COMMONSENSE COMPETITION: JURIES AND THE REVITALIZATION OF LAY INTUITIONS IN ANTITRUST

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The conventional wisdom among the antitrust bar, across both plaintiff and defense counsel, is that judges are better equipped than juries to serve as finders of fact, given the complexity of antitrust cases. Although most anyone would be familiar with what markets and prices are, the argument goes that more complicated determinations are simply too complex for ordinary people who lack the advanced education and repeat experience from which judges benefit. Under the prevailing view, counsel for either party may prefer a jury in a given case, but only for strategic reasons (i.e., the jury not understanding the case benefits their client).

This Note argues, however, that there is a commonsense understanding of anticompetitive conduct—here termed "commonsense competition"—that juries are well positioned to bring to bear and that imbues the antitrust law with lay intuitions regarding commercial morality and meaning. This is normatively desirable because the outcomes produced by such lay intuitions are more consistent with antitrust law's statutory and historical roots and could arguably produce superior economic outcomes relative to the currently predominant Chicago School, which rejects the use of lay intuitions in antitrust and instead emphasizes economic efficiency and econometric analysis.

Previous literature about the use of juries in antitrust has coalesced around two dueling perspectives: 1) Complexity, the predominant view, which posits that antitrust is too complicated for juries to evaluate cases and render decisions consistent with the law; and 2) Democracy, which argues that the use of juries is reflective of, and necessary

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to, democratic norms. Commonsense competition is related to the Democracy view but goes further in arguing that jury factfinding is not only consistent with democratic values but also affirmatively contributes to producing antitrust outcomes which better reflect important elements of its statutory and historical roots explicitly because juries express lay intuitions in applying antitrust law.

Commonsense competition fills a gap in existing efforts by reformers such as the Neo-Brandeisians to bring antitrust outcomes more in line with the varied motivations underlying the Sherman Act. These efforts have often neglected the importance of juries in accomplishing this goal. Juries are an especially powerful tool because they can serve as a check on judges, who have minimized the importance of lay intuitions in the law. This has had the effect of taking power from juries and resulted in narrower antitrust liability in the aggregate, although, notably, the expanded use of juries and lay intuitions is not uniformly liability expanding. The Note concludes by describing several policy proposals to increase lay intuitions in antitrust through jury participation.

Introduction

In 2023, the U.S. Department of Justice ("DOJ") went against history and its own prevailing norms in seeking a jury trial in its case against Google's advertising technology unit ("*Google AdTech*").[1] In the DOJ's January 2023 announcement of its case and decision to pursue a jury trial, the DOJ noted that it was the first time in roughly 50 years that it had taken such a step.[2] While some commentators argued that the DOJ viewed the opportunity to get the case in front of a jury as advantageous because of Big Tech's ubiquity and concomitant populist pushback,[3] the jury demand was an outlier within the spate of recent litigation against Big Tech brought by federal and state enforcers.[4]

One reason for the dominance of bench trials in antitrust cases brought by the government is that the right to a jury trial does not attach to a suit seeking purely injunctive relief.[5] Given government enforcers

1. Justin Wise, *Judge Versus Jury in Focus After Google Writes $2.3 Million Check*, Bloomberg Law (July 8, 2024), https://news.bloomberglaw.com/antitrust/judge-versus-jury-in-focus-after-google-writes-2-3-million-check [https://perma.cc/HJ4X-48VK]. The case was called United States v. Google LLC, No. 1:23-cv-00108 (E.D. Va. June 7, 2024).

2. Wise, *supra* note 1.

3. *Id*. (quoting Ryan Baker, a litigation partner at Waymaker, a boutique trial and appellate law firm).

4. Samuel Weinstein, *Understanding the DOJ's Decision to Seek a Jury Trial in the Google Ad Tech Case*, ProMarket (Apr. 26, 2023), https://www.promarket.org/2023/04/26/understanding-the-dojs-decision-to-seek-a-jury-trial-in-the-google-ad-tech-case/ [https://perma.cc/T9AM-8L22] (noting that a jury demand was "extremely rare in government civil antitrust cases" and describing the case as "unlike all the other recent cases federal and state governments have brought against Big Tech" in that it featured a jury demand).

5. Edward D. Cavanagh, *The Jury Trial in Antitrust Cases: An Anachronism?*, 40 Am. J. Trial Advoc. 1, 10 (2016) ("[T]he Court has emphasized that the Seventh

are limited to seeking damages that reflect their own losses as a victim of an antitrust violation, which are often de minimis in comparison to the broader market impact caused by equitable relief[6] such as preventing an acquisition, breaking up a monopolist, or enjoining a specific anticompetitive practice, damages claims by the federal government (and therefore, jury trials) are extremely rare.[7] This has resulted in bench trials as the default for many of the most important antitrust suits in recent decades, given the key role government enforcers play.[8]

Google ultimately avoided a jury trial by paying the maximum damages allegedly suffered by the suing government agencies due to the company's conduct ($2.3 million), leaving only the government's claims for injunctive relief and, consequently, returning the trial to the dominant bench trial format. The question remained, however: Why had the DOJ and Google gone to such great lengths in their fight over the finder of fact for a trial involving issues which are considered extremely complex even among antitrust experts?[9] After all, jury trials are typically considered more expensive, longer, and harder to predict than bench trials,[10] and, while it is generally accepted that juries can be more pro-plaintiff regarding damages,[11] as described above, money damages

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Amendment 'requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.'" (citing Curtis v. Loether, 415 U.S. 189, 194 (1974))).

6. In the *Google AdTech* case, the DOJ alleged $2.3 million in damages suffered by the federal government, while seeking injunctive relief including an order to break up Google's multi-billion-dollar ad business. Wise, *supra* note 1. In 2021, Google's "Google Network" revenue, which represents non-search display advertising revenue from Google's AdMob, Ad Manager, and AdSense products (the unit of the company which DOJ was seeking to break up), among others, generated $31.7 billion, a 37% increase over 2020 revenue. Compl., United States v. Google LLC, No. 1:23-cv-00108 (E.D. Va. Jan. 24, 2023).

7. Weinstein, *supra* note 4.

8. *See* Philip J. Weiser, *The Enduring Promise of Antitrust*, 52 Loy. U. Chi. J. 1, 7 (2020) (noting the federal government's role as "the nation's federal antitrust enforcer" and arguing that state antitrust enforcers are positioned to "ensure that important issues are raised before the courts whether or not the federal agencies are inclined or able to do so").

9. Weinstein, *supra* note 4 ("The DOJ's ad tech case against Google heightens [complexity] challenges. In large part this is because the industry background is extremely complicated, difficult even for experts to fully understand.").

10. Wise, *supra* note 1 ("Bench and jury trials follow different rhythms, with jury trials typically more expensive, longer, and harder to predict, said Richard Roth, a jury consultant who has helped businesses such as General Electric and IBM prepare for trials. 'Jurors can be fickle and every defense lawyer knows that,' Roth said.").

11. *See, e.g.*, Weinstein, *supra* note 4 ("The common wisdom is that juries in antitrust cases tend to favor the 'little guy' and disfavor the corporate giant."); Cavanagh, *supra* note 5 ("[A]ntitrust plaintiffs generally welcome juries as fact finders."); Note, *Controlling Jury Damage Awards in Private Antitrust Suits*, 81 Mich. L. Rev. 693 (1983) (arguing that antitrust juries can be manipulated into awarding excessive

were an afterthought in the case. Additionally, there is extremely limited evidence regarding how well juries perform (or which side they are most likely to favor) in antitrust cases,[12] thus begging the question of why the DOJ acted as it did and, relatedly, why Google went to such great lengths to avoid the jury.

At the same time, on the other side of the country, the *NFL Sunday Ticket* litigation[13] provided a possible explanation for the strategic considerations at play in *Google AdTech*. Throughout that trial, which was conducted with a jury, Judge Philip Gutierrez repeatedly admonished counsel for the class plaintiffs for "wasting time and complicating what he said should have been a straightforward case."[14] After deliberation, the jury found for the plaintiffs and awarded more than $4.7 billion in damages (before statutory trebling),[15] ruling that NFL teams, which are considered separate businesses, violated antitrust laws by illegally conspiring not to compete by pooling their broadcast rights and offering only a bundled out-of-market game package on a premium subscription service without a cheaper single-team option, thus curbing output, reducing choice, and increasing prices.[16]

Judge Gutierrez then not only overturned the jury's damages award but also reversed its judgment, ruling that the testimony of two expert witnesses for the class plaintiffs had flawed methodologies and should have been excluded.[17] On this basis, Judge Gutierrez found that "*no reasonable jury* could have found class-wide injury or damages,"[18] notwithstanding that a jury *had* just found such injury, to the tune of billions in damages. Judge Gutierrez further noted that if he had not ruled for the NFL on liability as a matter of law, he would have vacated the jury's damages verdict and conditionally granted a new trial "based

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damages, compounded by the statutorily-mandated trebling of damages under Clayton Act § 4).

12. Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 Fordham L. Rev. 2543 (2013) (surveying existing literature and finding an "absence of empirical support" for arguments against juries on complexity grounds).

13. *In re* NFL "Sunday Ticket" Antitrust Litig., No. 2:15-ml-02668-PSG-SK, 2024 WL 3628118 (C.D. Cal. Aug. 1, 2024).

14. Ken Belson, *Why the N.F.L. Put a $7 Billion Antitrust Case in the Hands of an Unpredictable Jury*, N.Y. Times (June 25, 2024), https://www.nytimes.com/2024/06/25/business/media/nfl-sunday-ticket-lawsuit-cost-tv-deal.html [https://perma.cc/ZJY6-TK74].

15. The Sherman Act allows private parties injured by antitrust violations to recover treble damages, meaning three times the actual damages proven. 15 U.S.C. § 15(a) (2000).

16. *The Implications of the In Re: NFL "Sunday Ticket" Litigation*, Kutak Rock LLP (July 9, 2024), https://www.kutakrock.com/newspublications/publications/2024/july/nfl-sunday-ticket-antitrust-verdict [https://perma.cc/8FXK-EW8G].

17. *NFL "Sunday Ticket" Antitrust Litig.*, 2024 WL 3628118, at *3.

18. *Id*. at *11 (emphasis added).

on the jury's *irrational* damages award."[19] Judge Gutierrez labeled the jury's damages award as such because it conformed to neither of the damages calculations of the class plaintiffs' aforementioned experts, who had calculated damages of $7.01 billion and $3.48 billion, respectively, while the jury calculated damages of $4.62 billion. Judge Gutierrez thus critiqued the jury for not following his instructions and "instead rel[ying] on inputs not tied to the record to create its own 'overcharge.'"[20]

While one might take DOJ's strategy in the *Google AdTech* case, the outcome in *NFL Sunday Ticket*, and other large recent damages awards in antitrust jury trials such as *National Association of Realtors*[21] to mean that juries are inherently pro-plaintiff, another series of cases provide some reason for doubt. In March 2023, a federal jury in *United States v. Manahe* acquitted four home health agency defendants of conspiring to fix wages and illegally entering into "no-poach" agreements.[22] The jury's decision came nearly seven years after DOJ first announced its intent to criminally prosecute employers and individuals for anticompetitive conduct in labor markets, including no-poach agreements.[23]

Since bringing its first-ever criminal charges for alleged anticompetitive conduct in labor markets in late 2020, the DOJ has failed to convince a single jury of the criminality of such conduct.[24] However, the DOJ has secured wins in this effort in bench trials, such as in *United States v. DaVita*. In that case, a federal judge ruled that the government's no-poach allegation was a type of horizontal market allocation which should be viewed as a per se violation of the antitrust

19. *Id*. at *9 (emphasis added).

20. *Id*. at *11.

21. Moehrl v. National Association of Realtors, No. 1:19-cv-016101/4:19-CV-00332 (N.D. Ill. Nov. 26, 2024); Debra Kamin, *Home Sellers Win $1.8 Billion After Jury Finds Conspiracy Among Realtors*, N.Y. Times (Oct. 31, 2023), https://www.nytimes.com/2023/10/31/realestate/nar-antitrust-lawsuit.html [https://perma.cc/VK79-TAEK] (in October 2023, a federal jury ruled that the National Association of Realtors and several large brokerages had conspired to artificially inflate the commissions paid to real estate agents, awarding damages of nearly $1.8 billion before trebling).

22. United States v. Manahe, No. 22-cr-00013, 2022 WL 3161781 (D. Me. Aug. 8, 2022); Lauren Norris Donahue et al., *DOJ Jettisons Its Last Criminal No-Poach Prosecution, But Antitrust Scrutiny of Labor Markets Is Here to Stay*, K&L Gates (Dec. 21, 2023), https://www.klgates.com/DOJ-Jettisons-Its-Last-Criminal-No-Poach-Prosecution-but-Antitrust-Scrutiny-of-Labor-Markets-is-Here-to-Stay-12-21-2023 [https://perma.cc/DJN6-S4JB]. No-poach agreements arise when competitors agree not to solicit or hire employees from each other's companies and are considered per se illegal by federal antitrust regulators. *See* U.S. Dep't of Just. & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals 1–4 (2016), https://www.justice.gov/atr/file/903511/dl [https://perma.cc/8PHJ-2JUA].

23. U.S. Dep't of Just. & Fed. Trade Comm'n, *supra* note 22, at 2.

24. Donahue et al., *supra* note 22.

laws, if proven.[25] Given per se treatment is the lowest threshold for liability in antitrust since plaintiffs must prove only the existence of an agreement (as opposed to anticompetitive effect, which generally requires defining a market),[26] the DOJ's poor record before juries in these cases is surprising and stands in stark contrast to its sterling results in other areas of criminal antitrust such as price fixing by sellers, which is also a per se offense.[27]

These precedents suggest that there is some meaningful difference between judges and juries. This Note will not seek to prove with scientific rigor the exact circumstances in which judges and juries diverge on antitrust competition issues or how litigants should act strategically. Instead, this Note argues that there is good reason for the DOJ to push for jury trials in cases like *Google AdTech*, beyond individual case strategy. Specifically, antitrust juries are normatively desirable because they bring lay intuitions regarding commercial morality and conduct to the application of antitrust law. Outcomes with juries therefore better reflect the statutory and historical roots of antitrust and serve as an important check on the judiciary. Indeed, by having prioritized econometric evidence over lay intuitions, judges have increased their power at the expense of jury participation while also narrowing antitrust liability.

The Note examines three key forms of lay intuition: 1) Evidence which is itself a lay intuition, e.g., the public recognition factor to define markets in *Brown Shoe*;[28] 2) Evidence which is highly amenable to lay factfinding, e.g., the *Brown Shoe* market definition factors more generally;[29] and 3) Commonsense intuitions applied to economic and/or expert evidence, e.g., a jury's interpretation of an expert's damages analysis.

To be sure, that jurors apply antitrust law using lay intuitions does not require or permit extra-record factfinding nor does lay intuition

25. Order Denying Defendants' Motion to Dismiss at 4, United States v. DaVita Inc., No. 21-cr-00229 (D. Colo. Jan. 28, 2022), 2022 WL 266759, at *2.

26. Eric S. Hochstadt & Nicholas J. Pappas, *Restrictions on Employee Change of Jobs: Antitrust Challenges to "Non-Compete" and "No-Poach" Clauses*, 34 J. Lab. & Emp. L. 253, 254 (2020) ("Per se treatment is reserved for a limited category of business practices that always, or nearly always, are harmful to competition, meaning that, on their face, they lead to higher prices or reduced output or lessened innovation.").

27. *See* Michael F. Tubach et al., *Why Does the Antitrust Division Keep Losing Criminal Trials?*, Antitrust Mag., Apr. 5, 2024, at 17–18.
(noting that from 2012 to 2019 (before the start of no-poach prosecutions), the average conviction rate for antitrust defendants was 92.2% compared to 91.4% for all criminal defendants prosecuted by the DOJ).

28. Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

29. *Id.*

carry value only in contexts in which jurors have personal experience (i.e., lay intuitions are valuable across both business-to-consumer ("B2C") and business-to-business ("B2B") markets). Instead, lay intuition is a positive quality inherent to juries and trying cases with juries can lead to increased emphasis on lay intuition evidence. While judges certainly have a role to play in revitalizing lay intuitions, for example, by prioritizing the *Brown Shoe* factors when performing market definition analysis, lay juries are, by their nature, well-positioned to apply antitrust law in a manner that reflects lay intuitions. Jury usage should therefore be increased as lay-intuition-based outcomes in antitrust better recognize the varied, and sometimes conflicting, motivations behind the antitrust laws.

Previous scholarship about antitrust juries has coalesced around two dueling perspectives: 1) Complexity, which argues that antitrust is too complicated for juries to render decisions consistent with the law;[30] and 2) Democracy, which advocates for jury usage on the basis of democratic values and norms.[31] This Note's perspective, which I refer to as "commonsense competition," is related to the Democracy view but goes further in arguing that jury decisions are not only consistent with democratic values but affirmatively contribute to antitrust outcomes more closely aligned with important elements of antitrust's statutory and historical roots—from which judges often shy away—given the jury's ability to use lay intuition in applying the antitrust laws.

Commonsense competition fills a gap in existing efforts by reformers such as the Neo-Brandeisians, who seek to broadly "stop exploitation in the economic realm" and "to interdict oligarchy in the political realm," to bring antitrust outcomes more in line with the varied motivations underlying the Sherman Act,[32] as opposed to the economic

30. *See, e.g.*, Donald E. Vinson, *Jury Psychology and Antitrust Trial Strategy*, 55 ANTITRUST L.J. 591, 593 (1986) (arguing that antitrust juries largely have a "complete lack of comprehension of the issues presented to them for decision"); Cavanagh, *supra* note 5 (describing objections to the use of juries in antitrust including statements by former Harvard Law School Professor and DOJ Antitrust Division head Donald Turner—"There would be significant gains from eliminating jury trials from private antitrust actions."—and from University of Pennsylvania Law Professor Herbert Hovenkamp—stating "[j]ury trials are a truly unfortunate way to decide most of the contested issues in complex antitrust cases" and describing antitrust juries as "the weak link in a system where most of the relevant evidence is economic and technical"); Frank H. Easterbrook, *Allocating Antitrust Decisionmaking Tasks*, 76 GEO. L.J. 305, 306–07 (1987) ("I am suspicious of booting to juries, and deferring to their conclusions on, questions that we—meaning judges, lawyers, economists, and other professions taken together—know very little about.").

31. *See, e.g.*, First & Waller, *supra* note 12; Cavanagh, *supra* note 5.

32. Jonathan B. Baker, *Finding Common Ground Among Antitrust Reformers*, 84 ANTITRUST L.J. 705, 705 (2022) (describing the Neo-Brandeisian movement and noting

efficiency heavy approach which has prevailed in recent decades. These efforts have often neglected the importance of juries in accomplishing this goal. Juries are an especially powerful tool because they can serve as a check on judges, who have minimized the importance of lay intuitions in the law. This has had the effect of reducing jury participation and resulted in narrower antitrust liability.

Notably, although revitalizing the presence of lay intuitions in antitrust law likely favors plaintiffs in the aggregate, the expanded use of juries and lay intuitions is not uniformly liability expanding. There are significant areas of the law, such as criminal no-poach cases, in which juries appear to be more reticent than judges to find liability. Additionally, there are situations in which lay intuition analysis may conflict with a strictly economic analysis in a manner which would favor defendants.

The Note concludes by making several policy proposals to increase the use of lay intuitions and juries in antitrust. These include proposals targeted specifically at increasing jury participation, such as litigants more frequently demanding juries, judges less frequently ruling as a matter of law or using pre-trial procedural screens too aggressively where a case might otherwise be amenable to jury factfinding, and changes to procedural and/or substantive antitrust law to encourage the use of juries and mitigate practitioner concerns regarding juries, such as reemphasizing lay-intuition-friendly analysis (e.g., the *Brown Shoe* market definition factors) or legislatively mandating a right to jury trial for cases seeking injunctive relief (as is very often true for cases brought by government enforcers), thus making possible jury factfinding for many of the most important antitrust cases.

Part I describes the conventional wisdom surrounding juries in antitrust, briefly discussing practitioner views before identifying Complexity and Democracy as the two major academic perspectives. Part II defines commonsense competition and identifies the key manifestations of lay intuitions in antitrust.

Part III argues that outcomes produced using lay intuitions closely track the statutory and legislative history of antitrust. Section III.A describes antitrust's statutory roots in the Sherman Act, which established antitrust law in the United States. The Sherman Act is broad

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that Neo-Brandeisians seek to "stop exploitation in the economic realm—going beyond harms to consumers and other buyers to include exploitation of small and powerless suppliers such as small businesses, farmers, and workers—and to interdict oligarchy in the political realm").

and sweeping in its language,[33] leaving it to subsequent interpreters to specify what terms such as "monopolize" mean in their time and place. The Sherman Act was influenced by a variety of concerns, not solely economic efficiency, and allowing juries in antitrust can help produce outcomes which better reflect these diverse concerns. Section III.B discusses the alignment of commonsense competition with the historical judicial approach to antitrust, as embodied by cases such as *Brown Shoe*, which prioritized qualitative "practical indicia" such as public recognition of a given market[34] over the largely quantitative approach which took hold of antitrust in the 1980s with the rise of the Chicago School.[35] Notably, consistent with antitrust's statutory roots, the Democracy perspective, and broader Neo-Brandeisian thought, *Brown Shoe* and many other historical cases from the Sherman Act's passage to the 1960s take seriously antitrust's concern with bigness[36] and the idea that concentrations of economic power can interfere with democratic rights and business innovation broadly.[37] Jury factfinding can produce

33. Elizabeth P. Berman, *How Industrial Policy Gave Us the Sherman Act*, ProMarket (Jan. 6, 2025), https://www.promarket.org/2025/01/06/how-industrial-policy-gave-us-the-sherman-act/ [https://perma.cc/V9WC-BNNA]; *see, e.g.*, Cyntrice Thomas et al., *The Treatment of Non-Team Sports Under Section One of the Sherman Act*, 12 Va. Sports & Ent. L.J. 296, 298 (2012) ("The broad language of the Sherman Act has given courts wide discretion to determine what constitutes an unlawful agreement or an attempt to monopolize.").

34. *Brown Shoe Co.*, 370 U.S. at 325 ("The boundaries of [] a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.").

35. For an example of Chicago School thinking (and its perception of *Brown Shoe*), see Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 Ariz. L. Rev. 609, 634 (2005) ("[N]oneconomic sources of information (of the sort called for by the *Brown Shoe* decision's 'practical indicia') do not illuminate the analysis, but rather serve to obscure it . . . such information does not provide economically meaningful insight. Principally, to the extent that they reflect strategic, organizational, or accounting elements of running a business, they remain either irrelevant or aspirational. Market definition is, simply, an economic concept.").

36. *See* Brad A. Greenberg, *The News Deal: How Price-Fixing and Collusion Can Save the Newspaper Industry–and Why Congress Should Promote It*, 59 UCLA L. Rev. 414, 451 (2011) ("[I]n barring a merger of two major shoe manufacturers, the Supreme Court said in *Brown Shoe Co. v. United States* that Congress has the authority to choose, as a matter of policy, to favor certain businesses—in that case, smaller, locally owned businesses—over others").

37. *See, e.g.*, Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 743 (2017) (arguing that modern antitrust has lost its way by abandoning Congress's original intent in the Sherman Act to "safeguard against excessive concentrations of economic power" as a means of promoting "a variety of aims, including the preservation

outcomes which better reflect lay intuition and thus are more consistent with the historical judicial approach.

Part IV describes how antitrust law has moved away from lay intuitions over the past several decades. It argues that judges have led this transition, which has in large part been driven by fears that antitrust analysis emphasizing lay intuitions undermines economic efficiency. This has most notably manifested in judicial concern with the "accuracy" of antitrust outcomes and a fear of "false positives," cautions which reflect an understanding of antitrust as a tool of economic efficiency rather than recognizing the varied motivations behind the antitrust laws. The result of the doctrinal moves inherent in this transition, many of which came in response to jury verdicts, has taken power away from juries and given it to judges, while at the same time narrowing liability. Importantly, by many analyses, this transition has likely failed on its own terms insofar as economic efficiency has not been increased by these developments.[38]

Part V argues that lay intuitions should be reemphasized in antitrust as the outcomes driven by lay intuition more closely align with antitrust's history and could possibly produce more economically efficient results. Juries are well-positioned to increase the presence of lay intuitions and carry significant benefits in antitrust just as in other fields of civil law.[39] Furthermore, there is an insufficient empirical basis

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of open markets, the protection of producers and consumers from monopoly abuse, and the dispersion of political and economic control").

38. *See, e.g.*, Filippo Lancieri, Eric A. Posner & Luigi Zingales, *The Political Economy of the Decline of the Antitrust Enforcement in the United States*, 85 ANTITRUST L.J. 441, 443–46, 499 (2023) (noting that during the Chicago School period, productivity growth slowed in the United States, even relative to many other developed economies, and that weakened antitrust enforcement is a plausible explanation); Lynn Parramore, *Chicago School Economist Got it Wrong. Strong Antitrust Policy Boosts the Economy.*, INST. FOR NEW ECON. THINKING (Mar. 29, 2021), https://www.ineteconomics.org/perspectives/blog/chicago-school-economists-got-it-wrong-strong-antitrust-policy-boosts-the-economy [https://perma.cc/5VCC-NTAM] ("For all the talk and concern about efficiencies in the last few decades [during the Chicago School era], what has actually resulted is an economy with lower investment, lower productivity, lower employment, and greater inequality than under the New Deal consensus. Plus, it is now widely acknowledged that the American economy is much more concentrated today, with numerous markets in which only a handful or fewer competitors still exist. The Chicago School has been proven wrong."); Mark Glick & Darren Bush, *The Chicago School, the Post-Chicago School, and the New Brandeisian School of Antitrust: Who is Right in Light of Modern Economics?*, 30 GEO. MASON L. REV. 935, 938, 948–49 (2023) (asserting that there "has been an enormous outpouring of analysis and data questioning the effectiveness of antitrust enforcement under the sway of Chicago School principles" and that, instead, the Neo-Brandeisians are "the only school to have the bulk of economics on their side").

39. *See* RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 254 (12th ed. 2020) (noting the benefits of juries, including imbuing the

for believing that judges are so much better equipped to understand economic data than juries to justify the prevailing pro-judge views in antitrust. The very existence of these views diminishes the presence of lay intuitions in antitrust by contributing to jury avoidance.

Part V then makes several policy proposals to increase the use of lay intuitions and juries in antitrust. These include proposals targeted specifically at increasing jury participation and changes to procedural and/or substantive antitrust law to encourage the use of juries. Additionally, whether performed by a judge or jury factfinder, Part V proposes antitrust law reemphasize lay-intuition-friendly analyses, such as the *Brown Shoe* market definition factors. The Note thus concludes that lay intuitions should play an important role in antitrust law and that the use of juries should therefore be increased, leading to competition policymaking through antitrust legal outcomes that serve more than economic interests alone and instead represent the varied concerns underlying the antitrust laws.

I. The Conventional Wisdom Regarding Antirust Juries

A. Practitioners Appear to Believe Juries are Plaintiff-Friendly

The vast majority of antitrust cases are resolved before trial.[40] Therefore, juries currently play a very limited role in antitrust in terms of actually serving as factfinders for trials. In civil law generally, however, plaintiffs are more likely to demand trial by jury when juries are relatively more favorable to plaintiffs in similar cases, jury awards are more variable relative to bench awards, and the disparity in trial costs is smaller.[41]

The results in antitrust cases suggest that antitrust litigants view juries as plaintiff-friendly, at least on the basis of the aforementioned reasons for demanding a jury: Of the top 25 largest antitrust settlements by money damages reaching final approval in 2022, there had been a jury demand made in 24 of the 25 cases.[42] Moreover, available data from the Federal Judicial Center show plaintiffs made a jury demand

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legal system with common sense, creating and localizing norms, and serving as a check against the domination of the legal system by elites).

40. *See, e.g.*, Lex Machina, Antitrust Litigation Report 2024, at 25 (2024) (about 3% of district court antitrust cases which terminated from 2021 to 2023 (excluding multidistrict litigation cases) went to trial).

41. *See* Joni Hersch, Harvard John M. Olin Ctr. for Law, Econ., and Business, Jury Demands and Trials 22–23 (2003).

42. *See* Joshua Davis & Rose Kohles Clark, Ctr. for Litig. & Cts., 2022 Antitrust Annual Report 20–22 (2023) (listing top antitrust cases with settlements reaching final approval in 2022 by size of aggregate settlement amount in 2022; I then looked up whether a jury demand had been made in each of these cases).

in 80% of cases categorized as antitrust since 2019, a figure which has stayed relatively stable over time.[43] A notable exception to this trend comes in cases involving the federal government as the lead plaintiff, which featured a jury demand in only 2% of cases over the same time period.[44] Interestingly, antitrust cases involving state enforcers as plaintiffs featured a jury demand in nearly 80% of cases, a rate much more consistent with private plaintiffs.[45]

Underlying the frequency in plaintiff jury demands is the conventional wisdom among antitrust practitioners that juries in antitrust cases tend to favor the "little guy" and disfavor the corporate giant.[46] Under this view, juries may find compelling evidence that a judge would discount when applying a given antitrust law.[47] Although plaintiffs face the challenge of anticipating which evidence will be most compelling to a jury, plaintiffs demand juries because they believe that juries are more likely to find for plaintiffs and issue larger damages verdicts than judges. From the defendant's perspective, juries are therefore disfavored, with defendants often arguing that these verdicts

43. *See* FED. JUD. CTR., IDB CIVIL 1988–PRESENT, https://www.fjc.gov/research/idb/interactive/24/IDB-civil-since-1988 [https://perma.cc/7G5L-FUG6]. Data was obtained from the Federal Judicial Center Integrated Database and filtered to include only "410 – ANTITRUST." Jury demands were made by plaintiffs in 81% of cases from 2014 to 2018 and 76% of cases from 2009 to 2013.

44. *Id*. The federal government cases featuring jury demands are the DOJ's recent suits against Google AdTech and Ticketmaster/Live Nation, respectively.

45. *Id*. This is likely at least in part because the state enforcers must sue parens patriae (i.e., on behalf of their citizens), whereas the federal government always has standing to sue. As such, suits led by states are more akin to private antitrust litigation insofar as the states must establish that their citizens have actually been harmed, lending itself to calculation of monetary damages, whereas the federal government need not do so. Gwendolyn Payton, *Parens Patriae Representative Suits by State AGs: Parental Help with Strings Attached*, JD SUPRA (Oct. 23, 2017), https://www.jdsupra.com/legalnews/parens-patriae-representative-suits-by-50795/ [https://perma.cc/8CMH-DJXK].

46. *See* Weinstein, *supra* note 4; *see also* Cavanagh, *supra* note 5 ("[A]ntitrust plaintiffs generally welcome juries as fact finders.").

47. Wise, *supra* note 1 (noting comments by Richard Roth, a jury consultant who has helped businesses such as General Electric and IBM prepare for trials, and Richard Holwell, a former judge in the Southern District of New York). Roth argued that "[j]urors can be fickle and every defense lawyer knows that," while Holwell said that plaintiffs and prosecutors often look at jury trials as an opportunity to focus on themes or narratives that a judge may not find as persuasive: "The ability to get across the main themes—that the defendant is a monopolist, and they're using their monopoly power to abuse the little guy . . . that perhaps gets more traction from a jury than a judge who has sat on the bench for 30 years and handled a lot of antitrust cases." *Id.* Howell specifically noted the "exceeding[] complexity" of antitrust law and urged plaintiffs' lawyers "to tell your story to people and get a reaction." *Id.*; *see also Controlling Jury Damage Awards in Private Antitrust Suits*, *supra* note 11, at 694–95 (arguing that antitrust juries can be manipulated into awarding excessive damages).

result in unacceptably high error costs.[48] This last issue is accentuated by the fact that antitrust standards are somewhat vague (e.g., forbidding "unreasonable" restraints of trade[49] and "unreasonably" exclusionary conduct by monopolists),[50] and privately enforced lawsuits give rise to treble damages, thus exacerbating the danger of juries to corporate defendants.

Note, however, that the choice of factfinder for most practitioners is simply a matter of tactics (i.e., who will be more likely to find for my client). Despite broader perceptions regarding the plaintiff-friendliness of juries, a defendant might prefer a jury in a given case. This could be true where, for example, the defendant believes that the jury will be sympathetic because they like and use the defendant's products as consumers. Under this understanding, that the DOJ went out of its way to try to get a jury in its case against *Google AdTech* (and appears to be doing so again with its second such jury demand in the *Ticketmaster/ Live Nation* litigation)[51] suggests only that the DOJ believes a jury will be more receptive to its arguments in these specific cases, not that the DOJ believes that there is some additional value to using jury factfinding beyond simply winning the case.[52]

B. The Complexity Perspective Posits Antitrust is Too Complex for Juries

The Complexity viewpoint interprets the perceived plaintiff-friendliness of juries to mean that antitrust is too complicated for juries to render decisions consistent with the law. Under this view, juries are overwhelmed by the economic elements of antitrust analysis[53] and fall back on their pro-plaintiff instincts even where no liability should properly be found. As such, juries get the law wrong and are therefore

48. *See, e.g.*, Thomas A. Lambert, *AAI's Antitrust Jury Instruction Project: A Good Idea in Theory, But…*, Int'l. Ctr. for Law & Econ. (Dec. 12, 2011), https://laweconcenter.org/resources/aais-antitrust-jury-instruction-project-a-good-idea-in-theory-but/ [https://perma.cc/YLN5-LUEV] (arguing that pro-plaintiff rules "threaten high error costs in the form of false convictions (and the chilling effect that follows)").

49. *Id*.

50. *Id*.

51. Complaint at 104, United States v. Live Nation Entertainment, Inc. & Ticketmaster L.L.C., No. 1:24-cv-3973 (S.D.N.Y. May 23, 2024).

52. *See* Wise*, supra* note 1 ("'A trial is a game,' said Rebecca Haw Allensworth, a Vanderbilt University law professor. 'Each side is trying to tilt the playing side in their favor. It's fair to say that the DOJ's primary objective was not to recover $2 million damages, it was to get the injunction.'").

53. *See, e.g.*, Weinstein, *supra* note 4 (quoting Professor Daniel Crane as arguing that "juries are usually not competent to decide the highly technical issues that modern civil antitrust law involves").

a source of unacceptable error costs.[54] Leading antitrust academics and practitioners such as former Harvard Law School Professor and DOJ Antitrust Division head Donald Turner,[55] former Harvard Law School Professor Phillip Areeda,[56] University of Pennsylvania Law School Professor Herbert Hovenkamp,[57] and Senior Judge Frank H. Easterbrook[58] have all publicly criticized the use of juries in antitrust, with Turner going so far as to call for the elimination of jury trials in antitrust.[59] At the heart of these critiques is a concern that antitrust is too complex for lay people, particularly since many of these same academics believe that economic and other technical evidence should be prioritized over intent evidence, the latter of which the jury might be more likely to consider (thus leading to the perceived "inaccuracy" of jury factfinding).[60]

The Complexity viewpoint has received some explicit validation from the courts, historically in cases dealing with the Seventh Amendment guarantee to a jury trial. At the peak of its acceptance,

54. *See, e.g.*, Vinson, *supra* note 30, at 593 (arguing that antitrust juries largely have a "complete lack of comprehension of the issues presented to them for decision" based on a two-day mock trial observed by experienced attorneys).

55. Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 812–14 (1987) (recommending "a congressional statute eliminating jury trial of private antitrust actions" given antitrust issues require "an analysis of economic and business factors beyond the competence of most jurors," and that the use of intent standards creates "a high likelihood that jury decisions [would] be influenced by emotional and other irrational factors," and so the "elimination of juries would increase the probability of accurate results").

56. *See* Phillip Areeda, *Monopolization, Mergers, and Markets: A Century Past and Future*, 75 CAL. L. REV. 959, 963–65 (1987) (discussing jury-related problems associated with the use of intent evidence to evaluate conduct in monopolization cases, with Areeda specifically arguing that "the major infirmity of the broad language of the jury instruction in Aspen [Skiing] is that it leaves to the jury unstated policy decisions as to privileged resources and legitimate business purposes").

57. HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 61, 63 (2005) (stating that "jury trials are a truly unfortunate way to decide most of the contested issues in complex antitrust cases" and describing antitrust juries as "a very weak link in a system where most of the relevant evidence is economic and technical").

58. *See, e.g.*, Easterbrook, *supra* note 30, at 306, 310 ("I am suspicious of booting to juries, and deferring to their conclusions on, questions that we—meaning judges, lawyers, economists, and other professions taken together—know very little about."); A. A. Poultry Farms v. Rose Acre Farms, 881 F.2d 1396, 1402 (7th Cir. 1989) (in which Easterbrook held that, although overwhelming evidence of predatory intent "impressed the jury," it had no real probative value).

59. *See* Turner, *supra* note 55, at 812–14.

60. *See, e.g.*, *id.* at 812–13; Areeda, *supra* note 56 at 963, 965 (arguing that even "accepted uses of intention can ultimately mislead courts and juries" and that allowing jurors to rely on intent evidence "can interfere with efficient operation of business enterprises and that, by creating enormous uncertainty, burdens a firm and the legal system with unnecessary costs").

the Third Circuit held that a "suit is too complex for a jury when circumstances render the jury unable to decide in a proper manner"[61] and found that the complexity of an antitrust case is a potential ground for denying the right to a jury trial "when a jury will not be able to perform its task of rational decisionmaking with a reasonable understanding of the evidence and the relevant legal standards."[62] However, other circuits have rejected this exception and the academic consensus is that the exception is "dead in the water."[63]

That a jury exception would even be created for antitrust, at least in one circuit, is notable given the numerous other facially complex fields of civil law in which no such exception has been recognized. Even where factfinders might act differently due to the complexity of the subject matter and necessary use of expert testimony (e.g., medical malpractice), the solution is not to remove the right to juries entirely but to change some element of process through which juries are instructed to evaluate the case (in medical malpractice, for example, leaning more heavily on industry custom when determining the appropriate standard for negligence).[64]

C. The Democracy Perspective Argues for Juries on the Basis of Democratic Norms

Against the Complexity perspective stands the Democracy perspective, which argues for juries on the basis of democratic values and norms. Democracy advocates contend that having a jury trial forces lawyers "to present their cases in ways that will make sense to lay people."[65] In the most important antitrust cases, this could provide a meaningful benefit in making the case and its issues more accessible to the general public, rather than being "cloaked in professional jargon."[66] Similarly, the Democracy viewpoint emphasizes that having juries is consistent with the democratic norm of participation by ordinary people in the judicial process.[67] This is particularly important in antitrust given corporate conduct can impact everyone's lives, be it as consumers,

61. *In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1079 (3d Cir. 1980).

62. *Id*. at 1086. The Third Circuit proposed a factor test to determine the complexity of a case which included determining the likely conceptual difficulty of understanding the legal issues and facts on the basis of the "amount of expert testimony and the probable length and detail of jury instructions." *Id*. at 1088.

63. Cavanagh, *supra* note 5.

64. *See, e.g.*, Philip G. Peters, Jr., *Modernizing the Medical Malpractice Standard of Care*, 52 Sw. L. Rev. 465, 467 (2024) ("Many modern [medical malpractice] decisions confirm their continuing adherence to the custom-based standard of care.").

65. First & Waller, *supra* note 12, at 2552.

66. *Id.* at 2553.

67. Cavanagh, *supra* note 5 ("[O]ften overlooked in the debate over the merits of juries in antitrust cases[] is that having antitrust disputes resolved by juries consisting

workers, or stakeholders, in our interconnected world, so having juries adds needed democratic legitimacy to antitrust jurisprudence.[68] The urgency of ensuring such legitimacy is made all the more clear given the alternative is to transfer the factfinding role from juries to judges and other "unaccountable and nontransparent technocratic institutions far removed from democratic (or national) control."[69]

Although limited, some judges have explicitly embraced the Democracy perspective. For example, Judge William G. Young responded to a Motion for New Trial after a jury verdict in the *Nexium* litigation with illuminating reflections on the jury's performance and articulations of his reasons for believing in the jury mechanism.[70] Young argued that courts "ought be especially wary of granting summary judgment upon the rationale 'no jury could possibly find . . .'" since, in all too many cases, this is "a thinly disguised form of judicial factfinding, forbidden by the Constitution in a jury case."[71] Young noted that the jury was attentive and asked intelligent questions throughout a complex case,[72] and its verdict was amply supported by evidence that had been "[t]ested against the common sense of actual jurors."[73] Asserting that jurors are just "as much constitutional officers as are" judges, Young argued that jury verdicts "are an even more important indicia of legal development [than judicial opinions] as they come from the people themselves, a transparent expression of direct democracy."[74] Young ultimately concluded that "[e]very single jury trial is both a test and a celebration of the right of a free people to govern themselves."[75]

Finally, the Democracy viewpoint highlights that there is limited, inconclusive evidence illustrating how well juries perform in antitrust cases.[76] What evidence is available is largely anecdotal, such as the

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of ordinary citizens promotes democratic values and lends legitimacy to the judiciary's function of resolving legal disputes among citizens.").

68. *Cf.* Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1679 (2020) ("[A]n antitrust system where legal rules are devised exclusively by Article III judges who approach antitrust as a domain of 'law made by judges as they see fit' bears signs of democratic illegitimacy." (internal citation omitted)).

69. First & Waller, *supra* note 12, at 2545.

70. Memorandum and Order on Motion for New Trial at 25, 94–101, *In re* Nexium (Esomeprazole) Antitrust Litig., No. 12-md-02409-WGY (D. Mass. July 30, 2015).

71. *Id*. at 15 (citation omitted).

72. *Id*. at 25.

73. *Id*. at 99.

74. *Id*. (quoting SEC v. EagleEye Asset Mgmt., 975 F. Supp. 2d 151, 161 n.12 (D. Mass. 2013)).

75. *Id*. at 110.

76. *See* First & Waller, *supra* note 12, at 2552 ("How well do antitrust juries do their job? Who knows. There are many jury studies, but almost none focused on antitrust. Some federal judges think juries do a good job; presumably, others do not.").

positive impression of the *Nexium* jury by Judge Young. Without meaningful data showing that juries perform suboptimally, Democracy theorists argue that the consistency of jury usage with democratic norms and values should rule the day.

II. Defining Commonsense Competition and Lay Intuitions

Commonsense competition is related to the Democracy view but goes further in arguing that jury decisions are not only consistent with democratic values but affirmatively push antitrust outcomes toward important elements of antitrust's statutory and historical roots, from which judges often shy away, because juries are able to express lay intuitions in applying antitrust law.

Commonsense competition is also related to the Neo-Brandeisian movement, which asserts that U.S. antitrust law should be focused on more than consumer welfare and economic efficiency and instead reflect a broader concern with private power and its negative effects on market competition, income inequality, consumer rights, unemployment, and wage growth in the antitrust laws.[77] Commonsense competition ties the Neo-Brandeisian argument that modern antitrust law has abandoned these concerns in favor of an overriding focus on economic efficiency to a doctrinal deemphasis of lay intuitions in antitrust, which has produced outcomes that do not reflect the varied motivations the Neo-Brandeisians have identified, and suggests increased jury usage as one possible solution.[78]

Commonsense competition argues that jury factfinding is a key means of reemphasizing lay intuitions in antitrust and producing applications of the antitrust law that are more faithful to antitrust's statutory, legislative, and early judicial history. The Note defines lay intuitions as including: 1) Evidence which is itself a lay intuition (i.e., what the public thinks), such as *Brown Shoe*'s public recognition factor for defining markets; 2) Evidence which is highly amenable to lay factfinding and thus can help make antitrust more visible to juries and the public at large, e.g., the *Brown Shoe* market definition factors more

77. *See, e.g.*, Glick & Bush, *supra* note 38, at 937 ("New Brandeisians advocate [] that competition policy can address the traditional antitrust goals of political democracy and support small businesses. They further claim that antitrust enforcement should be used to protect labor and to address inequality when it is being exacerbated by a traditional antitrust violation."); Vartan Shadarevian & Lloyd Lyall, *Modern Antitrust Meets Modern Rulemaking: Evaluating the Potential of FTC Competition Rulemaking*, 72 U. Kan. L. Rev. 389, 450 (discussing Neo-Brandeisians' view that overly concentrated market power is linked to "social and political concerns—such as political influence—that they believe antitrust ignores at its own peril").

78. *See infra* Parts IV & V.

generally; and 3) Commonsense intuitions applied to economic and/or expert evidence by jury factfinding, e.g., a jury's interpretation of an expert's damages analysis such as the jury's "irrational" damages award in the *NFL Sunday Ticket* litigation.

Although reemphasizing the first two forms of lay intuition is possible and should also be adopted where judges serve as factfinders, juries have the inherent benefit of numerosity and diversity of background, both of which better position juries to provide lay intuitions relative to judges. To be sure, that jurors apply antitrust law using lay intuitions does not require or permit extra-record factfinding. Whereas judges are often privy to extra-record, inadmissible evidence given their role,[79] one concern about juries that could be raised is that jurors will bring with them their lived experience, which could in some way represent extra-record factfinding (i.e., they might be biased or do their own research). However, both judges and juries bring to their role their personal experiences and rules against formal extra-record factfinding apply in both contexts, with jurors avoiding the inadmissible evidence to which judges are exposed. Indeed, as discussed above, commonsense competition posits that the lay intuition inherent in a jury's interpretation of admissible evidence is valuable in and of itself and is therefore a feature, not a bug. Just as Justice White observed in the criminal context, "when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed."[80] So here, commonsense competition argues that the jury's lay intuitions serve a real purpose—embodying the varied motivations of the antitrust laws in applying antitrust legal standards as factfinders—one which does not constitute extra-record factfinding.

Similarly, lay intuition carries value across contexts, and its value is not limited to situations in which jurors have personal experience (e.g., industries in which jurors are consumers or workers). Just as one might argue that the *Brown Shoe* market definition factors apply and are desirable across industries, the value of jury factfinding is not dependent on jurors' particular personal experiences. Instead, the jury must come to consensus in applying the antitrust law, with this consensus reflecting their shared intuitions as well as the instruction of judges. Such intuitions are the product of each individual juror's overall life experience and

79. *See, e.g.*, Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 571 (1998) (observing that "trial judges are often exposed to inadmissible, extra-record evidence").

80. Duncan v. Louisiana, 391 U.S. 145, 157 (1968).

collectively reflect their shared values, not any individual juror's experience as a consumer of some particular product. Jurors' common sense, which dictates how they perceive a market and fair competitive conduct, as well as how they interpret quantitative evidence, therefore has value regardless of the factual context of a specific case.

Even acknowledging the Democracy viewpoint, a skeptic of juries could also argue that what ordinary people think about competition reflects the culture in which they live, particularly the business practices to which they are subject. From this perspective, jury factfinding and application of antitrust laws can serve to entrench, rather than mitigate, anticompetitive practices or monopoly power. In the case of no-poach agreements, for instance, perhaps juries have not found liability because jury members live and work within a culture in which agreements restricting workers' rights are pervasive. Even where liability should properly be found, to the extent that jury members have internalized that widespread limitations of workers' rights are acceptable, this may cause juries to not view such agreements as criminal in nature. The result of this cycle is that using juries may actually strengthen the anti-worker environment in a self-reinforcing manner.[81] This feedback loop is a possible negative implication of the societal feedback loop that Democracy advocates argue embedding democratic processes such as juries into antitrust can create.[82]

Although there may be some weight to these critiques, it would sound awfully paternalistic,[83] and like a self-fulfilling prophecy, to let these concerns eliminate the perspective of actual consumers, workers, and other societal stakeholders from our competition law by avoiding or minimizing jury use, as we do now.[84] Ironically, as Part IV will discuss, it is judges who have moved antitrust outcomes away from antitrust's statutory and historical roots[85] and transformed the field into an expert-

81. Tubach et al., *supra* note 27, at 18 ("[A]greements not to recruit or hire employees are common components of legitimate business relationships. These factors may make it harder for jurors to see stand-alone no-poach agreements as criminal.").

82. *See* Spencer Weber Waller, *Antitrust and Democracy*, 46 Fla. St. U. L. Rev. 807, 855 (2019) (arguing that there is a feedback loop in which "civil society and related private actors provid[e] input and criticism requiring the more overtly political branches of government to react creating a new cycle of value creation and implementation," and thus "democracy and antitrust produces democracy in antitrust").

83. *Cf.* Thomas J. Horton, *Unraveling the Chicago/Harvard Antitrust Double Helix: Applying Evolutionary Theory to Guard Competitors and Revive Antitrust Jury Trials*, 41 U. Balt. L. Rev. 615, 659 (2012) ("The Chicago/Harvard approach represents anti-democratic paternalism at its worst.").

84. *See* Daniel A. Crane, The Institutional Structure of Antitrust Enforcement 110 (2011) ("A culture of jury avoidance permeates antitrust litigation, rendering actual jury trials rare and quaint events.").

85. *See, e.g.*, Andrew S. Oldham, *Sherman's March (in)to the Sea*, 74 Tenn. L. Rev. 319, 325 (2007) (arguing that common-law judicial interpretation has "unmoored

driven, largely economic inquiry.[86] If anything, judges as the de facto shapers of antitrust law have enabled the expansion of previously prohibited, now legally sanctioned conduct.[87] Indeed, judges, with their elite backgrounds, societal status, and possibility of representing large corporations after their time on the bench, seem more likely than ordinary people to be subject to the self-reinforcing dynamic favoring corporate interests described above, particularly given there is just one judge, as opposed to twelve jurors who must come to a consensus in applying the antitrust laws.

Commonsense competition proposes that antitrust should reemphasize lay intuitions given they are more likely to generate outcomes which are consistent with the antitrust laws' spirit and history and could also achieve superior economic performance. Juries are a natural way of accomplishing this goal, especially since their use can encourage the emphasis of other forms of lay intuition in the application of antitrust laws (i.e., litigants are more likely to provide juries with evidence which is susceptible to lay intuition). Jury usage is particularly desirable since the alternative means for the people to define anticompetitive conduct are limited in material respects, with Congress at historic lows in productivity[88] and the Presidency, which can affect antitrust policy through appointing leaders of the federal enforcers, being relatively undemocratic in nature.[89]

Inherent in the jury's numerosity and diversity of perspectives is the notion that the jury will use the intuitions they share, and to which they can agree, in applying antitrust law. By using a democratic process (the jury)

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the Sherman Act from its statutory foundations and set it adrift in a stormy sea of illegitimacy"); Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253, 2256 (2013) ("The legislative history of the Sherman Act has been studied thoroughly during the past century. There is broad agreement today, if not consensus, that the record does not support the historical claims that led to the adoption of the consumer welfare standard.").

86. *See* Malcolm B. Coate & Jeffrey H. Fischer, *Can Post-Chicago Economics Survive Daubert?*, 34 AKRON L. REV. 795, 813 (2001) (describing post-Chicago School thinkers as "start[ing] with the Chicago school's proposition that economics controls antitrust, but then [] add[ing] complexity to the microeconomic analysis").

87. Consider the example of resale price maintenance, which went from per se unlawful across all price and nonprice configurations as of 1970 to ultimately being declared fully permissible across all such configurations by the Supreme Court in Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877 (2007). *See* Thomas A. Tucker Ronzetti & Jordan A. Dresnick, *Vertical Price Agreements in the Wake of Leegin v. PSKS: Where Do We Stand Now?*, 64 U. MIAMI L. REV. 229, 229–30 (2009).

88. *See* Moira Warburton, *Why Congress Is Becoming Less Productive*, REUTERS (Mar. 12, 2024), https://www.reuters.com/graphics/USA-CONGRESS/PRODUCTIVITY/egpbabmkwvq/ [https://perma.cc/2K9Y-YBCY].

89. *See, e.g.*, Darrell M. West, *It's Time to Abolish the Electoral College*, BROOKINGS (Oct. 15, 2019), https://www.brookings.edu/articles/its-time-to-abolish-the-electoral-college/ [https://perma.cc/8CCQ-TKY6].

to provide these views, the jury can serve as a democratic updating mechanism in applying the antitrust laws, thus reinforcing antitrust law's democratic legitimacy and better reflecting societal conceptions of fairness.[90] Moreover, as discussed below, using juries reemphasizes lay intuitions in antitrust and thereby moves antitrust results towards closer alignment with the values inherent in the statutory, legislative, and early judicial history of antitrust.

III. Commonsense Competition is Consistent with the Statutory, Legislative, and Early Judicial History of Antitrust

A. The Statutory and Legislative History of Antitrust is Consistent with Lay Intuition Analysis

The statutory and historical roots of antitrust are consistent with the notion that lay intuitions should play an important role in antitrust. The text of the Sherman Act is famously broad and sweeping in its language.[91] The Act prohibits "every contract, combination . . . or conspiracy . . . in restraint of trade" and condemns "every person who shall monopolize" any commercial market.[92] Notably, the Act fails to define the precise meaning of such terms, neglecting, for example, to define what a monopoly is (e.g., how much market power must a company have?) or how to identify the act of "monopoliz[ing]" (e.g., does the term apply to any company which is acquiring or has acquired substantial market power, regardless of how this is accomplished, or does it apply only to the acquisition of market power in some anticompetitive way?).

Given the vagueness of the statutory text, it is worthwhile to consider the history surrounding the Act in assessing how the statute relates to modern perspectives about lay intuitions and juries in antitrust. The Act was passed in response to "public outcry over ravaging cartels,"[93] although even this is ambiguous insofar as it does not definitively establish from which groups and to what extent the statutory regime

90. Cavanagh, *supra* note 5, at 39 ("To deny litigants access to a jury merely because the issues involved are complex would deny the courts a window into community values and thus undermine the quality of justice. Moreover, precisely because the jury offers this community insight, jury participation in the legal process serves to legitimize the judicial decision making process, which, in turn, both reinforces the rule of law and promotes the acceptance of court rulings.").

91. *See, e.g.*, Thomas et al., *supra* note 33, at 298; William Letwin, Law and Economic Policy in America: The Evolution of the Sherman Act 95–99 (1965).

92. 15 U.S.C. §§ 1–2 (2012).

93. Derrian Smith, *Taming Sherman's Wilderness*, 94 Ind. L.J. 1223, 1223 (2019).

should offer protection.[94] Proponents of the Democracy perspective such as Professors Harry First and Spencer Weber Waller argue that the antitrust laws (of most relevance, the Sherman Act, the "Magna Carta of free enterprise" and the foundation of U.S. antitrust law[95]) were written to "advance democratic goals to deal with concentrations of economic power and to police business behavior that exploited consumers and excluded competitors."[96] Neo-Brandeisians argue that the Act's framers had multiple purposes, seeking to "structure markets to advance the interests of ordinary Americans in multiple capacities, not just as consumers."[97] On this basis, they argue that a reading of the Act as being solely concerned with economic efficiency and "nominally indifferent toward distributional effects" is "at best, a selective reading of this legislative history and, at worst, an intentional distortion of this historical record."[98]

Similarly, others argue that the antitrust laws contain within them not only a concern with the effects of unfair competition (e.g., higher prices to consumers) but also "a desire to prevent excessive concentration of wealth and power and a desire to keep open the channels of opportunity."[99] Indeed, statements of key members of the House and Senate at the time of the Act's passage—during the age of robber barons—not only condemned high pricing to consumers as "robbery"[100] and "extortion,"[101] but also expressed concern for small sellers who received lower prices due to concentrations of buying power,[102] small companies who were excluded from the market by larger competitors,[103]

94. *See* Sandeep Vaheesan, *The Twilight of the Technocrats' Monopoly on Antitrust?*, 127 YALE L.J. 980, 986 (2018) ("Antitrust law could conceivably protect consumers, small businesses, retailers, producers, citizens, or large businesses. But even identifying the protected group or groups does not fully resolve the question [of to what extent each group should be protected].").

95. *See* Verizon Commc'ns., Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 415 (2004) ("The Sherman Act is indeed the 'Magna Carta of free enterprise[']. . . ." (quoting United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972))).

96. First & Waller, *supra* note 12; *see also* Waller, *supra* note 82, at 808 ("From the earliest days of antitrust laws in the United States [i.e., the passage of the Sherman Act], the promotion and preservation of democracy was one of the goals of the drafters and supporters of state and federal antitrust law").

97. Vaheesan, *supra* note 94, at 991.

98. *Id*.

99. *See* Corwin D. Edwards, *An Appraisal of the Antitrust Laws*, 36 AM. ECON. REV. 172, 172 (1946).

100. 21 CONG. REC. 2614 (1890) (statement of Sen. Richard Coke).

101. *Id*. at 2461 (statement of Sen. John Sherman).

102. *See, e.g.*, *id*. at 4103 (statement of Rep. George Fithian).

103. *See* Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1153–54 (1981).

and the negative impact on political and social life of concentrations of economic power.[104]

Expressing more than a concern for economic efficiency alone, these commentators argue that the framers of the Sherman Act "condemned monopolistic overcharges in strong moral terms, rather than because of their efficiency effects."[105] Framing the Act in these terms avoids an understanding of the Act's broad textual framing as a mere formalization of common law tradition[106] and delegation to the courts of the power to make competition common law,[107] and instead permits an understanding of the Act as a broader statement of foundational principles, including both economic and non-economic aims, that were "to set the backdrop of American life," despite the statutory text's brevity and vagueness.[108] Under this latter interpretation, rather than seeing the law as a blank canvas from which courts were directed to develop competition law,

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104. *See, e.g.*, 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman) (asserting that, "[i]f we will not endure a king as a political power[,] we should not endure a king over the production, transportation, and sale of any of the necessaries of life"); *id.* at 2726 (statement of Sen. George Edmunds) (justifying antitrust as an antidote to "tyrannies, grinding tyrannies, that have sometimes in other countries produced riots, just riots in the moral sense"); *see also* RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA, 1888–1992: HISTORY, RHETORIC, LAW 24 (1996) (discussing the Sherman Act's origins and observing that "liberty—both industrial and political—seemed to need government intervention to reestablish competitive markets overrun by powerful trusts and cartels").

105. Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 95 (1982); *see also* RICHARD HOFSTADTER, THE AGE OF REFORM 243 (1955) (asserting that monopolies and trusts were viewed as violating Progressives' "inherited precepts and their moral preferences").

106. *See* HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY 228 (1954) (arguing that the Sherman Act merely formalized English common law without any intent for radical change from the status quo).

107. *See* Daniel A. Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1, 33 (2007) ("The choice of Sherman Act's framers to invoke the common law and not a corporate regulatory model entailed a necessary delegation of adjudicatory responsibility to Article III judges and juries, even in civil cases."); Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205, 1206 (2021) ("[T]he antitrust statutes are best understood as a legislative delegation to the courts to create an evolutionary and dynamic common law of competition."); Douglas H. Ginsburg, *An Introduction to Bork (1966)*, 2 COMPETITION POL'Y INT'L 225, 225 ("The open-textured nature of the [Sherman] Act—not unlike a general principle of common law—vests the judiciary with considerable responsibility . . . to choose among competing values."); Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 899 (2007) ("From the beginning the Court has treated the Sherman Act as a common-law statute . . . . Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on 'restraints of trade' evolve to meet the dynamics of present economic conditions.").

108. *See* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 17 (2018) (analogizing antitrust law to constitutional law).

we would instead take seriously the Act's text, purpose, and history in interpreting which conduct should be declared unlawful, just as courts do for other areas of statutory law.

Based on the Sherman Act's varied motivations, moral undertones, and broad text, one might expect antitrust outcomes aligning with the Act to include finding unlawfulness simply as a result of a business's size or "bigness,"[109] deliberate aim to exploit consumers[110] or harm smaller competitors,[111] or negative impact on social and political life,[112] rather than based solely on whether the conduct at issue is "economically efficient." As discussed below, the "first half" of antitrust legal history came much closer to embodying the former principles and, in doing so, emphasized lay intuitions frequently. That lay intuition analysis and historically faithful antitrust outcomes are aligned makes sense given the Sherman Act was written by politicians, not economic experts,[113] and is therefore in some sense itself an expression of lay, rather than

109. *See, e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945) (finding unlawful monopolization by virtue of having a monopoly (as opposed to monopoly accompanied by anticompetitive conduct), also known as "monopoly as a status offense").

110. *See, e.g.*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 597 (1985) (finding liability in part because defendant's conduct sacrificed customer goodwill to harm its competitor and noting that conduct violative of the Sherman Act "does not benefit consumers by making a better product or service available—or in other ways"); United States v. Am. Airlines, Inc., 743 F.2d 1114, 1116 (5th Cir. 1984) (finding defendant's proposal to its competitor to end price competition unlawful and noting that, prior to the proposal, defendant and its competitor were "competing fiercely for passengers flying to, from and through [Dallas-Fort Worth airport], by offering lower fares" so intention of proposal was to harm consumers).

111. *See, e.g.*, Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685, 702 (1967) (finding in predatory pricing context that "existence of predatory intent [to harm competitors] might bear on the likelihood of injury to competition"); Fashion Originators' Guild, Inc. v. FTC, 312 U.S. 457, 467 (1941) (finding unlawful group boycott of competitors where "purpose and object" of defendants was the "intentional destruction of one type of manufacture and sale which competed with" defendants').

112. *See, e.g.*, United States v. Phila. Nat'l Bank, 374 U.S. 321, 370 (1963) (rejecting proposed merger and noting that the antitrust laws are premised on the notion that "corporate growth by internal expansion is socially preferable to growth by acquisition").

113. Taking the legislators cited above, Senator Sherman did not graduate from college and was a lifelong politician. *See John Sherman (1897–1898)*, Miller Ctr. https://millercenter.org/president/mckinley/essays/sherman-1897-secretary-of-state [https://perma.cc/G87F-LGNA] ("After leaving school at the age of 14, he worked as an engineer on the Muskingum River improvement project, studied law, was admitted to the state bar in 1844, and then established a law practice in Mansfield, Ohio"). Senator Coke had a private law practice, fought in the Confederate Army, and spent most of his career as a politician. *See Gov. Richard Coke*, Nat'l Governors Ass'n https://www.nga.org/governor/richard-coke/ [https://perma.cc/W3NS-YF3V]. Senator Edmunds was a lawyer and lifelong politician. *See George Franklin Edmunds*, Britannica, https://www.britannica.com/biography/George-Franklin-Edmunds [https://perma.cc/7QYQ-KAHW].

expert, intuitions regarding societally acceptable competitive practices and economic structure.[114]

The Chicago School, which has dominated the "second half" of antitrust history, argues that the sole purpose of the antitrust laws is to maximize consumer welfare,[115] a reading which has been endorsed by the modern Supreme Court.[116] Other economics-focused perspectives assert that the Act was passed to promote distributive economic objectives[117] or "natural rights to economic liberty, security of property, and the process of free and competitive exchange from artificial interference by private actors,"[118] respectively. However, even leading Chicago School theorists such as Robert Bork understood antitrust as a "subcategory of ideology" that was necessarily connected to "the central political and social concerns of our time."[119] In Bork's understanding, the consumer welfare standard and its focus on economic efficiency had the virtue of saving the "liberal, democratic, and capitalist social order"[120] from "an unelected, somewhat elitist, and undemocratic judicial institution"[121] that saw "antitrust [as] . . . a cornucopia of social values, all of them rather vague and undefined but infinitely attractive."[122]

Given the ambiguities of the text and history of the Sherman Act, as well as the diversity of academic perspectives surrounding the Act's meaning, one must acknowledge, at least, the possibility that there are a multiplicity of values present in the Act, some of which may conflict.[123] Even the most ardent economics theorist cannot deny the connection between the economic impact of antitrust law and its broader social and

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114. *Cf.* Crane, *Antitrust Antifederalism*, *supra* note 107 (arguing that a corporate regulatory model of antitrust in which industrial policy specialists regulate competition would be superior to the delegation of antitrust adjudicatory decision making to generalist judges and juries embodied in the Sherman Act).

115. *Id*. at 38.

116. *See* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting ROBERT H. BORK, THE ANTITRUST PARADOX 66 (1978))).

117. *See* Lande, *supra* note 105, at 69–70 (arguing that "the antitrust laws were passed primarily to further what may be called a distributive goal, the goal of preventing unfair acquisitions of consumers' wealth by firms with market power").

118. Jonathon B. Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 FORDHAM L. REV. 2175, 2177 (2013) (arguing, therefore, that the proper focus of antitrust law is on "capturing economic efficiencies").

119. *See* ROBERT BORK, THE ANTITRUST PARADOX 408 (1978).

120. *Id*. at 418.

121. Robert H. Bork, *The Goals of Antitrust Policy*, 57 AM. ECON. REV. (PAPERS & PROC.) 242, 243 (1967).

122. BORK, *supra* note 119, at 50.

123. *See* William S. Comanor, *Antitrust in a Political Environment*, 27 ANTITRUST BULL. 733, 751 (1982) ("Those who look for a single-minded purpose in antitrust are inevitably frustrated.").

political implications. The Act therefore cannot be understood solely as a tool of pure economic efficiency.

Therefore, it would make little sense to base antitrust outcomes solely on economic evidence. While economics are surely of some value in assessing antitrust liability,[124] perceived economic efficiency alone cannot be the full solution to applying the antitrust laws if faithfulness to text and history are to mean anything.

B. The First Half of Antitrust History

The "first half" of antitrust history in the courts lends further support to the notion that lay intuitions matter to antitrust. There is broad consensus that antitrust jurisprudence today is different from that of the 1950s and 1960s insofar as the latter involved consideration of a much broader range of factors beyond economic efficiency alone.[125] Cases from this period, many of which have not been overruled, demonstrate the varied purposes of antitrust, including protecting consumers' interest in competitively-priced goods,[126] freedom for small businesses,[127] and dispersal of private power.[128] During this period, the Court explicitly held that "the intense congressional concern with the trend toward [economic] concentration warrant[ed] dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects,"[129] a direct embrace of lay intuition. Relatedly, the Court affirmed its interpretation that Congress prioritized economic decentralization over possible justifications, such as economies of scale, that lend themselves to economic efficiency arguments[130] and asserted

124. Antitrust law regulates business conduct and, as discussed above, broadly focuses on different forms of economic fairness.

125. Vaheesan, *supra* note 94, at 987 ("Antitrust law today is qualitatively different from antitrust law [in the 1950s and 1960s]" in relevant part because the courts then "interpreted antitrust law to advance a variety of objectives.").

126. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 (1940) ("Proof that a combination was formed for the purpose of fixing prices and that it caused them to be fixed or contributed to that result is proof of the completion of a price-fixing conspiracy under § 1 of the Act.").

127. *See* Simpson v. Union Oil Co., 377 U.S. 13, 20–21 (1964) ("The evil of this resale price maintenance program, like that of the requirements contracts held illegal by Standard Oil Co. v. United States, . . . is its inexorable potentiality for and even certainty in destroying competition in retail sales of gasoline by these nominal 'consignees' who are in reality small struggling competitors seeking retail gas customers.").

128. United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963).

129. *Id.*

130. *See* FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967) ("Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.").

that harm to competitors, even if it had minimal impact on consumer welfare, was cognizable under the antitrust laws.[131]

1. Brown Shoe and *Philadelphia National Bank*

The historical approach of the courts, which entails both embracing lay intuitions and taking seriously the text and history of the antitrust laws, is well illustrated by the cases of *Brown Shoe Co. v. United States*[132] and *United States v. Philadelphia National Bank*.[133] In *Brown Shoe*, the Court repeatedly emphasized the role of Congress's concerns regarding the rising tide of economic concentration in the American economy in passing the Clayton Act, another of the core antitrust laws, and the desirability of using antitrust law to retain "local control" over industry and protect small businesses.[134] The Court specifically noted Congress's fear of "accelerated concentration of economic power" not only on economic efficiency grounds, but also because of "the threat to other values a trend toward concentration was thought to pose."[135]

Although of course considering economics as part of its analysis, the Court expressly acknowledged that "Congress neither adopted nor rejected specifically any particular tests for measuring the relevant markets"[136] nor "adopt[ed] a definition of the word 'substantially' in either quantitative or qualitative terms."[137] In fact, the Court found that the standards proposed in the House Report relating to the Act were "couched in general language" and, rather than embracing complex economic analysis, reflected a "conscious avoidance of exclusively mathematical tests."[138] The Court therefore articulated its market definition standard in lay-intuition-friendly terms.

Importantly, the Court anticipated and shot down the notion that economic efficiency mattered most, finding that "Congress appreciated that occasional higher costs and prices might result from maintenance of fragmented industries and markets" but "resolved these competing considerations in favor of decentralization."[139] Based on its findings,

131. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959) ("[Anticompetitive conduct] is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy.").
132. 370 U.S. 294 (1962).
133. 374 U.S. 321.
134. *Brown Shoe Co.*, 370 U.S. at 333.
135. *Id.* at 316.
136. *Id.* at 320.
137. *Id.* at 321.
138. *Id.* at 321 n.36.
139. *Id.* at 344.

the Court held that the merger at issue had to be functionally viewed in the context of its particular industry.[140] Much of its analysis was qualitative and revolved around understanding "practical indicia" such as "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."[141] Again, this approach not only includes public recognition, which is itself a lay intuition, but also embodies a framework of analysis which anyone can understand. This may be part of why *Brown Shoe*'s market definition has proved enduring and is still frequently cited, including in the latest Merger Guidelines.[142]

Similarly, the Court in *Philadelphia National Bank* noted that the antitrust laws are premised on the notion that "corporate growth by internal expansion is socially preferable to growth by acquisition."[143] Having recognized social goals as having value in antitrust, the Court proceeded to define the relevant market for the challenged merger by focusing on factors such as the "convenience of location" to consumers and taking a practical, if admittedly non-scientific, approach.

For example, the Court noted that the relevant geographic market in banking is "a function of each separate customer's economic scale" and so "some fair intermediate delineation which avoids the indefensible extremes of drawing the market either" too large or too small was necessary.[144] The Court thus opted for the middle ground of the Philadelphia area which would "seem roughly to delineate the area in which bank customers that are neither very large nor very small find it practical to do their banking business" and so was most appropriate.[145] Splitting the difference in this manner, and doing so at least in part based on the practical realities of the banking business, reflects lay intuition thinking.

Just as the jury in *NFL Sunday Ticket* roughly "split the difference" between the damages estimates of the two experts there, the Court

140. *Id*. at 326.
141. *Id*. at 344.
142. U.S. Dep't of Just. & Fed. Trade Comm'n, 2023 Merger Guidelines 41–42 (2023) (citing *Brown Shoe* and noting that it had been quoted in United States v. U.S. Sugar Corp., 73 F.4th 197, 204–07 (3d Cir. 2023), to affirm a district court's application of *Brown Shoe* practical indicia to evaluate the relevant product market, which included, based on the unique facts of the industry, those distributors who "could counteract monopolistic restrictions by releasing their own supplies").
143. United States v. Phila. Nat'l Bank, 374 U.S. 321, 370 (1963).
144. *Id*. at 361. Importantly, this is reminiscent of the "splitting the difference" approach taken by the jury in the *NFL Sunday Ticket* litigation which was implicitly critiqued by the judge in that case. *See supra* notes 17–20 and accompanying text.
145. *Phila. Nat'l Bank*, 374 U.S. at 361.

here apparently took a "goldilocks" approach to defining the market by selecting the one that appeared "just right" based on the evidence available. Similarly, given "relevant economic data [was] both complex and elusive," the Court simplified the test of illegality by looking to market share as a proxy for probable economic effect, thus using economic evidence but doing so in a manner amenable to all.[146]

Philadelphia National Bank and *Brown Shoe*, both of which are still good law, therefore reflect lay intuitions in several ways and produced outcomes which were consistent with the varied motivations underlying the antitrust laws. In both, the perceptions of lay people were important to defining the relevant market, and the approach taken to analyzing the evidence at issue did not purport to be precise and scientific but instead was practically oriented. Moreover, each result reflected the Sherman Act's concern with economic concentration and its related societal implications, dismissing the defendants' economic efficiency arguments.

2. Leading Judicial Figures

In addition to relevant caselaw, judicial luminaries from this period, such as Supreme Court Justice Robert H. Jackson, also articulated an understanding of antitrust that is much more consistent with the varied statutory motivations discussed above. Jackson contended that antitrust revolved around "ideals of political and economic democracy," that the people "want[ed] no economic or political dictatorship imposed upon [them] either by the government or by big business," and therefore antitrust law could not "permit private corporations to be private governments," and concluded that "[w]e must keep our economic system under the control of the people who live by and under it."[147]

Jackson's contentions aligned with the bigness concerns of Supreme Court Justice Louis Brandeis, after whom the Neo-Brandeisian movement is named, who had argued decades previously that "[t]he evil of the concentration of [economic] power is obvious; and as combination necessarily involves such concentration of power, the burden of justifying a combination should be placed upon those who seek to effect it."[148] Brandeis's concerns were also echoed by Supreme Court Justice William O. Douglas, who invoked them in dissent in

146. *Id*. at 364–65.

147. Robert H. Jackson, *Should the Antitrust Laws be Revised?*, 71 U.S. L. Rev. 575, 582 (1937).

148. Louis D. Brandeis, *A Curse of Bigness*, *in* Other People's Money and How the Bankers Use It 120–33 (Melvin I. Urofsky ed., 1995) (originally published in Harper's Weekly, Jan. 10, 1914).

United States v. Columbia Steel Co., quoting Brandeis and arguing that "*The Curse of Bigness* shows how size can become a menace—both industrial and social. . . . For all power tends to develop into a government in itself. Power that controls the economy should be in the elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. . . . That is the philosophy and the command of the Sherman Act."[149] Notably, esteemed federal judge Learned Hand took up similar arguments in the landmark case of *United States v. Aluminum Co. of America*, asserting that the antitrust laws exist "to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other," a strong statement against the domination of economic efficiency at the expense of all else which took hold with the Chicago School.[150]

The mode of decision embraced by the courts historically, therefore, is quite different from that of the courts today, in which "antitrust law has been almost entirely divorced from norms of fairness or distributive justice that lie within the ken of the average layperson."[151] That the antitrust jury is not now "called upon to serve as the moral compass of the community" given the purely "technical conception of economic efficiency"[152] that antitrust has embraced does not mean that antitrust has been nor must always be this way. Instead, the varied concerns underlying antitrust were once reflected in a jurisprudence which emphasized lay intuitions. The next Part will discuss how judges moved antitrust away from lay intuitions, narrowing liability and reducing jury participation in the process.

IV. Judges Have Deemphasized Lay Intuitions in Antitrust at the Expense of Jury Participation While Narrowing Liability

Since the 1970s, judges have significantly diminished the presence of lay intuitions in antitrust, which has had the effect of reducing the jury's role in deciding cases and narrowing liability for defendants.[153] The reduction in lay intuitions has been accomplished through both

149. United States v. Columbia Steel Co., 334 U.S. 495, 535–36 (1948) (Douglas, J., dissenting).

150. *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 429 (2d Cir. 1945).

151. Crane, *Antitrust Antifederalism*, *supra* note 107, at 34.

152. *Id.*

153. *See* Horton, *supra* note 83, at 616 (describing the Supreme Court's "strong antipathy toward antitrust jury trials" and "eager willingness to keep monopolization cases away from juries").

procedural changes to pre-trial screening rules, empowering judges to make more liability determinations before trial,[154] some of which came about in antitrust cases, as well as through changing substantive standards for antitrust liability that deemphasize lay intuitions, often with the effect of narrowing liability.

Importantly, in explaining its rationale for moving antitrust away from lay intuitions, the Court has emphasized its concern with the "accuracy" of antitrust outcomes, with a specific fear of "false positives" or findings of liability where none should lie.[155] This caution reflects an understanding of antitrust as a tool of economic efficiency rather than recognizing the varied motivations underlying antitrust,[156] running counter to the Court's argument in *Brown Shoe* that the antitrust laws reflect a choice of economic decentralization (and the social and political benefits accompanying such decentralization) rather than focusing solely on maximizing economic efficiency.[157] The "accuracy" concern, as demonstrated by the Court's discussion of false positives, is rooted in a fear that such "[m]istaken inferences and the resulting false condemnations are especially costly, because they chill the very conduct the antitrust laws are designed to protect."[158]

The modern Court understands the purpose of the antitrust laws to be economic efficiency and productivity,[159] with the Court going so

154. Cavanagh, *supra* note 5, at 5 ("The Court has frozen juries out of the decision-making process in private antitrust cases in other ways, including [changing the standards for:] (1) granting motions to dismiss, (2) granting summary judgment motions, (3) excluding or limiting expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, and (4) denying class certification motions.").

155. *See* Turner, *supra* note 55, at 798 (explaining that "elimination of juries would increase the probability of accurate results" and thereby "reduce the private and public costs of antitrust litigation").

156. *See id.* at 798 ("[The] goal of [antitrust law] is to promote consumer welfare through the efficient use and allocation of resources." Turner then argues that "economics-based antitrust law" serves "populist" antitrust goals ("social and political reasons for limiting business size") and economics should prevail over such concerns given it is "questionable whether populist goals are appropriate factors to consider when formulating antitrust rules.").

157. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).

158. Verizon Commc'ns., Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) (quoting Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)).

159. *Id.* at 407–08 ("Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities."). One can also see the Court's focus on economic efficiency and concomitant fear of false positives through many of its recent cases. *See, e.g.*, Ohio v. Am. Express Co., 585 U.S. 529, 546 (2018) (holding that the credit card market must be defined as encompassing both "sides" of the market (consumers and merchants) because "[a]ny other analysis would lead to mistaken inferences of the kind that could chill the very

far as to venerate monopoly power, arguing that "[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."[160] To the Court, therefore, false positives are undesirable because they interrupt economic productivity and deter new business investment, particularly since, in its view, to hold otherwise would require "antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are illsuited."[161]

This stands in sharp contrast to *Brown Shoe*, *Philadelphia National Bank*, and the other early antitrust cases emphasizing lay intuitions in that, in those cases, "accuracy" is not the concern: If combating concentrations of economic power is the leading priority in antitrust, then antitrust courts need only draw the line regarding how much power is too much power, leaving it to the factfinder to measure whether the power wielded in a given case passes this line (by defining the market and calculating market share). The modern Court rejects approaches, such as Judge Hand's "monopoly as a status offense," that prioritize economic decentralization and argues, in line with the accuracy concern, that such tests impermissibly sacrifice economic efficiency and are therefore counter to the antitrust laws.[162]

The concern with false positives and accuracy demonstrates the tie between the perceived goals of antitrust law and the implementation of the antitrust laws through legal standards and analysis. As we will see in more detail below, the overall trend of the Court's moves over the last several decades has been to reposition antitrust as a project of economic efficiency and adopt standards which deemphasize lay intuition, reduce jury participation, and narrow lability.[163] Assuming, however, based

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conduct the antitrust laws are designed to protect") (citing Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993)); Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 895 (2007) (noting that courts should avoid increasing the "total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage" in justifying the elimination of per se treatment of vertical price restraints).

160. *Trinko*, 540 U.S. at 407.

161. *Id*. at 408.

162. *See Leegin Creative Leather Prods.*, 551 U.S. at 895.

163. Crane, *Antitrust Antitextualism*, supra note 107, at 1206 ("[T]he courts have manifested a systematic tendency to interpret the substantive antitrust statutes contrary to their texts, legislative histories, and often their spirit . . . . If this antitrust antitextualism is merely the product of common-law methodology, one would expect to see movement away from the statute's text in both permissive and restrictive directions,

on text and history,[164] that the success of antitrust outcomes should be measured by more than perceived economic efficiency effects, the Court's changes have been misplaced. Moreover, even assuming economic efficiency should be the measuring stick for antitrust success, the minimization of lay intuitions in antitrust has likely failed on its own terms.[165]

A. Procedural Evolutions Have Allowed Judges to Dictate Antitrust Outcomes Before Cases Reach Trial

At the trial level, jury factfinding is supposed to limit the trial judge to ruling over matters of law.[166] Jury factfinding can also limit appellate court power given the Seventh Amendment places great constraints on a court's authority to overturn factual findings made by a jury.[167] Specifically, the Federal Rules of Civil Procedure ("FRCP") permit judicial override of a jury's verdict only when "a reasonable jury would not have a legally sufficient evidentiary basis" to reach such a verdict.[168] This deferential "reasonable jury" standard applies with equal force to trial and appellate judges.[169] However, the FRCP's reasonable jury standard permits appellate courts to refine the substantive law in a particular area in a way that renders only one outcome supportable "as a matter of law."[170] We will see that appellate courts have used this and other procedural tools to decrease the importance of lay intuitions, often in response to antitrust trial jury findings of fact with which they disagree.

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or, to put it more crassly, both in favor of big capital and against it. But the movement has all been in one direction: loosening a congressional check on big capital.").

164. *See, e.g.*, Khan, *supra* note 68, at 1679 ("Even the most ardent textualists show casual disregard for the text of the antitrust laws, and statutory text generally receives only passing mention in antitrust cases. Control over the meaning of the antitrust laws now rests firmly in the grip of this unelected judiciary."); Oldham, *supra* note 85, at 324 (describing substantive antitrust law as a "common law monstrosity that federal courts have created atop the Sherman Act[]" and arguing that judges have "violat[ed] every conceivable canon of statutory interpretation" in interpreting the Act).

165. *See supra* note 38.

166. Cavanagh, *supra* note 5, at 38.

167. *See* U.S. CONST. amend. VII (providing in part "no fact tried by a jury[] shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law").

168. FED. R. CIV. P. 50(a)(1).

169. Adam N. Steinman, *Appellate Courts and Civil Juries*, 2021 WIS. L. REV. 1, 3 (2021).

170. *Id*. at 4–5 (noting that FRCP 50 "requires the appellate court to earn its ability to second-guess the jury by providing the sort of legal clarification that would benefit courts and litigants going forward").

Judicial changes to procedural rules, often in the context of antitrust cases, have made it less likely for cases to reach a jury, particularly when paired with heightened antitrust liability standards. The motivation behind these changes has often been, at least in part, a desire to screen out likely "false positive" cases before trial.[171] In doing so, the Court has pointed to concerns about antitrust's complexity as the rationale for the false positive concern and argued that making standards more defendant-friendly can contain costs of possibly vexatious litigation.[172] Of particular note are *Bell Atlantic v. Twombly*, which heightened the standard to survive a motion to dismiss in favor of defendants, and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, which did the same for the standard to survive a motion for summary judgment.

Twombly involved an alleged horizontal agreement not to compete between local telecommunications exchange companies in which the plaintiff consumer class sought to prove the agreement by alleging parallel conduct.[173] Given explicit agreement can be difficult to prove, plaintiffs bringing Sherman Act § 1 cases often turn to circumstantial evidence from which an unlawful agreement can be inferred, including parallel conduct.[174] In *Twombly*, the Court expressed its skepticism of these sorts of claims in holding that an allegation of conscious parallelism alone (i.e., market participants each adjust prices or business practices in response to competitors) was insufficient to survive a motion to dismiss.[175] The Court couched its reasoning in cost containment and policing insubstantial private treble damages actions, exhorting trial

171. *See, e.g.*, Cavanagh, *supra* note 5, at 5 (noting that judges have found "procedural vehicles to dispose of private suits pretrial" and discussing such vehicles).

172. For example, in *Twombly*, the Court cited an article by Richard Epstein which argued that the "fact/law distinction that organizes the federal rules does not work as well" in complex areas of law such as antitrust as compared to "simpler cases." Richard A. Epstein, AEI-Brookings Joint Ctr. for Regul. Stud., Motions to Dismiss Antitrust Cases: Separating Fact from Fantasy 2 (2006). Epstein contended that "[d]ecisions before trial on factual matters [in antitrust] are much more complex," later referencing the economic evidence needed to establish liability in an antitrust case (e.g., "whether it is unlawful for firms to lower prices below their marginal costs of production, to tie the sale of one good to the sale of another, or to impose territorial restrictions") and asserting that "as the costs of discovery have mounted [in complex cases], the case for terminating has gotten ever stronger, and should be done," dismissing private antitrust suits as "rent-seeking litigation." *Id.* at 2, 3. Epstein ultimately argued that the standard to survive summary judgment should be made higher to minimize the risk of false positives. *Id.*

173. *See* Bell Atl. Co. v. Twombly, 550 U.S. 544, 548–52 (2007).

174. Wentong Zheng, *A Knowledge Theory of Tacit Agreement*, 9 Harv. Bus. L. Rev. 399, 403–12 (2019) (discussing various means of proving inferred explicit agreements and tacit agreements).

175. *Bell Atl. Co.*, 550 U.S. at 556–57 ("[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not

judges to carefully screen antitrust complaints at the motion to dismiss stage in order to avoid waste of court and private resources.[176] As such, the Court heightened the standard to state a claim, holding that the allegations must establish a "plausibility of entitlement to relief" rather than a mere possibility,[177] and thus increasing judges' ability to cut off litigation at an early stage.[178]

In so doing, the Court diminished lay intuition insofar as the standard made it more difficult for a case to reach a jury (which could then impart its lay intuition). As the dissent in the case noted, the new standard appeared to allow judges to pass on the merits and thereby encroach on the factfinding role at a much earlier stage in litigation.[179] The implications for lay intuition were particularly important in the context of a Sherman Act § 1 claim given plaintiffs must often establish their case through "plus factors" (circumstantial evidence of agreement).[180] Such evidence is often particularly amenable to lay factfinding (because it entails qualitative intent evidence, which juries are regularly asked, and presumably competent, to evaluate across civil and criminal law more broadly) and may not be obtained until discovery, after the motion to dismiss.[181]

By heightening the standard at the motion to dismiss, therefore, the Court reduced the importance of lay intuitions because the litigation could be closed by a motion to dismiss before evidence of intent, which a jury could use to find liability were the case to proceed to trial, could be

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suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.").

176. Cavanagh, *supra* note 5, at 5.

177. *Bell Atl. Co.*, 550 U.S. at 557.

178. *See, e.g.*, Michael R. Huston, *Pleading with Congress to Resist the Urge to Overrule* Twombly *and* Iqbal, 109 MICH. L. REV. 415, 433 (2010) ("[S]ome judges view *Twombly* and [its companion, non-antitrust case] *Iqbal* as much more of a sea change than a mere clarification of a long-existing standard. Panels from various circuits have indicated that *Twombly* and *Iqbal* represent a 'significant change, with broad-reaching implications,' and have marked the two decisions as instituting a 'heightened' or 'stricter' pleading standard." (internal citations omitted)).

179. *See Bell Atl. Co.*, 550 U.S. at 585.

180. *See, e.g.*, Brief of the Am. Antitrust Inst. in Support of Respondents at *14–15, Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 2966601.

181. *Id.* (discussing cases in which trial jury found liability where evidence of intent plus factors emerged only after discovery and there was no direct evidence of conspiracy. The brief observed that this pattern "repeats through many cases in which plaintiffs have survived summary judgment on evidence of conspiracy or 'plus factors' that they likely could not have alleged before obtaining discovery," citing cases where such evidence included "evidence of communications among competitors," "letter from counsel for conspirator reminding co-conspirator of 'special relationship,'" "telex to defendant from distributor advising that 'corrective action' had been taken regarding discounters," and "reams of deposition testimony.").

surfaced through discovery. Intuitively, plaintiffs who lack intent evidence coming into litigation are then incentivized to rely more heavily on other plus factors that are often perceived as less amenable to lay factfinding, such as evidence of market structure and performance, but which can be surfaced earlier in the litigation process, in order to advance past the motion to dismiss stage.[182]

Similarly, *Matsushita* expanded the role of summary judgment in antitrust cases, with critics arguing that the standard announced there deprived the jury of many of its traditional functions.[183] In *Matsushita*, the plaintiff alleged that rival Japanese electronics manufacturers had conspired to drive it from the field by engaging in predatory pricing.[184] Despite expert evidence being presented by both sides, the Court ruled that the plaintiff had failed to establish a genuine issue of material fact[185] and expressed its skepticism of predatory pricing claims generally.[186] The Court held that "to survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of [Sherman Act §] 1 must present evidence that tends to exclude the possibility that the alleged conspirators acted independently."[187] In other words, the plaintiffs had to establish that an inference of unlawful conduct was reasonable in light of competing inferences of lawful conduct.[188] This again raised the bar for plaintiffs, making it more difficult for cases to reach trial and, consequently, juries.[189]

As in *Twombly*, the Court expanded judges' role in a manner which arguably intruded onto the factfinding function, at least per

182. *Cf.* Christopher R. Leslie, *The Decline and Fall of Circumstantial Evidence in Antitrust Law*, 69 Am. U. L. Rev. 1713, 1730–31, 1750 (2020) (discussing how judges have imposed requirements of direct evidence in Sherman Act § 1 cases that undercut the value of circumstantial evidence, most of which reflects intent).

183. *See, e.g.*, Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 1033–34 (2003).

184. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 584 (1986).

185. *Id*. at 587.

186. *Id*. at 588–89.

187. *Id*. at 588 (internal citation omitted). Note that this standard has subsequently been applied to antitrust cases seeking injunctive relief. *See, e.g.*, *In re* Titanium Dioxide Antitrust Litig., 959 F. Supp. 2d 799, 821 (D. Md. 2013) ("[I]t is clear that the *Matsushita* standard governs whether granting summary judgment is proper" in alleged price-fixing conspiracy where plaintiffs sought injunctive relief.).

188. *See id*.

189. *See, e.g.*, Suja A. Thomas, Keynote Address at Before and After the Summary Judgment Trilogy (Apr. 11, 2012), *in* 43 Loy. U. Chi. L.J. 499, 513 (2012) ("[W]hen a judge decides a case on summary judgment, the jury has less power, and the judge has more power, the judge being permitted to decide the result in the case.").

the dissent, and thereby diminished lay intuitions in the litigation.[190] Moreover, by reviewing the expert evidence and concluding that "if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy,"[191] the Court similarly diminished lay intuitions by focusing not on what the defendants' actual intent was but instead on what defendants' rational intent would be according to economic experts.[192] By ending litigation on the grounds that the alleged scheme was not what the defendants should have done, the Court ignored the contrary conclusions of the plaintiffs' expert[193] as well as commonsense economic evidence suggesting the possibility of unlawful behavior (here, "evidence that petitioners sold their goods in this country at substantial losses over a long period of time"[194]), thus dismissing evidence which was amenable to lay factfinding and precluding the possibility of a jury deciding the question. Again, in doing so, the Court heightened the test and narrowed liability, making it more difficult for cases to reach juries in any context, given the new summary judgment standard empowered judges to screen cases more readily.

B. Substantive Evolutions

The effect of the procedural changes described above has been to reduce the number of trials, thereby limiting the jury's opportunity to impart its lay intuition.[195] Where cases do reach trial, judges have often responded to what they perceive to be "inaccurate" jury findings by changing substantive antitrust law to reduce the importance of lay intuitions. This Note focuses on two notable areas that illustrate this

190. *See Matsushita*, 475 U.S. at 601, 606 ("If the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overturning settled law. . . . [This is because] the question is not whether the Court finds respondents' experts persuasive, or prefers the District Court's analysis; it is whether, viewing the evidence in the light most favorable to respondents, a jury or other factfinder could reasonably conclude that petitioners engaged in long-term, below-cost sales.").

191. *Id*. at 596–97.

192. *Id*. at 595 ("[A]s presumably rational businesses, petitioners had every incentive not to engage in the conduct with which they are charged, for its likely effect would be to generate losses for petitioners with no corresponding gains.").

193. *Id*. at 601.

194. *Id*. at 604.

195. *See* J.B. Heaton, *Jury Trials Are in Decline for Good Reason*, Law360 (Apr. 18, 2019), https://www.law360.com/articles/1151117/jury-trials-are-in-decline-for-good-reason [https://perma.cc/3VCA-M5HK] (noting the decline in jury trials across all of civil law and arguing that it is a positive innovation for the law).

dynamic: predatory pricing (of which the Court expressed its skepticism in *Matsushita*) and refusals to deal.

1. Predatory Pricing

Brooke Group v. Brown & Williamson Tobacco Corp. illustrates the way in which trial and appellate judges overrule trial jury findings and heighten standards for liability to keep cases away from juries in the first place. In *Brooke Group*, the trial jury returned a verdict in favor of the plaintiff which was then overruled by the district court, which held that the defendant was entitled to the judgment as a matter of law.[196] Reviewing the appellate judgment below, the Court took the "extraordinary step of conducting [a] sufficiency of the evidence review to reverse a predatory pricing jury verdict in favor of the plaintiff."[197] Thereafter, the Court heightened the legal standard for plaintiffs to prove liability above that which had prevailed previously, holding that plaintiffs must prove both that the defendant is pricing below the relevant metric of cost and that there is a dangerous probability that the defendant will recoup its "investment" in predation.[198] The result of this doctrinal move is that it is now incredibly difficult to bring successful predatory pricing claims, even where they might violate conventional understandings of competitive behavior, so plaintiffs rarely bring them at all.[199] Even where such claims are brought, the judicially created test requires more complex econometric expert evidence.[200]

In its opinion, the Court specifically noted that the case had involved a "115-day trial involving almost 3,000 exhibits and over a score of witnesses,"[201] after which the jury found for the plaintiffs and awarded roughly $50 million in damages before trebling.[202] In overturning this verdict as a matter of law, the district court had found that the defendant was entitled to the judgment on three separate grounds: "lack of injury to competition, lack of antitrust injury to [plaintiff], and lack of a causal link between the discriminatory rebates and [plaintiff]'s

196. Brooke Grp. v. Brown & Williamson Tobacco Corp. 509 U.S. 209, 218 (1993).
197. Crane, *Antitrust Antifederalism*, *supra* note 107, at 36.
198. *Brooke Grp.*, 509 U.S. at 222, 224.
199. C. Scott Hemphill, *The Role of Recoupment in Predatory Pricing Analyses*, 53 Stan. L. Rev. 1581, 1605 (2001) ("The degree to which predatory pricing occurs remains a difficult empirical question. The recent futility of bringing predatory pricing claims makes it impossible to rely upon a count of the cases actually brought before a court.").
200. *See* Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 Colum. L. Rev. Sidebar 1695, 1764 (2013) ("[T]he recoupment element [of the Court's predatory pricing test] necessitates more experts and concomitant speculation.").
201. *Brooke Grp.*, 509 U.S. at 218.
202. *Id.*

alleged injury,"[203] leaving little room for the jury's verdict to prevail on appeal. By affirming the district court's judgment overruling the jury and announcing its new heightened standard, the Court demonstrated its disapproval of the jury's liability finding and its desire to prevent recurrence of this issue. The result has been that antitrust claims alleging predatory pricing have "fallen into disuse"[204] given each prong of the new test is difficult to prove and necessarily requires expert evidence.[205] Importantly, the Court grounded its reasoning in a desire to avoid the false positive of condemning "legitimate price cutting"[206] and expressed its view that predation is simply "implausible,"[207] lending further credence to the notion that it changed the law to minimize jury discretion and avoid future "wrong" results (since, like in the *NFL Sunday Ticket* case referenced above, a trial jury had found liability where it was, in the judges' opinion, implausible).

Since then, the rule of *Brooke Group* has faced serious criticism on the grounds that it "permits the exclusion of higher-cost rivals whose presence would otherwise place downward pressure on prices" and "exonerates some below-cost pricing whose condemnation would have little chilling effect on procompetitive conduct,"[208] as well as for being a largely and unusually fact-specific ruling, which is inadequate for the bulk of potential predatory pricing cases.[209] This is all notable given research suggests that the Court originally planned to reverse the judgment below, which had affirmed the district court ruling,[210] as well as since the rulings here went against the historical, more receptive approach of the Court to finding predatory pricing liability.[211] Most importantly, the economics-only standard that the Court announced made "courtroom economics not just inevitable but often dispositive," thus feeding jury avoidance given practitioner perceptions of jury competence.[212]

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203. *Id*.
204. C. Scott Hemphill & Philip J. Weiser, *Beyond* Brooke Group*: Bringing Reality to the Law of Predatory Pricing*, 127 YALE L.J. 2048, 2049 (2018).
205. *See id*. at 2049, 2056.
206. *Brooke Grp.*, 509 U.S. at 223.
207. *Id*. at 227–28.
208. Hemphill & Weiser, *supra* note 204, at 2049.
209. *Id*. at 2050.
210. *Id*.
211. Christopher R. Leslie, *False Analogies to Predatory Pricing*, 172 U. PA. L. REV. 329, 333 (2024).
212. *Cf*. Rebecca Haw, *Adversarial Economics in Antitrust Litigation: Losing Academic Consensus in the Battle of the Experts*, 106 NW. U. L. REV. 1261, 1263 (2015) (arguing that "the rise of standards in antitrust analysis represents a delegation of authority from law and judges to economics and economists who can more finely tune legal norms to market realities").

The Court later replicated this result in an extremely similar context in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*[213] There, the Court reversed a jury verdict against Weyerhaeuser for monopolizing a buy-side market, in the process importing much of the test from *Brooke Group*[214] and thus transforming another area of substantive antitrust law into an economics-heavy, expert-dominated field perceived to be inappropriate for lay factfinding.

When it comes to lay intuitions, what is notable about *Brooke Group*, beyond narrowing liability such that it is very difficult to bring a claim, let alone reach trial, is that the Court acknowledged that "the record contain[ed] sufficient evidence from which a reasonable jury could conclude that Brown & Williamson envisioned or intended this anticompetitive course of events." [215] Moreover, there was "sufficient evidence in the record from which a reasonable jury could conclude that for a period of approximately 18 months, [the defendant]'s prices on its generic cigarettes were below its costs and that this below-cost pricing imposed losses on [the plaintiff] that [the plaintiff] was unwilling to sustain."[216] The claim failed, however, because the plaintiff failed to prove that the defendant "had a reasonable prospect of recovering its losses from below-cost pricing."[217]

As in *Matsushita*, therefore, the Court focused not on what the defendant intended to do through its conduct, but instead on what it should have intended to do were it fully rational from an economic perspective. Framing the standard in this way reduces the presence of lay intuitions because it opts to effectively require evidence which is perceived as unfriendly to lay intuitions (e.g., econometric analysis from experts), at the expense of both faithfulness to the intent and history of both antitrust laws and jury participation.

The Court did so here because it understood the point of antitrust law to be economic efficiency and consumer welfare; if predatory pricing was unsuccessful for the predator, the Court argued, consumers still won and so such conduct should not be deterred.[218] However, as discussed above, consumer welfare is not the sole criterion of antitrust success. Therefore, to find no unlawful conduct despite an acknowledged intent to harm a competitor runs counter to the antitrust laws.

213. 549 U.S. 312 (2007).
214. *Id.* at 315.
215. *Brooke Grp.*, 509 U.S. at 231.
216. *Id.*
217. *Id.*
218. *Id.* at 224.

Moreover, the inclusion of the recoupment factor reduces the importance of evidence which is perceived as amenable to lay factfinding. For example, rather than asking if an economically rational actor would have engaged in predation, one might instead ask whether the firm's internal documents reflected an intent to exclude with a subjective expectation of recoupment.[219] Framing the analysis in this way would reduce the need for economic experts and instead focus the inquiry on evidence that is easily susceptible to lay intuition and, importantly, might even better reflect the long-run profitability of the conduct, assuming alleged predators are rational economic actors.[220] By announcing the test that it did while also acknowledging the reasonableness of the jury's findings regarding the defendant's intent,[221] therefore, the Court responded to the jury's verdict by narrowing liability and reducing the importance of lay intuitions in the evidence it required, thereby making it more difficult for predatory pricing cases to reach a jury and, concomitantly, impairing jury participation.

2. Refusals to Deal

Similarly, trial jury verdicts have played a key role in the heightening of standards for refusal to deal violations and reducing the importance of lay intuitions. In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, the Court, in affirming a finding for plaintiffs,[222] went out of its way to point out the importance of procedural posture and concomitant deference to the jury's findings of fact, while relying significantly on lay intuitions. Subsequently, in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, the Court explicitly positioned the

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219. Note that this was the approach taken by the Court in Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685 (1967), *supra* note 111. The *Utah Pie* Court held that in predatory pricing contexts, the "existence of predatory intent [to harm competitors] might bear on the likelihood of injury to competition." 386 U.S. at 702.

220. *See* Hemphill & Weiser, *supra* note 204, at 2067 (arguing that recoupment should be established where "a firm might develop a reputation for predation by its conduct in one or multiple markets, and thereby deter entry into and preserve monopoly profits in other markets" because "[i]n that case, a predator could recoup its investment in below-cost prices even if supracompetitive pricing in the market in which the predation occurred did not suffice to recover the investment").

221. *Brooke Grp.*, 509 U.S. at 231.

222. *See* 472 U.S. 585, 604–05 (1985) ("[The Court] *must assume* that the jury followed the court's instructions. The jury *must*, therefore, have drawn a distinction 'between practices which tend to exclude or restrict competition on the one hand, and the success of a business which reflects only a superior product, a well-run business, or luck, on the other.' Since the jury was *unambiguously instructed* that Ski Co.'s refusal to deal with Highlands 'does not violate Section 2 if valid business reasons exist for that refusal,' we *must assume* that the jury concluded that there were no valid business reasons for the refusal." (emphasis added) (internal citations omitted)).

plaintiff-friendly verdict in *Aspen Skiing* as the "outer boundary" of the doctrine,[223] repositioning a defendant-friendly rule (discretionary dealing, a rule established by the Court in *United States v. Colgate & Co.*)[224] as the norm and reducing the importance of lay intuitions in the analysis by incorporating new factors, such as regulation,[225] that are typically thought to be less amenable to lay intuition and in themselves reflect few lay intuitions insofar as they rely on expert evidence.

Aspen Skiing involved an allegation of monopolization relating to the local market for downhill ski services in which the defendant ski mountain operator refused to continue a long-standing marketing arrangement that it was party to with the plaintiff operator and allegedly took additional actions which made it difficult for the plaintiff to market a competitive product.[226] After the jury found for the plaintiff, the defendant appealed and argued that the jury verdict was erroneous as a matter of law.[227] While the Court acknowledged that the defendant's action was "not necessarily anticompetitive,"[228] it found for the plaintiff, recognizing that, given the procedural posture of reviewing a jury verdict, the Court had to "interpret the entire record in the light most favorable to [the plaintiff] and give to it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn."[229]

The Court further noted that it had to "assume that the jury followed the court's instructions" and so must have "concluded that there were no valid business reasons for the refusal" given the jury was "unambiguously instructed" by the district court.[230] The Court concluded that "the evidence in the record, construed most favorably in support of [the plaintiff's] position, is adequate to support the [jury] verdict under the instructions given by the trial court."[231]

223. 540 U.S. 398, 401 (2004) ("*Aspen* is at or near the outer boundary of § 2 liability, and the present case does not fit within the limited exception it recognized.").
224. *Id*. at 408 ("[A]s a general matter, the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'" (citing United States v. Colgate & Co., 250 U.S. 300, 307 (1919))).
225. *Id*. at 411 ("Part of that attention to economic context [in evaluating allegedly monopolistic conduct] is an awareness of the significance of regulation. As we have noted, 'careful account must be taken of the pervasive federal and state regulation characteristic of the industry.'" (internal citation omitted)).
226. *Aspen Skiing*, 472 U.S. at 587–95.
227. *Id*. at 587.
228. *Id*. at 604.
229. *Id*.
230. *Id*. at 604–05.
231. *Id*. at 611.

Importantly, the Court's analysis in *Aspen Skiing* heavily featured lay intuitions. The decision rested on qualitative factors usually thought susceptible to lay factfinding such as consumer resistance to the changes to the marketing arrangement,[232] consumer surveys regarding which mountains they wanted to ski,[233] and anecdotal evidence of consumer confusion resulting from the defendant's conduct and harming the plaintiff.[234]

In *Trinko*, the Court proceeded to characterize *Aspen Skiing* as the "outer boundary" of the refusal to deal doctrine.[235] Leveraging the fact that the case was presented procedurally at the motion to dismiss stage (and was thus susceptible to de facto common lawmaking), the Court went out of its way to heighten the standard for finding liability (it could have instead found for the defendant on standing grounds, as the concurrence did)[236] and reduced the presence of lay intuitions in the refusal to deal doctrine in the process.

In reaching the merits and changing the doctrine, the Court argued that it was "a daunting task for a generalist antitrust court" to assess antitrust duties in a complex regulated market such as the one at issue.[237] Based on this perception, the Court asserted a fear of false positives,[238] emphasizing that this fear was compounded where the regulated nature of the industry made it such that, had the Court found the other way and imposed a duty to deal, it would be unable to "explain or adequately and reasonably supervise" this duty.[239] This concern had been emphasized by Verizon in its briefing for the case, which pointed to the slippery slope that a jury could "require[] a monopolist to dismantle itself, through piece-by-piece sharing of its assets," if it found "such creeping divestiture . . . at prices and terms the jury finds 'reasonable' [] [because

232. *Id*. at 594.
233. *Id*. at 606.
234. *Id*. at 607 ("During the 1977-1978 and 1978-1979 seasons, people with Ski Co.'s 3-area ticket came to Highlands 'on a very regular basis' and attempted to board the lifts or join the ski school. Highlands officials were left to explain to angry skiers that they could only ski at Highlands or join its ski school by paying for a 1-day lift ticket. Even for the affluent, this was an irritating situation because it left the skier the option of either wasting 1 day of the 6-day, 3-area pass or obtaining a refund which could take all morning and entailed the forfeit of the 6-day discount.").
235. 540 U.S. 398, 409 (2004).
236. *Id*. at 417–18 (Stevens, J., concurring) (arguing that there was no antitrust injury to the plaintiff and therefore no standing to sue so the Court should not have reached the merits).
237. *Id*. at 414 (majority opinion).
238. *Id*. ("The cost of false positives counsels against an undue expansion of [Sherman Act §] 2 liability.").
239. *Id*. at 415.

it] would improve the market overall."[240] Notably, Verizon specifically asserted that the regulated nature of the industry made assessing antitrust liability a "technically complex task for which antitrust courts are ill suited, particularly via jury trials."[241] Finally, as noted above, the Court emphasized the desirability of obtaining monopoly, thus grounding its fear of false positives in a concern that more expansive liability could deter the business investment and risk-taking that it considered to be at the core of the Sherman Act.[242]

Pursuant to these justifications, the Court narrowed liability by characterizing *Aspen Skiing* as a "narrow exception" consisting of a "unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggest[ing] a willingness to forsake short-term profits to achieve an anticompetitive end."[243] The Court also noted as important the defendant in *Aspen Skiing*'s "unwillingness to renew the ticket even if compensated at retail price[,] reveal[ing] a distinctly anticompetitive bent."[244] Applying this exception, the Court found that the complaint did not state a claim given it did not allege that the defendant "voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion," nor that the defendant refused to "sell at its own retail price."[245]

In contrast, the Court in *Aspen Skiing* affirmed a jury verdict in which the jury was instructed in much more general terms that, "if there were legitimate business reasons for the refusal [to deal], then the defendant, even if he is found to possess monopoly power in a relevant market, has not violated the law."[246] Rather than apply the same test and assess whether Verizon had legitimate business reasons for its refusal in *Trinko*, the Court heightened the standard for liability given the prior "legitimate business reasons" standard could presumably find liability in situations in which the course of dealing was not nor would ever be "voluntary" or in which the defendant refused to sell at some price lower than its own retail price. Moreover, in narrowing the test, the Court reduced possible lay intuition insofar as it limited the discretion that the factfinder has in applying the applicable standard given the new standard is so much narrower than the old. Similarly, this narrower standard

240. Reply Brief for Petitioner at *1, Verizon Commc'ns., Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (No. 02-682), 2003 WL 22068099.
241. *Id*. at *12 (quoting PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 150–51 (2003 Supp.)).
242. *Trinko*, 540 U.S. at 407.
243. *Id.* at 409.
244. *Id*.
245. *Id*.
246. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 597 (1985).

prevented cases that otherwise might have reached a jury from doing so, especially when paired with procedural standards that gave more discretion to judges to resolve litigation before trial. And, importantly, the Court's focus on regulation suggested a need for litigants to engage experts to assess the regulatory environment given "careful account must be taken of the pervasive federal and state regulation characteristic of the industry" for liability to be established.[247]

3. Other Substantive Antitrust Doctrines

Finally, it is important to note that courts have deprioritized lay intuitions regarding the standards that apply to many substantive antitrust doctrines, such as market definition. As described above, *Brown Shoe*'s approach focused heavily on lay intuitions. That approach contrasts markedly with the hypothetical monopolist test ("HMT"), which "examines whether a proposed market is too narrow by asking whether a hypothetical monopolist over this market could profitably worsen terms significantly, for example, by raising price."[248] The HMT "asks whether a hypothetical profit-maximizing firm, not prevented by regulation from worsening terms, that was the only present and future seller of a group of products ("hypothetical monopolist") likely would undertake at least a small but significant and non-transitory increase in price ("SSNIP") or other worsening of terms ("SSNIPT") for at least one product in the group."[249]

Like the tests described above, therefore, the SSNIP looks to what a rational economic actor would do, thus necessitating expert analysis, rather than looking only at the defendant's subjective intent and what lay people consider to be the firm's market. While some courts have described the SSNIP as facilitating the *Brown Shoe* practical indicia analysis,[250] the type of evidence required by the SSNIP is largely economic in nature and supplied by econometric experts. Assuming both sides engage experts, the factfinder must therefore weigh the relative merits of each expert's analysis in a "battle of the experts" in which these differences may depend on complex economic topics, subject to debate among the academic community itself.[251] While adding the SSNIP to the market definition analysis does not eliminate

247. *Trinko*, 540 U.S. at 411.
248. U.S. Dep't of Just. & Fed. Trade Comm'n, *supra* note 142, at 41.
249. *Id.* at 41–42.
250. *See, e.g.*, FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1038 (D.C. Cir. 2008).
251. For example, in *Whole Foods*, the "crucial difference" between the analysis of the dueling experts in the case was the choice of marginal loss of sales, as opposed to average loss of customers. *Id.*

consideration of practical indicia,[252] it adds complexity to the process given the need for econometric experts and arguably results in market definitions which do not reflect public perceptions.[253]

V. Juries Are a Logical Way to Reemphasize Lay Intuitions in Antitrust

Having seen how judges reduced the role of lay intuition in antitrust while narrowing liability and diminishing jury participation, this Note argues that lay intuitions must be reemphasized in antitrust and specifically that policy initiatives focused on increasing jury participation are one logical way of accomplishing this goal.

Importantly, although revitalizing the presence of lay intuitions in antitrust law likely favors plaintiffs in the aggregate, given judges have narrowed liability while diminishing the presence of lay intuitions, the expanded use of juries and lay intuitions would likely not be uniformly liability expanding. There are significant areas of the law, such as criminal no-poach cases, in which juries appear to be more reticent than judges might be to find liability, although admittedly there is no hard data as relates to no-poach cases given judges and juries are answering different questions (given the jury's factfinding role in criminal cases). Additionally, there are situations in which lay intuition analysis may conflict with a strictly economic analysis in a manner which would favor defendants. This may have been the case in the *Whole Foods* merger case, in which the Court accepted the FTC's market definition ("premium, natural, and organic supermarkets") at a point in time (2008) when there was arguably no actual lay recognition of such a subcategory.[254]

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252. *See, e.g.*, FTC v. Staples, Inc., 970 F. Supp. 1066, 1078–79 (D.D.C. 1997) (performing market definition analysis using econometric tools such as SSNIP, as well as practical indicia). The judge in *Staples* found particularly compelling practical indicia, such as the "unique combination of size, selection, depth[,] and breadth of inventory" available in the retailers, in defining the market. *Id.*

253. In *Whole Foods*, the FTC contended that the merging parties were "the two largest operators of what it called premium, natural, and organic supermarkets." 548 F.3d at 1032. It is arguable that the public perception matched that of the district court in the case, which concluded that the "premium, natural, and organic supermarkets" market was not a "distinct market" and that the defendants instead "compete[d] within the broader market of grocery stores and supermarkets." *Id*. at 1033.

254. Although, notably, the concurrence in the case relied heavily on the public recognition factor. *Id.* at 1045 (Tatel, J., concurring) ("[T]he FTC presented an enormous amount of evidence of 'industry or public recognition' of the natural and organic market 'as a separate economic entity' . . . . For example, dozens of record studies about the grocery store industry—including many prepared for Whole Foods or Wild Oats—distinguish between 'traditional' or 'conventional' grocery stores on

A. There Are Historical, Structural, Ethical, and Practical Reasons to Prefer an Antitrust Regime Which More Heavily Emphasizes Lay Intuitions

Accepting that there would likely be some expansion in liability, an approach to antitrust law which more heavily emphasizes lay intuition is preferable because it better aligns with the history of antitrust, resolves possible structural and ethical concerns regarding the minimization of jury participation in antitrust, and helps solve practical difficulties that are now present in much antitrust litigation, all without conclusively impairing economic efficiency.

As discussed in Part III, the history of antitrust reflects varied motivations and does not align with the modern Court's economic efficiency focus. Even assuming that current antitrust standards, which are influenced by a fear of false positives, remain in place, the consensus among academics discussed in Part I is that juries recognize different values than judges in applying the antitrust law. While this has driven concern among those favoring the Complexity perspective, that juries consider factors beyond economics alone when applying the antitrust legal standard should be considered a feature, not a bug, given the varied motivations present in antitrust history.[255] For example, from a historical perspective, that juries have thus far not found liability in no-poach cases is consistent with early antitrust's relationship with labor issues, even if some modern observers may find this troubling.[256]

That lay intuition from juries in applying antitrust law is beneficial is especially true if, from a historical perspective, we consider the Sherman Act to be doing more than merely formally creating a common law of antitrust. If the Act instead meant to convey important societal values, as this Note argues that it did, it cuts against all norms of democratic legitimacy to have the judiciary, the unelected branch, dictate most or all antitrust outcomes, especially in light of the current period of legislative unproductivity.

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the one hand and 'natural food' or 'organic' stores on the other. . . . Moreover, record evidence indicates that the Whole Foods and Wild Oats CEOs both believed that their companies occupied a market separate from the conventional grocery store industry.").

255. *Cf.* Harry First, *Bring Back Antitrust!*, THE NATION (May 15, 2008), https://www.thenation.com/article/archive/bring-back-antitrust/ [https://perma.cc/T5YK-QBVH] ("Something other than technical analysis is thus needed to make [antitrust] decisions. And the choice of the core concepts on which to focus antitrust enforcement is the product of political values, not technical decisions.").

256. *See, e.g.*, Parramore, *supra* note 38 ("[In the initial years after its enactment,] the Sherman Act was primarily used against labor to limit strike activity. It's interesting that the only person ever to go to jail as a result of antitrust enforcement in these decades was Eugene Debs, a labor leader and socialist party member.").

One structural concern implicated by the Court's movement over the last several decades is the balance of power within the judiciary between judges and juries. Assuming that the framers of the Sherman Act devised the Act against normal background principles, including the Seventh Amendment right to a jury trial, that the vast majority of antitrust cases are now resolved by a judge could give pause for concern about judicial self-aggrandizement.[257] Similarly, as alluded to in Judge Young's order in *Nexium*, there are ethical concerns at stake. Antitrust has taken on increased importance in our national life as businesses take up an ever-rising portion of the public sphere. In this context, de facto exclusion of juries in antitrust cuts against the democratic norms inherent in the American ethos.[258]

Jury usage can also solve practical problems in antitrust that have arisen due to the diminishment of lay intuitions and the concomitant focus on expert econometric analysis. Given the practical necessity of engaging experts on both sides of the "v," favoring lay intuitions can be a way to resolve matters of complex evidence which generalist judges are otherwise ill-equipped to do. For example, "[i]n the FTC's challenge to the proposed Sysco/US Foods merger . . . the court considered each side's economic expert testimony in considerable detail, but the court ultimately resolved the technical and methodological disagreements among the economists by turning to" lay intuition analysis.[259] The court focused its analysis on the *Brown Shoe* practical indicia, noting that *Brown Shoe* may be "old school" but it "remains the law, and this court cannot ignore its dictates."[260] Similarly, in the DOJ's challenge to the Anthem/Cigna merger, "the court resolved conflicting economic expert testimony by focusing on 'real world evidence.'"[261] Contrasting the "economic assumptions underlying the various methodologies" with the

257. *Cf.* John S. Albanes, *What is Significant Bodily Injury? Evaluating the District of Columbia Court of Appeals' Interpretation of the Felony Assault Statute Ten Years After its Enactment*, 5 VA. J. CRIM. L. 68, 95 (2017) (arguing that judicial self-aggrandizement has occurred in criminal law given the appellate court at issue made the relevant legal question one that was required to be "answered by the Court itself, rather than by the jury" and thus "remov[ing] decision-making authority from the province of the jury, even where the factfinder has applied the correct legal standard in existence at the time").

258. *See supra* notes 70–75 and accompanying text.

259. *See* Michael J. Perry & Stephen Weissman, *The First Cut Is the Deepest: Use of Economics Before the Antitrust Agencies and the Courts*, 32 ANTITRUST 44, 45–46 (2018) (noting that the court considered each side's "competing expert testimonies" and "concluded that the economic analysis of the FTC's expert was 'more consistent with the business realities of the food distribution market' than that of the defendants' expert").

260. *Id*. at 46.

261. *Id*.

parties' internal communications, the court concluded that "Anthems' ordinary course documents tell a consistent story that contravenes the firm's litigation position."[262] Since both sides will offer expert evidence, resolving these conflicts through lay intuitions could perhaps even produce greater legal certainty.[263]

Importantly, the practical benefits of resolving expert conflicts in this way can be extended to situations in which the conflict is between experts on the same side of the "v." In the *NFL Sunday Ticket* litigation, for example, there might be something normatively desirable about the jury's apparent decision to "split the difference" between the two experts' damages estimates. Acknowledging the "daunting task" facing generalist factfinders in applying complex areas of antitrust law that the Court identified in *Trinko*,[264] we might prefer the process of jury "sausage making" over judicial interpretations of expert analysis, especially if we assume, as the *Trinko* Court apparently did, that even judges are not necessarily competent to precisely and accurately explain their reasoning in these areas.[265] Rather than simply accepting the judge's interpretation of competing expert evidence, even if it is possibly incorrect, we might prefer to accept the jury's lay intuition, especially given the jury must come to consensus among a larger and inherently more diverse group of people, particularly since this is more consistent with democratic norms.

Finally, using lay intuitions and juries is preferable because there is limited evidence regarding the economic efficiency impacts of current antitrust doctrine. What evidence does exist suggests an association between heightened antitrust enforcement and economic productivity benefitting both businesses and labor.[266] Although by no means conclusive evidence, it seems counterintuitive to favor a legal regime which minimizes lay intuitions when that regime has been unable to demonstrate its superiority on its preferred metric of success, especially when strong historical, structural, and ethical reasons exist to prefer a regime which more heavily emphasizes lay intuitions. Having

262. *Id*.

263. *See* Richard A. Posner, The Problems of Jurisprudence 48 (1990) ("Standards that capture lay intuitions about right behavior . . . may produce greater legal certainty than a network of precise but technical, non-intuitive rules.").

264. *See supra* note 237 and accompanying text.

265. *See supra* note 239 and accompanying text.

266. *See supra* note 38*; see also* Simcha Barkai, *Antitrust Enforcement Increases Economic Activity*, ProMarket (Sep. 5, 2023), https://www.promarket.org/2023/09/05/antitrust-enforcement-increases-economic-activity/ [https://perma.cc/CVV3-33RM] (finding that DOJ antitrust enforcement actions lead to a long-run increase in "the level of economic activity[,]" business formation, "average wages, and the labor share").

established that lay intuitions in antitrust are desirable and therefore that antitrust is difficult to distinguish from other fields of law in which such intuitions are beneficial,[267] it is worthwhile to quickly survey the benefits of juries in other fields of law to see how increasing jury participation is a desirable means of revitalizing lay intuitions in antitrust.

B. The Recognized Benefits of Juries in Other Fields of Law Apply in Antitrust

Just as in other fields of civil law, there are significant benefits to having jury factfinding. Regardless of the context, jury verdicts offer "a contemporaneous expression of the community values that bear on the issues in each case."[268] As such, jurors are "ideally suited to impose moral and ethical norms," a key benefit in applying the antitrust laws if we understand judges to have driven the evolution away from lay intuitions and the morally inflected strands of antitrust history.[269] Juries have the advantage of the "diverse heritages, backgrounds, and experiences" of their members in counteracting possible bias and can therefore honor a "balance of virtues."[270] This is particularly true given their numerosity (there is never just one juror) and the need to achieve consensus, which can help to mitigate the effects of the cognitive bias that accompanies the human condition for both judges and juries. [271] For these reasons, citizen participation in public decision-making through juries is a "hallmark of American democracy."[272]

As such, jurors imbue the legal system with common sense, create and localize norms, and serve as a check against the domination of the legal system by elites.[273] This last point is of particular relevance if we consider the likelihood that the narrowing of liability in antitrust that

267. *See supra* note 263 (arguing for the benefits of lay intuitions across all fields of law).

268. Patrick E. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 Tex. L. Rev. 47, 58 (1977).

269. Thomas Jeffrey Horton, *Restoring American Antitrust's Moral Arc*, 62 S.D. L. Rev. 11, 44 (2017) (distinguishing jurors from "judges applying unrealistic neoclassical economic models"); *see also* Horton, *supra* note 83, at 655–56 ("Jurors are []well-prepared to meaningfully apply and enforce community standards of morality and fairness in antitrust cases.").

270. *See* Horton *supra* note 83, at 663.

271. *See* Adam J. Hirsch, *Evolutionary Theories of Common Law Efficiency: Reasons for (Cognitive) Skepticism*, 32 Fla. St. U. L. Rev. 425, 425 (2005) ("The cognitive deficiencies of judges themselves—being every bit as human as the persons whose suits they hear—suggest that they, too, are apt to make imperfect choices.").

272. *See* Horton, *supra* note 83, at 663.

273. Epstein & Sharkey, *supra* note 39, at 254.

accompanied the diminishment of lay intuitions as possibly resulting from the elite status of judges.[274]

Although Complexity advocates argue that "juries misunderstand essential economic concepts, fail to comprehend their instructions, and make decisions based on *fairness intuitions* that are irrelevant to antitrust analysis,"[275] they must also deal with the fact that "no comprehensive empirical study of the performance of juries in antitrust cases has been undertaken."[276] What evidence does exist is anecdotal and dramatizes perceived jury incompetence, particularly by focusing on economic issues.[277] Notably, Complexity advocates tend to highlight studies which portray juries as being "tilted in a populist, anti-big-business direction,"[278] one of the clear motivations of the Sherman Act. Pointing to such "tilting" casts only innuendo and does not firmly establish that juries apply relevant antitrust legal standards incorrectly. Moreover, jury results in some types of antitrust cases seem to go the other way (e.g., no-poach).

Given the lack of hard evidence regarding jury performance in antitrust specifically, it is helpful to turn to civil law more broadly. There too, criticism of jury performance is largely based on "anecdotal evidence from particular cases."[279] Where large scale studies have been done, however, these studies generally find significant agreement between judges and juries on liability.[280] Notably, civil law studies focusing on product liability and medical malpractice, two of the more complex areas of tort law, have found plaintiffs prevail "at a much higher

274. *See* Lancieri, Posner & Zingales, *supra* note 38, at 445.

275. Crane, *Antitrust Antifederalism*, *supra* note 107, at 34 (emphasis added).

276. *Id.*; *see also* CRANE, *supra* note 84, at 110–11 ("Despite a very broad consensus that civil juries must do a terrible job in antitrust cases, we do not actually know much about how antitrust juries actually perform.") (noting also that there have been "no system efforts to study the actual performance of civil antitrust juries").

277. Arthur Austin, *The Jury System at Risk from Complexity, the New Media, and Deviancy*, 73 DENV. U. L. REV. 51, 54 (1995) ("[A]t no time have I ever encountered a juror who had the foggiest notion of what oligopoly, market power, or average variable costs meant, much less how they applied to the case.").

278. CRANE, *supra* note 84, at 111–12 (describing study which found that "as many as 75 percent of jurors think that large corporations regularly use unethical and unfair tactics to bully smaller competitors and squeeze them out of the marketplace" (citing Barbara S. Swain & Dan R. Gallipeau, *Juror Attitudes in Antitrust Cases*, 9 ANTITRUST 14, 15–17 (1994))).

279. *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1489, 1511 (1997).

280. *See, e.g.*, HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 63 (1966) (finding 78% agreement between judge and jury in liability in study of roughly 4,000 state and federal civil jury trials based on questionnaires sent to judges); Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORN. L. REV. 1124, 1153 (1992) (replicating Kalven's findings).

rate before judges (48%) than they do before juries (28%),"[281] working against the Complexity perspective's fear as to false positives. Given the lack of quantitative evidence demonstrating that antitrust juries are different, it is hard to justify the prevailing pro-judge views in antitrust, in part because the legal system trusts juries to put themselves in the shoes of professionals across a plethora of complex industries to assess what conduct is objectively reasonable under a given set of facts.[282]

If the only real explanation that justifies the Complexity view is that judges are simply better educated than the average person, that is quite a slender reed, especially since judges are generalists, not experts. Regardless, antitrust was not created by nor entrusted to economic experts but was instead created in a democratic society by the people's representatives and entrusted to a judiciary in which ordinary people could participate through juries. If Congress wanted antitrust to be insulated from juries, it could have said so.[283]

On this understanding, juries are a desirable way to revitalize lay intuitions because their factfinding itself represents a form of lay intuition and their usage could promote the presentation of lay intuition evidence which might otherwise be deemphasized in favor of econometric evidence. Moreover, since juries need not give reasons for their verdict, unlike judges, jury usage may also be preferable where lay intuitions suggest "splitting the difference" among competing expert analysis to land at an outcome which better reflects the history and purpose of the antitrust laws.

C. Policy Recommendations for Increasing Lay Intuitions

Having established that increasing the use of lay intuitions is desirable and that juries are a reasonable means of contributing to this goal, the Note concludes by making several proposals to enact these changes. Of course, regardless of juries, judges can choose to more heavily emphasize lay intuitions in deciding cases, whether as a means of resolving "battles of the experts" or by prioritizing lay intuition analysis over more econometric approaches. Similarly, judges themselves can

281. Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORN. L. REV. 119, 145 (2002).

282. *See* Philip Sheng, *An "Objectively Reasonable" Criticism of the Doctrine of Qualified Immunity in Excessive Force Cases Brought Under 42 U.S.C. § 1983*, 26 BYU J. PUB. L. 99, 99 (2012) (arguing against judicial usurpation of juries in the context of qualified immunity).

283. Although this would likely be constitutionally impermissible under current doctrine, at least as relates to antitrust cases in which the case is "made of the stuff of traditional actions at common law tried by courts at Westminster in 1789" (i.e., legal, not equitable, relief sought). *See* SEC v. Jarkesy, 603 U.S. 109, 127–28 (2024).

promote jury participation in antitrust outcomes by less frequently ruling as a matter of law (and thus overruling jury verdicts), as well as by less frequently using pre-trial procedural screens (e.g., motions to dismiss and for summary judgment) where cases are arguably appropriate for lay factfinding. Finally, litigants themselves can help increase jury participation by more frequently demanding juries, although this approach is limited insofar as a significant majority of plaintiffs already do so.

Beyond actions by existing stakeholders within the judicial branch, Congress can also help ensure jury participation and lay intuition analysis in antitrust. As discussed in the Introduction, jury trials are incredibly infrequent in cases brought by federal enforcers, which often end up entailing the most potential societal change. Congress could mandate a right to trial by jury in such cases and thereby avoid the loophole exploited by Google in preemptively paying the government's alleged damages. Additionally, Congress could pass legislation (i.e., a "new" or "updated" Sherman Act) changing substantive antitrust law pursuant to its Commerce Clause power. Under this option, Congress could require courts to apply tests more substantially emphasizing lay intuitions (for example, a predatory pricing standard that looks to subjective intent rather than objective factors). Beyond increasing lay intuition analysis itself, this could also have the effect of changing practitioner perspectives regarding the suitability of juries for antitrust factfinding since the standards to be applied by factfinders would be perceived as friendlier to lay factfinding.

Conclusion

Creating and maintaining an important role for jury trials in antitrust can bring the field back to its foundations in lay intuitions. Returning to a more lay-intuition-centric approach can generate outcomes which better reflect the antitrust statutory text, legislative history, and substantial amounts of still-ruling precedent. While likely liability expanding, using juries and lay intuitions does not cut uniformly in favor of plaintiffs. Changing predominant attitudes surrounding lay intuitions and juries in antitrust can ultimately deliver common sense to our competition law and ensure a more robust, historically consistent era of antitrust.