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***DRAFT ***

IN DEFENSE OF BREAKUPS: ADMINISTERING A "RADICAL" REMEDY

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Rory Van Loo[†]

Calls for breaking up monopolies—especially Amazon, Facebook, and Google—have largely focused on proving that past acquisitions of companies like Whole Foods, Instagram, and YouTube were anticompetitive. But scholars have paid insufficient attention to another major obstacle that also explains why the government in recent decades has not broken up a single large company. After establishing that an anticompetitive merger or other act has occurred, there is great skepticism of breakups as a remedy. Judges, scholars, and regulators see a breakup as extreme, frequently comparing the remedy to trying to "unscramble eggs." They doubt the government's competence in executing such a difficult task, pointing to decision-making flaws dating back to the breakups of Standard Oil in 1911 and AT&T in 1984. Even many scholars calling for more vigorous antitrust enforcement recommend alternative remedies. This Article asserts that the pervasive hesitancy about administering breakups renders antitrust impotent in the face of monopolies—too often a statutory right without a remedy. More importantly, the Article challenges the perception of breakups as unadministrable. The intellectual foundations for the anti-breakup stance are weak, relying on outdated, anecdotal evidence. Moreover, antitrust would benefit from a methodological shift toward paying greater attention to the breakup insights yielded by other disciplines. In particular, business scholars have studied how the world's leading companies regularly break themselves up voluntarily. Additionally, administrative law scholarship has observed a broader evolution toward collaborative regulation that shows how the much-maligned historical approaches to antitrust remedies could be greatly improved by relying more on the business sector in designing and implementing breakups. In other words, insights from outside of antitrust address many critiques of breakups and show how that remedy is far from radical and messy. Antitrust observers should thus abandon the worldview that compares breaking up prior companies to unscrambling eggs. Or at a minimum they should recognize that scrambled eggs, once cooked, are divided into smaller portions. A greater willingness to do the same to monopolies in the post-merger context and beyond would bring regulators more in line with the business sector, which sees divestitures as a routine part of effective governance.

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INTRODUCTION

In the wake of bipartisan momentum to prosecute big tech companies, antitrust authorities have acknowledged that breakups are "perfectly on the table."[1] But this remedy faces intellectual opposition from a broader range of the ideological spectrum than many realize. Academics have driven a renaissance in antitrust scholarship, calling for stronger remedies for anticompetitive behavior, with some proposing breakups.[2] The breakup attention has focused on whether large corporations are violating antitrust laws and how a given breakup would alter competition once the

[1] Rob Copeland, *Breakup of Tech Giants 'on the Table,' U.S. Antitrust Chief Says*, WALL STREET J. (Oct. 22, 2019, 2:00 PM), https://www.wsj.com/articles/breakup-of-tech-giants-on-the-table-u-s-antitrustchief-says-11571765689 [https://perma.cc/9R8B-4U38] (quoting Makan Delrahim, head of the DOJ antitrust division).

[2] Scholars have for decades called for reforming antitrust, in what can be described as the Post-Chicago antitrust movement. *See* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008) (sharing scholarship by Jonathan Baker, Eleanor Fox, Herbert Hovenkamp, Marina Lao, John Kirkwood, Daniel Rubinfeld, and Steven Salop, among others). Members of that group and the more recent "New Brandeisian" antitrust movement have called for expanding breakups. *See* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 132–33 (2018); Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 800 (2017); Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1982 (2018).

process is complete.[3] Yet to pursue breakups, policymakers must also believe that authorities can administer them, and that the remedy is reasonable. Otherwise, courts would insist on another solution, such as mandating that tech companies provide competitors access to their platforms.[4] In the wake of intensifying scholarly scrutiny of antitrust, there has been no sustained attention to administering breakups.[5]

In the absence of close examination, the dominant view has remained, even among influential scholars supportive of more vigorous antitrust enforcement, that breakups are "radical"[6] and too costly.[7] The biggest conceptual barrier is the belief that breakups are too difficult for the government to administer.[8] As judges, scholars, and regulators have repeatedly put it, breaking up a merged company is like trying to "unscramble the eggs."[9]

That administrative resistance to breakups is overlooked in conversations about reforming antitrust, but it poses an existential problem. In theory, to combat monopoly power obtained through an illegal merger, authorities have long preferred breaking up the company to the "perilous" alternative—behavioral remedies, which require ongoing government oversight of the monopolist.[10] Yet if the preferred remedy—breakups—has become so infeasible that "we may as well forget about attempting to

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[3] *See, e.g., supra* note 2.

[4] *See infra* Part I.B. & IV.B.2.

[5] *See infra* Part I (summarizing the literature).

[6] *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 80 (D.C. Cir. 2001) ("[W]isdom counsels against adopting radical structural relief."); Todd Spangler, *Will the U.S. Break Up Big Tech? Don't Hold Your Breath*, VARIETY (June 4, 2019, 1:36 PM), https://variety.com/2019/digital/news/us-antitrust-break-up-facebook-google-amazon-apple-1203232588/ [https://perma.cc/2S6N-7NSS] (quoting Professor Herbert Hovenkamp as saying, "Breakup remedies are radical and they frequently have unintended consequences").

[7] *See* Herbert Hovenkamp, *Progressive Antitrust*, 2018 U. ILL. L. REV. 71, 99 (2018); Fiona Scott Morton, Opinion, *Why 'Breaking Up' Big Tech Probably Won't Work*, WASH. POST (July 16, 2019, 2:41 PM), https://www.washingtonpost.com/opinions/2019/07/16/break-up-facebook-there-are-smarter-ways-rein-big-tech/ [https://perma.cc/TE4W-N2F6] ("Just 'break them up' is an oversimplified sound bite, not a real policy that would restore competition in digital markets and benefit consumers.").

[8] *See* Hovenkamp, *supra* note 7, at 99 ("The main reason antitrust does not go further is concerns about administrability.") For an example of resistance on those grounds, see, e.g., Menesh S. Patel, *Merger Breakups*, WIS. L. REV. (forthcoming) (manuscript at 42, 50-51) (on file with the Cornell Law Review), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3469984 (concluding more ex post merger reviews are necessary but cautioning against breakups when entities have integrated their assets, because of "the fundamental difficulties of unwinding consummated mergers").

[9] *See, e.g.*, Consol. Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 261 (2d Cir. 1989) (quoting Sonesta Int'l Hotels Corp. v. Wellington Assocs., 483 F.2d 247, 250 (2d Cir. 1973)) ("[O]nce the tender offer has been consummated it becomes difficult, and sometimes virtually impossible, for a court to 'unscramble the eggs.'"); Laidlaw Acquisition Corp. v. Mayflower Grp., Inc., 636 F. Supp. 1513, 1517 (S.D. Ind. 1986) (referring to the "virtual impossibility of 'unscrambling the scrambled eggs'"); William J. Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 ANTITRUST L.J. 825, 830 (1997) ("Once a merger takes place and the firms' operations are integrated, it can be very difficult, or impossible, to unscramble the eggs and reconstruct a viable, divestable group of assets."); F. David Osinski, *Merger Remedies and the Undersupply of Economic Research*, 18 ABA ANTITRUST SEC. ECON. COMM. NEWSLETTER, no. 2, Fall 2017, at 5, 7 ("[I]n consummated mergers, … a divestiture may not restore competition due to the high cost and risk of unscrambling the eggs.").

[10] Philip J. Weiser, *Reexamining the Legacy of Dual Regulation: Reforming Dual Merger Review by the DOJ and the FCC*, 61 FED. COMM. L.J. 167, 176 (2008).

disestablish" integrated firms,[11] the law may offer no acceptable remedy to address illegal monopolies.

Through an outside-of-antitrust lens, this Article challenges the prevailing assumption that breakups are extreme and prohibitively difficult to administer. It contributes the first review of the empirical evidence on the *administration* of breakups, showing that the studies largely responsible for the early view of breakup administration as "clearly a disaster"[12] suffer from flawed methodologies.[13] Moreover, scholars' frequent critiques of breakups from decades and sometimes more than a century ago, in the case of Standard Oil, have limited relevance.[14] Part of the problem is that large antitrust breakups have not occurred in decades and were always rare, leaving an absence of recent data points.

Rather than relying on outdated and discredited antitrust research, this Article situates breakups within their broader business and administrative contexts. Current antitrust debates fail to consider the insights generated by routine private sector breakups. One-third of mergers and acquisitions (M&A)—more appropriately termed reorganizations—are divestitures.[15] These divestitures include some of the largest deals of the last decade, including Fox's sale of its 20th Century Fox production arm for $71 billion to Disney; eBay's spinoff of PayPal; and Hewlett-Packard's decision to split itself down the middle to create two of the one hundred largest companies in the United States.[16] Despite meaningful differences, the prevalence of these deals alone is informative because what antitrust observers have come to view as drastic is commonplace in the business world.

Moreover, scholars in other fields—notably strategic management, finance, and organizational behavior—have studied voluntary private sector breakups extensively.[17] They have shown how these voluntary divestitures add value and how better process design can improve their implementation.[18] Of course, it is important to recognize that even if antitrust breakups are costly and lower the firm's value, they may be economically beneficial by deterring executives from pursuing anticompetitive deals.[19] But by remaining disconnected from the extensive business scholarship on divestitures,

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[11] Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1163 (1982).

[12] Barbara A. Clark, *Merger Investigations at the Federal Trade Commission: An Insider's View*, 56 ANTITRUST L.J. 765, 774–75 (1988).

[13] *See infra* Section II.B.

[14] *See infra* Part II.A. (explaining limitations in leading historical case studies).

[15] Matthias F. Brauer & Margarethe F. Wiersema, *Industry Divestiture Waves: How a Firm's Position Influences Investor Returns*, 55 ACAD. MGMT. J. 1472, 1472 (2012).

[16] *See* Anjanette H. Raymond & Abbey Stemler, *Trusting Strangers: Dispute Resolution in the Crowd*, 16 CARDOZO J. CONFLICT RESOL. 357, 379 (2015); Peter Lee, *Reconceptualizing the Role of Intellectual Property Rights in Shaping Industry Structure*, 72 VAND. L. REV. 1197, 1283, n.315 (2019); Shira Ovide et al., *Hewlett-Packard Set to Break Up 75-Year-Old Company*, WALL STREET J. (Oct. 7, 2014), at A1, https://www.wsj.com/articles/hewlett-packard-to-split-into-two-companies-1412592132; FORTUNE 500, https://fortune.com/fortune500 [https://perma.cc/49KS-PSK3] (last visited Dec. 26, 2019).

[17] *See* Caterina Moschieri & Johanna Mair, *Research on Corporate Divestitures: A Synthesis*, 14 J. MGMT. & ORG. 399, 400 (2008) ("[O]nly by integrating literature in finance, strategy and organizational behavior can we obtain a comprehensive picture of divesting modes, antecedents, mechanisms and outcomes . . . .").

[18] *See infra* Section III.A (reviewing the literature).

[19] *See infra* Part III. (covering deterrence and shareholder harm).

the antitrust literature has exaggerated breakups' costs and governmental incompetence.

Regulatory scholarship can also improve the antitrust conceptualization of breakups. Antitrust scholars focus far more on *ex post* enforcement actions and legal cases, whereas scholars in environmental law and other regulatory fields extensively analyze the monitoring of firms and design of regulatory processes.[20] In particular, the literature in those other fields is in dialogue with a prominent strand of research, associated with administrative law, arguing for collaborative governance.[21]

Approaching breakup administration less as an adversarial law enforcement procedure and more as collaborative monitoring could streamline the process—thus speaking to one of the biggest critiques of breakups, delay. Also, collaborative governance aims to leverage business sector expertise to compensate for administrative agency sophistication shortfalls and information asymmetries. Most concretely, this would mean not only leveraging the monopoly's resources, but also involving independent third-party M&A consultants. Understanding the regulatory design literature thus encourages a more realistic assessment of how breakups can be implemented rather than an outdated sense of how they were handled decades ago.

The implications of a more informed view of breakup administrability are far-reaching. A misguided view of breakups may help explain what many observers see as decades of weak antitrust enforcement, leading to charges that "the deck is stacked in favor of large powerful firms."[22] Executives know that if they succeed in executing an anticompetitive merger, as long as they quickly integrate the companies antitrust enforcers or courts will fear breaking the company up.[23] Ironically, unfounded fears of doing harm through breakups have led to either harmful inaction or weaker remedies that are more likely to prove wasteful. If widespread unfounded resistance to administering breakups has contributed substantially to the presence of monopolies, it has imposed considerable costs on society.[24]

Once breakups are understood as a normal part of business affairs, and as capable of being co-administered with the private sector, courts and enforcers can deploy them more readily as an antitrust remedy. That shift solves the antitrust problem of what to do after an anticompetitive merger has occurred. But it also informs debates about how

[20] This disconnect reflects the institutional design of different agencies. *See* Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369, 436–40 (2019).

[21] *See, e.g.*, IAN AYRES & JOHN BRAITWAITE, RESPONSIVE REGULATION, TRANSCENDING THE DEREGULATION DEBATE 4–7 (1992) (offering a model of responsive regulation); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 4 (1997) ("I propose a normative model of collaborative governance that seeks to respond to complaints about the failings of contemporary regulation.").

[22] Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 745 (2018).

[23] *Infra* Part III.C.

[24] This is true whether one believes the goal of antitrust should be to advance consumer welfare or something larger, such as reducing inequality. On distribution and antitrust, see Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1, 11 (2015); Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 236–37 (2017); Rory Van Loo, *Broadening Consumer Law: Competition, Protection, and Distribution*, 95 NOTRE DAME L. REV. 211, 213, 216 (2019). *But see* Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171 (2016).

to handle monopolies that achieved their dominance in other ways.[25] At the very least, the intuitive resistance to breakups needs to end. Unless and until greater evidence is produced that breakups harm society, judges should be less hesitant to approve breakups, enforcers less tentative to pursue them, and policymakers less resistant to write laws that deploy them.

I. THE ANTITRUST REMEDY CONUNDRUM

Breakups exist in a state of conceptual tension. They are often described as the preferred antitrust remedy, yet persistently avoided in practice. This Part outlines the underappreciated hostility to administering breakups.

A. Breakups as the Favored Remedy

Antitrust remedies can be classified as behavioral or structural. Behavioral, or sometimes called conduct, remedies seek to make the monopolist take or stop taking some action, such as providing product access to rivals or prohibiting restrictive contract clauses.[26] In contrast, breakups are a structural remedy in which a company typically transfers assets—such as by selling a business unit or intellectual property to another company—or splits itself into two or more pieces.[27]

The pervasive skepticism about administering breakups is overlooked in part because many judges, scholars, and antitrust authorities have asserted a preference for structural over behavioral remedies. For long periods in antitrust history courts viewed structural remedies as the best way to address anticompetitive mergers. As the Supreme Court observed over fifty years ago, "Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when [an anticompetitive merger] has been found."[28] In the ensuing decades courts left intact that basic idea that divestiture is the "most effective[] of antitrust remedies."[29]

Antitrust enforcers are arguably the most important actors in determining remedies because of the Court's observation that "once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor."[30] The two primary federal antitrust enforcers are the Federal Trade Commission (FTC) and the Department of Justice (DOJ). In the context of merger remedies, FTC officials have cited "less oversight by the agencies" as a reason for preferring structural remedies.[31] In a 2004 guidance

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[25] *Infra* Part IV.C.

[26] See John E. Kwoka, Jr., *Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes*, 78 ANTITRUST L.J. 619, 636 (2013).

[27] *See* U.S. Dep't of Justice, Antitrust Div., Antitrust Division Policy Guide to Merger Remedies 6 (2011).

[28] United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 330–31 (1961).

[29] *See* Steves & Sons v. JELD-WEN, Inc., 345 F. Supp. 3d 614, 648 (E.D. Va. 2018) (quoting E.I. du Pont, 366 U.S. at 326); *In re* Chicago Bridge & Iron Co., Docket No. 9300, 2005 WL 120878, at *50 (F.T.C. Jan. 6, 2005).

[30] Ford Motor Co. v. United States, 405 U.S. 562, 575 (1972) (quoting E.I. du Pont, 366 U.S. at 334).

[31] *See* Osinski, *supra* note 9, at 7.

document, the DOJ reiterated its preference for structural remedies "because they are relatively clean and certain, and generally avoid costly government entanglement in the market."[32]

Those statements have left the impression that enforcers have retained a strong preference for structural remedies in merger review. In 2018, a federal judge considering a private lawsuit to break up a company that merged six years earlier observed that "the DOJ seeks divestiture in the vast majority of cases like this one."[33] Putting aside for the moment the accuracy of that statement,[34] the judge proceeded to reiterate the Supreme Court's characterization of antitrust law as viewing "divestiture as the remedy best suited to redress the ills of an anticompetitive merger."[35]

For similar reasons as judges and enforcers, scholars have also often stressed the superiority of structural remedies. Structural remedies have the broadest support "in merger cases, where divestiture is the natural remedy for breaking apart what never should have been joined together in the first place."[36] The literature emphasizes that structural remedies are "administratively considerably easier in that, once divestiture has occurred, the agency's job is largely complete."[37]

More recently, Lina Khan argued that structural remedies are superior to behavioral remedies in the context of a proposal for platform separation legislation.[38] A separation mandate would, for instance, prevent Amazon from both operating an online marketplace and selling its own goods on that platform. Khan points out that structural separation regimes have been preferred to behavioral remedies because they are "highly administrable" and require less ongoing monitoring.[39]

Thus, even as some progressive antitrust scholars have called for a "new framework for holding private power to account," in which "[s]tructural remedies are to be preferred,"[40] they engage with the issue of administering breakups at most in passing. In those brief discussions, they understandably echo in more modern contexts many of the same theoretical reasons why courts long claimed to prefer structural remedies. In light of the pervasive preferences expressed for structural remedies, it is understandable why the deep-seated resistance to administering breakups has remained largely unacknowledged and unchallenged.

B. Hostility to Administering Breakups

[32] U.S. Dep't of Justice, Antitrust Div., Antitrust Division Policy Guide to Merger Remedies 7 (2004) [hereinafter 2004 Merger Remedy Policy Guide].

[33] Steves & Sons, 345 F. Supp. 3d at 648 (applying the Clayton Act in a private action).

[34] *See infra* Part I.B.

[35] *Id.* (quoting California v. Am. Stores Co., 495 U.S. 271, 285 (1990))

[36] Spencer Weber Waller, *The Past, Present, and Future of Monopolization Remedies*, 76 ANTITRUST L.J. 11, 15 (2009); *see also* Steven C. Salop, *Modifying Merger Consent Decrees to Improve Merger Enforcement Policy*, ANTITRUST, Fall 2016, at 15, 18.

[37] Kwoka, *supra* note 25, at 636.

[38] *See* Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 980 (2019)

[39] *See id.* at 985–86, 1063–64, 1074–75.

[40] Tim Wu, *The Utah Statement: Reviving Antimonopoly Traditions for the Era of Big Tech*, MEDIUM: ONEZERO (Nov. 18, 2019), https://onezero.medium.com/the-utah-statement-reviving-antimonopoly-traditions-for-the-era-of-big-tech-e6be198012d7 [https://perma.cc/JZN5-5J42].

Despite the favored status of structural remedies in theory, antitrust breakups have become rare in practice. Part of the issue is that the statements of preference are relative rather than absolute. Additionally, concluding that structural remedies are generally superior to behavioral remedies does not bind the government in any given case.

Part of the confusion is that in some antitrust contexts, divestitures are favored. Divestitures that occur each year as part of merger approval have often involved the sale of a small part of the combined business.[41] However, those divestitures have until recently tended to be small—such as a handful of gas stations that would have left local monopolies post-merger in a specific town.[42] Whereas in a 1999 retrospective the *highest* price paid for divested assets as part of merger approval was "more than a hundred million dollars,"[43] Instagram—if Facebook was forced to divest it—would reportedly fetch a price of over a hundred billion dollars.[44]

Even if large pre-merger divestitures become common, they form part of a reorganization that still makes the divesting company bigger, not—as with breakups in other contexts—to make a company smaller. Accordingly, although breakups can be of any size and arguably include divestitures ordered during merger review, the term will be used herein to refer to a significant breakup of a business outside of the merger approval process.

The government has not broken up one of the country's largest firms since 1982 when it split AT&T into seven telephone operating companies and a long-distance carrier.[45] However, the intellectual case against breakups had been building long before. Since at least the mid-twentieth century, courts have been wary of breaking up a unitary company. In a landmark 1953 case, *United States v. United Shoe*,[46] the court described the government's request to dissolve a shoe manufacturer into three separate companies as "unrealistic."[47] The court pointed out that United Shoe produced all shoes "at one plant in Beverly, with one set of jigs and tools, one foundry, one laboratory for machinery problems, one managerial staff, and one labor force. It takes no Solomon to see that this organism cannot be cut into three equal and viable parts."[48]

Much of the intellectual foundations of the opposition to breakups come from the Chicago School. They have theorized that it is quite difficult to know what makes a firm appeal to consumers.[49] For instance, is Apple popular because of its patents, clever marketing, the genius of Steve Jobs, or something else?[50] Since courts and regulators are unlikely to be able to figure such questions out, a governmental breakup would risk

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[41] *See infra* Section II.B (reviewing studies of government divestitures).

[42] *See infra* Part IV.A.

[43] BUREAU OF COMPETITION, FTC, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS 8, 18–19 (1999) [hereinafter 1999 DIVESTITURE STUDY] (studying use of divestitures during merger review).

[44] Bernard S. Sharfman, *The Undesirability of Mandatory Time-Based Sunsets in Dual Class Share Structures: A Reply to Bebchuk and Kastiel*, 93 S. CAL. L. REV. POSTSCRIPT 1, 5 (2019).

[45] United States v. AT&T, 552 F. Supp. 131, 201, 224 (D.D.C. 1982).

[46] 110 F. Supp. 295 (D. Mass. 1953).

[47] *Id.* at 348.

[48] *Id.*

[49] Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J. L. & ECON. 1 (1973); Sam Peltzman, *The Gains and Losses from Industrial Concentration*, 20 J. L. & ECON. 229 (1977); RICHARD A. POSNER, ANTITRUST LAW (2d ed. 2001).

[50] *See* Ramsi A. Woodcock, *The Antitrust Duty to Charge Low Prices*, 39 CARDOZO L. REV. 1741, 1745 (2018).

ruining what consumers value most about the company. Thus, regardless of how monopoly power is obtained, once it exists a breakup risks undermining consumer welfare. These scholars have also pointed out that this risk weighs against breaking up monopolies who gained and maintained their monopoly power by offering superior products rather than through anticompetitive conduct.[51] The law does not allow for breaking up such companies.[52] Stated otherwise, the government wants to avoid smashing success.

Scholars have also long criticized the government's real-world execution of breakups.[53] The main evidentiary foundations of those concerns are twofold. First, many critiques stress the messiness of prior breakups.[54] One cautionary tale is of the 1970 dissolution of El Paso Natural Gas.[55] After antitrust authorities obtained a judicial order to break up the company, implementation took seventeen years and three Supreme Court orders urging the parties to proceed "without delay."[56] Observers believe that these and other incidents raise doubts about competence, as "courts' expertise lies in answering legal questions, not making [day-to-day] business decisions about questions such as pricing, product introduction, and investment in risky ventures."[57]

A second foundation for skepticism of divestitures' administrability comes from empirical research. Several studies of DOJ and FTC divestitures in the 1960s and 1970s found that few divestitures contributed to competition, with the earliest and most prominent of these examinations concluding that divestitures "could not be branded anything but a failure."[58]

Despite an already emerging intellectual hostility to breakups, the government proceeded with breaking up AT&T because it was an unusual case. AT&T was "substantially a creature of regulation and public intervention."[59] As a result, even those opposed to government intervention in private enterprise could see a breakup of the company as consistent with their values. Moreover, the company had about 90 percent of the market for long-distance calls and owned many local telephone

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[51] *See*, *e.g.*, Demsetz, *supra* note 49, at 5.

[52] *See infra* Part IV.C. (explaining and challenging this stance).

[53] *See, e.g.*, Emanuel Celler, *The Trial Court's Competence to Pass Upon Divestiture Relief*, 10 ANTITRUST BULL. 693, 693 (1965) (describing criticisms of trial judges' competence to issue remedies of divestiture for antitrust violations, including being too busy or inexpert); Jerrold G. Van Cise, *Limitations Upon Divestiture*, 19 GEO. WASH. L. REV. 147, 147–48 (1950) (criticizing the DOJ's pattern of too heavily searching for antitrust violators and too heavily relying on divestiture as a remedy).

[54] *See infra* Section II.A (reviewing scholarly discussions of past breakups).

[55] *See* Michael C. O'Connor, *Divestiture in Light of the El Paso Experience*, 48 TEX. L. REV. 792, 792 (1970).

[56] United States v. El Paso Nat. Gas Co., 376 U.S. 651, 662 (1964).

[57] *See also* HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 156 (1999).

[58] *See* Kenneth G. Elzinga, *Antitrust Enforcement: Pyrrhic Victories?*, 12 J.L. & ECON. 43, 47–53 (1969); Malcolm R. Pfunder et. al, *Compliance with Divestiture Orders Under Section 7 of the Clayton Act: An Analysis of the Relief Obtained*, 17 ANTITRUST BULL. 19, 20–21 (1972).

[59] William E. Kovacic, *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 CONN. L. REV. 1285, 1303 (1999).

monopolies nationwide.[60] Thus, if someone wanted to make a phone call to or from much of the country, the only option was AT&T.[61]

In the face of that government-created monopoly, Stanford Professor William Baxter assumed leadership of the DOJ antitrust division and sought a dissolution. At the same time, Baxter was a "Chicago school economist"[62] who thus preferred minimal governmental intervention and an emphasis on efficiency.[63] As he orchestrated the AT&T breakup, Baxter established the principles that would help ensure another one would not happen for decades.[64] Baxter declined to pursue breakups in a number of other cases—including IBM—and espoused a basic principle that "if 'there is no assurance that appropriate relief could be obtained,' then the government must question the value to consumers of prosecuting the antitrust case at issue."[65] That principle, created and embraced by scholars, became akin to a "Hippocratic oath for antitrust enforcers and jurists."[66]

That new cautionary approach to remedies, and to antitrust overall, was put to the test in the DOJ's case against Microsoft in the 1990s and early 2000s.[67] The company supplied the operating system for over 80 percent of computers and allegedly used that position to favor its own computer programs.[68] For instance, it required PCs to install Windows and Internet Explorer.[69] In 2000, the government proposed separating the company's operating system from its software applications—thus creating two entities.[70] The district court agreed to a breakup, mentioning deference to the government on the issue of remedies after it had established that Microsoft violated antitrust law.[71]

The *Microsoft* district court's choice of a structural remedy attracted much attention among legal scholars. By the time the Court of Appeals considered the case in 2001, many scholars had weighed in not only through amicus briefs but through law review articles that directly referred to the case.[72] Robert Crandall's 2001 study looked at divestiture cases against companies that—like Microsoft—had not obtained their monopoly power through mergers.[73] It found that only in four or five cases had courts ever ordered divestiture. It then examined nine structural relief cases and concluded

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[60] *See* Robert W. Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, 80 OR. L. REV. 109, 186 (2001).

[61] See *id.*

[62] Richard A. Epstein, *The AT&T Consent Decree: In Praise of Interconnection Only*, 61 FED. COMM. L.J. 149, 155 (2008).

[63] *See* Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 665 (1998).

[64] *See* Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 2 (2001).

[65] *Id.* (quoting *In re* Int'l Bus. Machs. Corp, 687 F.2d 591, 594 (2d Cir. 1982)).

[66] *Id.* at 2, n.5 (explaining how the new remedy "axiom has long influenced academic writings on antitrust and regulatory policy.").

[67] United States v. Microsoft Corp., 97 F. Supp. 2d 59, 64 (D.D.C. 2000), *vacated*, 253 F.3d 34 (D.C. Cir. 2001).

[68] *See* United States v. Microsoft Corp., 253 F.3d 34, 73–74 (D.C. Cir. 2001).

[69] *See id.* at 45.

[70] *See id.* at 48; Microsoft Corp., 97 F. Supp. 2d. at 62.

[71] *See* Microsoft Corp., 97 F. Supp. 2d at 62.

[72] *See, e.g.*, Amicus Brief (Proposed Conclusions of Law) by Robert H. Bork in Support of Microsoft Corp., Microsoft Corp., 97 F. Supp. 2d 59 (No. 98-1232), ECF 532; Amicus Brief by Lawrence Lessig, Microsoft Corp., 97 F. Supp. 2d 59 (No. 98-1232), ECF 533.

[73] *See* Crandall, *supra* note 60, at 109.

"that with one exception . . . there is very little evidence that such relief is successful in increasing competition, raising industry output, or reducing prices to consumers." Moreover, in the lone exception—AT&T—Crandall concluded that behavioral remedies could have produced comparable results.[74] Crandall deemed structural remedies to address monopolies like Microsoft were unusual and very likely to fail.[75]

In another 2001 article, Howard Shelanski and Gregory Sidak analyzed the Microsoft context more directly, and challenged the common remedy hierarchy in antitrust by observing that "ambitious structural remedies that incorporate supervisory and behavioral elements might require as much, or even more, continued judicial scrutiny as behavioral remedies require."[76] They urged the *Microsoft* court to tailor the remedy to the context,[77] which poses a challenge to breakups because behavioral remedies can be crafted that relate only to the anticompetitive conduct. In contrast, a breakup does not as directly address the anticompetitive action unless that action was a merger. Thus, Shelanski and Sidak's proposal implied that divestitures should only be applied to monopolies that had obtained their dominance through prior mergers—unlike Microsoft. Also, Shelanksi and Sidak argued that the remedy must "advance economic welfare at the lowest possible social cost."[78] A cost-benefit calculation was unlikely to provide support for divestitures under the prevailing zeitgeist because, as Richard Posner stated in a 2001 antitrust textbook, "Structural remedies such as divestiture are, as we know, slow, costly, [and] frequently ineffectual . . . ."[79]

In accordance with these and other scholarly views, the Court of Appeals overturned the remedy chosen.[80] The court acknowledged that divestiture "is indeed 'the most important of antitrust remedies,'"[81] but noted that because Microsoft had not obtained its monopoly power through anticompetitive mergers, it was appropriate to proceed cautiously before ordering a breakup.[82]

Several of the opinion's other points signaled a broader decline in the stature of breakups. The court directly dismissed the idea of deferring to the government after it had won its liability case.[83] More ominously, it described divestitures as "radical" and argued that because Microsoft had not obtained its monopoly power through mergers, the "logistical difficulty" of splitting the company may weigh against divestiture.[84] From the resistance to breaking up a single shoe production facility, courts had evolved to skepticism about breaking up a company even along two distinct but technologically

[74] *Id.* at 189.

[75] *Id.* at 197-98.

[76] Shelanski & Sidak, *supra* note 64, at 54.

[77] *Id.* at 3 ("[A]ny remedy should address the conduct for which Microsoft was found liable.").

[78] *Id.*

[79] RICHARD A. POSNER, ANTITRUST LAW 268 (2d ed. 2001).

[80] United States v. Microsoft Corp., 253 F.3d 34, 98 (D.C. Cir. 2001) (revising also the scope of the liability). Four eminent economists argued that Microsoft should not be broken up because of administrability *See* Brief of Amici Curiae Robert E. Litan, Roger G. Noll, William D. Nordhaus, and Frederic Scherer at 46–49, United States v. Microsoft Corp., 97 F. Supp. 2d 59 (D.D.C. 2000) (No. 98-1232).

[81] *Id*. at 105 (quoting United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 331 (1961)).

[82] *See* id.

[83] *Id.* at 80–81.

[84] *Id*. at 80, 106.

linked product lines. Finally, the court seemed to adopt the view of prominent antitrust scholars encouraging a close tailoring of the remedy to the anticompetitive behavior.[85]

By emphasizing that breakups' "long-term efficacy is rarely certain,"[86] the court painted uncertainty as cause for skepticism about breakups. That emphasis underscores how the cost-benefit formulation weighs against breakups. It is easier to identify the costs than the competitive benefits. There will often be clear increases in ongoing operating expenses because, for example, Facebook and Instagram would need to have two headquarters rather than one. Additionally, perhaps the most concrete and unavoidable category of costs in a breakup relates to the transition. Companies hire reorganization specialists, such as attorneys, accountants, and consultants; cover moving expenses; and absorb considerable employee time lost to managing and implementing the reorganization rather than producing the company's core product.[87] Courts and enforcers must also devote resources to monitoring and overseeing the breakup.[88]

In contrast, the main antitrust benefits of a breakup stem from improved competition. Yet the difficulty of predicting competitive effects is "axiomatic."[89] Relatedly, it is challenging to quantify the innovation and economic gains from two smaller, more nimble companies.[90] Thus, whereas costs of a breakup are undeniable, inevitable, and clearly identifiable, the benefits are inherently uncertain. Given that uncertainty, the *Microsoft* court's urging of "great caution"[91] in adopting breakups—if taken literally—could alone make divestitures rare or nonexistent by imposing an impossible evidentiary burden on the government. Whether due to the court's resistance or political changes, the government subsequently decided not to pursue a breakup, instead settling for behavioral remedies.[92]

The shift in thinking on remedies in the early 2000s, albeit limited to merger remedies, can be seen beyond courts. In its 2004 Policy Guide to Merger Remedies, the DOJ announced, "Structural remedies are preferred to conduct remedies in merger cases . . . ."[93] However, in its 2011 policy guidance, the DOJ provided a more measured assessment for remedies in merger cases, declaring, "In certain factual circumstances, structural relief may be the best choice to preserve competition."[94] Antitrust enforcers went from viewing behavioral remedies as "more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent"[95] in 2004

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[85] *See id.* at 107.
[86] *Id.* 80, 98–99.
[87] *See, e.g.*, William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 953 (1981) (describing "heavy administrative" costs).
[88] *See* Shelanski & Sidak, *supra* note 64, at 32–34.
[89] John M. Newman, *Antitrust in Digital Markets*, 72 VAND. L. REV. 1497, 1556 (2019).
[90] *Infra* Part III (discussing possible diseconomies of scale).
[91] United States v. Microsoft Corp., 253 F.3d 34, 80 (D.C. Cir. 2001); *see also* Timothy J. Muris & Jonathan E. Nuechterlein, *First Principles for Antitrust Review of Long-Consummated Mergers*, 5 CRITERION J. ON INNOVATION 29, 47 (2020) ("[I]f the government seeks to unwind a consummated merger, it must prove that the *prospective* benefits of that structural remedy outweigh the *prospective* harms, including the costs and unintended consequences that often arise from corporate de-integration and inevitably increase with time.")
[92] *See id.* at 98–103; *infra* Part IV.B.1. (discussing political factors).
[93] U.S. Dep't of Justice, *supra* note 32, at 7.
[94] U.S. Dep't of Justice, *supra* note 27, at 4.
[95] 2004 MERGER REMEDY POLICY GUIDE, supra note 32, at 7–8.

to seeing them as a "valuable tool" in 2011.[96] That shift occurred under the administration of President Obama, who had promised to "reinvigorate antitrust enforcement" by restructuring merger review.[97]

A 2007 case illustrates the government's ambivalence regarding breakups. Seven years had passed since the anticompetitive purchase of a hospital, causing the FTC to decide against a divestiture out of concern about the "potentially high costs inherent in the separation."[98] In the same opinion, the FTC explained, "Divestiture is the preferred remedy for challenges to unlawful mergers, regardless of whether the challenge occurs before or after consummation."[99]

Thus, the rhetoric of preferring structural remedies sounds more expansive than it is in practice. Once a few years have passed since the merger, or the entities have integrated, the government is often reluctant to pursue a divestiture. In recent decades, the professed preference for structural remedies should have come with a caveat of "unless it would be costly or messy."[100]

In short, deploying breakups as a remedy faces a considerable barrier beyond those that have been the focus in the budding literature fueling a revival of antitrust. When observers compare breakups to unscrambling eggs, they are usually referring to the undoing of a prior consummated merger.[101] Scholars and courts are even more resistant to splitting up companies in other contexts.[102]

This harsh view of breakups has larger implications for antitrust as an institution. Behavioral remedies are often costly and messy.[103] The theoretical preference for structural remedies thus poses a dilemma for antitrust. Enforcers must ask "whether any remedy is sufficiently practicable to yield net benefits" to determine whether a case should be brought at all.[104] In other words, the consensus is that if there is no practicable remedy, the government should leave the monopolist alone.

When the most practical remedy available is seen as a "clear[] disaster"[105] and "slow, costly, [and] frequently ineffectual,"[106] the Hippocratic oath for antitrust would direct authorities not to act.[107] The primary scholarly critique of antitrust law is the failure to act.[108] As Chief Justice Marshall observed in *Marbury v. Madison*, the government cannot be called a "government of laws . . . if the laws furnish no remedy

[96] U.S. Dep't of Justice, *supra* note 27, at 6–7.
[97] William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903, 904 (2009) (quoting Senator Barack Obama, Statement for the American Antitrust Institute (Feb. 20, 2008)).
[98] *In re* Matter of Evanston Northwestern Healthcare Corp., Docket No. 9315, at *6-7 (F.T.C. Jan. 12, 2006).
[99] *Id.* at 91.
[100] When consummated mergers are more recent in time, the preference may hold.
[101] *See supra* note 9 and accompanying text (discussing the egg metaphor).
[102] *See* Hovenkamp, *supra* note 57, at 156.
[103] *Infra* Part IV.B.
[104] Shelanski & Sidak, *supra* note 64, at 36 (emphasis omitted).
[105] Clark, *supra* note 12, at 7754.
[106] POSNER, *supra* note 79, at 268.
[107] *See* Shelanski & Sidak, *supra* note 64, at 2 (discussing Hippocratic standard).
[108] *See* Jonathan B. Baker et al., *Unlocking Antitrust Enforcement*, 127 YALE L.J. 1916, 1919 (2018); Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 268–71 (2001); JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 158 (2015); Khan & Vaheesan, *supra* note 24, at 237.

for the violation of a vested legal right."[109] The view of breakups as the best remedy but unworkable contributes to antitrust law's difficulty taking action against monopolies.[110]

II. THE WEAK EVIDENCE AGAINST ADMINISTRABILITY

This Part interrogates the common assumption that breakups are too unwieldy by exploring its evidentiary foundations. The point is not to debate the competitive impact of divestitures. The goal is instead to understand the literature on the administrability of the breakup remedy. Even if we assume breakups would increase competition once implemented, what is the support for arguments that we cannot trust courts and agencies to manage the process effectively?

A. The Limitation of Case Studies

Narratives hold outsized influence on perceptions and beliefs.[111] The narratives that loom largest in antitrust remedies are of the major historical breakups, which caused many observers to sour on divestiture as a remedy.[112] This Section focuses on two of them: *Standard Oil*,[113] because as "the mother of all monopolization cases,"[114] it holds sway in scholarly conceptions of divestitures and is still debated;[115] and *AT&T*,[116] because as the most recent large breakup and "arguably the most significant antimonopoly case [in] the U.S.,"[117] it presumably demonstrates the most advanced administration yet to be applied to a major government dissolution. Each of these historical breakups has been mentioned repeatedly in discussions of divestitures, even decades after they occurred.[118]

The 1911 breakup of Standard Oil remains "iconic because it was the first time antitrust was used to break up a company, and at the time Standard Oil was the largest company in the United States."[119] In its appeal to the Supreme Court, the company argued that its unitary nature made a dissolution logistically impractical and dangerous

[109] 5 U.S. 137, 163 (1803).

[110] *See infra* Part IV. (discussing breakups among other remedies).

[111] *See, e.g.*, ROBERT J. SHILLER, IRRATIONAL EXUBERANCE 13 (2d ed. 2005) (applying the power of narratives to asset bubbles); Jennifer Edson Escalas, *Self-Referencing and Persuasion: Narrative Transportation Versus Analytical Elaboration*, 33 J. CONSUMER RES. 421, 427–28 (2007) (demonstrating through controlled experiments the influence of narratives in marketing context).

[112] William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1149 (1989) ("Fresh memories of the deconcentration experiences of the 1970s have convinced many that the divestiture suit is a hopelessly flawed instrument of antitrust policy.").

[113] Standard Oil Co. v. United States, 221 U.S. 1 (1911).

[114] Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 290 (2003).

[115] *See* Kovacic, *supra* note 59, at 1300.

[116] United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub. nom.*, Maryland v. United States, 460 U.S. 1001 (1983).

[117] Howard Shelanski, *Antitrust and Deregulation*, 127 YALE L.J. 1922, 1945 (2018).

[118] *See, e.g.*, Peter C. Carstensen, *Remedies for Monopolization from Standard Oil to Microsoft and Intel: The Changing Nature of Monopoly Law from Elimination of Market Power to Regulation of Its Use*, 85 S. CAL. L. REV. 815 (2012) (mentioning Standard Oil 46 times and AT&T 14 times); Kovacic, *supra* note 112 (mentioning Standard Oil 23 times and AT&T 26 times).

[119] Barak Orbach & D. Daniel Sokol, *Antitrust Energy*, 85 S. CAL. L. REV. 429, 432 (2012).

to the oil industry and the economy more generally.[120] "There are many parts, but each part has its place, and if a part is taken out, the whole structure is disintegrated," the company predicted.[121] Those warnings, if believed, would be fatal to breakups because antitrust seeks to increase the number of competitors and overall industry output.[122] Divested pieces cannot provide those benefits if they cease to operate.

The company's defense is noteworthy because critics of breakups have long echoed it. Microsoft used similar arguments to overturn the court-ordered dissolution in 2001, citing the impracticability of undoing its "unitary" organization.[123] The Court of Appeals referred to that argument in overturning the breakup order.[124] One of today's leading progressive antitrust intellectuals, Fiona Scott Morton, has argued against tech breakups based on integration, saying, "By the time any antitrust verdict is rendered, there will be one coherent Facebook and no divisions to divest."[125]

Standard Oil was correct that its breakup required "a number of complicated restructurings."[126] The court order split the company into "eleven large production and distribution companies" and "forced the spin-off of several smaller refining companies, pipeline companies, and even a tank car company."[127] Nonetheless, the dissolution of Standard Oil proceeded "relatively smoothly even though most of the newly independent entities were deprived of the full-scale integration that Standard had argued was vital to their survival."[128] Even critics of the breakup agree that the oil industry and the divested pieces of Standard Oil thrived in the years after the breakup.[129] We do not know what would have happened otherwise, but Standard Oil's "warnings of industrial apocalypse"[130] turned out to be false.

To be clear, scholars still debate the efficiency benefits of the dissolution.[131] And the structure of Standard Oil was not the worst-case-scenario for divestitures. But breakup succeeded, despite substantial restructuring challenges, in facilitating "the emergence of a number of substantial independent competitors—including Amoco, Chevron, Exxon, and Mobil—where there had been but a single firm before."[132]

Scholars have a more favorable impression of the competitive impact of the AT&T divestiture than that of Standard Oil, most thinking that it was overall beneficial.[133] However, its administration came under withering scholarly attack soon

[120] Brief on the Law on Part of Appellants at 191, Standard Oil Co. v. United States, 221 U.S. 1 (1911) (No. 725) [hereinafter Standard Oil Brief].

[121] *Id.*

[122] *See* Jon M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501 (2019) (critiquing an "output-only" approach).

[123] Microsoft Corp. Brief at 47, 53, United States v. Microsoft Corp., 253 F.3d 34, 99 (D.C. Cir. 2001) (Nos. 00-5212 and 00-5213), 2001 WL 34153358.

[124] United States v. Microsoft Corp., 253 F.3d 34, 106 (D.C. Cir. 2001).

[125] Scott Morton, *supra* note 7.

[126] Kovacic, *supra* note 59, at 1301.

[127] HOVENKAMP, *supra* note 57, at 300.

[128] Kovacic, *supra* note 59, at 1298.

[129] *See, e.g.*, Crandall, *supra* note 60, at 112 (seeing limited impact).

[130] Kovacic, *supra* note 59, at 1298.

[131] *See* Michael Reksulak & William F. Shughart II, *Tarring the Trust: The Political Economy of* Standard Oil, 85 S. CAL. L. REV. POSTSCRIPT 23, 31–32 (2012).

[132] Kovacic, supra note 59, at 1300, 1302.

[133] *See* Crandall, *supra* note 60, at 123–92; Kovacic, *supra* note 59, at 1303.

after completion. The main critique was the degree of court involvement.[134] It took ten years to even get from the government's original filing of the lawsuit to the divestiture order, "spanning four Congresses, three Presidents, and two U.S. district court judges."[135] That order then began a period of extensive court monitoring and follow-up legal battles. About "thirty-five to forty separate waiver requests were filed per year in the first eight years of the decree," often taking years to resolve.[136] Some scholars have described the AT&T divestiture as a "failure" either because of the extensive costs and delays of relying on the court, or due to flawed decision-making by government officials who were tasked with running a business.[137] Like with Standard Oil, it is also impossible to know what would have happened had the government not broken up AT&T.[138]

As some perspective on these critiques, *AT&T* involved perhaps the largest set of divestitures in history.[139] It thus provides an extreme example of a large-scale and diffuse breakup. Moreover, as the discussion above illustrates, much of the administrability concerns center on the court's involvement. Thus, to the extent that the case furnishes arguments against breakups, it is against a breakup heavily managed by the courts.

This discussion is not meant to suggest that the Standard Oil, AT&T, or other historical dissolutions were perfect. As with most any large-scale project from long ago, whether in the private or public sector, hindsight enables observers to identify improvements. However, it would be perplexing if these cases continue to shape perceptions of divestitures. They are decades, and in the case of Standard Oil, over a century old. Similarly, to cite the *United Shoe* impracticability of splitting up a single shoe foundry as evidence of breakup ineptitude lacks analytic rigor and is anachronistic because even today's large shoe companies no longer produce their shoes out of a single factory.[140]

It should also give critics pause that decades after the breakup of AT&T, which by all accounts was followed by innovation, lower prices, and considerable competition, leading antitrust and telecommunications scholars cannot agree on whether the breakup represented "a policy success or a policy failure."[141] At a minimum, the subsequent world leadership of U.S. telecommunications companies and prosperity of oil companies indicates that even lengthy and messy breakups can still be followed by trailblazing innovation and intense competition.[142] Especially without

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[134] *See, e.g.*, Paul W. MacAvoy & Kenneth Robinson, *Losing by Judicial Policymaking: The First Year of the AT&T Divestiture*, 2 YALE J. REG. 225, 261 (1985).

[135] *Id.* at 225.

[136] Crandall, *supra* note 60, at 115.

[137] *See* MacEvoy & Robinson, *supra* note 134, at 246 (citing judicial judgment mistakes); Shelanski & Sidak, *supra* note 64, at 53 (urging divestiture caution based on AT&T).

[138] *See, e.g.*, Crandall, *supra* note 60, at 115 (exploring alternatives).

[139] Kovacic, *supra* note 59, at 1302.

[140] *See* Amit Singh, *Nike Manufacturing and Supply Chain Strategies*, MARKET REALIST (Oct. 17, 2019), https://marketrealist.com/2019/10/nike-manufacturing-and-supply-chain-strategies/ [https://perma.cc/5JLH-AL85] ("Nike's manufacturing network has over 525 factories in 40 countries.").

[141] Christopher S. Yoo, *The Enduring Lessons of the Breakup of AT&T: A Twenty-Five Year Retrospective*, 61 FED. COMM. L.J. 1, 2–3 (2008).

[142] *See* James W. Brock, *Economic Power, Henry Simons, and A Lost Antitrust Vision of Economic Conservatism*, 58 S.D. L. REV. 443, 452 (2013) (It is well to remember that innovation

considering how better design could address any flaws in past breakup administration, the historical record of prominent divestitures should not be cited as reason to condemn large-scale breakups today.

B. The Lack of Systemic Evidence

Beyond case studies, several more quantitative examinations in the 1960s through the 1980s influenced observers to see divestitures as "notoriously ineffectual."[143] The most recent and comprehensive study during that time period, by Robert Rogowsky, came to similar conclusions as the previous one that had painted a "bleak" picture of antitrust remedies.[144] Rogowsky analyzed over one hundred government antitrust cases.[145] Like the other early influential empirical studies, Rogowsky's did not analyze market data or consumer welfare. Instead, he identified success as a divestiture that "reestablishes the acquired firm (1) independent of the parent, (2) viable in the long run, and (3) adequately structured to be an effective competitor."[146] Based on these characteristics and other factors such as the length of time taken for the divestiture, Rogowsky classified 75 percent of the divestitures as either deficient or unsuccessful, with 28 percent falling into the worst category, unsuccessful.[147]

Rogowsky's metrics for assessing divestitures merit closer scrutiny. Divestitures were labeled as unsuccessful if the purchaser of the vertically divested assets had over 10 percent of the relevant market.[148] Not only does owning this much of the market fall far short of proving a monopoly, but this example indicates the study's heavy reliance on industry structure to measure competition. This and other measures of competition used by Rogowsky, such as whether the purchaser was in the Fortune 200,[149] have since been discredited as a sufficient basis for establishing a lack of competition.[150] Thus, Rogowsky labeled divestitures as unsuccessful for having characteristics that are well-known today to be perfectly consistent with a divestiture that improves competition.

Additionally, Rogowsky labeled as unsuccessful any divestiture that ordered an insufficient size of assets divested—called partial divestitures.[151] Many cases were classified as unsuccessful because the DOJ or FTC did not order any divestiture, or ordered a token amount.[152] In other words, if the enforcers had sought larger scale divestitures their success rate would have significantly improved by Rogowsky's own metrics. A study that played an important intellectual role in arguments against

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exploded after the breakup of AT&T's monopoly, not before.").

[143] Clark, *supra* note x, at 774; *See also* David Balto, *Lessons from the Clinton Administration: The Evolving Approach to Merger Remedies*, 69 GEO. WASH. L. REV. 952, 958 (2001).

[144] *See* Robert A. Rogowsky, *The Economic Effectiveness of Section 7 Relief*, 31 ANTITRUST BULL. 187, 212 (1986).

[145] *Id.* at 189.

[146] *Id.* at 190.

[147] *See id.* at 189, 196, 212.

[148] *See id.* at 189, 196, 218.

[149] *See id.* 218.

[150] *See, e.g.*, Herbert Hovenkamp, *The Neal Report and the Crisis in Antitrust*, 5 COMPETITION POL'Y INT'L 219 (2009) (chronicling the structure-conduct-performance paradigm).

[151] Rogowsky, *supra* note 151, at 195.

[152] *Id.* at 209, 228.

divestitures instead is perhaps better viewed as indicating that the government should pursue more extensive breakups.

Using a different methodology, the event study, another examination of divestitures through the 1970s drew similarly harsh conclusions. James Ellert examined the shareholder returns of firms subject to antitrust divestitures before and after those interventions.[153] If divestitures were successful, Ellert expected the divesting firms to offer lower stock market returns and dividends after the antitrust intervention relative to other companies not subject to such interventions. However, Ellert found no significant difference in the returns of divesting companies compared to those of other companies with different outcomes, such as having the antitrust case dismissed.[154] Moreover, the authors were unconvinced that anything the antitrust authorities did as part of its merger evaluation program effectively reduced any monopoly gains. Although the stock value of companies subject to antitrust suits dipped by under two percent, Ellert interpreted that drop as resulting from legal and other costs of such actions on the firms.[155]

Rogowsky's study helps to clarify the Ellert findings. A large number of divestitures never happened, took many years to implement, and required divestiture of only a small slice of assets.[156] Also, Ellert's interpretation of the drop of under two percent as being attributable to the costs of antitrust action are speculative and reflect an average loss.[157] Ellert's study is consistent with some subset of more extensive and well-designed divestitures reducing stock market returns.

A final shortcoming in Ellert's methodology is the limited value of stock market returns as a metric of anticompetitive earnings. Anticompetitive activities may not always yield higher profits or increase the value of the firm.[158] As a result, if the antitrust authorities' actions had improved competition, the improvements may not be seen in stock market returns.

Even assuming those earlier studies' methodologies were rigorous, there is further reason to doubt their findings' relevance today. The FTC looked into the administration of U.S. divestitures in an examination of all merger orders between 2006 and 2012. The success rate for structural remedies was 80 percent, defined as ultimately at least restoring competition.[159] Moreover, the unsuccessful cases resulted from the FTC divesting piecemeal assets.[160] When the FTC instead divested an ongoing business operation, all of the divestitures succeeded.[161] Therefore, the category most relevant to breakups consistently succeeded.

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[153] James C. Ellert, *Mergers, Antitrust Law Enforcement and Stockholder Returns*, 31 J. FIN. 715, 715 (1976) (examining firms challenged between 1950 and 1972).

[154] *Id.* at 715-16, 724.

[155] *Id.* at 724, 729.

[156] Rogowsky, *supra* note 144, at 195.

[157] Ellert, *supra* note 153, at 724–29.

[158] For instance, in theory, the firm may compete away the monopoly rents. Or if employees (including executives) captured the rents for higher salaries, successful antitrust interventions would not hit shareholder profit. *See* Crane, *supra* note 24, at 1192.

[159] *Id.* at 18 (horizontal mergers). A minority of cases required over two years. *Id.*

[160] *See id.* at 1–2 (including which include intellectual property, technology, brand names, research and development, and equipment).

[161] *Id*. at 1, 5 Success meant competition "remained at its premerger level or returned to that level within...two to three years."). *Id.*

The success rate of pre-merger divestitures is not a perfect comparison in terms of administering breakups, in part because they tend to be smaller scale.[162] Regardless, these findings further undermine the prior empirical studies many have cited as evidence that antitrust authorities administer structural remedies poorly. In particular, because they considered a much later timeframe, the FTC's studies appear to reflect enforcers' and courts' improved approach to administering divestitures by incorporating lessons learned in the intervening decades.[163]

More recent quantitative studies provide mixed results. Based on stock market returns, an examination of European Union (EU) pre-merger divestitures concluded that divestitures did not lead to significant declines in the stock prices of the firms ordered to divest, but that rivals benefited from those divestitures.[164] However, besides the weakness of stock market value as a metric of antitrust effectiveness, the authors' conclusions provide limited evidence for or against breakups as a remedy because they were most critical of the limited scope of those remedies. They believed enforcers should go further than partial divestitures to fully blocking mergers,[165] an intervention that is more akin to a large-scale breakup from a competitive perspective. Stock-market-based studies of uninhibited breakups could show a stronger impact on competition.

A central limitation of the above examinations is that they fail to deploy the most respected empirical mechanism for establishing causality: randomization.[166] The difficulty of knowing the counter-factual thus undermines all of these antitrust empirics. One study addresses that methodological shortcoming by considering the Dutch government's use of randomization in ordering divestitures by gasoline companies of stations along major highways.[167] The divested gas stations were found to lower prices by 1.3% to 2.3%.[168] The narrow market context, hospitable nature of gas stations to ownership transfer, and foreign jurisdiction heavily limit these findings' relevance to U.S. divestitures. Nonetheless, the most methodologically rigorous study available for determining causality indicates that divestitures can improve competition in some contexts.

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[162] *See supra* Part I.B. Also, for a pre-merger divestiture order the companies can refrain from pursuing the proposed merger if they think the ordered divestiture would be harmful. That means that the private sector retains a degree of discretion—a check on incompetent administration—that it lacks in the case of other types of antitrust divestitures. However, there is limited evidence that the private sector has rejected government-ordered divestitures and it would in any case be difficult to know whether a private-sector rejection meant the anticompetitive dimensions of the deal had been removed. Arguably, to the extent the rejection rate is low, it may actually strengthen the case for governmental competence in designing effective divestitures.

[163] FTC 1999 DIVESTITURE STUDY, *supra* note 43, at 39.

[164] *See* Tomaso Duso et al., *How Effective is European Merger Control?*, 55 EUROPEAN ECON. REV. 980, 995 (2011).

[165] Duso et al., *supra* note 164, at 1002.

[166] Dale L. Moore, *Recurrent Issues in the Review of Medical Research on Human Subjects*, 1 ALB. L.J. SCI. & TECH. 1, 8 (1991) ("[R]andomization is often absolutely essential to a study's design as a means of ensuring against any bias in treatment assignment.").

[167] Adriaan R. Soetevent, Marco A. Haan & Pim Heijnen, *Do Auctions and Forced Divestitures Increase Competition? Evidence for Retail Gasoline Markets*, 62 J. INDUST. ECON. 467, 467–70 (2014).

[168] *Id.* at 469.

Finally, none of this review's empirical studies considers deterrence.[169] If breakups deter firms from pursuing monopolistic mergers, they could improve consumer welfare even if the divestiture itself—analyzed narrowly in terms of the immediate price effects in the specific market—did not yield evidence of improved competition. As a result, some of the divestitures labeled "failures" in the Rogowsky study or as having only a minimal impact on stock price analyzed by Ellert could—once deterrence is taken into account—be viewed as successful.

In summary, the most influential studies shaping pessimism about governmental administration of breakups relied on questionable methodologies and are outdated. More recent studies even provide grounds for cautious optimism that larger government-ordered divestitures may yield high success rates. More importantly, there is an absence of compelling evidence against breakups despite an array of government interventions to separate large firms, including electric companies, railroads, banks, movie theaters, and television companies, among others.[170] The research is limited by the lack of sophisticated quantification of the effects of divestitures on consumer welfare, by the failure to consider deterrence, and by the absence of large breakups in the past few decades. Those limitations further underscore the speculative nature of claims about the government being too incompetent to administer breakups.

III. A BALANCED VIEW OF BREAKUPS

Given the limited evidentiary foundations for harsh perceptions of breakup administration, the hostility to that remedy deserves fresh examination. This Part expands the lens on breakups by situating them in their broader business and law enforcement contexts. The literature on private sector divestitures and the goals of antitrust are in tension with core assumptions of breakups as too extreme, complicated, and harmful.

A. Insights from Private Divestitures

Antitrust scholars have largely ignored research concerning an even more numerous category of divestitures: those occurring in the private sector. As a threshold matter, it is helpful to recognize the frequency of private divestitures. In the midst of a growing economy and strong stock market, a 2019 survey of senior corporate executives found that 84 percent of respondent companies were planning a voluntary divestiture within the next two years.[171] Well over three thousand private divestitures occur each year in the United States.[172] In contrast, the FTC listed only about fifteen

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[169] *See* Rogowsky, *supra* note 151, at 189. Over-deterrence is also problematic.

[170] *See* Roberta S. Karmel, *Is the Public Utility Holding Company Act A Model for Breaking Up the Banks That Are Too-Big-to-Fail?*, 62 HASTINGS L.J. 821 (2011); *see also* Khan, *supra* note 38, at 1037-51; Barach Orbach, *The Paramount Decrees: Lessons for the Future*, Antitrust Source, April 2020, at 2.

[171] *See* PAUL HAMMES, GLOBAL CORPORATE DIVESTMENT STUDY, EY 2 (2019), https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/divestment/2019/global_divestment_study_report.pdf (reporting survey results from 930 senior corporate executives).

[172] *See* Paula Loop, *When a Piece of Your Company No Longer Fits: What Boards Need to Know About Divestitures*, HARV. L. SCH. F. CORP. GOV. & FIN. REG. (July 27, 2017),

divestiture orders annually to alter proposed or consummated mergers in its latest divestiture study, or for less than one percent of all mergers and acquisitions.[173] If for no other reason, the universe of private sector divestitures merits attention because of the considerably larger volume of cases to be studied.

1. Are Private Divestitures Too Different To Be Helpful?

The antitrust scholarly omission of private divestitures is to some extent understandable. After all, there are many differences between the two enterprises. Most importantly, antitrust divestitures aim to lessen a potential source of monopoly profits, whereas private divestitures aim to increase the value (including the long-term profits) of the company.[174] Antitrust scholars might resist comparisons due to that distinction and because it changes the composition of divestitures—making it less likely, for instance, that private divestitures will create two horizontal competitors.[175] Additionally, a portion of private sector divestitures are conglomerates selling an unconnected business. These differences indicate boundaries for finding antitrust lessons in private divestitures.

However, to observe that there are differences between private and public divestitures, and that we must limit inferences accordingly, is to state the obvious. The more challenging question is how much the differences matter in light of the project. Since the project here is to shed greater light on antitrust breakups from a starting point of limited evidence, the existing differences warrant further examination.

Resistance to considering private divestitures due to the prevalence of private equity sales of conglomerate pieces would reflect an outdated view. Even in the 1980s and 1990s, a large portion of divestitures were not by conglomerates.[176] Since then the field has shifted considerably. Observers traditionally saw private divestitures as helping bring firms "back to their basics" by shedding peripheral assets, often during times of financial distress.[177] Over time, executives have increasingly pursued larger divestitures for strategic reasons rather than to offload unproductive and peripheral parts.[178] Strategic motives include the advantages of a leaner organization for

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https://corpgov.law.harvard.edu/2017/07/27/when-a-piece-of-your-company-no-longer-fits-what-boards-need-to-know-about-divestitures.

[173] *See* BUREAU OF COMPETITION, *supra* note 43, at 4.

[174] Consequently, antitrust breakups may be more likely to destroy shareholder value than strategic reorganizations—a possibility addressed below. *See infra* Section III.C (discussing shareholder value and deterrence).

[175] Relatedly, historically many divestitures were of bad assets, which are unlikely to weaken the firm's competitive position. *See* Michael C. Jensen, *Eclipse of the Public Corporation*, 67 HARV. BUS. REV. 61 (1989).

[176] Even in the 1980s and 1990s, a large number of divested units operated in the same industry as the parent. Hsiu-Lang Chen & Re-Jin Guo, *On Corporate Divestiture*, 24 REV. QUANTITATIVE FIN. & Acct. 399, 411 (2005) (finding that 36% of divestitures between 1985 and 1998 were of assets within the same industry by two-digit SIC code). The percentage of non-conglomerate sales could be higher or lower than this figure, given the limitations of industry codes.

[177] Donald D. Bergh, *Restructuring and Divestitures*, *in* OXFORD RESEARCH ENCYCLOPEDIA, BUSINESS AND MANAGEMENT 1, 1–29 (2017) (summarizing the literature).

[178] Moschieri & Mair, *supra* note 17, at 399 (describing divestiture as "a means to correct or reverse previous strategic decisions [(for example, diversification)], or a proactive strategic option").

innovation, cost-cutting, and long-term growth.[179] Some businesses have become so large and unwieldy that they are beyond the point of gaining economies of scale, and their larger size instead creates diseconomies of scale—or increased costs resulting from their size.[180]

By way of illustration, in 2012 Pfizer announced it would divest about 40 percent of its business as part of refocusing on human medicine development.[181] The company proceeded to shed assets that provided synergies in terms of research and distribution. It split off its animal health unit, which develops animal medicines, as a separate company in a $13 billion initial public offering (IPO);[182] and sold its nutrition business to Nestle for $12 billion dollars.[183] As another example, Hewlett-Packard executives opted for a breakup to respond to the increasing pace of technology-driven markets. CEO Meg Whitman described the strategy by observing, "Being nimble is the only path to winning."[184] The expansive motives for pursuing divestitures and the diversity of assets separated mean that private divestitures offer many case studies that are potentially relevant to various antitrust breakup contexts.

As to the observation that private divestitures differ by aiming to increase the firm's value, that distinction speaks more to the goals rather than to the administration. If the private sector demonstrates success splitting up large integrated companies, that experience can provide insights into how or whether antitrust authorities should do something similar, even if the goals for the breakup are different.

For instance, Scott Morton's skepticism about a Facebook-Instagram breakup echoes the view of many antitrust scholars because it was based on the observation that those two companies would be integrated by the time the breakup occurred.[185] Indeed, since 2001 in merger approval cases, antitrust authorities brought their only two post-merger divestitures within three years of the merger.[186] If the source of resistance is the degree of integration rather than the particular shape, it is a relevant inquiry to probe how the private sector has approached the divestiture of companies integrated to a comparable degree.

A note is in order on what is meant by integrated. In the case of Facebook and Instagram, the integration would largely mean technical platform connections—such as enabling users on one platform to message users on another.[187] The two social media

[179] Bergh, *supra* note 177, at x (listing motivations for enterprise-wide reorganizations).

[180] *See* Jesse W. Markham Jr., *Lessons for Competition Law from the Economic Crisis: The Prospect for Antitrust Responses to the "Too-Big-To-Fail" Phenomenon*, 16 FORDHAM J. CORP. & FIN. L. 261, 315 (2011). *See also* Jeremy Kress, *Solving Banking's "Too Big to Manage" Problem*, 104 MINN. L. REV. 171, 208–09 (2019).

[181] Seemantini Pathak et al., *Settling Up in CEO Compensation: The Impact of Divestiture Intensity and Contextual Factors in Refocusing Firms*, 35 STRATEGIC MGMT. J. 1124, 1125 (2014); Michael J. De La Merced, *Pfizer Spins Off Animal Health Unit in $2.2 Billion I.P.O.*, N.Y. TIMES, Feb. 1, 2013, at B7.

[182] *Id.*; Imram Ahmed & Kasra Kasraian, *Pharmaceutical Challenges in Veterinary Product Development*, 54 ADVANCED DRUG DELIVERY REVS. 871, 872 (2002).

[183] *See* Sam F. Halabi, *The Origins and Future of Global Health Law: Regulation, Security, and Pluralism*, 108 GEO. L.J. 1607, 1620 (2020).

[184] *See* Ovide, Lublin & Mattioli, *supra* note 16.

[185] *See infra* note 125 and accompanying text.

[186] Patel, *supra* note 8, at 19-20.

[187] *See Facebook to Integrate Whatsapp, Instagram, and Messenger*, BBC (Jan. 25, 2019), https://www.bbc.com/news/technology-47001460 [https://perma.cc/6SL7-9SW8].

platforms would still under normal circumstances operate as distinct business units within the company, supported by common company-wide functions. Also, consumers would continue to be able to interface with the two platforms as distinct products, in the sense of being able to use one and not the other.

If observers are searching for divestiture case studies to understand a given possible antitrust breakup, some of the tens of thousands of private sector breakups in recent years could—from an administration standpoint—offer some appeal. Many involve the separation of horizontal businesses, technology companies, prior mega-mergers. They are at least as likely to offer some insights, if not overall better matches, than the AT&T or Standard Oil breakups that tend to dominate the antitrust discussions of tech breakups.

The point is not that any particular private sector divestiture is a clear model for any particular proposed breakup, such as the eBay-PayPal merger and subsequent divestiture as a roadmap for Facebook-Instagram.[188] Large divestitures, public or private, tend towards uniqueness. Pointing out that a given proposed private sector breakup is different from any given public sector breakup for any number of reasons misses the point.

Rather the point in discussing the integration-related resistance to the Facebook-Instagram breakup is to diagnose the type of concern that is prevalent in antitrust discussions of breakups. A big part of that broader resistance is not about the particularity of the proposed breakup at hand. Instead, many observers demonstrate an abstract and generalized concern about breaking up consummated mergers—or breaking up the company once it is integrated.[189] Those concerns should be informed by a set of *business* questions about how costly, lengthy, and difficult it would be to break the particular company up—not the extent to which a prior merger is consummated or integrated.

In other words, for antitrust scholars to recognize what can be gained from a more interdisciplinary perspective on breakups, it is necessary to exit the antitrust silo that inclines toward labeling private sector divestitures as different. A more productive approach is to examine whether the points of commonality yield insights. Although the differences are real, it would be misguided to use them as a justification for ignoring private divestitures. Since the private sector has undertaken divestitures of integrated companies with great frequency, study of those undertakings can speak to key business assumptions that have implicitly shaped breakup skepticism.

2. What Insights Might Private Divestitures Offer?

One key difference between private sector and antitrust views of divestitures is how to view the prospect of splitting up an integrated company. Executives who are deciding whether to divest—and business scholars who study those divestitures—are less deterred by the associated risks and costs than observers of antitrust breakups. For instance, while the private sector also prefers to sell a separate business unit rather than one that is heavily intertwined,[190] many strategic divestitures split integrated businesses

[188] *See* Bergh, *supra* note 177.
[189] *See supra* Part I.B.
[190] See Irene M. Duhaime & John H. Grant, Factors Influencing Divestment Decision-Making: Evidence from a Field Study, 5 STRATEGIC MGMT. J. 302 (1984).

whose information technology systems have been intertwined for decades.[191] Hewlett-Packard was a fully integrated company—the type of "unitary" company that deters courts and enforcers from breakups—when it decided to split into two roughly equal halves.[192]

Executives pursue such strategic breakups despite awareness of the considerable resources and complexity.[193] Again, Hewlett-Packard executives knew beforehand that the divestiture would take several years to complete, cost an estimated $1.8 billion, require extensive administrative management, and cause great "upheaval" within the company.[194] They proceeded despite that awareness and produced two highly profitable companies.[195]

What about in the context of technology-heavy deals? Antitrust scholars have urged particular caution in pursuing post-merger breakups in that space.[196] The private sector has no such reservations, pursuing a number of divestitures years after consummation. Examples include PayPal and eBay, which had technologically integrated their platforms by the time the combined company decided to split, and AOL-Time Warner.[197]

Another perspective comes from shareholders, who also demonstrate relative comfort with divestitures. Following unprofitable mergers and acquisitions, shareholders regularly pressure their managers to undo those consummated mergers even years later.[198] In contrast, as described above, antitrust authorities have consistently declined to undo an anticompetitive merger mistakenly approved, even though they acknowledge—as have a large number of scholars—that such mistakes have occurred.[199] In other words, antitrust enforcers almost never fix their prior mistakes by breaking up a company, but shareholders regularly fix their managers' mistakes by forcing a breakup.

Of course, administrative costs may be systematically higher in forced divestitures, which are inherently adversarial processes. Higher administrative costs would be expected particularly if the parties frequently argue over details, requiring more court interventions and likely slowing the merger down. These differences are

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[191] *See, e.g.*, Stephanie Overby, *How CIOs Unravel IT Systems After a Business Divestiture*, CIO (Feb. 24, 2014), https://www.cio.com/article/2378617/how-cios-unravel-it-systems-after-a-business-divestiture.html (describing Hess integration).

[192] *See* Shira Ovide et al., *supra* note 16 (describing the divestiture).

[193] Rui de Figueiredo et al., *The Costs of Refocusing: Evidence from Hedge Fund Closures During the Financial Crisis,* 40 STRATEGIC MGMT J. 1269, 1271, 1287 (2019) (summarizing prior research on the well-known costs of reorganizing).

[194] *See* Robert McMillan, *H-P Says Costly Split Will Save $1 Billion,* Wall St. J., May 22, 2015, at B1; Chris Matthews, *Here's How Much HP's Split is Going to Cost*, FORTUNE (May 22, 2015), https://fortune.com/2015/05/22/hp-split-cost.

[195] *See supra* note 16.

[196] *See, e.g.*, Patel, *supra* note 8, at 63 (concluding that technology mergers may be extremely difficult to separate after a significant amount of time from consummation); Scott A. Sher, *Closed But Not Forgotten: Government Review of Consummated Mergers Under Section 7 of the Clayton Act*, 45 SANTA CLARA L. REV. 41, 91 (2004) (explaining how in "high-tech markets, it is often impossible to separate out the assets of the merged parties following close").

[197] *See* Bergh, *supra* note 177.

[198] Donald D. Bergh & Barton M. Sharp, *How Far Do Owners Reach into the Divestiture Process? Blockholders and the Choice Between Spin-Off and Sell-Off*, 41 J. MGMT. 1155, 1156 (2015).

[199] *See supra* Part I.A.; KWOKA, *supra* note 108, at 158.

real but some context for them is helpful. Studies have found that private acquisitions are often subject to litigation—over 90% by 2011.[200] Thus, private divestitures are subject to court delays. They also tend to last years and take longer than executives expect.[201]

The point here is not that private and public divestitures involve the same costs. Antitrust breakup costs higher than private sector divestitures may be avoidable with effective regulatory design,[202] but large-scale breakups will inevitably be complex, expensive, and lengthy. However, the private sector perspective indicates that many observers may have inflated negative perceptions of the administrative costs by attributing what is unavoidable—or at least what also occurs in the private sector—to government incompetence. The real question should be whether the inescapably high costs of the breakup are worth the benefits.

The current antitrust analysis may underestimate those benefits. Some, if not most, breakups would be expected to create non-antitrust-related value through the types of efficiency and nimbleness that motivate private sector divestitures. To elaborate, non-antitrust benefits may remain unrealized due to factors such as agency costs, emotional barriers, or because the monopoly rents outweigh the divestiture gains.[203] Independent of those considerations, however, any number of current companies might benefit from divestitures without those benefits being sufficient to justify the costs of the divestiture. Suppose that it would cost a company $500 million to implement a private divestiture, and the efficiency and innovation gains of the divestiture amount to $400 million, that company will not rationally choose to divest. However, if the government were to break up that company for independent antitrust reasons, the $400 million in efficiency gains would need to be added to the benefits side of the breakup—even though they would not be the motivating factor.

Whether or not that $400 million would rightly be seen as lowering the costs of administration is debatable, but ultimately unimportant. Those side benefits of breakups could in some contexts offset even higher governmental costs of administering breakups. More importantly, the cost-benefit analysis could significantly underestimate the benefits of breakups because the antitrust literature pays so little attention to private sector divestitures.

Private sector divestitures also inform the high "failure" rate of antitrust divestitures in the 1950s through 1970s that tainted observers' assessment of the remedy.[204] By most accounts, a large portion of all M&A transactions have questionable value, with a representative study putting the failure rate at almost half of all deals.[205] Scholars similarly conclude that private sector divestitures have "mixed results."[206]

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[200] *See* Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465, 469 (2015).

[201] *See, e.g.*, *supra* note 194 and accompanying text (mentioning HP's lengthy divestiture); Stephen Heidari-Robinson & Suzanne Heywood, *Getting Reorgs Right*, 94 HARV. BUS. REV. 85, 86 (2016) (reporting that 80% of executives thought the deal did not achieve success on time).

[202] *See infra* Section IV.A (discussing breakup design).

[203] These topics are developed further *infra* sections III.B.1. and IV.B.

[204] *See supra* Section II.B.

[205] *See* Nicole Zadrazil et al., *The Crucial Role of Time in M&A Activities: An Inductive Exploration*, 13 J. MOD. ACCT. & AUDITING 350, 350 (2017) (reviewing the literature).

[206] *See* Pathak et al., *supra* note 198, at 1125.

Of course, the different metrics do not allow straight comparisons of success rates across antitrust and the private sector.[207] But large private and antitrust divestitures are both at their core about dividing a company into pieces. Thus, private sector success rates can provide perspective on overlapping issues faced in antitrust breakups.

One of those is how to interpret evidence of a government breakup being costly, messy, and potentially failing. The failure rates in the private sector raise the issue of whether legal scholars unfairly blamed unavoidable challenges on government incompetence. Business scholars who view over 70% of private sector deals as "abysmal failures" do not recommend that executives abandon them.[208] Instead, they view failures as indicating opportunities to improve.[209]

The business sector's persistence in the face of many failed reorganizations has brought benefits in the case of divestitures. Studies have consistently concluded that divestitures overall increase shareholder value, despite administrative challenges.[210] The data also indicates that certain types add significantly more value, such as larger divestitures.[211]

If intellectuals had convinced business leaders to abandon large private divestitures based on the high failure rates evident in the 1980s it would have hurt the economy on a large-scale. Yet intellectuals used flawed evidence of antitrust breakup failure to convince authorities to abandon that remedy starting in the 1980s. Competition may have consequently suffered on a large-scale basis due to that faulty evidentiary interpretation.

Although differences must be considered in comparing corporate divestitures to antitrust divestitures, such comparisons should be made rather than ignored. Many important questions still remain unanswered in the business literature on divestitures.[212] Still, that literature is far more expansive, recent, and rigorous than the corresponding antitrust literature.

Situating antitrust remedies in the broader context of private sector reorganizations shows how the picture painted of breakups has become distorted. The costs of breakups are not as high as antitrust scholars and judges commonly assume. Businesses regularly expend considerable funds on organizational streamlining and system updating. To estimate the accurate costs for an antitrust breakup, it would be necessary to only count those expenses that would not have otherwise been incurred. It would also be necessary to lower the estimated "cost" of administering breakups by the gains from efficiency and nimbleness, which are currently omitted from relevant antitrust remedy analyses.

An isolated analysis also risks implying that complications and delays are the fault of courts or enforcers, rather than features of divestitures. Indeed, one of the factors driving some CEOs to pursue a reorganization is the belief that the company "needs to

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[207] *Supra* Section III.A.1. Thus, one cannot conclude from private divestiture rates that antitrust breakups should occur with a particular frequency or success rate.

[208] *See* Roger L. Martin, *M&A: The One Thing You Need to Get Right*, 94 H. BUS. REV. 42, 44 (2016) (providing M&A advice despite high failure rates).

[209] *See, e.g., id.* at 44 (recommending better oversight and skill transfer).

[210] *See* Chris Veld & Yulia V. Veld-Merkoulova, *Value Creation Through Spin-Offs: A Review of the Empirical Evidence*, 11 INT'L J. MGMT. REVS. 407, 409 (2009).

[211] See id.

[212] *See* Bergh, *supra* note 177 (reviewing the business literature).

be shaken up."[213] Executives are even willing to divide a company up along new lines that do not reflect a prior merger.

That private sector mindset sits in stark contrast to the widespread conception of even the more straightforward category of antitrust breakup—consummated mergers—as analogous to "unscrambling the egg."[214] Whereas nobody tries to unscramble eggs, sophisticated and successful business leaders routinely carve up their own integrated companies despite inevitable transaction costs and decades of evidence that many fail. The hostility to breakups is partly born of the disciplinary and academic silo in which breakup conversations have persisted.

B. Shareholder Harm Is Not an Obstacle

The Supreme Court has historically emphasized that "the Government cannot be denied the [divestiture] remedy because economic hardship, however severe, may result."[215] Nonetheless, concerns about shareholders have persisted as a factor influencing the remedy choice.[216] Indeed, in fighting the government's proposal of a breakup, Microsoft wanted the court to consider "[t]estimony from Goldman, Sachs & Co. and from Morgan Stanley Dean Witter that dissolution would adversely affect shareholder value."[217] The district court declined to do so, and in overturning the order of a breakup, the Court of Appeals cited the value of hearing that shareholder testimony.[218] The rest of this Part shows why judges should not worry about significant shareholder harm, because it is unlikely to happen and may be economically desirable if it does.

If the concern about shareholders comes from fear of harm to people's retirement and savings, the evolving structure of equity ownership is relevant. Most publicly traded shares of large companies now are owned by mutual funds and other institutional owners holding diverse stocks. As a result, the impact of any given breakup would be diluted for most shareholders. Additionally, improved long-term health of markets encouraged by antitrust could benefit most of a given company's shareholders even if a broken up company's stock was hurt. Indeed, the authors of the leading study of divestitures' impact on stock value concluded that divestitures led to a transfer of monopoly rents from the prosecuted company to rivals.[219]

Even if the concern is solely about an individual company, a perhaps obvious point is that a breakup does not mean that a portion of the company is eliminated. If Google is forced to sell YouTube or Facebook is required to divest Instagram, shareholders would receive a massive payment for that sale.[220] Overall, the literature consistently

[213] *See* Heidari-Robinson & Heywood, *supra* note 201, at 86.
[214] *See supra* note 9 and accompanying text.
[215] *See* United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 327 (1961). By predating the Chicago School's ascendancy, this language does not reflect today's Court.
[216] *See* United States v. Int'l Tel. & Tel. Corp., 349 F. Supp. 22, 30 (D. Conn. 1972), *aff'd sub nom.*, Nader v. U.S, 410 U.S. 919 (1973).
[217] United States v. Microsoft Corp., 253 F.3d 34, 99 (D.C. Cir. 2001).
[218] *Id.* (listing various sources of testimony that were improperly not heard).
[219] Duso et al., *supra* note 164, at 995..
[220] *See* Sharfman, *supra* note 44.

shows that private divestitures "have a positive impact on the divesting parent's share price."[221]

There has been limited direct study of the effects on shareholders of breakups. Moreover, what few studies exist did not examine the ultimate question of how breakups would compare to other antitrust remedies. Nonetheless, the leading quantitative research into stock value following antitrust divestitures suggests that the organizational reconfiguration does not significantly drive the stock value down.[222]

Nor have the most far-reaching antitrust breakups necessarily hurt shareholders. In its failed Supreme Court appeal of dissolution, Standard Oil warned that dissolution would be calamitous to shareholders—a possibility that could not be ruled out with confidence at the time because such a case was unprecedented.[223] But within a year of the court order to dissolve Standard Oil, the company's total stock value had increased since the case was announced.[224] Within two years of the court-ordered divestiture, founder John D. Rockefeller's wealth tripled.[225] It is impossible to know the counterfactual, but the breakup was not—as predicted by Standard Oil's lawyers—calamitous to shareholders.

Of course, because historical antitrust breakups were often poorly designed, more powerful antitrust divestitures may lead to different results. If most scholars are correct that the AT&T breakup overall increased competition,[226] that case study is illustrative. Going into the case, the government was concerned about hardship to AT&T's shareholders.[227] Nonetheless, those who held their shares benefitted substantially following the breakup.[228]

How might breakups fail to harm shareholders even while improving competition? Maintaining a monopoly can be expensive.[229] Instead of focusing on defensive protection of a dominant market position, firms in a competitive industry pursue greater adaptability and may invest more in innovation.[230] That renewal has the potential to grow the industry at a faster rate than in an industry dominated by a monopolist. Faster-moving companies may be even more important in light of the increasing pace with which technologies are requiring companies to adapt.[231]

Agency theory and organizational psychology help to explain this conundrum of effective antitrust breakups still increasing shareholder value. Senior managers have often pursued growth, especially through mergers and acquisitions, even when growth

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[221] Moschieri & Mair, *supra* note 17, at 399.
[222] *See supra* Part II.B. (reviewing the literature).
[223] *See* Kovacic, *supra* note 59, at 1301.
[224] Malcolm R. Burns, *The Competitive Effects of Trust-Busting: A Portfolio Analysis*, 85 J. POL. ECON. 717, 732 (1977).
[225] *See* Michael Reksulak et al., *Titan Agonistes: The Wealth Effects of the* Standard Oil *(N.J.) Case*, 21 RES. L. & ECON. 63, 64 (2004).
[226] Kovacic, *supra* note 64, at 1303 (describing scholars' perspectives).
[227] United States v. Microsoft Corp., 253 F.3d 34, 102 (D.C. Cir. 2001).
[228] Kovacic, *supra* note 59, at 1303.
[229] *See, e.g.*, Crane, *supra* note 24, at 1188.
[230] Robert E. Hoskisson et al., Asset Restructuring and Business Group Affiliation in French Civil Law Countries, 25 STRATEGIC MGMT. J. 525, 527, 532 (2004).
[231] *Cf.* Eric D. Beinhocker, *The Adaptable Corporation*, MCKINSEY Q., no. 2, 2006, at 82 (describing how large companies "can sometimes become so complex that they go into gridlock and change becomes impossible").

would not improve the company's value.[232] Yet many companies hold those acquisitions even after it is clear that they were failures, only divesting them when forced to do so by shareholders.[233] Agency theory views these divestitures as demonstrating a misalignment of incentives: managers' compensation was often more dependent on the size of the company, whereas owners care more about profit.[234] Or executives may direct a large share of the monopoly rents toward salaries, while the portion shared with shareholders does not offset the corresponding costs.[235]

Because the design of executive compensation structures has improved, CEOs' motivation to grow counterproductively is presumably lessened today compared to decades ago.[236] Moreover, increasing external pressures on managers—including from activist shareholders[237]—have presumably made inaction in the face of value-creating reorganizations less likely. Nonetheless, the agency problem persists.[238] Moreover, there is some evidence that organizational inertia and emotional factors may cause companies to hold on to assets that they would economically benefit from divesting.[239]

Another way of conceptualizing the potential benefits to shareholders is to view antitrust breakups as a tool of corporate governance to push executives away from self-serving acquisitions.[240] A primary goal of corporate law is to align the incentives of shareholders and managers—by, for instance, imposing a fiduciary duty on managers.[241] Yet it is costly for shareholders to monitor and influence their agents in the firm—managers and directors—which helps explain why "[t]he problem of managerial agency costs dominates debates in corporate law."[242] By discouraging managers from pursuing growth that harms shareholders, or by encouraging beneficial divestitures, antitrust enforcers may in some instances benefit shareholders by addressing a harmful effects of those high agency costs.

It is unclear what percent of breakups would add value to shareholders by solving agency costs or otherwise improving the firm's performance. But recent empirical evidence indicates that when CEOs propose mergers, "there is a very large thumb on the scale that pushes all deals toward approval."[243] It is plausible that a substantial

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[232] *Cf.* Jensen, *supra* note 175 (noting owner-manager conflicts).

[233] Jennifer E. Bethel & Julia Liebeskind, *The Effects of Ownership Structure on Corporate Restructuring*, 14 STRATEGIC MGMT. J. 15, 15 (1993).

[234] Robert E. Hoskisson et al., Corporate Divestiture Intensity in Restructuring Firms: Effects of Governance, Strategy and Performance, 37 ACAD. MGMT. J. 1207, 1208–09 (1994).

[235] *See supra* note 158 and accompanying text.

[236] *See* David I. Walker, *The Way We Pay Now: Understanding and Evaluating Performance-Based Executive Pay*, 1 J. L. FIN. & ACCT. 395 (2016) (describing how an upsurge in relative performance evaluation in exec pay arrangements focuses comp on firm-specific performance).

[237] *See, e.g.*, Elisabeth de Fontenay, *Private Equity's Governance Advantage: A Requiem*, 99 B.U. L. REV. 1095 (2019).

[238] *See* Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSPECTIVES 89, 90 (2017).

[239] *See* Bergh, *supra* note 177, at 6 (reviewing the literature).

[240] *See* Spencer Weber Waller, *Corporate Governance and Competition Policy*, 18 GEO. MASON L. REV. 833, 873–74 (2011) (discussing the relationship between antitrust and shareholder value).

[241] *See* Megan Wischmeier Shaner, *Officer Accountability*, 32 GA. ST. U. L. REV. 357, 360–63 (2016).

[242] Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767, 767 (2017).

[243] James D. Cox et al., *Understanding the (Ir)relevance of Shareholder Votes on M&A Deals*, 69 DUKE L.J. 503, 504 (2019).

portion of antitrust breakups would not harm shareholders, and many may even benefit them. Of course, it is not, and should not be, the goal of antitrust to break up a company to bring shareholders unrealized gains. Still, the evidence available suggests that any resistance to breakups out of concern of significant harm to shareholders rests on weak foundations.

Despite the absence of evidence of extreme harm to shareholders in the past, to the extent that a monopoly is earning considerable profits from its market dominance, lower stock value would be expected following at least some effective breakups. Putting aside for now the questions surrounding deterrence and fairness,[244] what does the private sector literature on divestitures add to this issue?

As the primary tool for assessing corporate law and antitrust, efficiency would presumably weigh heavily in the comparison of shareholder interests to consumer welfare.[245] Antitrust laws arguably already prioritize consumer welfare over the monopoly owners' interests.[246] To that preexisting hierarchy, this Article has illuminated another efficiency contributor omitted from those analyses: Breakups can "help ensure that managers only retain "assets for which [their firms] have a comparative advantage and sell assets as soon as another firm can manage them more efficiently."[247] That additional efficiency consideration further weakens the argument for letting shareholder harm obstruct breakups.

In summary, substantial valuation drops as a result of breakups are uncertain to happen and of little societal concern if they do. Indeed, as the next section shows, even if every future breakup harms monopolies' shareholders, that result may be valuable to addressing monopolies.

C. Costly Breakups May Increase Deterrence

The discussion so far has questioned whether breakup costs are prohibitively high, especially viewed through the private sector lens on such costs. But the argument has yet to interrogate the predominant assumption in the literature that high breakup costs are unequivocally bad.[248] Upon closer examination, that assumption is incomplete.

Of course, holding all else equal, it is no doubt desirable to expend fewer public resources and seek minimal waste to achieve the same antitrust goal. Nonetheless, to be effective, antitrust remedies must keep companies from seeking monopoly power in the future.[249] As mentioned above, however, the existing empirical critiques that

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[244] Deterrence is discussed infra Section III.C. Those hit hardest would be concentrated shareholders, such as executives and founders of a given large firm, many of whom would have directly benefited from the antitrust violations or have the ability to monitor anticompetitive wrongdoing. Thus, disgorgement of their prior anticompetitive profits would be appropriate to better align incentives and from a fairness perspective.

[245] *See* Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 637-39 (2006).

[246] *See* Ramsi Woodcock, *The Antitrust Case for Consumer Primacy in Corporate Governance*, 10 UC IRVINE L. REV. 1395, 1400 (2020).

[247] Larry Lang et al., *Asset Sales, Firm Performance, and the Agency Costs of Managerial Discretion*, 37 J. FIN. ECON. 3 (1995).

[248] *See supra* Section I.B. (reviewing the hostility to breakups).

[249] George Stigler, *The Economic Effects of the Antitrust Laws*. 9 J.L. & ECON. 225, 227 (1966).

labeled breakups a failure did not consider deterrence.[250] In other words, the indictment of breakups is uninformed by arguably the field's main function, because "U.S. antitrust policy is primarily a *deterrence* system."[251]

One reason for that omission is that the difficulty in measuring deterrence makes it impossible to draw firm conclusions.[252] However, breakups must play a central role in the architecture of antitrust. Unlike in Europe, where "the civil fine is the tool of choice,"[253] U.S. "antitrust laws do not now provide for a civil penalty for monopolization."[254] Nor do antitrust enforcers exercise their ability to pursue disgorgement, which requires a monopoly firm to give up its illegal profits.[255] The costs imposed by a breakup are thus a potential substitute for the deterrent effects of disgorgement and civil penalties.[256] For instance, if remedies were only pursued when they imposed minimal burdens on companies, then there would be few downsides for companies pursuing anticompetitive mergers: In the worst case scenario, they still gain because they keep the monopoly profits they earn until the low-cost breakup.[257]

The current breakup paradigm also gives businesses a blueprint for strategically positioning themselves to avoid breakups. Scholars and courts have emphasized that although it is relatively easy to split a company up when it has merged but kept its operations separate, it would be unwise to break up those same companies once integrated.[258] In 2012, an FTC Bureau of Competition director clarified in an official statement that the agency "is most likely to . . . divest an autonomous, on-going business unit that comprises at least one party's entire business in the relevant market."[259] That policy seeks to ensure that the divested "business unit contains all components necessary to operate autonomously, that it has operated autonomously, that it is segregable from the parent, and that the unit's buyer will be able to maintain or restore competition almost immediately."[260]

Courts have offered related details for merging companies wishing to avoid a later breakup. If a business that merged illegally has been together for some length of time, the court will look at investments made after the merger that may be diminished as a result of the breakup. In the case of two hospitals that merged seven years earlier in

[250] *See supra* Section II.B. Nor do leading examinations of antitrust deterrence necessarily consider breakups of existing monopolies.

[251] Paul L. Joskow, *Transaction Cost Economics*, *Antitrust Rules, and Remedies*, 18 J. L., ECON., & ORG. 95, 98 (2002).

[252] Jo Seldeslachts et al., Settle for Now but Block for Tomorrow: The Deterrence Effects of Merger Policy Tools, 52 J. L. & ECON. 607, 608 (2009).

[253] Stephen Calkins, Civil Monetary Remedies Available to Federal Antitrust Enforcers, 40 U.S.F. L. REV. 567, 570 (2006).

[254] Harry First, *The Case for Antitrust Civil Penalties*, 76 ANTITRUST L.J. 127, 127 (2009).

[255] Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 ANTITRUST L.J. 79, 79 (2009). Private parties could bring follow-on lawsuits for damages, if judges allow. *See* John M. Newman, *The Antitrust Jurisprudence of Neil Gorsuch*, 45 FLA. ST. U. L. REV. 225, 242–48 (2017).

[256] The substitute has the disadvantage of not being well calibrated in terms of the total amount and ability to affect executives personally.

[257] *Cf.* Steven C. Salop, *Merger Settlement and Enforcement Policy for Optimal Deterrence and Maximum Welfare*, 81 FORDHAM L. REV. 2647, 2652 (2013) (applying decision theory to merger review).

[258] *See supra* note 196 and accompanying text.

[259] Richard Feinstein, Dir., Fed. Trade Comm'n Bureau of Competition, Negotiating Merger Remedies 5 (2012)

[260] Id.

violation of antitrust law, for instance, divestiture was found to be too costly because the combined company had invested in improvements to a cardiac surgery program and computer systems.[261] A divestiture could cause delays in the surgery program and glitches in the computer systems.[262]

The implication from these guidance statements and court orders is that executives running a monopoly—whether built organically or through illicit mergers—can improve their chances of never being broken up by integrating all business units. The current framework incentivizes executives to make rapid investments, such as in common technological interfaces that link different parts of the company and ensure that no significant piece operates autonomously.

Anecdotal evidence points to such strategic positioning. After a wave of calls to break up Facebook in 2018 took particular aim at its acquisition of Instagram and WhatsApp,[263] CEO Mark Zuckerberg announced plans to connect these platforms more closely.[264] Similarly, telecom companies were motivated by breakup fears in designing an integrated structure rather than seeking to retain separate modules.[265]

Thus, there is reason to believe that companies strategically take steps post-merger to lessen the likelihood of authorities breaking them up.[266] That maneuvering may help explain the dearth of breakups if savvy businesses are systematically able to integrate more quickly than antitrust authorities can learn that a merger was anticompetitive. Although other reasons exist to integrate, excess integration motivated by breakup avoidance is wasteful. Excess integration is thus doubly harmful, through both short-term higher costs and long-term thwarting of antitrust. Yet these skewed incentives are omitted from the recent literature on breakups.[267]

Additionally, it will be difficult if not impossible for executives to rigorously compare any harms to the company of excess integration, such as the business being "too big to manage."[268] But identifying potential benefits of avoiding a breakup would be more concrete, in the sense of avoiding a costly reorganization. Indeterminacy of estimating breakup effects plagues questions about deterrence, making it impossible to know whether antitrust currently over-deters or under-deters.[269] There is a risk of over-deterring—which could prevent some beneficial mergers or investment in innovation. However, the weight the evidence suggests that antitrust enforcers have been more likely to err on the side of underenforcement.[270] This Article's demonstration of the underappreciated analytic and institutional resistance to breakups strengthens the case for concluding that the current antitrust framework under-deters.[271]

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[261] *In re* Matter of Evanston Northwestern Healthcare Corp., Docket No. 9315, at *11 (F.T.C. Jan. 12, 2006).

[262] *Id.* at *11 n.12.

[263] *See, e.g.*, Micklethwait et al., *supra* note 1.

[264] BBC, *supra* note 187.

[265] David D. Clark, Designing an Internet 256–58 (2018).

[266] For an application of decision theory to antitrust remedies, see Salop, *supra* note 257, at 2652.

[267] *See, e.g.*, Patel, *supra* note 8, at 44 (expressing only the opposite concern of disincentivizing prompt or complete integration for fear of the costs of a mandatory breakup).

[268] *Cf.* Kress, *supra* note 180, at 208–09 (discussing the managerial problems of size).

[269] *See* Calkins, *supra* note 253, at 568 & n.4; Salop, *supra* note 257, at 2649.

[270] *See* KWOKA, *supra* note 108, at 158; Shapiro, *supra* note 22, at 745.

[271] *See supra* Section III.C. On the broader topic of deterrence inconsistencies, see Ramsi A. Woodcock, *Inconsistency in Antitrust*, 68 U. MIAMI L. REV. 105, 159 (2013).

In the extreme, in theory costly breakups could be preferable to cost-free breakups if the benefits of improving deterrence outweighed the administrative waste. From a more realistic perspective, the implication is that the unavoidable costs of breakups can provide societal benefits by discouraging anticompetitive mergers and inefficient comingling. To be clear, enforcers should not purposefully make breakups extra costly.[272] But understood as a byproduct of improving firm-level efficiency, deterrence, and competition, substantial breakup administration costs can contribute to an optimal antitrust policy.

IV. IMPLICATIONS

The statutory root of antitrust authority, the Sherman Act, did not specify the remedy of divestiture.[273] Instead, that authority flows from courts' equity powers, and "is flexible and capable of nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."[274] As a result, a shift toward viewing breakups as administrable can immediately improve antitrust without changing statutes or upending doctrine. Breakup administration also speaks to possible legislative reforms to antitrust that could better address monopolies.

A. Administering Breakups

In assessing breakups as a remedy, the question is how the government might perform today rather than how it performed decades ago. The literature on private sector breakups emphasizes that the success of divestitures varies depending on the design and management of the process.[275] Three principles are important for designing the administration of antitrust breakups: leveraging business sector expertise, streamlining court involvement, and remaining open to large breakups.

The first of these principles, business expertise, is important in light of perhaps the primary sources of resistance to breakups: "Judges aren't good at breaking up companies."[276] Observers are right to doubt courts' competence in administering such day-to-day business decisions. However, that critique of breakups reflects an antiquated understanding of governance.

Since the last large-scale breakup, many agencies have evolved toward what scholars have described as "new governance" and "collaborative" methods of regulation.[277] These and related concepts speak to regulatory process design and are most closely associated among legal scholars with administrative law.[278] In the context of breakup administration, this model of governance would encourage the regulator to leverage private-sector expertise and knowledge rather than recreating it.[279] The

[272] A monetary penalty would be preferable for adding deterrence to breakups.

[273] Sherman Antitrust Act of 1890, 26 Stat. 209 (codified as amended in 15 U.S.C. §§ 1-38 (2018)).

[274] Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 131 (1969).

[275] Christian Thywissen et al., *Process Matters—The Relevance of the Decision Making Process for Divestiture Outcomes*, 51 LONG RANGE PLANNING 267, 278–79 (2018).

[276] Spangler, *supra* note 6;

[277] *See* Freeman, *supra* note 21, at 4.

[278] *See supra* note 21 and accompanying text.

[279] *See* Jody Freeman, *The Private Role In Public Governance*, 75 N.Y.U. L. REV. 543, 549 (2000).

Environmental Protection Agency, Consumer Financial Protection Bureau, and other agencies now pervasively rely on large businesses to develop internal self-regulatory processes, often in the compliance department, or through third-party inspectors. The agencies then monitor or manage the firm's internal self-policing infrastructure.[280]

These new governance models allow the agency to benefit from the firm's skill in designing the best path to achieving a regulatory goal.[281] A key feature of the design is establishing a regular dialogue with regulated entities, in which the regulator learns about and assesses the process and outputs.[282] Viewed through this more expansive new governance lens, the competence of the government in designing and managing breakups should not be the determinative factor in assessing whether breakups are administrable.

By some measures, the FTC has been slower than other agencies in shifting toward new governance. For instance, whereas the CFPB and EPA have about as may lawyers as monitors (examiners and inspectors), the FTC enforces the law almost entirely through lawyers.[283] But the FTC has shown an openness to relying on private parties, such as independent third-party monitors in divestitures.[284] Assuming a large gap exists between the FTC's tactics and regulatory best practices, the differences should lend further confidence that improvements in its historic approach to breakups are possible by moving closer to administrative best practices.

How would these principles translate into administering breakups? Space constraints do not allow for a comprehensive sketch of the process, but the literature in finance, strategy management, and business organization provides insights into how to administer breakups more effectively. Success factors include involving middle managers in implementation,[285] and adopting an effective communication campaign with employees.[286]

Antitrust enforcers should not be expected to become experts on these various details—although hiring industry divestiture experts as antitrust agency employees may help. Enforcers can to some extent leverage the monopoly's internal reorganization capabilities, but relying on a self-serving firm's workforce as the main source of business expertise would be a mistake. Thus, enforcers can increase the chances that the breakup benefits consumers by requiring the firm to pay for outside reorganization experts.

Hiring outside experts to run the breakup is essential because research into private, voluntary divestitures supports the commonsense notion that "serial divesters," or firms that regularly divest, perform far better at divestitures.[287] Yet the dearth of large-

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[280] *See* Van Loo, *supra* note 20, at 401 ("[T]he firm's compliance team essentially serves as the regulatory monitors' agents.").

[281] See Rory Van Loo, The Missing Regulatory State: Monitoring Businesses in an Age of Surveillance, 72 VAND. L. REV. 1563, 1603-04 (2019).

[282] Id.

[283] *See* Van Loo, *supra* note 20, at 411.

[284] BUREAU OF COMPETITION, *supra* note 43, at 27.

[285] *See generally* Danielle Nees, *Increase Your Divestment Effectiveness*, 2 STRATEGIC MGMT. J. 119, 120–21 (1981).

[286] C. Gopinath & Thomas E. Becker, Communication, Procedural Justice, and Employee Attitudes: Relationships Under Conditions of Divestiture, 26 J. MGMT. 63, 63 (2000).

[287] Mark Humphery-Jenner, Ronan Powell & Emma Jincheng Zhang, *Practice Makes Progress: Evidence from Divestitures*, 105 J. BANKING & FIN. 1, 15 (2019).

scale antitrust breakups means that antitrust enforcers lack that experience, including the ability to identify what key information the firm may be hiding that is crucial to a successful divestiture.[288] Nor are monopolies themselves likely to be serial divesters, even if their advice could be trusted. Hiring outside experts brings serial divestiture expertise into the process, since those entities not only have experience in designing effective reorganizations, but in knowing what information they must request of a firm to make effective decisions.

An inevitable challenge is that reorganization experts specialize in adding value to the firm rather than promoting competition. Again, the literature on new governance proves instructive though. To some extent, a similar argument could be made about other industries—that firms specialize in making profits, not in enforcing the law—so why situate compliance within the firm? Part of the answer is that the goal is to build on as much private sector expertise as possible before adding the public regulatory layer. Another way of thinking about this is that a reorganization is difficult enough, so whether the third-party consultants can help with 50 percent, 75 percent, or 90 percent of the process, it is better to leverage that business knowledge rather than ignoring it.

Moreover, the enforcer and trustee would still be involved in managing the design of the plan, in an iterative process. There would thus be a team component to the breakup administration process, weighing various options from both perspectives. The enforcer brings the deeper understanding of what would improve competition that the private sector consultants may lack.

That reporting structure speaks to a related concern. The close working relationship with the monopoly in developing the breakup plan risks industry capture of the process. A captured third-party expert or regulator could encourage breakups that place excess weight on increasing the value of the firm. To address that risk, the monopoly should be required to pay for the third-party experts, but not be allowed to choose them—or at least should not have the final word. Moreover, the third-party experts should agree not to later serve the firms involved in the divestiture for a certain number of years afterwards to avoid conflicts of interest. Additionally, it would reduce capture potential that the consultant would report to and need to have its breakup plan approved by the FTC, DOJ, or other government representative prioritizing competition. These and other adjustments would need to be implemented into the design of breakup administration to address the unavoidable challenges in such a large-scale public-private undertaking.

Although third-party reorganization services can cost millions of dollars, firms often hire such experts when they voluntarily merge and reorganize.[289] Regardless, imposing additional expenses alongside the breakup could help fill the gap of civil penalties in addressing monopolies, thereby making divestitures more deterrent.[290] The purpose is not to increase the costs of the breakup, but the deterrence upside potentially makes such administration-improving costs more acceptable.

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[288] Even with adequate expertise, limited resources create obstacles.

[289] *See The Unit Economics of Consulting: How Much Do McKinsey, BCG and Bain Charge Clients*, ROCKETBLOCKS, https://www.rocketblocks.me/guide/business-model.php (last visited Jan. 5, 2020) (noting that a typical twelve-week strategy case can cost upwards of $1.25 million for consulting firms such as McKinsey or BCG).

[290] *See supra* Section III.C.

To some, a privatized breakup process will seem suboptimal. It is debatable whether it would be preferable for administrative agencies to have the capabilities to design and oversee the day-to-day details of breakups. Similarly, there would be benefits to judges to having the resources and competence to swiftly rule on objections from the monopolist along the way. But that is not the world that exists, and it would require massive government overhauls and increases in public expenditures to get there.

The more relevant question is whether the addition of third-party reorganization expertise—which can be implemented without doctrinal, organizational, or expenditure changes—is a substantial improvement over breakups run by government authorities with limited expertise and resources. More generally, to reject breakups based on either an assumption that the government must do everything or a mistrust of collaborative governance is to hold antitrust to a different standard than other regulators face.[291]

The second principle is to streamline as much as possible the court's involvement in designing and implementing the breakup. Avoiding protracted legal wrangling about the details is important because one of the biggest administrability critiques of breakups is excess delay.[292] A similar problem has motivated new governance models that aim to move from an adversarial to a cooperative relationship.[293] Rather than the agency and firm fighting through court orders to hand over information, the goal is a problem-solving approach in which the firm and the regulated entity work together towards a common compliance goal.[294]

Both the regulator's authority and its approach are relevant to avoiding repeatedly going to court over many details of the breakup. Of course, the monopoly should have a means of weighing in on and submitting evidence about the choice of remedy and the shape of the breakup. At the same time, courts should exercise their discretion to avoid what Microsoft had requested: "substantial discovery, adequate time for preparation and a full trial on relief."[295] When courts grant those requests by deep-pocketed companies, they greatly increase the costs of pursuing a breakup. The monopoly thus succeeds in making that particular case more difficult for resource-strapped enforcers and in weakening the intellectual argument for breakups by providing yet another example of a bogged down, expensive case.

Although many approaches might streamline court involvement, a straightforward path would be to return to the long-established tendency to defer to enforcers' remedy design. Prior to *Microsoft*, after finding antitrust liability, courts were more willing to defer to agencies on the question of remedy.[296] That approach makes more sense in light of what Rebecca Haw Allensworth has identified as the "adversarial economics" problem in antitrust, in which courts struggle to determine the winner of the "battle of the experts" hired by each party.[297] One of Allensworth's solutions is to provide courts

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[291] *See, e.g.*, Freeman, *supra* note 21, at 33-66 (providing regulatory examples).

[292] *See supra* note 262 and accompanying text (discussing delay concerns).

[293] *See* Freeman, *supra* note 21, at 22.

[294] Id.

[295] United States v. Microsoft Corp., 253 F.3d, 34, 103 (D.C. Cir. 2001).

[296] *See* United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 334 (1961).

[297] See generally Rebecca Haw Allensworth, Adversarial Economics in Antitrust Litigation: Losing Academic Consensus in the Battle of the Experts, 106 NW. U. L. REV. 1261 (2012).

with access to third-party expert testimony.[298] Another way of conceptualizing the hiring of third-party reorganization experts is as addressing that dueling economists problem, but outside of the delay-filled court process.

To further improve expediency and expertise, the court should also delegate considerable process administration to a court-appointed trustee, ideally one with deep antitrust and private sector divestiture experience. In recent years, courts have increasingly relied on these parties—sometimes called a special master or monitor—to oversee antitrust remedies.[299] The trustee has unrestricted access to the monopoly, and communicates to the DOJ or FTC any anticompetitive conduct observed.[300] These court-appointed monitors have in many fields become a standard means to "police the firm" following court orders.[301]

The regulatory structure for breakups would thus be best understood as the trustee running the day-to-day process subject to veto by the antitrust enforcer. The trustee and enforcer would oversee a private sector workforce of third-party reorganization experts paid for by the monopoly, in addition to the monopoly's internal experts who inform the breakup plan. Courts would provide a check on the process but should only become involved in unusual circumstances once the breakup process is underway, with heavy deference to the enforcer and trustee-run plan. Perhaps court involvement would be mostly limited to situations in which the enforcer disagreed with the trustee, or some high bar such as abuse of discretion. Those limits are important to ensure that the breakup process stays streamlined.

A third principle for effective administration is removing the government inhibition about pursuing far-reaching breakups. One of the most consistent findings in the empirical literatures on both private and antitrust divestitures is that smaller divestitures leave the separated assets with insufficient resources to compete.[302] Additionally, smaller divestitures may leave the monopoly too large and fail to produce a sufficiently fragmented industry. The FTC's own study of merger approvals concluded as much, since all of its divestitures of ongoing businesses succeeded, "suggesting that the more limited scope of the asset package increases the risk that a remedy will not succeed."[303]

Antitrust authorities appear to have internalized some of those lessons in the past few years. Aside from speeches proclaiming as much,[304] enforcers also in 2018 required the largest divestiture ever, a $9 billion divestiture required in the Bayer/Monsanto deal, along with another sizeable divestiture to DISH as part of the Spring-T-Mobile deal.[305] Granted, those large merger-approval divestitures are small

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[298] *Id.* at 1293.

[299] D. Daniel Sokol, *Policing the Firm*, 89 NOTRE DAME L. REV. 785 (2013).

[300] FTC 1999 DIVESTITURE STUDY, *supra* note 43, at 29–30.

[301] Veronica Root, *The Monitor-"Client" Relationship*, 100 VA. L. REV. 523, 527 (2014).

[302] *See* Duso et al., *supra* note 164, at 1002; Rogowsky, *supra* note 144, at 209.

[303] BUREAU OF COMPETITION, *supra* note 43, at 5.

[304] *See* Makan Delrahim, Ass't Attn'y Gen., Antitrust Div., Dep't of Justice, Keynote Address at American Bar Association's Antitrust Fall Forum (Nov. 16, 2017).

[305] Arthur J. Burke, Ronan P. Harty, Jon Leibowitz, Howard Shelanski & Jesse Solomon, *Davis Polk Discusses Largest U.S. Antitrust Divestiture in Bayer-Monsanto Deal*, COLUM. BLUE SKY BLOG, June 13, 2018, available at https://tinyurl.com/yas8nxah; Antitrust-Horizontal Mergers-DOJ Approves T-Mobile/Sprint Merger Under DISH Network-Entry Theory. Proposed Final Judgment, United States v. Deutsche Telekom Ag, No. 19-Cv-02232 (D.D.C. July 26, 2019), 133 Harv. L. Rev. 739, 741 (2019).

in number, involve the sale of assets to other multinational companies rather than the creation of a standalone company, and amount to a fraction of the size of what the sale of Instagram would be, for instance.[306] Thus, those deals are more limited and likely different in form than would be the case in breaking up some of today's largest companies. Nonetheless, the trend toward larger pre-merger divestitures indicates that antitrust enforcers may recognize the benefits to competition of larger divestitures.

Ironically, the reluctance since the 1980s to push for large breakups stems in part from a fear of messing something up.[307] But by holding back out of fear of mistakes, enforcers make it less probable that those divestitures will succeed as ongoing businesses. Rather than avoiding damage, the antitrust Hippocratic oath has caused harm.[308] Courts and enforcers must be willing not only to pursue breakups, but also to design them to fully address the problem—by analogy, to remove the entire cancerous tumor rather than only part of it.

This discussion is not meant to provide an exhaustive list of administrative best practices. For instance, it would also be ideal to consider accompanying breakups with penalties, to the extent that the costs of a breakup are deemed insufficient for optimal deterrence. Nor should the discussion be taken as suggesting that antitrust breakups as described here would be a straightforward undertaking. Like any private reorganization and any government intervention in private affairs, they would often prove messy and imperfect.

Nonetheless, there is no doubt that the historical approach to administering breakups can be meaningfully improved upon—a process that has already begun. Moreover, as antitrust enforcers gain experience administering breakups they will become better process supervisors.[309] In addition to leveraging existing private sector experience, regulators should adopt the prevailing corporate mindset recognizing glitches as parts of a worthwhile process. Unavoidable setbacks provide opportunities to improve administration rather than reason to abandon a remedy that is well within modern collaborative regulators' sphere of competence.

B. Choosing Breakups

This Article's main implication concerns enforcers' and courts' perception of breakups. The predominant discomfort with breakups as a remedy is rooted in two misperceptions. The first is that the government is disastrous at administering breakups. The second is that the risks of a breakup are tremendous. Neither of these is supported in the literature, particularly once breakups are viewed in terms of how they would and should be administered today, rather than how they were implemented decades ago.

As a result, at the very least, there is a need for greater openness to deploying breakups. As part of this increased openness, courts should view with great skepticism dire predictions that breakups will destroy shareholder value, consumer welfare, the

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[306] *See supra* note 44 and accompanying text.
[307] *See supra* Section I.B (explaining the origins of hostility to breakups).
[308] On the Hippocratic Oath, see Shelanski & Sidak, *supra* note 64, at 2.
[309] *Cf.* Humphery-Jenner, Powell & Zhang, *supra* note 287, at 15.

industry, or the economy. Faced with a government breakup, businesses have historically developed self-serving estimates that later proved to be wrong.[310]

The question then becomes how much more than openness is warranted. Is there support for a regulatory or judicial default assumption that breakups are the superior remedy? Once a firm has violated antitrust law, choosing a remedy amounts to a prediction of whether breakups would be superior to other alternatives.

1. Comparing Breakups to Access Remedies

This section focuses on the alternative remedy of mandated access in the post-merger context. But much of the analysis is relevant to other behavioral remedies and to other liability contexts. The focus on access mandates reflects their prevalence in recent breakup conversations as the leading alternative suggested instead of breakups. Some critiques of AT&T's dissolution emphasize that a better solution would have been to mandate that AT&T allow competitors to use its telephone network.[311] One of the prominent alternative remedies proposed instead of splitting Instagram from Facebook is to require "that Facebook enable open interconnection between itself and any new market entrant."[312] The preference by many for this alternative is rooted in a skepticism about breakups' administrability, even in the post-merger context.[313] Additionally, access remedies are more appealing than other behavioral remedies in the post-merger context, there may be no conduct to prohibit moving forward that would address the prior merger.

Comparing access remedies to breakups is a context-specific undertaking and thus it would be of limited value to attempt to declare one remedy as superior to the other overall. Access remedies have the potential to improve consumer welfare, particularly in the context of financial and technology platforms or when a breakup would destroy what consumers value most in a company.[314] Moreover, breakups and access remedies together will sometimes be necessary.[315]

It would nonetheless be a mistake to view breakups as inherently more costly and messy simply because two merged companies have integrated. Scholars have pointed out that access remedies require ongoing "sophisticated oversight and dispute resolution mechanisms that typically exceed the resources and strengths of the enforcement agencies."[316] Although the perception of bad experiences with breakups soured antitrust decision-makers, "our experience with conduct remedies has also not

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[310] *See supra* Section II.A.

[311] *See id.* at 189; Epstein, *supra* note 62, at 161-63.

[312] Scott Morton, *supra* note 7.

[313] *See, e.g.*, SMorton, *supra* note 7.

[314] *See* Rory Van Loo, *Digital Market Perfection*, 117 MICH. L. REV. 815, 836 (2019); Rory Van Loo, *Making Innovation More Competitive: The Case of Fintech*, 65 UCLA L. REV. 232, 234 (2018).

[315] If separated from Instagram after showing the merger had been anticompetitive, Facebook might still be found to undermine competition—at which point mandating interoperability with other social networks may prove valuable. For an in-depth treatment of Facebook emphasizing behavioral remedies, see Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 BERKELEY BUS. L.J. 39, 81-82 (2019).

[316] Spencer Weber Waller, *Access and Information Remedies in High-Tech Antitrust*, 8 J. COMP. L. & ECON. 575, 575–77 (2012).

been satisfying, and there is little reason to think that such decrees work any better in monopolization cases."[317] In the most recent large-scale case that included access remedies, Microsoft was involved with the court for sixteen years, until 2011.[318] Thus, a similar narrative of administrative messiness can be crafted about access remedies as exists for breakups.

Moreover, given the outdated antitrust view of breakups, many observers may have compared access remedies implemented recently with breakups administered decades ago. A more rigorous comparison would reflect how enforcers would administer breakups today—by leveraging private sector expertise.[319] Within that proper frame of reference, there is no strong evidentiary basis for access remedies as more administrable.

Nor do those arguments in favor of access remedies consider the types of economic gains identified in this Article for breakups. The antitrust analysis sees the benefits of intervention in terms of consumer welfare, and the remedies as part of the costs. However, to those consumer welfare benefits, breakups *as a remedy* add extraneous societal gains of nimbler, more efficient firms.[320] Included in those overlooked benefits are the reorganization and systems upgrade expenses that can be handled during the breakup and that even a well-run monopoly would have undertaken anyways.[321] Access remedies, and indeed behavioral remedies overall, do not provide those additional benefits. For large monopolies, breakups' added efficiency could be substantial.

These additional considerations may be enough to tip the remedy scale in breakups' favor in many cases. But given the dearth of recent data points available, the empirical case for a breakup preference is weak. The safe stance would therefore be to declare that the remedy analysis should be undertaken from a place of neutrality. A neutral starting point defers the choice of remedy to future sophisticated cost-benefit analyses tailored to the facts of a given case.

There are risks in adopting a facially neutral approach, however. Neutrality towards remedies would be ideal if the remedy analysis were truly objective, informed by the interdisciplinary empirics relevant to breakups, and able to adjust for deterrence. However, arguably the primary "dilemma facing antitrust enforcers is to balance the costs and benefits in a world without perfect information."[322] In all likelihood, faced with a sophisticated economic argument against breakups from industry, in many cases the government's economists will fail to establish any particular remedy as definitively preferable.[323]

As a result, despite the intention to remain objective, the decision will still often come down to a judgment call. Behavioral economics has shown that unrecognized biases influence even experts' decisions.[324] Institutions and ideologies resist change,

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[317] HOVENKAMP, *supra* note 57, at 301–02.

[318] *See* United States v. Microsoft Corp., 159 F.R.D. 318 (D.D.C. 1995); Press Release, The U.S. Dep't of Justice, Microsoft Antitrust Final Judgment Expires May 12 (May 11, 2011).

[319] *See supra* section IV.A.

[320] *Supra* Part III.

[321] *Supra* Part III. These can instead be seen as reducing breakups' costs.

[322] Rogowsky, *supra* note 144, at 191.

[323] *Cf.* Allensworth, *supra* note 297, at 1293 (explaining adversarial antitrust economics).

[324] *See* Stephen J. Choi & A.C. Pritchard, *Behavioral Economics and the SEC*, 56 STAN. L. REV. 1, 25-27 (2003).

and even in scientific experiments what people conclude depends partly on what their preconceptions have taught them to see.[325] Moreover, wealthy firms exert considerable influence on the political process and consistently argue against breakups.[326] The most influential actors in the private sector would thus overall be expected to pressure antitrust policy away from breakups. Of course, officials may still choose breakups under intense public or political pressure, such as that surrounding their ongoing investigations of Amazon, Facebook, and Google.[327] But in the absence of such extraordinary influence, the psychologically and politically attractive choice for an unsure enforcer may be to settle for a remedy other than a breakup. A purportedly neutral approach risks amounting to a de facto preference for remedies other than breakups.[328]

Is a de facto default to behavioral remedies desirable? In theory, a behavioral remedy default allows for lighter antitrust intervention. A preference for behavioral remedies is thus appropriate when there is concern about over-enforcement or over-deterrence. However, if scholars are correct that antitrust faces the opposite problem, there are institutional design foundations for a default to breakups.

More ex post breakups can improve ex ante identification of harmful mergers. Since firms proposing a merger have far more extensive information than do antitrust authorities, they are in a better position to predict whether a given merger will later prove anticompetitive. By pursuing the remedy that firms dislike the most, ex post breakups can cause firms to internalize the costs of anticompetitive mergers. Holding enforcers' merger approval process constant,[329] an increase in ex post breakups would therefore overall add more of the private sector's sophistication to determining which mergers should not move forward due to anticompetitive concerns.[330] The potential to better calibrate antitrust diagnostics support a breakup default.

Institutional design considerations also apply to the administration of the remedy. Even with a flawless design, access mandates usually require ongoing oversight. Consequently, executives can retain their monopoly power if they can sufficiently outmaneuver regulatory monitoring. More broadly, there are many different ways to abuse monopoly power. As a result, beyond policing a firm for a specific behavioral remedy, the government must have mechanisms for policing that same firm for different violations.

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[325] Thomas S. Kuhn, The Structure of Scientific Revolutions 113 (1962).

[326] *See, e.g.,* Matthew C. Stephenson & Howell E. Jackson, *Lobbyists as Imperfect Agents: Implications for Public Policy in A Pluralist System*, 47 HARV. J. ON LEGIS. 1 (2010) (linking lobbying to a status quo bias); Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383, 400 (2017) (explaining how market position can provide leverage with government).

[327] *See* Jacob M. Schlesinger et al., *Hunting for Giants*, WALL ST. J., June 12, 2019, at A1.

[328] Or, more precisely, a de facto default to remedies other than breakups.

[329] Of course, for ex post breakups to improve antitrust they must not cause public regulators to invest less in ex ante screening for problematic mergers. An extreme breakup default could overall harm antitrust if it caused authorities to defer the pre-merger approval process until later. However, given the current starting point of extreme resistance to breakups and heavy industry influence in politics, such a swing is unlikely and could be addressed if it materializes rather than using such an argument as a reason to avoid a clear improvement.

[330] Antitrust relies on both public and private actors for enforcement. *See, e.g.*, Steves and Sons, Inc. v. JELD-WEN, Inc., 345 F.Supp.3d 614, 648 (E.D. Va. 2018) (considering private suits to enforce antitrust law).

A breakup that addresses monopoly power, rather than leaving it intact, offers the greatest potential to save both of those ongoing sources of regulatory oversight. The private sector has greater resources and sophistication than antitrust authorities, whose budgets have not grown or have shrunk even as the markets they regulate expanded considerably.[331] Access remedies requiring enduring government involvement are therefore more in tension with agencies' resource and sophistication limitations than are breakups, which offer a clear end point.[332]

Another institutional limitation on antitrust authorities is that their leadership is subject to sudden changes in the political process when new presidential administrations arrive. Consequently, a monopoly subject to behavioral constraints could wait for a more deregulatory political regime to assume control of antitrust enforcement, at which point the monopolist could petition for lax monitoring or removal of the restraints.[333] Relatedly, the monopoly's efforts to capture enforcers are more constant than public attention. That asymmetry in pressure and the subtle nature of regulatory monitoring make access mandates vulnerable to erosion.

Breakups are inherently more resistant to the political process.[334] Granted, the changing of presidential administrations complicated the government's decision not to continue pursuing a breakup of Microsoft following the appeal.[335] Still, once a breakup is achieved it is comparatively more difficult for a future pro-monopoly FTC, for instance, to reconstruct the prior monopoly. Thus, breakups may be more likely to succeed because they require less monitoring by both the enforcer and the public.

Finally, breakups are the more market-oriented remedy. Those arguing for inaction or the continuation of more cautious antitrust enforcement often reason that dynamic competition will ultimately unseat even monopolies.[336] That view weighs in favor of conduct over structural remedies, because markets have the chance to respond to inevitable imperfections in the breakup administration. In contrast, with access remedies, private actors face a sustained non-market constraint. Those putting faith in markets, and dynamic competition, should thus find that mandated breakups driven by the private sector are the more appealing antitrust remedy.

The case for a breakup default is strongest in the case of consummated mergers. It may thus be worth shifting the burden of proof onto the party arguing against breakups in the post-merger context. Moreover, as Steven Salop has argued, antitrust authorities should consider requiring divestitures of the company even if the divested pieces are unrelated to the original anticompetitive merger.[337] That principle is crucial

[331] *See* Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467, 511 (2020).

[332] Industry can later consolidate—thus the need to prevent and deter.

[333] *See supra* Section III.C.

[334] *But see* Frank H. Easterbrook, *The Limits of Antitrust,* 63 TEX. L. REV. 1 (1984) ("[T]he economic system corrects monopoly more readily than it corrects judicial errors.").

[335] Harry First & Andrew I. Gavil, *Re-Framing Windows: The Durable Meaning of the Microsoft Antitrust Litigation*, 2006 UTAH L. REV. 641, 688 (2006).

[336] *See* Shelanski & Sidak, *supra* note 64, at 10–11 (describing classic antitrust theory). For an application of market forces to the division of assets, emphasizing the ease of forced intellectual property licensing, see Ramsi Woodcock, *Antitrust's Messy Breakup Fallacy*, WHAT AM I MISSING (Jan. 15, 2019), https://zephyranth.pw/2019/01/15/antitrusts-messy-breakup-fallacy.

[337] Salop, *supra* note 36, at 18–19.

in the context of a monopoly's acquisition of a nascent competitor, which may have halted the competitor during the sole window of time comprising any true threat.[338]

Should breakups be the default remedy beyond the post-merger context? Although a universal antitrust breakup default for non-merger cases is unwarranted, the traditional deference to enforcers' choice of remedy seems sensible—even if the remedy is a breakup. In choosing a remedy, however, enforcers should consider the factors mentioned above—the challenges of policing monopolies for behavioral remedies, need for deterrence, and broader economic benefits of breakups. Enforcers and judges should then make the final decision based on what would most help consumers and society rather than which remedy fits the wrong most closely.

2. Comparing Breakups to Inaction and Other Alternatives

Space constraints do not allow for devoting similar attention to comparing other alternatives, but a few brief notes are in order. Other alternatives include financial penalties, regulation outside of antitrust, and inaction. Financial penalties are difficult and impractical to set at a deterrent level.[339] These and other alternatives are worthy of sustained examination, and in some contexts one or several of them combined may be superior to breakups. However, overall, conduct prohibitions and penalties are less promising than other options for returning the full costs of the anticompetitive merger back to society moving forward.

In terms of regulatory interventions outside of antitrust, new legal rules would be needed for many such proposals for oversight, such as treating online platforms as utilities.[340] Thus, those outside-of-antitrust alternatives may not be practical—making the real choice between an antitrust remedy and no intervention.

If breakups cannot be used once a company has integrated, for some the best option would be inaction. There is little doubt that preventing anticompetitive mergers beforehand is better than prosecuting them afterwards. Moreover, , the lowest-cost intervention—narrowly defined as the expenditures by government—will always be to do nothing and hope that markets will dislodge the monopoly, such as through disruptive innovation.[341] And it is hard to argue with the proposition that, all else equal, antitrust should promote competition through the intervention with the least administrative costs.

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[338] For a discussion of Facebook making defensive acquisitions, see C. Scott Hemphill, *Disruptive Incumbents: Platform Competition in an Age of Machine Learning*, 119 COLUM. L. REV. 1973, 1987 (2019).

[339] *See* Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443, 475 (2006). The present value of future monopoly gains is speculative and presumably large. Moreover, given enforcement costs and imperfect detection, optimal deterrence would likely need to exceed the full costs to the monopoly. Margaret Guerin-Calvert, Keith N. Hylton, Daniel L. Rubinfeld, Gregory J. Werden, Koren Wong-Ervin & Terry Calvani, *Some Thoughts on Cartel Sanctions*, 18 ANTITRUST SOURCE 1, 2 (2019). That level of fine may shut down the company and harm consumers overall. For a general review of deterrence theory and applications to antitrust, see Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421 (1998).

[340] *See* K. Sabeel Rahman, The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept, 39 CARDOZO L. REV. 1621, 1670 (2018).

[341] *See* Carstensen, *supra* note 118, at 840.

However, it is difficult to identify all anticompetitive mergers in advance.[342] Additionally, if the goal is to address monopoly power, we cannot be assured that an organic market disruption is around the corner. An extreme faith in markets to solve all problems has become far less common than it was during formative years in antitrust development.[343] Since then, Nobel-prize winning work in transaction costs, behavioral economics, and information asymmetries has laid the foundations showing that market failures are widespread and persistent.[344]

Moreover, the economic goal is not to lower the expenses incurred by the government and the monopoly in implementing the remedy. Instead, it is to advance competitive markets that improve consumer welfare—measured, in great part, by efficiency.[345] To be sure, an efficiency analysis should include the remedy implementation expenses. But there is no strong evidence that antitrust breakups harm efficiency.[346] Therefore, the remedy that costs the least to implement—inaction—can be by far the economically most harmful choice if it leaves in place a monopolist that substantially lowers consumer welfare—or provides incentives for anticompetitive mergers.

A default to breakups would leave open the possibility of convincing evidence swaying the remedy choice in another direction, including inaction. If a startup is gaining rapid market share with a game-changing technology, for instance, inaction may be preferable. Absent such compelling evidence to the contrary, however, when deciding between breakups and inaction, there is strong support for defaulting to pursuing a breakup remedy.

In summary, the design of remedies should reflect antitrust law's institutional and political constraints. When the cost-benefit analysis yields a clear preferable remedy in any given case, that remedy should be adopted. However, in many cases economic analysis will fail to yield any firm conclusion as to the best remedy. In light of the existing constraints on antitrust agencies and trials, a purportedly neutral approach may produce outcomes counter to what antitrust most needs given the pressures toward under-deterrence. Furthermore, a working hypothesis that begins with breakups as the preferred remedy, and resolves ambiguity in their favor, would result in more actual breakups. It would thus produce the data points needed to reassess the hypothesis and readjust in accordance with up-to-date, sophisticated empirics rather than outdated studies, historical anecdotes, and intuition. As a practical matter, a breakup default may be necessary to right the course toward eventually choosing breakups on the merits.

C. Expanding Breakups

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[342] *See* Michael L. Katz & Howard A. Shelanski, *Merger Analysis and the Treatment of Uncertainty: Should We Expect Better?*, 74 ANTITRUST L.J. 537, 538 (2007) (noting error risks).

[343] *See* Shelanski & Sidak, *supra* note 64, at 11 (citing the decline of Schumpeterian influence).

[344] The recipients include Ronald Coase (1991) and Douglas North (1993) for transaction costs; George Akerlof, Michael Spence, and Joseph E. Stiglitz (2001) for information asymmetries; and Daniel Kahneman (2002) and Richard Thaler (2017) for behavioral economics. *All Prizes in Economic Sciences*, NOBEL PRIZE, https://www.nobelprize.org/prizes/uncategorized/all-prizes-in-economic-sciences/ [https://perma.cc/9SZ4-BQNT].

[345] *See, e.g.*, Shelanski & Sidak, *supra* note 64, at 19 (discussing allocative efficiency).

[346] *See supra* Part II.

Greater clarity about administering breakups speaks to perhaps the most controversial antitrust entity: the monopoly that did not obtain its dominance through mergers and has done nothing illegal. As a matter of law, "monopolists are permitted to keep their lawfully acquired market positions so long as they do not engage in exclusionary practices."[347] Those firms can charge monopoly prices.

This Article does not establish that society would be better off by getting rid of the conduct requirement and making even monopolies obtained by "superior skill, foresight and industry"[348] illegal. However, in two main ways a more comprehensive understanding of breakups weakens the existing antitrust allowance of such "successful" monopolies. First, the leading justification for allowing monopolies to exist and charge monopoly prices is to provide incentives for innovation and investment.[349] Most famously, Justice Scalia explained:

> The 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.[350]

DOJ officials have echoed those concerns by citing as the leading, if not the only, obstacle the need "to protect the very incentives to innovate."[351] In particular, the articulated fear is discouraging entrepreneurs from starting up a company.[352]

In other words, innovation is the principal reason given not to break up a firm that is charging monopoly prices. Absent that concern, society would be better off ending the consumer welfare harms from monopoly pricing. The innovation argument in favor of monopolies is powerful because many see innovation as the most important driver of economic growth and progress.[353]

The protection of innovation is valuable. In light of what breakups can accomplish as a remedy, however, innovation concerns do not support the current antitrust

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[347] Hovenkamp, *supra* note 7, at 98–99.

[348] United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945).

[349] *See, e.g.*, David S. Evans & Keith N. Hylton, *The Lawful Acquisition and Exercise of Monopoly Power and Its Implications for the Objectives of Antitrust*, COMPETITION POL'Y INT'L, Autumn 2008, at 203 ("U.S. antitrust laws recognize . . . . monopoly profits as the desirable rewards for entrepreneurship.").

[350] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407 (2004).

[351] Makan Delrahim, Assistant Attorney Gen., U.S. Dep't of Justice, Start Me Up: Start-Up Nations, Innovation, and Antitrust Policy, Remarks at the University of Haifa (Oct. 17, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-university-haifa-israel.

[352] *Id.*

[353] *See* MICHAEL A. CARRIER, INNOVATION FOR THE 21ST CENTURY (2009); Howard Shelanski, *Information, Innovation, and Competition Policy*,161 U. PA. L. REV. 1663, 1667 (2013).

permissiveness of success-driven monopolies. To assess that concern, it bears emphasis that breaking up an organic monopoly would only happen when a company becomes extremely successful. That constraint means that the breakup could unfold in a way that would offer those who built the company sufficient rewards for their innovation.

To illustrate, consider how the innovation source of resistance to breakups would play out in the leading targets for breakups, Google, Facebook, and Amazon. If Amazon were split between into several companies—say its cloud computing business, its Amazon-owned sales business, and a platform—founder and CEO Jeff Bezos would still own stakes in enormous companies and still be among the wealthiest humans ever to exist, like Rockefeller was after the government carved up Standard Oil.[354] It is hard to imagine future entrepreneurs would look to Bezos at that point and somehow be discouraged from following similar paths.

As further perspective, consider a hypothetical in which Amazon, Google, and Facebook were by some antitrust administrative mistake shut down today. In such a scenario, those companies' founders would still be extraordinarily wealthy. It is not clear that even under those circumstances entrepreneurs would be discouraged from a path whose worst-case antitrust scenario was extremely unlikely and would still leave them so well off and famous. Moreover, if such outcomes occurred by mistake, reforms could be implemented to halt or change the breakup process. To be clear, this Article does not propose such a scenario, which would be riskier from the perspective of innovation incentives and would harm consumer welfare. Still, the hypothetical is informative because it shows the limited downsides as measured by the innovation argument's main concern.

Moreover, the sale of the company's assets can be assessed before completing the forced deal. If the proposed sale would leave the monopoly's founders and investors uncompensated to a degree that might discourage future innovation, the government could change course. That approach would address scholarly concerns about making investments in research and development unprofitable. The current policy of blanket prohibitions even of breakups that would leave innovators amply compensated—a policy justified by concerns about those innovators—is inconsistent with the prevalence of profitable private divestitures that leave shareholders better off.[355]

Additionally, a defining feature of entrepreneurship is "high risk."[356] The vast majority of startups fail to yield significant returns on investment.[357] If by error, occasionally antitrust enforcement erased the wealth of an innovator who created a monopoly, it would be counterintuitive if such rare occurrences would discourage a group of people who are already undeterred by long odds. Of course, if breakups routinely wiped out the wealth of entrepreneurs, that would risk changing incentives. Again, though, the historical record does not indicate that breakups impoverish entrepreneurs.

Despite the existing policy's questionable foundations, the valid concerns about harming innovation should still inform the design of any no-fault monopolization

[354] *See supra* note 225 and accompanying text.

[355] *See supra* Part III.A.

[356] *See* D. Daniel Sokol, *Antitrust's "Curse of Bigness" Problem*, 118 MICH. L. REV. 1259, 1275 (2020).

[357] William R. Kerr et al., *Entrepreneurship as Experimentation*, J. ECON. PERSP., Summer 2014, at 26.

standard.[358] As mentioned above, when the remedy responds to a consummated merger or other illegal conduct, a breakup may need to be accompanied by disgorgement or penalties to sufficiently deter. However, when breakups are used against monopoly power obtained legally—by offering a better product—such a penalty need not be part of the remedy. The goal would be to remove or lower the ability to exercise monopoly power. By allowing the entrepreneur in such situations to split up the successful monopoly and reap the rewards of the market price of that sale, antitrust law can address the harms from monopolies and the concerns about discouraging monopolies built on successful products.

The innovation discussion in this section has so far focused on incentives to innovate up to the point of becoming a monopoly because that is the chief justification for the current antitrust regime. A related issue is worth considering briefly, albeit of secondary importance: What would be the effects on innovation moving forward of breaking up a monopoly? Antitrust scholars are divided on how such an intervention would affect innovation,[359] but those debates omit the private sector perspective on breakups. Many large firms have broken themselves up to become more innovative.[360] There is reason to believe monopolies would be unlikely to pursue such innovation-improving divestitures if the effect would be to lessen their monopoly rents.

Thus, although it is beyond the scope here to settle the broader debate about innovation and antitrust, the most prominent normative foundation for allowing monopolies is in tension with a business sector view of breakups and innovation. It is inaccurate to state that we must tolerate monopoly prices because doing so is vital to motivating innovation. A more refined understanding of breakups shows that antitrust law can have it both ways by breaking up some currently lawful monopolies.

Moving beyond innovation, the rehabilitation of breakups informs debates about reforming antitrust law's treatment of successful monopolies. The law's permissiveness of monopolies is easier to defend from a paradigm of breakups being unwieldy. If breakups are viewed as disastrous or radical, there may be no viable remedy for a company that acquired and maintained its monopoly power legally. Behavioral remedies could work in some situations, but there would be no wrongful conduct to fix for an otherwise law-abiding firm.

Moreover, to preserve innovation incentives an organic monopoly would presumably need to be compensated by competitors for providing access. That would require the government to oversee the pricing of that access over time. Even more problematic would be situations in which access and traditional behavioral remedies would not fit. In those cases, the only remedy that would address monopoly prices may be price control, or the government setting the price of the monopoly's products at something reflecting the competitive level. Yet price controls are economically disfavored.[361]

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[358] On the importance of innovation informing antitrust remedies, see Keith N. Hylton, *A Unified Framework for Competition Policy and Innovation Policy*, 22 TEX. INTELL. PROP. L.J. 163 (2014).

[359] For overviews, see Tim Wu, *Taking Innovation Seriously: Antitrust Enforcement If Innovation Mattered Most*, 78 ANTITRUST L.J. 313, 314 (2012); Woodcock, *supra* note 246, at 1415-21.

[360] *Supra* Part III.A.

[361] Joseph R. Mason et al., *The Economic Impact of Eliminating Preemption of State Consumer Protection Laws*, 12 U. PA. J. BUS. L. 781, 795 (2010). Exceptions include utilities.

In other words, one of the potential obstacles to reforming antitrust law to prosecute more monopolies is the uncertainty how to intervene. An informed view of breakups provides a workable and promising remedy. There would need to be other reasons to want to allow the law to continue permitting monopolies, rather than due to the absence of a feasible remedy.

It bears emphasis that there is room for large businesses and some concentrated markets that bring more benefit to consumers and society than alternatives. The question of when a broken-up industry would improve consumer welfare is not the focus of this Article. But some companies, such as social networks, can only be broken up so far in the traditional sense without ruining what is valuable to consumers.[362]

The costs of a breakup are real and appropriate to consider in choosing the remedy. And courts should retain skepticism when it is not the government seeking the breakup, but a competitor suing its rival. A more expansive vision for breakups may be in order, but that does not mean the government should go on a rampage to make all industries fragmented.

Rather, the main point is that some of the key foundations for the current near-universal allowance of organic monopolies erodes when viewed in the context of what is known about governance and divestitures *outside of antitrust*. There are other non-economic reasons some may oppose or support antitrust breakups of organic monopolies.[363] But the leading economic foundations for allowing monopolies—providing motivation to innovate—are conjectural. Those foundations also sit in tension with widespread business practices, history, and a common sense consideration of the example set by wealthy founders of broken up companies.

In contrast, there are well-established consumer welfare harms from a firm charging monopoly prices.[364] Thus, the main economic argument cited by Supreme Court justices, scholars, and antitrust authorities does not hold as the foundation for a universal rule that monopolies should not be broken up.

A more accurate understanding of administrability illuminates not only the flaws in the current regime, but also the path forward. It is possible to construct an antitrust policy that reflects both that valid emphasis on innovation and the economic value of limiting monopoly power. Legislative reforms would, for companies who obtained and maintained excess monopoly power lawfully, seek to break up those companies when possible to do so in a way that both preserves the core appeal to consumers and rewards the entrepreneurs for their innovation. Like in other areas of antitrust, judicial review would provide a check on abuse of such power.

Note that this proposal channels the leading scholarly justification of the status quo—innovation incentives—into designing a better approach to administering breakups. The framework is likewise consistent with Justice Scalia's emphasis on allowing monopoly profits "at least for a short period," since—unlike in the case of monopolies obtained or maintained by unlawful conduct—the breakup of lawful monopolies would not involve disgorgement of those prior monopoly profits.

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[362] For a thoughtful challenge to no-fault monopolization, see Marina Lao, *No-Fault Digital Platform Monopolization*, 61 WM. & MARY L. REV. 755 (2020).

[363] Pro-monopoly arguments include autonomy and fears of government abuse of power, though similar arguments apply generally to antitrust law. Labor (employment) is relevant. Arguments against monopolies include the consolidation of political power and inequality.

[364] *See* Lao, *supra* note 359, at 789 (reviewing the literature).

In summary, without breakups, there will sometimes be nothing that antitrust can do to advance competition. Greater openness to breakups should be pursued because they address the clear harm of monopolies instead of emphasizing unproven risks of disastrous breakups or stifled innovation. Removing breakups' administrative misperceptions will recharge the law's power to combat monopolies, and make the field less vulnerable to accusations of "irrelevance."[365] When breakups would benefit society, lawmakers and enforcers should not hesitate to use them—even in the face of monopolies previously thought untouchable.

CONCLUSION

The field of antitrust would benefit from a more interdisciplinary examination of breakups, drawing on both administrative law scholarship and business scholarship. An outside-of-antitrust lens, along with a closer look at the existing case against breakups, reveals that the widespread, deeply ingrained antitrust hostility to breakups is unfounded. There is insufficient evidence that government-mandated breakups have harmed the economy. Moreover, business executives and shareholders regularly initiate breakups as part of good corporate governance. Owners overall emerge from those events wealthier than before, despite substantial costs, delays, and organizational upheaval. Antitrust authorities are being held to a standard of success that would cripple private sector mergers and acquisitions. Unless evidence emerges suggesting that such interventions are harmful, enforcers and courts should more liberally pursue breakups, and legislators should consider expanding the remedy's reach to currently legal monopolies.

Indeed, it is quite possible that even the breakup of companies incorrectly targeted could yield benefits to the economy and to the company. CEOs often pursue counterproductive empire building, thus producing more unmanageable companies that are unable to adapt with modern fast-changing markets. Many antitrust breakups would also yield non-antitrust efficiency and innovation gains currently omitted from the antitrust analysis. Although indiscriminate breakups would be counterproductive, these obscured gains show that the risks of incorrect identification are not as grave as characterized.

Most importantly, the potential upside for competition, and society, is substantial. Perhaps a better analogy for antitrust than unscrambling eggs is that controlled burns help reinvigorate forests, allowing ecosystems to regenerate and emerge more resilient than before. The working hypothesis moving forward should be that more breakups would have a similar effect on markets: they have short-term costs in the service of preserving market health and competition in the long term. The only way to test that hypothesis is to begin exercising the authority that has long existed and that lawmakers and antitrust authorities have become irrationally reluctant to use. Doing so may not only end the mismanagement of the ultimate antitrust remedy, but also free the field from any enforcement paralysis.

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[365] Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2543 (2013) (describing criticism of antitrust).