# Note

# The Sustainability Paradox: A Competitive Case for Sustainability Agreements

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## Abstract

*American antitrust law has remained focused on one goal since the first antitrust statute—the Sherman Act—was passed: promoting competition. In striving toward this foundational goal, the Court has refined and expanded the contours of antitrust jurisprudence and the analytical tools it applies to alleged violations of competition law. As the consequences of climate crises grow ever-more ubiquitous, the Court must employ its historic willingness to add nuance to antitrust analysis by expanding the rule of reason to allow firms to engage in private collective actions aimed at curbing the worst impacts of climate change directed at markets.*

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## Introduction

Since the turn of the twentieth century, American antitrust jurisprudence has upheld and protected one value: competition.[1] While tools and balancing tests used to measure competitive effects have evolved since the Sherman Act[2] was passed in 1890, they have always been deployed to preserve competitive markets.[3] As antitrust law expanded from its early, relatively limited focus on predatory monopolies to its broader contemporary considerations—which include concerns about mergers and interlocking directorates in addition to anticompetitive business practices[4]—courts developed the "rule of reason" to analyze antitrust issues.[5] Under the rule of reason, some activities—such as price fixing, limitations on output, and intentional market division—are considered per se illegal, although other activities may be defensible if litigants can show the behavior is not actually anticompetitive.[6]

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1 *See infra* Part I.

2 15 U.S.C. §§ 1–7.

3 *See id.* § 1. *See generally* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. Econ. Persps. 43 (2000) (providing a detailed overview of the last one hundred years of antitrust jurisprudence).

4 *The Antitrust Laws*, FTC, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/SS4C-XYD8].

5 *See* Kovacic & Shapiro, *supra* note 3, at 45.

6 *See infra* Section I.B.2. For further reading, see generally Andrew I. Gavil, William E. Kovacic, Jonathan B. Baker & Joshua D. Wright, Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy 115–27 (4th ed. 2022).

From the 1970s through present day, courts have measured competitiveness via the consumer welfare standard, which prompts courts to consider whether the allegedly anticompetitive behavior negatively impacts consumers, typically through unnaturally high prices.[7] When deciding an antitrust case, courts look solely to the economic consequences of an action.[8] Justifications for restraints on competition may include legitimate business purposes and other economic factors but cannot include moral, social, or ethical considerations.[9] Some consider these boundaries of antitrust law too limited and argue that antitrust jurisprudence should be expanded to consider factors, like sustainability or environmentalism, that go beyond purely empirical, economic factors like prices, output, and market share.[10]

Currently, courts do not accept "green" arguments, or other types of social welfare arguments, as defenses for anticompetitive behavior.[11] Under the current application of the consumer welfare economic framework, entities are prohibited from forging agreements that would raise prices or restrict output even if the defending entity can demonstrate significant positive effects of the agreements.[12] While there is a lively debate in Europe exploring how competition law could expand to consider sustainability and environmental factors,[13] the Supreme Court's explicit rejection of any noneconomic antitrust defense has suppressed a similarly active domestic conversation.[14] In the United States,

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7 *See* Christine S. Wilson, Comm'r, U.S. Fed. Trade Comm'n, Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get 1 (Feb. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf [https://perma.cc/E2N8-9MDU].

8 *See, e.g.*, Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 696 (1978); Standard Oil Co. v. FTC, 340 U.S. 231, 249 (1951); Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1912).

9 *See* discussion *infra* Section II.A.

10 *See* discussion on green antitrust *infra* Section II.C. *See generally* Paul Balmer, *Colluding to Save the World: How Antitrust Laws Discourage Corporations from Taking Action on Climate Change*, 47 Ecology L. Currents 219 (2020).

11 *See* Balmer, *supra* note 10, at 224–25 ("Because courts cannot even consider the obviously beneficial goals of those types of agreements, corporations would be wise to avoid them entirely.").

12 *See* FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 432–34 (1990).

13 *Compare* Michal Konrad Derdak, *Square Peg in a Round Hole? Sustainability As an Aim of Antitrust Law*, 14 Y.B. Antitrust & Regul. Stud., no. 14, 2021, at 39, 41, *and* Alexander Raskovich, Douglas H. Ginsburg, Bruce H. Kobayashi, Abbott B. Lipsky, Jr., Joshua D. Wright & John M. Yun, Comment, *Colluding to Go Green: Global Antitrust Institute Comments on the Austrian Federal Competition Authority's Draft Guidelines to Exempt "Sustainability Agreements*,*"* Geo. Mason L. & Econ. Rsch. Paper Series, June 22, 2022, at 1, *and* Simon Holmes, *Climate Change, Sustainability, and Competition Law*, 8 J. Antitrust Enf't 354, 356 (2020), *with* Maarten Pieter Schinkel & Leonard Treuren, *Green Antitrust: (More) Friendly Fire in the Fight Against Climate Change* (Amsterdam Ctr. for L. & Econ., Working Paper No. 2020-07, 2020).

14 For an example of recent agency action in line with Supreme Court precedent that stifled an attempt by industry to collaborate on reducing emissions, see Hiroko Tabuchi & Coral

suggestions for how sustainability considerations could be incorporated into antitrust practice have largely advocated for congressional action.[15]

Contemporary antitrust jurisprudence is singularly concerned with empirical economics, which wholly bars defendants from presenting evidence of environmental issues or impacts in competition cases.[16] Unfortunately, and in the competition space, ironically, environmental problems are becoming increasingly critical issues to the health and functioning of the economy, a phenomenon that will only worsen over the coming years.[17] If not mitigated, the consequences of climate change and environmental degradation will cause significant disruptions to both existing and future markets, as those consequences will likely impact the stores of raw natural resources, supply and manufacturing chains, the job market, and the disposable income of consumers.[18] These climate consequences pose a serious risk to market competition and consumer welfare.

The coming climate crisis requires a new way of thinking about market health and competition. At the same time, old habits die hard. Even a cursory examination of antitrust law demonstrates that courts are highly unlikely to accept antitrust defenses focused purely on the social good of protecting the environment.[19] Congressional deadlock and partisanship make it even more difficult to imagine legislative action on antitrust and sustainability.[20] If Congress will not change the law, and courts are loath to adopt social good considerations into the law, the question then becomes whether sustainability agreements can be justified within the existing framework. What if business agreements to promote sustainability, such as output restrictions in at-risk markets or bilateral decisions to use more renewable production models, could be considered measures that promoted and reinforced the viability of long-term market competition? What if, even in the face of potential

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Davenport, *Justice Dept. Investigates California Emissions Pact That Embarrassed Trump*, N.Y. Times (Sept. 6, 2019), https://www.nytimes.com/2019/09/06/climate/automakers-california-emissions-antitrust.html [https://perma.cc/79HW-XUFT].

15 *See, e.g.*, Dailey C. Koga, Comment, *Teamwork or Collusion? Changing Antitrust Law to Permit Corporate Action on Climate Change*, 95 Wash. L. Rev. 1989, 2021–25 (2020); Balmer, *supra* note 10, at 230–31.

16 Balmer, *supra* note 10, at 224–25.

17 *See* Coral Davenport & Jeanna Smialek, *Federal Report Warns of Financial Havoc from Climate Change*, N.Y. Times (Nov. 3, 2021), https://www.nytimes.com/2020/09/08/climate/climate-change-financial-markets.html [https://perma.cc/FDJ8-477B].

18 *See* U.S. Glob. Change Rsch. Program, Fourth National Climate Assessment 25 (2018), https://nca2018.globalchange.gov/ [https://perma.cc/N6W9-8326].

19 *See* discussion *infra* Sections II.A–.B on the limits of contemporary antitrust jurisprudence.

20 *See, e.g.*, Faye Shen Li Thijssen, *How Partisanship Hinders Action on Environmental Policy*, Fulcrum (Mar. 22, 2022), https://thefulcrum.us/big-picture/Leveraging-big-ideas/environmental-gridlock [https://perma.cc/WXS5-BDK4] (highlighting partisan disagreements over the origins of climate change, the parties' divergent policy priorities, and the impact of negative partisanship).

short-term anticompetitive effects, courts considered the long-term consequences of climate to a relevant market when determining whether an alleged antitrust violation was truly anticompetitive?[21]

This Note argues that courts should expand the rule of reason to allow sustainability defenses in antitrust litigation when defendants can provide sufficient evidence that a horizontal agreement[22] between two or more firms is necessary in the long term to preserve a competitive market that is at serious risk of disappearing due to environmental destruction. This argument does not ask courts to completely reject the consumer welfare standard or stray from the core function of antitrust law, preserving competition.[23] Instead, this Note asks the courts to take long-term competitive consequences into consideration in addition to immediately quantifiable effects like pricing or market share. If environmental degradation threatens the long-term viability of a competitive market, then market competition could be preserved by allowing limited horizontal agreements between businesses intended to restore or preserve the relevant market. Such agreements will promote future competition and enhance consumer welfare by maintaining the market and its goods or services.

Part I of this Note explores the development and evolution of American antitrust law, with an emphasis on the rule of reason, the quick look, and per se illegality. Part II provides an analysis of the ways in which current antitrust law is unequipped to handle the looming impacts of climate change and how a broad restructuring of antitrust law is not cognizable. Part II also examines the international green antitrust movement's efforts to integrate competition and climate considerations. Part III lays out the proposed solution: an expanded rule of reason with the capacity to consider sustainability defenses that remains in line with the antitrust statutes, antitrust precedent, and, paramountly, competition. Part III also provides a speculative application of the solution to a hypothetical competition case. This Note argues that just as past courts adapted antitrust jurisprudence to respond to the competition issues of the last century, contemporary courts can refashion existing antitrust tools to address the competition concerns of the coming century.

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21 For a discussion of market definition in the climate context (and associated difficulties), see generally Michael A. Carrier, *An Antitrust Framework for Climate Change*, 9 NW. J. TECH. & INTELL. PROP. 513, 514–15 (2011).

22 Horizontal agreements are agreements reached between competitors in the same market, as opposed to vertical agreements, which are agreements made between entities at different levels of the supply, manufacturing, and distribution chains. For an in-depth explanation, see GAVIL ET AL., *supra* note 6, at 122–25.

23 *E.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (explaining Congress's "concern with the protection of *competition*, not *competitors*").

## I. American Antitrust Law: Statutes and Methodologies

Competition law carries the authority to regulate every competitive market and every entity within those markets.[24] From medical societies to amateur football, mattress retailers to opera performers, American industries compete under the invisible hand of the market and the watchful eye of antitrust regulators.[25] The statutes underpinning American competition law are relatively broad; thus, courts have played a significant role in shaping the application and standards of antitrust law.[26] Part I provides an overview of the three key antitrust statutes, the legal elements necessary for a successful competition claim under the statutes, and the analytical frameworks courts use to assess antitrust cases.

### *A. The Antitrust Statutes*

For over a century, three foundational statutes have governed antitrust law in the United States: the Sherman Act,[27] the Clayton Act,[28] and the Federal Trade Commission Act ("FTC Act").[29] The oldest of the three statutes, the Sherman Act of 1890, prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."[30] Though Congress used the word "[e]very" to describe the trade restraints outlawed by section 1, over time the courts read latitude into the statute so that, in practice, section 1 of the Sherman Act bans only unreasonable contracts, combinations,

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24 *See* 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . .").

25 *See, e.g.*, Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332 (1982) (physician medical society violated price-fixing prohibition by setting maximum prices); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984) (NCAA restrictions on televised collegiate football was anticompetitive trade restraint); United States v. Sealy, Inc., 388 U.S. 350 (1967) (mattress manufacturer's geographic licensing scheme was illegal horizontal trade restraint); Polygram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005) (agreement between music distributors not to sell old concert recordings illegal under section 5 of the FTC Act).

26 *The Antitrust Laws, supra* note 4. See discussion *infra* Section I.B.2, for an examination of the Supreme Court's shaping of the application of the antitrust statutes through the rule of reason, per se condemnation, and the quick look.

27 15 U.S.C. §§ 1–7.

28 *Id.* §§ 12–27.

29 *Id.* §§ 41–58 (FTC Act).

30 *Id.* § 1. The Sherman Act also prohibits certain monopolistic behavior. Gavil et al., *supra* note 6, at 441. The law of monopolies is beyond the scope of this Note, which is limited in focus to exploring agreements between competitors. For an overview of monopoly law, see generally *id.* at 441–681.

and conspiracies.[31] Claims brought under section 1 require showings of concerted action between a minimum of two distinct actors and an anticompetitive effect[32] stemming from that action.[33] The Sherman Act is enforced by the Department of Justice and successful showings that an entity violated competition law can lead to millions of dollars in fines and prison time.[34]

Congress bolstered and clarified the Sherman Act's competitive protections twenty-four years later when it passed the Clayton Act.[35] In contrast to the general language of the Sherman Act, the Clayton Act explicitly forbids companies from engaging in certain practices likely to impede market competition, including anticompetitive exclusive dealing arrangements,[36] tying arrangements,[37] and, due to the amendments in the Robinson-Patman Act of 1936,[38] price discrimination.[39] After the 1976 passage of the Hart-Scott-Rodino Act,[40] which modified the Clayton Act, the law also prohibits anticompetitive mergers.[41] The

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31 *E.g.*, Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918) (clarifying that Congress cannot have intended to ban all trade restraints, only those with anticompetitive effects and holding "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").

32 Some actions are sufficiently anticompetitive on their face that the anticompetitive effect can be presumed and does not require proof through evidence. *See infra* notes 62–65 and accompanying text.

33 *See* Gavil et al., *supra* note 6, at 116; *see also* Christine L. White, Saralisa C. Brau & David Marx Jr., Antitrust and Health Care: A Comprehensive Guide 18–19 (2d ed. 2017).

34 The Sherman Act sets fines for corporations at a maximum penalty of $100,000,000, fines for individuals at $1,000,000, and prison time at a maximum of 10 years. 15 U.S.C. § 1.

35 *Id.* §§ 12–27.

36 *Id.* § 14. Exclusive dealing arrangements are agreements between a buyer and seller that the buyer will not purchase commodities from the seller's competition. *See id.* Like with price discrimination, the statute specifies that for the conduct to be illegal, it must harm competition or promote monopolization. *Id.* Exclusive dealings that do not harm competition are entirely legal and may even be procompetitive. *See id.*; *see also Exclusive Dealing or Requirements Contracts*, FTC, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-supply-chain/exclusive-dealing-or-requirements-contracts [https://perma.cc/7AVL-ECQH].

37 Tying arrangements are sales conditioned on the buyer's purchase of two or more products bundled together. *Tying the Sale of Two Products*, FTC, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/tying-sale-two-products [https://perma.cc/2AS7-6LLF]. Tying arrangements become an antitrust concern when the seller's market power is sufficient to substantially lessen consumer choice. *See id.*

38 15 U.S.C. §§ 13a–13b, 21a.

39 Illegal price discrimination is the practice of charging different customers different prices for the same commodity if that price differential is likely to cause a competitive injury or promote monopolization. *Id.* § 13; *see also* White et al., *supra* note 32, at 19–20.

40 15 U.S.C. §§ 15c–15h, 18a, 66.

41 *Id.* §§ 18–18a. Merger analysis is beyond the scope of this Note. For an explanation of the Hart-Scott-Rodino Act's premerger notification and waiting period requirements, see *Premerger Notification Program*, FTC, https://www.ftc.gov/enforcement/premerger-notification-program [https://perma.cc/998R-6EHD].

Clayton Act is enforced by both the Department of Justice Antitrust Division and the Federal Trade Commission.[42] In order to heighten the stakes for noncompliance, Congress also used the Clayton Act to grant parties injured by antitrust violations the opportunity to recover treble damages.[43]

The FTC Act, passed in the same year as the Clayton Act, established the Federal Trade Commission and authorized the Commission to prevent economic actors from "using unfair methods of competition" or "deceptive acts or practices."[44] The FTC Act allows the Federal Trade Commission to bring civil suits against companies or individuals that engage in many of the same practices criminally punishable under the Sherman Act.[45] The FTC Act also established the Commission's regulatory and rulemaking authority, investigative powers, and core role in consumer protection.[46]

### *B. The Elements of Anticompetitive Horizontal Agreements*

Civil and criminal cases dealing with alleged horizontal restraints of trade in violation of antitrust law require similar showings: concerted action and an anticompetitive effect.[47] Over time, the Court has developed several interconnected analytical tools to examine the actual or likely impact that an agreement may have on competition: the rule of reason, the quick look, and per se condemnation.

#### *1. Concerted Action: Agreement Between Competitors*

The first element for a horizontal restraint claim is a demonstration of concerted action—i.e., an agreement to act in a certain way—between competitors.[48] Competitors are "separate economic actors pursuing separate economic interests."[49] For purposes of antitrust law, an individual business (or person) typically cannot engage in concerted action

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42 15 U.S.C. §§ 12–27.

43 *Id.* § 15.

44 *Id.* §§ 45, 45(a)(2).

45 *See* WHITE ET AL., *supra* note 32, AT 21.

46 *See generally A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FTC (MAY 2021) [HEREINAFTER FTC], HTTPS://WWW.FTC.GOV/ABOUT-FTC/MISSION/ENFORCEMENT-AUTHORITY [HTTPS://PERMA.CC/P8BT-E2UJ].

47 *See id.*; *see also Elements of the Offense*, DEP'T OF JUST. (FEB. 2020) [HEREINAFTER DOJ], https://www.justice.gov/archives/jm/antitrust-resource-manual-1-attorney-generals-policy-statement [https://perma.cc/42H5-7LAK] (describing elements of criminal antitrust charge); *see, e.g.*, FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 455–56 (1986) (identifying in a civil case the critical findings of conspiracy (i.e., concerted action) and competition suppression).

48 FTC, *supra* note 45; DEP'T OF JUST., *supra* note 46; *Ind. Fed'n of Dentists*, 476 U.S. at 455–56.

49 Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769 (1984).

with itself unless the entity in question is a collective of competitors.[50] The Court has held that a key factor in determining whether parties are independent and competitive entities is whether they have separate loci of control and economic decision-making.[51] The Sherman Act aims to bolster market competition by ensuring that separate actors make their decisions autonomously and never in concert with each other.[52] The most egregious examples of concerted action between competitors include instances of agreeing to set prices on certain goods to artificially raise profits[53] and the formation of cartels to control market behavior.[54]

### 2. *Anticompetitive Effect: The Rule of Reason, Per Se Condemnation, and the Quick Look*

To violate antitrust law, a concerted action must also generate an anticompetitive effect.[55] The methodology used by courts to analyze challenged restraints for anticompetitive results has changed and evolved over time. The Supreme Court's holding in *Chicago Board of Trade v. United States*[56] established the rule of reason, a key tool used to assess the competitive or anticompetitive nature of an agreement.[57] There, the Court considered whether the Sherman Act prohibited a grain exchange's "call" rule that held constant the price of not-yet-arrived grain from the close of business through to the exchange's next day opening.[58] In holding that the call rule was not an antitrust violation, the Court explained that when assessing an agreement, "[t]he

50 *See, e.g.*, *id.* at 769 (holding that parent company and wholly owned subsidiary are not competitors and thus cannot engage in concerted action under section 1). *But see* United States v. Sealy, Inc., 388 U.S. 350, 352, 356–58 (1967) (shared license for name and trademark did not nullify individual sellers' competitive relationship with each other).

51 Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 195 (2010).

52 *See id.* at 195–96.

53 *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 178–200 (1940) (describing a violation of the Sherman Act in which oil companies divided the spot market for gas in an attempt to increase the retail price of gas).

54 *See* Alexis Jacquemin & Margaret E. Slade, *Cartels, Collusion, and Horizontal Merger*, 1 Handbook Indus. Org. 415, 416 (1989) (discussing cartel formation as tool firms use to "acquire and maintain positions of market power"). One of the most famous cartels was the vitamins cartel of the 1990s. *See* Shearman & Sterling, *Vitamins*, Cartel Dig., https://www.carteldigest.com/cartel-detail-page.cfm?itemID=21 [https://perma.cc/23PE-ZKPR]. Over the course of the decade, multiple companies colluded to divide up the multibillion-dollar vitamin market and set vitamin prices. *Id.* The eventual prosecutions from the Department of Justice and international enforcers resulted in hundreds of millions of dollars in fines and multiple prison sentences. *Id.*

55 *E.g.*, Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 688 (1978) (noting that the analysis of a restraint "focuses directly on the challenged restraint's impact on competitive conditions").

56 246 U.S. 231 (1918).

57 *Id.* at 238–39.

58 *Id.* at 236–38.

true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[59] The Court determined that when assessing whether an act violates the antitrust laws, judges must "consider the facts peculiar to the business to which the restraint is applied."[60] Full rule of reason analysis thus requires courts to engage in an in-depth exploration of the market conditions surrounding the alleged restraint, including, among other factors, the history of the business and broader industry, definitions of relevant geographic and products markets, measurable impacts of the restraint on competition, and any procompetitive or efficiency justifications offered by the defendant.[61]

After extensive experience dealing with certain types of agreements, the Court truncated the necessary investigations under rule of reason analysis and established per se categories of illegal conduct.[62] Per se illegal agreements are those "whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality."[63] Conduct that is considered illegal per se includes price fixing, market allocation, certain types of boycotts, and output restrictions.[64] These per se illegal categories of conduct arose after the courts gained "considerable experience with certain business relationships" and felt confident the conduct was so wholly anticompetitive that a detailed investigation of relevant market conditions and competitive impacts was unnecessary.[65]

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59 *Id.* at 238.

60 *Id.*

61 *E.g.*, *id.* ("To determine that question [of legality] the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."); *see also* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978).

62 *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 692.

63 *Id.*

64 *See*, *e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940) (holding price fixing is per se illegal); United States v. Topco Assocs., 405 U.S. 596, 598–600, 608 (1972) (allocation of right to sell private-label grocery brands in discrete geographic markets constituted horizontal territorial restraint in violation of Sherman Act); FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 414, 432–34 (1990) (holding attorneys refusing to take public indigent client cases until pay increased had engaged in illegal group boycott); United States v. Andreas, 216 F.3d 645, 666–67 (7th Cir. 2000) (cartel agreement to limit output in order to raise prices for lysine treated as per se violation).

65 *Topco*, 405 U.S. at 607–08; *see also* N. Pac. Ry. v. United States, 356 U.S. 1, 5 (1958) (describing per se illegal conduct as "practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use").

Some conduct exists in a space between that condemned by the per se rules and that assessed under the rule of reason.[66] This conduct is distinct enough from a per se violation that it cannot be deemed illegal on its face, yet it is also similar enough to a per se violation—or appears sufficiently anticompetitive at first glance—that a full-scale rule of reason analysis seems superfluous; in these cases, the court applies a "quick look" analysis to judge the conduct.[67] The quick look is particularly relevant in cases in which the court is confronting what appears to be a classically illegal trade restraint in a new context or in a market with which the court is largely unfamiliar.[68] The quick look allows courts to introduce nuance into their consideration that is not always granted to defendants facing allegations of clearly per se illegal conduct.[69]

The distinctions among the rule of reason, per se analysis, and the quick look are amorphous. These methodologies do not exist on a lateral spectrum—it is too simplistic to line them up as discrete categories and move from one to the next in a row.[70] Rather, the methodologies work in concert with one another, such that courts may apply a quick look to ultimately categorize conduct as per se illegal or, in the contrary, a quick look may result in the court ordering a full marketplace analysis under the rule of reason.[71] The quick look itself has no circumscribed boundaries; instead, based on the circumstances of the case at hand, the court's look might be very quick, somewhat quick, or fairly lingering.[72] There is no "categorical line" separating agreements that are obviously anticompetitive from those in which a fuller economic analysis is warranted.[73] The Court has acknowledged that the complicated interplay of actors in a competitive market, particularly when that market is

66 *See, e.g.*, FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 458–60 (1986) (examining conduct that was similar *to* per se illegal group boycotts but declined to apply per se condemnation and instead analyzed the conduct under a truncated rule of reason devoid of a full market analysis); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100–04 (1984) (examining actions that constituted horizontal price fixing and output limitation, which are typically per se illegal, but decided that per se condemnation was inappropriate because "horizontal restraints on competition are essential if the product [televised college football] is to be available at all").

67 *See generally* Max R. Shulman, *The Quick Look Rule of Reason: Retreat from Binary Antitrust Analysis*, 2 SEDONA CONF. J. 89 (2001).

68 *See, e.g.*, *Ind. Fed'n of Dentists*, 476 U.S. at 458–59 (declining to apply the per se label to what appeared to be a group boycott due to concerns about excessive application of the label).

69 Shulman, *supra* note 66, at 89–90.

70 *See* Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 362–64 (1982) (Powell, J., dissenting) (dissenting from the Court's decision to label medical price ceilings per se illegal because "the per se label should not be assigned without carefully considering substantial benefits and procompetitive justifications. This is especially true when the agreement under attack is novel, as in this case.").

71 *See, e.g.*, Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779 (1999).

72 *Id.* at 781.

73 *Id.* at 780–81.

unfamiliar or particularly complex, necessitates an antitrust jurisprudence sufficiently flexible to match the contours of the market.[74] At the same time that antitrust inquiries are particularized, antitrust aims remain singularly focused on promoting competition.[75]

## II. Doctrine and Standards: Evolution and Contemporary Application

The methodologies used by the Court to analyze individual antitrust cases evolved alongside a broader set of standards and policy goals that shape the macro picture of American antitrust law. In the early days of American antitrust, courts and legislators were concerned about the power of big business to dictate economic conditions, stifle competition, and squash smaller rivals.[76] In the second half of the twentieth century, attention began to shift away from concerns around ensuring the success of small and medium enterprises against giant corporations and toward a purely economic focus on what came to be called "consumer welfare."[77] Part II explains the history and contemporary application of the consumer welfare standard, highlights the limitations of the standard as applied today, and contrasts the standard with an alternative framework—green antitrust.

### A. *The Consumer Welfare Standard and the Primacy of Prices*

The consumer welfare standard centers antitrust law around a single priority: economic benefit to consumers as measured through prices.[78] The consumer welfare standard helps to clarify that antitrust is a prohibitive, rather than a prescriptive, body of law.[79] Antitrust law promotes competition by banning anticompetitive behavior, rather than by prescribing procompetitive action.[80] In other words, antitrust law tells firms what they *cannot* do, but it does not dictate what they can or must do.[81] As a mechanism for understanding these goals and limits,

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74 *Id.* at 781.

75 *E.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (explaining Congress's "concern with the protection of *competition*, not *competitors*").

76 *See* Tracy Miller & Alden F. Abbott, Policy Spotlight: Antitrust Policy and the Consumer Welfare Standard 1 (Mar. 2021), https://www.mercatus.org/research/policy-briefs/policy-spotlight-antitrust-policy-and-consumer-welfare-standard [https://perma.cc/8ZYK-SCFZ]; Jonathan M. Jacobson, Another Take on the Relevant Welfare Standard for Antitrust 3 (Aug. 2015); Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. Rev. 551, 560 (2012).

77 Koga, *supra* note 15, at 1997–98.

78 Jacobson, *supra* note 75, at 2.

79 A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 Rev. Indus. Org. 741, 745 (2019).

80 *Id.* at 746.

81 *See id.*

the consumer welfare standard serves to "provide[] a criterion to guide the formulation and case-by-case application" of antitrust statutes and court-dictated rules.[82]

In *The Antitrust Paradox*—which quickly became one of the most influential pieces of scholarship in twentieth-century antitrust dialogue—Judge Robert Bork argued that antitrust law should promote low consumer prices through efficient business practices and courts should base competition law decisions on purely economic considerations.[83] This price-centric approach to antitrust, based in neoclassical economics,[84] became known as the "Chicago school."[85] Though the Supreme Court has never explicitly adopted the Chicago principles by name, the Court's current focus on economic considerations and refusal to entertain noneconomic defenses to antitrust violations demonstrates the integration of Chicago principles into Supreme Court holdings.[86]

### *B. The Limits of the Consumer Welfare Standard and Per Se Illegality*

The prevailing application of the consumer welfare standard renders the term a misnomer because rather than emphasizing the overall wellbeing of consumers—a strategy that would necessarily take into consideration factors beyond prices—the consumer welfare standard limits its concern to economic efficiency as achieved through competitive

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82 *Id.*

83 *See* Leon B. Greenfield, Perry A. Lange & Nicole Callan, *Antitrust Populism and the Consumer Welfare Standard: What Are We Actually Debating?*, 83 Antitrust L.J. 393, 396 (2020); *see also* Makan Delrahim, Assistant Att'y Gen., Antitrust Div., Dep't of Just., Antitrust 40 Years After the *Paradox*: No Longer "A Policy At War With Itself" (June 22, 2018) ("*The Antitrust Paradox* has been cited in more than 50 district court rulings . . . , over 100 court of appeals rulings, and 18 Supreme Court opinions . . . ."). *See generally* Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself (1978).

84 The core tenet of neoclassical economics asserts that consumers want to acquire goods and will keep acquiring more goods until the utility of another unit will be offset by the cost. E. Roy Weintraub, *Neoclassical Economics*, Econlib, https://www.econlib.org/library/Enc/NeoclassicalEconomics.html [https://perma.cc/T8V6-XVEU]. This relationship also applies to production, as producers want to sell goods and will continue making more units until the cost to add another unit outweighs the gain from selling it. *Id.* In-depth analysis of neoclassical economics is beyond the scope of this Note. For a deeper perspective on the development and general framework of neoclassical economics, see *id.*

85 *See generally* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. Pa. L. Rev. 925 (1979) (exploring the development and core tenets of the Chicago school of antitrust analysis, as well as the definitional limits of the term as Chicago school thinking became more of a consensus view at the time).

86 *See* Jacobson, *supra* note 75, at 1 ("The Supreme Court has never articulated a specific welfare standard."); George L. Priest, *Bork's Strategy and the Influence of the Chicago School on Modern Antitrust Law*, 57 J.L. & Econ. S1, S6–S7 (2014); Greenfield et al., *supra* note 82, at 396–97.

markets.[87] The hyperfocus on efficiency that runs through antitrust decisions and academic dialogue stems from the Chicago school's success in centralizing neoclassical economics.[88] Neoclassical economics frames competition through "microeconomic price theory models of perfect competition and monopoly," stresses market self-regulation, and presumes that the private sector is better capable of promoting efficiency than the government (executive, legislative, or judicial).[89]

Courts applying the contemporary version of the consumer welfare standard in antitrust litigation look for clear evidence of an injury in the form of rising prices or decreasing quality, coupled with danger to the efficient allocation of resources.[90] Some conduct is so likely to be anticompetitive that it is proscribed as a matter of law.[91] In these per se illegal cases, defendants are not permitted to offer justifications for their conduct.[92] Once a particular type of conduct—like a group boycott or an output limitation—is classified as per se illegal, future courts often do not reconsider the conduct's classification, meaning that many categories of conduct have not been reexamined in decades.[93]

Application of per se illegality under the consumer welfare standard is rapidly becoming an insufficient solution to contemporary competition cases.[94] The consumer welfare standard's narrow focus on immediate price impacts, and the resulting rigidity of per se illegal classification, inhibits courts' ability to engage in a broader analysis

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87 *See* Norman W. Hawker & Thomas N. Edmonds, *Avoiding the Efficiency Trap: Resilience, Sustainability, and Antitrust*, 60 Antitrust Bull. 208, 209 (2015); *see also* Am. Antitrust Inst., The Next Antitrust Agenda: The American Antitrust Institute's Transition Report on Competition Policy to the 44th President of the United States 9 (2008). *See generally* Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. Competition L. & Econ. 133 (2011).

88 Stucke, *supra* note 75, at 555–56.

89 Am. Antitrust Inst., *supra* note 86, at 4–5.

90 *See, e.g.*, Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995) ("[A]n act is deemed *anticompetitive* under the Sherman Act only when it harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality.").

91 United States v. Topco Assocs., 405 U.S. 596, 607–08 (1972) (explaining per se illegality).

92 *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 103–04 (1984) ("*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.").

93 For example, the FTC's website currently lists "price fixing, bid rigging, and market division" as illegal violations of the antitrust laws, based on historic court determinations. *Dealings with Competitors*, FTC, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors [https://perma.cc/Y99S-9R5F]; *see also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940); *Topco Assocs.*, 405 U.S. at 608; FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 432–34 (1990).

94 *See* Lina M. Khan, *The End of Antitrust History Revisited*, 133 Harv. L. Rev. 1655, 1673 (2020) ("[T]he longstanding dominance of Chicago and Post-Chicago has led antitrust analysis to be governed by a fairly closed set of methodological approaches that—as new research is now highlighting—suffer from critical blindspots.").

of competitive effects beyond prices.[95] Near-exclusive focus on price minimizes the extent to which courts can consider this potential range of competitive effects, which could include factors such as variety of choice, room for innovation, economic growth, and competitive business merits.[96]

Even within these standards and limitations, the Supreme Court has acknowledged the complexity of analyzing competition cases. In *National Society of Professional Engineers v. United States*,[97] the Supreme Court recognized that there are layers to competitive analysis: "The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—*and not just the immediate cost*, are favorably affected by the free opportunity to select among alternative offers."[98] The petitioners, an engineering organization that promoted the interests of its members and published ethical guidelines, had a rule that essentially banned engineers from telling customers their individual fees until after the customer had selected an engineer to hire for a project.[99] The organization argued that price competition between engineers could lead to lower quality engineering work, which would be against the public interest.[100] Although the Court ultimately rejected this argument as straying too far beyond the bounds of antitrust law, the *Professional Engineers* decision represents one of few times the Court seemed willing to explore, at least for a moment, other aspects of competition beyond naked price.[101]

This broader range of competitive effects does not, and indeed cannot, include social, moral, or ethical considerations. Those noncommercial considerations stray beyond the bounds of antitrust law.[102] Antitrust is concerned with the "protection of competition, not competitors,"[103] and not social welfare or ethics.[104] The Supreme Court has explicitly stated that even if competition may entice unethical actions, the antitrust concern must remain limited to protecting competition.[105]

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95 *See id.* at 1667–68.

96 Am. Antitrust Inst., *supra* note 86, at 13.

97 435 U.S. 679 (1978).

98 *Id.* at 695 (emphasis added).

99 *See id.* at 683–84.

100 *Id.* at 683–85.

101 *Id.* at 695–96; *see supra* Section II.A. (on the Chicago school and contemporary emphasis on hard economic data like price and market share).

102 *See generally* Nelson O. Fitts, *A Critique of Noncommercial Justifications for Sherman Act Violations*, 99 Colum. L. Rev. 478 (1999) (arguing the Sherman Act precludes consideration of noncommercial defenses).

103 Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (emphasis omitted).

104 *See, e.g.*, *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 695–96.

105 *Id.* at 696 ("[W]e may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition.").

Singular focus on competition is foundational to antitrust practice; as Justice Burton explained over seventy years ago, "[t]he heart of our national economic policy long has been faith in the value of competition."[106] The Sherman Act's prohibition on unreasonable trade restraints cannot "be evaded by good motives."[107] As such, any potential reconsideration of the per se categories must not stray beyond the realm of competition concerns.[108]

### C. Green Antitrust as an Alternative to Consumer Welfare

The green antitrust movement stands in stark contrast to competition-focused antitrust jurisprudence and asks courts to go beyond a purely economic framework by considering, or even centralizing, the environmental impact of an agreement or merger.[109] Green antitrust is a broad term, combining influences from sustainable business models, climate science, the environmental movement, and others; it is not indicative of a single idea or centralized coalition.[110] Broadly speaking, the movement posits that corporate action is necessary in the battle against climate change, but fear of competition law liability can prevent corporations from taking concerted actions on sustainability that would yield environmental and business benefits.[111]

Green antitrust is slowly becoming more influential internationally, particularly in Europe as both individual state laws and the laws of the European Union are comparatively friendlier to environmental defenses to anticompetitive behavior.[112] For example, in 2021, Austria became the first country to create a full legal exemption to antitrust prosecution for certain corporate agreements that support sustainability.[113] Intergovernmental organizations have also considered the role

106 Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951).

107 Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1912).

108 *See Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 696.

109 *See* Schinkel & Treuren, *supra* note 13.

110 Due to the breadth and lack of centrality in the green antitrust movement, it is difficult to provide a single definition. The movement reaches across sectors and is largely concentrated in Europe. For some broad definitions and examples in the European legal context, see Jay Modrall, *Sustainability, Antitrust and the EU Green Deal*, Norton Rose Fulbright (Jan. 2021), https://www.nortonrosefulbright.com/en/knowledge/publications/4d7ef55a/sustainability-antitrust-and-the-eu-green-deal [https://perma.cc/L2QS-QC23]. For an example of how a law firm addresses sustainability in its antitrust practice, see Johannes Hertfelder, *Green Antitrust*, Gleiss Lutz, https://www.gleisslutz.com/en/esg/green-antitrust.html [https://perma.cc/2F7D-MAZQ].

111 Schinkel & Treuren, *supra* note 13, at 2–3.

112 *See* Holmes, *supra* note 13, at 359–61.

113 Viktoria H.S.E. Robertson, *The World's First Green Antitrust Provision Shows that Climate Action Is the Newest Antitrust Frontier*, ProMarket (Mar. 10, 2022), https://www.promarket.org/2022/03/10/the-worlds-first-green-antitrust-provision-shows-that-climate-action-is-the-newest-antitrust-frontier/ [https://perma.cc/DF2E-7HW9].

of competition in solving the climate crisis; for example, in 2021, the OECD published a research report exploring how competition policy can take sustainability concerns into account, particularly considering the practical limits of regulating around climate and competition.[114]

The green antitrust movement is broad, and scholars throughout Europe have written about applications of green antitrust at the EU and single-state level.[115] Within this broader scholarship, Maarten Schinkel and Leonard Treuren, economists who study and write about European competition issues, succinctly summarize the core tenant of green antitrust as the notion "that tensions between competition and sustainability can be eased with less competition" and more collaboration.[116] Taken at its best, green antitrust identifies a clear problem to solving climate issues—government's failure to act in a consequential way—and asserts that the private sector may be more capable of success.[117]

Some analyses suggest that certain sustainability problems can potentially only be solved through firm collaboration due to competition law's limited scope and the slow movement on other types of climate regulation.[118] In these instances, Simon Holmes, a British scholar and judge, argues to a primarily European audience that courts should "move the dial radically" to "permit[] arrangements that contribute to combatting climate change."[119] Although European law prohibits anticompetitive behavior, European Union treaties lay out a number of clear exceptions (of relevance here are carve outs for public interest exemptions to competition law).[120] These exemptions create a potential opening in European competition law for environmental considerations because, according to Holmes, environmental protection could be a legitimate state interest, such as the public security necessity of creating and maintaining sustainable energy supplies.[121] Holmes concludes that green antitrust is possible in Europe without extensive changes to European law if the way European courts understand the law can adapt and evolve.[122]

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114 Org. for Econ. Co-operation & Dev., Environmental Considerations in Competition Enforcement (2021), https://www.oecd.org/daf/competition/environmental-considerations-in-competition-enforcement.htm [https://perma.cc/9HHH-UNSR].

115 For background reading on European initiatives and scholarship attempting to combine competition and climate, see sources cited *supra* note 13.

116 Schinkel & Treuren, *supra* note 13, at 5, 11 (examining economic literature on green antitrust and finding that available data does not suggest companies would be incentivized to coordinate on sustainability measures).

117 Balmer, *supra* note 10, at 221–22; *see also* Schinkel & Treuren, *supra* note 13, at 5.

118 Holmes, *supra* note 13, at 355–57.

119 *Id.* at 358.

120 *Id.* at 396.

121 *Id.*

122 *Id.* at 402.

As the conversation around green antitrust grows richer in Europe, few American scholars or practitioners have suggested that domestic antitrust laws ought to embrace environmentalism and sustainability.[123] Yet their work lays out a framework for how American competition law could adapt to meet the new pressures and challenges facing the market because of climate change. Paul Balmer, a practitioner, argues that American courts ought to expand their analysis frameworks to consider the possible advantages of firms collaborating on sustainability projects.[124] Balmer suggests that the fear of violating antitrust laws prevents corporations, particularly those already inclined to adopt unilateral sustainability practices, from "making commitments with competitors on any industry standard that could lead to higher consumer prices."[125] Under the existing antitrust framework,[126] corporations cannot use social welfare concerns to defend higher prices.[127] Balmer argues that companies may engage in more sustainable practices, such as collaborating to reduce carbon emissions, if permitted to offer these social benefits as justification for anticompetitive behavior.[128]

Similarly, Inara Scott, a former practitioner and current academic focused on sustainable business practices, argues that adopting sustainability considerations into antitrust would allow firms to collaborate, ultimately leading to higher standards and codes of conduct along with creative solutions to global problems.[129] Scott additionally suggests that the vague language in the Sherman Act coupled with the judiciary's historical difficulty defining the Act's precise scope render metrics such as the consumer welfare standard, economic efficiency, and even competition itself open to multiple interpretations.[130] Under this suggested flexibility, Scott argues that "socially responsible collaborative agreements" should be granted a market failure or social welfare defense to application of the antitrust laws.[131]

Despite the possible environmental and economic benefits of greener antitrust laws, true green antitrust is impracticable in the United States. American courts cannot accept green antitrust's centralization of

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123 There is little scholarship explicitly advocating for a green antitrust approach in the United States. For two examples of authors who have written on this, see Inara Scott, *Antitrust and Socially Responsible Collaboration: A Chilling Combination?*, 53 Am. Bus. L.J. 97, 105, 142–44 (2016); Balmer, *supra* note 10, at 220. For an analysis that rejects noncommercial or social welfare justifications in antitrust law, see generally Fitts, *supra* note 101. *See also* discussion of the consumer welfare standard *supra* Section II.A. and accompanying notes.

124 Balmer, *supra* note 10, at 220.

125 *Id.* at 229.

126 *See* discussion of the consumer welfare standard *supra* Section I.A.

127 *See* Balmer, *supra* note 10, at 230.

128 *Id.* at 220.

129 Scott, *supra* note 122, at 105–10.

130 *Id.* at 112–14.

131 *Id.* at 105, 144.

climate concerns over competition as to do so would go far beyond the scope of the Sherman and Clayton Acts. In the United States, the singular purpose of antitrust is to promote competition, not solve social ills.[132] As the impacts of climate change on the economy become increasingly severe, however, sustainability and competition may become more interconnected than previously anticipated in American antitrust.

## III. The Competitive Case for Sustainability Agreements

Over thirty years ago, the Supreme Court explained in *California Dental Ass'n v. FTC*[133] that antitrust cases demand "an enquiry meet for the case," meaning that courts should ensure that their assessments of the "circumstances, details, and logic" of an alleged trade restraint are proportional in scope to the complexity or novelty—or lack thereof—of the contested action.[134] Even before *California Dental* articulated that antitrust analysis ought to be case and fact specific, the Supreme Court demonstrated its willingness to go beyond the plain language of antitrust statutes banning "every"[135] restraint of trade[136] and adapt the prohibitions of competition law to changing markets.[137] Indeed, the analytical tools the Court uses to decide antitrust cases exemplify its willingness to add new layers of nuance to antitrust jurisprudence; the rule of reason evolved from the Court's early acknowledgement that Congress did not truly mean to ban "every" restraint of trade but only those which unreasonably hinder competition,[138] the per se categories developed after the Court gained extensive experience with certain types of agreements and their consequences,[139] and the quick look

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132 *See* Standard Oil Co. v. FTC, 340 U.S. 231, 248–49 (1951); *see also* Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1912).

133 526 U.S. 756 (1999).

134 *Id.* at 781.

135 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

136 *E.g.*, Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918) ("Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").

137 *See, e.g.*, Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23–25 (1979) (holding that a set price for a blanket media license was not a per se violation of antitrust law, even though it was technically an artificially set price, because the blanket license produced significant efficiencies in the distribution and use of media).

138 Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 61–62, 69 (1911) (holding that the Sherman Act only prohibits unreasonable restraints of trade, thus establishing the rule of reason); *see also Bd. of Trade of Chi.*, 246 U.S. at 238.

139 *E.g.*, N. Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); United States v. Topco Assocs., 405 U.S. 596, 607–08 (1972) ("It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act.").

resulted from the Court's understanding that different alleged violations may require different levels of analysis.[140]

While the core of antitrust has always been to prohibit anticompetitive behavior, the Court's determinations of what actually counts as anticompetitive behavior demonstrate an understanding that competition is complicated.[141] When the Court established the rule of reason in *Standard Oil Co. of New Jersey v. United States*[142] in 1911, it could not have anticipated exactly how, decades later, that rule would evolve and apply to new technologies like in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*[143] In *Broadcast Music*, the Court considered whether a blanket license for musical works was an antitrust violation and found that the blanket license should not be considered per se illegal price fixing due to substantial market efficiencies and the creation of an essentially new product—even though a blanket license is technically a fixed price for goods in a market.[144] The Court demonstrated antitrust law's capacity for dexterity as it applied the well-litigated rule of reason articulated in *Standard Oil* to a new product, in the midst of an evolving technological landscape, and found that there were good reasons to take a new approach.[145]

The encroaching impact of climate change on the economy represents a significant challenge to the future of competitive market functioning.[146] The current political landscape of gridlock and partisanship suggests that Congress lacks the necessary motivation and legislative capital to take sufficiently timely and prodigious actions.[147] The corporate world, however, is realizing that unchecked climate change could cut into their bottom lines at some point in the future, causing some firms to take action on sustainability.[148] For example, the

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140 Cal. Dental Ass'n v. FTC, 526 U.S. 756, 780–81 (1999) ("[T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment.").

141 *See* discussion *infra* Section I.B.2.

142 221 U.S. 1 (1911).

143 441 U.S. 1, 21–25 (1979) (applying the rule of reason to prices set on blanket licenses for musical recordings).

144 *Id.* at 23–25.

145 *See id.*

146 *See* Davenport & Smialek, *supra* note 17.

147 For recent examples of Congressional deadlock on environmental issues, see Samantha Gross, *Republicans in Congress Are Out of Step with the American Public on Climate*, Brookings (May 10, 2021), https://www.brookings.edu/blog/planetpolicy/2021/05/10/republicans-in-congress-are-out-of-step-with-the-american-public-on-climate/ [https://perma.cc/8FY9-Z9JY]; Adam Liptak, *Gridlock in Congress Has Amplified the Power of the Supreme Court*, N.Y. Times (July 2, 2022), https://www.nytimes.com/2022/07/02/us/supreme-court-congress.html [https://perma.cc/Q7VV-F65R].

148 For examples of companies, including Unilever, Tesla, and Ikea, taking unilateral private action on climate and environmentalism, see Ivana Kottasová, *These Companies Are Leading*

Climate Finance Working Group, a collective of financial services trade associations, was formed to bring the financial community together to discuss sustainability actions that individual firms could take.[149] However, notable as these steps may appear, as climate-related impacts on the market grow more significant, unilateral corporate action is likely a woefully insufficient response from the private sector.[150]

One possible solution with powerful potential is private, collective actions wherein firms could collaborate on plans to reduce the impacts of climate change, particularly in their relevant product and geographic markets.[151] However, current application of the antitrust statutes prohibits this collective private action because the resulting plans would almost certainly involve consequences that courts currently consider anticompetitive, such as higher prices, market allocation, or output restrictions.[152] The consumer welfare standard's singular focus on prices as a measure of competitive success limits the court's ability to analyze other factors critical to competitive markets and is an insufficient tool for promoting healthy, competitive markets.[153]

Fortunately, the consumer welfare standard is not a statute, constitution, or other binding source of law. It is an articulation of the values and priorities of economic thinking and competition law over the last century.[154] As we move forward into this century, the Court can change the conversation and articulate a new understanding of competition law and the antitrust statutes. The Court can and should modify the methodology it uses to decide antitrust cases by refusing to apply the per se rule in cases where the defendants have procompetitive sustainability defenses for their conduct. The Court should expand the rule of reason

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*the Fight Against Climate Change*, CNN Bus. (Oct. 9, 2018, 11:59 AM), www.cnn.com/2018/10/09/business/climate-change-companies [https://perma.cc/PN8U-GV7T]. For analysis of the economic risks and consequences of climate change, see Celso Brunetti, Benjamin Dennis, Diana Hancock, David Ignell, Elizabeth K. Kiser, Gurubala Kotta, Anna Kovner, Richard J. Rosen & Nicholas K. Tabor, Climate Change and Financial Stability, Fed. Rsrv. (Mar. 19, 2021), www.federalreserve.gov/econres/notes/feds-notes/climate-change-and-financial-stability-20210319.html [https://perma.cc/99G3-MVXV].

149 The U.S. Climate Fin. Working Grp., Financing a U.S. Transition to a Sustainable Low-Carbon Economy (2021) https://www.isda.org/a/qXITE/Financing-a-US-Transition-to-a-Sustainable-Low-carbon-Economy.pdf [https://perma.cc/6Q9A-VWYR].

150 Andrew Winston, *Corporate Action on Climate Change Has to Include Lobbying*, Harv. Bus. Rev. (Oct. 16, 2019), https://hbr.org/2019/10/corporate-action-on-climate-change-has-to-include-lobbying [https://perma.cc/8DUY-NP4M] (highlighting the insufficiency of individual firms' climate action, calling for a government solution).

151 Ram Nidumolu, Jib Ellison, John Whalen & Erin Billman, *The Collaboration Imperative*, Harv. Bus. Rev., Apr. 2014, at 4, https://aurovikas.aravind.org/os2019/upload1/resources/TheCollaborationImperative-HBRbyRamNidumolu.pdf [https://perma.cc/YL77-2TH7] (highlighting various models of potential corporate collaboration).

152 *See supra* notes 93–95 and accompanying text.

153 *See* Barak Orbach, *How Antitrust Lost Its Goal*, 81 Fordham L. Rev. 2253, 2276 (2013).

154 *See* discussion of the consumer welfare standard *supra* Section II.B.

to allow consideration of sustainability arguments when defendants provide sufficient evidence that a horizontal agreement is necessary to preserve a competitive market.

This application of the rule of reason is in line with the primary concern of antitrust law, protection of competition.[155] Consideration of sustainability defenses in the limited instances where environmental factors genuinely challenge the long-term viability of a competitive product or geographic market is a defense more akin to accepted efficiency and new product arguments,[156] and as such, these agreements can be distinguished from "naked restraints of trade" deemed per se illegal.[157] In certain areas and industries, climate harms and unsustainable practices could likely lead to such negative consequences on a market that competition between firms in that market is no longer feasible.[158] Firms or individuals in those markets should have the latitude to explore probusiness and proenvironmental solutions, such as a horizontal agreement focused on sustainability with the intent and capacity to restore or preserve the relevant market. As courts already routinely analyze economic and industry data in antitrust cases, they should be well-equipped to add consideration of environmental data. That is not to say that implementation of this solution will be simple. Establishing the precise evidentiary showing requirements is beyond the scope of this Note and will undoubtedly demand trial and error. How impending a climate consequence may be and whether an agreement is sufficiently narrowly tailored to that crisis are fact-specific inquiries. These inquiries will be complex, and that complexity will scale to the relevant market. The collection and presentation of data will be expensive in time and money. What is clear, however, is that preservation of markets vulnerable to climate consequences could ensure future competition, allow new entrants, and enhance the status of consumers by maintaining consumer access to the commodities in that market. Permitting sustainability agreements can, again, in certain specific instances, therefore enhance long-term competition and align with the goals of antitrust law.

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155 Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) ("It is competition, not competitors, which the Act protects.").

156 Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 24 (1979).

157 United States v. Topco Assocs., 405 U.S. 596, 608 (1972) (quoting White Motor Co. v. United States, 372 U.S. 253, 263 (1963)).

158 Examples of total market disruption could include geographic areas becoming too hot for human habitation or market activity; destruction of habitats and ecosystems in the wetlands and Arctic that would spell the end of those areas' economic use; the business impact, particularly on small businesses, of destruction due to wildfire or flooding; and climate change impacting the global agricultural markets. *See* Oliver Milman, Andrew Witherspoon, Rita Liu & Alvin Chang, *The Climate Disaster is Here*, The Guardian (Oct. 14, 2021, 5:00 AM), https://www.theguardian.com/environment/ng-interactive/2021/oct/14/climate-change-happening-now-stats-graphs-maps-cop26 [https://perma.cc/QA8L-CXKT].

*Hypothetical Application: Can Collaboration Save the Manatees and Competition?*

In suggesting a novel approach to competition cases, this Note necessarily strays beyond established caselaw and precedential fact patterns. As such, the following hypothetical application of the proposed solution is intentionally not based on any prior case, company, person, party, or instance of conduct. Rather, the hypothetical imagines a scenario where the proposed solution would be most impactful and most likely to be accepted by a court.

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The Florida Everglades present a spectacular example of biodiversity and are traditionally rich in wildlife, unique topography, and beautiful flora.[159] As such, guided tours, adventure excursions, and site-seeing activities are common in the Everglades,[160] and various companies compete with one another to offer tours to a wide audience of tourists.[161] The Everglades, however, are also particularly vulnerable to the consequences of climate change and pollution.[162] For example, huge swaths of the Everglades's bird populations have died due to human-caused environmental degradation.[163] Likewise, higher water salinity caused by rising sea levels resulting from climate change threaten flora and fauna in the Everglades.[164]

Two successful Everglades tour companies are Green Tours and Blue Tours.[165] Green Tours and Blue Tours both offer popular airboat tours throughout the swamps and marshes. These tours are the only publicly available tours in the region, and as such, Green Tours and Blue Tours are each other's only significant competitor. Over the years, both Green Tours and Blue Tours have started noticing the impacts of climate change in their geographic area of operation. Particularly, they

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159 *America's Everglades—The Largest Subtropical Wilderness in the United States*, Nat'l Park Serv. (Sept. 25, 2023), https://www.nps.gov/ever/index.htm [https://perma.cc/H8J7-UD9Q].

160 Holly Johnson & Ann Henson, *The 11 Best Everglades Airboat and Swamp Tours*, U.S. News (June 30, 2023, 3:00 PM), https://travel.usnews.com/features/the-best-everglades-tours [https://perma.cc/JU98-YSTW].

161 *See Tourism to Everglades National Park Creates $104.5 Million in Economic Benefits*, Nat'l Park Serv. (Apr. 23, 2015), https://www.nps.gov/ever/learn/news/tourism-to-everglades-national-park-creates-104-million-in-economic-benefits.htm [https://perma.cc/T9MA-4N3D].

162 *See* Rajendra Paudel, *Climate Change Effects in South Florida and the Everglades*, The Everglades Found., www.evergladesfoundation.org/post/climate-change-and-everglades-restoration [https://perma.cc/9ECJ-6X37].

163 Richard Luscombe, *In the Fight to Save Florida's Fragile Everglades, It All Comes Back to Politics*, Guardian (Apr. 22, 2015, 8:21AM), https://www.theguardian.com/us-news/2015/apr/22/florida-everglades-obama-climate-change [https://perma.cc/ZG79-G588].

164 *Id.*

165 This hypothetical is not based on any actual company; any similarity in name or description is completely coincidental.

have noticed that rising sea levels and chemical pollution have deteriorated the quality of the natural environment; access to that environment is, in essence, the product the companies provide to consumers. Further, Green Tours and Blue Tours both recently received reports from their environmental consultants that the noise of their airboats is causing disruption to birds and frightening manatees away from their native mating grounds, risking future avian and manatee populations in the area. Without birds, manatees, and beautiful landscapes to show to tourists, Green Tours and Blue Tours will likely both go out of business, and there will be no tours available to visitors in wide swaths of Florida.

Green Tours and Blue Tours both realize that an influx of corporate dollars could make a significant positive impact on existing pollution clean-up efforts. They also know that there is a new, expensive, and smaller model of airboat that causes almost no noise or water disruption, thus protecting bird and manatee habitats. However, the tour companies are stuck in a stalemate—neither is willing to expend significant resources on the environment when it will both cost profits and benefit the other company. Green Tours' and Blue Tours' executives thus develop a plan. Green Tours and Blue Tours will agree to each raise their prices by five percent and funnel the excess profits into pollution cleanup, native animal rehabilitation, and the joint purchase of a fleet of the new, expensive, but environmentally friendly, airboats. Further, both Green Tours and Blue Tours agree to limit the number of tours offered per day and stop dealing with suppliers who act in environmentally unfriendly ways. The agreement is designed to ensure both companies pay a price to ensure the sustainability of the local Everglades.

The Federal Trade Commission and Department of Justice accuse the companies of violating the antitrust statutes by engaging in per se illegal price fixing, output restrictions, and refusals to deal. The agencies ask the presiding judge for summary judgment granting an injunction and imposing fines. The judge, having recently read a student note on competition and climate, decides she is willing to hear testimony on the procompetitive justifications of the agreement even though it appears per se illegal. She denies the motion for summary judgment and allows the case to proceed to a bench trial. At trial, the judge hears testimony from expert witnesses who explain that the environmental dangers to the Everglades mean that, without swift action in the airboat tour industry, the Everglades will soon be diminished to a point where there will be no market for tourism at all. The experts also explain that the companies' joint sustainability actions will allow for substantial pollution cleanup and downgrade impact on wildlife to the lowest possible level, thus ensuring that the Everglades remain a beautiful tourist destination. The judge applies the rule of reason and integrates the long-term, procompetition sustainability defense into her analysis. Ultimately, the judge accepts the argument offered by Green Tours and Blue Tours that a sustainability

agreement between them is necessary to preserve the local Everglades and ensure the companies' long-term ability to compete, based on quality and product offerings, in the airboat tourism market.

The preceding hypothetical explores one scenario where a sustainability defense could be accepted by a court as a procompetitive justification for an apparently anticompetitive agreement because of the agreement's ability to preserve long-term access to a competitive market. This scenario highlights the potential that sustainability defenses have to preserve both competitive markets and consumer access to endangered resources. This preservation will likely only grow more necessary as climate change continues to threaten delicate ecosystems.[166] Green Tours and Blue Tours's hypothetical agreement also highlights the crucial limits of this Note's proposed expansion of defenses considered under the rule of reason. To stay within the bounds of the antitrust statutes,[167] the proposed sustainability defenses can only be accepted when there is a clear, evidence-backed connection between the proposed trade restraint and the goal of preserving market competition and consumer access to goods or services. Furthermore, the agreement must be wholly limited to actions on sustainability and must be as narrow in scope as possible.

## Conclusion

As climate change continues to threaten the future health of industry and markets, and thus consumer access to goods and services, private sector action is becoming an increasingly critical aspect of successful sustainability efforts.[168] As it stands, antitrust law in the United States prevents many potential private sector agreements, including those that focus on sustainability. Fortunately, as evidenced by its evolution over time, antitrust law is sufficiently dexterous to adapt to meet the challenges of evolving markets and concerns.[169] Courts should take advantage of antitrust law's capacity to evolve by allowing defendants to present sustainability arguments and considering the potential that sustainability agreements can generate long-term procompetitive effects in a market. By moving these horizontal agreements from per se illegal violations of competition law to actions subject to the rule of reason, courts will be able to engage in a richer inquiry into the particulars of each case and more wholly assess the consequences of parties' actions. By acknowledging the situations where collaboration can benefit competition and allowing parties to move forward with sustainability agreements, courts can help ensure that competition robustly continues into the next century.

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166 *See* Milman, Witherspoon, Liu & Chang, *supra* note 157 and accompanying text.

167 *See supra* Section I.A and accompanying footnotes.

168 *See, e.g.*, Carrier, *supra* note 21.

169 *See* discussion *supra* Sections I.A–.B.