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## BESPOKE ANTITRUST

HARRY FIRST† and SPENCER WEBER WALLER††

*Antitrust laws in the United States and competition rules in Europe are usually set out in statutes of general applicability, written in broad, almost constitutional, form. This is a “one size fits all” statutory style. There is another possible style of antitrust, which we call “bespoke antitrust.” It consists of specialized rules customized for the industry, for a particular plaintiff or defendant, or for the practice in question.*

*In this article we describe the under-appreciated trend toward bespoke antitrust law. We think that this trend shows up in case law, enforcement agency practice, and regulatory alternatives. We also look at existing and new proposals to create more bespoke antitrust rules and institutions to deal with the challenges of digital platforms and other dominant firms in the tech space. This, we believe, is a particularly important example of the trend toward more bespoke rules for competition law.*

*We conclude with a cautious endorsement and some caveats. There are important areas where targeted efforts are worth the price, but bespoke antitrust can be expensive to implement. More importantly, it can threaten the rule of law by carving out exemptions if society (or the beneficiaries) are willing to pay the price. Nevertheless, custom tailoring does have an important place in the design of antitrust law.*

### I. INTRODUCTION: OFF-THE-RACK OR COUTURE?

Antitrust law in the United States (“U.S.”) is often referred to as the “Magna Carta of free enterprise.”<sup>1</sup> It provides the ground rules for market capitalism with three basic broad, almost constitutional statutes of general applicability—the Sherman Act,<sup>2</sup> Clayton Act,<sup>3</sup> and Federal Trade Commission Act.<sup>4</sup> In the European Union (“EU”), the competition rules are in the Treaty on the Functioning

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†† John Paul Stevens Chair in Competition Law, Professor and Director, Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law. Email: [swalle1@luc.edu](mailto:swalle1@luc.edu). This article is dedicated to the memory of Tom Horton, whose talent, enthusiasm, and kindness knew no bounds.

1. United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).
2. 15 U.S.C. §§ 1-7.
3. 15 U.S.C. §§ 12-27.
4. 15 U.S.C. §§ 41-58.

of the European Union and the Merger Regulation.<sup>5</sup> These competition rules similarly provide a broad framework of general applicability, part of an *acquis communautaire* binding on the member states, their citizens through the doctrine of direct effect, the member states of the European Economic Area (“EEA”), and other preferred trading partners of the EU.<sup>6</sup>

We might call this style of antitrust “one size fits all” or “off-the-rack.” There is another possible style of antitrust, though, which we call “bespoke antitrust.” It consists of specialized rules customized for the industry, a particular plaintiff or defendant, or for the practice in question. Custom-tailored rules and institutions normally fit and look better but also cost significantly more than the mass-produced equivalents. In the real world, the extra costs may well be worth it for a fancy dress or suit but rarely so for casual shirts or jeans.

In the legal realm, the same trade-off exists for the legal regulation of markets. The time and costs of exquisite tailoring must be compared to a mass-produced, low-cost garment that serves ordinary everyday needs.

In this article we describe the under-appreciated trend toward bespoke antitrust law that we see happening today. We think that this trend shows up in case law, enforcement agency practice, and regulatory alternatives. We also look at existing and new proposals to create more bespoke antitrust rules and institutions to deal with the challenges of digital platforms and other dominant firms in the tech space, both in the U.S. and abroad. This, we believe, is a particularly important example of the trend toward more bespoke rules for competition law.

Our examination of current trends leads us to the question of whether this trend is a good one. Our conclusion is a cautious endorsement of bespoke, but with two caveats. One caveat is a basic efficiency concern: bespoke antitrust is expensive in many ways and can affect how antitrust enforcement resources are allocated. A second caveat is more basic. Too much bespokeness can threaten the rule of law. The rule of law aims at uniformity; bespoke tailoring does not. By carving out exemptions if society (or the beneficiaries) are willing to pay the price, those with resources may get a different rule of law than those who do not.

A desire to carry through on every nip and tuck may end up with garments only fit for the few. A bespoke approach may thus work best with high-impact issues and industries where the benefits of careful tailoring may be highest and the deviation from uniformity may be acceptable.

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5. Treaty on the Functioning of the European Union, 2010 O.J. (C 83) 47-199; Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (L 24) 1.

6. See generally Anu Bradford, *THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD* (2020); Spencer Weber Waller, *The Omega Man or the Isolation of U.S. Antitrust Law*, 52 CONN. L. REV. 123, 195 (2020) (analyzing the different methods by which EU competition law has become the global standard).

## II. HOW MUCH OF U.S. ANTITRUST LAW IS ALREADY CUSTOM-TAILORED?

The most off-the-rack provisions of U.S. antitrust law are Sections 1 and 2 of the Sherman Act, which prohibit broad but definable categories of anticompetitive agreements and monopolization.<sup>7</sup> In contrast, Sections 3 and 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act (“FTC Act”) are a bit more elastic and thus have more tailoring at the waist.<sup>8</sup>

### A. THE RULE OF REASON AS CUSTOMIZATION

The question of bespoke versus one size fits all antitrust goes beyond the usual debates over which practices are per se unreasonable versus which are subject to a rule of reason analysis. What we mean by bespoke would encompass a case under either approach where the defendant argues (and sometimes the plaintiff agrees) that the normal rules should not apply to them because of the unique aspects of the defendant, its industry, or perhaps some macroeconomic crisis.

Whether a case is formally categorized as “per se” or “rule of reason,” courts have avoided re-cutting antitrust rules in response to an argument that competition itself is inappropriate or ruinous for a particular industry, that a price fixed should be deemed reasonable for the particular defendants who set it, or that the agreement harmed competition but was societally helpful in some other manner.<sup>9</sup> Nevertheless, from early in the development of Sherman Act jurisprudence, the courts have permitted defendants to argue that a particular arrangement is not harmful to competition because of the special characteristics of the product, the industry, or the firms in question—a bespoke approach.

U.S. Supreme Court Justice Louis D. Brandeis articulated this approach in 1918, when he described how to apply the rule of reason:

To determine [legality] the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.<sup>10</sup>

Recent antitrust decisions have only exacerbated this tendency toward a bespoke approach, custom-tailoring analysis to make it “meet for the case.”<sup>11</sup>

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7. See 15 U.S.C. §§ 1, 2.

8. See 15 U.S.C. §§ 14, 18, 45.

9. The argument for this approach is spelled out in *Nat'l Soc. of Prof. Eng'rs v. United States*, 435 U.S. 679 (1978).

10. *Bd. of Trade v. United States*, 246 U.S. 231, 244 (1918).

11. *Cal. Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756, 781 (1999).

There are many examples: In *Ohio v. American Express Co.*,<sup>12</sup> the Supreme Court crafted an approach to two-sided platforms that appeared to apply only to the defendant's two-sided platform (which the Court dubbed a "transaction platform") but might not apply to the defendant's competitors that had a different business model and certainly would not apply outside the payments industry (say, to newspapers).<sup>13</sup> In *NCAA v. Alston*,<sup>14</sup> the Court left undisturbed a lower court's re-writing of the terms of college football players' compensation from NCAA schools, done under the cover of the "less restrictive alternative" doctrine, while at the same time appearing to find the NCAA in violation of the Sherman Act.<sup>15</sup> And in *United States v. Microsoft Corp.*,<sup>16</sup> the D.C. Circuit Court of Appeals adopted a rule of reason for tying, but only for the software industry.<sup>17</sup>

### B. INCIPIENCY

There is another form of custom tailoring in U.S. antitrust law beyond the debate over where an agreement falls on the spectrum between per se and rule of reason and how the case should then be resolved. Congress tailored the antitrust laws to favor enforcement by catching certain anticompetitive practices in their incipiency.<sup>18</sup> Section 7 of the Clayton Act broadly prohibits mergers and acquisitions where the effect "may" tend to substantially lessen competition.<sup>19</sup> Similarly, Section 3 of the Clayton Act prohibits tying and exclusive dealing agreements where their effect also "may" tend to substantially lessen competition.<sup>20</sup>

Section 5 of the FTC Act prohibits "unfair methods of competition,"<sup>21</sup> which courts have read to include violations of the letter or the spirit of the antitrust laws, thereby filling gaps in those statutes and preventing incipient violations of the Sherman Act.<sup>22</sup> When the courts or the FTC confine themselves to deciding Section 5 cases under the letter of the Sherman Act, we get a mass-produced outfit rather than the tailored item that Congress intended. In recent years, the FTC has most often resisted a more bespoke approach, particularly eschewing the discretion the Supreme Court gave in 1972 to act as a "court of equity" and

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12. 138 S.Ct. 2274 (2018).

13. *Id.* at 2285-91.

14. 141 S.Ct. 2141 (2021).

15. *Id.* at 2162, 2166.

16. 253 F.3d 34 (D.C. Cir. 2001) (en banc).

17. *Id.* at 94-95.

18. See generally Richard M. Steuer, *Incipiency*, 31 LOY. CONSUMER L. REV. 155 (2019) (exploring this further).

19. 15 U.S.C. § 18.

20. 15 U.S.C. § 14.

21. 15 U.S.C. § 45(a).

22. See *Fed. Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 693 (1948) (explaining that the purpose of the Act is to "hit at every trade practice . . . which restrained competition or might lead to such restraint if not stopped in its incipient stages").

consider “public values” when deciding what is “unfair” in a particular case.<sup>23</sup> In 2022, though, the FTC issued a policy statement that moved toward some custom tailoring to deal with problems that might lie beyond the bounds of the Sherman and Clayton Acts. The policy statement explained its current view of Section 5. The FTC emphasized the scope of its authority to prohibit unfair methods of competition to attack incipient violations of the antitrust laws as well as practices that violate the spirit of the antitrust laws and that tend to affect competitive conditions negatively.<sup>24</sup>

Merger enforcement under the Clayton Act may be the paradigmatic example of bespoke antitrust. Although Section 7 applies generally to all mergers that affect interstate commerce, beginning in 1968 the Department of Justice and the FTC have issued a series of increasingly complex enforcement guidelines to explain which merger cases they might choose to bring and which cases they might not.<sup>25</sup>

The custom tailoring of enforcement includes a notification process first adopted by statute in 1976, under which only certain mergers (those that exceed specified size thresholds) need to be notified to government enforcers.<sup>26</sup> This means that non-notified mergers will almost never draw a government challenge, even if they violate the law. But the notification of a merger to the federal government does not mean that a challenge is likely either. In 2020, for example, of the 1,637 mergers that were notified to the FTC and the Antitrust Division of the U.S. Department of Justice (“Justice Department”), only 48 mergers received a “second request” for more information (less than three percent).<sup>27</sup> Even fewer cases end up being litigated—in 2020, the FTC filed seven complaints, the Antitrust Division filed eight.<sup>28</sup> Finally, mergers that undergo this thorough review often involve transactions valued in the billions of dollars and multiple markets about which government enforcers need to learn. Not surprisingly, this is an expensive process for the government. The FTC in 2020, for example, spent nearly half its competition budget and allocated nearly half its competition staff to

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23. See *Fed. Trade Comm’n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972). Compare *id.*, with *Fed. Trade Comm’n v. Qualcomm, Inc.*, 969 F.3d 974, 986 n.11 (9th Cir. 2020) (confining its decision to whether Qualcomm’s licensing practices violated Section 1 and Section 2 of the Sherman Act, not considering whether there was a “standalone” Section 5 violation).

24. See Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the FTC Act, Commission File No. P221202 (Nov. 10, 2022), <https://perma.cc/366C-KS7Z>; see also FTC, Statement of the Commission On the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (July 9, 2021), <https://perma.cc/XL2H-582X> (withdrawing 2015 interpretation of Section 5; intending to go beyond conduct that violates the antitrust laws).

25. See U.S. DEP’T OF JUST., *Merger Enforcement*, <https://perma.cc/S3SF-YFPA> (last updated Aug. 4, 2022) (providing each version of the merger guidelines, past and present).

26. See 15 U.S.C. § 18a.

27. See FTC, *HSR Transactions Filings and Second Requests by Fiscal Year*, <https://perma.cc/J2GS-VMVN> (last updated Nov. 12, 2020).

28. FED. TRADE COMM’N & DEP’T OF JUST. ANTITRUST DIV., HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2020 10, 13 (2020), <https://perma.cc/PTQ5-K9AG>.

a merger review process that yielded seven lawsuits, a result it actually touted as a “record number.”<sup>29</sup>

### C. REGULATION, EXEMPTIONS, AND IMMUNITIES

As the discussion of the Clayton and FTC Acts indicates, Congress can direct the agencies and courts toward the customization of legal rules and enforcement. Beyond these antitrust statutes, such customization can take the form of standing up a separate regulatory body to control particular industries or sectors of the economy—banking, electric power and natural gas, telecommunications, railroads, air transportation, and ocean shipping, to name a few. Such regulation is said to recognize that some form of market failure makes it unlikely that normal market forces will control improper behavior. Agencies are then tasked with deciding, in varying degrees, the appropriate industrial structure of the industry, conditions of service, entry, and pricing. Regulation is not expected to follow any set pattern; it can and does vary from industry to industry.<sup>30</sup>

Congress also has customized antitrust through statutory exemptions and immunities granted for a variety of industries, from medical schools to soft-drink bottlers to newspaper publishers.<sup>31</sup> Some of these special exemptions are minor nips and tucks, like confirming rule of reason treatment for practices that would normally be treated as such by the courts,<sup>32</sup> or immunizing conduct in the name of certainty that probably never violated the antitrust laws in the first place.<sup>33</sup> Others are more substantial alterations with different rules of liability, remedies, procedures, and institutions.<sup>34</sup>

The courts also sometimes enter the tailoring business, crafting immunities that are not apparent from the text of the off-the-rack Sherman Act, such as the Noerr–Pennington doctrine,<sup>35</sup> the state action doctrine,<sup>36</sup> the non-statutory labor

29. See FED. TRADE COMM’N, FISCAL YEAR 2020 CONGRESSIONAL BUDGET JUSTIFICATION 2 (Mar. 11, 2019), <https://perma.cc/5A53-NW3J>; FED. TRADE COMM’N, 2020 ANNUAL HIGHLIGHTS 4 (Apr. 2021), <https://perma.cc/CS2D-J2UZ> (referring also to eleven deals that were abandoned in the face of staff recommendations to block them); see also Jonathan Kanter, Ass’t Att’y Gen., U.S. Dep’t of Just., Antitrust Div., *Respecting the Antitrust Laws and Reflecting Market Realities* (Sept. 13, 2022) (“We are litigating more than we have in decades. Since I was confirmed in November, the Division has challenged or obtained merger abandonments in six cases. Several other transactions were abandoned after parties were informed they would receive second requests . . . . We will litigate more merger trials this year than in any fiscal year on record.”).

30. For the classic presentation of this type of regulation in the United States, see ALFRED E. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* (1970-71).

31. For a thorough review, see ABA SECTION OF ANTITRUST LAW, *FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW* (2007).

32. See 15 U.S.C. § 4302 (requiring rule of reason for research joint ventures and standard setting organizations).

33. See 15 U.S.C. §§ 4001-03, 4011-4021 (creating a system for granting export trade certificates).

34. See *i* 15 U.S.C. § 4016(b) (allowing only actual damages for persons injured by conduct covered by export trading company certificates); 15 U.S.C. § 37b (granting immunity for graduate medical matching programs).

35. See *Eastern RR Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127 (1961).

36. See *Parker v. Brown*, 317 U.S. 341 (1943); *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

exemption,<sup>37</sup> and even a limited exemption for the business of professional baseball.<sup>38</sup> Much like any custom-tailoring job, though, these alterations are never finished. Further customization will be needed as the wearer “evolves” and its needs change. Bespoke may be singularly focused, but it is not “one and done.”<sup>39</sup>

#### D. REMEDIES/CONSENT DECREES

Remedies in antitrust offer one of the most fertile fields for individualizing the law. Indeed, as the court of appeals wrote in *Microsoft*, the remedy must be “tailored to fit the wrong.”<sup>40</sup> This tailoring shows up in every aspect of remedies. When imposing criminal penalties, the Sentencing Guidelines reject an undisciplined tailoring of punishment; instead, they opt for guided tailoring.<sup>41</sup> Criminal sentences and fines are calculated according to the amount of commerce affected, modified by specified aggravating and mitigating factors—the role of the defendant in the conspiracy; whether coercion, threats, or violence were used; the acceptance (or not) of responsibility; cooperation (or not) with the government; and any past violations.<sup>42</sup> This is an effort to make the punishment fit the crime.

When granting civil remedies, injunctive relief must be sufficient not just to prohibit the unlawful conduct but must restore competition to the affected market segments, which necessarily leads to remedies that vary from case to case.<sup>43</sup> Divestiture and other structural remedies must be effective, but not unduly harmful to the lawful operations of the businesses and the public interest.<sup>44</sup> When the Justice Department settles a case through the entry of a consent decree, a court must find that the settlement “is in the public interest,”<sup>45</sup> but courts are given only slight discretion to reject decrees whose terms the parties have negotiated and to

37. See *Connell Constr. Inc. v. Plumbers & Steamfitters Union*, 421 U.S. 616 (1975).

38. See *Fed. Baseball Club v. Nat’l League*, 259 U.S. 200 (1922), modified by Curt Flood Act of 1988, codified at 15 U.S.C. § 26b(2). The story of the baseball exemption is well told in STUART BANNER, *THE BASEBALL TRUST: A HISTORY OF BASEBALL’S ANTITRUST EXEMPTION* xi (2013) (“Scarcely anyone believes that baseball’s exemption makes any sense.”).

39. Compare *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 379 (1991) (rejecting interpretations of the Sherman Act that would “look behind the actions of state sovereigns”) (granting immunity), with *N.C. State Bd. of Dental Exam’rs v. Fed. Trade Comm’n*, 574 U.S. 494, 503-04 (2015) (looking at composition of state regulatory board; deciding it is not “sovereign” because members are market participants; state action immunity is “disfavored”).

40. *United States v. Microsoft Corp.*, 253 F.3d 34, 107 (D.C. Cir. 2001) (en banc).

41. See *United States v. Booker*, 543 U.S. 220 (2005) (making Sentencing Guidelines advisory, not mandatory, but requiring courts to take them into account).

42. See U.S. SENTENCING COMM’N, *GUIDELINES MANUAL* §§2R1.1, 3B1 (Nov. 2021), <https://perma.cc/HH2U-VABZ>.

43. For a review of the legal standards for remedies in government civil cases, see Harry First, *Antitrust Remedies and the Big Tech Platform Cases*, in ERIKA M. DOUGLAS ET AL., *WASHINGTON CENTER FOR EQUITABLE GROWTH, JUDGING BIG TECH: INSIGHTS ON APPLYING U.S. ANTITRUST LAWS TO DIGITAL MARKETS* 13-17 (Laura Alexander ed., 2022), <https://perma.cc/NZF2-BCDH>.

44. *Id.*

45. Antitrust Procedures and Penalties Act (Tunney Act), codified and amended at 15 U.S.C. § 16 (b)-(g) (2004).



which they have agreed.<sup>46</sup> Some of these consent decrees can end up providing a regulatory structure that applies only to the defendants and that may prove hard to dislodge later, as the Justice Department's efforts to review the ASCAP/BMI decree have shown.<sup>47</sup>

Negotiated remedies in merger cases provide some particularly dramatic examples of bespoke design. Merger consent decrees may require the identification of which assets or stock will be divested, to whom, and on what timetable. In more complex arrangements, the respondents may also have to provide employees, raw materials, know-how, software, and proprietary information about customers and competitors to a buyer preapproved by the enforcement agency and/or the court. Monitors or trustees may be required to ensure compliance with divestitures and any required firewalls imposed on the merging parties. Complex arbitration or other alternative dispute resolution mechanisms may be required to resolve day-to-day disputes over pricing, access, or non-discrimination. Examples abound—Google ITA, Ticketmaster/LiveNation, Comcast/Universal.<sup>48</sup>

In the T-Mobile/Sprint merger, Justice Department enforcers went so far as to broker a deal with a non-party to the merger to get that company to enter the market and try to replace the competition that would be lost as a result of the merger. This was followed by a complex consent decree and the appointment of a monitoring trustee with ongoing responsibility to supervise the conduct of the new T-Mobile/Sprint and the new entrant, Dish.<sup>49</sup>

More recently, however, the Biden administration has sought to pull back from complex bespoke merger remedies. Its policy has been to try to stop more mergers from being consummated in the first place, litigating more cases in court where necessary.<sup>50</sup>

In monopolization cases the remedies often are even more individualized. Government monopolization cases today are fewer, larger, lengthier, and more complex even than merger cases with highly contentious remedies sought and imposed. The Bell System divestiture of the regional operating companies took

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46. See *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 11 (D.D.C. 2007) (scope of review “sharply proscribed”).

47. See Makan Delrahim, Ass't Att'y Gen., U.S. Dep't of Just., Antitrust Div., Remarks at the Vanderbilt University Law School Virtual Event “And the Beat Goes On”: The Future of the ASCAP/BMI Consent Decrees (Jan. 15, 2021), <https://perma.cc/WKB5-Y3U9>. “ASCAP” stands for American Society of Composers, Authors and Publishers, and “BMI” stands for Broadcast Music, Inc.

48. See John Kwoka & Spencer Weber Waller, *Fix It or Forget It: A “No-Remedies” Policy for Merger Enforcement*, COMPETITION POL'Y INT'L (2021) (discussing cases and dissatisfaction with the remedies chosen); Spencer Weber Waller, *Access and Information Remedies in High-Tech Antitrust*, 8 J. COMP. L. & ECON., 575 (2012).

49. See *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 197-98 (S.D.N.Y. 2020) (describing settlement). For a good description of the monitoring trustee's responsibilities in overseeing relief in the Sprint/T-Mobile merger, see Memorandum of Points and Authorities in Support of Unopposed Motion of the United States to Appoint Monitoring Trustee, *United States v. Deutsche Telekom AG* at 3-4, Civ. No. 1:19-cv-02232-TJK (D.D.C. Dec. 9, 2019), <https://perma.cc/YBQ3-QKD2>.

50. Jonathan Kanter, Assistant Attorney General, Keynote Speech at Georgetown Antitrust Law Symposium: Respecting the Antitrust Laws and Reflecting Market Realities (Sept. 13, 2022), <https://perma.cc/77HD-5WXX>.

over twelve years of time-consuming court attention and constant monitoring by the Justice Department and the Federal Communications Commission. Congress eventually passed the Telecommunications Act of 1996 to provide a statutory and highly customized pathway for new entry, jointly administered by state and federal regulatory agencies and reviewed by the courts, and which required incumbent local phone providers to cooperate with new entrants to ensure effective entry.<sup>51</sup>

In the *Microsoft* litigation the combined remedies imposed around the world involved (depending on the jurisdiction) the offering of an operating system without a browser, the imposition of choice screens for access to web browsing, non-discrimination obligations, enhanced interoperability, provision of mountains of technical and interface information, the creation and funding by Microsoft of monitoring and compliance systems, and repeated court hearings, a process that went on for nearly a decade.<sup>52</sup>

The latest round of government monopolization cases in the U.S. have yet to reach the remedy stage, but the European Commission's recent cases have produced a new set of bespoke remedies to deal with dominant firm abuses. In those cases, the Commission tried to correct distortions in Google's presentation of product shopping sites; sought to give consumers more choice of search engines by having Google present search engine choice screens; and secured an agreement with Amazon restricting its use of data that independent Amazon sellers generate, regulating access to Amazon's "Buy Box," and controlling how Amazon offers its "Prime" services to other sellers.<sup>53</sup>

#### E. PROSECUTORIAL DISCRETION AND BUSINESS REVIEW LETTERS/ADVISORY OPINIONS

Competition enforcers also have a special power to allow arrangements by one company or by an industry to be treated differently than other parties or industries. A decision to treat what might otherwise be a criminal per se offense as a civil violation (e-books<sup>54</sup>) or vice versa (no poaching agreements<sup>55</sup>) is a form

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51. For a discussion of the AT&T restructuring and its effects, see ROBERT W. CRANDALL, *AFTER THE BREAKUP: U.S. TELECOMMUNICATIONS IN A MORE COMPETITIVE ERA* (1991).

52. See ANDREW I. GAVIL & HARRY FIRST, *THE MICROSOFT ANTITRUST CASES: COMPETITION POLICY FOR THE TWENTY-FIRST CENTURY* 235-79 (2014).

53. See Thomas Hoppner, *Google's (Non-) Compliance with the EU Shopping Decision* (Tech. Univ. Wildau, Sept. 2020), <https://perma.cc/DM6X-HT93>; Michael Ostrovsky, *Choice Screen Auctions 2* (Stan. Univ. & NBER, Working Paper, No. 28091, 2020), <https://perma.cc/D4SF-YMFZ>; European Commission Press Release, *Antitrust: Commission Accepts Commitments by Amazon Barring It from Using Marketplace Seller Data, and Ensuring Equal Access to Buy Box and Prime* (Dec. 20, 2022), <https://perma.cc/DZ49-M2DU>.

54. See generally *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015) (conspiracy among publishers to raise e-book prices) (not prosecuted criminally).

55. See generally *United States v. Patel*, No. 3:21-cr-220, WL 17404509 (D. Conn. Dec. 2, 2022) (rejecting defense argument that prosecution for no-poach agreement violates due process because the government had only announced its intention to prosecute such cases criminally in 2016, five years after the alleged conspiracy began).

of tailoring generally immune from court review in the U.S. unless a prosecution involves some sort of highly improper discrimination.

But an even greater power is the power to do nothing. An agency decision not to proceed inevitably shapes the law. It has been decades since U.S. government enforcers have brought cases involving price discrimination, resale price maintenance, vertical territorial or customer non-price restraints, pure conglomerate mergers, or cases under Section 5 of the FTC Act based only on a “standalone” theory and not on the Sherman or Clayton Acts as well. More to the point, this type of tailoring can be redone at any moment.<sup>56</sup>

Guidance provides another way to tailor the law to what seems most elegant to the tailor without taking any enforcement action. Justice Department business review letters<sup>57</sup> and FTC advisory opinions<sup>58</sup> allow the agencies to indicate whether they would or would not challenge a proposed agreement or course of conduct, or, sometimes, give the agencies an opportunity to “guide” the parties to a course of conduct arguably not required by the law at all.<sup>59</sup> More subtly, a well-crafted amicus brief<sup>60</sup> or speech<sup>61</sup> can change the fabric of the law, even if the changes are not readily visible to an outside observer.

## F. COMPETITION RULE MAKING

The FTC has rule-making authority, but it has exercised it with regard to its antitrust jurisdiction only once.<sup>62</sup> President Biden’s Executive Order, issued in

56. See, e.g., Josh Sisco, *Pepsi, Coke Soda Pricing Targeted in New Federal Probe*, POLITICO (Jan. 9, 2023), <https://perma.cc/G3WA-L29U> (reporting preliminary FTC investigation for price discrimination in violation of Robinson-Patman Act; most recent case settled more than twenty years ago).

57. ANTITRUST DIV., U.S. DEP’T OF JUST., *Business Reviews*, <https://perma.cc/FBQ8-TEVK> (last visited Apr. 4, 2023).

58. FED. TRADE COMM’N, *Advisory Opinions*, <https://perma.cc/YH88-US52> (last visited Apr. 4, 2023).

59. See Letter from Renata B. Hesse, Acting Assistant Att’y Gen., to Michael A. Lindsay, Esq. (Feb. 2, 2015), <https://perma.cc/JY4R-Z3VQ> (reviewing standard setting organization’s procedures with regard to the selection of SEPs for its standards; approving restriction on patent holders’ ability to obtain injunctive relief from infringers; noting that the provision “will not be significantly more restrictive than current U.S. case law”).

60. See, e.g., Brief for the United States & the Fed. Trade Comm’n as Amici Curiae in Support of Neither Party, *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015) (No. 14-8003), 2014 WL 4447001 (arguing that Foreign Trade Antitrust Improvements Act should allow the government to bring an action even if private parties are barred); *Motorola Mobility LLC*, 775 F.3d 816 (accepting government position).

61. See, e.g., Bruce B. Wilson, Deputy Assistant Att’y Gen., Remarks before the Fourth New England Antitrust Conference, “Patent and Know-How License Agreements: Field of Use, Territorial, Price and Quantity Restrictions” (Nov. 6, 1970) (setting out Antitrust Division policy on when certain patent license restrictions would be considered per se unlawful), <https://perma.cc/GD9U-FJY4>.

62. See Discriminatory Practices in Men’s and Boy’s Tailored Clothing Industry, 31 Fed. Reg. 14416 (Nov. 9, 1966) (codified at 16 C.F.R. § 412 (1968)) (rule enacted pursuant to Section 2, Clayton Act), *rescinded*, 59 Fed. Reg. 8527 (Feb. 23, 1994); see also Nat’l Petroleum Refiners Ass’n v. Fed. Trade Comm’n, 482 F.2d 672, 674, 698 (D.C. Cir. 1973) (upholding rule requiring posting of octane ratings at the pump for gasoline sales) (rule enacted pursuant to Section 5, FTC Act). See generally Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. CHI. L. REV. 357 (2020) (rulemaking under Section 5 of the FTC Act should play a role in antitrust law).

July 2021, however, sought to change the FTC's approach.<sup>63</sup> The Executive Order, among other things, urged the FTC to consider rules to curtail the use of non-compete clauses and "other agreements" that unfairly limit worker mobility.<sup>64</sup> The Executive Order also urged the FTC to adopt rules dealing with a number of practices in which the major tech platforms engage but which might be hard to attack through antitrust litigation, such as unfair data collection and "unfair competition in major Internet marketplaces."<sup>65</sup>

In 2023 the FTC took up the first suggestion, issuing a 216-page Notice of Proposed Rulemaking to ban the use of non-compete clauses (clauses that have the "effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer").<sup>66</sup> The FTC justified its proposed rule because of the impact such clauses have on employee wages and on the ability of entrepreneurs to start new businesses.<sup>67</sup> The proposed rule is "bespoke" in the sense that it focuses on one particular practice that might affect competition for workers and their compensation. Even so, the FTC sought public comment for tailoring the rule further, perhaps limiting its applicability based on a worker's job function, occupation, earnings, or, specifically, exempting "senior executives" from the rule.<sup>68</sup> This shows that a bespoke rule can vary as well; it can be "one size fits all" or can be further tailored to fit distinct shapes and sizes.

#### G. THE BLACK HOLE OF ARBITRATION

Arbitration allows for highly customized antitrust decisions that are hidden from public view altogether. The U.S. Supreme Court has ruthlessly enforced arbitration clauses in both business-to-business and business-to-consumer contracts to require arbitration in lieu of litigation and to require individual versus collective arbitration if the dispute resolution agreement so indicates.<sup>69</sup>

This system of "private justice" replaces off-the-rack statutes and precedents with one-off arbitration proceedings conducted in private by arbitrators chosen pursuant to the rules specified in the agreement using procedures also specified by the agreement itself. The arbitrator need not be a lawyer, the award need not be written, nor reasons given unless agreed to by the parties. The tribunal's rules, remedies, procedures, and the contents of the award need not conform to the law of any of the jurisdictions which might have resolved the private dispute in

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63. See Proclamation No. 14036, 86 Fed. Reg. 36987, 36992 (July 9, 2021).

64. *Id.*

65. *Id.*

66. See Notice of Proposed Rulemaking, Non-Compete Clause Rule, 88 Fed. Reg. 3482 (Jan. 19, 2023), <https://perma.cc/E44J-YFUP> [hereinafter NPRM]. The proposed rule carves out an exception for the sale of a business in certain circumstances. See *id.* at 3483.

67. See FED. TRADE COMM'N, *Fact Sheet: FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, <https://perma.cc/4899-U9N5>.

68. See NPRM, *supra* note 66, at 143, 150.

69. See *Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).

question. By definition, this is bespoke antitrust on a contract-by-contract basis, but also normally hidden from view and never to be seen by the public.

On the consumer side, the very presence of the clause will often deter the filing of any arbitral claim at all. The expected value of such a claim by a consumer is negative. Too often, a consumer with a claim that may be individually meaningful is deterred by the costs and unfamiliarity of arbitration against a well-resourced repeat corporate player and the possibility that a losing claim will result in having to pay the corporation's legal fees.

### III. SHOULD U.S. COMPETITION POLICY SHOP AT TARGET OR HERMES?

Every legal system has a combination of rules versus standards as well as simple categories versus complicated case by case systems for determining liability and remedies. This section highlights some opportunities for high fashion shopping that are available more widely in jurisdictions outside the U.S., some of which the U.S. might want to consider when selecting the best wardrobe for the challenges that face contemporary competition law enforcement.

#### A. MARKET STUDIES/CODES OF CONDUCT

The competition tool kit for many jurisdictions also includes provisions for market studies in addition to specific enforcement actions. Think of this process as one for reviewing and refurbishing an existing wardrobe for a new occasion and a more in-shape physique. In general, market studies assess whether competition in a market is working efficiently and propose measures to address any identified issues. These measures can include recommendations such as proposals for regulatory reform or improving information dissemination among consumers. They can also include the opening of antitrust investigations.

Market studies can identify restraints to competition that are not necessarily outright violations of existing competition laws. They are also used for competition advocacy, pre-enforcement information gathering, ex-post assessments, law reform, and the creation of new legal regimes on an industry-specific basis. A 2016 Organisation for Economic Co-operation and Development ("OECD") survey indicated that 68% of jurisdictions surveyed had specific powers to undertake such surveys and another 26% relied on more general competition powers to do so; 87% of the respondents reported that recommendations to the government for changes in laws, regulations, or public policies were one of the potential outcomes for such inquiries.<sup>70</sup> In some jurisdictions, the sectoral regulators have such powers either alone or in conjunction with the competition authority. On several occasions, the result has

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70. See ORG. FOR ECON. CO-OPERATION & DEV., THE ROLE OF MARKET STUDIES AS A TOOL TO PROMOTE COMPETITION 8-10 (2016), <https://perma.cc/Q76Q-CJFK>.

been the creation of a sectoral specific code of competition, fine-tuned for industry characteristics and the nature of the competitive issues.<sup>71</sup>

One example is the United Kingdom (“U.K.”), which, after an extensive market investigation of the supermarket industry, created an industry code of conduct with specific rules for supplier–supermarket relations, a dispute resolution procedure, and an ombudsman.<sup>72</sup> Similarly, Australia has specific industry codes for competition for franchising, horticulture, groceries, wheat, and oil. Australia also has a separate statutory provision permitting the creation of access provisions to designated infrastructure.<sup>73</sup>

In contrast, U.S. competition agencies have more limited powers and appetite to conduct such studies and no current ability to consider whether antitrust enforcement actions or an industry specific code would be an appropriate response. The Justice Department has no statutory powers to require the production of business information outside of a specific enforcement action; the lack of such power is extremely rare.<sup>74</sup>

The Federal Trade Commission has such powers under Section 46 of the FTC Act but has chosen to use them only in a limited fashion.<sup>75</sup> While it is conceivable that Section 46 could be used to conduct broader market studies of concentrated or otherwise problematic industries and the contemplation of industry specific antitrust rules, the FTC has not done so. It has used Section 46 to produce thoughtful reports on “numerous important consumer protection matters and certain competition issues that cut across industry lines” (patent trolls and merger remedies, for example) “but only one specific competition-related study of a particular industry (generic drugs).”<sup>76</sup> This valuable study included proposals for legislative reform to deal with the vexing gaming of the system for introducing and approving generic drugs.

The U.S. experience with sector-specific antitrust rules is largely limited to the 1921 Packers and Stockyards Act, which was enacted because of Progressive Era concerns with the imbalance of power between small livestock producers as sellers and the large concentrated (and often colluding) meat packers as buyers.<sup>77</sup> Even here, government failure to update the regulations and enforcement under this Act has made this experiment a highly criticized and mostly ineffective tool

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71. See Waller, *supra* note 6, at 165-69.

72. *Id.* at 166.

73. *Id.* at 166-67.

74. See *id.* at 166 (2016 OECD survey of sixty competition authorities shows only U.S. Department of Justice and Hong Kong lacked power to request such information).

75. 15 U.S.C. § 46(a) (stating that the Commission has the power to “gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, [exempting certain industries] . . . and its relation to other persons, partnerships, and corporations”).

76. Waller, *supra* note 6, at 167-68.

77. See The Packers and Stockyards Act of 1921, 7 U.S.C. §§ 181-229.

to achieve its intended purpose. This is another area that President Biden's Executive Order sought to fix.<sup>78</sup>

## B. THE DIGITAL MARKETS ACT AND SIMILAR STATUTORY REFORM

Concerns over the power of digital platforms and other tech companies have led numerous jurisdictions to consider whether specialized competition rules are necessary for these sectors. The EU is probably the furthest along in this regard with the adoption of the Digital Markets Act (“DMA”), which entered into force on November 1, 2022.<sup>79</sup> As the European Commission described the Act, “gatekeeper platforms,” in broad outline, will be required to (1) “allow third parties to inter-operate with the gatekeeper’s own services in certain specific situations”; (2) “allow their business users to access the data that they generate in their use of the gatekeeper’s platform”; (3) “provide companies advertising on their platform with the tools and information necessary for advertisers and publishers to carry out their own independent verification of their advertisements hosted by the gatekeeper”; and (4) “allow their business users to promote their offers and conclude contracts with their customers outside the gatekeeper’s platform.”<sup>80</sup> The DMA also provides that gatekeeper platforms will not be allowed to (1) treat services and products they offer “more favorably in ranking than similar services or products offered by third parties on the gatekeeper’s platform”; (2) “prevent consumers from linking up to businesses outside their platforms”; or (3) “prevent users from un-installing any pre-installed software or app.”<sup>81</sup>

Several other jurisdictions have proposed or adopted digital codes that include or focus on provisions that are competition adjacent but not part of the traditional domain of antitrust rules. For example, Australia has enacted legislation that requires designated digital platforms to bargain collectively with traditional news media outlets for the use of news content on their platforms, buttressed by compulsory arbitration to set royalties if an agreement is not reached.<sup>82</sup> Japan has issued Guidelines to control how digital platforms acquire

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78. See Proclamation No. 14036, 86 Fed. Reg. at 36992 (providing direction to Secretary of Agriculture). The Department of Agriculture subsequently proposed regulations to give poultry growers more information in their bargaining with dominant live poultry dealers, but the regulations have not yet been adopted. See Transparency in Poultry Grower Contracting and Tournaments, 87 Fed. Reg. 34980 (June 8, 2022) (proposed rule).

79. Regulation 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and Amending Directives 2019/1937 and 2020/1828 (Digital Markets Act), 2022, O.J. (L 265/1), <https://perma.cc/H4FT-2Y69>.

80. See EUROPEAN COMM’N, *The Digital Markets Act: Ensuring Fair and Open Digital Markets*, <https://perma.cc/535E-UY55> (last visited Apr. 6, 2023).

81. See *id.* See generally Peter Alexiadis and Alexandre de Stree, *The EU’s Digital Markets Act: Opportunities and Challenges Ahead*, 23 BUS. L. INT’L 163 (May 2022) (describing the DMA).

82. See Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021, <https://perma.cc/X288-BSEM>; Damien Cave, *Google is Suddenly Paying for News in Australia. What About Everywhere Else?*, N.Y. TIMES, (Feb. 17, 2021), <https://perma.cc/QPV5-T347>; David Oxenford, *Could Australian Decision Giving Broadcasters the Right to Collectively Bargain with*

or use consumers' personal information, based on the Antimonopoly Act's prohibition on the abuse of a superior bargaining position.<sup>83</sup> Most famously, the EU has adopted the General Data Privacy Regulation, which has required online businesses serving the EU market to re-tailor their data privacy policies, often worldwide.<sup>84</sup>

Other jurisdictions have focused on modifying institutional design and enforcement techniques rather than comprehensive statutory or regulatory change. The UK's Competition and Markets Authority ("CMA"), following its studies and reports, established a Digital Markets Unit within the CMA to begin work on a "new regulatory regime for the most powerful digital firms," bolstered by a new Data, Technology and Analytics unit ("DaTA"), composed of those with data engineering; data science; and data and technology market intelligence expertise.<sup>85</sup>

Reforms focused on digital platforms have also been proposed in the U.S. but have not yet been adopted. The FTC has begun to consider issuing rules that would limit online commercial surveillance and data collection but has not yet formulated specific rules.<sup>86</sup> The antitrust subcommittee of the U.S. House of Representatives Judiciary Committee, after a lengthy investigation of digital platforms, issued a 364-page report that called for comprehensive reform of antitrust.<sup>87</sup> The report had nearly thirty pages of statutory suggestions, but without specific legislative proposals.<sup>88</sup> That report was followed by the introduction in both the U.S. House and Senate of bipartisan legislation to implement the key provisions of the report and add additional antitrust reforms.<sup>89</sup> None of those bills were enacted into law, however, and legislative change awaits an uncertain fate in the current Congress.

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*Tech Companies Be a Preview of Things to Come in the US?*, BROAD. L. BLOG (Nov. 3, 2021), <https://perma.cc/97WG-6QD5>.

83. See JAPAN FAIR TRADE COMM'N, GUIDELINES CONCERNING ABUSE OF A SUPERIOR BARGAINING POSITION IN TRANSACTIONS BETWEEN DIGITAL PLATFORM OPERATORS AND CONSUMERS THAT PROVIDE PERSONAL INFORMATION (Dec. 17, 2019), <https://perma.cc/2DTM-CQEG>.

84. Commission Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119).

85. See COMPETITION & MKTS. AUTH., THE CMA'S DIGITAL MARKETS STRATEGY: JUNE 2019 (Feb. 9, 2021), <https://perma.cc/ATR8-N256>; COMPETITION & MKTS. AUTH., DIGITAL MARKET UNIT (Apr. 7, 2021), <https://perma.cc/XV9F-B4PT>.

86. Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273 (Aug. 22, 2022) (providing advance notice of proposed rulemaking).

87. Staff of H.R. Comm. On the Judiciary, 117 Cong., Investigation of Competition in Digital Markets, (Comm. Print 2022) (prepared by the Subcommittee on Antitrust, Commercial and Administrative Law).

88. See *id.* at 317-42.

89. For a good review of the House bills, see Randy Picker, *The House's Recent Spate of Antitrust Bills Would Change Big Tech as We Know it*, PROMARKET (June 29, 2021), <https://perma.cc/M3X7-7AM8>.



#### IV. SOME CAVEATS FOR BESPOKE ANTITRUST

Bespoke antitrust seeks to tailor antitrust rules to specific situations or parties, arguably making the law a better fit for the competition problem presented. This should reduce the likelihood of error and thereby diminish the need to employ error cost analysis, which the courts have too often used to restrict antitrust enforcement.<sup>90</sup> Error cost analysis seeks to lower the cost of uncertain results; bespoke seeks to make the results more certain in specific cases.

But bespoke antitrust poses a different risk—not the risk of uncertain results but the risk that the law itself may become too uncertain because the law is always up for alteration. Rather than the danger of error, bespoke antitrust runs the danger of loss of uniformity (no pun intended) and, along with it, the diminution of fairness and access.

Uniformity in the application of law is a cornerstone of the rule of law. Like cases should be treated alike. Law with ever-modifying rules can be applied differently from case to case. Evaluating mergers in an extremely context-specific way can mean that some industries may be allowed to concentrate further (mobile telecommunications) while others are not (healthcare insurance); or some industries may find their services highly regulated (college and professional sports) while others get more freedom (streaming platform operators). Laws of general application can be applied in a non-uniform way, of course, but they are clearly intended to apply to all. Bespoke rules are not.

Loss of uniformity not only affects the fairness of the law, both in its perception and its application, but also affects deterrence, a goal of both criminal and civil enforcement. When the law is up for particularized consideration, corporate counsel will likely be more probabilistic in their advice and companies more likely to go closer to the line on the assumption that they can get tailored consideration.

Bespoke rules also are, by definition, more costly, as shown most dramatically in merger enforcement. This means that these rules may not be available to all, just to those with resources. In the legislative arena we think of the effort to obtain bespoke rules in rent-seeking terms, generally viewing rent-seeking as socially costly behavior, but we do not usually remember that only those with rents to get can afford to seek them.

Finally, bespoke antitrust rules can distort the institutions of antitrust enforcement themselves. The effort to tailor antitrust rules to specifics—and to litigate those specifics in highly-contested court proceedings—takes time and resources for antitrust enforcers. Fewer cases can be brought, and enforcement may be more subject to capture as targets make concerted efforts to influence antitrust enforcers. This can be a problem for all enforcement agencies, but a particular problem for less well-resourced agencies that may end up allocating

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90. See Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 *FORDHAM L. REV.* 2543, 2570-72 (2013).

their time and resources disproportionately to customized cases, with little left for important but run-of-the-mill general enforcement.

## V. CONCLUSION – T-SHIRTS AND TUXEDOS

The allure of bespoke couture antitrust rules, custom made for the most important competition problems of the day, is substantial. Such fashionable work looks terrific and can approach enduring works of art. But if done poorly, they waste time and money and end up as objects of ridicule.

The question is not who wore it best but how to build a collection of antitrust rules, procedures, institutions, and remedies for the everyday, as well as the special-occasion needs of the real world. Most legal systems will need a mix of standard off-the-rack rules and a mechanism for determining whether more tailored rules are necessary for special occasions. The more routine matters need the least tailoring and should be the subject of simple mass-produced rules and remedies. These include rules of per se illegality for naked cartel behavior and related facilitating behavior as well as rules of per se legality (or nearly so) for non-hard-core minor agreements not raising significant concerns by firms with negligible market power. It also suggests that courts are rarely the proper tailor to torture the fabric of the law in individual proceedings where the existing rules may not perfectly fit the parties but the costs in terms of uncertainty are high and the benefits rarely visible.

The best case for bespoke antitrust, as in fashion, is the high stakes, but recurring, special occasion. Where a persistent high stakes issue arises that will recur across time and jurisdictions, it may be worthwhile to invest in a higher quality garment suitable for more than a single use. Even the simplest cost-benefit analysis suggests that not every industry or practice needs more complex specially tailored rules regardless of the special pleading or rent-seeking behavior of the parties. Taking the time to lay out a pattern that will fit many cases and needs only minimal tailoring before use may lead to better garments. Sentencing guidelines are a good example, focusing customization on a few salient details; competition rules, if not overly regulatory, could be another; good market studies, with targeted recommendations, a third.

Democracy, accountability, and good fashion sense require a public process by an expert, but accountable, body. Due process lets the public into the design process, which could include well-run legislative hearings or a thorough agency-led market study geared toward the industries and practices where the most good can be done for the least expense in time and alterations. In this way we can get the antitrust garments to look and fit as best as we can and at the right price—no evening gowns worn to a family picnic and no T-shirts to black-tie events.