Testimony of the Hon. Diane P. Wood
Before the
U.S. House of Representatives Subcommittee on
Antitrust, Commercial, and Administrative Law

Hearing on Reviving Competition, Part 3:
Strengthening the Laws to Address Monopoly Power

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Mr. Chairman, Ranking Member Buck, and Members of the Subcommittee: I would like to begin by thanking the Subcommittee for its decision to hold these hearings on the subject of concentrated economic power in our economy and the way in which the antitrust laws can best address monopolies, both existing and incipient. It is a privilege to be able to offer some thoughts on this vital subject, which is one that I have studied throughout my professional career.

I would like to make just a few key points for the Committee's consideration:

- First, the antitrust laws have always been concerned not only with "consumer welfare," as the Chicago School has used that term, but also with concentrated economic power that chokes off vibrant competition and innovation.
- Second, it is not only possible, but essential, that exclusionary practices be once again pursued seriously by both the government antitrust enforcers—the U.S. Department of Justice's Antitrust Division and the Federal Trade Commission, as well as the state Attorneys General—but also by the private parties who have been empowered for more than a century to serve as "private attorneys general" who can supplement the efforts of public enforcers.
- Third, it may be time to consider legislative changes to the statutes, particularly in the area of remedies, so that anticompetitive practices do not go unredressed because antitrust standards are overly onerous or the available remedies are either too weak or otherwise ineffective.

I am here today to express only my personal views on these subjects—views that have been developed over years of teaching at the University of Chicago Law School, more than 25 years of work as a co-author of a leading antitrust casebook, and my two years

of service in the DOJ's Antitrust Division as the Deputy Assistant Attorney General in charge of our international enforcement. The experience of other countries that have been afflicted by monopolies from time to time has provided useful context for my thinking.

The important question this Subcommittee is considering is whether, at this stage in our history, we have again come to a point at which legislative tweaking of the antitrust laws is desirable. I note in this connection that there is nothing unusual about such a question. The Sherman Act itself has not remained unchanged since its original enactment on July 2, 1890. To the contrary, Congress has amended it six times, most recently in 2004.[1] Indeed, Congress regularly reviews statutes in light of their application and judicial interpretation, and it occasionally enacts laws designed to restore the original congressional intent. It did just that with respect to the Americans with Disabilities Act of 1990,[2] when it enacted the ADA Amendments Act of 2008,[3] which was entitled "An Act [t]o restore the intent and protections of the Americans with Disabilities Act of 1990." The 2008 legislation disapproved several Supreme Court decisions and restored a broader understanding of the definition of disability to the statute.[4] Similarly, Congress took action in response to the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*,[5] which had found that a plaintiff's claim for sex discrimination was barred because she did not object when the employer first established a lower pay rate for her. Under the Lilly Ledbetter Fair Pay Act of 2009,[6] passed by Congress in response to the Court's decision, a claim accrues with each discriminatory paycheck. In other instances, Congress has considered action that would qualify or reject a Supreme Court decision, and it has opted not to do so.[7] The bottom line is that these decisions are for Congress.

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[1] See 50 Stat. 693 (Aug. 17, 1937); 69 Stat. 282 (July 7, 1955); Pub. L. No. 93-528, 88 Stat. 1708 (Dec. 21, 1974); Pub. L. No. 94-145, 89 Stat. 801 (Dec. 12, 1975); Pub. L. No. 101-588, 104 Stat. 2880 (Nov. 16, 1990); and Pub. L. No. 108-237, 118 Stat. 668 (June 22, 2004).

[2] 42 U.S.C. §§ et seq.

[3] Pub. L. No. 110-325, 112 Stat. 3553 (Sept. 25, 2008).

[4] See 42 U.S.C. § 12102(2)(A) (adding "working" to the list of recognized "major life activities").

[5] 550 U.S. 618 (2007).

[6] Pub. L. No. 111-2, 123 Stat. 5 (Jan. 29, 2009), amending 42 U.S.C. § 2000e-5(e) and 29 U.S.C. § 626, among other laws.

[7] See, e.g., S. 1874, 95th Cong. § 5 (1978) (proposed repealer of Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)); H.R. 11942, 95th Cong. § 3 (1978) (same); H.R. 2004, 96th Cong., 1st Sess. (1979) (same); S. 2772, 97th Cong., 2d Sess. (1982) (same, and no hearings were held); Antitrust Modernization Commission Report and Recommendations at 270 (2007) (calling on Congress to overrule Illinois Brick). The Reagan administration pursued a package of bills that would amend the antitrust laws to provide, among other

The Antitrust Laws and Monopoly: History

It should not be controversial to state that the U.S. antitrust laws have always been concerned about the problem of monopoly, but this proposition became contested in the late 1970s with the publication of Robert Bork's influential book, *The Antitrust Paradox.* Professor Bork argued forcefully that the Sherman Act of 1890—our foundational antitrust law—"was intended to strike at cartels, horizontal mergers of monopolistic proportions, and predatory business tactics."[8] He contended that "it was also clear … that the delegation [of power to the courts to elaborate the law] was confined by the policy of advancing consumer welfare."[9] In time, the Supreme Court came to accept that limiting principle.[10] Nonetheless, in doing so the Court was interpreting broad language in the statute, even though, as the Court put it in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*,[11] "[f]rom the beginning the Court has treated the Sherman Act as a common-law statute."[12] This does not mean, however, that the Court has held that Congress lacks power to change the statute. Not at all, as one can see from its treatment of, for example, the Foreign Trade Antitrust Improvements Act of 1982, which established the outer reaches of Sherman Act coverage for foreign-commerce cases.[13]

The only problem with Professor Bork's assertion that it is *clear* that the Sherman Act was only about "consumer welfare," as he defined it, is that there is little to no support in the legislative history of the statute to support it. One can easily see this in two leading examinations of the history of the statute: William L. Letwin's article on "Congress and the Sherman Antitrust Law: 1887-1890,"[14] and Hans B. Thorelli's book, *The Federal Antitrust Policy*.[15] As Letwin points out, before the Sherman Act was passed "[t]here were numerous objections to the trusts … . Trusts, it was said, threatened liberty, because they corrupted civil servants and bribed legislators; they enjoyed

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things, for single damages in all exclusionary practice cases. See Ky P. Ewing, Jr., Antitrust in the 100th Congress: Issues, Rhetoric, Reality, 1-WTR Antitrust 33, 35–36 (1987).

[8] The Antitrust Paradox at 20 (1978).

[9] *Id.*

[10] See, for example, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984); Brooke Group v. Brown & Williamson Tobacco, 509 U.S. 209 (1993); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[11] 551 U.S. 877 (2007).

[12] *Id.* at 899.

[13] See 15 U.S.C. § 6a; F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004).

[14] 23 U. Chi. L. Rev. 221 (1956).

[15] Published 1955, Johns Hopkins Press.

privileges such as protection by tariffs; they drove out competitors by lowering prices; victimized consumers by raising prices; defrauded investors by watering stocks; put laborers out of work by closing down plants; and somehow or other abused everyone."[16] In other words, the original purpose of the law was far from the focused "consumer welfare" notion that later emerged. Recall, too, that the "trusts" against which the public was reacting had begun as individual firms, but had been aggregated into larger unified entities, by industry (oil, sugar, steel, copper, etc.). The law was designed from the start to address the new behemoths.

Although Senator Sherman did not have a leading role in drafting the bill that emerged from the Senate Judiciary Committee,[17] he nonetheless played a prominent part when debate began on the bill. His statement, too, reveals a purpose that went well beyond low prices for consumers:

> The popular mind is agitated with problems that may disturb the social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition. …
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> They had monopolies and mortmains [roughly, perpetual land-holdings] of old, but never before such giants as in our day. …
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> If 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. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.[18]

In short, the drafters of the antitrust laws were just as concerned with the untrammeled power that combinations or monopolies could exercise as they were with consumer welfare. The prevention of competition, they knew, affected potential competitors, just as it affected consumers, and the law was designed to address both issues.

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[16] Reprinted in Handler, Pitofsky, Goldschmid & Wood, Trade Regulation at 58 (4th ed. 1997) (cited as Handler et al.).

[17] Letwin, reprinted in Handler et al., at 64.

[18] Thorelli, reprinted in Handler et al., at 65–66.

For many years, the Supreme Court understood the law in the same way. Just nine years after the passage of the Sherman Act, the Court decided *United States v. Trans-Missouri Freight Association,*[19] a government action designed to break up an alliance of railroads. Here is what Justice Peckham had to say about the relatively new law:

> It is true the results of trusts, or combinations of that nature, may be different in different kinds of corporations, and yet they all have an essential similarity, and have been induced by motives of individual or corporate aggrandizement as against the public interest. In business or trading combinations they may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class and the absorption of control over one commodity by an all-powerful combination of capital.[20]

This strongly indicates that the people who passed the Sherman Act thought that competition could be protected only if the law reached both consumer welfare and unfair methods of competition that pushed competitors out of the market. That is undoubtedly why, in 1914, when Congress passed the Federal Trade Commission Act, it gave the Commission authority over "unfair methods of competition," not simply cartels or actions harming consumer welfare.[21]

The question for Congress might therefore be whether the turn away from a dual-purpose statute is consistent with its goals. If so, then the harm that occurs when a monopolist uses exclusionary tactics to push a rival out of the market will either be corrected ultimately by market forces or, in some instances, it may be reachable through state-law business torts. Often, however, it will go unredressed for a long period. That takes me to my second point: whether it is indeed impossible to have an enforcement

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[19] 166 U.S. 290 (1897).
[20] 166 U.S. at 322–23.
[21] 15 U.S.C. § 45.

program against exclusionary conduct that does not risk creating an unintended disincentive to vigorous competition.

Exclusionary Practices

There are many ways in which a dominant firm (meaning a firm with enough market power to behave to a significant degree independently of its rivals) may seek to consolidate its market position and become a true monopolist, able to extort supra-competitive prices from customers and to ignore other pressures, such as those to innovate. The firm may set about acquiring all potential rivals, flying for as long as possible under the radar screen of merger enforcement. The firm may exploit governmental barriers, such as licensing requirements, zoning requirements, regulatory permissions, or tariff walls. The firm might grant exclusive dealing rights to downstream manufacturers or users, perhaps with an ultimate goal of vertical integration. Both input foreclosure and customer foreclosure are possible strategies, as are "most-favored-nation" deals designed to make it difficult for an outsider to obtain new business by offering favorable terms. The firm might refuse to deal with a disfavored entity—something innocuous if done by an entity with no market power, but much more troublesome if done by a near-monopolist. Additionally, there are an array of predatory strategies that a dominant firm may use in an effort to prevent a rival from obtaining a toehold in the market: predatory pricing, predatory acquisitions, predatory input stockpiling, and so on. Predatory strategies do cost money, if one looks at their exercise in isolation, but if one adds in the *in terrorem* effect that well-placed predation can have on potential entrants, those costs may be worth it to the predator. Tying arrangements describe another measure that, if used by a firm with little market power, can be innocuous or even pro-competitive, but if used by a dominant firm, can push rivals for the tied product out of the market. Bundled discounts can have much the same effect.

We are past the time when automatic condemnation of exclusionary practices makes any sense. No longer would we say, as the Supreme Court did in *Northern Pacific Railway v. United States*,[22] that every one of the practices the Court identified are "unlawful in and of themselves."[23] The Court's list included horizontal price-fixing (still a *per se* violation), horizontal division of markets (still a *per se* violation), group boycotts (now assessed under the rule of reason), and tying arrangements (also for the most part

[22] 356 U.S. 1 (1958).
[23] *Id.* at 5.

assessed now under the rule of reason).[24] But does that mean, or should it mean, that exclusionary practices should be given a free pass? Unless the Supreme Court has been kidding all these years when it says that rule-of-reason treatment should not be equated with legality—and there is no reason, in the face of decisions such as *National Collegiate Athletic Association v. Board of Regents*,[25] to think that—the real question is only whether it is possible, using the sophisticated techniques of the rule of reason, to distinguish between an anticompetitive exclusionary practice and good old-fashioned hard competition. Justice Scalia expressed great concern about this in his opinion in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,[26] but he may have over-corrected (or, to put it more colloquially, he may have thrown the baby out with the bathwater). He wrote there 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. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.[27]

With respect, if that statement reflects the true scope of section 2 of the Sherman Act, then perhaps it is time to take another look at the statute. Classically, the kind of anticompetitive conduct the Court looked for was either unlawful attainment of monopoly power (perhaps through anticompetitive mergers, or fraud on the Patent Office, or similar abuses) or unlawful maintenance of monopoly power (through the use of various exclusionary practices).[28] But inherent in these statements is that the methods used either to attain or maintain one's market position matter.

I would not be so quick to give up on the possibility of distinguishing between anticompetitive exclusion and the type of ebb and flow in the market that occurs when healthy rivalry prevails. Whatever practice or practices are being challenged do not stand in isolation. An enforcer, whether from a governmental entity or the private

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[24] *Id.*

[25] 468 U.S. 85 (1984) (NCAA found liable under the rule of reason).

[26] 540 U.S. 398 (2004).

[27] *Id.* at 407.

[28] See United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

sector, would never succeed in persuading a court that a practice was genuinely exclusionary if the actor did not have at least a dominant position (meaning something like 40% of a sensibly defined market). Other factors would also be relevant, including the history of what has happened in the market since the exclusionary practice was instituted, the ease of entry and exit, and the durability of any barriers. If the dominant firm has created a bottleneck through which other potential rivals cannot pass, that too would be a relevant fact in determining whether the practice reflected anticompetitive exclusion as opposed to fair competition.

Underenforcement of this area of antitrust has a number of sources. To an extent, it stems from prosecutorial discretion on the part of both the Antitrust Division and the Federal Trade Commission. The FTC Act and the Sherman Act (supplemented in some instances by the Clayton Act) are there to be used, the argument goes, if the will to bring the cases is there. But before one decides that the enforcement agencies (plus all the state attorneys general, plus potential private parties) are asleep at the switch, another explanation must be confronted: the content of the doctrine as developed by the Supreme Court for the last 45 years. No enforcer, private or public, can or should waste her time bringing a suit that is doomed to fail, or even a suit that barely squeaks by the lawyer's ethical duties to the court and her client. Congress could, if it wished to do this, single out particular areas of concern for a legislative boost to the laws, just as it did in 1984 when it passed the National Cooperative Research Act,[29] or when it passed the Export Trading Company Act of 1982.[30] The NCRA was designed to ensure that research and development (and later production) joint ventures were assessed under the rule of reason rather than the *per se* rule, but it illustrates Congress's ability to take a targeted approach to antitrust reform. The ETCA recognized that organizations devoted to export were unlikely to harm U.S. consumers (even though the law obviously could not protect export trading companies from foreign laws). As a prelude to this type of reform, Congress could consider establishing a commission to recommend particular practices (such as exclusion flowing from government action, patent abuse, or bottleneck monopolies) for potential legislative action.

Remedies

Finally, let me touch briefly on the question of remedies. The Sherman Act itself was written as a criminal statute. It makes illegal both "every contract, combination in the form of trust or otherwise, or conspiracy," as well as monopolization or attempt or

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[29] See NCRA, 15 U.S.C. § 4301 et seq.

[30] See ETCA, 15 U.S.C. § 4002 et seq.

conspiracy to monopolize. Although these were initially misdemeanors, they have for many years both been felonies, punishable by criminal fines for either corporations or individual persons. Individual defendants can also be imprisoned for up to ten years. But the criminal dimension of section 2 is, for all practical purposes, defunct. For many of the reasons (all sound, in my opinion) that the Supreme Court has exercised caution with single-firm behavior, the idea of indicting, fining, and even imprisoning a defendant for exclusionary behavior has seemed too extreme to the Antitrust Division, through Republican and Democratic administrations alike.

That leaves us with a thin set of choices for section 2 enforcement. On the civil side, private parties are entitled to sue either for injunctive relief, including divestitures,[31] or treble damages.[32] The government is also authorized to obtain injunctions,[33] and the United States may sue for three times its own damages.[34] State attorneys general may sue *parens patriae* for injury to persons within their state.[35] In some monopolization cases, damages can be difficult to prove; in other monopolization cases, a more straightforward economic estimate is possible, including but not limited to those asserting a monopoly overcharge (or underpayment).

An injunction is powerful medicine: if violated, it is enforced through contempt of court, which can involve either fines, imprisonment, or both. For that reason, the terms of an injunction must be clear enough and specific enough to give the enjoined party notice of what it must and must not do. For simple injunctions, this is not too hard: don't trespass across Greenacre; stop emitting fumes into the atmosphere; cease using a contested trademark. But if the injunction requires changes in business practices, it becomes more difficult for a court to oversee. The best example of this may be the Modified Final Judgment in the government's monopolization case against AT&T. That elaborate injunction (which had both positive and negative components) required the district court to become a mini-administrative agency running the nation's telecommunications business, until Congress passed the Telecommunications Act in 1996. Every request for new business had to go through the Department of Justice's Antitrust Division, from whence it was presented to the court. Better structures for this kind of oversight are possible, if Congress is willing to consider them. It is no accident,

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[31] 15 U.S.C. § 26.
[32] 15 U.S.C. § 15(a).
[33] 15 U.S.C. § 25.
[34] 15 U.S.C. § 15a .
[35] 15 U.S.C. § 15c.

given the AT&T experience, that when the *Microsoft* case was being litigated, so much attention was paid to the remedial question.

At the present time, the tools in our injunctive box include (a) orders forbidding companies to engage in certain behaviors, (b) orders requiring positive actions, such as using open-source architecture, nondiscriminatory access to key functionalities, or licensing a certain portfolio of patents (with a dispute-resolution mechanism if licensing fees are contested), or (c) spin-off or divestiture orders, which could look like the break-up of the Bell Telephone empire, or at a more modest level might involve peeling off certain aspects of the business that could then operate competitively. Each has its advantages for particular situations, and each has its challenges. In the third situation, courts often enlist the assistance of a court-appointed monitor, who can more easily perform the oversight and implementation functions.

The question that deserves re-visiting is whether we ought to follow the example of the European Union and many other countries and add civil fines to the quiver. The argument against doing so is a serious one: the fine must be set at an optimal level, or it will be either just a nuisance payment (and thus ineffective), or ruinous (and undesirable for that reason). But there may be some cases in which a combination of an injunction and a fine might make sense, and if the civil fine turns out to be ineffective, nothing says that the government is required to seek that relief.

Another possibility, related to both civil fines and injunctions, is the possibility of expressly authorizing the governmental enforcers (by which I mean just the Antitrust Division and the FTC) to seek disgorgement of monopolistic profits. That isn't quite the same as damages, and it isn't quite the same as an injunction, but it is a remedy that (if properly evaluated) can deprive the monopolist of its gains from the Sherman Act violation, and thus create an incentive not to engage in exclusionary practices.

Conclusion

Recent studies that I am certain are well known to the Subcommittee have demonstrated that the problem of market concentration has become severe in many areas of our economy. This is a real problem that threatens to sap our economy of its vitality. Revisiting section 2 of the Sherman Act is an important first step in addressing it. True as it might be that "the antitrust laws are for the protection of competition, not competitors," it is equally true that without competitors, there will be no competition. Let me again thank the Subcommittee for this opportunity to share some thoughts about this problem. I look forward to continuing the dialogue.