, 372 U.S. 253, 264 (1963) (Brennan, J., concurring); see also *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 74–75 (3d Cir. 2010) ("The plaintiff then must demonstrate that the restraint itself is not reasonably necessary to achieve the stated objective.").

⁷⁵ AREEDA, ANTITRUST LAW, *supra* note 72, ¶ 1502; *The Apple E-Book Anti-Trust Case: The Closing Arguments*, *supra* note 12.

⁷⁶ United States v. Apple Inc., 952 F. Supp. 2d 638, 694 (S.D.N.Y. 2013).

⁷⁷ *Id.* at 691, 694. Judge Cote noted, however, that should the rule of reason have applied, then Apple would still have violated the Sherman Act, because Apple failed to show pro-competitive effects from its agreements with the Publisher Defendants. *Id.* at 694.

⁷⁸ *Id.*

⁷⁹ Gavil, *supra* note 70, at 736 n.19.

⁸⁰ United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290 (1897).

Freight Association case, the Supreme Court ruled that collusive pricing is always inefficient and should be forbidden without regard for “what the intent was on the part of those who signed it.”⁸¹ The list of *per se* antitrust activities grew over the next several decades to include market divisions and group boycotts, which, along with collusive pricing, are all multi-party activities.⁸² Additionally, a list of licensing practices by copyright holders was described by the Justice Department as “The Nine No-Nos.”⁸³

A major distinction has developed between practices which involve “vertical” combinations as well as vertical restraints such as those between producers and distributors of a product, which are seen as less harmful to competition, and “horizontal” mergers and deals between competitors, which receive the highest scrutiny, and are subject to the most durable of the *per se* rules.⁸⁴ Of most import to the case against Apple is the position courts have taken that the making of horizontal deals to fix prices—for example, “cartelization”—is “manifestly anticompetitive”⁸⁵ and lacks “any redeeming virtue.”⁸⁶ These char-

⁸¹ *Id.* at 342.

⁸² *White Motor Co. v. United States*, 372 U.S. 253, 259–60 (1963).

⁸³ Makan Delrahim, *Maintaining Flexibility in Antitrust Analysis: Meeting the Challenge of Innovation in the Media and Entertainment Industries*, 28 COLUM. J.L. & ARTS 343, 344 n.2 (2005).

⁸⁴ *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984) (“[The Sherman Act contains a] basic distinction between concerted and independent action.”); Thomas Leary, Comm’r, Fed. Trade Comm’n, Address at the Conference Board 2004 Antitrust Conference: Structured Outline for the Analysis of Horizontal Agreements 1 (Mar. 3–4, 2004), available at <http://commcns.org/1cEXOYp>; see also Werden, *supra* note 11, at 41.

⁸⁵ *Cont’l T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49–50 (1977).

⁸⁶ *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985) (internal quotation marks omitted); *The Crisis in Antitrust*, *supra* note 21, at 365 (“Price-fixing is antisocial precisely because it lessens the total output of society. When competitors agree on higher prices and put them into effect, they necessarily restrict output and so reduce total wealth.”). Robert Bork was talking about physical commodities that always incur a substantial marginal cost to produce one more widget, but it is uncertain how his analysis applies to e-books when the marginal cost of another copy of a bestseller is negligible for the publisher. Seth Godin, *How Much Should an eBook Cost?*, DOMINO PROJECT (Dec. 20, 2011), <http://commcns.org/1h29gKD>. But will a price-fixing agreement among competitors in digital media ever result in no societal decrease in total output? Assuming that at a higher price, fewer books would likely be sold, the answer depends on whether that reduction in dissemination of the digital media represents a real reduction in societal output. In its briefs in the Apple case, the Justice Department has relied more on the simple effect of higher prices for consumers as evidence of an antitrust harm. Complaint, *supra* note 1, at 5 (alleging that “Defendants’ ongoing conspiracy and agreement have caused e-book consumers to pay tens of millions of dollars more for e-books than they otherwise would have paid”). Yet, a reduced volume in e-book sales as compared to a hypothetical scenario should be the legitimate measure of societal loss under the Borkian model. As long as the expected result of higher prices on a digital commodity is fewer copies sold, it seems unlikely that price-fixing agreements for digital commodities should be any differ-

acterizations also differentiate the conduct by both Apple and Amazon. While Apple was liable for participating in a horizontal price-fixing scheme, Amazon was criticized for using its vertical integration as a publisher, retailer, and e-reader seller to disrupt traditional publishers and devalue their products.⁸⁷

While the case law has differentiated between certain multi-party and single-party anticompetitive behaviors, there are arguments to be made for applying similar treatment to single and multiple-party offenders overall. Judge Richard Posner, a proponent of the “Law and Economics” discipline, has written that “[a]n intelligent antitrust policy cannot stop with collusive pricing among independent firms and ignore monopoly pricing by a single firm.”⁸⁸ He calls for similar treatment of multi-party and single-party price fixing, or else competing firms would be given “an incentive to merge into a single firm in order to be able to practice monopoly pricing without inviting punishment.”⁸⁹ A major contrast between the activities of Apple and the activities of Amazon is that Amazon did not enter into agreements with any external entity to conduct its offending business practices. But if, as Judge Posner says, a single company which fixes prices is equally guilty of anticompetitive behavior as a group of companies who work together to fix prices,⁹⁰ then the legal boundary between Apple’s price-setting collusion and the “anti-competitive” prices used by Amazon for e-books becomes blurred.

Unlike “anti-competitive” pricing, the price-fixing conspiracies typically require multiple parties and, therefore, generate more evidence of meetings and other conspiratorial conduct.⁹¹ In *United States v. Socony-Vacuum Oil Co.*, the Supreme Court narrowed the requirements for proving that activities had produced negative outcomes, in cases dealing with *per se* Sherman Act violations.⁹² In *Socony-Vacuum*—also known as *Madison Oil*—the Court produced the “definitive” statement of the rule against price fixing,⁹³ but this time the

ent from those for physical commodities.

⁸⁷ Amy Martinez, *Amazon.com Trying to Wring Deep Discounts from Publishers*, SEATTLE TIMES, <http://commcns.org/1e8GTf1> (last updated Apr. 2, 2012, 11:13 AM).

⁸⁸ POSNER, ANTITRUST LAW, *supra* note 21, at 37.

⁸⁹ *Id.*

⁹⁰ *Id.* (“An intelligent antitrust policy cannot stop with collusive pricing among independent firms and ignore monopoly pricing by a single firm.”).

⁹¹ *Id.* at 66. Posner notes that “launching a cartel may require elaborative negotiations among the parties, which must be carried on in a clandestine manner to avoid immediate detection by the antitrust enforcers” and that the “likelihood of detection” rises with the number of parties. *Id.*

⁹² *See generally* *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

⁹³ POSNER, ANTITRUST LAW, *supra* note 21, at 36–37. “Madison Oil” comes from the name of the city where the trial was held: Madison, Wisconsin. *Id.* at 37 n.10. In the *Apple* opinion, Judge Cote relied on *Arizona v. Maricopa County* to conclude that the prosecution had successfully shown that Apple committed a *per se* violation of the Sherman Act. United

Court left out any requirement for a potential impact on prices.⁹⁴ The *Socony-Vacuum* Court held that any attempt at *per se* anticompetitive behavior, such as a meeting or a contract for price fixing, even with little likelihood of success, could be illegal.⁹⁵

The government has responded to this shift by employing strategies in price-fixing cases that had proven successful in prosecuting conspiracies, focusing their efforts on proving illicit communications (for example, in-person meetings, email, or telephone conversations).⁹⁶ The government's complaint against Apple and the Publisher Defendants consisted largely of a narrative of meetings and communications between the Publisher defendants and Apple that relies heavily on such details.⁹⁷ It is plausible that the prosecutors believed that *Socony-Vacuum* relieved them of the need to prove that a conspiracy damaged competition overall (which Apple contested) or that there was a potential for an increase in prices.

The *Socony-Vacuum* decision also foreclosed the possibility that Apple could defend itself by arguing that the deals made with the Publisher Defendants were justified by Amazon's anti-competitive pricing on e-books.⁹⁸ Accord-

States v. Apple Inc., 952 F. Supp. 2d 638, 694 (S.D.N.Y. 2013). The Court, in *Maricopa County*, noted that under "the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal *per se*." *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 347, 351 (1982) (internal quotation marks omitted) (stating that the "anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered").

⁹⁴ *Socony-Vacuum Oil Co.*, 310 U.S. at 224 n.59.

⁹⁵ *Id.*

⁹⁶ POSNER, ANTITRUST LAW, *supra* note 21, at 37. Note that the DOJ will bring criminal charges against actors involved in price-fixing agreements; however, the type of case brought depends on the nature of the underlying conduct. See U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL, at III-12 (5th ed. 2012), available at <http://commens.org/1ghFyQ5>. Under *Matsushita v. Zenith*, to overcome summary judgment, the claimant must present unambiguous evidence that tends to exclude an innocent interpretation. *Matsushita Electric Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 597-98 (1986) ("On remand, the Court of Appeals is free to consider whether there is other evidence that is sufficiently unambiguous to permit a trier of fact to find that petitioners conspired to price predatorily for two decades despite the absence of any apparent motive to do so. The evidence must 'ten[d] to exclude the possibility' that petitioners underpriced respondents to compete for business rather than to implement an economically senseless conspiracy."). Antitrust cases involving collusion are particularly difficult under the high evidentiary standards. Collusive conduct, without evidence of an agreement, is nearly impossible to detect, let alone prove. Lawyers refer to the phenomenon of coordination of pricing "without any overt detectable acts of communication" as "conscious parallelism," but Posner calls it "tacit collusion." POSNER, ANTITRUST LAW, *supra* note 21, at 53.

⁹⁷ Complaint, *supra* note 1, at 13-15.

⁹⁸ *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 688-89 (S.D.N.Y. 2013); *Socony-Vacuum Oil Co.*, 310 U.S. at 221-22 ("[Congress] has no more allowed genuine or fancied

ing to the *Socony-Vacuum* Court, the Sherman Act generally prohibits collusive activity, regardless of the justification.⁹⁹ Thus, under *Socony-Vacuum*, price-fixing cases—like the one against Apple—allow little opportunity to justify such activities on the basis of accusations of pre-existing price fixing by other market participants.

III. THE RISE OF THE “LAW AND ECONOMICS” VIEW OF ANTITRUST AND RECENT TRENDS IN ENFORCEMENT

By the mid-1950s, the basic structure of the “rule of reason” was largely agreed upon, while the number of *per se* rules had begun to grow. Yet, scholars and professionals disagreed over the ultimate goals of antitrust law.¹⁰⁰ In the 1950s and 1960s, antitrust law sought generally to protect unrestrained competition, while accounting for the costs of goods and the viability of small businesses.¹⁰¹ However, antitrust law did not have coherent goals to justify enforcement, which Bork considered irrational.¹⁰² However, in 1977, a decisive shift occurred when the Supreme Court, in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, overruled the *per se* rule against non-price vertical restraints.¹⁰³ The last four decades have seen the continued move away from many of the previously established *per se* rules and toward a consensus in the courts that enforcement of antitrust laws should include an economic analysis as to how antitrust activities impact society’s “total welfare” by harming the competitive process.¹⁰⁴ Support for this trend originated with the “Law and Economics” movement in the 1960s, led by the influential advocacy of Robert Bork and Richard Posner, among others.¹⁰⁵

competitive abuses as a legal justification for [price-fixing] schemes than it has the good intentions of the members of the combination.”).

⁹⁹ *Socony-Vacuum Oil Co.*, 310 U.S. at 221–22.

¹⁰⁰ ROBERT H. BORK, *THE ANTITRUST PARADOX, A POLICY AT WAR WITH ITSELF* 50 (1978) [hereinafter *THE ANTITRUST PARADOX*].

¹⁰¹ *The Crisis in Antitrust*, *supra* note 21, at 373; *see also* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) (describing the “preservation of our democratic political and social institutions” as among the purposes of the Sherman Act).

¹⁰² *THE ANTITRUST PARADOX*, *supra* note 100, at 50.

¹⁰³ *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 (1977); *see also* Werden, *supra* note 11, at 20 (noting the *Sylvania* decision’s importance).

¹⁰⁴ Gavil, *supra* note 70, at 734 (noting that, since the 1970s, the Supreme Court has “march[ed] away from *per se* rules” and has incorporated economic principles into the rule-of-reason analysis).

¹⁰⁵ Dylan Matthews, ‘Antitrust Was Defined by Robert Bork. I Cannot Overstate His Influence’, *WASH. POST* (Dec. 20. 2012), <http://commsns.org/1bkRbDX>; *see* Roger Parloff, *The Negotiator No One Doubts That Richard Posner Is a Brilliant Judge and Antitrust Theoretician. Is That Enough to Bring Microsoft and the Government Together?*, *CNNMONEY*

While largely successful in their influence on jurisprudence, “Law and Economics” proponents have recognized that their approach differs from the populist impulses with which the American public understood the antitrust laws.¹⁰⁶ It is not surprising then, that Senator Schumer and other proponents of the public controversy over the Justice Department’s decision to prosecute Apple omitted legal rationales from their criticisms.¹⁰⁷

The heart of the “Law and Economics” approach to antitrust is a consistent economic understanding of the harms understood to result from the process of forming and maintaining monopoly power.¹⁰⁸ When a firm gains monopoly power over a market, it is no longer subject to the standard competitive impulse to produce the greatest possible quantity of the product and offer it for the lowest possible price.¹⁰⁹ Once monopoly power is obtained and competition is eliminated entirely or diminished seriously, then producing less of a product while raising the price may be a more profitable strategy for the producer.¹¹⁰ A producer (or a cartel) that controls the majority of the market share can withhold supply from the market to the extent necessary to increase demand, allowing the monopolist to raise prices.¹¹¹

Although the monopolist must sell fewer items to achieve the desired higher prices, his primary benefit is from the increase in the *marginal* profit returned on the items produced—the source of monopoly profits.¹¹² So as long as competitors control a small fraction of the market, then each competitor’s ability to affect prices by reducing supply will be offset by the other competitors’ willingness to increase output.¹¹³ Thus, the monopolist profits while prices rise and

(Jan. 10, 2000), <http://commcns.org/1hWrZJv>.

¹⁰⁶ POSNER, ANTITRUST LAW, *supra* note 21, at 35 (“After a century and more of judicial enforcement of the antitrust statutes, there is a consensus that guidance must be sought in economics” rather than populist notions). Posner describes “populist impulses” as seeking to protect consumers from high prices and loss of choices, and to shield small businesses from the advantages of larger corporate competitors and the powers of concentrated wealth. *Id.* at 34.

¹⁰⁷ See, e.g., Schumer, *supra* note 2, at A15; Letter from Scott Turow to Members, *supra* note 29. Some have argued that antitrust enforcement is particularly susceptible to the effects of public perception. See Larry Smith, *Continental Airlines Navigates Public Scrutiny over Antitrust Exemption*, LEVICK DAILY (Apr. 15, 2009), <http://commcns.org/1d4UiH1>.

¹⁰⁸ See POSNER, ANTITRUST LAW, *supra* note 21, at 9 (arguing that the monopolist’s “power over price”—for example, the ability to use market power to set high prices and drive down production—is “the essence of the economic concept of monopoly.”).

¹⁰⁹ *Id.* at 10.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 10–11.

¹¹² *Id.*

¹¹³ *Id.* at 10. Ultimately the high prices for the monopolized item motivate additional suppliers to enter the market and compete by offering prices slightly lower than the monopolist’s price. *Id.* This leads to the common refrain from proponents of lax antitrust en-

while consumer choice, total employment, small business growth, and innovation decrease.¹¹⁴

This is where the so-called “layperson’s” narrative of the danger of anti-competitive activity often ends.¹¹⁵ Yet, Judge Posner discounts some of the popularly feared effects of monopolies, arguing, for example, that the price effects of a monopoly on consumers should be ignored as merely transfer payments, which were costless to society.¹¹⁶ Furthermore, “Law and Economics” advocates consider protectionist motivations for antitrust enforcement economically unsound.¹¹⁷ Judge Posner believes that the “economic theory of monopoly provides the only sound basis for antitrust policy.”¹¹⁸ The “economic theory of monopoly”—according to Posner and other “Law and Economics” advocates—opposes monopolies as decreasing society’s total wealth and as decreasing customer satisfaction.¹¹⁹ Under this view, the true evil of monopoly primarily accrues through a “loss in value resulting from the substitution [by customers] for the monopolized product” causing a “net loss” to the economy.¹²⁰ While increased prices to consumers may be the most noticeable and politically resonant effect of monopolies, they are seen as less detrimental than the cost that monopolies impose on society as a whole.¹²¹ In short, increased prices reward the monopolist’s reduced production of demanded goods, while

forcement that “all monopolies are temporary.” But the problem is the damage to public welfare that occurs while they exist and the waste caused by single entities or groups seeking to gain monopoly power by inefficient means. *Id.* at 13–14.

¹¹⁴ *Id.* at 12.

¹¹⁵ *Id.* at 13.

¹¹⁶ *Id.* (“Those higher prices are the focus of the layperson’s concern about monopoly—an example of the often sharp divergence between lay economic intuition and economic analysis.”). The monopolist unfairly takes property from the consumer without providing any compensating “transfer payments.” Judge Posner advocates ignoring this wealth transfer from the consumer to the monopolist when calculating the harm of a monopoly because in the scheme of the economy as a whole it sums to zero, albeit recognizing the collateral possibility of some net loss to society’s total welfare due to indirect effects of monopoly pricing as an incentive toward inefficient monopoly-seeking behavior by producers and distributors. This is distinct from other effects of monopoly such as inefficiency and decreases in overall economic output. *See id.* For a view opposing the Chicago School’s, see Robert Lande’s article, *Wealth Transfers As the Original and Primary Concern of Antitrust*, *supra* note 46, at 76.

¹¹⁷ *The Crisis in Antitrust*, *supra* note 21, at 364 (“It is the rapid acceleration of the . . . ‘protectionist’ trends in antitrust that has brought on the present crisis.”).

¹¹⁸ POSNER, *ANTITRUST LAW*, *supra* note 21, at 9.

¹¹⁹ *See also* Robert Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 *FORDHAM L. REV.* 2349, 2351 n.4 (2013).

¹²⁰ POSNER, *ANTITRUST LAW*, *supra* note 21, at 13.

¹²¹ George J. Stigler, *Monopoly*, *LIBR. ECON. & LIBERTY*, <http://commcns.org/1fgmmBz> (last visited Jan. 2, 2014).

forcing consumers to satisfy their demands at a higher cost by resorting to substitutes.¹²² Posner and “Law and Economics” proponents believe that the main concern should be preventing inefficiency caused by artificial scarcity.¹²³

This contention is critical to understanding why the practices of Amazon and the prosecution of Apple raise such fundamental concerns in antitrust law.¹²⁴ Under the economic theory of modern antitrust law, the higher prices that consumers paid for e-book bestsellers, after Apple entered the market, is only relevant as circumstantial evidence that fewer e-books were distributed than otherwise would have been.¹²⁵ If this theory were followed without regard to the *per se* rule against price fixing, then the only *economically* sound basis for prosecuting Apple and the Publisher Defendants would be their collusion’s effect of lowering the overall output of e-books.¹²⁶

Judge Posner’s view of “efficiency” as the sole legitimate goal of competition policy has been criticized for inconsistently describing the measure of efficiency.¹²⁷ According to “Law and Economics” proponents, the Sherman Act should only be enforced on the basis of cognizable harm to competition that results in reduced output.¹²⁸ If this is true, can Apple’s transgressions be justified under the Sherman Act by the necessities of competing against an existing monopoly? The previous section discussed the adoption of *per se* rules, including the rule against horizontal price fixing, which, under the ruling of *Socony-Vacuum*, foreclosed any further economic analysis or the “rule of reason.”¹²⁹ But in subsequent cases in the 1970s and 1980s, the courts have softened some of the *per se* doctrines to be presumptions which can be rebutted by a showing of circumstances that the defendant was not engaging in restraining trade.¹³⁰

¹²² POSNER, ANTITRUST LAW, *supra* note 21, at 12–13. As an example, a monopoly cost of a pork chop that is sold at a monopoly price is of little or no concern to Posner but true harm of monopolies is the aggregate effect on the economy. This causes consumers to unnecessarily eat Spam when they really want pork chops and could afford pork chops if they were sold at a lower, more competitive market-price.

¹²³ POSNER, ANTITRUST LAW, *supra* note 21, at 2.

¹²⁴ *Should Justice Drop the Apple Ebook Lawsuit?*, *supra* note 28.

¹²⁵ See POSNER, ANTITRUST LAW, *supra* note 21, at 12.

¹²⁶ *The Crisis in Antitrust*, *supra* note 21, at 365 (“Price-fixing is antisocial precisely because it lessens the total output of society. When competitors agree on higher prices and put them into effect, they necessarily restrict output and so reduce total wealth.”).

¹²⁷ Rudolph J. Peritz, *The Predicament of Antitrust Jurisprudence: Economics and the Monopolization of Price Discrimination Argument*, 1984 DUKE L.J. 1205, 1289 (1984).

¹²⁸ *The Crisis in Antitrust*, *supra* note 21, at 365.

¹²⁹ See *supra* Part II.

¹³⁰ See *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100–01 (1984) (holding that “we have decided that it would be inappropriate to apply a *per se* rule to this case,” because the NCAA is “an industry in which horizontal restraints on competition are essential if the product is to be available at all”); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 24 (1979) (applying the “rule of reason” to analyze the

Apple's best hope at overcoming the government's case at trial was to show evidence that the *per se* rule against price fixing should not apply, that its deals with the Publisher Defendants was necessary for its legitimate business objectives, and that its activities had procompetitive effects.¹³¹ Apple was unsuccessful at each of these goals.¹³²

IV. THE CASE AGAINST APPLE AND THE PUBLISHER DEFENDANTS

Now that the Sherman Act's history and current jurisprudential standards have been discussed, we can address the central purpose of this article, to assess the decision of the Justice Department to prosecute Apple for violating the Sherman Act. Apple's entry into the market for digital books was strikingly different from Amazon in approach and market effects.¹³³ However, the tactics employed by both companies in the few short years since they began selling e-books have been unconventional and ruthless.¹³⁴ With the e-book market, Apple and Amazon have both been in competition.¹³⁵ In 2009, Amazon was maintaining a 90% market share in e-books, selling bestsellers at \$9.99 per title.¹³⁶ Amazon's retail price on many bestsellers was several dollars less than the wholesale price for which the Publisher Defendants sold the books to Ama-

allegedly anti-competitive activity, because the "blanket license has provided an acceptable mechanism for at least a large part of the market").

¹³¹ United States v. Apple Inc., 952 F. Supp. 2d 638, 691, 694–95, 700 (S.D.N.Y. 2013); see AREEDA, ANTITRUST LAW, *supra* note 72, ¶ 1502. As Professor Areeda explained:

To avoid dismissal, the plaintiff must allege that competition in a specified market has been restrained. To avoid adverse summary judgment it must show that the facts favor or at least that there are disputed material facts on that question. If such a restraint is shown, the burden passes to the defendant to offer evidence that a legitimate objective is served by the alleged behavior. That justification will be lost if the plaintiff shows that the objective can be achieved by a substantially less restrictive alternative . . . [For a legitimate and necessary objective], the harms and benefits must be compared to reach a net judgment whether the challenged behavior is, on balance, reasonable.

Id.

¹³² *Apple Inc.*, 952 F. Supp. 2d at 691, 694–95, 700.

¹³³ Schumer, *supra* note 2, at A15.

¹³⁴ See Ken Auletta, *Publish or Perish: Can the iPad Topple the Kindle, and Save the Book Business?*, NEW YORKER (Apr. 26, 2010), <http://commcns.org/1cL4C14> ("Jobs planned to stand on Amazon's neck and press down hard, with publishers applauding."); Complaint, *supra* note 1, at 3 ("Apple had long believed it would be able to 'trounce Amazon by opening up [its] own ebook store.'"); Martinez, *supra* note 87; Richard Eskow, *Protesters Confront Amazon Founder Jeff Bezos*, THE NATION.COM (May 29, 2012), <http://commcns.org/1eemOR4>.

¹³⁵ Mark Rogowsky, *E-Book Case Reminds Apple Its Biggest Enemy Isn't Samsung or Google*, FORBES (Aug. 3, 2013), <http://commcns.org/PdVE7y>.

¹³⁶ Hiltzik, *supra* note 9.

zon.¹³⁷ The Publisher Defendants feared that Amazon's \$9.99 price, which was substantially lower than the price for hardcover versions, would become the new standard, thereby driving down prices for hardcovers and for best-selling and newly released e-books, in general.¹³⁸ In early 2010, Apple made an agreement with each of the five largest book publishers to sell e-books in Apple's online iTunes store under an "agency" pricing model, which allowed the publishers to raise the prices at which e-books would be sold and would guarantee Apple a 30% margin.¹³⁹ It is these deals between Apple and the book publishers, which are the central activities for which the Justice Department prosecuted Apple for violating the Sherman Antitrust Act.¹⁴⁰ In assessing the case against Apple, this section first looks at the deals and how they came about in detail, and then considers the defenses Apple attempted to employ.

Apple and its original co-defendants, the Publisher Defendants, each entered into their agency-pricing deals with clear motivations.¹⁴¹ Apple had an interest in becoming a retailer of e-books in order to expand the utility of its digital content marketplace, the iTunes store.¹⁴² Only two years before, Apple CEO Steve Jobs had expressed doubt about the profitability of ebooks, saying, "It doesn't matter how good or bad the product is, the fact is that people don't read anymore."¹⁴³ By the time that Apple was planning for the debut of the iPad, it was clear that by adding e-books to the media catalogue of iTunes, Apple would be raising revenue while destroying its rival's market dominance in e-books.¹⁴⁴

Meanwhile, the publishers were interested in the higher price at which Apple was selling books to consumers.¹⁴⁵ However, the Justice Department's complaint characterizes Amazon's low prices as a beneficial and natural result of healthy "price competition."¹⁴⁶ The complaint states that the Publisher Defendants intended to end this competition and cause e-book prices to rise above the \$9.99 that Amazon was offering.¹⁴⁷ It is clear from the Publisher Defendants' statements quoted by the complaint that the publishers were so interested in pushing e-book prices up that they were willing to give Apple a 30% com-

¹³⁷ Complaint, *supra* note 1, at 9.

¹³⁸ *Id.* at 10.

¹³⁹ Complaint, *supra* note 1, at 3.

¹⁴⁰ *Id.* at 5.

¹⁴¹ Auletta, *supra* note 134.

¹⁴² *Id.*

¹⁴³ *Id.* (internal quotation marks omitted).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Complaint, *supra* note 1, at 2.

¹⁴⁷ *Id.* at 2–3.

mission on each e-book that Apple sold.¹⁴⁸ Under the agency pricing model, publishers controlled the sale price, and the retailer became the publishers' "agent," having no power to "alter the retail prices set by the publishers."¹⁴⁹ Apple's 30% commission was bigger than the commission Amazon received from wholesale pricing, even for those books that were not sold for a loss.¹⁵⁰ Publishers charged Amazon and other wholesale retailers around \$13 for a bestseller.¹⁵¹ However, the publishers' share of e-book sales with Apple usually resulted in approximately a \$9 share.¹⁵² Still, publishers believed that the decreased revenue was worth it to keep retail prices high for both e-books and printed books.¹⁵³

Industry analysts list several reasons book publishers desired rising e-book prices despite a loss of direct revenue from each e-book sold. Most directly, the publishers believed that the price Amazon sought for best-selling titles created an incorrect public perception that \$9.99 represented a fair price for a best-selling e-book copy and, by inference, devalued the best-selling print versions of books.¹⁵⁴ Therefore, the publishers believed that pushing the price of e-books upwards would result in increased profits from print books, which was feasible in a world without \$9.99 e-book bestsellers.¹⁵⁵

The publishers may also have been motivated to collude with Apple so as to gain bargaining leverage over Amazon.¹⁵⁶ As discussed below, after announcing their deals with Apple, the publishers approached Amazon with a credible threat to pull their books from Amazon's catalog—an offer Amazon could not refuse.¹⁵⁷

Traditionally, publishers had sole control of the distribution channel between authors and consumers.¹⁵⁸ Another major motivation to make agency-pricing deals with Apple was that they were existentially threatened by the prospect of Amazon using its domination of e-book sales to sign-up its own authors.¹⁵⁹ Amazon had already begun to offer authors the opportunity to sell e-

¹⁴⁸ *Id.* at 3.

¹⁴⁹ *Id.* at 4.

¹⁵⁰ *Id.* at 3.

¹⁵¹ Auletta, *supra* note 134.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Complaint, *supra* note 1, at 2–4.

¹⁵⁶ Martinez, *supra* note 87.

¹⁵⁷ Auletta, *supra* note 134.

¹⁵⁸ *Id.*

¹⁵⁹ See David Carr, *Book Publishing's Real Nemesis*, N.Y. TIMES, Apr. 16, 2012, at B1 ("As low-margin companies trapped in a declining business with fewer outlets, book publishers face an existential threat."); see also Owen, *supra* note 7.

books directly to Amazon customers in the “Kindle” digital format, circumventing the need for publishers.¹⁶⁰ Facing the prospect of obsolescence, brought on by growing number of self-publishing options, traditional publishers were placed in an unfamiliar position of defending their very roles in the industry.¹⁶¹ Defenders of the role of the publishers claimed that publishers add value through their discovery of great books and authors and their editing services, neither of which Amazon provides.¹⁶²

If Amazon could convince customers that books were worth less than the publishers believed, while also expanding the ability of authors to self-publish, then the publishers could be squeezed out of the publishing equation.¹⁶³ The publishers feared a literary world where they no longer existed; a world where all books were offered directly by the author and were *not* vetted by “real” editors.¹⁶⁴ Amazon’s e-book discounts posed an existential threat to the publishers, and the publishers wanted the practice curtailed. At the same time, Apple was preparing to launch the iPad, and Apple intended to sell e-books. The two, Apple and the publishers, came together to limit the retail-price competition amongst e-books.¹⁶⁵ However, the government needed to prove exactly how Apple and the publishers worked together to set prices or stifle competition.¹⁶⁶

According to the DOJ’s complaint, the “price fixing” agreement started with the publishers not long after Amazon had come to dominate the e-book market.¹⁶⁷ In 2008 and 2009, the CEOs of each of the Publisher Defendants met about every three months at restaurants in Manhattan and discussed the increasing market for e-books and Amazon’s role in that market.¹⁶⁸ They discussed what one called the “\$9.99 problem” posed by Amazon.¹⁶⁹

At these restaurant meetings, the company executives discussed how “Amazon had been buying many e-books from publishers for about [\$13.00] and selling them for \$9.99, taking a loss on each book in order to gain market share and encourage sales of its electronic reading device, the Kindle.”¹⁷⁰ According

¹⁶⁰ Carol Memmott, *Authors Catch Fire with Self-Published E-Books*, USA TODAY (Feb. 9, 2011), <http://commcns.org/1e8H1vd>.

¹⁶¹ *See id.* (listing self-publishing firms); *see also* Auletta, *supra* note 134 (describing a possible future without traditional publishers).

¹⁶² Owen, *supra* note 7.

¹⁶³ *Id.* (arguing that the market may be better served without traditional publishers).

¹⁶⁴ *See* Kristine Kathryn Rusch, *The Business Rusch: Slush Pile Truths*, KRISWRITES.COM (July 6, 2011), <http://commcns.org/PGnVUG> (internal quotation marks omitted).

¹⁶⁵ Complaint, *supra* note 1, at 3.

¹⁶⁶ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, 225–26 n.59 (1940).

¹⁶⁷ Complaint, *supra* note 1, at 2–3.

¹⁶⁸ *Id.* at 13–14.

¹⁶⁹ *Id.* at 14–15.

¹⁷⁰ *See* Auletta, *supra* note 134.

to the prosecution in the *Apple* case, by the end of 2009, a conspiracy emerged between the Publisher Defendants, called joint ventures, which had the purpose of stopping retail-price competition and raising e-book prices above \$9.99.¹⁷¹ This strategy, the switch to selling e-books by an “agency model” where retail prices would be dictated by the publishers, was considered impossible without the participation of publishers representing a major portion of Amazon’s market share.¹⁷² Also critical was the inclusion of a “most favored nation” clause in each of Apple’s contracts with the publishers, guaranteeing Apple the ability to match the lowest price of each title offered by any competitor.¹⁷³ This price parity provision imposed severe penalties on any publisher who would choose to stay with the old wholesale model, guaranteeing to each of the publishers that they would act as a group.¹⁷⁴

The Publisher Defendants carried out their plan, so as to avoid antitrust liability. Ken Auletta, a media business writer for the *New Yorker*, reported some of the most important details of the case in an article in spring 2010.¹⁷⁵ After speaking extensively with the publishers, he observed that “none of the publishers seemed to think that they could act alone, and if they presented a unified demand to Amazon they risked being charged with price-fixing and collusion.”¹⁷⁶ That report indicates that the publishers approached the plan with requisite caution about the very prosecution that they ultimately faced, and carefully chose a method they believed would allow them to address the “\$9.99” problem without violating the antitrust laws.¹⁷⁷

On January 27, 2010, Apple announced its plan to enter the e-book market.¹⁷⁸ Prior to that announcement, however, each publisher had contracted with Apple.¹⁷⁹ Then, bound by the most-favored-nation clause in their contracts with Apple, the publishers collectively forced the agency-pricing switch on their e-book sellers in a matter of weeks and months, beginning with Amazon.¹⁸⁰ Former Apple CEO Steve Jobs announced that Apple had made deals with the publishers to sell their books in the iTunes store in his speech at the media event premiering the iPad on January 27, 2010.¹⁸¹ Jobs, after his presentation,

¹⁷¹ Complaint, *supra* note 1, at 15.

¹⁷² *Id.* at 2–3.

¹⁷³ *Id.* at 20–21.

¹⁷⁴ *Id.* at 21.

¹⁷⁵ See generally Auletta, *supra* note 134.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Complaint, *supra* note 1, at 4.

¹⁸⁰ *Id.* at 26–28.

¹⁸¹ Steve Jobs, Address at the Yerba Buena Center for the Arts Announcing the “iBooks App” (Jan. 27, 2010), <http://commcns.org/NLjh6E>.

was interviewed by Walt Mossberg at the *Wall Street Journal*.¹⁸² When Mossberg asked why consumers would pay Apple \$14.99 when they can buy the same book from Amazon for \$9.99, Jobs responded, “That won’t be the case. The price will be the same.”¹⁸³ Continuing, Jobs said, “Publishers may withhold their books from Amazon,” because “[t]hey’re unhappy.”¹⁸⁴

These quotes seemed damning enough to the Justice Department that they were laid-out in the complaint against Apple and the publishers, and were presented throughout the *Apple* trial.¹⁸⁵ What Jobs knew regarding the motivations of the publishers and when he knew it were central issues in the prosecution’s case.¹⁸⁶ If he were still alive at the time, Jobs may have been called to testify in the trial.¹⁸⁷ Instead, the DOJ quoted Walter Issacson’s biography of Steve Jobs and emails he wrote at the time of the e-book deals, which suggest that he knew that Apple was providing the publishers with a conduit through which to coordinate their desired change in pricing models.¹⁸⁸

It is essential to the prosecution of an antitrust collusion case to prove the actual “acts of conspiring” which formed an anti-competitive conspiracy between the defendants.¹⁸⁹ The deals Apple made with each of the publisher defendants were “vertical” in orientation, that is, between entities placed consecutively in the chain of commerce.¹⁹⁰ As discussed previously, vertical price fixing strategies are not *per se* illegal under the Sherman Act in the way that horizontal schemes are.¹⁹¹ Therefore, to foreclose Apple’s ability to argue toward positive impacts of its deal in a “rule of reason” analysis, it was necessary to the Justice Department’s case to show that a “horizontal” agreement was

¹⁸² Auletta, *supra* note 134.

¹⁸³ *Id.* (internal quotation marks omitted).

¹⁸⁴ *Id.* (internal quotation marks omitted).

¹⁸⁵ Complaint, *supra* note 1, at 25–26; *see also* United States Closing Argument Presentation at 60, *United States v. Apple Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013) (No. 12 CV 2826) [hereinafter U.S. Closing Argument Presentation], *available at* <http://commcns.org/1dDhgTr>.

¹⁸⁶ U.S. Closing Argument Presentation, *supra* note 185, at 64.

¹⁸⁷ Nate Raymond, *Apple CEO Cook Ordered to Testify in E-Books Case*, REUTERS (Mar. 13, 2013), <http://commcns.org/1iIJ9PK>.

¹⁸⁸ United States’ Opening Statement Presentation at 2, 57, 73, 78, *United States v. Apple Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013) (No. 12 CV 2826) [hereinafter U.S. Opening Statement Presentation], *available at* <http://commcns.org/MXh6ff>.

¹⁸⁹ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (“Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal *per se*.”).

¹⁹⁰ Andrew Orłowski, *Apple Returns to Courtroom Once Again to Contest Ebook Shafting*, REGISTER (Aug. 9, 2013), <http://commcns.org/1kEN5Qb>; *see* U.S. Opening Statement Presentation, *supra* note 188 (demonstrating the chain of commerce through a slide titled “Publishers Earn Less Under an Agency Model”).

¹⁹¹ *Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 57–58 (1977).

made between market competitors attempting to stifle competition and that Apple was a knowing participant in a conspiracy to make such a deal.¹⁹² To make its case, the Justice Department introduced numerous records of emails and calls between the executives of the publishers and Apple, and presented a graphical representation of the publishers' communications with Apple that depicted Apple at the hub of the communications, surrounded by the Publisher Defendants.¹⁹³ The government claimed that Apple willingly served as a "critical conspiracy participant" with the Publisher Defendants.¹⁹⁴ Apple hoped to show on a factual basis that it did not conspire with the Publishers and did not know that they were attempting to raise e-book prices when it made the deals. Apple argued that it made the agency pricing deals with each of the publishers, and all in close succession, in order to provide "the best possible e-reading experience for consumers" on its iPad and to announce the arrangements at the event introducing the iPad.¹⁹⁵

Even if Apple were to avoid facing a *per se* Sherman Act case by showing that it was not part of the horizontal price fixing conspiracy to which the Publisher Defendants settled before trial,¹⁹⁶ the case could still have been litigated successfully by the DOJ on the broader argument that Apple unreasonably restrained trade by making deals that raised e-book prices.¹⁹⁷ In other words, cases of vertical price-fixing are not considered *per se* anti-competitive, but must be considered under the "rule of reason" analysis discussed in Part II.¹⁹⁸ Unlike with a *per se* case, the evidence must address the actual harm that would have been caused to competition as a result of Apple's collusion with each of the publishers.¹⁹⁹ Most obvious is the harm of the increased prices of e-books to consumers under Apple's agency pricing deals with publishers.²⁰⁰ Apple's e-book prices were soon adopted by e-book retailers and within weeks the price of e-books, including those sold by Amazon, increased by several dollars.²⁰¹ According to one estimate, this price increase cost consumers \$200 million in 2012.²⁰² Although Apple faced a *per se* case, Apple argued, at trial, that its actions did not harm the competition. Apple presented a chart that showed while

¹⁹² *The Apple E-book Antitrust Case: The Closing Arguments*, *supra* note 12.

¹⁹³ See generally U.S. Opening Statement Presentation, *supra* note 188.

¹⁹⁴ Complaint, *supra* note 1, at 19.

¹⁹⁵ *Apple Inc.*, 952 F. Supp. 2d at 700.

¹⁹⁶ See *id.* at 645.

¹⁹⁷ *Id.* at 694.

¹⁹⁸ See discussion *supra* Part II. See the *Standard Oil* case for a discussion of antitrust standards. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 63–64 (1911).

¹⁹⁹ *Apple Inc.*, 952 F. Supp. 2d at 688, 694.

²⁰⁰ *Id.* at 694.

²⁰¹ *Id.*

²⁰² Letter from Mark Cooper to Senator Herb Kohl, *supra* note 16.

prices for e-books sold by the Publisher Defendants did increase, the overall average price of all e-books sold, including by other publishers, actually decreased subsequent to Apple's entry and the switch to agency pricing.²⁰³

From the perspective of consumers, the increased cost of goods available to them is the clearest harm of anti-competitive behavior.²⁰⁴ But, as discussed previously, for advocates of the Chicago School of Law and Economics, increased consumer costs are not the correct measure of harm for Sherman Act violations.²⁰⁵ Judge Richard Posner explains that the layperson's concern that customers of a monopolized good pay a higher price is not the most important adverse effect of a monopoly.²⁰⁶ Posner would argue that the loss to consumers who paid the higher monopoly price was "a transfer payment and therefore a mere bookkeeping entry on the social books."²⁰⁷ More important, according to Posner and other "Law and Economics" advocates, is the economist's concern for a loss of value to the whole economy from the inefficiency caused by consumers' substitution of inefficient alternatives in place of their preferred, but monopolized item.²⁰⁸ According to this view, monopoly's net costs to society are in inefficient substitution, inefficient expense by sellers to gain a monopoly, and inefficient expenses by consumers to avoid paying monopoly prices.²⁰⁹ These net costs are difficult to calculate. It also makes it essential to consider the behavior of consumers within the market.²¹⁰ Nevertheless, when these net costs are found to exist, then there are actionable antitrust violations.²¹¹ Judge Posner says that the profits from monopoly pricing are often wasted on protecting and concealing the monopoly.²¹² Therefore, if Apple and the publishers had used their increased revenue to build and maintain a dominating market share

²⁰³ Exhibit DX-434 ("Average eBook Retail Prices for Sony, Amazon, Barnes & Noble, Apple Google, Books-A-Million, and Kobo, February 2008–March 2012"), *United States v. Apple Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013) (No. 12 CV 2826) [hereinafter Exhibit DX-434], available at <http://commcns.org/1inZ4kR>.

²⁰⁴ Letter from Mark Cooper to Senator Herb Kohl, *supra* note 16.

²⁰⁵ POSNER, *ANTITRUST LAW*, *supra* note 21, at 35; 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, 22 (2007).

²⁰⁶ POSNER, *ANTITRUST LAW*, *supra* note 21, at 13.

²⁰⁷ *Id.*; see also William H. Page, *The Chicago School and the Evolution of Antitrust Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221, 1238 (1989).

²⁰⁸ POSNER, *ANTITRUST LAW*, *supra* note 21, at 12 n.5; Kovacic, *supra* note 205, at 22.

²⁰⁹ POSNER, *ANTITRUST LAW*, *supra* note 21, at 13–14; see also Page, *supra* note 207, at 1233.

²¹⁰ POSNER, *ANTITRUST LAW*, *supra* note 21, at 13–14.

²¹¹ *Id.* at 17; Wesley J. Liebeler, *What Are the Alternatives to Chicago?*, 1987 DUKE L.J. 879, 880 (1987).

²¹² POSNER, *ANTITRUST LAW*, *supra* note 21, at 15.

or to stifle competition, then those expenses are lost to society and, therefore, should be counted as the harm of the antitrust violations as well.²¹³ Under this approach, Apple and the publishers would not be guilty of antitrust violations if the consumers who would have purchased e-books from Apple at the lower price of \$9.99 were driven by higher prices to fill their demand with a less desirable and, therefore, less-efficient alternative (e.g., older, cheap e-book titles, or printed books).

If antitrust liability should be solely based on the harm from a monopoly to society, then one market's failure could counteract the harmful effects of another market's failure (e.g. a monopoly), thereby justifying anticompetitive behavior.²¹⁴ One novel theory, known as the intramarket second-best trade-offs defense, says just that.²¹⁵ Under second-best trade-offs, antitrust defendants have argued that prosecuting them is not in the public interest, because allowing their collusion and reduced production is the second-best alternative to eliminating all market failures, which for one reason or another is not possible.²¹⁶

Apple may argue that Amazon's dominance and maintenance of that dominance, through offering \$9.99 bestsellers, represents a market failure causing irreversible harm to society, and that Apple's collusion was the second-best alternative to the government stopping the market failure directly.²¹⁷ While this argument theoretically offers hope to a defendant not facing a *per se* case, it has not succeeded in the courts.²¹⁸ Judge Posner, while acknowledging that the logic of second-best trade-offs follows from some Chicago School theories, calls its requirements for voluminous economic proof "unworkable" in a practical sense.²¹⁹ Posner declares, "Finally and decisively, antitrust litigation, already fearfully protracted, costly, and complex, would be completely unworkable if a second-best defense were recognized."²²⁰ Chicago School-style economic calculations for society's cost of monopolies are less popular than noneconomic values, such as "fairness," and the Justice Department has cited the

²¹³ *Id.* at 15–16.

²¹⁴ *Id.* at 12 n.5.

²¹⁵ Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs*, 98 MICH. L. REV. 849, 850 (2000).

²¹⁶ POSNER, ANTITRUST LAW, *supra* note 21, at 13 n.5; Hammer, *supra* note 215, at 882–91; Claus Thustrup Hansen, *Second-Best Antitrust in General Equilibrium: A Special Case*, 63 ECON. LETTERS 193, 196–97 (1999).

²¹⁷ See Richard B. McKenzie, *In Defense of Apple*, LIBR. ECON. & LIBERTY (July 2, 2012), <http://commens.org/1cEYs8q> (criticizing the DOJ's rationale for bringing an antitrust-enforcement action against Apple).

²¹⁸ Hammer, *supra* note 215, at 883.

²¹⁹ POSNER, ANTITRUST LAW, *supra* note 21, at 13 n.5.

²²⁰ *Id.*

increased cost to consumers as the primary harm caused by Apple in this case.²²¹

At trial, Apple also argued against prosecution, because there was a net benefit to consumers as a result of its agency pricing deals with the publishers.²²² The defense claimed that Apple's entry into e-book sales provided an alternate distribution channel for e-books, increasing competition between the retailers to offer authors and publishers better services and prices.²²³ As a result, Apple's e-book market participation boded well for a future with a more robust e-book seller marketplace.²²⁴ Additionally, with Amazon's market share reduced below its prior level of near monopoly, the retail giant was suddenly forced to compete with Apple and others. The defense argued that Amazon would be compelled to innovate and to offer better services to its customers and its growing (as well as its growing horde of self-published e-book authors). Although these ends did not ultimately justify Apple's means under the law, perhaps they should have.

V. THE CASE AGAINST AMAZON

The Department of Justice's Antitrust Division has successfully pursued a case against Apple and the five Publisher Defendants for colluding to raise the price of e-books, in restraint of trade in violation of § 1 of the Sherman Act.²²⁵ But the government's decision to prosecute the case has been criticized for

²²¹ See, e.g., Edwin J. Hughes, *The Left Side of Antitrust: What Fairness Means and Why It Matters*, 77 MARQ. L. REV. 265, 269 (1994); Complaint, *supra* note 1, at 5.

²²² "To support its assertion that Apple's arrangement was a bad one for consumers, the government showed a slide indicating that the average price for e-books sold by the five publishers spiked after they signed the deal." Tangel, *supra* note 7, at B2. "Apple's attorney denied the government's accusations and said that the company had brought innovation to a broken e-book market that has benefited consumers." *Id.*

²²³ Shara Tibken, *Apple and the DOJ Face Off over E-Book Prices (FAQ)*, CNET NEWS (June 3, 2013, 4:00 AM), <http://commcns.org/11GMAT9> (discussing Apple's argument that its e-book participation "fostered innovation and competition by breaking Amazon's monopolistic grip on the publishing industry and by allowing publishers to set their own prices").

²²⁴ Shara Tibken, *Apple's Eddy Cue: Yep, We Caused E-book Pricing to Rise*, CNET NEWS (June 13, 2013 10:33 AM), <http://commcns.org/1e8Haid> (observing that Apple's defense counsel sought to show that Apple "was looking out for customers . . . not trying to change the e-book market. And . . . while some prices would be higher, consumers ultimately would benefit from the bigger selection of titles").

²²⁵ *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 691 (S.D.N.Y. 2013) ("The Plaintiffs have shown through compelling evidence that Apple violated Section 1 of the Sherman Act by conspiring with the Publisher Defendants to eliminate retail price competition and to raise e-book prices."); see also 15 U.S.C. § 1 (2012) ("[E]very contract . . . or conspiracy, in restraint of trade or commerce . . . is . . . illegal.").

failing to recognize a major contextual factor that critics say negates the economic justification for the case.²²⁶ Those critics point out that Amazon built and maintained a near total monopoly in the e-book market with negative results for consumers and the economy.²²⁷ According to this theory of justification, Amazon had leveraged market dominance to do irreversible damage to the publishing industry for several years before Apple even began selling e-books.²²⁸ Amazon's domination of e-book retail sales, the company's impact on the print book industry, and the ways in which Amazon's practices have "damaged" the publishing industry are frequently raised by critics of the case against Apple as a means of defending Apple's practices.²²⁹ Therefore, in order to evaluate the case against Apple, it is helpful to examine Amazon's activities in the relevant market, looking for anticompetitive practices or any other contributions to market failures that may undermine, at least on some level, the legitimacy of the case against Apple.

Amazon's involvement in the sale of e-books began in 2007 with an aggressive entry into the market for digital books that combined the simultaneous introduction of the Kindle Reader mobile device and the company's first offer-

²²⁶ See *United States v. Apple Inc.*, 889 F. Supp. 2d 623, 635 (S.D.N.Y. 2012) (noting that the critics of the proposed final judgment argued that "defendants' collusive behavior had substantial pro-competitive effects"); Philip Elmer-DeWitt, *The Apple E-book Case Is Headed for the 2nd Circuit*, CNNMONEY (July 10, 2013 1:30 PM), <http://comcnns.org/1dbKc1x>.

²²⁷ See *Apple Inc.*, 889 F. Supp. 2d at 635 (observing that the critics of the proposed final judgment claimed that Apple and the Publisher Defendants' "collusive behavior . . . limit[ed] the negative impact of Amazon's" monopolistic behavior); Roger Parloff, *U.S. v Apple: A Puzzle with a Big Piece Missing*, CNNMONEY (June 25, 2013, 2:51 PM) [hereinafter *A Puzzle with a Big Piece Missing*], <http://comcnns.org/1lGMFpV> (commenting that the "crux of what makes the case so peculiar" is that Amazon was the dominant player in the market, not Apple, and Amazon had designed its prices "to exclude new entrants, drive out competitors, and consolidate [its] monopoly power").

²²⁸ Schumer, *supra* note 2, at A15 (commenting that early-on, in the e-book business, Amazon had captured a 90% market share and forced publishers and authors "to [choose between] allow[ing] their books to be sold at the prices Amazon set . . . or stay[ing] out of the e-books market entirely"); Owen, *supra* note 7 (noting that before Apple entered the market, "Amazon [had] steadily push[ed] down the prices of e-books, [and the] big book publishers were sinking fast"); Brad Stone, *Amazon's Hit Man*, BLOOMBERG BUSINESSWEEK (Jan. 25, 2012), <http://comcnns.org/1fUStqm> ("Physical book sales have been flat for a decade and are starting to get eclipsed by e-books.").

²²⁹ Schumer, *supra* note 2, at A15 (claiming that Amazon's monopoly "served Amazon well, but it put publishers and authors at a distinct disadvantage as they continued to try to market paper books and pave a way forward for a digital future"); Shara Tibken, *Apple: We Wanted a 'Level Playing Field' for Publishers*, CNET NEWS (June 4, 2013 11:11 AM), <http://comcnns.org/1cNOOjt> (quoting testimony from the CEO of a settling Publisher Defendant—Penguin Group—as saying, "There's a fairly delicate ecosystem in publishing," and although the industry is "more and more efficient as the years go by . . . print is definitely going down").

ing of e-books to read on the Kindle.²³⁰ Amazon's prior position as the leading online seller of traditional printed books, combined with offering the innovative and popular Kindle Reader, were important factors in fostering Amazon's success in this new enterprise.²³¹ E-books and mobile reading devices have been around for years, but Amazon's sales far outpaced any prior entrant into the market.²³² Critics of Amazon have pointed out that some additional noteworthy practices helped propel Amazon to near total control of the market for e-books.²³³ By 2010, Amazon was responsible for an estimated 90% of all e-books sold.²³⁴ This dominance was sustained in part by Amazon's choice to offer bestselling e-book titles for the price of \$9.99, even while it was usually paying the publishers several dollars more for each book it sold.²³⁵ This tactic, known as "loss leading," is widely recognized as a means of attracting customers and expanding market share.²³⁶ Typically, a "loss leading" seller accepts a loss on a sold item or a class of items, at one time, with the expectation that the uniquely low price will drive buyers to purchase other items, which can be priced higher than competitive market value, in order to make up for the loss the seller takes on the "leader" item.²³⁷

In Amazon's case, the tactic may instead have been a "predatory pricing" scheme, intended to prolong Amazon's leading position in the market while

²³⁰ *A Puzzle with a Big Piece Missing*, *supra* note 227; Martinez, *supra* note 87 (observing that when Amazon introduced the Kindle in 2007, it simultaneously revealed that it "would sell newly released e-books for \$9.99, below the wholesale price").

²³¹ Martinez, *supra* note 87 (noting that Amazon accounted for "at least 75 percent of [online] print-book sales" and "20 to 25 percent of all U.S. book sales"); Ivan Mironchuk, *E-books - How Far Have We Come*, DATABASE PUB. CONSULTANTS (July 11, 2011), <http://commcns.org/PdWjG9>.

²³² See Marie Lebert, *eBooks: 1998 - The First eBook Readers*, PROJECT GUTENBERG NEWS (July 16, 2011), <http://commcns.org/MXhg6n> (stating that the first e-book readers as we know them today, were introduced in 1998); Alex Hern, *Amazon Launches Yet Another Loss-Leader, but What Is Its Plan?*, NEW STATESMAN BLOG (Oct. 12, 2012, 2:42 PM), <http://commcns.org/1n6HgNr> (noting that the Kindle is a market dominator for e-book readers).

²³³ Martinez, *supra* note 87.

²³⁴ Hiltzik, *supra* note 9.

²³⁵ *Id.*; see also Martinez, *supra* note 87 (discussing the effects of Amazon's selling at a loss).

²³⁶ BARRON'S DICTIONARY OF FINANCE AND INVESTMENT TERMS 338 (5th ed. 1998) ("Loss leader concept, primarily in retailing, where an item is priced at a loss and widely advertised in order to draw trade into the store. The loss is considered a cost of promotion and is offset by the profits on other items sold.").

²³⁷ For example, some critics accuse Amazon of being a "loss leader" in the book business, because with the millions of other products that it sells, "Amazon can practically give books away to get customers, and then it can make money on them by selling them potato chips and computers." Martinez, *supra* note 87.

relying on the prospect of a future opportunity to raise prices.²³⁸ The prices for most e-books Amazon sells cost no more than \$9.99; further, Amazon claims that it sells its Kindle Reader device at cost.²³⁹ Critics contend that Amazon's financial profile signals that a future price increase may be inevitable.²⁴⁰ Analysts have noted that Amazon's current price-to-earnings ratio—that is, the share-price compared to the earnings-per-share—reveals that investors expect Amazon's profits to increase drastically.²⁴¹ However, it is unclear how Amazon's profits can increase without increasing the prices on the items it sells, including e-books.²⁴² Critics also point out that e-books purchased for the Kindle can only be read on a Kindle device or application and customers' purchased electronic libraries are therefore “locked” to their Kindles forever.²⁴³ Therefore, the longer that Amazon could prolong its market dominance, then the more difficult it would be for its customer base to give up their Kindles and migrate to a competing e-reader platform, if Amazon raised prices for e-book bestsellers up to or above the wholesale price.

The use of sub-market prices to keep competitors out of the market is not new.²⁴⁴ The drafters of the Sherman Act discussed hypothetical scenarios in which a monopolist discourages competitors by charging low prices that no one else can meet.²⁴⁵ But at that time and for many decades thereafter, much of activity that came to be referred to as “predatory pricing” involved charging prices that were too low for competitors to match, though still above the costs of the alleged violator.²⁴⁶ The modern use of the concept has been brought into focus, starting in the 1970s, by a highly influential paper that defined prices as predatory only when they are below the marginal costs of the seller.²⁴⁷ Then, in *Matsushita v. Zenith*, the Supreme Court downplayed the significance of predatory-pricing conspiracies. The *Matsushita* Court believed that such conspiracies were “self-detering” due to the heavy costs that failure imposed on

²³⁸ See Hern, *supra* note 232.

²³⁹ Press Release, Amazon, Kindle Fire HD and Kindle Fire HD 8.9" Now Available for Pre-Order (May 23, 2013), phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=1823563 (announcing that Amazon offers over 1.2 million e-books at \$9.99 or less, and over 650,000 at \$4.99 or less.); Hern, *supra* note 232.

²⁴⁰ Hern, *supra* note 232.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Hiltzik, *supra* note 9.

²⁴⁴ See POSNER, ANTITRUST LAW, *supra* note 21, at 34.

²⁴⁵ For example, the framers of the Sherman Act seemed concerned that low prices were harmful because they put small businesses competing for trusts at a competitive disadvantage. *Id.*; see also PERITZ, COMPETITION POLICY IN AMERICA, *supra* note 43, at 18 (quoting a senator as saying that prices should be fair, not cheap).

²⁴⁶ Wildfang, *supra* note 18, at 327.

²⁴⁷ *Id.*

the conspirators.²⁴⁸ Since *Matsushita*, predatory pricing has been considered rare and self-correcting, because the predator-seller must: first, sell products at a loss for long enough to drive competitors out of business permanently; and, second, have a reasonable expectation that he will be able to raise prices at a later time above the competitive market level and, thereby, profit.²⁴⁹

Amazon argues that it did not engage in predatory pricing and that its incredible success in the e-book market is due to the fact that it was the first company that successfully entered that market.²⁵⁰ Amazon's innovative technology and marketing strategies²⁵¹ should be rewarded by profits, not prosecuted. Amazon should argue that its monopoly control of the e-book market is temporary and would not harm any market competitors.²⁵² E-books exist in a digital marketplace, a market that new entrants can enter easily.²⁵³ Distributing e-books involves practically no marginal costs;²⁵⁴ therefore, in the e-book market, conspirators have less incentive, than they otherwise would in a traditional market,²⁵⁵ to use monopoly power to raise prices and sell fewer units.

The price of a book should be what the market demands, but book pricing has been inflated by the publishers; and Amazon has used those inflated prices to seize the e-book market.²⁵⁶ It is important to distinguish between books that are interchangeable (genre fiction, diet books, manuals, and etc.) and books for which there are no substitutes, such as a book by your favorite author.²⁵⁷ Seth

²⁴⁸ *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 595 (1986).

²⁴⁹ *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 224–26 (1993).

²⁵⁰ Martinez, *supra* note 87.

²⁵¹ See *The Walmart of the Web; Amazon*, ECONOMIST (Oct. 1, 2011), <http://commcns.org/1cld5wY> (explaining how Amazon rose to become one of the most successful online retailers).

²⁵² See *Brooke Grp. Ltd.*, 509 U.S. at 224–25 (describing the duration and injury requirements).

²⁵³ New entrants in the e-book market can easily find a wide selection of self-publishing companies, online e-book creation tools, and other valuable resources that will guide them through the entire process of self-publishing an e-book. David Carnoy, *How to Self-Publish an eBook*, CNET REVIEWS (June 1, 2012), <http://commcns.org/PG09uX>.

²⁵⁴ Godin, *supra* note 86 (“On one hand, the marginal cost of delivering a single e[-]book is close to zero. It might cost Amazon . . . a dime to transmit it, but it certainly costs the publisher nothing.”).

²⁵⁵ See Thomas G. Krattenmaker et al., *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 249 (1987).

²⁵⁶ See *The Walmart of the Web; Amazon*, *supra* note 251 (“Amazon’s pricing strategy also reflects one of the firm’s core beliefs, which is that cheap stuff makes customers cheerful. Call it the Walmart of the web.”); Jeffrey A. Trachtenberg, *E-Book Prices Prop Up Print Siblings*, WALL ST. J., Sept. 12, 2011, at B1 (“Even as readers grow more comfortable with digital books, some continue to question why so many of the most popular new e-books are priced so high.”).

²⁵⁷ Godin, *supra* note 86.

Godin, founder of *The Domino Project*, argues that the natural price for e-books is very low.²⁵⁸ For example, many self-publishing kindle authors will sell their books for a few dollars.²⁵⁹ Self-publishing authors claim that they have watched their sales multiply many times when they reduced their prices from \$2.99 to \$0.99.²⁶⁰

Amazon might also defend its practices in e-books by pointing out that monopolies affect digital products differently than they do physical items.²⁶¹ The printing and distribution of print books is costly.²⁶² Every extra book printed and sent to stores presents a risk that those costs will not be recouped if the book remains unsold. Meanwhile, the marginal cost to distribute e-books is only a few cents,²⁶³ and entering the e-book market as a distributor requires little more than buying a domain name.²⁶⁴ Under these conditions, Amazon's opportunity to use its dominant market position to engage in competitive pricing was only viable if the company was working with a longer-term strategy to somehow keep new competitors from entering the e-book market after raising prices back to profitable levels.

Ultimately, the case against Amazon for antitrust in e-book sales depends on an understanding of Amazon's strategy.²⁶⁵ Amazon intended for e-books to replace print books as the standard medium, and it sought to make \$9.99 the standard price for e-books.²⁶⁶ Amazon's internal strategy in e-books is somewhat inscrutable, and when Charlie Rose, in 2009, asked Amazon founder and CEO Jeff Bezos to describe his outstanding talent, he said it was his focus on the long term and a "willingness to be misunderstood."²⁶⁷ Amazon was operating within the law, if the company was pricing e-books below its price paid to publishers in order to push customers to consider e-books generally. Then, once the market for digital books grew sufficiently, Amazon could begin to

²⁵⁸ *Id.*

²⁵⁹ Rebecca Ratcliffe, *Kindle the Fire to Self-Publishing*, GUARDIAN (Jan. 13, 2012), <http://commcns.org/1cld9Nf>.

²⁶⁰ Mathew Ingram, *Future of Media: The Rise of the Million-Selling Kindle Author*, GIGAOM (June 20, 2011, 9:19 AM), <http://commcns.org/1ilJKAZ>.

²⁶¹ See generally Asher Meir, *Is Amazon's Low Pricing Competitive or a Real Monopoly?*, JERUSALEM POST (Apr. 20, 2012), <http://commcns.org/1fgn81m>.

²⁶² Alan Finder, *The Joys and Hazards of Self-Publishing on the Web*, N.Y. TIMES, Aug. 16, 2012, at B8.

²⁶³ *Id.*

²⁶⁴ Suw Charman-Anderson, *Libiro: New Ebook Store for Indie Authors*, FORBES (Sept. 17, 2013), <http://commcns.org/1cEYMnG>.

²⁶⁵ Farhad Manjoo, *The Stupidest Thing Apple Ever Did*, SLATE (July 11, 2013), <http://commcns.org/1hYMW7s>.

²⁶⁶ *Id.*

²⁶⁷ Auletta, *supra* note 134.

charge higher prices.²⁶⁸ However, if Amazon sought to eliminate or inhibit competition by gaining the majority of U.S. e-book customers, and if Amazon then increased prices once it had locked-in its customer-base, then Amazon would be guilty of antitrust violations.

VI. ANTITRUST POLICY SHOULD BE FLEXIBLE ENOUGH TO RECOGNIZE MARKET FAILURES AND AVOID MAKING MATTERS WORSE

The contrasts between the legal liabilities of Amazon and Apple show an important need for an extensive policy analysis before the decision is made to prosecute an antitrust case. Anti-competitive behavior must be considered in light of the surrounding circumstances.²⁶⁹ Prosecutions, such as that against Apple, should be reined in. The Justice Department could adjust the policies that guide prosecutors to account for the discord between the prosecution of Apple and the inability to address Amazon's prior "damage" to competition. A reasonably narrow rule could be added to the Antitrust Division Manual that, in the case of a significant justification of a possible market failure, which is not addressed by the Sherman Act as currently interpreted, prosecutors should decide against pressing antitrust charges.²⁷⁰ The negative consequence of punishing the success of lawful businesses is the highly publicized precedents that have wide effects on economic efficiency.²⁷¹ These consequences outweigh the harm from the missed prosecution of a bad actor.²⁷² Prosecutors should incorporate the underlying logic of the second-best tradeoffs defense into their decisions to prosecute Sherman Act violations.²⁷³

Additionally, Congress should address this issue through statute. It would not be necessary, and may do more harm than good, to amend the Sherman

²⁶⁸ *Id.* ("[A] close associate of Bezos puts it more starkly: 'What Amazon really wanted to do was make the price of e-books so low that people would no longer buy hardcover books. Then the next shoe to drop would be to cut publishers out and go right to authors.'").

²⁶⁹ Timothy J. Brennan, "High-Tech" Antitrust: Incoherent, Misguided, Obsolete, or None of the Above? *Comments on Crandall-Jackson and Wright*, 38 REV. INDUS. ORG. 423, 432 (2011), available at <http://commns.org/1maGSfq> ("We should use all of the specific information that is available at the time in assessing an alleged anticompetitive merger or practice, including whether it would suppress or promote innovation.").

²⁷⁰ Bryan Chaffin, *The DOJ Only Wants to Control (and Limit) Apple's iTunes*, MAC OBSERVER (Aug. 2, 2013, 6:45 PM), <http://commns.org/1hWt6cg> (commenting that the DOJ's remedy against Apple "hands unprecedented power to Apple's competitors").

²⁷¹ Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2-3 (1984).

²⁷² *Id.* at 3.

²⁷³ Hammer, *supra* note 215, at 882-91 (identifying the elements that a defendant must show to make the intramarket second-best defense and discussing the intramarket second-best defense).

Act.²⁷⁴ Instead lawmakers may amend the Tunney Act, which regulates the Justice Department's practices with regard to prosecuting and settling antitrust cases.²⁷⁵ The Tunney Act already requires that any entered consent decree must be "in the public interest" as determined by the court that enters the settlement.²⁷⁶ An amendment could add the additional requirement that the court must find that the circumstances of the market, as it existed prior to the alleged antitrust, represented a healthier competitive process than the market circumstances that resulted from the alleged antitrust. This would sufficiently describe the vast majority of antitrust claims, leaving out only those prosecutions that punish behaviors that arguably led to an improvement in competition in the relevant market, such as that of Apple and the Publisher Defendants.

Clearly this proposal is not a perfect solution. One problem is that, limited by the bounds of the Tunney Act, it would only regulate proposed consent decrees and would have no direct effect on the ability of prosecutors to pursue cases in court.²⁷⁷ However, if such a change was made, perhaps courts would take note of Congress's intent to regulate antitrust prosecutions in this manner and allow the change to influence case law at the margins. The lion's share of antitrust cases are settled by defendants—as were the cases against each of the Publisher Defendants—and this amendment would have created a possible barrier to those settlements, possibly forcing the Justice Department to follow through to a trial or else drop the charges.²⁷⁸

If lawmakers go beyond the Tunney Act and seek to amend the Sherman Act substantially, they should be mindful of the precedents undergirding the law. Standing alone, § 1's first sentence supports vast volumes of law and analysis, and it impacts practically every segment of the economy. So far, Congress has refrained from altering the substance of either of the Sherman Act's sections.²⁷⁹ The Sherman Act's framers' contradictory and antiquated

²⁷⁴ See THE ANTITRUST PARADOX, *supra* note 100, at 6, 177 (explaining that proposals for antitrust legislation, which focus on preventing mergers and enhancing enforcement powers, is misplaced, because there "is no reason to believe that the destruction of national wealth involved in the enactment of these bills or other recent proposed legislation would be compensated by any social gain").

²⁷⁵ See Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706, 1706, 1709 (1974).

²⁷⁶ 15 U.S.C. § 16(e) (2012).

²⁷⁷ *Id.*; United States v. Microsoft Corp., 56 F.3d 1448, 1459–60 (D.C. Cir. 1995) ("The court's authority to review the [consent] decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place.").

²⁷⁸ Jeffrey A. Trachtenberg, *Macmillan Settles Antitrust Case over E-Book Pricing*, WALL ST. J. (Feb. 8, 2013), <http://commcns.org/1e8HvBo>.

²⁷⁹ However, amendments to the Sherman Act have been introduced. For example, Senator Herb Kohl proposed a bill to reverse the *per se* rule against vertical price-fixing, which was established by the holding in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551

statements suggest that few of them were certain of the specific legal and economic implications of the law when it was passed.²⁸⁰ Thus, today's lawmakers should be cautious when proposing to change the Sherman Act's substance. Such changes could have numerous unintended consequences when interpreted by courts alongside the existing jurisprudence.²⁸¹

VII. CONCLUSION

The Justice Department's successful case against Apple was based on clear precedents backed by a challenging case for Apple to maintain. As the law stands, there is little room for a defendant like Apple, in a case of a *per se* anti-trust violation, to justify the existence of a harmful monopoly or other market failure. Therefore, Apple's primary defense strategy was to contest the factual basis for the Justice Department's case: that Apple knowingly participated in a conspiracy for the purpose of raising e-book prices.²⁸² Nonetheless, Apple also pressed against the policy argument, which was being argued by the prosecution—as a result of Apple's deals with the publishers, consumers were ultimately harmed by higher prices on e-books.²⁸³

For years, Amazon distressed the book publishing industry, authors, and brick-and-mortar stores with its insistence on charging \$9.99 for most bestselling e-books, but that is not a crime. Nor is it a justification in any yet recognized legal sense for Apple's subsequent deals with the Publishers that ended the "\$9.99 problem." Although it is conceivable that Amazon's internal strategy was consistent with a plan to benefit indirectly from pricing e-books at a loss, there is insufficient evidence that Amazon intended to raise the prices on e-books at a later date. Doing so would immediately draw in competitors, who have little or no barriers to entry, and who would quickly eat up market share. Amazon's strategy was most likely a means to expand adoption of the proprie-

U.S. 877 (2007). See Discount Pricing Consumer Protection Act of 2011, S.75, 112th Cong. § 2(b)(1) (2011).

²⁸⁰ PERITZ, *COMPETITION POLICY IN AMERICA*, *supra* note 43, at 17. *But see Legislative Intent and the Policy of the Sherman Act*, *supra* note 45, at 7 ("Congress intended the courts to implement (that is, to take account in the decision of cases) only that value we would today call consumer welfare. To put it another way, the policy the courts were intended to apply is the maximization of wealth or consumer want satisfaction.").

²⁸¹ Am. Bar Ass'n, Comments Regarding the Oil and Gas Industry Act of 2006, S. 2557, 109th Cong., at 1, 3 (Apr. 2006), available at <http://commcns.org/MXhIkP> (last visited Aug. 20, 2013).

²⁸² Sam Gustin, *Apple Found Guilty in E-Book Price Fixing Conspiracy Trial*, TIME (July 10, 2013), <http://commcns.org/1fNFCWs>.

²⁸³ See Exhibit DX-434, *supra* note 203 (showing, by a chart, that the average price that consumers paid for e-books has decreased steadily since April 1, 2010).

tary Kindle Store format for e-books, thus “locking” customers’ libraries of purchased in to the format for good. Even this theory is only supported by inference, and is far too weak to support a Sherman Act § 2 case against Amazon.

But, as discussed above in the previous section, perhaps there should be an additional procedural check put in place in the Tunney Act to protect antitrust defendants who may argue that their actions are justified by significant market failures. Courts have produced voluminous law addressing just these questions and have reached some stable guidelines for reasonable limits for antitrust cases, along with *per se* analysis for certain irredeemable practices. Changing the Sherman Act itself may do more harm than good, by affecting the existing jurisprudential standards in unintended ways. Instead, the problems of Apple’s prosecution can be addressed cautiously with narrow changes to ways that federal prosecutors conduct their cases. Either the Justice Department, or Congress through an amendment to the Tunney Act, can add the requirement that prosecutors consider the possibility that it may not be in the public interest to prosecute supposedly anticompetitive practices like those of Apple when they result in some form of arguably positive effects on the relevant market.