Ridding the Law of Outdated Statutory Exemptions to Antitrust Law: A Proposal for Reform

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RIDDING THE LAW OF OUTDATED STATUTORY EXEMPTIONS TO ANTITRUST LAW: A PROPOSAL FOR REFORM

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Antitrust law is designed to be an overarching check against anticompetitive conduct that harms the free market system. Almost as soon as the first antitrust laws were enacted in the United States, however, industry groups began lobbying Congress for exemptions from these laws. Most of the statutory exemptions created over the last one hundred years remain in place, despite widespread changes in economic theory, market structures, and overall antitrust law. Today, some exemptions are merely irrelevant, while others actively harm society by transferring wealth to private individuals and hampering beneficial competition. This Note proposes a four-part legislative solution to rid the law of stale or harmful exemptions while preserving those that respect the bedrock principles of antitrust law.

Introduction

In *United States v. Topco Associates*, Justice Thurgood Marshall famously wrote that "[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[1] Despite Justice Marshall's statement, there are at least thirty-five federal statutory exemptions to the broad protections of the Sherman Act, the Federal Trade Commission Act, and other bedrock antitrust statutes. Some grant immunity to whole industries. Others exempt certain types of behavior from challenge.

Most of the statutory exemptions enacted over the last one hundred years are still in place today, despite widespread changes in economic theory, market structures, and antitrust law in general. When initially enacted, many statutory exemptions were seen as special-interest legislation harmful to competition, competitors, and society. While others were beneficial when first put into law, even many of those have grown irrelevant over time. Some have

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1. 405 U.S. 596, 610 (1972).

even become as harmful as those enacted with the intent of benefitting special interests.

This Note proposes a way to reduce the number of exemptions in effect, enabling a return to the bedrock principles of antitrust law. Part I provides background information on antitrust law and statutory exemptions. Part II discusses the need for reform. Part III proposes a legislative solution that combines a general sunset on all statutory exemptions after a fixed period of time, a Government Accountability Office (GAO) report on the continuing need for each statutory exemption currently in place, hearings on any exemption found to be still warranted by the GAO, and further legislation reinstating any exemption found warranted by Congress. This Note argues that such a solution would jump start the debate on whether to repeal the more controversial statutory exemptions currently in effect while allowing the less controversial exemptions to be taken out of the United States Code without wasting congressional time or expense on exemption-by-exemption repeal. Because this solution shifts the burden back onto an exemption's proponents to prove—both to a neutral expert within the GAO and to Congress—that a favored exemption is necessary, it will rid the system of irrelevant or harmful exemptions while preserving only those that are beneficial to society at large.

I. Antitrust Law and Statutory Exemptions

A. *Economic Theory, Purpose, and the Evolution of Antitrust Law*

Three principal antitrust statutes outlaw anticompetitive behavior in the United States: the Sherman Act,[2] the Clayton Act,[3] and the Federal Trade Commission Act.[4] Section 1 of the Sherman Act criminalizes "[e]very contract, combination . . . or conspiracy in restraint of trade or commerce among the several states, or with foreign nations."[5] Section 2 criminalizes monopolization, attempted monopolization, or conspiracy to monopolize "any part of trade or commerce among the several States, or with foreign nations."[6] The Clayton Act forbids certain individuals "engag[ing] in commerce" from performing specific acts.[7] For example, section 2

2. *See* Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2006).
3. *See* Clayton Antitrust Act, 15 U.S.C. §§ 12–27 (2006).
4. *See* Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2006).
5. 15 U.S.C. § 1 (2006).
6. *Id.* § 2.
7. *Id.* § 13(a).

of the Clayton Act forbids price discrimination,[8] while section 3 forbids tying[9] and exclusive dealing.[10] The Federal Trade Commission Act grants the Federal Trade Commission (FTC) power to enjoin "unfair or deceptive acts or practices in or affecting commerce."[11]

Two characteristics shared by these three statutes are important to note. First, they are incredibly broad: together, they give the Department of Justice, the Federal Trade Commission, state attorneys general, and private plaintiffs the ability to challenge, either administratively or judicially, any anticompetitive behavior that affects trade or commerce. Furthermore, modern courts interpret "trade or commerce" expansively.[12] Unless there is a specific statutory or judicially created exemption, any conduct involving the exchange of money or bartering for goods or services counts as "trade or commerce."[13]

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8. *Id.*

9. Tying is an arrangement whereby a seller conditions the sale of one product or type of product on the purchase of another product or type of product. Likewise, a tying arrangement exists if a seller agrees to sell a product at a discounted price, but only if the buyer also buys another product. The Clayton Act, 15 U.S.C. § 14 (2006), bars such agreements if the agreement substantially lessens competition or tends to create a monopoly. *See also* United Shoe Machinery Corp. v. United States, 258 U.S. 451 (1922).

10. 15 U.S.C. § 14 (2006).

11. Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (2006). Other examples of antitrust legislation include statutes such as the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. §§ 15c–15h (2006), which deals with anticompetitive mergers; the Robinson-Patman Act, 15 U.S.C. §§ 13–13b, 21a (2006), which increased anti-price discrimination provisions of the original Clayton Act; and the Celler-Kefauver Antimerger Act, 15 U.S.C. §§ 18, 21 (2006), which clarified that the Clayton Act applied to both horizontal and vertical mergers. All of these statutes are important to Antitrust Law in general but are beyond the scope of this Note.

12. More specifically, the Sherman Act applies to "commerce among the several states, or with foreign nations." Section 1(a) of the Clayton Act, 15 U.S.C. § 12(a), defines commerce as "trade or commerce among the several States and with foreign nations." Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, provides that "[c]ommerce means commerce among the several states or with foreign nations." Courts have interpreted this to apply to any conduct that would fall under the Commerce Clause of the United States Constitution, with one lingering exception for professional baseball. *See* Fed. Baseball Club v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922) (holding that baseball is not "commerce"). Note that this exception was created at a time when the Supreme Court read the Commerce Clause much more narrowly than it does today. For most industries, the coverage of antitrust laws has expanded alongside the expansion for the Commerce Clause. *See* AM. BAR ASS'N SECTION OF ANTITRUST LAW, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW 7 & n.21 (2007) ("Indeed only in very limited, and sometimes exotic, circumstances have modern courts found conduct to be outside the scope of antitrust.") (citing a case where a court held that solicitation of gratuitous charitable donations was not trade or commerce, and was therefore outside the scope of antitrust regulation as one such odd example). But neither the Court nor Congress has overruled *Federal Baseball Club. See Id.* at 5–6 & n.15 (2007) ("Namely, neither the Court nor Congress has ever overruled the Court's sui generis 1922 rule that professional baseball is not 'commerce.'").

13. *See* AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 7

Second, these statutes operate at a high level of generality, and their texts provide little detail to aid enforcement. The general purpose and principles of the statutes are clear: they are designed to protect economic liberty by preserving "free and unfettered competition"[14] and are premised on the theory that "unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."[15] However, the antitrust statutes do not explicitly define what "free and unfettered competition" actually means. Antitrust law in the United States is therefore a judge-made doctrine resting on top of a general statutory framework. As a result, substantive antitrust law evolves with the economic theory and political ideals of the day.[16]

Consequently, over the past seventy years, the doctrine has changed enormously. From the 1940s through 1970, courts interpreted antitrust law expansively.[17] Both private and public suits were frequent, and plaintiffs usually won.[18] Many business practices were per se illegal,[19] and courts often refused to allow a defendant to proffer procompetitive justifications for their behavior, even if compelling ones existed.[20] Supreme Court decisions focused more on protecting small businesses and individual competitors than on

14. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

15. *Id.*

16. *See* ROBERT PITOFSKY, HARVEY J. GOLDSCHMID & DIANE P. WOOD, TRADE REGULATION 1–3 (6th ed. 2010).

17. In the monopolization context, the Supreme Court seemed almost to adopt a no-fault theory of monopolization under Section 2 of the Sherman Antitrust Act. The Court still required proof of bad acts in addition to market dominance, but lower courts defined "bad acts" so broadly that almost any conduct was enough to create liability for a firm with monopoly power. *See* William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix,* 2007 COLUM. BUS. L. REV. 1, 17; *see, e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945); Am. Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. Griffith, 334 U.S. 100 (1948).

18. ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 33 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf; *see generally* HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 1–10 (2005).

19. When a business behavior is per se illegal, if the plaintiff proves that the defendant engaged in the conduct, the defendant is liable for a violation of antitrust laws; a defendant is given no opportunity to explain that her conduct was in fact good for competition. Classic examples that remain per se illegal today include horizontal price fixing, where two or more competitors agree to buy or sell a product or service only for a certain price, *see* United States v. Socony Vacuum, 310 U.S. 150 (1970), and horizontal market division, where two or more competitors agree to buy or sell a product or service only in a specific geographic location or market, *see* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 734 (1988).

20. *See* ANTITRUST MODERNIZATION COMM'N, *supra* note 18, at 34.

fostering efficiency and innovation-enhancing competition.[21] To the Warren Court, a competitive market was one that contained many firms and where small firms had a right to compete with bigger ones, even if the small firms were less efficient.[22]

The leading economic theory of the day was structuralism, which stated that, in a concentrated market, participants would inevitably engage in anticompetitive behavior.[23] To structuralists, an effective antitrust policy was one directed at preventing market concentration by protecting small competitors, attacking collusion between firms, and blocking mergers, even if doing so prevented individual firms from competing as forcefully as they could.[24] Structuralists believed that true unfettered competition required many market participants. To achieve this, antitrust law needed to actively protect the weaker firms in the market.[25]

Starting in the 1960s, structuralism's dominance slowly began to wane as new economic research out of the University of Chicago gained prominence. Scholars associated with the up-and-coming Chicago School[26] argued that a competitive market was one where unfettered rivalries between firms pushed prices down, increased output, and spurred innovation.[27] Such competition enhanced consumer welfare and increased economic efficiency, benefitting the free-enterprise system as a whole. To the Chicago School, the goal of antitrust law was to enhance consumer welfare by encouraging this type of cut-throat competition. The Chicago School did not mind market concentration because, as less-efficient firms were forced out of the market, efficiency would grow and consumers would benefit. New economic research supported this argument: it suggested that effective competition could occur with a few large firms in a market, and that protecting many small, inefficient competitors merely to avoid concentration actually led to higher prices,

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21. *See, e.g.*, FTC v. Procter & Gamble*,* 386 U.S. 568 (1967) (merger illegal because the resulting firm would have efficiencies that none of its rivals could meet); Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (merger illegal because the resulting firm could undersell its competitors); *see also* ANTITRUST MODERNIZATION COMM'N, *supra* note 18, at 34.

22. ANTITRUST MODERNIZATION COMM'N, *supra* note 18, at 34; HOVENKAMP, *supra* note 18, at 2.

23. *See* HOVENKAMP, *supra* note 18, at 37; *see also* ANTITRUST MODERNIZATION COMM'N, *supra* note 18, at 34; *see generally* Herbert Hovenkamp, *Antitrust and the Costs of Movement*, 78 ANTITRUST L. J. 1, 74–76 (2012).

24. *See* HOVENKAMP, *supra* note 18, at 36–37.

25. *See id.*

26. Primary examples include Robert Bork, Richard Posner, and Frank Easterbrook.

27. *See generally* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 928 (1979); Harry S. Gerla, *Restoring Rivalry as a Central Concept in Antitrust Law*, 75 NEB. L. REV. 209, 210–11 & n.4 (1996).

lower output, and decreased efficiency—effects that harmed consumers.[28] In other words, the Chicago School argued that structuralism, as an economic theory, was wrong.

The Chicago School also argued that many of the market structures and business practices previously condemned by courts as per se illegal were in fact beneficial to competition. Chicago School theorists therefore urged courts to allow defendants to proffer economic arguments for how their behavior was procompetitive and beneficial to consumers, and to permit behavior that under existing law would be per se illegal where procompetitive effects outweighed anticompetitive ones.[29]

In the 1970s, the Supreme Court endorsed the Chicago School's reasoning, pronouncing that "antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*'"[30] and describing the Sherman Act as a "consumer welfare prescription."[31] In 1977, with *Continental T.V., Inc. v. GTE Sylvania Inc.*,[32] the Court began a systematic dismantling of many of the per se rules it created over the prior fifty years, "increasingly turn[ing] to modern economic theory to inform its interpretation and application of the Sherman Act" through the use of the "rule of reason."[33]

In contrast to a per se offense, when conduct is examined under the rule of reason, courts look not just at the type of conduct involved, but also at whether that conduct actually has a negative effect on competition. This involves a complex inquiry into "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed."[34] Defendants are allowed to proffer reasons for why the challenged conduct is beneficial—rather than harmful—to consumers. Economists are brought in by both sides to testify, producing complex models using economic theory to show the effects of the conduct. Under a rule of reason analysis, a court will only find conduct illegal if it determines that the conduct had

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28. *See* Antitrust Modernization Comm'n, *supra* note 18, at 34.

29. *See* Gellhorn et al., Antitrust Law and Economics 105 (5th ed. 2004); Antitrust Modernization Comm'n, *supra* note 18, at 33.

30. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

31. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting Robert H. Bork, The Antitrust Paradox 66 (1978)).

32. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57–59 (1977).

33. *See* Antitrust Modernization Comm'n, *supra* note 18, at 36 (quoting Gavil et al., Antitrust Law in Perspective: Cases, Concepts, and Problems in Competition Policy 358 (2002)).

34. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978).

or will have a negative impact on competition.[35] Although a handful of business practices are still examined under a per se test, most conduct today is analyzed using the "rule of reason."[36]

B. Catalog of Exemptions

Together, the Sherman Act, the Clayton Act, and the Federal Trade Commission Act bar anticompetitive behavior involving trade or commerce. Because modern courts construe trade or commerce broadly, almost any conduct that involves an exchange of money or bartering for a good or service is subject to antitrust law.[37] To prevent antitrust law's broad application in areas where they have felt it unwarranted, the courts and Congress have read and written numerous exemptions into antitrust law over the past eighty years.[38] For example, the Supreme Court created *Noerr-Pennington* immunity to protect political lobbying efforts from antitrust challenge,[39]

35. The rule of reason was first applied in 1911 by the Supreme Court in Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911), which distinguished between the mere possession of monopoly power (which does not violate the Sherman Act) and the use of that power to restrain trade (which does). The rule of reason emerged again in the late 1970s with *Cont'l T.V., Inc.*, 433 U.S. at 36 (implementing a rule of reason standard for vertical nonprice restraints), and continued to spread in the 1990s and 2000s with State Oil Co. v. Kahn, 522 U.S. 3 (1997) (establishing the rule of reason standard for vertical maximum resale price maintenance agreements), and Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (vertical minimum resale price maintenance agreements). *See* Maurice Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1379–80 (2009).

36. *See Stucke, supra* note 35, at 1379–82.

37. *See* AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 7–8. Note the limited exception for professional baseball. *Id.* at 3.

38. It is important to mention judicially created immunities briefly, although they are generally outside the scope of this Note. The largest problem with statutorily created exemptions is that they are enacted in one fell swoop and then left, without amendment, for the foreseeable future. Their continuing validity is rarely, if ever, examined, and only a few are ever repealed. Judicially created immunities do not pose the same problems, because lower courts—and, periodically, the Supreme Court—regularly review the scope of the doctrine. *See, e.g.*, FTC v. Phoebe Putney, 133 S. Ct. 1003 (2013); *see also* AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 21.

39. The Noerr-Pennington doctrine is a judicially created doctrine announced by the Supreme Court in two cases: *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Together, *Noerr* and *Pennington* announce that an individual cannot be held liable in antitrust for petitioning the government to act in an anticompetitive way. The immunity is premised on the theory that if antitrust law were allowed to question lobbying efforts, it would raise First Amendment concerns and might chill legitimate lobbying efforts. *See Noerr*, 365 U.S. at 137; *Pennington*, 381 U.S. at 670. This immunity has a limited exception: if the petitioning effort is a "mere sham"—for instance, where the actor is using the petitioning process to impede competition and does not actually care whether the government body they are petitioning

Parker immunity to immunize state regulatory action from scrutiny,[40] and *Koegh* immunity to prohibit private treble damages suits where the plaintiff claims that a rate submitted to and approved by a regulator violated antitrust law.[41]

The majority of antitrust exemptions, however, were written into law by Congress. A leading Monograph by the American Bar Association Section of Antitrust Law organizes these statutory exemptions into three general categories.[42] For the sake of simplicity, this Note will use that organizational system.

The first category consists of exemptions for an entire industry or type of activity in favor of state or national regulation. For example, the Shipping Act of 1916 exempted the ocean shipping industry from antitrust scrutiny,[43] and the Transportation Act of 1920 immunized railroad mergers and other agreements.[44] In 1945, Congress passed the McCarran-Ferguson Act, immunizing the "business of insurance" from federal antitrust scrutiny and leaving regulation to the states.[45] Congress enacted the last broad statutory exemptions in the mid-1940s.[46] As the era of deregulation took hold in the

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ultimately takes the action for which they are petitioning—then immunity under *Noerr-Pennington* is not available. *Noerr*, 365 U.S. at 144. For example, a trucking company that makes a series of baseless objections to a potential competitor's licensing solely to increase the competitor's expenses and delay their entry into the market, without any hope of actually achieving denial, would be unable to claim *Noerr-Pennington* immunity. *See, e.g.*, Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

40. The *Parker* Doctrine was created by the Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943), and clarified in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980). It holds that state legislators and regulators may act anticompetitively as long as their intent to displace competition is clearly articulated and the anticompetitive policy is actively supervised by the state. *See also* Hoover v. Ronwin, 466 U.S. 558, 568–69 (1984).

41. The *Keogh* doctrine, also called the Filed-Rate Doctrine, was created by the Supreme Court in *Keogh v. Chicago Northwest Railway*, 260 U.S. 156 (1922). The doctrine was created at a time when firms operating in a regulated industry were often required to file proposed rates for review with regulators. Regulators would only approve a rate if it was "fair and reasonable." The Supreme Court created the *Keogh* doctrine on the premise that only the relevant regulatory body had authority to review and change rates—even if the rate was inflated because of unlawful price fixing. In the second half of the twentieth century, the United States underwent a period of deregulation, so the *Keogh* doctrine carries little remaining effect. The few remaining industries required to submit rates do so more out of formality than necessity, as regulating agencies do not substantively review rates. *See* ANTITRUST MODERNIZATION COMM'N, *supra* note 18, at 340–41.

42. *See* AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 31–52.

43. Shipping Act of 1916, ch. 451, 39 Stat. 728.

44. Transportation Act of 1920, ch. 91, § 407, 41 Stat. 456, 480–82 (1934). In 1948, Congress passed the Reed-Bulwinkle Act, ch. 491, 62 Stat. 472 (1948), which added some price-fixing agreements to the list of exemptions enjoyed by the railroad industry alone.

45. *See* McCarran-Ferguson Act, 15 U.S.C. §§ 1011–1015 (2006).

46. The last two exemptions to go into effect were the McCarran-Ferguson Act in 1945 and the Reed-Bulwinkle Act in 1948. *See* AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 34.

1950s and 1960s, most of the exemptions in this category were repealed or substantially modified. Today, only five such exemptions remain.[47] Each remaining exemption provides for oversight of an industry through regulation in theory, although in practice oversight is often limited.[48]

The second category consists of exemptions for specific transactions, practices, or events that are thought to be socially desirable or economically beneficial. As of 2006, nineteen exemptions fell into this category.[49] Some authorize naked price fixing or market allocation,[50] while others allow joint ventures or sales agreements that

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47. The five schemes currently in effect are: the McCarran-Ferguson Act, 15 U.S.C. §§ 1011–1015 (2006), which exempts the "business of insurance" if "regulated by state law"; the Shipping Act, 46 U.S.C. §§ 40101–42307 (2006), which exempts agreements between members of ocean shipping conferences to set and publish fixed rates for specific routes; the Capper-Volstead Act, 7 U.S.C. § 291 (2006), which works in conjunction with the Agricultural Marketing Agreement Act, 7 U.S.C. § 608b (2006) to exempt agricultural cooperatives and some agreements between farmers and agricultural processors about how to market, price, or restrict output for a particular crop; the Fishermen's Collective Marketing Act, 15 U.S.C. §§ 521–522 (2006), which functions much like the Capper-Volstead Act to allow fishing cooperatives to collectively market fish; and the Norris-LaGuardia Act, which operates alongside sections 6 and 20 of the Clayton Act. Together, the Norris-LaGuardia Act and the Clayton Act provide an exemption for labor union activities. Clayton Act, 15 U.S.C. §§ 17–31 (repealed); Norris-LaGuardia Act, 29 U.S.C. §§ 101–113 (2006). The Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101–113), replaced the Clayton Act § 20, expanding the once-modest limitation on injunctions in labor disputes. *See* United States v. Hutcheson, 312 U.S. 219 (1941); s*ee also* AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 38.

48. This is particularly true for fishing and agricultural cooperatives. Although the Capper-Volstead Act provides limited oversight of cooperatives, it has no effective institutional capacity to enforce its regulatory decisions. *See* AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 35. If a cooperative charges excessive prices, the Secretary of Agriculture can review and condemn those prices, and has started investigations into excessive pricing on seven separate occasions. However, none of the investigations actually resulted in action by the Secretary of Agriculture. Furthermore, the Secretary has no authority over the internal operations of cooperatives. *Id.* at 101–02; *see also* Ralph H. Folsom, *Antitrust Enforcement under the Secretaries of Agriculture and Commerce*, 80 Colum. L. Rev. 1623, 1634–37 (1980). Similarly, the Secretary of Commerce has the power under the Fishing Cooperative Act to block agreements to charge an "enhanced" price. *See* 15 U.S.C. § 522 (2006); AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 37. But, the writers of the ABA Monograph could not find any instance in which the Secretary actually exercised this regulatory authority. *Id.* The authors suggest that this is because a series of court decisions in the 1940s and 1950s effectively stripped the Secretary of Commerce of his oversight ability under the Act. *See id.* Additionally, under the McCarran-Ferguson Act, regulatory oversight of the insurance industry was left to the states; accordingly, the rigor of oversight varies widely from state to state. *See id.* at 35, 133, 141–46.

49. *See* AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 38–49.

50. There are eight exemptions that fit into this subcategory. They include the Natural Gas Policy Act of 1978, 15 U.S.C. § 3364(e) (2006), as modified by the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (authorizing natural gas pipeline companies to enter into market allocation agreements in the event of a gas shortage and exempting such agreements from antitrust scrutiny if approved by the Federal Energy Regulatory Commission); the Anti-Hog Cholera Serum Act, 7 U.S.C. § 852 (2006) (exempting a marketing agreement governing price and other sales conditions between Anti-Hog Cholera

would otherwise be illegal.[51] Two immunize a specific merger or types of mergers.[52] Some of the exemptions in this category replace antitrust liability with regulatory oversight,[53] while others do

Serum Producers if approved by the Secretary of Agriculture); the Defense Production Act, 50 U.S.C. App. §§ 2061–2171 (2006) (exempting market allocation of military materials from antitrust scrutiny during a national emergency, if approved by the Secretary of Defense); 49 U.S.C. § 40129 (2006) (exempting certain agreements between competing air carriers to allocate landing rights at airports); Television Program Improvements Act of 1990, 47 U.S.C. § 303c(c) (2006) (authorizing persons in the television industry to agree on guidelines "to alleviate the negative impact of violence in telecast material" without antitrust scrutiny); 16 U.S.C. § 824k(e)(1) (2006) (exempting price fixing and other traditionally anticompetitive conduct in the electric power market from antitrust scrutiny by granting exclusive jurisdiction to the FERC); Charitable Gift Annuity Antitrust Relief Act, 15 U.S.C. §§ 37–37a (2006); ICC Termination Act of 1995, 49 U.S.C. § 13703 (2006) (exempting collective agreements between motor carriers that set rates for moves of household goods). *See* AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 38–42.

51. Exemptions pertaining to joint ventures or sales agreements include: Webb-Pomerene Act, 15 U.S.C. §§ 61–66 (2006) (authorizing the creation and operation of joint ventures to sell products of American companies overseas, subject to supervision by the Federal Trade Commission); Export Trading Company Act, 15 U.S.C. §§ 4001–4003 (2006) (authorizing the creation and operation of joint ventures to sell products of American companies overseas, subject to supervision by Secretary of Commerce); Sports Broadcasting Act of 1961, 15 U.S.C. §§ 1291–1295 (2006) (authorizing collective sale of broadcasting rights to professional basketball, football, baseball, and hockey games); Newspaper Preservation Act, 15 U.S.C. §§ 1801–1804 (2006) (immunizing joint ventures between newspapers that contain otherwise unlawful price-fixing agreements, market allocations, and revenue pooling, provided that one of the newspapers in the joint venture is failing); Agreement Relating to the International Telecommunications Satellite Organization "Intelsat," Art. XV(c), Aug. 20, 1971, 23 U.S.T. 3814 and Headquarters Agreement Between the Government of the United States of America and the International Telecommunications Satellite Organization, ¶ 16, Nov. 22–24, 1976, 28 U.S.T. 2249 (exempting together, by treaty obligation, COMSAT, a common carrier of satellite communications for its conduct in serving INTELSAT, which is an international regulatory body); Small Business Act, 15 U.S.C. § 638(d) (immunizing research and development joint ventures between small businesses if approved by the administrator of the Small Business Association and the Attorney General); 49 U.S.C. § 41308 (2006) (exempting cooperative agreements about international air travel if approved by the Secretary of Transportation); 49 U.S.C. § 42111 (2006) (allowing mutual aid agreements between air carriers if there is a strike that affects international air travel); 15 U.S.C. § 37b (2006) (immunizing the matching program used to place medical school graduates with resident programs). *See* AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 43–47.

52. *See* Professional Football League Merger Act, 15 U.S.C. §§ 1291–1295 (2006) (authorizing the merger of the NFL and AFL football leagues); 49 U.S.C. § 10501(b)(2) (2006) (immunizing merger agreements between railroads that are approved by the Surface Transportation Board) and 49 U.S.C. § 10706(a)(3)(B)(ii) (2006) (requiring direct proof of conspiracy in a price-fixing conspiracy antitrust suits against a railroad); *see also* AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 48–49.

53. For example, the Natural Gas Policy Act of 1978, 15 U.S.C. § 3364(e) (2006), as modified by the Natural Gas Wellhead Decontrol Act of 1989, allows gas pipeline operators to agree on how to allocate gas supplies when faced with a natural gas shortage, subject to supervision by the Federal Energy Regulatory Commission. Without this exemption, such an agreement would likely violate section 1 of the Sherman Act as a per se illegal horizontal price-fixing agreement. *See* AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 32.

not.[54] Some of these exemptions, like the Anti-Hog Cholera Serum Act,[55] appear to have little relevance today; however, this category of exemptions is the only one that continues to expand.[56]

One frequently cited example of an exemption that falls into this category is the Newspaper Preservation Act.[57] The Act immunizes joint ventures between newspapers that contain otherwise unlawful price-fixing agreements, market allocations, and revenue pooling, provided that one of the newspapers in the joint venture is failing. The Act was passed because legislators believed that it was important for society to have a large number of local newspapers with different editorial viewpoints, and many had begun to fail.[58]

The third category of statutory exemptions includes limited modifications of antitrust law for the benefit of some class of activity.[59] The exemptions in this category often modify the remedy that a plaintiff may seek or the substantive standard the plaintiff must

54. For example, the Charitable Gift Annuity Antitrust Relief Act allows charities to jointly set rates for annuities without any federal oversight. 15 U.S.C. §§ 37–37a (2006); *see also* AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 33.

55. This Act authorizes the Secretary of Agriculture to approve a cartel-like marketing agreement among suppliers of an anti-hog cholera vaccine, including rules setting prices and governing other sales conditions, if firms producing 75 percent of the total volume of the vaccine agree. It then exempts any firms participating in the cartel from antitrust prosecution. 7 U.S.C. § 852 (2006). For a more detailed description, see AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 39–40. There are currently no agreements under this provision. *Id.* at 40.

56. The newest exemption to enter into effect was the Medical Resident Matching Program Exemption, codified at 15 U.S.C. § 37b (2006). This exemption immunizes sponsoring, conducting, or participating in a graduate medical education residency-matching program. *See* ANTITRUST MODERNIZATION COMM'N, *supra* note 18, at 348.

57. 15 U.S.C. §§ 1801–1804 (2006).

58. AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 242–44.

59. The exemptions in the third category are: Soft Drink Interbrand Competition Act, 15 U.S.C. §§ 3501–3503 (2006) (requiring courts to consider whether trademarked soft drinks are "in substantial and effective competition with other products of the same general class" when evaluating horizontal market division agreements between soft drink bottlers and producers); Bank Merger Act, 12 U.S.C. § 1828(c) (2006) and Bank Holding Company Act, 12 U.S.C. § 1849(b) (2006) (requiring courts to consider the convenience and needs of the community when deciding whether to allow a particular bank merger that might otherwise be unlawful, exempting consummated mergers, staying mergers until any litigation is complete, and shortening the statute of limitations on challenges to proposed bank mergers); National Cooperative Research and Production Act, 15 U.S.C. §§ 4301–4106 (2006) (eliminating treble damages for qualified joint ventures and modifying the rule of reason standard); Standards Development Organization Advancement Act of 2004, Pub. L. No. 108-237, 118 Stat. 661 (amending 15 U.S.C. §§ 4301–4304) (eliminating treble damages and modifying the rule of reason standard for Standards Development Organizations); Health Care Quality Improvement Act, 42 U.S.C. §§ 11111–11152 (2006) (raising the burden of proof for antitrust challenges to peer review procedures for medical practitioners, and eliminating private rights of action for damages); Local Government Antitrust Act, 15 U.S.C. §§ 34–36 (2006) (eliminating treble damages liability for local governments who violate antitrust laws and limiting relief for private plaintiffs to an injunction). *See* AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 49–52.

meet in order to prove a breach of antitrust law.[60] Sometimes, the substantive standard ordered by Congress effectively operates as complete immunity. For example, the Soft Drink Interbrand Competition Act required courts to examine horizontal market division agreements between soft drink bottlers and producers using a rule of reason-like analysis.[61] But, because the Act also requires plaintiffs to show a lack of "substantial and effective competition" among bottlers, courts have determined that this additional requirement creates effective immunity for soft drink trademark holders and their bottlers.[62]

C. Traditional Justifications for Antitrust Exemptions

Today, the antitrust community largely views statutory exemptions as special interest legislation that is harmful both to the legitimacy of the government's regulation of the economy and to economic progress.[63] Many exemptions have aroused this sentiment since the time of their passage.[64] However, supporters of each statutory exemption were able to proffer at least some public policy reasons for each exemption's necessity. To understand why so many

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60. For example, the Local Government Antitrust Act, 15 U.S.C. §§ 34–36 (2006), allows plaintiffs to bring suit against local government officials acting in their official capacity for violation of antitrust laws but limits relief to an injunction. Similarly, the National Cooperative Research and Production Act, 15 U.S.C. §§ 4301–4306 (2006), eliminates treble damages liability for registered research joint ventures and requires courts to apply a specific form of "rule of reason" analysis when determining whether the challenged conduct of the joint venture is legal. *See* Am. Bar Ass'n Section of Antitrust Law, *supra* note 12, at 33.

61. *See* H.R. Rep. No. 96-1118 at 2, 4–6 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2373.

62. *See, e.g.*, Penn. *ex rel.* Zimmerman v. PepsiCo, Inc., 836 F.2d 173, 175–76 (3d Cir. 1988).

63. *See, e.g.*, Antitrust Modernization Comm'n, *supra* note 18, at 335; Am. Bar Ass'n Section of Antitrust Law, *supra* note 12, at 27; Maurice E. Stucke & Allen P. Grunes, *Why More Antitrust Immunity for the Media Is a Bad Idea,* 105 Nw. U. L. Rev. 1399, 1402 (2011). The idea that exemptions and immunities need to be enacted with caution and largely removed from the law is not new. In 1955, two reports on the modernization of antitrust law, the Stigler Report and the Shenefield Report, called for cutting back on antitrust exemptions and immunities. The Stigler report was prepared largely by academics associated with the University of Chicago. The Shenefield Report was prepared by a commission formed by President Carter. Members of Congress filled half of the seats. *See* Stephen Calkins, *Antitrust Modernization: Looking Backwards*, 31 J. Corp. L. 421, 436, 440, 448 (2006); Nat'l Comm'n for the Review of Antitrust Laws & Procedures, Report to the President and the Attorney General (1979) (conventionally known as the Shenefield Report); George J. Stigler et al., Report of the Task Force on Productivity and Competition (1969), *reprinted in* 115 Cong. Rec. 15,933 (1969) (conventionally known as the Stigler Report).

64. *See Newspaper Preservation Act: Hearings on S. 1520 before the Antitrust Subcomm. of the H.R. Comm. on the Judiciary*, 91st Cong. 294–98, 357–63 (1969) (testimony of Richard W. McLaren, Asst. Atty. Gen., Antitrust Div., Dep't of Justice) (urging Congress not to pass the NPA); *Soft Drink Interbrand Competition Act: Hearings on S. 598 before the Subcomm. on Antitrust,*

exemptions hold little value today and should be repealed, it is first necessary to understand the basic arguments typically proffered for their support. Three arguments appear frequently. Two—natural monopoly and market or institutional failure—are rooted in economics; the third is social-policy based.

1. Natural Monopoly

One common economic justification for antitrust exemptions is that the market for which an exemption was designed is a natural monopoly. A natural monopoly occurs when demand within a certain market is insufficient to support more than one firm, usually because there are significant entry barriers or because input costs are too high to allow more than one firm to produce the good at a minimum efficient scale.[65] For example, a remote town with a population of 1,000 can likely support only one gas station. If the market for gas in that town is a natural monopoly, a second gas station would either drive the first station out of business or fold soon after opening because it would be unable to sell a sufficient quantity of gas to cover its entry or fixed costs.

When a natural monopoly exists, particularly where a firm sells products without ready substitutes, the firm is essentially unregulated by competition. Even if such firms do not engage in "monopolizing" behavior that would violate the Sherman Act, the market might not naturally produce the most efficient result in the absence of effective competition. Therefore, direct government regulation of price and output in such a situation might be a better, more efficient alternative.[66]

2. Market or Institutional Failure

A second common economic justification for antitrust exemptions is that some characteristic of an industry or market is preventing that market from operating efficiently—that there is a market or institutional failure.[67] According to this argument, the

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Monopoly and Business Rights of the S. Comm. on the Judiciary, 96th Cong. 89–104 (1979) (testimony of William S. Comanor, Director, Bureau of Economics of the Federal Trade Commission); *id.* at 205–09 (testimony of Eleanor M. Fox, Professor of Law, New York University School of Law); s*ee also* David L. Foster et al., *The National Cooperative Research Act of 1984 as a Shield From the Antitrust Laws*, 5 J.L. & COM. 347 (1985).

65. *See* AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 54.

66. *Id.* at 54–55.

67. *See id.* at 56.

only way to retain market efficiency is by fostering coordination between firms that would ordinarily be illegal (or at least sufficiently suspect to risk antitrust scrutiny).[68] This coordination may take the form of an otherwise potentially illegal joint venture, information pooling, price fixing, or market distribution.

This argument was used to explain why research and development (R&D) ventures should receive special treatment under the antitrust laws in the National Cooperative Research Act of 1984.[69] The proponents of the Act claimed that the fixed costs associated with R&D were so high that a smaller firm could not afford to develop a product and, therefore, could not afford to participate in the market. But, the argument went, the smaller firm could be an active market participant if it did not have to invest in the full cost of R&D. The result, according to this argument, was a market failure because otherwise-viable competitors were removed from the market, harming competition overall. This market failure could be "fixed," supporters explained, by allowing small firms to bind together through R&D joint ventures, spreading the fixed costs associated with R&D across multiple firms. This would allow greater competition in the market.[70]

Although such joint ventures were not necessarily illegal under antitrust law, Congress believed that the threat of antitrust prosecution and the risk of treble damages deterred companies from entering even the otherwise legal, procompetitive joint ventures of this kind.[71] To fix this market failure, Congress passed the NCRA, which provided that registered R&D joint ventures would be judged on a rule of reason standard if subjected to antitrust scrutiny, and that any successful plaintiff could recover only single damages, not treble.[72] Because rule of reason cases are expensive to prosecute—particularly when the plaintiff can only recover single damages—the NCRA lowered the risk associated with entering into R&D joint ventures, potentially helping to remedy that market failure.[73]

In justifying the McCarran-Ferguson Act, proponents tell another version of the market failure story. In most industries, forward-looking price sharing, including predictions of future expenses, is often illegal because it facilitates price fixing and cartel behavior. But, in

68. *See id.*

69. National Cooperative Research Act of 1984, Pub. L. 98-642, 98 Stat. 1815 (codified as amended at 15 U.S.C. §§ 4301–4306 (2006)); s*ee also* Am. Bar Ass'n Section of Antitrust Law, *supra* note 12, at 263–68.

70. *See, e.g.*, 15 U.S.C. §§ 4301–4306.

71. Am. Bar Ass'n Section of Antitrust Law, *supra* note 12, at 265.

72. 15 U.S.C. §§ 4302–4303.

73. *See infra* note 111, and accompanying text.

the insurance industry, proponents claim that information sharing is essential to efficient pricing.[74] The cost of an insurance product is mostly a function of future expenses, predicted customer-by-customer based on each customer's "risk profile." The more data to which an insurance company has access, proponents argue, the more accurate their risk profiles will be, and the more efficient their pricing models will become. If multiple firms pool their customer data, they can create a far more accurate risk profile than a single firm acting alone, improving efficiency and reducing the cost of insurance to consumers.[75] Therefore, insurance companies need an exemption from antitrust laws to share future expense data.[76]

3. Social Policy

In addition to these economic justifications, some proponents have justified antitrust exemptions through social policy arguments. For example, when passing the Newspaper Protection Act, Congress decided that saving dying newspapers in order to ensure a citizenry educated by diverse editorial viewpoints was more important than letting inefficient competitors drop out of the market.[77] Similarly, in the Sports Broadcasting Act (SBA), Congress authorized league-wide exclusive television agreements in professional football, basketball, baseball, and hockey—agreements that, shortly before enactment of the SBA, were found to violate antitrust laws.[78] The Act allowed professional sports leagues to pool their broadcasting rights for sale, thereby increasing profits through behavior otherwise prohibited by the Sherman Act.[79] Accordingly, the SBA can be seen as an attempt to subsidize professional sports that Congress views as socially desirable.[80]

Most often, those supporting antitrust exemptions employ some combination of economic and public policy justifications in support

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74. *See* AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 137.

75. *See Statutory Immunities and Exemptions: The McCarran-Ferguson Act, Public Hearing Before the Antitrust Modernization Commission* 7–9, 40–41, 48–49 (Oct. 18, 2006) (statement and testimony of Michael McRaith), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/061018_Final_McCarran.pdf [hereinafter *McCarran-Ferguson Act Hearing*]; *see also id.* at 14–16, 32–33 (statement and testimony of Julie Gackenbach).

76. ANTITRUST MODERNIZATION COMM'N, *supra* note 18, at 350–51.

77. *Id.* at 79–80.

78. 15 U.S.C. §§ 1291–1295 (2006), *reversing* United States v. NFL, 196 F. Supp. 445 (E.D. Pa. 1961); *see also* AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 217.

79. *See* Ross C. Paolino, *Upon Further Review: How NFL Network Is Violating the Sherman Act*, 16 SPORTS LAW. J. 1, 6–9 (2009).

80. AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 79.

of their proposals. However, just because economic and social policy concerns were cited when each statutory exemption was enacted does not mean that those concerns were well-founded, nor does it mean that such reasons were the actual impetus behind the legislation.

II. REFORM IS OVERDUE

A. *Current Attitudes Toward Statutory Exemptions*

Today, much of the antitrust community disfavors statutory exemptions.[81] Many scholars believe that, regardless of the rationale stated during debate, statutory exemptions are often special interest legislation, passed at the behest of a particular industry without full consideration of the larger social or economic impact.[82] Courts tend to view exemptions with suspicion and, as a result, read them narrowly. In examining a statutory exemption for the sports broadcasting industry,[83] for example, Judge Easterbrook bluntly stated that "[t]he Sports Broadcasting Act is special interest legislation, a single-industry exception to a law designed for the protection of the public."[84] He therefore condoned court decisions limiting the exemption to what was specifically provided for in the text: "Recognition that special interest legislation enshrines results rather than principles is why courts read exceptions to the antitrust laws narrowly, with beady eyes and green eyeshades."[85]

Government enforcers of antitrust laws are similarly suspicious of statutory exemptions. While advocating against the passage of a new exemption for credit card fees in 2008, the Principal Deputy Assistant Attorney General for Antitrust, Keith B. Nelson, stated that the Department of Justice "believes that antitrust exemptions can be justified only in very rare instances, when the fundamental free-market values underlying the antitrust laws are compellingly outweighed by a clearly paramount and clearly incompatible public

81. *See* ANTITRUST MODERNIZATION COMM'N, *supra* note 18, at 335; AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 27; Stucke & Grunes, *supra* note 63, at 1402 ("The broad consensus among the legal and academic antitrust community is that antitrust exemptions are rarely a good thing.").

82. *See* Stucke & Grunes, *supra* note 63, at 1402.

83. Sports Broadcasting Act, 15 U.S.C. §§ 1291–1295 (2006).

84. Chicago Prof'l Sports v. NBA, 961 F.2d 667, 671–72 (7th Cir. 1992).

85. *Id.*

policy objective."[86] He explained that the Department of Justice is reluctant to support new exemptions because "antitrust laws are the chief legal protector of the free-market principles on which the American economy is based."[87] Further, "[c]ompanies free from competitive pressures have incentives to raise prices, reduce output, and limit investments in expansion and innovation to the detriment of the American consumer."[88]

Antitrust scholars have taken a similar position. In its 2007 monograph on statutory exemptions, the American Bar Association Section on Antitrust noted that none of the nine exemptions examined in detail "appear[ed] to have a reasonable, public interest justification today."[89] Its authors observed that some exemptions are "for practical purposes irrelevant . . . [or] have proven unnecessary."[90]

Even more troubling to the Section on Antitrust, however, were those exemptions that continued to actively harm society, exemptions that had authorized "private parties to exploit market power for their own benefit without any oversight mechanism to ensure that private gains would be devoted to public interest goals," and which had transferred wealth without producing "the public interest benefits on which they were initially justified."[91] Ultimately, the authors recommended that all existing exemptions be removed or amended, and that future use of exemptions be curtailed or discontinued completely.[92]

Likewise, the Antitrust Modernization Commission, a body of antitrust experts established by Congress to make recommendations on how antitrust law should be reformed, found in their 2007 Report that "statutory exemptions undermine, rather than upgrade, the competitiveness and efficiency of the U.S. economy," and urged Congress to revisit and repeal many of the exemptions currently in place.[93]

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86. Letter from Keith B. Nelson, Principal Deputy Assistant Attorney Gen., U.S. Dep't of Justice, to Lamar Smith, Ranking Member, H. Comm. on the Judiciary (June 23, 2008), *available at* http://www.vantagecard.com/images/DOJResponsetoSmithLetter6-23-08.pdf. (arguing in opposition to the Credit Card Fair Fee Act of 2008).

87. *Id.*

88. *Id.*

89. AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 293.

90. *Id.*

91. *Id.*

92. *See id.* at 292.

93. ANTITRUST MODERNIZATION COMM'N, *supra* note 18, at 335.

B. Categorization of Current Exemptions by Effectiveness and Harmfulness

This Note posits that existing antitrust exemptions can be divided into three general categories: exemptions that are harmless but irrelevant, exemptions that actively harm competition and society by transferring wealth to private groups without corresponding public benefits, and exemptions that may continue to be beneficial.

The first category consists of statutory exemptions that have so little relevance today that no one is likely to push for or challenge their proposed repeal. Many of these exemptions highlight an important problem with statutory exemptions more generally: even if a statutory exemption was well-tailored to fix an economic or social policy concern at the time of its passage, that concern may have ceased to exist while the exemption remains in place. Statutory exemptions do not have the flexibility to adapt to changing markets, economic theories, and public policy goals.

Antitrust laws in the United States are not spelled out in intricate detail in the United States Code. They consist of a bare-bones statutory framework that underlies substantive judge- and agency-created doctrine that changes over time with advances in economic thinking. With this construction, antitrust laws can adapt as economic theories and market conditions change. Statutory exemptions, with detailed provisions designed to remedy unfavorable conditions at a given period in time, cannot. As a result, conditions change and the laws grow stale.

One example in this category is the Anti-Hog Cholera Serum Act, which, with the blessing of the Secretary of Agriculture, authorizes a price-fixing cartel of anti-hog cholera serum producers.[94] Hog cholera was officially eradicated in the United States in 1978, and with the eradication came the demise of anti-hog cholera serum production.[95] There has not been an approved cartel, or an attempt to install an improved cartel, for years.[96] Another similarly irrelevant exemption is contained within the Defense Production Act.[97] The Act authorizes blatant market division of military materials markets during times of national emergency and exempts those market division agreements from antitrust scrutiny. The Act was

94. Anti-Hog Cholera Serum Act, 7 U.S.C. § 852 (2006).

95. *See Hog Cholera Declared Eradicated in the U.S.*, N.Y. TIMES, Jan. 31, 1978, at 12. For a history of the effort to eradicate hog cholera, see Sci. & Educ. Admin., U.S. Dep't of Agric., *Eradicating Hog Cholera*, AGRIC. RES., Mar. 1978, at 8, *available at* http://www.ars.usda.gov/is/timeline/cholera.htm.

96. *See* AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 39–40.

97. *See* 50 U.S.C. App. §§ 2061–2171 (2006).

passed in 1950 but has never once been used.[98] These exemptions are irrelevant today, and their continued existence poses no real threat to competition or society more generally. The only serious objection one can make to these exemptions is symbolic—that they muddy the antitrust laws and take up room in the United States Code.

The second category of antitrust exemptions includes those that "authorize private parties to exploit market power for their own benefit," transferring wealth without producing "the public interest benefits for which they were initially justified,"[99] which unquestionably harms competition and society. The exemptions in this category without question have not created the public gains promised when they were enacted, and should be removed for the sake of economic competitiveness. Unlike irrelevant exemptions, these exemptions are likely to have powerful supporters who will lobby for their retention. Those powerful supporters likely engage in the exempted conduct and therefore benefit from the exemption's continued existence.

One example in this category is the Wholesale Power Act, which exempts price fixing and other traditionally anticompetitive conduct in the electric power market from antitrust scrutiny.[100] The Act granted this exemption without providing an alternative regulatory scheme or any other means to deter anticompetitive conduct that are actually enforced. This exemption thus allows suppliers of wholesale electricity to increase their earnings at the expense of consumers.[101] The Act continues to extract higher prices from consumers today, harming efficiency and competition as a whole.[102]

The third category consists of exemptions whose repeal is more controversial because there is evidence of a past or ongoing benefit to society. One example is the McCarran-Ferguson Act. As discussed above, the McCarran-Ferguson Act exempts the insurance industry from antitrust scrutiny for certain information-sharing arrangements.[103] This particular exemption has received significant attention in recent years. Bills proposing the exemption's repeal,

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98. *See* AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 40.

99. *Id.*

100. *See* 16 U.S.C. § 824k(e)(1) (2006).

101. *See generally* Peter Carstensen, Presentation at the American Bar Association Antitrust Section Program: The Antitrust Modernization Commission at Mid-Course (June 9, 2006), *available at* http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/report_amc-transcript.authcheckdam.pdf.

102. *See generally id.*

103. *See supra* notes 74–76 and accompanying text.

however, have died in committee.[104] The Antitrust Modernization Commission held an entire hearing on the McCarran-Ferguson Act alone,[105] and academic literature surrounding the repeal of the Act has been particularly active.[106]

As expected, the insurance industry has objected vociferously to suggestions of reform.[107] The primary argument presented by supporters of the Act is that sharing cost data is actually procompetitive because it enables insurers, particularly smaller insurers, to reasonably assess risk and compete effectively.[108] But whether the conduct exempted by the Act would even be illegal under antitrust law today is questionable and, even were it to be challenged, such activity would be judged under the rule of reason, with due consideration given to any procompetitive effects.[109] Absent the exemption, data sharing would be subject to no more scrutiny than in other industries: procompetitive data sharing would be allowed, while anticompetitive data sharing would be illegal under the rule of reason.

The exemption contained in the McCarran-Ferguson Act would make more sense if antitrust law today were primarily enforced using a per se illegal standard, as exposure to antitrust scrutiny would prevent both procompetitive and anticompetitive data sharing. But one of the benefits of the rule of reason approach for agreements such as these is that it distinguishes between actions that are procompetitive in a particular situation and those that are not, encouraging the former while prohibiting the latter. If the only real justification proffered in support of the McCarran-Ferguson Act is that such data sharing is procompetitive, it is not clear what benefit this exemption provides today.

An alternative explanation for the insurance industry's support of the McCarran-Ferguson Act is that it gives the industry the tools it needs to inflate prices through conscious parallelism if not actual

104. *See, e.g.*, Health Insurance Industry Antitrust Enforcement Act of 2013, H.R. 99, 113th Cong. (2013) (eliminating most of the McCarran-Ferguson's insurance industry exemption).

105. *McCarran-Ferguson Act Hearing*, *supra* note 75.

106. *See, e.g.*, Chris Sagers, *Much Ado About Possibly Pretty Little: McCarran-Ferguson Repeal in the Health Care Reform Effort*, 28 YALE L. & POL'Y REV. 365 (2010).

107. *See, e.g.*, *NAMIC Starts Web Weapon to Keep McCarran-Ferguson*, PROPERTY CASUALTY 360° (Apr. 16, 2007), http://www.propertycasualty360.com/2007/04/16/namic-starts-web-weapon-to-keep-mccarran-ferguson; *NAMIC Opposes 'Misguided' Efforts to Repeal McCarran-Ferguson Exemption*, NAMIC, http://www.namic.org/Home/ReadArticle/98ecaec6-2425-4a8a-a431-a2f51fb56f77 (last updated Mar. 26, 2010).

108. *See* ANTITRUST MODERNIZATION COMM'N, *supra* note 18, at 351; *see also McCarran-Ferguson Act Hearing*, *supra* note 75, at 7–9, 40, 48–49 (statement and testimony of Michael McRaith); *id.* at 14–16, 32–33 (statement and testimony of Julie Gackenbach).

109. *See* ANTITRUST MODERNIZATION COMM'N, *supra* note 18, at 351.

price fixing.[110] A more benign explanation is that the industry is afraid that the cost of defending a rule of reason suit is so high that it would deter even procompetitive behavior.[111] However, the insurance industry has not made clear why the risks and costs associated with rule of reason litigation are any larger in the insurance industry than in any other industry so as to justify different treatment. After enjoying sixty-eight years of immunity, the industry should at least be required to explain to Congress why it deserves special treatment.

III. A PROPOSAL FOR REFORM

Once in place, exemptions are rarely revisited,[112] and powerful industries continue to lobby for new ones.[113] For example, regardless of whether the McCarran-Ferguson Act remains warranted or not, every attempt to repeal the Act has failed. In fact, every recent attempt to reform any current statutory exemption has failed.[114] The harm, or, at the very least, the ineffectiveness of many of these statutory exemptions is neither partisan nor heartily contested by antitrust experts.[115] But efforts to repeal exemptions rarely gain

110. *See, e.g.*, Benjamin Holland Able, *Model-Based Pricing in Hurricane Insurance: A Case Study for Judicial Reform of the McCarran-Ferguson Act*, 46 MICH. J. L. REFORM 1029, 1045–46 (2013).

111. If the principle fear is that the cost of defending a rule of reason suit would deter procompetitive conduct, perhaps a better alternative to the current exemption would be to draft a new exemption allowing antitrust scrutiny but limiting damages to single damages, rather than treble damages, similar to the National Cooperative Research and Production Act. This would deter private plaintiffs from bringing a rule of reason suit, because the potential single-damages recovery is unlikely to warrant the costs of bringing such a suit. *See* discussion *supra* notes 69–73 and accompanying text.

112. AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 4.

113. See the Medical Resident Matching Program Exemption, contained in 15 U.S.C. § 37b (2006). For examples of recent proposed statutory exemptions that were not ultimately enacted, see Pandemic and All-Hazards Preparedness Act, S. 3715, 112th Cong. (2012); Credit Card Fair Fees Act of 2008, H.R. 5546, 110th Cong. (2008).

114. Members of Congress occasionally introduce bills repealing or limiting existing statutory exemptions, but over the past few years such attempts have died in committee. *See* Health Insurance Industry Antitrust Enforcement Act of 2013, H.R. 99, 113th Cong. (2013) (eliminating most of the McCarran-Ferguson's insurance industry exemption); Internet Radio Fairness Act of 2012, H.R. 6480, 112th Cong. (2012) (limiting current statutory exemptions for joint ventures between sound recording copyright holders).

115. This does not mean, however, that the repeal of many of these antitrust exemptions will face little resistance. The industries currently benefitting from exemptions earned the exemptions initially because those industries had the political clout to raise their issue to lawmakers. For many exemptions, participants in the benefitted industries have profited, often enormously, from the lack of antitrust regulation, and will likely fight against any attempted repeal. Additionally, it is likely that the repeal of certain antitrust exemptions, such as those that benefit farmers or labor, will be politically charged. But, even disregarding the

traction. Interest groups advocating for an exemption may be powerful and strongly motivated, but groups advocating against an exemption are often fragmented and have little stake in pursuing repeal.[116]

Any effective solution must do two things. First, it must provide a way to review the statutory exemptions currently in place to determine whether they are still necessary and beneficial to society. Second, it must switch the default from one where a statutory exemption, once enacted, remains on the books until Congress acts affirmatively to repeal it to one where a statutory exemption is presumed to expire after a short period of time unless Congress believes that it is still necessary. Further, any solution must be an efficient use of congressional time and must break the institutional stagnation that has prevented the review and repeal of statutory exemptions to date.

This Note's proposed solution is a federal law containing four provisions. Specifically, this Note urges Congress to adopt legislation that (1) imposes a general sunset on all statutory exemptions after five years, (2) orders the Government Accountability Office (GAO) to prepare a report on the continuing need for each statutory exemption currently in place, (3) requires the Senate and House Judiciary Committees to hold hearings on any exemption that the GAO finds still warranted, and (4) provides that, if the committees find that an exemption should be renewed after the hearings, they forward a law overriding the sunset provision for that exemption to the floor of each house to be voted on, signed by the President, and put into effect.[117]

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more contentious exemptions, there are a significant number of exemptions that serve no continuing purpose and are unlikely to draw wide support in Congress.

116. The ABA monograph puts this point well: "If legislative exemptions are to be continued, there is a need not only for high quality, pre-adoption fact-finding, but also for ongoing review. However, absent some permanent institutional change Congress will have no incentive to review existing exemptions. It has only rarely done so and then only when the political will exists in some constituency for change." Am. Bar Ass'n Section of Antitrust Law, *supra* note 12, at 310.

117. A number of the proposals put forth suggest that all exemptions enacted in the future contain a sunset provision. *See id.* at 311; Antitrust Modernization Comm'n, *supra* note 18, at 355; Theodore Vorhees, Presentation at the American Bar Association Antitrust Section Program: The Antitrust Modernization Commission at Mid-Course 198 (June 9, 2006), *available at* http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/report_amc-transcript.authcheckdam.pdf. To date, only one statutory exemption, the Need-Based Educational Aid Act, 15 U.S.C. § 1 note (2006), has contained a sunset provision. The Act allowed certain colleges and universities to collectively design a formula to calculate need-based financial aid without a charge of illegal price fixing. It was extended twice but then allowed to expire in 2008. This Note's proposed reform draws heavily on the history of the Need-Based Education Aid Act. In addition to the sunset provision, the Act also mandated that the Government Accountability Office study the effects of the Act and report to

A. The Sunset Provision

Perhaps the most critical aspect of this Note's proposed reform is the five-year general sunset provision that would apply to all statutory exemptions currently in place.[118] This provision switches the default from one where every exemption remains in effect indefinitely to one where irrelevant and harmful exemptions are automatically stripped from the law absent an affirmative act by Congress. This provision will force the proponents of a statutory exemption to once again make their case for why the exemption is appropriate.

B. The GAO Report

The provision requiring a GAO report on each existing exemption is also critical. Few, if any, hearings have been held on the vast majority of exemptions currently in place. Many exemptions have not been reconsidered in decades, and no one knows how effective most statutory exemptions actually are in accomplishing their stated goals. To reform this area of the law, more information is desperately needed. The purpose of the GAO report is to uncover this information.

The GAO report should ask and answer several questions. First, it should determine whether the conduct immunized by a given statutory exemption could result in antitrust liability today. As explained in Part I, antitrust law has changed immensely over the past sixty years in response to evolving economic theory and market conditions. Many behaviors that were once per se illegal are now firmly

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the House and Senate Judiciary Committees. *See* Pub. L. 107-72, § 3, 115 Stat. 648 (2001). The report generated was "very thorough, careful and comprehensive, using a variety of different approaches to analyze the data." AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 43 n.74. The report concluded that the Act had no impact whatsoever on the amount of financial aid offered to any given student, nor did it have any effect on the likelihood that a student offered aid would enroll at any particular school. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-963, HIGHER EDUCATION: SCHOOLS' USE OF THE ANTITRUST EXEMPTION HAS NOT SIGNIFICANTLY AFFECTED COLLEGE AFFORDABILITY OR LIKELIHOOD OF STUDENT ENROLLMENT TO DATE 4–6 (2006); AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 42–43.

118. Although the proposal for which this Note advocates is primarily focused on ridding the law of statutory exemptions currently in place, it is important to note that any future exemptions should also contain a sunset provision like the one in the Need-Based Educational Aid Act, 15 U.S.C. § 1 note (2006). Unless Congress writes a sunset provision into every future exemption enacted, antitrust law will once again become just as muddied as it is today.

analyzed under the rule of reason and rarely, if ever, found to violate antitrust laws.[119] Even many behaviors formerly deemed anticompetitive under the rule of reason are, when explained through modern economic theory, likely to be found legal.[120] If the conduct exempted would not actually violate modern antitrust law, then the exemption is unnecessary and should not be renewed.[121]

Second, the GAO should determine if the behavior covered by the exemption actually occurs today, regardless of whether it would be subject to antitrust liability. Some amendments, like the Anti-Hog Cholera Serum Act[122] and parts of the Defense Production Act,[123] are irrelevant today not because the conduct would be permissible under contemporary antitrust laws but because the problem they were designed to address no longer exists.[124] Conduct that does not occur does not deserve an exemption, and any existing exemption should be allowed to lapse. Even if future conduct might warrant an exemption, it is better to repeal the current exemption and require Congress to enact a new one that is tailored to the circumstances at that later date.

Third, the GAO should ask what justifications were given for the exemption's original passage. Was the exemption passed to remedy some apparent market failure? Was it designed to protect conduct that Congress deemed socially desirable, despite its anticompetitive effect? Was it designed to replace antitrust regulation with direct governmental regulation? Was it purely a reaction to an administrative or court decision finding liability where Congress believed the behavior was in fact procompetitive? To appropriately judge the success or failure of any given exemption, it is essential to know the intent behind its enactment.

Fourth, the GAO should ask, in light of the findings made in the third inquiry, whether the exemption has served its intended purpose and whether it is still needed today. Has the exemption

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119. For example, resale price maintenance agreements were once treated as per se illegal under the Supreme Court's holding in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). However, with an opinion that sounds like it was taken wholesale from a Chicago School economic theory textbook, the Supreme Court in 2008 ruled that such agreements are rarely, if ever, anticompetitive and should be analyzed under the rule of reason. *See* Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2008); *see also supra* Part I.

120. One example is conduct categorized as a nonprice vertical restraint, like a territorial restriction imposed by a manufacturer on a retailer. *See* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57–59 (1977).

121. ANTITRUST MODERNIZATION COMM'N, *supra* note 18, at 350.

122. 7 U.S.C. § 852 (2006).

123. *See* 50 U.S.C. App. §§ 2061–2172 (2006).

124. *See* AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 12, at 39–40; *see also supra* notes 94–98 and accompanying text.

successfully achieved the aims that it was ostensibly enacted to achieve? Has it actually fostered the socially desirable behavior that it was designed to encourage? Has the exemption enhanced or harmed consumer welfare? What does the affected market look like today in comparison to when the exemption was passed? If the exemption was enacted to enable direct regulation, is there still a regulatory scheme providing oversight?

C. Hearings and Renewal of Recommended Exemptions Only

The GAO would then compile this information in a report and clearly recommend whether or not to renew the given exemption. This report would be submitted to the Senate and House Judiciary Committees. If the report recommends that a given exemption be extended, then both committees must, under this Note's proposed law, hold a hearing on the exemption. If, after the hearing, the committees find that the exemption should be renewed, then the committees must forward a provision overriding the sunset for the exemption to the floor of each house to be voted on and signed by the President. In contrast, if the report recommends that the statutory exemption be allowed to expire, and Congress does not decide on its own to hold hearings or override the sunset provision, then the exemption will expire at the end of the five-year sunset period.

D. Summary of the Reform Proposal

This reform is not perfect. It requires Congress to act—a requirement not easily fulfilled in today's era of partisan deadlock. Moreover, it places a heavy burden on the GAO and undoubtedly comes with costs, some of which will go toward studying exemptions that, for all practical purposes, cause no harm today. However, many statutory exemptions currently in effect are undermining the competitiveness and efficiency of the United States economy and, to date, no piecemeal reform has worked. Therefore, this Note suggests a bolder, most holistic approach.

This reform allows non-partisan experts in antitrust law to examine existing exemptions and make recommendations regarding their continued utility. It then places the burden on supporters of an exemption to demonstrate, to the GAO and to Congress, why the exemption is still necessary. Because this solution requires minimal congressional action, it will hopefully limit the risk of political deadlock. Further, because it would mandate full committee hearings only on exemptions that remain useful, it would allow the docket of exemptions to be cleared with little wasted congressional time. Additionally, because the solution would require Congress to act affirmatively to retain a statutory exemption, the default would switch from perpetuating every exemption—regardless of effectiveness—to automatic sunset of all exemptions absent clear congressional intent to preserve specified ones.

Overall, this reform is designed to jump start the debate on whether the more-controversial exemptions currently in effect, like the McCarran-Ferguson Act, should be repealed. At the same time, this reform eliminates less controversial, irrelevant exemptions from the United States Code without wasting Congressional time or expense on an exemption-by-exemption repeal.

Conclusion

Antitrust law is designed to be an overarching check against anticompetitive conduct that harms the free market system. Statutory exemptions to antitrust laws are supposed to provide some relief from this check in cases where natural monopolies or market failures make the application of antitrust law to a specific industry or to particular conduct harmful to competition, or where Congress has decided that some social policy goal is more important than robust competition. However, many of the statutory exemptions currently on the books no longer serve their intended purpose. Some are merely irrelevant, while others actively harm society by transferring wealth to private individuals and hampering beneficial competition. It is time for holistic reform. If enacted, this Note's four-part legislative solution would make significant progress toward ridding the law of such stale or harmful exemptions, bringing antitrust law back to its bedrock principle of protecting economic liberty by preserving competition.