Dear Next Generation Antirust/Privacy Scholars Reader,

Thank you very much for your engagement with this draft. Though this work is at an early stage, I greatly appreciate your feedback. In particular, it would be helpful to hear your thoughts on: the methodology for the project, the basis for categorizing the procompetitive justifications, additional relevant literature and any particular questions on procompetitive justifications you view as significant or in need of attention.

This draft is currently a Matryoshka doll, with a significantly more developed section on whether data privacy protection is cognizable as a justification. This reflects the focus of my other scholarship on the antitrust/privacy interface. I also thought that this sub-topic would prove interesting for our discussion (particularly given the recent *Apple v. Epic* decision from the N.D. Cal). The discussion on privacy as a justification here also illustrates how the broader case survey project could be usefully applied in future, to assess new purported justifications.

Best,
Erika

PROCOMPETITIVE JUSTIFICATIONS

Erika M. Douglas*

Under the rule of reason in antitrust law, defendants may avoid liability by proving a procompetitive justification for their conduct. Such "business justifications" often play a pivotal role in the most complex antitrust litigation.

Over the past 40 years, the rule of reason has become the de facto standard for most conduct under the Sherman Act. Procompetitive justifications are poised to take on newfound importance in the current era of antitrust law, as anti-monopolization enforcement unthaws and progressive antitrust reforms take hold. Despite this growing relevance, the jurisprudence on justifications remains light and unsettled. The scholarly analysis of procompetitive justifications is also surprisingly sparse.

This article provides a comprehensive analysis of [nearly 100] cases in which courts considered business justifications over the last decade. It uses those cases to develop a descriptive typology of the justifications being argued in antitrust cases, their success rates, and their relationship to the balancing of competitive effects. With this systematic examination of the jurisprudence, the article seeks to clarify and deepen judicial, agency and scholarly understanding of what is—and is not—a justification in antitrust law. The resulting analysis will be particularly useful for defendants who are developing justification arguments, as well as for antitrust agencies and private plaintiffs who must respond to such arguments.

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INTRODUCTION

In rule of reason cases, defendants may avoid antitrust liability by showing a "plausible (and legally cognizable) competitive justification" for their conduct.[1] Once the plaintiff has proven a *prima facie* case of harm to competition, the defendant is given the opportunity to demonstrate a nonpretextual, procompetitive justification for its impugned actions.[2]

If such a justification is shown, the case is likely to end in the defendant's favor.[3] The question of what is—and is not—cognizable as a justification in antitrust law may therefore determine the outcome of Section 1 and Section 2 Sherman Act cases. In particular, procompetitive justifications tend to play a role in the most complex, high-profile antitrust litigation, such as the seminal *United States v. Microsoft* case.

Relative to this importance, the law on procompetitive justifications is

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[1] Polygram Holding, Inc. v. FTC, 416 F.3d 29, 36 (D.C. Cir. 2005). The rule of reason is the prevailing standard in Sherman Act cases. The Sherman Act is the principal federal antitrust law in the United States. Sherman Antitrust Act, 15 U.S.C. §§ 1–2 (the "Sherman Act"); *see* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977) ("Since the early years of this century a judicial gloss on this statutory language has established the 'rule of reason' as the prevailing standard of analysis." (citing Standard Oil Co. v. United States, 221 U.S. 1 (1911))). This is in contrast to the *per se* standard, which applies to "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable." N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

[2] United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001) (per curiam) ("[I]f a plaintiff successfully establishes a *prima facie* case under § 2 [of the Sherman Act] by demonstrating anticompetitive effect, then the monopolist may proffer a 'procompetitive justification' for its conduct." (citing Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 483 (1992))); United States v. Dentsply Int'l, Inc., 399 F.3d 181, 196 (3d Cir. 2005) ("[H]aving demonstrated harm to competition, the burden shifts to [the defendant] to show that [its impugned conduct] promotes a sufficiently pro-competitive objective." (citing United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993))).

[3] Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828 (2009) (finding that only about 2% of rule of reason cases in the survey period proceed beyond analysis of business justifications).

under-developed. Scholars describe the jurisprudence as unclear,[4] unsettled[5] and subject to "competing approaches that have produced seemingly irreconcilable results."[6] The law on justifications is often briefly explained in functional terms as requiring an improvement competition, or efficiency.

This brevity in the law of procompetitive justifications has not been ameliorated over time. For example, antitrust scholar Jonathan B. Baker asked in 1998 during his tenure at the Federal Trade Commission "What business justifications count? How substantial must the business justification be? Who bears the burden of proving a business justification?"[7] Fast forward to 2013, and Baker found himself asking again, this time in a law review article "what business justifications for exclusionary conduct are cognizable?"[8] At both points in time, these questions were fairly asked, and largely unanswered. The passage of 15 years in between saw little advancement in the depth of judicial or scholarly articulation of what, exactly, constitutes a procompetitive justification in antitrust law.

Some scholars will be quick to conclude that this over-estimates the importance of procompetitive justifications to antitrust law. After all, research shows that most rule of reason cases end before justifications impact the liability outcome—plaintiffs tend to fail earlier on, due to insufficient proof that the defendant engaged in anticompetitive conduct.[9] But it would be a mistake to dismiss justifications as unworthy of judicial and scholarly attention.

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[4] Dustin Sharpes, *Comment: Reintroducing Intent Into Predatory Pricing Law*, 61 Emory L.J. 903, 933 (2012) (complaining that courts "have failed to provide any clear guidelines" and observing that the legal community is seeking a definite list of justifications).

[5] Ashley Ulrich, Crediting Procompetitive Justifications for Digital Platform Defendants: Continued Salience of a Broad, Efficiencies-Focused Approach, 10 NYU J. Intell. Prop. & Ent. L. 95 (2020) ("In the over 100 years since *Chicago Board of Trade* and 40 years since *BMI,* antitrust doctrine has not yet coalesced around a clear standard for when to credit a procompetitive justification within rule of reason analysis.").

[6] John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 Indiana L.J. 501 503 (2019).

[7] Jonathan B. Baker, *Promoting Innovation Competition Through the Aspen/Kodak Rule*, Federal Trade Commission: Speeches (Oct. 16 1998), https://www.ftc.gov/es/public-statements/1998/10/promoting-innovation-competition-through-aspenkodak-rule.

[8] Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 Antitrust Law Journal 527, 554 (2013).

[9] Carrier (1999); Carrier (2009) [NTD: Add cites.]

Several developments in antitrust law are making the question of what is—and is not—a procompetitive justification more relevant than ever before. Over the past 40 years, the rule of reason has become the *de facto* standard for most conduct under the Sherman Act, replacing the *per se* standard for conduct such as vertical price and non-price restraints. This shift means that courts are more likely to face more arguments on justifications, which are considered under the rule of reason but not under the *per se* standard. More recently, a wave of progressive antitrust reforms has focused on lowering the bar for plaintiffs at the outset of a Sherman Act case. This shift to make it easier for plaintiffs to establish a *prima facie* case of anticompetitive conduct will also make it more likely that cases proceed past the first stage of the burden-shifting framework—where past cases have often been dismissed—and onward to the consideration of procompetitive justifications.

Finally, the recent revival of complex anti-monopolization enforcement by U.S. antitrust agencies brings new relevance to procompetitive justifications. High-stakes agency cases, like those brought by federal and state enforcers against Google and Facebook in the last two years, are almost guaranteed to involve sophisticated arguments on justifications. These large technology firms are well represented by top antitrust counsel, and will find it well worth fighting over purported justifications to potentially avoid liability. Like the *Microsoft* case of the previous era, this new flurry of seminal litigation is likely to press courts into consideration of sophisticated justification arguments, in the complex technology markets. The outcomes of these significant cases may hinge on the defendant's ability to prove its conduct was justified, yet the law on what constitutes such a justification remains relatively light.

This combination of heightened relevance and under-articulation in the law and scholarship make it well worth asking again "what is a business justification?" While prior scholarship has anecdotally addressed certain high-profile cases involving justifications, or looked at other stages in rule of reason burden-shifting, none has focused in-depth on what constitutes a justification. This article contributes a systematic analysis of [nearly 100] cases in which courts have considered procompetitive justifications over the last [11] years. It uses those cases develop a descriptive typology of the justifications being argued in antitrust cases, to evaluate their success rates, and to discuss the relationship between justifications and the balancing of competitive effects.

The article seeks to deepen judicial, agency and scholarly understanding

of what is—and is not—a business justification with its in-depth examination of the jurisprudence in which justifications are argued. The resulting analysis is likely to be useful for defendants in the development of justification arguments, as well as for antitrust agencies or private plaintiffs who must respond to such arguments.

I. THE NEW RELEVANCE OF PROCOMPETITIVE JUSTIFICATIONS

This section examines why procompetitive justifications are poised to take on new importance in the current era of antitrust law.

From the late 1970's to present, antitrust jurisprudence has shifted, applying the rule of reason to more conduct than ever before under the Sherman Act. The changing treatment of vertical restraints is perhaps the best example of this trend of applying the rule of reason to conduct once subject to the *per se* standard. In its 1977 *Continental T.V. v. GTE Sylvania* decision, the Supreme Court held that certain non-price vertical restraints should be analyzed under the rule of reason, rather than the *per se* standard applied to such restraints in the past.[10] The case marked a turning point toward the wider application of the rule of reason in cases where economic evidence could plausibly demonstrate that the challenged restraint to improve competition. Following in *GTE Sylvania*'s footsteps, Supreme Court cases like *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.* overruled nearly a century of *per se* treatment to find that minimum resale price restraints may also be subject to the rule of reason.[11] Economic evidence indicated that such restraints could, in fact, improve competition between brands by enabling same-brand retailers to recoup their investments in customer service, showrooms and the like.

This jurisprudential transition toward the rule of reason over the last 40 years means that procompetitive justifications are more likely to be argued, and considered in more depth, than if the *per se* standard had continued to apply to such conduct. Though the presence or absence of a plausible justification may influence whether the court initially chooses to apply the *per se* rule or the rule of reason,[12] once a court has determined the *per se* standard applies, asserted justifications become irrelevant. Competitive effects are assumed. Under the rule of reason, however, the defendant's justifications are considered, and, as noted above, may even determine the

[10] [NTD: Add cite.]

[11] 551 U.S. 877 (2007) (overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)).

[12] See e.g. BMI v. CBS, Inc., 441 U.S. 1 (1979).

case outcome as the full rule of reason analysis unfolds.

More recently, a strong push for progressive antitrust reform has created the potential for procompetitive justifications to become more relevant in several ways. Certain scholars, and now Biden-era antitrust agency leadership, are pushing back on "embedded ideological preference for non-intervention" in modern antitrust law.[13] Antitrust law has a longstanding preference toward false negatives over false positives, on the assumption the former is ultimately less costly to consumer welfare.[14] This thinking has long placed a thumb on the scale toward permitting firms to engage in conduct and narrowing the prohibitions in antitrust law. Of late, some scholars argue such error cost assumptions need to be re-examined, as they may no longer broadly hold, and may result in systematic under-enforcement of antitrust law.[15]

After an era of perceived defendant-friendly antitrust policy and enforcement, this "Neo-Brandeisian"[16] movement is pressing for a variety of reforms that would lower the initial evidentiary burdens for plaintiffs in antitrust cases.[17] As the current FTC Chairwoman observes with concern that

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[13] Andrew I. Gavil & Steven C. Salop *Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis: Revitalizing the Rule of Reason for Exclusionary Conduct*, 168 U. Pa. L. Rev. 2107, 2112 (2020).

[14] Baker, Taking The Error Cost Out Of Error Cost Analysis: The Error Cost (the error cost "framework was first employed in the law and economics literature by Richard Posner during the 1970s and introduced into mainstream antitrust scholarship by Paul Joskow and Alvin Klevorick in 1979. Modern antitrust commentators often credit Frank Easterbrook's adoption of the framework in a widely cited article published in 1984. [NTD: Add cite.]

[15] Andrew I. Gavil & Steven C. Salop *Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis: Revitalizing the Rule of Reason for Exclusionary Conduct*, 168 U. Pa. L. Rev. 2107, 2125-2130 (2020). Available at: https://scholarship.law.upenn.edu/penn_law_review/vol168/iss7/7; Jonathan B. Baker, *Taking The Error Out Of "Error Cost" Analysis: What's Wrong With Antitrust's Right*, 80 ALJ 1.

[16] [NTD: Define term with Hovenkamp *Whatever Happened To The Antitrust Movement*?]

[17] See e.g. Steve C. Salop and Charlotte Slaiman, A New Section 5 Policy Statement Can Help the FTC Defend Competition, July 19, 2021, https://publicknowledge.medium.com/a-new-section-5-policy-statement-can-help-the-ftc-defend-competition-a76451eacb39 (expressing concern that the Sherman and Clayton Act antitrust rules often set too high a bar on plaintiffs). For example, scholars Andrew I. Gavil and Steven C. Salop, supra note_ suggest that the first and second steps of the rule of reason framework be blended to some extent, reducing the plaintiffs initial evidentiary burden where the defendant appears to have no valid efficiency justification to correct for what they views as a pro-defendant bias in the current rule of reason framework. The existing framework largely ignores the

"the defendant has prevailed in nearly all rule-of-reason cases in recent decades."[18] While the established Chicago school thinking is characterized by a significant degree of deference toward the justifications claimed by defendants, [19] this progressive movement centers (which around removing a perceived pro-defendant bias) is likely to be much less deferential to claimed justifications. Instead of early dismissals, these antitrust reforms (to the extent they are successful) would make it easier for plaintiffs to meet their *prima facie* burden at the outset of a case. This will make it more likely that cases will proceed past this first step in the burden-shifting framework to reach the question of whether there is a legitimate business justification. The question of what constitutes a justification would become more relevant, more often.

Further, justifications based on health, safety, equality or even data privacy are more likely to be cognizable under emerging Neo-Brandeisian conceptions of antitrust law than under the prevailing economic efficiency views. This era of antitrust reformism moves away from the strict efficiency and consumer welfare parameters that characterize the Chicago School in a way that, perhaps ironically, creates the potential for acceptance of these justifications, which are often not cognizable under existing law. Neo-Brandeisian scholars and policymakers tend to argue for antitrust to encompass what might be termed "non-efficiency" goals, such as combatting corporate power, reducing income inequality, assisting labor or protecting privacy.[20] Though they conceive of this expansive role of antitrust law as a means to hold large corporations liable, carried to its logical conclusion, this thinking would also expand what constitutes a legitimate justification in antitrust law. If antitrust law is no longer centrally premised on economic efficiency, then justifications premised on broader social welfare become more plausible. Without this equally-expansive treatment of justifications,

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evaluation of potential justifications until the plaintiff produces adequate evidence of competitive harm. Instead, Gavil and Salop propose an evaluation of competitive effects that considers whether claimed justifications appear to be pretextual, minimal or even absent. Gavil & Salop at 2136-367 (2020).

[18]at 2, Khan, Remarks of Chair Lina M. Khan on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act July 1, 2021

,https://www.ftc.gov/system/files/documents/public_statements/1591506/remarks_of_chair_khan_on_the_withdrawal_of_the_statement_of_enforcement_principles_re_umc_under.pdf

[19] See e.g. Carrier The Real Rule of Reason: Bridging the Disconnecting (1999) at 1319 (observing that "[t]he Chicago School also would offer substantial deference to the proffered justifications").

[20] [NTD: Neo-Brandeisian literature.]

progressive antitrust theory would appear lopsided and illogical—non-economic factors would be considered when assessing anticompetitive conduct but ignored in analyzing justifications. Under this progressive conception of antitrust law, threads of the jurisprudence like *United States v. Brown University*, which adopts a non-economic, or at least tenuously economic, view of what constitutes a justification, would have more purchase than under existing law.[21]

Finally, progressive antitrust thinking, and beyond, have heralded a new era of monopolization enforcement that places justifications front and center. Over the last 20 years, U.S. antitrust agencies have left much of the highest-profile antitrust litigation against technology giants to EU enforcers. The last high-stakes monopolization case brought by the DOJ was *Microsoft*, and that case settled in 2001. All of this changed in 2020, when the Federal Trade Commission and state enforcers brought seminal cases against social media company Facebook, and the Department of Justice Antitrust Division's (DOJ) brought its first case against Google for its search and search-advertising practices. These era-defining agency cases are the first in the lineage of big-name monopolization cases since *Microsoft*, and they signal a new era in monopolization enforcement.[22] Just as in *Microsoft*, this flurry of agency cases is likely to press courts into the consideration of sophisticated arguments on purported justification in complex, high-tech industries.

For all of these reasons, in this era of antitrust law, courts are more likely than ever before to find themselves inquiring more deeply, and more often, into whether defendants have established a procompetitive justification. Agencies, courts and defendants would benefit from a clearer understanding of what is —and is not—cognizable as a procompetitive justification.

II. Summary of Prior Literature and Description of the Article Contribution

Scholars have regularly criticized the jurisprudence on procompetitive justifications as unsatisfactory and unclear.[23] John M. Newman notes that

[21] *Brown Univ*., 5 F.3d at 677–78 (accepting as a justification the enhancement of choice for certain students and broadening of the socioeconomic sphere of the potential student body as justifications for collusion on need-based financial aid between elite colleges); *see also* HDC Med., Inc. v. Minntech Corp., 474 F.3d 543, 550 (8th Cir. 2007) (accepting that "[p]atient safety is a valid business justification" for the alleged misconduct). The author argues elsewhere that these cases are incorrect under existing law. See [NTD: Add citation to ABA The Source article]

[22] [NTD: Cite Tim Wu.]

[23] John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 Indiana

"despite their prominent role in antitrust enforcement, procompetitive justifications have remained underexplored and poorly understood."[24] Jonathan B. Baker summarizes some of the most significant open questions regarding procompetitive justifications, asking "[w]hat business justifications count? How substantial must the business justification be? Who bears the burden of proving a business justification?"[25] Despite this scholarly frustration, the literature reveals relatively few articles dedicated to systematic consideration of these important questions—a gap this article aims to remedy.

In one of the most extensive examinations of procompetitive justifications to date, John M. Newman's 2019 article proposes that justifications be recognized only where the challenged restraint of trade is likely to alleviate a market failure, and thereby increase consumer welfare.[26] His article groups justifications into three categories of argumentation: market failures, improvement of the competitive process or type of effect (on price or on output). While acknowledging that the latter two approaches appear throughout the jurisprudence, Newman dismisses both as likely to lead to uncertainty and incorrect case outcomes, as mere shortcuts for identifying market failures. Newman observes briefly that defendants have begun to argue a variety of justifications. However, he focuses on a selection cases and, in particularly Supreme Court jurisprudence, in support of his approach.

Michael Carrier published two articles, one in 1999 and a follow-up

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L.J. 501 503 (2019) ("[a]n examination of the relevant case law reveals competing approaches that have produced seemingly irreconcilable results."); Dustin Sharpes, *Comment: Reintroducing Intent Into Predatory Pricing Law*, 61 Emory L.J. 903, 933 (2012) (courts "have failed to provide any clear guidelines"); Ashley Ulrich, Crediting Procompetitive Justifications for Digital Platform Defendants: Continued Salience of a Broad, Efficiencies-Focused Approach, 10 NYU J. INTELL. PROP. & ENT. L. 95 (2020)("In the over 100 years since *Chicago Board of Trade* and 40 years since *BMI,* antitrust doctrine has not yet coalesced around a clear standard for when to credit a procompetitive justification within rule of reason analysis."). [NTD: add older articles]

[24] John M. Newman, Procompetitive Justifications in Antitrust Law, 94 Ind. L.J. 501, 506 (2019).

[25] Jonathan B. Baker, Promoting Innovation Competition Through the Aspen/Kodak Rule, Federal Trade Commission: Speeches (Oct. 16 1998), https://www.ftc.gov/es/public-statements/1998/10/promoting-innovation-competition-through-aspenkodak-rule.

[26] John M. Newman, Procompetitive Justifications in Antitrust Law, 94 Ind. L.J. 501, 517 (2019) (critiquing marketplace effects-based definitions of valid justifications).

article in 2009, which systematically examine the grounds for dismissal in rule of reason cases. Although not specific to the topic of procompetitive justifications, these articles are generally relevant here because they consider the outcomes at each stage of the burden-shifting framework in rule of reason decisions.

In his 1999 article, Carrier examines a set of 495 rule of reason cases to determine the grounds on which each was dismissed.[27] Carrier's data set is limited to cases where the adjudication is final, excluding preliminary injunctions (whether granted or denied) and any other cases that could still proceed further (such as a denial of a motion for summary judgement or denial of a motion to dismiss). The data set considers only decisions by judges, excluding jury cases.

Carrier finds that 84% of judge-decided rule of reason cases are disposed of at the first analytical step, when the plaintiff fails to demonstrate sufficient anticompetitive effects from the defendant's alleged restraint on competition.[28] Among the remaining cases, 3% were dismissed on the grounds that the defendant failed to establish a procompetitive justification. In at most 1% of these remaining cases, the plaintiff demonstrated that the restraint at issue was not reasonably necessary to achieve the stated objective, or could be "less restrictive. Only 4% of the 495 cases in the overall set proceeded to the final balancing step of the rule of reason analysis before dismissal (and in the remaining cases, the plaintiff prevailed). Carrier's finding that 84% of rule of reason cases were dismissed based on a failure to prove anticompetitive effects suggest that 16% of cases proceeded at least to the next stage of the burden-shifting framework, where the defendant would be afforded the opportunity to show a procompetitive justification (though the article is unclear about this figure, perhaps reflecting a lack of clarity in the cases themselves).[29]

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[27] [NTD: Add cite to Carrier (1999), and add period of time case data set covers.]

[28] Carrier (1999).

[29] The article concludes that the defendant failed to establish a business justification in 3% of the total surveyed cases, but that only 84% of cases were resolved at the initial step in the burden-shifting framework. This implies that business justifications were established in the remaining 13% of the cases that proceeded beyond this initial step, or else those cases would not have proceeded to subsequent steps in the burden-shifting framework (though this is not stated in the article). At times the article describes cases as "not fall[ing] into any category" of the enumerated grounds for dismissal, because either the conduct was procompetitive (because a justification was shown), or the courts found the conduct was not an unreasonable restraint of trade (again, a way of saying a justification was shown). See e.g. 1289. The figure may be slightly less than 13%, given that some decisions are described as the court applying erroneous analysis. The number of cases in which a justification was established may also be somewhat higher than

Carrier concludes from his analysis that courts tend to follow a burden-shifting framework and that rule of reason analysis is less amorphous than scholars often assumed at the time of the article.[30] Carrier then considers the normative questions of whether courts should consider each step in the burden-shifting framework: anticompetitive effects, procompetitive justifications, the reasonable necessity of the impugned restraint, the presence of less restrictive alternatives and the balancing step. He considers the legislative history, common law preceding the Sherman Act and the Chicago School and post-Chicago school economic theory related to each of these stages in the rule of reason analysis. Most relevant here, Carrier argues, based on these sources, that courts have the capacity to, and should, consider procompetitive justifications.[31] Finally, Carrier recommends combining the second and third stages of the burden-shifting framework to require the defendant, rather than the plaintiff, to demonstrate that the restraint is reasonably necessary to achieve a legitimate procompetitive objective. He argues this change is commensurate with the parties respective access to evidence and would remedy some courts misunderstanding of the burden.[32]

In a later update to the same study in 2009, Carrier finds that from 1999-2009 even more cases were dismissed based on a failure to prove anticompetitive effects, with just under 97% of 222 rule of reason cases ending at this stage.[33] Seven of these 222 cases (approximately 3.1%) resulted in a finding both of no anticompetitive effect, and the establishment of a procompetitive justification (in other words, the defendant "won" the case on two separate grounds).[34] In the remaining cases where *no* anticompetitive effect was found (approximately an additional 3.2% of the cases in the set of 222), a business justification was established, and the case proceeded further along in the burden-shifting framework.[35] Carrier concludes overall that the

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13%, because in at least some of the 84% of cases there was likely a dual finding: not only did the court find no anticompetitive effect, it also found that, if the plaintiff had shown such an effect, the defendant would have established a procompetitive justification as well. In other words, the plaintiff "lost" the case on both the first and second steps of the burden shifting framework.

[30] Carrier (1999) at 1267.

[31] Carrier (1999) at 1271.

[32] *Id.*

[33] Carrier (2009) at 828-29 (describing the results of a data set similarly limited to judge's final determinations in dismissals of rule of reason cases).

[34] at 830 (reporting 7 of 222 cases finding both, which is converted to a percentage figure above). This illustrates the category of cases inferred above from the 1999 study.

[35] at 829 (finding .5% of cases, respectively, had an unrebutted procompetitive justification or a finding of no less restrictive alternative, and 2.2% proceeded to the balancing stage).

rule of reason is "even more crucial" now than it was at the time of the initial study.[36]

Both of Carrier's articles provide meaningful insight into the dismissal of rule of reason cases, and are useful to refute the notion that balancing is frequently involved such analysis. The purpose of the studies, however, was to contribute a high-level perspective on rule of reason dismissals, not to focus on the role of business justifications within those decisions. Neither of Carrier's articles focus on the nature of the justifications that are established in the cases, nor do the articles delve into any unsuccessful justification arguments (where the defendant does not establish the claimed procompetitive justification).

This article continues the work of Carrier, Newman and others with an examination focused specifically and systematically on arguments of procompetitive justifications. Carrier's excellent studies included cases decided only up to 2009, leaving more than a decade of cases yet to be similarly analyzed. This article updates and deepens the rule of reason case data through to 2021, with a focus on procompetitive justifications. It examines the types of justifications that are being argued before the courts in both trial and appellate litigation. It considers which of justifications argued are being dismissed as pretextual or not cognizable in law, and which are being proven by the defendant. It considers whether the types of justifications argued—or their success rates in court—have changed over time, whether certain justifications are more likely to result in courts proceeding to the balancing stage of the rule of reason analysis, or in a finding that the restraint was not reasonably necessary (or that there was a "less restrictive" alternative). This contribution to the literature will be useful for both defendants and antitrust agencies in understanding the types and likely success of various procompetitive justification arguments.

III. METHODOLOGY

This study examines rule of reason decisions issued between 2009 and July 2021 in which courts consider a proffered procompetitive justification. The cases include claims brought under Section 1 and 2 of the Sherman Act and Section 5 of the FTC Act.

To identify relevant terminology and to design a Westlaw advanced search string that would produce a universe of potentially relevant cases,

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[36] at 828.

initial Westlaw test searches were conducted, along with a non-exhaustive review of the top search results. This review indicated that the term "justification" alone was both too narrow and too broad. It produced many false positives, due to colloquial use and use in non-antitrust cases, and missed other terms sometimes used refer to procompetitive justifications.[37] The term "Sherman" was included to eliminate non-antitrust cases involving justifications.

The final search string used to identify the set of cases for systematic review was as follows: ("business justification" OR "procompetitive justification" OR (efficiency /s (justification or defense))) & Sherman. This search produced 1,167 results. These results were narrowed to include only the following procedural postures, as categorized by Westlaw:

- Motion for Summary Judgment
- On Appeal
- Motion to Dismiss for Failure to State a Claim
- Motion to Dismiss
- Motion for Permanent Injunction
- Judgment
- Review of Administrative Decision
- Motion for Judgement on the Pleadings

Unlike Carrier's 1999 and 2009 studies, non-final dispositions were included within the relevant data set, on the logic that decisions in which the case may proceed could still involve consideration of a procompetitive justification. However, the procedural postures listed in **Appendix A** were excluded, on the basis that they were very unlikely to include consideration of procompetitive justifications and primarily include preliminary motions unrelated to the justifications arguments (for example, motions on various procedural, standing or jurisdictional matters, preliminary injunctions, directed verdicts or class certification disputes).

This process narrowed the set of potentially relevant cases to 174 decisions. These 174 cases were manually reviewed to determine which cases considered procompetitive justifications. The review included both appeal and lower court decisions in the same litigation where the decisions each considered arguments on justifications. It excluded false positives.

The relevant decisions from the 174 case set (those which consider

[37] [NTD: See further discussion on these various terms, *infra*.]

arguments on business justifications) were then reviewed in-depth by two reviewers. Each case was summarized and categorized under the headings shown in **Appendix B**. [NTD: These cases are still being reviewed. At last count, we had reviewed approximately 80 decisions but this includes some pre-2009 cases as part of the initial work to identify relevant search terms.] This included categorization of the types of justification(s) argued in the cases, as follows:

- Competitor Free-Riding Prevention
- New Product Introduction
- Technical Necessity
- Reduced Transaction Costs
- Improved Transparency in Market/Reduced Information Asymmetry
- Intellectual Property Right
- Efficiency Justification - Lower Price
- Efficiency Justification - Better Quality
- Efficiency Justification - More Innovation
- Immunity
- Data Privacy
- Health or Safety
- Other Non-efficiency Justification
- Other Justification - Generally
- Competitive Balance

These categories are based on justifications that appear in the argumentation for more than one rule of reason case. However, as discussed in further depth throughout this article,

not all are properly cognizable in antitrust law as a justification. Some, like health and safety, are not cognizable in law, and others, such as antitrust immunity arguments, are referred to or framed incorrectly as "justifications" when they involve other legal concepts.

This categorization of justification is not meant to suggest that justifications would be recognized only where they fall within established categories. As discussed below, the Supreme Court has repeatedly evaluated justifications based on substance, not form, and in particular, economic evidence of the likely effects of the conduct or restraint on competition. Justifications are necessarily, in some sense, a case-by-case determination — they depend on the specific facts, and must be demonstrated based on specific evidence in each case.

However, in this surprisingly unsettled area of law, this categorization provides insight into judicial thinking on justifications. Over time, categories have emerged across the jurisprudence which are useful in understanding the traits of what constitutes a valid business justification, and which purported justifications tend to be found pretextual. This categorization also illuminates outlier decisions, where courts accept "justifications" that are either not properly cognizable in law, or "justifications" that are more properly termed immunity or exceptions from antitrust law.[38]

IV. FINDINGS ON THE LAW OF PROCOMPETITIVE JUSTIFICATIONS

The concept of a justification has a deep history, tracing back to descriptions of antitrust law by Senator John Sherman himself. Sherman described a then-proposed Sherman Act as covering "unlawful combinations to prevent competition,"[39] but also emphasized that the legislation would "not in the least affect combinations in aid of production where there is free and fair competition."[40] This reflects the central idea that not *every* restraint of trade would be prohibited—only those that impaired competition in an unlawful manner. Restraints that did not unlawfully impair competition would be justified.

The rule of reason has become the prevailing analytical standard applied to alleged Sherman Act Section 1 and Section 2 violations.[41] This rule of reason analysis typically proceeds using a burden-shifting framework. The plaintiff must first demonstrate a *prima facie* case of harm to competition.[42] If harm is shown, the burden shifts to the defendant to establish a nonpretextual, procompetitive justification for its actions.[43] Once the

[38] [NTD: See discussion to be developed in the article, *infra*.]

[39] 21 CONG. REC. 2456 (1890); *see also* Carrier, The Real Rule of Reason: Bridging the Disconnect (1999) at 1317 (finding that this Sherman Act history indicates the framers would allow defendants to introduce procompetitive justifications).

[40] 21 CONG. REC. 2457 (1890).

[41] *Cont'l T.V.*, 433 U.S. at 49 (noting that the rule of reason is "the prevailing standard of analysis") (citing *Standard Oil*, 221 U.S.); FTC v. Qualcomm Inc., 969 F.3d 974, 991 (9th Cir. 2020) ("Regardless of whether the alleged antitrust violation involves concerted anticompetitive conduct under § 1 or independent anticompetitive conduct under § 2, the three-part burden-shifting test under the rule of reason is essentially the same.")

[42] *Microsoft*, 253 F.3d at 58–59 (describing the burden-shifting framework).

[43] *Id.* at 59 ("[I]f a plaintiff successfully establishes a *prima facie* case under § 2 [of the Sherman Act] by demonstrating anticompetitive effect, then the monopolist may proffer a 'procompetitive justification' for its conduct." (citing Eastman Kodak,

defendant establishes a procompetitive justification, the burden shifts back to the plaintiff, who may rebut the justification by showing a less restrictive alternative to achieve the same competitive effect or "demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit."[44]

As lamented in the literature summarized above, there is no widely applicable or clearly settled definition of what constitutes a procompetitive justification in the antitrust jurisprudence.[45] At this second stage of the analytical framework, courts describe valid justifications in a variety of ways, both in terminology and in substance.

However, among this variation, there is an observable and shared focus on improved efficiency[46] and/or consumer welfare[47] in the substance of many

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504 U.S. at 483)); United States v. Dentsply Int'l, Inc., 399 F.3d 181, 196 (3d Cir. 2005) ("[H]aving demonstrated harm to competition, the burden shifts to [the defendant] to show that [its impugned conduct] promotes a sufficiently pro-competitive objective." (citing United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993))).

[44] *Id.* (providing that, if the defendant establishes a procompetitive justification, the burden shifts back to the plaintiff to rebut that justification, or if it cannot, to "demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit"). Cases rarely proceed to this final stage of analysis. *See* Carrier, *supra* note 3.

[45] See *supra* [NTD: Refer to Summary of Prior Literature].

[46] *See, e.g.*, FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459 (1986) (stating that agreements limiting consumer choice in a market are anticompetitive, "[a]bsent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services"); Nat'l. Collegiate Athletic Ass'n. v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 114 (1984) (rejecting the defendant's "efficiency justification" because there was no proof that the restraints "produced any procompetitive efficiencies which enhanced the competitiveness of college football television rights"); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 20 (1979) (considering whether the challenged practice is "designed to 'increase economic efficiency and render markets more, rather than less, competitive') (citing United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16 (1978)) [hereinafter *BMI*]; *Cont'l T.V.*, 433 U.S. at 54 (finding that "[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products"); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608 (1985) (finding a "failure to offer any efficiency justification whatever for [the defendant's] pattern of conduct").

[47] *See, e.g.,* Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1183 (1st Cir. 1994) ("In general, a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare."), *abrogated on other grounds by* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010).

of the descriptions of justifications. For example, in *United States v. Microsoft Corp.*, the D.C. Circuit described a procompetitive justification as "a nonpretextual claim that [the monopolist's] conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal."[48] The First Circuit similarly describes a justification asserted in response to a Section 1 Sherman Act claim as "valid if it relates directly or indirectly to the enhancement of consumer welfare" such as the "pursuit of efficiency and quality control."[49] At times, courts describe justifications in more granular terms associated with improved efficiency or consumer welfare in antitrust law, such as increased output, improved operating efficiency, enhanced quality or greater consumer choice.[50] As with much of modern antitrust law, these judicial references to "efficiency" are understood to mean economic efficiency.[51]

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[48] *Microsoft*, 253 F.3d at 59.

[49] *Data Gen. Corp.*, 36 F.3d at 1183. Though this article discusses all rule of reason cases generally, Phillip E. Areeda and Herbert Hovenkamp suggest it may be easier to prove a justification in unilateral conduct cases than in joint conduct cases, given the latter is viewed as more suspect in antitrust law. 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 658(f) (4th ed. 2015).

[50] *See, e.g.*, Polygram Holding, Inc., 136 F.T.C. 310, 345–46 (2003), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005) ("Cognizable justifications ordinarily explain how specific restrictions enable the defendants to increase output or improve product quality, service, or innovation."); McWane, Inc. v. FTC, 783 F.3d 814, 841 (11th Cir. 2015) (describing cognizable justifications as "typically those that reduce cost, increase output or improve product quality, service, or innovation" (quoting In the Matter of McWane, Inc., 2014-1 Trade Cas. (CCH) ¶ 78670, 2014 WL 556261, at *30 (FTC Jan. 30, 2014))); Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1023 (10th Cir. 1998) (explaining that "increasing output, creating operating efficiencies, making a new product available, enhancing product or service quality, and widening consumer choice have been accepted by courts as [procompetitive] justifications" and observing further that "mere profitability or cost savings have not qualified as a defense under the antitrust laws"). But see John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 517 (2019) (critiquing marketplace effects-based definitions of valid justifications on the basis that such effects cannot necessarily be equated with increased consumer welfare).

[51] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 888 (2007) (referring to the evaluation of justifications "based upon demonstrable economic effect" (quoting *Cont'l T.V.,* 433 U.S. at 58–59)); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 690 n.16 (1978) (noting that the antitrust inquiry into the reasonableness of competitive restraints emphasizes "economic conceptions") [hereinafter *Professional Engineers*]. Hovenkamp's leading treatise also clarifies that this judicial use of the term "efficiency" to describe justifications should be understood to refer to reduction in the costs or output of the monopolist itself

In a departure from this commonly understood focus on economic efficiency, certain cases like *United States v. Brown University* adopt a largely non-economic view of what constitutes a valid justification.[52] These decisions are discussed in more depth below (see section on *Non-Cognizable "Justifications"*). However, these cases are outliers. The weight of Supreme Court precedent confirms that cognizable justifications are premised on improvements in economic welfare,[53] consistent with the consumer welfare standard that guides antitrust law writ large.

There is also a common thread in the jurisprudence that suggests the ultimate question is whether an asserted justification has procompetitive effects.[54] Unless there is "some countervailing procompetitive virtue"—which usually takes the form of improved efficiency—then the restraint or conduct is not justified.[55] This means a mere desire to maintain a monopoly market share, or to thwart the entry of competitors, cannot act as a justification.[56]

(productive efficiency), rather than the market as a whole (allocative efficiency), given that even monopolists are under no obligation to make the market larger. AREEDA & HOVENKAMP, *supra* note 19, ¶ 658, at 190.

[52] *Brown Univ.,* 5 F.3d at 677–78 (accepting the enhancement of choice for certain students and broadening of the socioeconomic sphere of the potential student body as justifications for collusion on need-based financial aid between elite colleges); see also HDC Med., Inc. v. Minntech Corp., 474 F.3d 543, 550 (8th Cir. 2007) (accepting that "[p]atient safety is a valid business justification" for the alleged misconduct).

[53] *See, e.g.*, *Professional Engineers*, 435 U.S. at 690 n.16 (1978); *Ind. Fed'n of Dentists*, 476 U.S. at 463–64.

[54] *Bd. of Regents of Univ. of Okla*., 468 U.S. at 104 ("Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition."); 1-800 Contacts, Inc. v. FTC, 1 F.4th 102, 114 (2d Cir. 2021) (referring to the concept of a "procompetitive justification[]"); *Ind. Fed'n of Dentists*, 476 U.S. at 459 (noting that agreements limiting consumer choice in a market are unlawful under the rule of reason, "[a]bsent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services"); *Data Gen. Corp.*, 36 F.3d at 1183 ("In essence, a unilateral refusal to deal is prima facie exclusionary if there is evidence of *harm* to the competitive process; a valid business justification requires proof of countervailing *benefits* to the competitive process.").

[55] *Ind. Fed'n of Dentists*, 476 U.S. at 459.

[56] *Data Gen. Corp.*, 36 F.3d at 1183 (suggesting that monopolist may rebut an inference of exclusionary conduct by establishing "legitimate competitive reasons for the refusal" (citing Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 483 n.32 (1992)).

Based on these general criteria of improved economic efficiency, and procompetitive effects, courts have accepted variety of different justifications as procompetitive. Commonly cognizable justifications include the prevention of competitor free-riding on investments, technical necessity in product design,[57] the reduction of transaction costs,[58] and the ability to provide new products to customers.[59]

In addition to these various threads of law on the substance of what constitutes a justification, the language used to refer to justifications varies among these decisions. The terminology includes references to "business justifications," "procompetitive justifications," "efficiency justification[s]"[60] and "defenses," among other terms.[61] Though these labels are often used interchangeably in the decisions (and in this article), there are substantive distinctions worth drawn between some of them. For example, scholar Herbert Hovenkamp explains that reference to intellectual property as a "justification" is likely incorrect, as the exercise of valid intellectual property right would mean there is no anticompetitive conduct to begin with—and thus no justification is required.[62] By definition, anticompetitive conduct is that "without legitimate business purpose that makes sense only because it eliminates competition."[63] For this reason, although justifications are referred to in some judicial decisions as a "defense" it is more accurate to say that, where the defendant establishes a procompetitive justification for its conduct, there is no violation to defend against. This difference goes not only to terminology, but further to the burden imposed on plaintiff and defendants,

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[57] *Microsoft*, 253 F.3d at 67 (D.C. Cir. 2001) (establishing valid technical reasons related to production functionality for overriding consumers' default browser choices in Windows to use Microsoft's browser instead).

[58] *See, e.g.*, *Leegin*, 551 U.S. at 892 (noting that "even absent free riding[,] [i]t may be difficult and inefficient for a manufacturer to make and enforce a contract with a retailer specifying the different services the retailer must perform," and it is more efficient to simply set a minimum resale price that guarantees the margin the retailer needs to meet expectations for service and other non-price offerings).

[59] *BMI*, 441 U.S. at 22.

[60] Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 Antitrust Law Journal 527, 554 (2013)("efficiency justification").

[61] [NTD: Add cites.]

[62] [NTD: Add cite.]

[63] Morgan v. Ponder, 892 F.2d 1355, 1358 (8th Cir. 1989) (citing Gen. Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795, 804 (8th Cir. 1987)).; LePage's Inc. v. 3M, 324 F.3d 141, 152 (3d Cir. 2003) (en banc) ("[A] monopolist will be found to violate § 2 of the Sherman Act if it engages in exclusionary or predatory conduct *without a valid business justification*." (emphasis added)).

respectively, in rule of reason cases.

A. Evidence of Consumer Welfare Benefits

Even if a justification is generally cognizable in law, the defendant must show that the impugned restraint is likely to generate the claimed economic benefit in the particular case.[64] Courts have rejected justification arguments where there is inadequate evidence of the asserted economic benefits in the specific case.[65] As the Eleventh Circuit explained in *McWane, Inc. v. FTC*, even where the claimed conduct "*could* result in increased efficiency in the right market conditions," the defendant will not establish a justification unless it demonstrates "reasons to think that such conditions exist in [the given] case."[66] This means the defendant will often need to produce relatively specific economic evidence to substantiate the procompetitive effects of its actions,[67] and to demonstrate that procompetitive benefits flow from the challenged restraint or conduct.[68]

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[64] FTC v. Indiana Federation of Dentists at 459 ("If the claimed benefit is one that can be considered in a rule of reason analysis, the defendant must produce evidence that the restraint is likely to generate that benefit." (citing BMI and NCAA)); *see also* Andrew I. Gavil & Steven C. Salop, Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis: Revitalizing the Rule of Reason for Exclusionary Conduct, 168 U. PA. L. REV. 2107, 2137 (2019) ("[G]eneral categorical evidence of benefits . . . should not be sufficient to carry the defendant's burden once the plaintiff produces evidence of probable competitive harm. . . . Permitting purely theoretical justifications to satisfy the defendant's burden in a particular case would amount to a sub rosa presumption and would lead to excessive false negatives. Justifications must be evaluated solely with the case-specific evidence . . . .").

[65] *See, e.g., McWane*, 783 F.3d at 841 (finding no reason that the challenged restraint would increase economic efficiency on the particular facts of the case); United States v. Visa U.S.A., Inc., 344 F.3d 229, 243 (2d Cir. 2003) (finding no evidence that the exclusionary rules had the claimed positive effect on competition).

[66] *McWane*, 783 F.3d at 841 (emphasis added).

[67] *See, e.g.*, *Leegin*, 551 U.S. at 890–91 (considering economic evidence of the ways in which resale price maintenance may prevent free riding and therefore promote competition); Cal. Dental Ass'n v. FTC, 224 F.3d 942, 950–51 (9th Cir. 2000) (considering extensively, on remand, economic evidence of the effect of the challenged restraints in ameliorating information asymmetries for consumers in the given market and other asserted procompetitive effects).

[68] The Apple e-books litigation, though not specific to data privacy, demonstrates this problem of a lack of causal connection between the procompetitive effects and the restraint. Apple identified consumer benefits in the form of price decreases in the e-book industry and the development of technological innovations embedded in the iPad but failed to establish that those benefits were due

B. Pretextual Justifications

Courts will reject business justifications that are merely "pretextual" on the facts.[69] This is an evidentiary question. Courts and agencies will look for testimony and contemporaneous documents that support the defendant's claimed justification for its conduct. Ostensible justifications will be found pretextual when evidence (or a lack of evidence) indicates that the claimed rationale does not plausibly explain the defendant's conduct.[70]

When a firm simply invokes a "justification" *post hoc*, it will often be difficult to demonstrate credibly that its actions were driven by the claimed rationale. For example, in *United States v. Dentsply International, Inc.* the Third Circuit found that the claimed justification for exclusive dealing requirements was pretextual, because the justification was inconsistent with almost all of the evidence on the challenged policy, including the company's "announced reason for [its] exclusionary policies, its conduct enforcing the policy, its rival suppliers' actions, and [its own] dealers' behavior in the marketplace."[71] In other cases, ostensible justifications have been

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to the challenged conduct in the case. United States v. Apple, Inc., 791 F.3d 290, 334 (2d Cir. 2015).

[69] *See e.g.*, New York *ex rel.* Schneiderman v. Actavis PLC, 787 F.3d 638, 658 (2d Cir. 2015) (finding "[a]ll of Defendants' procompetitive justifications for withdrawing IR are pretextual"); LePage's Inc. v. 3M, 324 F.3d 141, 164 (3d Cir. 2003) (affirming the jury verdict that defendant's business justification was pretextual where 3M claimed consumers wanted single invoices and shipments as a reason for the bundled rebates it offered across product lines that were challenged as a Section 2 Sherman Act violation because there was no "testimony or evidence" supporting 3M's asserted justification); United States v. Dentsply Int'l, 399 F.3d 181, 197 (3d Cir. 2005) (affirming the district court's conclusion that the ostensible justification for exclusive dealing policy was pretextual); Eastman Kodak Co., 504 U.S. at 484 (rejecting defendant's business justifications as pretextual).

[70] Some courts address this stage of the analysis with a further burden-shifting framework where the burden shifts to the plaintiff to show that the defendant's claimed justification is pretextual. See, e.g., Morris Commc'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1295 (11th Cir. 2004) (holding that once the defendant has met its burden to show its valid business justification, the burden shifts to the plaintiff to show that the proffered business justification is pretextual); Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1212 (9th Cir. 1997) ("A plaintiff may rebut an asserted business justification by demonstrating either that the justification does not legitimately promote competition or that the justification is pretextual.").

[71] *Dentsply Int'l*, 399 F.3d at 196–97 (finding the defendant's practice of refusing to sell to distributors that carried other manufacturers' artificial teeth

undermined by more innocuous evidence, such as testimony from company leadership that the rationale for the conduct "did not cross [their] mind."[72]

[NTD: This discussion of pretextual justifications is developed further in the *Emerging Justifications: Data Privacy Protection* section, *infra*. Add a section discussion on cases in which there is no rational business purpose proffered for the conduct. For example, in *Aspen Skiing* the dominant ski company "fail[ed] to offer any efficiency justification whatever" for its decisions, 472 U.S. at 608, 105 S.Ct. at 2860, and "was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Id.* at 610–11, 105 S.Ct. at 2861.]

C. The (Ir)relevance of Intent in Assessing Procompetitive Justifications

[NTD: Develop discussion on intent evidence here. Evidence of a business justification, much like intent evidence, may aid the court in understanding the facts and determining the likely consequences. Though justifications may play a role akin to intent evidence, justifications (in contrast with intent evidence) are objective, and therefore potentially more useful to the courts in understanding what occurred.[73] Positive intent evidence will not "save an otherwise objectionable act." [74]]

D. Types of Justifications Argued and/or Recognized in the Jurisprudence

Defendants regularly assert a wide array of purported justifications for their conduct. Though not all are properly cognizable in antitrust law, this section describes a typology of justifications claimed in the jurisprudence, and the number of times which each was argued—and successfully proven—in the data set of rule of reason cases.

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violated Section 2 as an unlawful maintenance of monopoly power); *see McWane*,. 783 F.3d at 841–42 (finding that the defendant's "damning internal documents seem to be powerful evidence that its procompetitive justifications are 'merely pretextual'").

[72] *Image Tech. Servs.*, 125 F.3d at 1219 (finding the claimed intellectual property justification was pretextual where the parts manager responsible for the challenged policy testified that the ostensible justification "did not cross [his] mind" (alteration in original)).

[73] Areeda and Hovenkamp, id.

[74] *Chicago Bd. of Trade v. United States,* 246 U.S. 231, 238 (1918).

1. Emerging Justifications: Data Privacy Protection

The need to protect consumer data privacy is one of the newest justification defendants are invoking in rule of reason cases. Though some courts are skeptical of defendants' claims of privacy protection as a justification,[75] at least one federal court has already accepted such arguments. In *Epic Games, Inc. v. Apple Inc.*,[76] a U.S. District Court for the Northern District of California judge found that data privacy and security justified Apple's imposition of distribution and payment rules on third-party apps distributed through the company's app store. Despite evidence that Apple's practices on were *prima facie* anticompetitive, Apple successfully argued that the rules also improved data privacy and security for end users, which, in turn, enhanced competition between mobile device operating systems.[77] *Epic v. Apple* is one of the first U.S. antitrust cases to recognize data privacy as a procompetitive justification, but far from the last. Several other digital platforms are invoking user data privacy in response to allegations of anticompetitive conduct.[78]

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[75] *See, e.g.*, hiQ Labs, Inc. v. LinkedIn Corp., 938 F.3d 985, 994 (9th Cir. 2019) (rejecting arguments by LinkedIn, a professional social networking service, that user data privacy protection was the rationale for its allegedly anticompetitive conduct), *vacated on other grounds*, 141 S. Ct. 2752 (2021).

[76] No. 4:20-CV-05640-YGR, 2021 WL 4128925 (N.D. Cal. Sept. 10, 2021) [hereinafter *Epic v. Apple*]. Apple's app store practices are also the subject of a statement of objections from the European Commission. Eur. Comm'n Press Release IP/21/2061, *Antitrust: Commission Sends Statement of Objections to Apple on App Store Rules for Music Streaming Providers* (Apr. 30, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061 (announcing that the Commission has "informed Apple of its preliminary view that [Apple] distorted competition in the music streaming market as it abused its dominant position for the distribution of music streaming apps through its App Store").

[77] *Epic v. Apple*, at *102, *105.

[78] *See, e.g.*, hiQ Labs, Inc. v. LinkedIn Corp., 938 F.3d 985, 994 (9th Cir. 2019) (noting that LinkedIn, a professional social networking service, asserted user data privacy protection as the rationale for its allegedly anticompetitive conduct), *vacated on other grounds*, 141 S. Ct. 2752 (2021). Google has emphasized data security in response to allegations of anticompetitive conduct from rival Aptoide. Press Release, *Aptoide: EU National Court Rules Against Google in Anti-Trust Process* (Oct. 22, 2018), https://www.prnewswire.com/news-releases/aptoide-eu-national-court-rules-against-google-in-anti-trust-process-821883497.html; Dave Kleidermacher, *Android Security 2017 Year in Review*, GOOGLE SECURITY BLOG (Mar. 15, 2018), https://security.googleblog.com/2018/03/android-security-2017-year-in-review.html (describing Google's position that it removes apps to protect

It is worth distinguishing from the outset what these justification arguments are not. The research for this article did not find U.S. cases in which antitrust defendants are claiming regulatory immunity, meaning an argument that privacy regulation displaces antitrust law.[79] Nor are defendants claiming that a particular statutory authorization, permission, or conflict is occurring between antitrust and data privacy law. These claims would be analyzed under different precedent and principles of antitrust law, though they share the thematic similarity with the arguments canvassed in this article of tension between antitrust and privacy law. Instead, the arguments discussed here are softer and more generalized assertions that the anticompetitive conduct protects the privacy interests of consumers, to the benefit of competition, or that privacy is important for consumers, and therefore the defendant's conduct is justified, even if shown to be *prima facie* anticompetitive. The digital firm casts itself as the privacy champion of users rather than an anticompetitive actor.

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users from malicious or unsecure app downloads). Apple has also invoked data privacy and security concerns in response to other allegations of anticompetitive conduct. *See* Adam Satariano, *Apple Defends App Store Policies After Spotify's Antitrust Complaint*, N.Y. TIMES (Mar. 15, 2019), https://www.nytimes.com/2019/03/15/business/apple-spotify.html (describing Apple's invocation of consumer interests in "[t]he App Store [being] a safe, secure platform" in response to Spotify's allegations of anticompetitive conduct); H. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COM. & ADMIN. L., 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS 55 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf (quoting testimony from Tile Chief Privacy Officer and General Counsel Kirsten Daru that "Apple has used the concept of privacy as a shield" for anticompetitive conduct); *id.* at 358 (summarizing Apple's position that its disparate treatment of applications is driven by differences in data storage practices that impact privacy and security risks).

[79] Richard M. Brunell, *In Regulators We Trust: The Supreme Court's New Approach to Implied Antitrust Immunity*, 78 ANTITRUST L.J. 279, 283 (2012) ("Conduct that is specifically authorized by regulators under a regulatory statute is often immune, but it may not be if there is no conflict between the underlying goals of the regulatory statute and the antitrust laws." (footnote omitted)); Cases like Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP have found that industry-specific regulatory regimes may supplant antitrust law, even where both areas of law impose compatible obligations. Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 412 (2004) (explaining that where there exists "a regulatory structure designed to deter and remedy anticompetitive harm . . . the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny").

a) Privacy Protections That Enhance Competition are Justified

Nothing in existing antitrust law, canvassed above, precludes the recognition of new justifications such as data privacy protection. The jurisprudence focuses on the substance of the competitive effects from the challenged restraint or conduct, rather than simply looking to established categories of justifications. Among the varying case law, the shared focus is on whether a justification offers improved competition, and relatedly, enhanced efficiency[80] and/or consumer welfare.[81]

This suggests privacy protections should be cognizable as a justification in antitrust law when their effects are procompetitive. The relationship or effect of the restraint on data privacy is, in other words, not determinative. What matters is the effect of the restraint on competition.

A 2016 Canadian case reinforces this argument that antitrust law would permit data privacy restraints to be recognized as a justification. *Commissioner of Competition v. Toronto Real Estate Board* offers one of the most detailed considerations in law of whether privacy protection is a

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[80] *See, e.g.*, FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459 (1986) (stating that agreements limiting consumer choice in a market are anticompetitive, "[a]bsent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services"); Nat'l. Collegiate Athletic Ass'n. v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 114 (1984) (rejecting the defendant's "efficiency justification" because there was no proof that the restraints "produced any procompetitive efficiencies which enhanced the competitiveness of college football television rights"); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 20 (1979) (considering whether the challenged practice is "designed to 'increase economic efficiency and render markets more, rather than less, competitive') (citing United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16 (1978)); *Cont'l T.V.*, 433 U.S. at 54 (finding that "[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products"); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608 (1985) (finding a "failure to offer any efficiency justification whatever for [the defendant's] pattern of conduct").

[81] *See, e.g.,* Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1183 (1st Cir. 1994) ("In general, a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare."), *abrogated on other grounds by* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010).

potential justification for anticompetitive conduct. Canadian competition enforcers brought an antitrust claim against the Toronto Real Estate Board (TREB),[82] alleging that TREB had abused its dominance in residential real estate brokerage services within certain markets. TREB was a professional association of real estate brokers. It operated a database of real estate listings that, at the time of the case, had no readily available substitute. TREB had promulgated exclusionary rules that denied online real estate brokers access to certain home listing data in its database, while making that same data available to traditional brick-and-mortar brokers. This practice excluded online brokers, who were posing a competitive threat to TREB's many traditional realtor members by undercutting their prices and providing more direct consumer access to real estate listings.

In response to this allegation of abuse of dominance, TREB argued that it had limited the online distribution of certain listing data to protect the data privacy of the individuals who were selling their homes through its real estate platform.[83] TREB claimed it had restricted online brokers from accessing certain information, such as historical home selling prices, because its distribution online would violate the home sellers' privacy interests. TREB presented a number of arguments in support of this position, arguing that its denial of online data access was necessary to comply with Canadian privacy law, and to accord with TREB's own terms and conditions of service for its home sales database.

The case was heard by the Canadian Competition Tribunal, an adjudicative body that specializes in Canadian competition law. The Tribunal found that TREB had failed to establish on the facts that user privacy protection was a significant driver of its misconduct.[84] Importantly, though, the Tribunal recognized in *obiter dicta* that privacy could be cognizable as a justification in law, explaining that "there may be legal considerations, such as privacy laws, that legitimately justify an impugned practice, provided that the evidence supports that the impugned conduct was primarily motivated by such considerations."[85]

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[82] 2016 Comp. Trib. 7 (Can.). "Abuse of dominance" under the Canadian Competition Act is, for the purposes of discussion here, roughly equivalent to unlawful monopolization under Section 2 of the Sherman Act.

[83] *Id.* ¶ 321, at 61.

[84] *Id.* ¶ 380, at 74. See discussion of the evidence and factual findings in *Comm'r of Competition v. Toronto Real Estate Bd.*, *infra* notes 129–133 and accompanying text.

[85] *Id.* ¶ 294, at 56.

The decision suggests there is no barrier in Canadian antitrust doctrine to recognizing a restraint on privacy as procompetitive. Similar logic applies in U.S. antitrust law. Where a defendant can demonstrate that its privacy-protective restraint is positive for competition, those restraints should be justified. The effects on competition and consumer welfare are determinative.

Further, in determining the competitive effects of privacy restraints, existing U.S. law on justifications suggests economic effects evidence will be influential. The Supreme Court has focused on demonstrated economic realities in assessing novel justification claims, and in particular, on economic evidence regarding whether the restraint is likely to improve efficiency.[86] In leading cases like *Cont'l T.V., Inc. v. GTE Sylvania Inc.*[87] and later *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*,[88] the Court looks to economic evidence to develop judicial understandings of how vertical restraints affect competition.[89] After considering economic evidence that such restraints are often procompetitive, the Court moved from subjecting such restraints to a *per se* standard to instead applying the rule of reason standard that looks at effects evidence. Where privacy restraints have positive effects on competition, as demonstrated through evidence of improved economic efficiency, those restraints are likely to be justified in antitrust law.

(1) When is Privacy Protection "Efficiency Enhancing"?

This leaves an important question—when are privacy protections efficiency enhancing? In their extensive review of privacy economic scholarship, Alessandro Acquisti and his co-authors observe that privacy protections have variable effects on economic efficiency.[90] The theoretical and empirical economic research demonstrates situations in which privacy protections improve economic efficiency and welfare in markets, but also scenarios in which the protection of privacy can decrease such efficiency and

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[86] *Leegin*, 551 U.S. at 888 (noting recent jurisprudence that rejected evaluation of restraints on competition "based on 'formalistic' legal doctrine rather than 'demonstrable economic effect'" (quoting *Cont'l T.V.*, 433 U.S. at 58–59)).

[87] 433 U.S. 36 (1977).

[88] 551 U.S. 877 (2007).

[89] *Id.* at 895–96; *Cont'l T.V.,* 433 U.S. at 54–55.

[90] Alessandro Acquisti, Curtis Taylor & Liad Wagman, *The Economics of Privacy*, 54(2) J. OF ECON. LIT. (2016), 442, 443 (observing a key theme from the literature review that both theoretical and empirical economic analysis shows a duality in which privacy protection can increase or decrease social welfare).

welfare.[91] Privacy protection has the potential to result in either effect, depending on the specific context and conditions in the market, and the assumptions in the economic models applied.[92]

The meta-conclusion in the privacy economics literature supports the dual contention of this section: in some situations, privacy protections will constitute procompetitive justifications, while in others they will not. Applied to the question of whether privacy can act as a justification, Acquisti's findings suggest that defendants will, in some cases, be able to present evidence that their privacy restraints improve economic efficiency, and thus establish a justification in antitrust law. The research also suggests that in other situations, the economic evidence will demonstrate that the privacy restraints (or conduct) reduce efficiency, and the defendant will fail to demonstrate its purported privacy-based justification. Though economic findings are not law, this context-specific economic efficiency evidence will often be deeply influential in whether defendants can demonstrate that privacy protection justifies its *prima facie* anticompetitive conduct.

This examination of the economic literature also illustrates the important role of case-specific evidence in establishing a privacy-based justification. Even if a justification is generally cognizable in law and economics, the defendant must show that the impugned restraint is likely to generate the claimed economic benefit in the particular case.[93] Courts have rejected justification arguments where the evidence is inadequate in the specific case to support the asserted economic benefits.[94] As the Eleventh Circuit

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[91] *Id.* at 448 (finding that, depending on context and conditions, "privacy can either increase or decrease individual as well as societal welfare")

[92] *Id.*

[93] *FTC v. Indiana Federation of Dentists* at 459 ("If the claimed benefit is one that can be considered in a rule of reason analysis, the defendant must produce evidence that the restraint is likely to generate that benefit." (citing BMI and NCAA)); *see also* Andrew I. Gavil & Steven C. Salop, Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis: Revitalizing the Rule of Reason for Exclusionary Conduct, 168 U. PA. L. REV. 2107, 2137 (2019) ("[G]eneral categorical evidence of benefits . . . should not be sufficient to carry the defendant's burden once the plaintiff produces evidence of probable competitive harm. . . . Permitting purely theoretical justifications to satisfy the defendant's burden in a particular case would amount to a sub rosa presumption and would lead to excessive false negatives. Justifications must be evaluated solely with the case-specific evidence . . . .").

[94] *See, e.g., McWane*, 783 F.3d at 841 (finding no reason that the challenged restraint would increase economic efficiency on the particular facts of the case); United States v. Visa U.S.A., Inc., 344 F.3d 229, 243 (2d Cir. 2003) (finding no

explained in *McWane, Inc. v. FTC*, even where the claimed conduct "*could* result in increased efficiency in the right market conditions," the defendant will not establish a justification unless it demonstrates "reasons to think that such conditions exist in [the given] case."[95] This means defendants will need to produce relatively specific economic evidence to substantiate the procompetitive effects of its privacy restraints,[96] and to demonstrate that procompetitive benefits flow from the challenged restraints.

(2) Privacy Protection as a Justification: Reducing Information Asymmetry

To illustrate the contextual potential for privacy restraints to enhance efficiency – or not – consider an example of a privacy-protective restraint that reduces information asymmetry in a market.

Courts have regularly recognized that restraints may be justified as procompetitive where their effect is to correct information asymmetries for consumers.[97] For example, in the leading case of *California Dental Association v. FTC* the FTC challenged the defendant dental association's advertising rules, which required member dentists to include certain price and other disclosures in their ads.[98] The FTC argued that the enforcement of these rules impermissibly restricted truthful advertising, in violation of Section 5 of the FTC Act.[99] The Supreme Court found that the defendants procompetitive justifications were plausible, in part because of their potential to reduce information asymmetries between patients and dentists in the specific market. The Supreme Court remanded to the Ninth Circuit for further consideration of the justification arguments, finding they had been too quickly dismissed by the lower court.

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evidence that the exclusionary rules had the claimed positive effect on competition).

[95] *McWane*, 783 F.3d at 841 (emphasis added).

[96] *See, e.g.*, *Leegin*, 551 U.S. at 890–91 (considering economic evidence of the ways in which resale price maintenance may prevent free riding and therefore promote competition); Cal. Dental Ass'n v. FTC, 224 F.3d 942, 950–51 (9th Cir. 2000) (considering extensively, on remand, economic evidence of the effect of the challenged restraints in ameliorating information asymmetries for consumers in the given market and other asserted procompetitive effects).

[97] California Dental v. FTC 224 F.3d 942 (on remand from Supreme Court).

[98] 526 U.S. at 761, 119 S.Ct. 1604.

[99] *Id.* at 945.

Applying a rule of reason standard on remand, the Ninth Circuit found that the dental association guidelines were justified. In particular, the court found it was likely that the rules reduced information asymmetries inherent in the dental services market.[100] Dentists know much more about their services than consumers, and it can be difficult for consumers to obtain accurate information about dental service quality until after those service are purchased (and even then, the court observed, it may be difficult for patients to discern the quality of care).[101] The dental association successfully argued that its restrictions on advertising provided consumers with more accurate and verifiable information, by requiring dentists to fully disclose certain price and quality information.[102] Economic expert testimony indicated that the advertising disclosure rules made it easier for consumers to obtain accurate information about dental services and reduced the search costs for consumers to find the information needed to compare different dentists.[103] The court provided the example of one dentist that advertises a $20 discount on bridge work for new patients, and one that advertises a 15% discount for the same services.[104] The association's rules required each dentist to disclose their regular and discounted dollar rates so patients could determine the absolute prices of each service. This transparency gave consumers the information necessary to compare dental services, and to select the dentist that best suited their needs, which likely enhanced overall competition.[105]

Looking at earlier economic literature, it seems counterintuitive to argue privacy protection reduces information asymmetry in markets. Writing on the economics of privacy from the 1990s emphasizes the tendency of privacy law and privacy protection to reduce data flows.[106] Economist Kenneth Laudon observes that "[p]rivacy is indeed about creating and maintaining asymmetries in the distribution of information."[107] He gives the example of

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[100] *Id.* at 952.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.* at 953.
[106] *See, e.g.,* Ryan Calo, Privacy Law's Indeterminacy, Theoretical Inquiries in Law, vol. 20, no. 1, 2019, pp. 33-52 at *15 (ssrn copy) https://doi.org/10.1515/til-2019-0001. (observing that "[e]conomists in general, law and economics scholars in particular, tend to be heavily skeptical about privacy for its tendency to deny market participants information.").
[107] Kenneth C. Laudon, Markets and Privacy, 39 *Communications of the Association for Computing Machinery* 92, 98 (1996); See also Richard A. Posner, *The Economics of Privacy*, 71 (2) American Economic Review 405 (1981) (arguing privacy protection creates inefficiencies in markets by concealing information).

health insurance companies, which, due to privacy laws, do not have full information about the individuals to whom they sell insurance.[108] The result of this imperfect information is that the insurance company must charge higher rates to some individuals than would be possible if more health information was available. Privacy law limits information flow, and this leads to a decline in efficiency and potentially also in consumer welfare.

More recent literature, though, illustrates that privacy rules could reduce information asymmetries *by providing information about privacy itself.* Acquisti observes that in digital markets, consumers are "severely hindered" in their ability to make decisions about their privacy, because they often have asymmetric information about when their data is collected, for what purposes it is collected and the consequences of such collection.[109] This suggests the potential for privacy-protective rules imposed by an intermediary to improve market transparency for consumers, much like in *California Dental*.

Imagine a popular app store that introduces rules requiring all apps distributed through its store to make real-time privacy disclosures when a consumers' location is being tracked by an app. Many app developers are unhappy with this new requirement, because it changes consumer behavior, reduces tracking and hindering the developers' ability to collect and monetize user location data through services and advertising. The store operator then bars all non-compliant apps from its store, including some apps that compete with the store operator's own vertically-integrated app offerings. This prompts some app developers to complain to antitrust authorities, alleging that the operator's conduct significantly reduces competition and constitutes a refusal to deal in violation of Section 2 of the Sherman Act. Assume for the sake of this hypothetical that the rival app developers could show the operator has monopoly power and make a *prima facie* case of anticompetitive conduct, though both can be challenging to establish in real cases.

Much like the dental association in *California Dental Association v. FTC*, with supporting economic evidence, the app store operator could demonstrate that its privacy disclosure rules make the relevant market for apps more efficient.[110] By their nature, the required privacy disclosures are likely to

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[108] Id. at 97-98. Laudon continues this example to illustrate the idea of moral hazard, where the "bad drives out the good" and the insured pool becomes unhealthy people (who need insurance more) because healthy people refuse to pay the increased rates.

[109] Acquisti, *supra* note 90 at 442,477-78.

[110] The app store operator may even find it easier to demonstrate that its conduct is justified than in *California Dental*, because the case would involve unilateral

increase transparency for consumers in the relevant market for purchasing or downloading apps. In the absence of the operator's disclosure rules, it is difficult and time consuming for consumers to obtain accurate information about how and when apps track their location. The terms and conditions for apps are often dense, and app companies change their terms unilaterally and regularly. Even if a diligent consumer examined these changing terms for each app they used—an impractical and time consuming scenario— the disclosures often will not state with specificity how or when location tracking occurs within a given app.

The disclosure rules and their enforcement are likely to increase privacy transparency in the market, making it easier for consumers to find and compare the location tracking apps engage in, and to choose apps that suit their privacy preferences. The app store rules ensure increased disclosure of location tracking, which reduces information asymmetries between the apps and consumers regarding when tracking occurs and lowers the search costs for consumers to find apps that match their privacy preferences. This increased transparency about location tracking may well drive competition between apps to provide better privacy protection, perhaps reducing the extent to which apps track user location beyond what is necessary to deliver services, or prompting the use of just-in-time consumer consent to tracking when it occurs. The rules appear likely to make the relevant market more efficient, to the benefit of consumers. Since efficiency is enhanced by this privacy protective conduct or restraint, the defendant's conduct would be justified under the rule of reason standard.

(3) Privacy Protection as a Justification: Data Privacy and Security Restraints Enhance Interbrand Competition in *Epic v. Apple*

The recent *Epic v. Apple* decision offers another leading example where privacy protective rules are justified as a procompetitive. Judge Yvonne Gonzalez Rogers of the Northern District of California found that Apple's rules for the Apple app store were justified despite evidence of the rule's anticompetitive effects, because their effect was to protect user data privacy and security which, in turn, enhanced interbrand competition for mobile

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conduct, unlike the concerted action by the association of competitors in *California Dental*. AREEDA & HOVENKAMP, *supra* note 19, ¶ 658(f) (suggesting it may be easier to prove a justification in unilateral conduct cases than in joint conduct cases, given the latter is viewed as more suspect in antitrust law).

operating systems.[111]

This ongoing litigation arose when Apple banished Epic's popular Fortnite from its app store. Epic had introduced its own in-app payment methodology, in a purposeful violation of Apple's app store rules, and the terms of Apple's developer licensing agreement.[112] Apple's store is the near-exclusive source of application downloads for iOS apps[113] for use on Apple's popular mobile devices. Epic claims that Apple violated Sections 1 and 2 of the Sherman Act and state unfair competition law by imposing anticompetitive payment and distribution restrictions on third-party apps, as a condition of distributing those apps through the Apple app store.[114] Epic disputes Apple's prohibitions on "store-within-a-store" apps (preventing decentralized distribution), technical prohibitions on app downloads from outside the Apple store (preventing "sideloading" of apps), and Apple's requirement that employees conduct a human review of app functionality and descriptions (collectively referred to in the decision and this section as the "app distribution restrictions").[115] Epic also challenges Apple's requirement that apps use the company's proprietary in-app payment processing system,[116] for which Apple collects a 30 percent commission on all in-app purchases.[117]

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[111] *Epic v. Apple*, 2021 WL 4128925 (N.D. Cal. Sept. 10, 2021).

[112] *Id.* at *14.

[113] iOS is Apple's mobile operating system.

[114] Compl. for Inj. Relief ¶¶ 184–91, 216–23, Epic Games, Inc. v. Apple Inc., No. 4:20-CV-05640-YGR (N.D. Cal. Aug. 13, 2020) (alleging Sherman Act Section 2 unlawful monopoly maintenance in iOS app distribution and in-app payments); *id.* ¶¶ 207–14, 225–31 (alleging Sherman Act Section 1 unreasonable restraints of trade in iOS app distribution and in-app payments). Epic also claims that Apple denied it access to an essential facility in the form of Apple's app store under Section 2, *id.* ¶¶ 193–205, engaged in tying in violation of Section 1, *id.* ¶¶ 233–244, and violated California antitrust and unfair competition law, *id.* ¶¶ 246–90. Epic was unsuccessful in all of its Sherman Act claims, including a failure to establish that Apple held monopoly power in the relevant market under Section 2. *Epic v. Apple*, 2021 WL 4128925, at *96. However, the court found that Apple's anti-steering provisions, which prevented apps from using buttons, links, or other calls to action to direct consumers to purchasing mechanisms other than Apple's own in-app payments system, violate California unfair competition law. *Id.* at *115–*17.

[115] *Epic v. Apple*, 2021 WL 4128925, at *63–*69 (analyzing the anticompetitive effects of Apple's app distribution restrictions); *id.* at *78–*79 (analyzing the anticompetitive effects of Apple's in-app payment requirement).

[116] *Epic v. Apple*, 2021 WL 4128925, at *20–*22 (describing Apple's rules and rate for in-app payment commissions).

[117] *Id.* at *21.

In considering the Section 1 claims under the rule of reason framework,[118] Judge Gonzalez Rogers found that Epic had provided evidence of the *prima facie* anticompetitive effects of Apple's restraints.[119] The evidence suggested that Apple's ability to maintain its 30 percent in-app commission rate likely "stems from market power."[120] Further, Apple's restraints on distribution precluded developers from opening other game stores for iOS apps, which would compete with Apple on commission rates, likely lowering prices to end users and producing more innovative features in game distribution.[121] Judge Gonzalez Rogers concluded that Apple's practices were linked by "common threads" of unreasonable restraints on competition and harm to consumers.[122]

However, at the second step of the burden-shifting framework, Judge Gonzalez Rogers finds Apple's rules were justified, because the rules enhanced privacy and security for end users, enabling Apple to better compete with other mobile operating systems.[123] Citing *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, Judge Gonzalez Rogers reasoned that Apple's centralized app distribution or "walled garden" approach is the company's competitive differentiator from rival operating systems like

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[118] This discussion focuses only on the Section 1 claims, because that portion of the lengthy decision contains the most extensive consideration of justifications.

[119] *Id.* at *101, *104. Judge Gonzalez Rogers first found that the developer agreement between Apple and app developers was not a concerted agreement, because it was unilaterally imposed by Apple onto developers. *Id.* at *99 (citing *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148 (9th Cir. 1988) to find that the developer agreement was a unilateral contract, and not sufficient to find a concerted agreement between Apple and app developers) However, she "nonetheless continues the analysis to inform the issues relating to anticompetitive and incipient antitrust conduct" for Section 1, and to express concern over Apple's anti-steering provisions in state unfair competition law. *Id.* at *100.

[120] *Id.* at *101.

[121] *Id.* See also the court's evaluation of the facts presented regarding anticompetitive effects. *Id. at**63–*69.

[122] *Id.*

[123] *Id.* at *102. The decision also accepts a second justification based on data privacy and security enhancing the appeal of products for consumers, and rejects a third justification that the restraints were imposed to protect Apple's intellectual property investment. Epic then also attempts to rebut Apple's justifications by proposing several less restrictive means through which Apple could have achieved the claimed procompetitive effects, but Judge Gonzalez Rogers finds that none of the alternatives would be as effective as the current human review or in-app payment system, and that courts should "give wide berth to business judgments." *Id.* at *105.

Google's Android.[124] Apple's testimony and survey evidence indicated that many consumers choose Apple devices because they offer strong data and privacy protection.[125] The restrictions Apple places on app distribution pricing increase the available choices for consumers, "allowing users who value open distribution to purchase Android devices, while those who value security and the protection of a 'walled garden' to purchase iOS devices."[126]

In *Leegin*, the Supreme Court recognized that the imposition of resale price minimums by a manufacturer onto retailers selling its products could be procompetitive, and was therefore subject to the rule of reason.[127] The *Leegin* court looked to economic literature in drawing this conclusion, finding such work "replete with procompetitive justifications for a manufacturer's use of resale price maintenance,"[128] and supportive of the idea that such restraints could enhance efficiency.[129] The court explained that resale price minimums could increase interbrand competition by preventing free-riding by same-brand retailers:

> A single manufacturer's use of vertical price restraints tends to eliminate intrabrand price competition [among same-brand retailers]; this in turn encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers. . .
>
> Absent vertical price restraints, the retail services that enhance interbrand competition might be underprovided. This is because discounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services

[124] *Epic v. Apple*, 2021 WL 4128925 at *102 (citing *Leegin*, 551 U.S. at 890-91). The reasoning described here is articulated for Apple's distribution restraints in the decision. Judge Gonzalez Rogers appears more skeptical that the same justifications apply to Apple's payment restrictions, but ultimately articulates similar reasoning: the in-app payment restraints improve data security, which provides Apple with a competitive advantage and consumers the choice of "a unitary safe and secure means to execute transactions." *Id.* at *105–*06.

[125] For 50–62% or more of users, depending on the country, security and privacy were found to be an important aspect of iPhone purchasing decisions. *Id.* at *75.

[126] *Id.* at *102.

[127] 551 U.S. 877 (2007).

[128] *Id.* at 889.

[129] *Id.* (citing ABA Section of Antitrust Law, Antitrust Law and Economics of Product Distribution 76 (2006) ("[T]he bulk of the economic literature on [resale price maintenance] suggests that [it] is more likely to be used to enhance efficiency than for anticompetitive purposes")).

> generate. . . .Consumers might learn, for example, about the benefits of a manufacturer's product from a retailer that invests in fine showrooms, offers product demonstrations, or hires and trains knowledgeable employees. . . . .Or consumers might decide to buy the product because they see it in a retail establishment that has a reputation for selling high-quality merchandise. [130]

Apple's argument relies on a modern analogy to *Leegin*. Though not addressed in-depth in the decision itself, Apple's filings describe this argument in greater detail. Apple claims that Epic seeks to "freeride" on the investments Apple makes in enforcing high standards of privacy and security, by operating a rent-free store of Epic's own without the same user privacy protections.[131]As in *Leegin*, Apple argues that it invests heavily in its online app store—the showroom equivalent for a digital company—including with its review of apps, customer service, distribution, marketing, and developer tools.[132] Apple argues that its mandatory in-app purchase commissions, and its restraints on app distribution, enable such investment and, in turn, the maintenance of a "secure and trusted platform for consumers to discover and download software."[133] Customers download apps from the Apple store, at least in part, because of Apple's trusted reputation for providing a high level of privacy and security quality.

Adapting *Leegin*'s arguments, Apple essentially claims that its privacy, rather than price, maintenance improves interbrand competition. Apple paints

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[130] *Id*. at 890-91 (citations omitted) (citing *GTE Sylvania,* 97 S.Ct. 2549).

[131] Apple Inc.'s Answer, Defenses & Countercl. ¶ 9, at 43, ¶ 35, at 52, Epic Games, Inc. v. Apple Inc., No. 4:20-CV-05640-YGR, 2020 WL 7012286 (N.D. Cal. Sept. 8, 2020) (describing Apple's claimed investments in its app store and accusing Epic of free riding on Apple's investments in its app store). Apple also argues the restraints are justified based on reduced transaction costs for Apple, app developers and consumers. *Id.* ¶ 3, at 51.

[132] *Id.* at ¶ 10, at 44 (noting the vast majority of Apple fees are in the form of commissions, which enable the app store to operate successfully, and that "Apple manages all aspects of the transaction on behalf of the developer—from offering an extensive library of tools for app development, to the promotion and marketing of apps within the App Store, to providing customer support for app purchases, to collecting sales proceeds from consumers for distribution to the developers").

[133] *Id.* at 6. Apple further argues that the disputed commission "reflects the immense value of the App Store, which is more than the sum of its parts and includes Apple's technology, tools, software for app development and testing, marketing efforts, platinum-level customer service, and distribution of developers' apps and digital content." *Id.* at 5.

a picture of Epic's attempts to free-ride, by evading the app store restrictions—first with a request to offer its own competing Epic Games mini-store within Apple's store, then with its own payment system in the Fortnite app, which violated the Apple app store guidelines and agreements between the parties. Apple claims that Epic does not uphold privacy and security standards equivalent to Apple's, pointing to Epic's history of offering apps outside of iOS that contain security vulnerabilities.[134] If Apple's rules were loosened to allow Epic to offer a "store within a store," consumers would presumably see Epic's offerings within the same Apple app store (from which they ordinarily download Apple-vetted apps) and assume those apps also meet Apple's privacy and security standards. Like the retailers who free-rode on the investments of other retailers in service and showrooms in *Leegin*, Apple would then lose sales to Epic, who is able to offer lower app and in-app prices by saving money on privacy-related investments. This scenario seems particularly plausible given that declines in privacy or data security are often difficult for consumers to detect, at least in the short term,[135] whereas lower prices for apps or in-app purchases are easily noticed. Privacy would erode to a level below that preferred by customers, as Apple loses the margin that enabled it to maintain privacy and security quality within its app store. Apple's distribution restraints alleviate this privacy erosion problem, by preventing Epic from undercutting privacy and security quality within Apple's app store.

The restraints therefore allow Apple to offer a mobile app store with privacy quality that makes it competitive with other mobile operating systems, such as Google's Android. Apple argues that Google offers a less secure app ecosystem, but more openly available sources for apps. Consumers who prefer more secure apps are likely to choose Apple as their operating system, and those that are willing to sacrifice some privacy and security in exchange for a wider array of sources for apps are likely to choose Android.

This adaptation of classic free-riding arguments illustrates how privacy and security restraints may enhance competition. Accepting Apple's arguments, as Judge Gonzales Rogers did, the restraints improve privacy quality and, as a result, enhance interbrand competition. Though privacy related, the justification is cognizable in antitrust law due to this effect on competition.

[134] *Id.* ¶¶ 31–32, at 51.

[135] For example, the sharing of consumer data without consent, or the presence of malware in apps, may only become evident over time (if ever).

Both Epic and Apple have since appealed Judge Gonzales Rogers' decision to the Ninth Circuit.[136] As the case proceeds, an exploration of the related economic literature on free-riding and interbrand competition might be expected, and helpful. The Northern District decision does not delve into such literature, nor does it address the potential impact of differences between *Leegin* and Apple's business—for example, Apple is not merely a distributor of its own products as *Leegin* was, but rather plays a role equivalent both to app "manufacturer," supplying its own apps, and distributor.

b) Distinguishing Normative Privacy Claims: Limiting Competition to Achieve Data Privacy is not a Justification in Antitrust Law

Since "privacy" is a wide-ranging and often amorphous concept, it is also helpful to understand when a claim of data privacy protection is likely *not* cognizable as a justification in antitrust law. It is important to distinguish a particular variation of the "privacy as justification" argument, in which the defendant claims the following: users benefit from the protection of their privacy, which is only able to be reasonably achieved by limiting competition.

This arguments is an old antitrust chestnut reframed in new, privacy clothing. Defendants in Sherman Act cases have regularly claimed that limiting competition will produce some form of broader social benefit, such as improved public health or safety. Complainants in merger reviews have similarly pressed U.S. antitrust agencies to use antitrust law to impose conditions upon or block mergers in order to prevent harm to the environment or to protect employees who may lose their jobs post-merger.[137] Now, these data privacy protection arguments are supplanting other societal interests like public health, safety or labor protection in similar calls to extend the role of

[136] Notice of Appeal, Epic Games, Inc. v. Apple Inc., No. 21-16506 (9th Cir. Sept. 13, 2021); Notice of Appeal, Epic Games, Inc. v. Apple Inc., No. 21-16695 (9th Cir. Oct. 14, 2021). Apple has also sought interim relief to suspend the effect of the ruling pending appeal.

[137] FTC Statement on Google/Doubleclick *Google/DoubleClick*, FTC File No. 071-0170, at 2–3 (2007), https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf

(noting in response to calls to protect privacy in a merger review that "The Commission has been asked before to intervene in transactions for reasons unrelated to antitrust concerns, such as concerns about environmental quality or impact on employees.").

antitrust law.

The Supreme Court has made clear that claims to such purported justifications are "nothing less than a frontal assault on the basic policy of the Sherman Act," because they rely on the premise that competition may be harmful to consumers.[138] In both *National Society of Professional Engineers v. United States*[139] and *FTC v. Indiana Federation of Dentists*,[140] the Supreme Court firmly rejected arguments that restraints on competition were justified simply because the effect of the restraint was to improve public health or safety.

In *Professional Engineers*, the Department of Justice, Antitrust Division (DOJ) established that the defendant engineering society's ethical rules were *per se* anticompetitive. The rules prohibited members of the society from bidding against each other to supply engineering services. The defendant claimed that its rules were justified because their enforcement protected the public from the inferior and unsafe engineering work that would result if engineers competed on price, driving down quality in order to achieve these lower prices.[141]

The Supreme Court flatly rejected this justification, reasoning that the Sherman Act makes a legislative judgment that competition is positive for consumers.[142] Even if that judgment is not correct in every market, or every situation, "the statutory policy precludes inquiry into the question whether competition is good or bad. . . . The judiciary cannot indirectly protect the public against this harm by conferring monopoly privileges on the manufacturers."[143] Accepting arguments that competition is sometimes "bad" for consumers, as the defendant engineering society claimed, would amount to the creation of judicial exceptions to the Sherman Act policy, substituting the court's view for that of Congress on the proper role of competition.[144] The Supreme Court confirmed that, in considering whether a restraint is unlawful,

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[138] *Id.* at 695.

[139] 435 U.S. 679 (1978).

[140] 476 U.S. 447 (1986).

[141] *Professional Engineers*, 435 U.S. at 694–95 (describing a rule of reason standard under which the lower courts should have considered the proffered justification).

[142] *Id.*

[143] *Id.* at 695–96.

[144] *Id.* at 694; *Brown Univ.*, 5 F.3d at 664 (observing that *Professional Engineers* and *Indiana Federation of Dentists* "preclude substituting Congress' view of the social benefits of competition for that of a defendant").

the court's inquiry is properly "confined to a consideration of impact on competitive conditions."[145]

Twelve years later in *FTC v. Indiana Federation of Dentists*, the Supreme Court reaffirmed this view. Relying heavily on *Professional Engineers*, the Court rejected the defendant's claim that its restraints on competition improved the quality of dental care, and therefore improved consumer health.[146] The asserted health benefits to consumers flowed from an absence of competition, created by the defendant's unlawful conduct, and therefore did not constitute a justification in antitrust law.

Based on this jurisprudence, courts should reject the argument that limits on competition are required because those limits improve privacy as an intrinsically valuable benefit for society. Such claims are inconsistent with Supreme Court precedent on justifications. Such an argument is distinct from those discussed above, where the claim is instead that privacy protection improves competition or economic efficiency and is therefore potentially justified.[147]

Consider, for example, a dominant social media company that terminates any fast-growing competitors who interoperate with its online services. Faced with claims of a refusal to deal under the Sherman Act, the social media company argues that allowing interoperability jeopardizes user privacy, because greater third-party access to users social media data means more of user that data for advertising, more location tracking and the like. The company argues that this protection of user privacy protection was the reason for the termination. Without more, this amounts to a claim that consumers must be shielded from competition for social media services, or else their data privacy will be eroded to the detriment of social welfare. This relies on the assumption that competition is harmful to consumers, putting it at odds with the basic premise of the Sherman Act that competition benefits consumers' economic welfare. Like the "justifications" asserted in *Professional Engineers* and *Indiana Federation of Dentists*, such arguments should be rejected by antitrust courts. Supreme Court jurisprudence confirms that restraints on competition cannot be justified based exclusively on claims of social welfare improvement in the absence of competition.

This is not to imply that the protection of data privacy is unimportant, or

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[145] Professional Engineers, 435 U.S. at 690.

[146] *Ind. Fed'n of Dentists*, 476 U.S. at 462–63.

[147] See discussion above on privacy protections that may improve economic efficiency and competition.

a less than worthwhile socio-political goal. Much like the public health and safety arguments in these earlier cases (to the extent they were credible on the facts), the protection of data privacy is a deeply desirable. Data privacy protection benefits consumers, and the broader public, in immediate and tangible ways, such as preventing unwanted intrusion into our lives or financial harm from identity theft. More importantly, data privacy plays an essential role in underpinning personal autonomy, dignity and democracy.[148] Scholars such as Anita Allen describe privacy as "indispensable" and "foundational," and therefore necessary to social functioning and justified on normative grounds.[149] Scholars like Shoshana Zuboff similarly view privacy as having intrinsic value, and go further to contest our societal tolerance of markets for data extraction, and the commoditization of our personal information.[150]

These normative or quasi-moralistic arguments on the intrinsic value of privacy are, however, beyond the scope of current antitrust law, and even at odds with it. Zuboff's eloquent opposition to markets for private data is impossible to reconcile with the pro-market orientation at the heart of antitrust law. The unimpeachable social value of data privacy does not render its protection an antitrust concern. As the Supreme Court points out in *National Society of Engineers*, antitrust law assumes that competition, and by association, the markets in which it occurs, are positive for consumers. Antitrust law, as the law of competition, has bounds. The promotion of privacy for its normative or intrinsic value is beyond those bounds.

Lessening competition in exchange other social values—whether the protection privacy, health, safety, labor or something else—is an entirely legitimate policy goal, but one for the consideration of legislatures rather than

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[148] *See, e.g.*, ALAN WESTIN, PRIVACY AND FREEDOM 46 (1967) (emphasizing the role of data privacy choice within a free society); Kenneth C. Laudon, Markets and Privacy, 39 *Communications of the Association for Computing Machinery* 92, 92 (1996) ("Protecting individual information privacy is a widely accepted value in democratic societies—without which the concept of democracy based on individual choices makes little sense.")

[149] Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 725 (quote in text) and 738 ("Privacy has value relative to normative conceptions of spiritual personality, political freedom, health and welfare, human dignity, and autonomy."); *see also* Ryan Calo, *Privacy and Markets: A Love Story*, 91 NOTRE DAME L. REV 649, 661-62 (2016) (summarizing the literature from privacy law scholars who take issue in various ways with markets for privacy).

[150] Shoshana Zuboff, *Big Other: Surveillance Capitalism and the Prospects of an Information Civilization*, 30 J. OF INFO. TECH. 75 (2015).

antitrust courts alone. For courts to allow justification that limit competition to achieve these socially desirable goals would amount to the creation of judicial exceptions in antitrust law, which, as *National Society of Engineers* points out, is beyond the role of the judiciary.

The review of mergers by U.S. antitrust agencies reinforce these bounds to the role of privacy in a distinct but closely adjacent antitrust context to the Section 1 and 2 Sherman Act claims that are the focus of this section. U.S. antitrust agencies have refused to intervene in mergers on the basis of normative privacy concerns, drawing a similar delineation between calls to protect privacy for its normative value versus claims that privacy protection improves competition. In 2007, the FTC declined to impose remedies on Google's acquisition of ad-serving company DoubleClick, despite concerns over the impact of the transaction on the data privacy of users of Google's services.[151] Consumer privacy advocates, and one dissenting FTC Commissioner, worried that post-transaction, the merging parties would combine their ad-related data sets in a manner that negatively impacted consumer privacy.[152]

The majority of the FTC Commissioners, though, analogized the claimed effects on privacy to concerns in past mergers over impacts on the environment or on labor and concluded that "[a]lthough such issues may present important policy questions for the Nation, the sole purpose of federal antitrust review of mergers and acquisitions is to identify and remedy transactions that harm competition. . . . the Commission lack[s] legal authority to require conditions to this merger that do not relate to antitrust . . . ."[153] The majority distinguished these issues from a scenario the agency was willing to consider within the scope of antitrust law, in which the merger would negatively affect non-price attributes of competition, such as the quality of consumer privacy.[154] However, there was little evidence that any such competition-related impacts on privacy would arise from Google's

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[151] FTC Statement on Google/Doubleclick, *supra* note 137 at 2-3.

[152] *Id.*; Dissenting Statement of Comm'r Pamela Jones Harbour, *Google/DoubleClick*, FTC File No. 071-0170, at 10 (2007), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf.

[153] FTC Statement on Google/Doubleclick, *supra* note 137 at 2. *But see* Dissenting Statement of Comm'r Pamela Jones Harbour at 10 (expressing greater concern over the privacy impacts of the transaction and considering "various theories that might make privacy 'cognizable' under the antitrust laws").

[154] FTC Statement on Google/Doubleclick, *supra* note 137 at 2–3.

purchase of DoubleClick.[155] The agency, in effect, crafted a limit on the role of privacy in merger reviews. The FTC was willing to consider whether the merger negatively affected privacy as a non-price parameter of competition. Any other adverse effects on consumer privacy that might arise from the combination of data post-merger were considered outside of the FTC's jurisdiction in conducting its merger review.[156] Since Google/Doubleclick, both the FTC and the DOJ have continued to take a similar position on the general bounds of privacy's relevant to antitrust analysis.[157]

These agency views on the role of privacy in merger reviews hint that a similar dichotomy—and similar limits—are likely to emerge when a defendant asserts that data privacy justifies its anticompetitive conduct. When a defendant makes arguments based on normative privacy concerns premised on limiting competition to improve privacy, courts and agencies are likely to find that the purported justification is not cognizable in antitrust law. In contrast, when the privacy justification is premised on increasing competition, it is likely to be cognizable in antitrust law.

c) Pretextual Privacy Justifications? – A Factual Question

Though this analysis on legal cognizability is fundamental, a defendant's success in claims of privacy as a justification may more often depend on the facts. Does the evidence show that the defendant was acting to protect users' data privacy? Or is the defendant merely invoking user privacy *ex post*, as a convenient means to ward off allegations of anticompetitive conduct? Courts will reject claims of privacy as a justification where such claims are merely pretextual.[158]

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[155] *Id.* at 2–3.

[156] *Id.* at 2.

[157] *See, e.g.*, Noah Joshua Phillips, Comm'r, Fed. Trade Comm'n, Should We Block This Merger? Some Thoughts on Converging Antitrust and Privacy at 3 (Jan. 30, 2020), ("Privacy can be evaluated as a qualitative parameter of competition, like any number of non-price dimensions of output; but competition law is not designed to protect privacy."); Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, " . . . And Justice for All": Antitrust Enforcement and Digital Gatekeepers 9 (June 11, 2019) ("[D]iminished quality is also a type of harm to competition. . . . [P]rivacy can be an important dimension of quality."); Deborah Feinstein, *Big Data in a Competition Environment*, CPI ANTITRUST CHRON. 2 (May 2015) ("[T]he FTC has explicitly recognized that privacy can be a non-price dimension of competition.").

[158] *See* discussion above on Pretextual Justifications on the applicable law.

Again here, the *Commissioner of Competition v. Toronto Real Estate Board* case provides insight on how the factual analysis may proceed for claims of privacy protection as a justification. The Canadian Competition Tribunal was persuaded by the *absence* of contemporaneous documents identifying user privacy protection as a reason for the defendant's conduct, and by the evidence of TREB's other practices related to data and consumer consent.[159] The documentary evidence showed that, when TREB had faced earlier privacy concerns over the online posting of interior home photos (unrelated to conduct challenged in the case), TREB had sought legal advice, then modified the consent provision in its standardized listing agreements to facilitate such postings. TREB took no equivalent action when it came to the privacy concerns asserted as a justification before the Tribunal. This discrepancy suggested that privacy was not, in fact, a motivating factor in TREB's restriction of online brokers' access to home listing data.[160] Further, in other business contexts TREB had interpreted preexisting consumer consents as sufficiently broad to enable it to disclose consumer data. When it came to the challenged restraints in the case, TREB interpreted its user consent obligations as being more onerous, invoking those obligations as a reason to limit data access.[161] This overall context, along with the lack of documentary evidence reflecting privacy concerns, demonstrated that "privacy played a comparatively small role" in TREB's choice to adopt and enforce the disputed policy.[162] The Tribunal found that the asserted privacy concerns were pretextual—an "afterthought," raised in the face of litigation.[163]

Early U.S. cases suggest that antitrust courts will be skeptical when large digital platforms claim that their conduct is driven by user data privacy protection. In the *hiQ Labs, Inc. v. LinkedIn Corp.* decisions, both the Northern District of California and the Ninth Circuit were dubious of LinkedIn's claim that it had excluded a rival to protect users' privacy interests.[164] Initially, social media company LinkedIn had permitted hiQ, a data analytics startup, to scrape (electronically harvest) data from user

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[159] Comm'r of Competition v. Toronto Real Estate Bd., 2016 Comp. Trib. 7, ¶¶ 405–06 (Can.).

[160] *Id.*

[161] *Id.*

[162] *Id.* ¶ 390.

[163] *Id.*

[164] hiQ Labs, Inc. v. LinkedIn Corp., 273 F. Supp. 3d 1099 (N.D. Cal. 2017), *aff'd*, 938 F.3d 985 (9th Cir. 2019), *vacated and remanded on other grounds* 141 S.Ct. 2752 (2021) (mem.). The decision was vacated and remanded by the Supreme Court on grounds unrelated to the antitrust claims.

profiles on LinkedIn's popular social networking service. HiQ used that information to power its data analytics software, which alerted employers to changes to their employees' LinkedIn profiles.[165]

LinkedIn later blocked hiQ from accessing any user profiles on its social networking service.[166] HiQ claimed that LinkedIn had terminated its access to protect LinkedIn's own, competing data analytics services, in violation of state unfair competition law.[167] LinkedIn argued it had acted out of concern for users' data privacy, not to limit competition. HiQ was scraping data from individual profiles in a manner that LinkedIn claimed was a violation of users' individual privacy settings, and their reasonable expectations of privacy.[168]

On hiQ's motion for a preliminary injunction to regain access to LinkedIn profiles, the District Court was unconvinced that "actual" consumer privacy expectations were "shaped by the fine print of a privacy policy buried in the User Agreement that likely few, if any, users have actually read."[169] This skepticism is at odds with the FTC's fundamental assumption in Section 5 FTC Act enforcement that consumers' reasonable expectations of privacy are established by the terms of privacy policies. This longstanding view is reflected in the FTC's earliest privacy-related Section 5 enforcement, which was premised on the idea that "[c]ompanies that made express or implied

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[165] hiQ Labs, Inc. v. LinkedIn, Corp., 938 F.3d at 990. Since LinkedIn is primarily used for professional social networking, such profile updates were used as a proxy to identify employees potentially at risk for leaving their job. HiQ brought several claims, including instate unfair competition law. Though not an agency or federal law case, the decision is interesting because privacy is claimed as the justification for alleged anti-competitive conduct.

[166] *Id.* at 992.

[167] *Id.* at 998.

[168] *See hiQ*, 273 F. Supp. 3d at 1106-07. Approximately 50 million LinkedIn users had engaged a privacy setting called "Do Not Broadcast," which prevented changes to their LinkedIn profile from being automatically e-mailed to every contact in the user's professional network—a network that potentially included employers, and fellow employees. *hiQ*, 938 F.3d at 994.When the setting is activated, changes made by users to their profiles are not sent via automated e-mail from LinkedIn to the contacts in the users' LinkedIn social networks. When the setting is not engaged, everyone in the users' networks receives an automated alert highlighting the changes in their profiles. *Id.* HiQ's software reported on such profile changes to employers in a manner that failed to account for this user privacy setting. LinkedIn claimed this disregard for user settings, and the terms and conditions of the social network, were the reason it terminated hiQ's access. *Id.*

[169] *hiQ*, 273 F. Supp. 3d at 1107.

promises simply had to keep them."[170]

On appeal, the Ninth Circuit was similarly doubtful that users had expectations of privacy in their LinkedIn profile data, but the court focused more on the public nature of the profile information being scraped by hiQ.[171] While acknowledging that posting publicly on social media does not necessarily imply consent to the use of data for "all purposes," the court ultimately concurred with the district court finding that user privacy expectations in LinkedIn profile information were "uncertain at best."[172] Even if such privacy interests did exist, they were outweighed at the preliminary injunction stage by hiQ's interest in accessing the profile data so it could continue to operate its business.[173]

Along similar lines, a recent state antitrust agency case expresses preemptive skepticism of a user data privacy justification invoked by Google. A Texas-led group of state attorneys general are pursuing a high-profile monopolization case against Google.[174] Their amended complaint includes allegations that the company is acting in an anticompetitive manner with its plans to terminate third-party access to cookies on its Chrome internet browser.[175] The complaint describes Google's purported privacy justifications for the change as "a ruse" and mere "pretext."[176]

Although these cases are early-stage, the initial skepticism toward privacy protection as a justification is perhaps understandable. Many of the digital platforms now invoking user data privacy as a shield against antitrust claims have been high-profile, repeat targets of data privacy law enforcement for violating the very same users' data privacy. Ryan Calo predicts this predisposition toward skepticism at a more general level, arguing that antitrust judges seek to decide cases "in ways that maximize efficiency," producing "overall judicial skepticism toward a force like privacy that stands

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[170] Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 648 (2014).

[171] *hiQ*, 938 F.3d at 998.

[172] Id.

[173] *Id.* at 995.

[174] Second Am. Compl., Texas v. Google LLC, No. 4:20-cv-957-SDJ, 2021 WL 2043184 (E.D. Tex. Aug. 4, 2021).

[175] *Id.* at 96–99 (alleging Google's cookies change is anticompetitive, because it "raise[s] barriers to entry and exclude[s] competition in the exchange and ad buying tool markets" by blocking cookies tracking by publishers and advertisers, who would otherwise compete with Google to deliver advertising).

[176] *Id.* at 60, 99.

in the way" of such efficiency by, for example, limiting information flows.[177] This may explain the doubt these companies face in arguing that user privacy justifies their exclusion of competitors.

This sense of skepticism may also stem from the separation between the party whose privacy interests are at stake (often users) and the party invoking those interests (often the digital platform). It is more typical for defendants to invoke their *own* rights or interests, such as intellectual property rights, to justify their conduct. However, this separation of privacy interests may be narrowing as digital platforms face a growing threat of liability for failures to police third-party privacy misconduct on their services. For instance, the FTC made clear in an action against Facebook that "Facebook will be liable for conduct by [third-party] apps that contradicts Facebook's promises about the privacy or security practices of these apps."[178]

Ultimately, it will be important for agencies and courts to evaluate privacy justifications based on the specific evidence and arguments in each case. As in *TREB* and *hiQ*, evidence of the defendant's past and current data privacy practices may shed light on whether a justification is pretextual.

a. Competitor Free-Riding/Enables Interbrand Competition

The prevention of competitor free-riding is perhaps the justification most frequently and clearly acknowledged by the Supreme Court.[179] Though this

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[177] Ryan Calo, *Privacy Law's Indeterminacy*, Theoretical Inquiries in Law, vol. 20, no. 1, 2019, pp. 33-52 at *15 (ssrn copy) https://doi.org/10.1515/til-2019-0001.

[178] Statement of the Comm'n, In re Facebook, Inc., No. C-4365, FTC File No. 092 3184, at 1 (Aug. 10, 2012), https://www.ftc.gov/public-statements/2012/08/statement-federal-trade-commission-matter-facebook-inc.

[179] *See* [NTD: Add Leegin, add GTE Sylvania]; Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 461, 112 S. Ct. 2072, 2079, 119 L. Ed. 2d 265 (1992)"In both *Continental T.V.,* 433 U.S., at 55, 97 S.Ct., at 2560, and *Monsanto,* 465 U.S., at 762–763, 104 S.Ct., at 1470(accepting free-riding prevention as a justification because without restrictions a manufacturer would not be able to induce competent and aggressive retailers to make the kind of investment of capital and labor necessary to distribute the product." [NTD: free-riding prevention was not a justification accepted in Kodak itself]; Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 762–63, 104 S. Ct. 1464, 1470, 79 L. Ed. 2d 775 (1984), where the Supreme Court again acknowledges the potential for a legitimate justification of preventing free riding (though there was no justification found on the facts of the case). The Court says "The manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the product, and will

is often referred to as a "free-riding justification," it is more properly termed free-riding *prevention.*[180]

Free-riding prevention is the paradigmatic justification for vertical restraints. Such restraints may serve to increase interbrand competition, by encouraging resellers or dealers to invest in a manner that benefits consumers.[181] Consider a market in which retailers compete both same-brand dealers, and with dealers who sell other brands. In a scenario where the manufacturer imposes no vertical same-brand restraints on its dealers, some may invest in offering "fine showrooms… product demonstrations… and knowledgeable employees,"[182] repair services, promotional activities or other amenities,[183] to the benefit of customers. Customers may benefit from those services as they shop at one dealer, but then purchase from another same-brand dealer who offers lower prices. The result may often be that "the high-service retailer will lose sales to the discounter, forcing it to cut back its services to a level lower than consumers would otherwise prefer."[184]

Vertical restraints can promote interbrand competition, by encouraging such investment to the benefit of consumers, while limiting free-riding by same-brand dealers who capture demand without making such investment. If the manufacturer requires all of its dealers to engage in certain investment and to provide certain service, this mitigates the free-riding problem of the purely competitive situation above. All dealers have nice showrooms and great service. Those who invest no longer risk losing customers to a discounting dealer. The result may be more robust competition between the dealers who sell different brands, in place of the intrabrand rivalry and free-riding that occurs without restraints. In other words, vertical restraints can enable a manufacturer to achieve efficiencies in the distribution of their, and therefore compete more effectively against other-brand manufacturers to the benefit of consumers.[185]

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want to see that "free-riders" do not interfere." (citing *Sylvania, supra,* 433 U.S., at 55, 97 S.Ct., at 2560) at 763.

[180] See eg. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 461, 112 S. Ct. 2072, 2079, 119 L. Ed. 2d 265 (1992) (referring to the Supreme Court "accept[ing] free-riding as a justification")

[181] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890-91 (2007) (vertical price restraints are thought to prevent free-riding and therefore promote competition).

[182] Leegin at 891.

[183] GTE Sylvania 433 U.S. 36, 55(1977).

[184] Leegin at 891.

[185] GTE Sylvania 54-55.

In *Continental T.V., Inc. v. GTE Sylvania* the Supreme Court classically describes the justification of free-riding prevention.[186] In the face of declining market share, television manufacturer GTE Sylvania had introduced a new franchise system of selling its products only to a select group of highly-skilled retailers. In order to attract these top-notch retailers, the company had limited the number of franchises permitted within a particular geographic area, and required dealers to sell only from the locations where each was franchised (though there was no exclusive territory granted).[187] The strategy worked—Sylvania more than doubled its market share. [188]

However, a terminated franchisee, Continental T.V., challenged Sylvania's rules as a violation Section1 of the Sherman Act. Continental claimed Sylvania had entered into and enforced franchise agreements that prohibited the sale of Sylvania TVs, except from authorized locations.[189]

The Supreme Court affirmed that the rule of reason standard applied to this conduct,[190] explaining that:
. . . economics have identified a number of ways in which manufacturers can use such [vertical] restraints to compete more effectively against other manufacturers…. For example, new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the customer.[as GTE Sylvania did here] Established manufactures can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products."[191]

The court noted that market imperfections, like the free-rider effect, meant that the same levels of service might not be provided to consumers in

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[186] 433 U.S. 36, 55 (1977); see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890-91 (2007) (explaining how vertical price restraints are thought to prevent free-riding and therefore promote competition).

[187] GTE Sylvania at 38.

[188] *Id.*

[189]*Id.* at 40 (Continental was dissatisfied with Sylvania's management of franchise locations and began transferring Sylvania TV inventory to a non-authorized location for resale. Sylvania terminated Continental's franchise for this violation of the agreement, and sued for amounts owing. Continental cross-claimed under the Sherman Act).

[190] GTE Sylvania at 58.

[191] GTE Sylvania at 55.

the absence of such restraints.

[NTD: Add observations on cases involving free-riding based on overall review of data set]

b. Competitive Balance Justifications

c. Reduced Transaction Costs Justifications

Real-world exchanges between buyers and sellers often have costs that arise from the task of entering into the transaction. Theory around transaction costs is often traced to the work of Ronald Coase, who posited that there were costs to entering into contracts. This included determining the appropriate price, and negotiating each transaction.[192] Instead of entering into "continuous, costless, voluntary" exchanges as perfect competition theory predicted,[193] when real-life parties entered into a deal, these bargaining and information costs often arise.[194]

Courts have recognized the reduction of transaction costs as a procompetitive justification for restraints.[195] For example, inefficiencies in negotiating and enforcing a large number of individual contracts might be

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[192] R. H. Coase, *The Nature of the Firm*, 4 Economica 386, 390–91 (1937) (noting the cost of "concluding a separate contract for each exchange transaction," and discussing the cost of uncovering prices and negotiating).

[193] Alan J. Meese, Reframing Antitrust in Light of Scientific Revolution: Accounting for Transaction Costs in Rule of Reason Analysis (March 28, 2011). Hastings Law Journal, Vol. 62, No. 2, 2010, William & Mary Law School Research Paper No. 09-93 at 488 (describing perfect competition theory and the later scholarly thinking that recognized the existence of transaction costs). See Frank H. Knight, Risk, Uncertainty, and Profit at 76–93 (Augustus M. Kelley, 1964) (1921) (describing the assumptions of a perfect competition model) and at 76-81 (describing the assumptions of perfect competition).

[194] *Id.* Meece (Hastings) at 489. Modern scholars have extended the concept to describe transaction costs even more broadly as including costs such as those created where one party makes a relationship-specific investment, and the passage of time enables the counterparty to engage in later, opportunistic behavior to appropriate or threaten to appropriate that investment (describing such transaction costs in literature from Telser and Bork as building on Coase's transaction cost theories). These costs are discussed in the section on free-riding, above. [NTD: add cross ref.]

[195] Leegin at 892 (acknowledging that minimum resale price setting, instead of specifying all of the different retailer obligations, can improve the efficiency of a manufacturer making and enforcing contracts with retailers who sell its goods). [NTD: add BMI and any other key cases]

remediated by standardized rules that achieve a similar outcome[196] or collective negotiations[197] may reduce transaction costs. Though each may initially appear anticompetitive, the restraint may reduce the costs of entering into transactions, encouraging such transactions and promoting competition. In the absence of these restraint, the cost of entering into transactions could render exchanges between buyers and sellers unprofitable, and cause transactions that are beneficial to consumers not to occur. Restraints of trade that reduce transaction costs can therefore enable more efficient exchanges between buyers and sellers and improve consumer welfare.

The Supreme Court's 1979 decision in Broadcast Music, Inc. v. Columbia Broadcasting System, Inc (*BMI*) provides an excellent example of transaction cost justifications.[198] Television broadcaster CBS alleged that music rights agencies BMI and ASCAP had engaged in price-fixing with their issuance of blanket copyright licenses, violating Section 1 of the Sherman Act.[199] In considering whether the conduct ought to be subject to a *per se* or rule of reason standard, the Supreme Court emphasized that the blanket licensing practices created efficiencies in the market that enabled transactions to occur:[200]

> . . . [the blanket licenses and the rights agencies themselves] developed together out of the practical situation in the marketplace: thousands of users, thousands of copyright owners, and millions of compositions. Most users want unplanned, rapid, and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. . . . the costs are prohibitive for licenses with individual radio stations, nightclubs, and restaurants, . .

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[196] Leegin at 892 (noting that ". . . even absent free riding. . . [i]t may be difficult and inefficient for a manufacturer to make and enforce a contract with a retailer specifying the different services the retailer must perform," and instead more efficient to simply set a minimum resale price that guarantees the margin the retailer needs to meet expectations for service and other non-price offerings).

[197] [NTD: cite BMI].

[198] Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 99 S. Ct. 1551 (1979).

[199]CBS also brought Section 2 Sherman Act claims which were dismissed before the case reached the Supreme Court. *BMI,* 99 S. Ct. at 1556-57 (noting monopolization and tying claims were dismissed at the Court of Appeals and not pursued by CBS).

[200] *BMI,* 99 S. Ct. at 1562-63.

> and it was in that milieu that the blanket license arose. A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided.

The Court notes no less than three times in the decision that these market realities made the negotiation of separate license for the performance of individual works "impossible,"[201] "nearly impossible"[202] or at least "impracticabl[e]."[203] Direct negotiations with individual rightsholders, would, in other words, have transaction costs that were prohibitively high.

The restraint on competition, here blanket licenses for which BMI and ASCAP set prices, substantially lowered transaction costs, so that licensing transactions beneficial to both rightsholders and licensees could take place efficiently.[204] The blanket licenses reduced transaction costs by limiting the necessary number of transactions that were required to license music. The restraints made the market more efficient, and more competitive.[205] Given these potential efficiency benefits from blanket licensing, the Supreme Court found that BMI and ASCAP's practices should be subject to the rule of reason.[206]

More recently, Apple argued a transaction cost justification in its defense of the Epic/Fortnite litigation (though the Northern District of California did not address these arguments as a justification in its decision).[207] Apple argued that, by requiring that third-party apps to use Apple's in-app purchase mechanism, it reduced transaction costs for consumers (which Apple terms "contracting friction").[208] The mandated, centralized payment processing enables consumers to make in-app purchases without providing their payment information to each individual app developer. It also makes it possible for consumers to easily reinstall (and start purchasing through) apps

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[201] *BMI,* 99 S. Ct. at 1555.

[202] *BMI*, 99 S. Ct. at 1559.

[203] *BMI*, 99 S. Ct. at 1560.

[204] The DOJ advanced a similar position in its amicus brief in BMI—that the sheer volume of copyright transactions and users made individual licensing impractical, leaving collective licensing as the only realistic alternative in the market. *Id*. (describing the Department of Justice, Antitrust Division amicus brief).

[205] *BMI,* 99 S.Ct. at 1551.

[206] *Id.* at 1564.

[207] See discussion of the facts of this litigation in the section above titled *Emerging Justifications: Data Privacy Protection*, *supra*.

[208] Apple v. Epic, Apple Reply (N.D. Cal.) at para 12 ("provides immense benefit to consumers and developers by reducing contracting friction").

on new devices, and to centrally track their in-app purchasing history.[209] Apple's rules may thus make in-app purchases more efficient, by reducing the transaction costs for consumers.

[NTD: Add discussion of the results from the case review for transaction cost cases here.]

2. Improved Transparency in the Market/Reduce Information Asymmetry for Consumers as a Justification

[NTD: Cross reference to discussion of privacy restraints potentially ameliorating information asymmetry, above. Add discussion of cases involving reduction in information asymmetry as a justification, e.g. *California Dental* (on remand to the Ninth Circuit).]

3. Enabling the Introduction of New or Better Products for Consumers as a Justification

4. Capacity Limitations as a Justification

5. Technical Necessity as a Justification

6. Ancillary Restraints as a Justification

7. Other Improved Efficiency (Increased Output, Quality or Lower Price) as a Justification

8. Non-Cognizable "Justifications"

a) Improved Consumer Health and Safety

E. Distinguishing Immunity Arguments in Antitrust Law

1. Intellectual Property

2. Data Privacy

CONCLUSION

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[209] *Id.*

Appendix A: Procedural Postures Excluded from Data Set of Rule of Reason Cases involving Procompetitive Justifications

The following procedural postures (as categorized by Westlaw) were excluded from the Westlaw results on the grounds they were unlikely to consider arguments on business justifications:

- Motion for a preliminary injunction
- JMOL/directed verdict motions
- motions to dismiss for lack of personal jurisdiction
- MTD for lack of subject matter jurisdiction
- Motion to exclude expert report/testimony
- Motion to certify class
- Motion to compel arbitration
- MTD for lack of standing
- Motion to strike
- Motion to transfer/change venue
- Bail or custody
- Motion for additional discovery
- Motion for stay
- Motion to approve settlement
- Motion to consolidate
- MTD for lack of jurisdiction
- Motion to strike
- Petition for writ of cert
- Post-trial hearing

Appendix B: Categories Analyzed for Cases in Data Set with Procompetitive Justification Arguments

- Case Citation
- Cause of Action: Sherman Act Section (1 or 2) or other Law
- Claim 1 Allegations
- Claim 2 Allegations
- Facts
- Procedural Posture
- Result
- Final Adjudication (Y/N)
- Procompetitive Justification 1 Description of Argument
- Procompetitive Justification 2 Description of Argument
- Anticompetitive Effects Found? (Step 1 in Burden-Shifting Framework) (Y/N)
- Procompetitive Justification Established? (Step 2 in Burden-Shifting Framework) (Y/N)
- Categorization of Procompetitive Justification 1
- Categorization of Procompetitive Justification 2
- Did the Court Engage in Balancing/Weighing (Step 3 in Burden-Shifting Framework) (Y/N)
    - If yes, did effects of the procompetitive justification outweigh the anticompetitive conduct effects
    - If no, describe how the court disposes of the allegation
- Additional Notes