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Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy

JOHN B. KIRKWOOD*

A federal judge recently held that Apple violated antitrust laws by conspiring with leading publishers to raise e-book prices. While the Justice Department characterized the case as routine, many commentators argued it should not have been brought. In their view, the real villain was Amazon, whose power and aggressive behavior threatened to create a monopoly, reduce consumer choice, and diminish the vitality of book publishing. In the face of such a powerful customer, the publishers should have been allowed to collude.

This article addresses that issue, in the e-books case and in general. In the e-books case, collusion was almost certainly unwarranted. Amazon appeared to be engaged in loss leading, not predatory pricing, and fears of an eventual Amazon monopoly were largely unfounded. Amazon's buyer power, moreover, was not monopsony power, which is frequently harmful, but countervailing power, which can lead to lower consumer prices. There was no evidence it had caused a reduction in the variety of new books.

In some circumstances, however, collusion to control a powerful customer would be justified. This article identifies the most important situations and develops a defense to the per se rule to protect them. While the defense would rarely be satisfied, when it is, it would provide a remedy for anticompetitive buyer power that would otherwise persist.

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I. INTRODUCTION

Few recent antitrust cases have generated as much interest—and controversy—as “the e-books case.” It involved five leading publishers, two of America’s best known high-tech firms (Apple and Amazon), and a secret conspiracy, fueled by Steve Jobs himself, to force Amazon to charge higher prices.¹ According to the Justice Department, the publish-

1. Amazon’s growth, ambitions as a publisher, and deep discounting of e-books concerned the publishers so much that, according to Brad Stone, they “believed their necks were being fitted for the noose.” BRAD STONE, *THE EVERYTHING STORE: JEFF BEZOS AND THE AGE OF AMAZON* 280

ers—encouraged and assisted by Apple—agreed to impose a new pricing model on Amazon, which sharply increased the prices of new and bestselling e-books.² In the Justice Department’s telling, it was a routine case: “Stripped of the glitz surrounding e-books and Apple, this is an unremarkable and obvious price-fixing case appropriate for *per se* condemnation.”³

But it was hardly routine in the eyes of many inside and outside the industry. To the contrary, the response to the Justice Department’s first round of proposed settlements, which allowed Amazon to resume its price cutting on e-books, was intense and highly critical. The settlements generated 868 public comments, and they were “overwhelmingly negative.”⁴ To be sure, many of them were submitted by Amazon’s competitors, who may have been cloaking self-serving objections⁵ in public interest terms.⁶ Other comments, however, could not be so easily swept aside. For example, the Authors Guild, which represented individuals who were not participants in the conspiracy and who would normally

(2013). Their response was “a sprawling, dramatic, multiyear imbroglio that would be laid bare in . . . thousands of pages of legal documents and weeks of courtroom testimony . . .” *Id.*

2. See *infra* Part II (summarizing the case).

3. Plaintiff’s Pretrial Memorandum of Law at 4, *United States v. Apple, Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013) (No. 12-cv-2826).

4. Opinion & Order at 19, *United States v. Apple, Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013) (No. 12-cv-2826); see also *id.* (“More than 90 percent . . . opposed entry of the proposed Final Judgment.”).

5. See Response of Plaintiff United States to Public Comments on the Proposed Final Judgment at v, *United States v. Apple, Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013) (No. 12-cv-2826) (“Critical comments generally were submitted by those who have an interest in seeing consumers pay more for e-books, and hobbling retailers that might want to sell e-books at lower prices.”).

6. Amazon’s competitors argued that the “agency model” of pricing, which the publishers imposed on Amazon, benefited consumers because it encouraged other retailers to enter or invest in the industry. See, e.g., Comments of Barnes & Noble, Inc. on the Proposed Final Judgment at 19, *United States v. Apple, Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013) (No. 12-cv-2826) (“This result [releasing Amazon from the agency model] can only hurt e-book consumers. Improved profitability has enabled distributors to invest substantially in the industry.”); American Booksellers Association Comments on the Proposed Consent Decree at 2, *United States v. Apple, Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013) (No. 12-cv-2826) (“Indie bookstores’ entrance into the e-book market in late 2010 occurred only because the market was commercially viable as a consequence of adoption by various publishers of the Agency Model in April 2010.”); Apple Inc.’s Tunney Act Comment at 4, *United States v. Apple, Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013) (No. 12-cv-2826) (“[T]he Proposed Judgment . . . will harm emerging eBook competitors such as Apple, Barnes & Noble, and other retailers, including independent retailers. In the end, the biggest loser will be the consumer . . .”).

Part II explains the principal differences between the wholesale model and the agency model. In brief, under the wholesale model, publishers charge a wholesale price, and retailers are free to set the retail price. Under the agency model, the retail price of a book is determined by the publisher. By imposing the agency model on Amazon, the conspiring publishers took control of Amazon’s retail prices and increased them, which made it more profitable to enter or invest in the e-books market.

prefer competition in the distribution of their ideas, opposed entry of the consent orders.⁷ Numerous commentators also criticized the government's action,⁸ including Professor Richard Epstein, who concluded that "the betting here is that this law suit is a mistake."⁹

What united the critics was concern with Amazon's dominant position as an e-book retailer and its aggressive tactics, particularly its below-cost pricing as a seller and its hard bargaining as a buyer. Its low prices could drive out other booksellers and ultimately increase retail prices, while its buyer power could reduce gains to publishers and authors, stunting the development of new titles. One common refrain was that the government was focused on collusion by the publishers and Apple when the real problem was the threat of an Amazon monopoly.¹⁰ Scott Turow, President of the Authors Guild, declared that "Amazon was using e-book discounting to destroy bookselling, making it uneconomic for physical bookstores to keep their doors open."¹¹ Michael Shermer stated: "What this lawsuit probably will do . . . is return to Amazon the power to monopolize the e-book market through predatory pricing to the detriment of publishers, authors and, ultimately, read-

7. See Comments of The Authors Guild, Inc. at 1, *United States v. Apple, Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013) (No. 12-cv-2826).

8. See, e.g., David Carr, *Book Publishing's Real Nemesis*, N.Y. TIMES, Apr. 15, 2012, at B1, available at http://www.nytimes.com/2012/04/16/business/media/amazon-low-prices-disguise-a-high-cost.html?pagewanted=all&_r=0; Michael Hiltzik, *E-Book Ruling a Boon for Amazon*, L.A. TIMES, Sept. 12, 2012, at B1, available at <http://articles.latimes.com/2012/sep/12/business/la-fi-hiltzik-20120912>; Robert G. Hansen, *The Apple E-Book Lawsuit and Amazon's \$9.99 Problem*, U.S. NEWS (Apr. 13, 2012, 12:12 PM), <http://www.usnews.com/opinion/blogs/economic-intelligence/2012/04/13/the-apple-e-book-lawsuit-and-amazons-999-problem>; Steven Pearlstein, *Pick Your Monopoly: Apple or Amazon*, WASH. POST (Mar. 10, 2012), http://www.washingtonpost.com/pick-your-monopoly-apple-or-amazon/2012/03/05/gIQA0kBB4R_story.html; Michael Shermer, *E-Book Overkill*, L.A. TIMES (Apr. 16, 2012), <http://articles.latimes.com/2012/apr/16/opinion/la-oe-shermer-apple-collusion-lawsuit-20120416>.

9. Richard Epstein, *Not Proven: The DOJ Suit Against Apple for eBook Pricing*, RICOCHET (Apr. 12, 2012, 12:33 PM), <http://ricochet.com/main-feed/Not-Proven-The-DOJ-suit-Against-Apple-for-eBook-Pricing>. He elaborated: "Stated more generally, the usual cartel involves restrictions that have few if any efficiency benefits. These agency transactions have both pluses and minuses for consumers and for overall social welfare. It is a good rule of thumb to hold back from public enforcement when the relative balance is unclear." *Id.*

10. See, e.g., Juliette Garside, *Ebook Bestsellers: Ebook Price War Between Apple and Amazon Set to Be Exposed by EC Probe*, OBSERVER, Dec. 18, 2011, at 36 ("The whole point of the agency model is to prevent the emergence of monopolists like Amazon," says Benedict Evans, a digital media expert at Enders Analysis. "What the publishers have done is stopped Amazon from crushing the independent ebook retail sector.").

11. *Letter from Scott Turow: Grim News*, AUTHORS GUILD (Mar. 9, 2012), <http://www.authorsguild.org/advocacy/letter-from-scott-turow-grim-news>. Turow argued that brick-and-mortar bookstores provide an especially valuable service: "Marketing studies consistently show that readers are far more adventurous in their choice of books when in a bookstore than when shopping online. In bookstores, readers are open to trying new genres and new authors: it's by far the best way for new works to be discovered." *Id.*

ers.”¹² David Carr asserted that Amazon was not only using below-cost pricing to block entry into e-book retailing,¹³ but wielding its buyer power to coerce better terms from publishers.¹⁴ Steven Pearlstein asked the ultimate question: “[A]re monopolies so bad that we might want to tolerate a little price-fixing by customers or suppliers in order to break them? Could a little anti-competitive behavior actually be pro-competitive?”¹⁵

This article addresses that question. It asks whether suppliers ought to be allowed to collude to counteract the power of a large customer, either in the circumstances of the e-books case or in other settings. The issue is important. If the e-books case was a mistake, it would cast doubt on the value of antitrust enforcement, suggesting that it seeks to preserve “competition” at the expense of consumers.¹⁶ Likewise, if collusion to control a powerful customer can never be permitted, no matter how beneficial the consequences, it would raise questions about the very purpose of antitrust law. Is the goal to preserve rivalry for its own sake, or is the aim to make consumers, small suppliers, and the economy better off? Finally, if, as a normative matter, collusion to control a powerful customer should be allowed in some circumstances, antitrust law must address the pragmatic issue: Can those circumstances be identified with sufficient clarity to permit a workable and limited defense?¹⁷

Part II begins by summarizing the e-books case. This review leaves little doubt that the defendant publishers conspired, with the enthusiastic assistance of Apple, to impose a new pricing model on Amazon and other retailers, causing the prices of popular e-books to rise substantially. The question is whether that conspiracy was nevertheless desirable because it reduced Amazon’s power and aggressive behavior, benefitting consumers in the long run.

12. Shermer, *supra* note 8. Senator Schumer argued that, if Amazon were not restrained, it would devastate book publishing as well as book retailing. He asserted that “the suit could wipe out the publishing industry as we know it,” and stated that “[t]he prospect that a single firm would control access to books should give any reader pause.” Charles E. Schumer, *Memo to DOJ: Drop the Apple E-Books Suit*, WALL ST. J., Jul. 18, 2012, at A15.

13. Carr, *supra* note 8 (“Amazon’s \$9.99 subprofit price was a virtually impenetrable barrier to entry for anyone who couldn’t afford to lose millions in order to gain market share.”).

14. *Id.* (“From the very beginning and with increasing regularity, Amazon has used its market power to bully and dictate. It leaned on the Independent Publishers Group in recent months for better terms and when those negotiations didn’t work out, Amazon simply removed the company’s almost 5,000 e-books from its virtual shelves.”).

15. Pearlstein, *supra* note 8.

16. *Cf.* Chris Sagers, *United States v. Apple and the Contemporary Legitimacy of Antitrust*, CPI ANTITRUST CHRONICLE, June 2012 (1), at 2.

17. The issue is difficult because, as Sagers notes, “If there is one regulator that does not share the public interest, it is a conspiracy of competitors.” *Id.* at 3. The pragmatic question, then, is whether workable criteria can be identified for determining when collusion by self-interested suppliers would promote consumer welfare.

To lay the groundwork for that inquiry, Part III reviews the state of the law and the scholarship on whether collusion is permissible if it offsets the power of a large customer. The case law is clear. Virtually all cases apply a rule of *per se* illegality to hard-core collusion—agreements among rivals that set prices or output but do not involve any productive integration—even if the colluders are selling to or buying from a firm with substantial power. Only one case has recognized the benefits of offsetting power.¹⁸ Similarly, most scholars would not let firms collude to exert countervailing power, concluding that a defense for such behavior would do more harm than good.¹⁹ Several economists have shown, however, that when small suppliers face a customer with monopsony power, they can protect themselves and benefit consumers by colluding to force the monopsonist to raise its input price and increase output.²⁰

Part IV evaluates whether this—or any other rationale—justified the e-books conspiracy. The economists' rationale did not because Amazon did not possess monopsony power. While it did have considerable countervailing power,²¹ there was no evidence that the exercise of this power had harmed consumers or that it was likely to pose a much more severe threat in the future.²² Amazon's below-cost prices on many titles were a concern, but these prices were probably not predatory, and even if they had been, the proper response was not collusion but an antitrust lawsuit. Neither Amazon's power as a buyer nor its behavior as a seller justified a conspiracy that imposed substantial price increases on consumers.²³

The larger issue, however, remains: Should suppliers be allowed to collude in some circumstances to offset the power of a large customer? Part V concludes that the answer is yes and proposes a limited defense

18. *Balmoral Cinema, Inc. v. Allied Artists Pictures Corp.*, 885 F.2d 313, 317 (6th Cir. 1989).

19. See *infra* Part III.B (summarizing the views of Professors Hovenkamp, Elhauge, Baker, Farrell, and Shapiro).

20. See *infra* Part III.B (describing the work of Professors Blair, Harrison, and Campbell). Monopsony power is the classic form of buyer power. In theory, it is the mirror image of monopoly power, and its exercise usually results in input prices—and output—that are below the competitive level.

21. Countervailing power is the other type of buyer power. As explained below, it means the power to offset the market power of a supplier. While the exertion of this power is often procompetitive, it can be anticompetitive in many ways.

22. Amazon's market share in e-books has dropped substantially and it now faces several large competitors. Moreover, independent booksellers, an important channel for the presentation of new titles, have been expanding recently. See *infra* Part IV.B.

23. Other analyses of the e-books conspiracy have also concluded that it should have been challenged. See CHRIS SAGERS, APPLE, ANTITRUST, AND IRONY (forthcoming 2015); Nicholas Timchalk, Note, *E-Books, Collusion, and Antitrust Policy: Protecting a Dominant Firm at the Cost of Innovation*, 38 SEATTLE U. L. REV. 161 (2014).

to the *per se* rule to protect the most important instances of procompetitive collusion. That defense would have three elements. First, colluding suppliers would have to prove that their customer had buying power. In addition, the suppliers would have to demonstrate that this power, whether monopsony power or countervailing power, was legally acquired, substantial, persistent, and durable.²⁴ Second, the suppliers would have to prove that their action was desirable. If the customer's power was monopsony power, no further proof would be required, for counteracting monopsony power through the creation of supplier power is ordinarily procompetitive.²⁵ If the power was countervailing power, however, the suppliers would have to furnish additional proof, because the exercise of such power is often procompetitive and, when that is so, it should not be offset. To show that the customer's exercise of countervailing power had been anticompetitive, the suppliers would have to demonstrate that it had reduced their ability to innovate and that collusion would lead to more innovation.²⁶ Third, the suppliers would have to prove that their collusion did not create downstream market power, for if it did, it would normally harm consumers.

These requirements are demanding and would seldom be satisfied. True monopsony power is unusual in the American economy,²⁷ and substantial, persistent, and durable monopsony power is even rarer. While countervailing power is more common,²⁸ suppliers could not often prove that the exercise of such power had an adverse effect on innovation. Finally, upstream collusion frequently produces downstream market power and, when that is so, suppliers could not collude. In short, Parts IV and V affirm the traditional antitrust hostility to collusion, both by rejecting the asserted justifications for it in the e-books case and by demonstrating that the circumstances required to justify it in other cases are highly restrictive. Nevertheless, there are some situations in which collusion would be justified, and it appears possible to identify and protect those cases through a limited and practical defense. When the necessary

24. Persistent and durable are similar terms, but in this framework persistence means that the customer's power had existed for a significant period of time, and durable means it is unlikely to be eroded in the future.

25. In technical terms, creating a bilateral monopoly typically leads to higher output, even if there is no guarantee it will produce the efficient level. *See infra* Parts III & V.

26. While countervailing power can harm competition in other ways, it is prudent to limit the defense, at least initially, to instances in which such power retards innovation, the most important dimension of competition. Part V suggests practical criteria for determining whether the exercise of countervailing power had reduced innovation and whether collusion would increase it.

27. *See* John B. Kirkwood, *Powerful Buyers and Merger Enforcement*, 92 B.U. L. REV. 1485, 1496–97 (2012).

28. *See id.* at 1502–05.

facts are established, collusion to control a powerful customer ought to be permitted.

II. THE E-BOOKS CONSPIRACY

It is easy to characterize the e-books conspiracy as anticompetitive. In the simple version of the case, Amazon was a disruptive force that the publishers took steps to suppress. The case arose because Amazon greatly expanded a new market by introducing a popular e-reader and selling e-books at very low prices. Those prices aroused the ire of book publishers because they threatened the publishers' traditional methods of pricing and distribution. As a result, the publishers joined forces with Apple, a prospective entrant into the new market, to force Amazon to raise its prices, increasing Apple's profits and helping the publishers protect the much higher prices they charged on new hardcover books. In this narrative, the conspirators used a classic method of exclusion—raising rivals' costs²⁹—a method condemned in another high profile case involving a large customer combatting a new and disruptive method of distribution.³⁰

This rendition of the e-books conspiracy, however, tells only part of the story. It ignores the threats that Amazon itself may have posed to competition, consumers, and the publishing industry. Part IV evaluates whether those threats justified the publishers' and Apple's collusion. This Part summarizes and analyzes the conspiracy itself, based on the Justice Department's complaint,³¹ the district court's opinions,³² and other information.

A. *The \$9.99 Problem*

Under any version of the case, Amazon was a pioneer. It was the first firm to develop a widely used e-reader, introducing the Kindle and its associated e-book store in November of 2007.³³ Moreover, one of its "most successful marketing strategies was to lower substantially the

29. For the leading exposition, see Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 *YALE L.J.* 209, 230–42 (1986).

30. See *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 930 (7th Cir. 2000).

31. Complaint, *United States v. Apple, Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013) (No. 12-cv-2826).

32. *United States v. Apple Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013); Opinion & Order, *supra* note 4.

33. The Kindle's "crucial improvement over previous e-readers" was its ability to "store as many as two hundred books . . ." George Packer, *Cheap Words: Amazon is Good for Customers. But is it Good for Books?*, *NEW YORKER* (Feb. 17, 2014), http://www.newyorker.com/reporting/2014/02/17/140217fa_fact_packer?currentPage=all.

price of newly released and bestselling e-books to \$9.99.”³⁴ As a result, e-book sales exploded, achieving triple-digit sales growth each subsequent year.³⁵ At the same time, the ballooning sales of e-books and Amazon’s very low price upset many of the leading book publishers.

The publishers saw Amazon’s \$9.99 price as a threat to their profits and traditional business model for four main reasons. First, they believed that “the price point was eating into sales of hardcover print books, which were often priced at thirty dollars or higher.”³⁶ Second, “if \$9.99 solidified as the consumers’ expected retail price for e-books,” the publishers worried that “Amazon and other retailers would demand that publishers lower their wholesale prices, further compressing publisher profit margins.”³⁷ Third, “the rapid growth in e-books” stimulated by that price “would threaten the survival of brick-and-mortar bookstores (the Publisher Defendants’ preferred distributors)”³⁸ Finally, there was a more existential threat: “The Publisher Defendants were especially concerned that Amazon was well positioned to enter the digital publishing business and thereby supplant publishers as intermediaries between authors and consumers.”³⁹

The \$9.99 price was particularly jarring to the publishers—and to many others as well—because it was frequently below Amazon’s wholesale cost. Since Amazon also sold many titles at a profit, the government characterized its conduct as loss leading rather than predation:

Some of those \$9.99 e-books were sold below Amazon’s wholesale cost, especially once publishers began raising their digital list prices in late 2008 and early 2009. However, the \$9.99 loss leaders represented a relatively small portion of Amazon’s e-book sales, and Amazon generally realized positive margins on the balance of its e-book sales.⁴⁰

But even if the \$9.99 price was not truly predatory, the Publisher Defendants (Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster) remained unhappy with it and met repeatedly to develop a response.⁴¹

34. Complaint, *supra* note 31, ¶ 2.

35. *Id.* ¶ 27.

36. Opinion & Order, *supra* note 4, at 5.

37. Complaint, *supra* note 31, ¶ 33.

38. Opinion & Order, *supra* note 4, at 5–6.

39. Complaint, *supra* note 31, ¶ 34.

40. Plaintiffs’ Pretrial Memorandum of Law, *supra* note 3, at 6–7.

41. These meetings, conducted in private and without counsel present, were highly suggestive of an illicit conspiracy. *See* Complaint, *supra* note 31, ¶ 39:

Starting no later than September of 2008 and continuing for at least one year, the Publisher Defendants’ CEOs (at times joined by one non-defendant publisher’s CEO) met privately as a group approximately once per quarter. These meetings took

B. *Apple's Entry and Proposed Terms*

Fortunately for the publishers, Apple was about to launch its latest new product, the iPad, and wanted to sell e-books on it. Moreover, Apple favored the agency model—under which publishers would set the retail prices of e-books and retailers would receive a commission for selling them—because it would provide Apple with a guaranteed profit margin.⁴² In addition, as explained below, both Apple's margin and the publishers' revenues would be higher if Amazon's retail prices could be raised. As the Justice Department maintained, therefore, "Apple's entry into the e-book business provided a perfect opportunity for collective action to implement the agency model and use it to raise retail e-book prices."⁴³

Apple soon circulated a proposed e-book distribution agreement to the leading publishers that embodied the agency model. It contained four key terms:⁴⁴ (1) retail pricing authority would be held by the publisher; (2) the publisher must "lower the retail price of each e-book in Apple's iBookstore to match the lowest price offered by any other retailer,"⁴⁵ whether or not that retailer was on the agency model; (3) "Apple would receive a 30 percent commission for each e-book sale;"⁴⁶ and (4) each publisher "would have identical pricing tiers for e-books sold through Apple's iBookstore."⁴⁷

The Justice Department asserted that the "purpose of these provisions was to work in concert to enforce the Defendants' agreement to raise and stabilize retail e-book prices."⁴⁸ Of course, the most favored nations clause (provision (2)) would actually *prevent* prices from rising if Amazon's \$9.99 price was allowed to continue. Under that clause, the publishers would have to lower their prices in the iBookstore to match

place in private dining rooms of upscale Manhattan restaurants and were used to discuss confidential business and competitive matters, including Amazon's e-book retailing practices. No legal counsel was present at any of these meetings.

See also *United States v. Apple*, 952 F. Supp. 2d 638, 651 (S.D.N.Y. 2013) (making essentially identical findings of fact). The Publisher Defendants also frequently communicated with each other by telephone. Complaint, *supra* note 31, ¶ 72.

42. See *Apple*, 952 F. Supp. 2d at 659 ("Apple settled on an agency model with a 30% commission, the same commission it was using in its App Store. Agency . . . ensured that Apple would make a profit from every e-book sale in its iBookstore . . ."); Complaint, *supra* note 31, ¶ 6 (noting that in his basic pitch to the publishers, Steve Jobs, Apple's then-CEO, stressed the commission Apple would receive: "We'll go to [an] agency model, where you set the price, and we get our 30% . . .").

43. Complaint, *supra* note 31, ¶ 51.

44. See *id.* ¶¶ 62–65.

45. *Id.* ¶ 65.

46. *Id.* ¶ 63.

47. *Id.*

48. *Id.* ¶ 66.

Amazon. If they did that, though, the consequence would be less revenues for both themselves and Apple, since under the agency model the revenues of both retailer and publisher are a function of the retail price.⁴⁹ In short, while the ostensible purpose of the most favored nations clause was to protect Apple from being undercut by Amazon's pricing, in reality it created a financial incentive to *raise* Amazon's prices.⁵⁰

In addition, Apple's executives told the publishers that they wanted to see the retail price of a new or bestselling e-book increased from \$9.99 to \$12.99 or \$14.99. In a remarkably explicit email, Steve Jobs urged one of the publishers: "Throw in with Apple and see if we can all make a go of this to create a real mainstream e-books market at \$12.99 and \$14.99."⁵¹ Similarly, Judge Cote found: "At their very first meetings in mid-December 2009, the Publishers conveyed to Apple their abhorrence of Amazon's pricing, and Apple assured the Publishers it was willing to work with them to raise those prices, suggesting prices such as \$12.99 and \$14.99."⁵² In order to achieve this objective, however, the agency model had to be applied to Amazon.

C. *The Publishers' Move Against Amazon*

1. NEED FOR JOINT ACTION

The publishers realized that if they wanted to impose the agency model on Amazon, they had to act together. If they did not—if one pub-

49. Under provision (3), Apple would receive a commission of thirty percent of the retail price of each sale. The publisher would receive seventy percent. A lower retail price would thus mean that both Apple and the publisher would make less money.

50. Judge Cote agreed, describing the incentive as a "severe financial penalty" the publishers would face if they did not require Amazon to increase its prices. *See United States v. Apple*, 952 F. Supp. 2d 638, 648 (S.D.N.Y. 2013) (finding that the most favored nations clause "imposed a severe financial penalty upon the Publisher Defendants if they did not force Amazon and other retailers similarly to change their business models and cede control over e-book pricing to the Publishers"); *see also id.* at 665 (stating that the most favored nations clause "literally stiffened the spines of the Publisher Defendants to ensure that they would demand new terms from Amazon."). While provision (2) was not literally a most favored nations clause, many people, including Judge Cote, called it that because its function was to make sure that Apple was not placed at a disadvantage relative to its competitors.

51. Complaint, *supra* note 31, ¶ 71. Likewise, Jobs reportedly told his biographer that his fundamental pitch to the publishers was: "We'll go to [an] agency model, where you set the price, and we get our 30%, and yes, the customer pays a little more, but that's what you want anyway." *Id.* ¶ 6.

52. *See Apple*, 952 F. Supp. 2d at 647. Judge Cote acknowledged that the "record is equivocal on whether Apple itself desired higher e-book prices than those offered at Amazon." *Id.* at 706 n.68. But she added: "It is unequivocal though that Apple embraced higher prices so convincingly that the Publishers believed that Apple was content with, and even wanted, higher prices . . ." *Id.*

There is no doubt about the publishers' intent. They were so interested in eliminating Amazon's \$9.99 price that they were willing to give up revenues in order to achieve it. As explained below, under the agency model proposed by Apple, the publishers would make *less* money from the sale of e-books, even if retail prices rose to \$14.99.

lisher tried to impose the model by itself—Amazon would almost certainly retaliate, curtailing or eliminating its orders from that publisher and making its strategy unprofitable.⁵³ On the other hand, if the publishers collaborated, Amazon would have to capitulate, since “collectively the Publisher Defendants accounted for nearly half of Amazon’s e-book revenues.”⁵⁴ As a result, Judge Cote declared, “from the publishers’ perspective, the switch to the agency model had the hallmarks of a classic collective action problem.”⁵⁵

Central to this conclusion was Amazon’s dominant position in book retailing, which Apple portrayed in vivid terms:

Amazon is the most powerful force in books. It accounts for 60% of eBook sales today. It also is the dominant retailer of physical books online with an estimated 70% share. It is estimated that Amazon will account for 50% of *all* book sales in 2012. That makes Amazon an essential partner to any publisher, and, as a result, it has significant leverage to dictate terms in its negotiations. And when publishers resist, Amazon makes them pay.⁵⁶

To ensure the necessary unanimity in the face of such a powerful customer, Apple’s chief negotiator, Eddy Cue, told the five publishers that it “‘would only [launch the iBookstore] if we got them all.’”⁵⁷ Cue explained: “‘I just wanted to assure [the publishers] that they weren’t going to be alone, so that I would take the fear away of the Amazon retribution that they were all afraid of.’”⁵⁸

2. MACMILLAN FOLLOWED BY THE OTHER FOUR

Accordingly, in early 2010, all five publisher defendants informed Amazon that they intended to move to the agency model.⁵⁹ Once their agreements with Apple were signed, however, no publisher wanted to be the first to tell Amazon it had to accept the model. Ultimately, Macmillan made the first move.⁶⁰ Its CEO flew to Seattle and in a short, tense

53. *See id.* at 647.

54. Complaint, *supra* note 31, ¶ 46.

55. *In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d 671, 684 (S.D.N.Y. 2012).

56. Apple Inc.’s Tunney Act Comment, *supra* note 6, at 7–8. Apple’s comment was written two years after the introduction of agency pricing. When the publishers were contemplating this move, Amazon’s share of e-book sales was ninety percent. *See Opinion & Order*, *supra* note 4, at 35.

57. Plaintiffs’ Pretrial Memorandum of Law, *supra* note 3, at 30 n.129.

58. *Id.* at 31 n.131.

59. *United States v. Apple*, 952 F. Supp. 2d 638, 672 (S.D.N.Y. 2013) (“In separate conversations on January 20 and over the next few days, the Publisher Defendants all told Amazon that they wanted to change to an agency distribution model with Amazon.”).

60. Joint Brief for Plaintiffs-Appellees United States and Plaintiff-States (Page Proof) at 27, *United States v. Apple Inc.*, 13-3741 (L) (2d Cir. May 27, 2014) (“Macmillan was the first publisher to give Amazon an ultimatum.”); *see also Apple*, 952 F. Supp. 2d at 679 (noting that

meeting told Amazon that Macmillan would switch to the agency model and that, if Amazon did not agree, it would withhold the e-book versions of new hardcover titles from Amazon until seven months after it released the print versions.⁶¹

Since Macmillan had confronted Amazon by itself, Amazon retaliated as expected, removing the “buy buttons” from *all* of Macmillan’s titles, its print books as well as its e-books.⁶² This demonstration of Amazon’s buyer power was short-lived, however; within two days, Amazon restored the buy buttons on all Macmillan titles.⁶³ The dramatic switch occurred because Amazon learned that four of the other leading publishers would also insist on agency terms, and it could not refuse to deal with all five.⁶⁴ Thus, by the time Apple opened the iBookstore in April 2010, Amazon had agreed with all five publishers to accept the agency model.⁶⁵ Since Barnes & Noble had also moved to agency,⁶⁶ this meant that every one of the nation’s major book retailers had surrendered control over the retail pricing of e-books.

D. *Impact on Prices and Amazon’s Market Share*

The result was an immediate and sharp increase in the retail prices of many e-books.⁶⁷ Instead of selling them at \$9.99, Amazon was frequently charging \$12.99 or \$14.99, an increase of thirty or fifty percent.⁶⁸ Overall, the district court found that the increase was substantial, and for *New York Times* (“NYT”) bestsellers it exceeded forty percent.⁶⁹

only “Macmillan, the smallest of the five Publishers, did the honorable thing and delivered its message in person.”)

61. Plaintiffs’ Pretrial Memorandum of Law, *supra* note 3, at 20–21.

62. Motoko Rich & Brad Stone, *Publisher Wins Fight on E-Books*, N.Y. TIMES, Feb. 1, 2010, at B1 (“Amazon shocked the publishing world late last week by removing direct access to the Kindle editions as well as printed books from Macmillan . . .”).

63. Complaint, *supra* note 31, ¶ 84 (“Just two days after it stopped selling Macmillan titles, Amazon capitulated and publicly announced that it had no choice but to accept the agency model . . .”); *see also* Rich & Stone, *supra* note 62.

64. Plaintiffs’ Pretrial Memorandum of Law, *supra* note 3, at 21 (“Amazon capitulated once it understood that all five Publisher Defendants had committed themselves to the agency model across all their retailers.”); *id.* at 21 n.98 (citing the testimony of Russell Grandinetti, an Amazon executive, that “it had been made clear to us by Simon, HarperCollins, Macmillan, Hachette and Penguin that they were all going to require us to move to agency Much as we disagreed with the publishers’ decision . . . we could not have new titles from five of our biggest publishers unavailable to our customers, so we really had no choice but to negotiate” agency terms).

65. *See* Plaintiffs’ Pretrial Memorandum of Law, *supra* note 3, at 20 (noting that virtually all e-book retailers had made agency agreements with the publishers by the time “the iBookstore became publicly accessible on April 3, 2010”).

66. *Id.* (“Some retailers, such as Barnes & Noble, readily accepted agency terms . . .”).

67. *Id.* (“Almost overnight [prices increased on] the vast majority of newly released and bestselling e-books . . .”).

68. *See id.*

69. *United States v. Apple*, 952 F. Supp. 2d 638, 682 (S.D.N.Y. 2013) (“The increases at

Other e-book retailers also raised prices: “After defendants’ coordinated switch to agency pricing, a consumer could not find Publisher Defendants’ newly released and bestselling e-books for \$9.99 at *any* retailer.”⁷⁰ As the Justice Department put it, the conspirators had achieved their goal. They had “eliminated the ‘wretched \$9.99 price’ that so attracted the reading public and so infuriated publishers”⁷¹

At the same time, though, the structure of the e-book retail market became less concentrated. The higher margins provided by the agency model facilitated Apple’s entry and made it easier for Barnes & Noble, which had introduced the Nook in 2009,⁷² to expand. The growth of these two rivals—and others like Google and Sony⁷³—caused Amazon’s market share to drop sharply. According to the district court, “it is undisputed that Amazon’s market share in e-books decreased from 90 to 60 percent in the two years following the introduction of agency pricing.”⁷⁴

This decline in Amazon’s dominance, however, cannot automatically be described as procompetitive. If Amazon’s preeminence had been due solely to superior performance—the introduction of a popular e-reader and low, but non-predatory e-book prices—a conspiracy that restricted this performance (by forcing Amazon to charge higher prices) would not enhance competition. To the contrary, it would discourage Amazon—and other firms—from engaging in such desirable performance in the future, and it would cause consumers to pay higher prices, both in the short run and the long term. While the conspiracy would encourage new entry, that entry could not be justified if the only reason it occurred was artificially elevated prices.⁷⁵

Amazon within roughly two weeks of moving to agency amounted to an average per unit e-book retail price increase of 14.2% for their New Releases, 42.7% for their NYT Bestsellers, and 18.6% across all of the Publisher Defendants’ e-books.”)

70. Opinion & Order, *supra* note 4, at 33.

71. Reply Memorandum in Support of the United States’ Motion for Entry of Final Judgment at 2, *United States v. Apple, Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013) (No. 12-cv-2826).

72. See Julie Bosman, *Holiday Sales Slide 60% at Struggling Barnes & Noble Nook Unit*, N.Y. TIMES, Jan. 10, 2014, at B3, available at <http://www.nytimes.com/2014/01/10/business/media/barnes-noble-reports-steep-drop-in-holiday-sales.html>.

73. See *infra* note 203 and accompanying text.

74. Opinion & Order, *supra* note 4, at 35.

75. Such entry might still have some benefits. As Geoffrey Manne notes, it could “increas[e] e-book retail competition and promot[e] innovation among e-book readers” Geoffrey Manne, *How Apple Can Defeat the DOJ’s E-Book Antitrust Suit*, FORBES (Apr. 12, 2012, 5:30 PM), <http://www.forbes.com/sites/beltway/2012/04/12/how-apple-can-defeat-the-doj-s-e-book-antitrust-suit>. But if there were no market failure—no reason why the e-books market would not generate entry if consumers valued it more than it cost—then the benefits of the entry would be outweighed by the artificially higher retail prices that induced it.

Moreover, Apple claims it would have entered anyway. So long as the publishers adopted an agency model—and Apple got its thirty percent commission—entry would have been profitable, whether or not the publishers raised retail prices. See Appellant Apple Inc.’s Opening Brief (Page

Several industry participants claimed that the switch to agency pricing led to a *reduction* in e-book prices. Barnes & Noble, the American Booksellers Association, Penguin, and others submitted data purporting to show this.⁷⁶ But economic experts retained by the Justice Department produced regression analyses that found the opposite,⁷⁷ and it is hard to see why the publishers' adoption of agency—and Amazon's reluctant acceptance of it—would have caused prices to fall. If the publishers had wanted lower retail prices, they could have reduced their wholesale prices without shifting to agency. By eliminating Amazon's ability to sell e-books for \$9.99, the conspiracy would have tended to raise retail prices, not lower them. Thus, if retail e-book prices did fall, on average, after the widespread adoption of agency, that was likely not due to the conspiracy, but rather to broader industry trends, such as the rising popularity of e-books, the growth in the number of e-titles, and the consequent realization of economies of scale and scope.⁷⁸ In fact, according to the district court, average e-book prices did not fall following the shift to agency.⁷⁹

E. *Random House's Position and Its Implications*

When the five publishers adopted agency pricing and imposed it on Amazon, they created a profit opportunity for Random House, the

Proof) at 22, *United States v. Apple Inc.*, No. 13-3741 (L) (2d Cir. Feb. 25, 2014) (“Apple sought to enter a market dominated by a single retailer and needed to ensure that it could be *competitive* and *profitable*. . . . [T]o avoid launching a lossmaking business, . . . it . . . insisted on its 30% commission, with which it knew it could be profitable at *any* price point.”). Of course, Apple may have been posturing when it made this claim. But its position is consistent with the fact that other firms entered the e-books market while Amazon was still charging \$9.99, indicating that they, too, did not need higher prices to enter. *See infra* note 196 and accompanying text.

76. Opinion & Order, *supra* note 4, at 31.

77. Plaintiffs' Pretrial Memorandum of Law, *supra* note 3, at 36 (stating that Professor Gilbert's analysis showed that “ten months after the agency contracts took effect, Publisher Defendants' e-book titles sold on Amazon were, on average, 23.9% higher than their pre-agency prices. Professor Ashenfelter's regression analysis similarly finds a 24.6% increase . . . over the same period”).

78. *See* Apple Inc.'s Pre-Trial Memorandum of Law at 5, *United States v. Apple, Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013) (No. 12-cv-2826) (describing a quadrupling of the number of e-titles available between April 2010 and May 2013); *see id.* at 16 (indicating that the number of e-books purchased from seven of the leading retailers increased more than 447% from the second quarter of 2010 to the first quarter of 2012).

79. *Apple*, 952 F. Supp. 2d at 685:

Apple argued at trial that the opening of the iBookstore actually led to an overall decline in trade e-book prices during the two-year period that followed that event. Its evidence was not persuasive. Apple's experts did not present any analysis that attempted to control for the many changes that the e-book market was experiencing during these early years of its growth The analysis presented by the Plaintiffs' experts as well as common sense lead invariably to a finding that the actions taken by Apple and the Publisher Defendants led to an increase in the price of e-books.

nation's largest trade book publisher.⁸⁰ Random House could undercut the other publishers and increase its profits and market share by allowing Amazon to continue to sell its e-books for \$9.99 while charging more for the other publishers' e-books. This strategy, normally available to any firm that wants to cheat on colluding rivals, was especially appealing in this case. Under the agency terms proposed by Apple and adopted by the five publishers, the publishers *made less money*, even after they raised prices, than they made under the wholesale model. Under that model, it was common for a large publisher like Penguin to charge a wholesale price of roughly \$13.00 for the e-book version of a new hardcover title. While Amazon would incur a loss if it resold the e-book for \$9.99, Penguin would still receive \$13.00. Under the agency model, in contrast, Amazon was forced to charge a higher retail price, say \$12.99, but because the model provided a commission of thirty percent,⁸¹ the per unit revenue Penguin would receive would be just \$9.09.⁸² Worse, because the agency model resulted in higher retail prices, the number of units sold fell, relative to what they would have been under the wholesale model.⁸³ In short, the move to agency meant that the five publishers were receiving less revenue per unit and selling fewer units. As a result, Random House could make considerably more money by retaining the wholesale model. It would receive a higher price on each e-book it sold, and it would sell more of them. Moreover, because Amazon would continue to charge \$9.99 for popular Random House e-books while the prices of other publishers' titles rose, Random House would gain even greater market share.

Initially, Random House chose to take advantage of this profit opportunity.⁸⁴ It refused to participate in the alleged conspiracy, maintained its wholesale prices, and allowed Amazon to continue to discount them heavily. The effect on its sales and the sales of the other five publishers was as expected. During the first week of agency pricing, "Amazon e-book sales for non-agency publisher Random House increased 10%, while Publisher Defendants' sales declined 20% overall"⁸⁵ The strategy was so successful that an Amazon executive complimented Random House on it. She noted "how well served Random House was

80. *Id.* at 673 (noting that Random House is "the largest Publisher").

81. *See supra* note 46 and accompanying text.

82. That is, \$12.99 less thirty percent or, equivalently, seventy percent of \$12.99.

83. The total number of e-books sold rose markedly during this period. *See supra* note 78. But the higher retail prices meant that the expansion would have been even greater had Amazon been able to continue charging \$9.99.

84. *See Apple*, 952 F. Supp. 2d at 677 (stating that Random House "believed it 'would be better off economically sticking with the wholesale model.'").

85. Plaintiffs' Pretrial Memorandum of Law, *supra* note 3, at 37; *see also Apple*, 952 F. Supp. 2d at 686 (noting that Random House's sales and market share increased).

by essentially cheating on the conspiracy by sticking with the higher wholesale prices and lower retail prices of the traditional wholesale model”⁸⁶ Eventually, however, Random House fell into line. When Apple introduced a new version of the iPad in 2011, Random House moved to the agency model.⁸⁷ It is unclear why this change made sense. True, Apple had not been stocking Random House titles in the iBookstore, and the switch to agency rectified this problem, but Random House presumably stood to gain much more by allowing Amazon, the much larger e-book retailer,⁸⁸ to market its titles at a substantially lower price.⁸⁹

While Random House’s switch to agency is puzzling, the greater puzzle is the behavior of the five major publishers. According to the government’s theory and a great deal of supporting evidence, the five conspired to adopt the agency model and impose it on Amazon, even though the consequence was that their profits fell—they sold fewer e-books and received less money for each one.⁹⁰ Several observers noted the anomaly. A Random House executive stated: “I guess what we never figured in was the idea that five publishers would band together and insist on receiving worse terms.”⁹¹ Barnes & Noble pointed out the same problem: “[T]he alleged conspiracy was intended to *reduce publisher profits*.”⁹² An Amazon executive agreed; he could not understand why Penguin was “working so hard to have [Amazon send it] less money on each sale while at the same time, reducing total sales and frustrating

86. Plaintiffs’ Response to Apple’s Pretrial Memorandum of Law at 18 n.89, *United States v. Apple, Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013) (No. 12-cv-2826) (summarizing email from an Amazon executive to a Random House executive).

87. *See* Plaintiffs’ Pretrial Memorandum of Law, *supra* note 3, at 22 (noting that Random House switched “exclusively to agency distribution of e-books as of March 1, 2011”); Turow, *supra* note 11 (stating that Random House “took the leap with the launch of the iPad 2”).

88. *See* Garside, *supra* note 10 (reporting that Apple’s share of e-book sales in the U.S. was at best less than half of Amazon’s share, which was then about sixty percent).

89. To be sure, Apple threatened Random House with certain consequences if it did not accept agency. *See* Plaintiffs’ Pretrial Memorandum of Law, *supra* note 3, at 22 (“Apple pressured Random House to switch to agency by, *inter alia*, threatening to block Random House e-books that were sold as standalone apps from appearing in its App Store”); *see also id.* at 22 n.100 (“Additionally, Mr. Jobs threatened that Random House might not receive full support from Apple personnel if it eventually put its e-books into the iBookstore at a later date.”). But these consequences seem small compared to the costs of giving up both higher wholesale pricing and lower retail pricing.

90. Apple, in contrast, benefited directly from the agency model it proposed, since the result was higher retail prices and (effectively) lower wholesale prices (due to the generous commission Apple received).

91. *See* Plaintiffs’ Response to Apple’s Pretrial Memorandum of Law, *supra* note 86, at 18 n.89.

92. Comments of Barnes & Noble, Inc. on the Proposed Final Judgment at 13, *United States v. Apple, Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013) (No. 12-cv-2826).

us.”⁹³

Perhaps the publishers had a procompetitive motivation. They may have felt, as so many commentators did, that Amazon’s dominant position and aggressive behavior was harmful to their long-run interests and had to be controlled—even if that required lower profits in the short term. By avoiding an Amazon monopoly, the publishers could enhance their long-term competitiveness by making the purchase of books more attractive relative to other uses of consumers’ income and thereby improve the long-run welfare of consumers as well as their own profits. The reason the alleged conspiracy reduced publisher profits, in short, was that it was an investment—an investment that would ultimately redound to their benefit.

There are two objections to this theory. One, the subject of Part IV, is that Amazon’s power and behavior did not in fact justify collusion to counteract it. Instead, the publishers overestimated the threat that Amazon posed and adopted a remedy that directly harmed consumers. The second objection is that the publishers’ long-run goal was not procompetitive. Their ultimate aim was not to benefit consumers but to preserve the higher prices they charged for hardcover books. The adoption of agency was an investment, but the return would come not from making the purchase of books more attractive to consumers. Instead, it would come from preserving the ability to sell a large category of those books at higher prices.⁹⁴

Of course, even if the publishers’ ultimate goal had been procompetitive, it would have been very difficult, probably impossible, to defend their collusion under existing case law. As Part III also explains, however, several economists have shown that collusion to offset the classic type of buyer power—monopsony power—can be beneficial. Their work provides the foundation for the more comprehensive and detailed defense developed in Part V.

III. BUYER POWER AS A JUSTIFICATION FOR COLLUSION

Since the Supreme Court declared price fixing to be *per se* illegal,⁹⁵ it has never allowed sellers to collude to offset the power of a large buyer. To be sure, the Court has never confronted the question precisely. It has never faced a case in which a group of small, competitive sellers

93. *Apple*, 952 F. Supp. 2d at 678 n.46 (quoting Russell Grandinetti); *see also id.* at 692 (“The economics of the Agreements [with Apple] were, simply put, ‘terrible’ for the Publishers.”).

94. Judge Cote found that the publishers saw their long-term interest—“their ultimate goal”—as “the protection of book value.” *Id.* More specifically: “The Publisher Defendants wanted to shift their industry to higher e-book prices to protect the prices of their physical books and the brick and mortar stores that sold those physical books.” *Id.* at 665.

95. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

alleged that their sole customer had so much buying power that, unless the sellers joined together, it would depress price and output below the competitive level, exploiting them and reducing efficiency. But as Part III.A explains, the Court has repeatedly rejected claims that collusion was necessary to correct other market problems, making it highly unlikely that the Court would permit suppliers to collude because they faced a monopsonist. Moreover, in one decision, where lawyers for indigent criminal defendants organized a boycott to force the local government—the sole purchaser of these services—to pay them more, the Court came very close to rejecting this defense.⁹⁶ Only one case stands as an exception to this pattern: a Sixth Circuit decision holding that collusion by buyers might be justified if it reduced the market power of suppliers and the benefits were passed on to consumers.⁹⁷

As Part III.B shows, most scholars agree with the state of the law, not because they think that collusion can never benefit consumers, but because they believe it is better policy to reject the justification in all cases. In essence, these scholars reason that if a buyer has too much power, antitrust law ought to challenge that power directly and, if it cannot, it ought to wait for market forces to erode it. Where market forces are unlikely to do so, it is better to allow the power to continue than to permit sellers to collude to offset it because (a) collusion will often make things worse and (b) it is hard to tell when that is not so. As Part III.B also notes, however, this view is not unanimous. Several scholars believe that suppliers ought to be allowed to combine to offset buyer power because, in certain circumstances, it would increase output, prevent exploitation of the suppliers, and benefit consumers. If those circumstances could be identified at a reasonable cost, an exception from the *per se* rule would advance the purposes of antitrust law. Collusion in those settings would enhance downstream competition and raise consumer welfare, supplier welfare, and total welfare.

To be sure, such collusion would interfere with the competitive process upstream if that process is defined solely in terms of rivalry. But it would not constitute anticompetitive conduct under a more accurate definition. As I have argued elsewhere, anticompetitive conduct is best defined as “conduct that creates market power, transfers wealth from consumers to producers, and fails to provide consumers with compensating benefits.”⁹⁸ Under that definition, collusion that qualifies for the

96. See *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 436 (1990).

97. See *Balmoral Cinema, Inc. v. Allied Artists Pictures Corp.*, 885 F.2d 313, 316–317 (6th Cir. 1989).

98. See John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 *FORDHAM L. REV.* 2425, 2429 (2013). In a buy-side case, the definition of anticompetitive conduct would be similar: Conduct that creates monopsony

defense set forth in Part V would not be anticompetitive. To the contrary, it would provide consumers with compensating benefits: it would increase output, often lower prices, and, in some cases, enhance innovation.

A. Case Law

The landmark case in this area is *United States v. Socony-Vacuum Oil Co.*,⁹⁹ where Justice Douglas, exasperated at past attempts to justify price-fixing conspiracies, declared that Congress had not intended to accept any justifications at all:

Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination.¹⁰⁰

The Court declared that agreements to fix prices were *per se* illegal¹⁰¹ and that no defense of reasonableness would be accepted.¹⁰² This apparently inflexible ban, the most important in antitrust law,¹⁰³ persists to this day.¹⁰⁴ Thus, more recent decisions have rejected attempts to justify collusion on the ground that it would promote social values, like public safety, or put an end to illegal behavior. For example, in *National Soci-*

power, transfers wealth from suppliers to buyers, and fails to provide suppliers with compensating benefits. *See id.*

99. 310 U.S. 150 (1940).

100. *Id.* at 221–22.

101. *Id.* at 223.

102. *Id.* at 226 n.59.

103. Hard-core price fixing is the only antitrust offense that is commonly prosecuted criminally. The Supreme Court has characterized collusion as the “supreme evil of antitrust.” *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). And Professor Hovenkamp, co-author of the leading antitrust treatise, has called price fixing “kind of the first-degree murder of antitrust violations.” Thomas Catan, *Critics of E-Books Lawsuit Miss the Mark, Experts Say*, WALL ST. J. (Apr. 23, 2012, 2:36 PM), <http://online.wsj.com/news/articles/SB10001424052702303978104577359741232993860>.

This prominence may not be entirely warranted. Several scholars have argued that antitrust’s focus on hard-core collusion has diverted needed attention from monopolization and other forms of exclusionary conduct. *See* Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497, 503–04 (2009) (asserting that the Court’s antitrust hierarchy is not supported); *see also* Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527 (2013) (arguing that anticompetitive exclusion could be more problematic than collusion).

104. *See* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 893 (2007) (“A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, *per se* unlawful.”).

ety of *Professional Engineers v. United States*,¹⁰⁵ the defendant claimed that competitive bidding would result in engineering work that was “dangerous to the public health, safety, and welfare.”¹⁰⁶ In accord with *Socony-Vacuum*, the Court announced that it would not permit an “inquiry into the question whether competition is good or bad.”¹⁰⁷ The “Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.”¹⁰⁸ Similarly, in *FTC v. Indiana Federation of Dentists*,¹⁰⁹ the Court stated: “That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it.”¹¹⁰

The strong language of these decisions and the broad rule they articulate make it highly unlikely that the Court would create an exception for collusion to counteract buyer power. Yet the Court has not actually confronted the situation in which such an exception would be most appealing—the classic case of monopsony, in which “a single buyer faces a large number of suppliers, each too small to affect the market price and each operating on an upward-sloping marginal cost curve.”¹¹¹ In this setting, as any textbook treatment shows, the monopsonist will purchase less than the competitive quantity, pay less than the competitive price, and transfer wealth from the suppliers to itself.¹¹² In such a case, collusion by the suppliers would end their powerlessness and enhance their ability to bargain with the buyer, likely raising the price the suppliers receive and increasing the quantity they sell, producing a result that is closer to the competitive outcome both upstream and downstream.¹¹³ If so, consumer welfare, supplier welfare, and total welfare would all increase. In short, in the pure monopsony scenario, collusion by the otherwise exploited suppliers could be desirable.¹¹⁴

105. 435 U.S. 679 (1978).

106. *Id.* at 685.

107. *Id.* at 695.

108. *Id.* at 696; *see also id.* at 689 (stating that the Court has “unequivocally foreclose[d] an interpretation of the Rule as permitting an inquiry into the reasonableness of the prices set by private agreement.”).

109. 476 U.S. 447 (1986).

110. *Id.* at 465.

111. *See Kirkwood, supra* note 27, at 1495 (identifying the essential characteristics of the monopsony model).

112. *Id.* at 1495, 1497.

113. *See infra* notes 135, 147–49 and accompanying text.

114. This is not the only setting in which collusion to offset buyer power could be procompetitive. Suppose the buyer itself has countervailing power (i.e., the suppliers have market power, and the buyer’s power can be used to reduce that power). In this situation, the exercise of buyer power is frequently procompetitive. *See Kirkwood, supra* note 27, at 1505–09. But in a number of cases, the exercise of countervailing power by a large buyer can be anticompetitive. *See id.* at 1506, 1536–58. When that is so, collusion by the suppliers to counteract that power could be desirable, as discussed below.

The Court has never explained why collusion by suppliers could not be permitted in this setting, especially if strict limits like those laid down in Part V were observed. In *FTC v. Superior Court Trial Lawyers Ass'n*,¹¹⁵ however, the Court considered a similar situation in which an association of small sellers—individual attorneys who represented indigent criminal defendants—colluded to force the Washington, D.C. government—the only purchaser of these services—to raise their hourly rates.¹¹⁶ The Association did not argue that the D.C. government had monopsony power, perhaps because the attorneys could turn to other types of practice fairly readily. Instead, the fundamental policy issue was whether the *per se* rule should apply to the boycott when the pre-conspiracy rates, even if they were competitive by economic standards, might well have been too low to provide the quality of representation that society owed these indigent defendants.¹¹⁷ But that possibility, even if true, would not change the result. The Court applied the *per se* rule, declaring that “it is not our task to pass upon the social utility or political wisdom of price-fixing agreements.”¹¹⁸

The only case to recognize an exception is *Balmoral Cinema, Inc. v. Allied Artists Pictures Corp.*¹¹⁹ It involved the reverse of the situation we have been discussing (small sellers facing a monopsony buyer). In *Balmoral Cinema*, the sell-side of the market had market power and the buy-side colluded to offset it. A group of film exhibitors had engaged in a “split,” a type of horizontal restraint in which the exhibitors decide which one of them will bid on a particular film; once that decision is made, only one exhibitor bids on the film and the others refuse to deal with the supplier.¹²⁰ The plaintiff argued that this behavior should be subject to the normal *per se* ban on group boycotts, but the Sixth Circuit refused to apply the *per se* rule because the split may have increased the

115. 493 U.S. 411 (1990).

116. *Id.* at 422–23.

117. Justice Stevens recognized the issue in a telling paragraph in the opinion, noting that “[r]easonable lawyers may differ about the wisdom of this enforcement proceeding,” and that “[r]espondents’ boycott may well have served a cause that was worthwhile and unpopular.” *Id.* at 421. Indeed, he was willing to “assume that the preboycott rates were unreasonably low, and that the increase has produced better legal representation for indigent defendants.” *Id.*

118. *Id.* at 421–22. For decisions rejecting a countervailing power defense to collusion more directly, see Robert Pitofsky, Chairman, Fed. Trade Comm’n, Thoughts on “Leveling the Playing Field” in Health Care Markets, Remarks Before the Nat’l Health Lawyers Ass’n (Feb. 13, 1997) in 1997 WL 80767 at *4 (asserting that if the defendants argue they need to create “a countervailing force in order to neutralize a perceived imbalance in bargaining power, antitrust law will not be receptive”) (citing *United States v. Columbia Pictures Indus.*, 507 F. Supp. 412 (S.D.N.Y. 1980), *aff’d mem.*, 659 F.2d 1063 (2d Cir. 1981); *Mich. State Med. Soc’y*, 101 F.T.C. 191 (1983)).

119. 885 F.2d 313 (6th Cir. 1989).

120. *Id.* at 314–15.

exhibitors' buying power, enabling them to pay lower license fees and reduce ticket prices.¹²¹ The court stated: "Exhibitors, as purchasers of films, may be justified in combating the market power of film suppliers by group action. Such action may lower prices to moviegoers at the box office and may serve rather than undermine consumer welfare."¹²²

Balmoral Cinema recognized that consumers may benefit when buyers collude to counteract the market power of suppliers. It also refused to protect those suppliers from conduct that diminishes their welfare. Therefore, the Sixth Circuit implicitly made a subtle but important distinction between two types of buy-side cases. In the first, small competitive suppliers face a monopsonist, and the suppliers deserve protection from the unjustified exercise of such power. In the second, the suppliers have market power, the buyer exercises countervailing power, and the suppliers may not deserve protection because consumers may benefit from the reduction of their power.¹²³ In other respects, however, the analysis in *Balmoral Cinema* was inadequate. The court did not appreciate that the market power of the film suppliers derives, at least in part, from the popularity of their films and that their incentive to develop new films may be diminished if exhibitor collusion reduces their profits. Moreover, if the exhibitors are allowed to collude to strengthen their buying power, they may also collude on ticket prices, which would harm consumers.

Balmoral Cinema, in short, is a perceptive but incomplete analysis of a complicated issue. The scholarly analysis is much more thorough. While most scholars, like Professors Hovenkamp and Elhauge, support the case law, there are important exceptions, as the following section explains.

B. *Scholarship*

Professors Hovenkamp and Elhauge would not allow suppliers or buyers to collude to counteract power on the other side of the market. They do not dispute that such collusion may sometimes enhance competition and consumer welfare. Indeed, when suppliers have market power, Hovenkamp would permit buyers to combine to offset that power so long as the buyers enter into purchasing cooperatives, rather than engage

121. *Id.* at 316–17.

122. *Id.*

123. See Zhiqi Chen, *Buyer Power: Economic Theory and Antitrust Policy*, 22 RES. L. & ECON. 17, 18 (2007) ("[T]he competition effects of buyer power are quite different depending on whether it is monopsony power against powerless suppliers or countervailing buyer power against large suppliers with market power."). For a summary of the principal differences between monopsony power and countervailing power—differences in nature, prevalence, and effects—see Kirkwood, *supra* note 27, at 1493–1512.

in hard-core price fixing, even though the impact on the suppliers, the buyers, and consumers may be exactly the same:

[W]hile countervailing power does not provide a defense against a Sherman Act claim of buyer price fixing, it may be the rationale of procompetitive joint purchasing. . . . By organizing into buying cooperatives or similar ventures, smaller buyers can force concentrated sellers to behave more competitively toward the smaller buyers, thus making the market more competitive. In fact, this is a fairly common rationale of competitive joint purchasing.¹²⁴

Absent some sort of integration, however, Hovenkamp would not let buyers collude to exert countervailing power because he believes that hard-core collusion is too dangerous to allow, given its frequent adverse effects and the difficulty of determining its actual impact in a particular case.

Hovenkamp supports this position in four ways. First, he asserts that the claim that buyers have colluded to exercise procompetitive countervailing power “would certainly be raised in almost any case where the selling market is not perfectly competitive.”¹²⁵ Second, “the exertion of countervailing power typically does not improve the situation,”¹²⁶ for the parties are likely to “share the monopoly power that exists rather than strive to eliminate it.”¹²⁷ Third, “the result can be ‘double marginalization,’ in which the [sellers’] cartel extracts its monopoly overcharge and then the [buyers’] cartel adds an additional overcharge.”¹²⁸ Finally, “determining actual output effects in such cases would involve the court in economic inquiries beyond its capacity.”¹²⁹

Elhaug makes several additional points. He notes, for example, that collusion to offset buyer power would be unnecessary in two situations. First, if the power was acquired illegally, it might well be eliminated by challenging the conduct that created it.¹³⁰ Second, if it were

124. 12 HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 2015b, at 164 (3d ed. 2012) [hereinafter 12 HOVENKAMP].

125. *Id.* at 162. Hovenkamp is of course addressing whether *buyers* ought to be allowed to collude to offset seller market power. Doubtlessly, he would treat supplier collusion to offset buyer power—the focus of this article—the same way. See 4 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 943e, at 258 (3d ed. 2009) (“Nor would we accept as a defense to an otherwise unlawful merger that the merger was necessary to create countervailing power offsetting the monopsony power of a single buyer or buyers’ cartel.”).

126. 12 HOVENKAMP, *supra* note 124, ¶ 2015b, at 162.

127. *Id.*

128. *Id.* at 163.

129. *Id.*

130. See EINER ELHAUGE & DAMIEN GERADIN, *GLOBAL ANTITRUST LAW AND ECONOMICS* 244 (2007). Pitofsky phrases the point more generally: “From a policy and enforcement perspective, the most effective response to the emergence of excessive buyer power is not to permit the aggregation of some form of countervailing power. Rather, the appropriate response is to try to prevent the aggregation of excessive buying power in the first place.” Pitofsky, *supra* note 118, at

“correctable by market forces,” it would likely disappear on its own.¹³¹ Elhaug also stresses that supplier collusion would be harmful in two situations, even if the buyer’s power was legally acquired and likely to persist. In the first, the extra profits provided by the power may “reflect a desirable return for the investment . . . that created that . . . power[.]”¹³² If so, collusion to reduce those returns would be counterproductive. In the second situation, collusion would be harmful if it was used, not to offset buyer power, but to cooperate with the buyer to enhance downstream market power.¹³³

While each of these objections has force, not all apply to the focus of this article—supplier collusion to offset buyer power. For example, Hovenkamp’s argument that the parties will simply share their existing market power applies only to *buyer* collusion to offset seller market power. When a buyer has monopsony power—but no downstream market power—and sellers cannot create downstream market power by colluding, there will be no downstream market power to share. But there is also a larger point. The objections raised by Hovenkamp and Elhaug do not prove that buyer power can never justify seller collusion. They indicate that such a justification would be valid only in narrow and carefully specified circumstances.

Several scholars have built on this point, arguing that, in certain settings, collusion to counteract buyer power should be allowed. In their latest book on monopsony,¹³⁴ for example, Professors Blair and Harrison assert that when competitive suppliers face a buyer with monopsony power, supplier collaboration would enhance total welfare and consumer welfare:

From the standpoint of social welfare, the structural condition of bilateral monopoly is preferable to . . . a monopsony dealing with competitive suppliers. If . . . rival sellers collaborate in response to monopsony, the quantity sold increases, which will increase the quantity of the final good. This result benefits consumer [welfare] and, therefore, it is consistent with the most fundamental goal of the antitrust [laws].¹³⁵

*6. While Pitofsky’s approach is clearly correct when it is feasible, it is not always possible. When buyer power has been acquired and maintained legally, it cannot be eliminated by antitrust action.

131. ELHAUGE & GERADIN, *supra* note 130, at 244, 246.

132. *Id.* at 245.

133. *Id.*

134. ROGER D. BLAIR & JEFFREY L. HARRISON, *MONOPSONY IN LAW AND ECONOMICS* (2010).

135. *Id.* at 136. Blair and Harrison do not contend that supplier collusion in response to monopsony will achieve the perfectly competitive outcome. It will simply achieve a procompetitive result: output and consumer welfare will increase. The difference occurs because, as noted below, bargaining between the colluding sellers and the monopsonist is hampered by transaction costs and information asymmetries, which make it unlikely that the parties will agree on the competitive level of output. In the absence of these imperfections, however, the bargaining

Blair and Harrison readily acknowledge that there are “limitations” to accepting a buyer power justification for collusion.¹³⁶ Collusion is a “risky policy choice,”¹³⁷ and it is always better to eliminate the downstream monopsony than to allow upstream collusion. But removing the downstream monopsony is not always possible. Blair and Harrison also recognize that when suppliers are allowed to collude to offset buyer power, transaction costs will increase since the colluding sellers must bargain among themselves and with the buyer to establish a new relationship. But those costs “will not be incurred unless the overall benefit of achieving the joint profit-maximizing agreement offsets them.”¹³⁸

This logic suggests, for example, that competing physicians ought to be allowed to bargain collectively with a monopsonist insurance company, and Blair and Harrison take that position: “When the market for health care services is competitive on the supply side and monopsonistic on the buying side, cooperative bargaining by the health care providers will have beneficial results for consumers.”¹³⁹ They caution that this recommendation makes sense only where the health insurer is a true monopsony. In that case, reimbursement rates would be below the competitive level and doctors would be providing fewer services or spending less time with their patients.¹⁴⁰ In contrast, if the physicians face a set of competing health plans, collusion by the physicians is likely to raise reimbursement rates and lead to higher insurance premiums, harming consumers. Thus, where state legislation authorizes the attorney general to allow collective negotiations, they state that it is “the responsibility of the attorney general to limit collective negotiations to those markets where monopsony is a problem.”¹⁴¹ Since true monopsony is uncommon, Blair and Harrison emphasize that seller collusion can be justified only in a “few relatively rare situations.”¹⁴² But in those situations, it would be beneficial.

would result in the competitive outcome, as Blair and Harrison demonstrate formally. The intuition behind this result is easy to understand. Imagine that instead of an input market consisting of competitive sellers facing a powerful buyer, there is a single, vertically integrated firm that produces the inputs and uses them to manufacture a final product. If that firm had no downstream market power (i.e., no power in the final product market), it would maximize its profits by producing at the point where its marginal cost equals the downstream market price. That, of course, is the competitive outcome and it explains why, when colluding sellers face a monopsonist without downstream market power, the parties have a strong incentive to achieve the competitive outcome. That outcome maximizes their joint profits.

136. *Id.*

137. *Id.* at 140.

138. *Id.* at 138.

139. *Id.* at 208.

140. BLAIR & HARRISON, *supra* note 134, at 207.

141. *Id.* at 211.

142. *Id.* at 140.

Professor Campbell first made this point in 2007: “Contrary to the conventional wisdom, bilateral monopoly is better for consumers than a monopsonist buying from competitive suppliers.”¹⁴³ Likewise, he would allow collective negotiations between physicians and an insurance company with monopsony power.¹⁴⁴ Campbell’s article provoked a response from Professors Baker, Farrell, and Shapiro, who argue that he overstated the benefits of collusion to offset monopsony power.¹⁴⁵ They assert that when competitive sellers face a monopsony, collusion by those sellers will *not* inevitably result in the efficient level of output, as it does in the bilateral monopoly model. To the contrary, in the presence of imperfect information and incomplete contracts, bilateral monopoly is likely to result in a smaller quantity.¹⁴⁶ This critique, however, shows only that bilateral monopoly is unlikely to result in the optimal level of output in the real world. It does not establish that collusion to offset monopsony power would not *improve* the situation—raising output, benefiting consumers, and enhancing supplier welfare. In fact, it is likely to do so. As Baker, Farrell, and Shapiro acknowledge, both the colluding sellers and the monopsonist have an incentive to increase output, since that would increase their total profits.¹⁴⁷ Moreover, by colluding, the sellers have substantially increased their ability to force the buyer to make this mutually advantageous change.¹⁴⁸ Because of the procompeti-

143. Tom Campbell, *Bilateral Monopoly in Mergers*, 74 ANTITRUST L.J. 521, 521 (2007).

144. Tom Campbell, *Bilateral Monopoly: Further Comment*, 75 ANTITRUST L.J. 647, 647–48 (2008) (“[T]he greatest likely area for the application of my policy advice . . . is . . . where individual physicians are attempting to bargain more effectively against monopsonistic insurance companies by banding together.”). Campbell supports his position by noting that two statutory exemptions from the antitrust laws share the same rationale:

Agricultural cooperatives, for example, are granted an exemption under the Capper Volstead Act, because of the assumption that farmers would otherwise be forced to sell only to one, or a few, powerful buyers. Labor unions receive an exemption as well, based on the premise that, at least in the specific locale, there is only one or a few dominant employers (purchasers) for the labor being offered.

Campbell, *supra* note 143, at 523.

145. See Jonathan B. Baker, Joseph Farrell & Carl Shapiro, *Merger to Monopoly to Serve a Single Buyer: Comment*, 75 ANTITRUST L.J. 637 (2008).

146. *Id.* at 638 (“In widespread circumstances, a buyer will limit its quantity so as to influence the seller’s perception of its willingness to pay for the product. As a result, inefficiently low quantities routinely result from bilateral bargaining under asymmetric information.”).

147. *Id.* (“We agree with Campbell that two parties engaged in bargaining—such as a single buyer negotiating with a single seller—have an *incentive* to trade the quantity that will maximize their joint profits.” (emphasis added)).

148. In the analogous situation—when buyers merge to exert countervailing power against a monopoly seller—output is likely to increase. See James Mellsop & Kevin Counsell, *Antitrust Insights: Assessing the Implications of Upstream Buyer Power on Downstream Consumers*, ANTITRUST INSIGHTS, Summer 2009, at 3 (“[W]here the buyer has some bargaining power, it can extract some of the monopolist’s surplus, and to do so generally results in a higher quantity of input purchased than in the pure monopoly case, even if this is not necessarily the joint profit maximizing quantity.”); see also Jonathan M. Jacobsen & Gary J. Dorman, *Joint Purchasing*,

tive consequences of bilateral monopoly, Professors Hammer and Sage state, “[t]wo market failures are sometimes better than one.”¹⁴⁹

Professor Grimes also supports an exception to the *per se* rule when small suppliers face a buyer (or group of buyers) with monopsony power.¹⁵⁰ Absent this exception, the suppliers are likely to be exploited, and output is likely to fall, which would not only harm the suppliers but also diminish the well-being of consumers. “The very nature of monopsony or oligopsony power,” Grimes states, “is that it tends to suppress output and reduce quality or choice.”¹⁵¹ He, too, is sensitive to the need to limit the exception, since a blanket permission to collude, whenever there is power on the other side of the market, is “likely to work much anticompetitive mischief”¹⁵² Suppose that “a group of steel producers agree to coordinate price and output because they face powerful buyers in the automobile industry”¹⁵³ If that is allowed, “it will be difficult to prevent steel producers from coordinating their action toward other, perhaps less powerful buyers. Aircraft and appliance manufacturers, for example, would now face the market power of the associated steel producers.”¹⁵⁴ To avoid such undesirable results, Grimes proposes a set of conditions that must be satisfied before collusion to counteract buyer power is permitted.¹⁵⁵ If these conditions are satisfied—conditions that limit the defense to “readily identifiable fact patterns in which anticompetitive risks are low and procompetitive potential is significant”¹⁵⁶—the goals of antitrust law would be advanced, not undermined.¹⁵⁷

Monopsony and Antitrust, 36 ANTITRUST BULL. 1, 19 (1991) (stating that bilateral monopoly “is almost never worse than the simple monopoly outcome . . . and is generally better for downstream consumers since the bargaining war will tend to push prices and output in the direction of the competitive level”); Kirkwood, *supra* note 27, at 1533 (analyzing the issue and concluding that “a merger of buyers that creates a bilateral monopoly—but no downstream market power—is likely to be procompetitive”).

149. Peter J. Hammer & William M. Sage, *Monopsony as an Agency and Regulatory Problem in Health Care*, 71 ANTITRUST L.J. 949, 966 n.74 (2004).

150. See Warren S. Grimes, *The Sherman Act’s Unintended Bias Against Lilliputians: Small Players’ Collective Action as a Counter to Relational Market Power*, 69 ANTITRUST L.J. 195 (2001).

151. *Id.* at 210.

152. *Id.* at 232.

153. *Id.* at 200.

154. *Id.* at 200–01.

155. See *id.* at 234; see also *infra* note 157 (quoting the conditions).

156. Grimes, *supra* note 150, at 233–34.

157. The specific conditions he proposes, however, may not be optimal. Professor Grimes frames them as elements of a defense to a charge of price fixing:

There are three parts to the limited defense: (1) a safe harbor for small players with a collective market share of 20 percent or less in any relevant market . . . ; (2) a safe harbor for all similarly situated small players that sell or buy exclusively from a power player possessing relational market power . . . ; and (3) a near-miss fallback

The key issue, then, is whether an exception to the *per se* rule can be circumscribed sufficiently. The scholars who oppose it do so not because they believe that collusion to control a powerful customer can never be justified. They oppose it because they think the defense would be asserted too frequently and businesses and courts could not readily determine when collusion to offset buyer power would in fact be procompetitive.¹⁵⁸ Part V attempts to meet these concerns by developing a set of criteria that are tightly limited, easily understood, and readily applied. If this effort is successful, it would further the goals of the anti-trust laws.

C. Goals of the Antitrust Laws

As a recent symposium demonstrated, scholars still disagree about the overarching goal of antitrust law.¹⁵⁹ Some assert that its fundamental purpose is to protect the competitive process.¹⁶⁰ Others argue that the ultimate goal is total welfare.¹⁶¹ Most now maintain that the predominant objective is consumer welfare.¹⁶² That does not mean, of course,

rule of reason standard for small players that demonstrate that their collective action is unlikely to have anticompetitive effects.

Id. at 234. Condition (1) seems too narrow. If a hundred small sellers face a single buyer with monopsony power, why allow only twenty percent of the sellers to combine? This group may have insufficient bargaining power to force the monopsonist to change its terms, and the other sellers would continue to be exploited. Similarly, condition (2) seems under inclusive. It applies only to “relational market power”—power that arises when a small seller makes a “financial and psychological commitment to an enduring commercial relationship”—not to other forms of buyer power, including monopsony power. *Id.* at 198. Finally, condition (3) seems too costly, remitting courts and businesses to a rule of reason inquiry to determine whether the sellers’ collusion was procompetitive.

158. See, e.g., ELHAUGE & GERADIN, *supra* note 130, at 246.

159. See Barak Orbach, *The Goals of Antitrust Foreword: The Pursuit of Purpose*, 81 *FORDHAM L. REV.* 2151 (2013). Likewise, the world’s competition authorities have not reached a consensus. See Maurice E. Stucke, *Reconsidering Antitrust’s Goals*, 53 *B.C. L. REV.* 551, 567–68 (2012) (describing the varying objectives reported by members of the International Competition Network).

160. See Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 *ANTITRUST L.J.* 707, 727 (2007) (stating that “the Court’s decisions have consistently held that the Sherman Act protects the competitive process”); Eleanor M. Fox, *Against Goals*, 81 *FORDHAM L. REV.* 2157, 2160 (2013) (“Let us call this objective ‘robust markets,’ and let us consider the general objective of antitrust to proscribe acts that significantly undermine robust markets.”).

161. See, e.g., Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 *N.Y.U. L. REV.* 659 (2010); Louis Kaplow, *On the Choice of Welfare Standards in Competition Law*, in *THE GOALS OF COMPETITION LAW 3* (Daniel Zimmer, ed., 2012); Roger D. Blair & Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 *FORDHAM L. REV.* 2497 (2013).

162. See, e.g., Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 *HARV. L. REV.* 397, 435 (2009) (“The Antitrust Standard is Consumer Welfare, Not Total Welfare”); Steven C. Salop, *Question: What is the Real and Proper Antitrust Welfare*

that antitrust should stop any practice that harms consumers, whether or not it has an adverse effect on competition. The purpose of antitrust law—of competition law—is to combat conduct that both diminishes competition *and* reduces consumer welfare.¹⁶³ For this reason, the fundamental goal of antitrust law is best described as protecting “consumers from anticompetitive conduct—conduct that creates market power, transfers wealth from consumers to producers, and fails to provide consumers with compensating benefits.”¹⁶⁴ This goal, and a parallel goal for

Standard? Answer: The True Consumer Welfare Standard, 22 LOY. CONSUMER L. REV. 336 (2010); Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 FORDHAM L. REV. 2349 (2013); Herbert Hovenkamp, *Implementing Antitrust’s Welfare Goals*, 81 FORDHAM L. REV. 2471, 2477 (2013) (“In sum, antitrust policy in the United States follows a consumer welfare approach in that it condemns restraints that actually result in monopoly output reductions, whether or not there are offsetting efficiencies and regardless of their size.”).

163. See ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS ii–iii (2007) (stating that antitrust is for competition and consumers). To illustrate the difference between conduct that hurts consumers but not competition, and conduct that harms both, consider a firm that occasionally produces defective toasters. The firm’s behavior would harm the consumers who bought its defective toasters, but it would not diminish market rivalry. It would not reduce the ability or the incentive of other firms in the market to compete. As a result, the firm’s conduct might constitute a tort, a breach of warranty, or a type of deception, but it would not be an antitrust violation.

Suppose, however, that a firm adopts a strategy of producing all its toasters in a substandard way and charging lower prices as a result, yet advertising them as effective appliances. Such behavior would distort market rivalry because it would divert sales from other toaster manufacturers through improper means. As a result, it might constitute an “unfair method of competition” in violation of Section 5 of the Federal Trade Commission Act. See William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 945 (2010) (“[B]efore 1938, the Commission routinely challenged such practices as deception, lotteries, and commercial bribery as unfair methods.”).

More recently, however, the Commission has moved away from this approach, focusing instead on conduct that reduces rivalry to such a degree that it affects market-wide prices and output. See *id.* at 946. Under this narrower approach, conduct would not be anticompetitive merely because it distorted rivalry and harmed consumers; it would have to create market power. This brings Section 5 more closely into line with the principal antitrust laws, the Sherman Act and the Clayton Act, which are targeted largely, if not exclusively, at practices that create market power. See generally John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 201 (2008). For an argument that Section 5 should not be so limited—that it ought to reach competition-distorting practices like bribery and deception that lack any redeeming value, even if they do not raise prices—see Maurice E. Stucke, *A Response to Commissioner Wright’s Proposed Policy Statement Regarding Unfair Methods of Competition*, CPI ANTITRUST CHRONICLE, Sept. 2013, at 4–5; see also Neil W. Averitt, *The Elements of a Policy Statement on Section 5*, 13 ANTITRUST SOURCE 1, 11 (2013) (maintaining that Section 5 should cover practices like bribery of purchasing agents and industrial espionage if they are widespread in an industry and harm customers).

164. See Kirkwood, *supra* note 98, at 2429. In a buy-side case, the fundamental goal would be comparable: protecting small, powerless suppliers from conduct that creates monopsony power, “transfers wealth from suppliers to buyers,” and fails to “provide suppliers with offsetting benefits.” See *id.*

buy-side cases, has (I believe) the widest support, not only in the legislative history and language of the antitrust statutes, but also in the case law, the preferences of the American people, and the ease of administration.¹⁶⁵

If collusion to control a powerful customer satisfied the demanding criteria set forth in Part V, it would further virtually all of these goals. It would not, of course, preserve the competitive process upstream, if that process is defined solely as a process of rivalry among upstream suppliers. But it would promote the competitive process downstream because it would increase output, frequently lower prices, and sometimes enhance innovation, making the suppliers' offerings—or products made from those offerings—more attractive to downstream purchasers, increasing downstream rivalry. For the same reasons, it would enhance consumer welfare and total welfare. Further, if collusion to control a powerful customer were in fact both procompetitive downstream and welfare enhancing, it would not offend the fundamental goal of antitrust law. While it would create market power, it would also correct a market failure—the anticompetitive exercise of buyer power—and benefit rather than harm consumers.

1. COMPETITIVE PROCESS

Hard-core collusion is widely viewed as a direct affront to the competitive process. If it involves price or output, it is *per se* illegal, commonly prosecuted criminally, and sometimes described as the most heinous antitrust offense.¹⁶⁶ But collusion to control a powerful customer is different from common, hard-core price fixing. Unlike the latter, collusion to control a powerful customer would benefit consumers and enhance downstream competition, so long as it satisfied the requirements of Part V. Thus, even if the principal goal of antitrust law were to protect the competitive process, collusion to control a powerful customer would serve that goal in a substantial way. By counteracting the undesirable effects of buyer power, it would improve the competitive process downstream.

More important, protecting the competitive process should not, without further elaboration, be the overarching goal of antitrust law. As many scholars and policymakers have observed, the term “competitive process” is too vague by itself to distinguish between restraints on rivalry that are desirable and restraints that are undesirable.¹⁶⁷ Mergers

165. See generally *id.*

166. See *supra* notes 101–04 and accompanying text.

167. See, e.g., Elhauge, *supra* note 162, at 436 n.104; Stucke, *supra* note 159, at 569–70; Kirkwood, *supra* note 98, at 2427.

among competitors, for example, are limits on rivalry—they completely eliminate competition between the merging parties—but antitrust law properly permits some horizontal mergers and prohibits others. Which mergers should be permitted? The answer cannot be determined by looking at the competitive process alone, if that term refers exclusively to the number of rivals or to the existence of rivalry among them, because a merger that lowers price also reduces the number of rivals and eliminates rivalry between two of them. The test is whether the merger is likely to harm or benefit consumers in the relevant market.¹⁶⁸ In the case of a merger that may enhance monopsony power, the test is analogous—whether it is likely to harm or benefit small suppliers in the relevant market.¹⁶⁹ Anticompetitive conduct is thus conduct that both restricts rivalry and harms consumers or small suppliers.

To be sure, the term “competitive process” could easily be reinterpreted to mean a process of rivalry that benefits consumers in sell-side cases and small suppliers in buy-side cases. Under that definition, conduct that interferes with the competitive process would be conduct that both restrains rivalry and injures consumers or small suppliers. So speci-

168. See Elhauge, *supra* note 162, at 436 n.104 (“But what does the ‘competitive process’ mean? It cannot turn on whether the process involves more competitors or more competitive behavior among them, for antitrust law allows mergers that reduce the number of competitors and joint ventures that limit competitive behavior if they benefit consumer welfare . . .”). Thus, courts consider efficiencies in evaluating a merger only to the extent that the efficiencies would benefit consumers in the relevant market. See Kirkwood & Lande, *supra* note 163, at 225:

No court in the United States . . . has ever allowed a merger that was likely to increase prices in the relevant market (or otherwise deprive consumers of the choices a competitive market would provide) on the ground that it was likely to enhance economic efficiency. To the contrary, the courts have uniformly insisted that merging parties cannot establish an efficiencies defense unless they show both that the merger would generate significant cost savings and that enough of those savings would be passed on to consumers that consumers would benefit from (or at least not be hurt by) the merger.

The federal government’s merger guidelines take the same position, asking whether efficiencies would prevent harm to consumers in the relevant market. See U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 10 (2010), available at <http://www.ftc.gov/os/2010/08/100819hmg.pdf> [hereinafter HORIZONTAL MERGER GUIDELINES] (“[T]he Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger’s potential to harm customers in the relevant market, e.g., by preventing price increases in that market.”); Hovenkamp, *supra* note 162, at 2476–77 (stating that, under the 2010 Guidelines, “if the merger is likely to result in a market-wide output reduction and price increase . . . then the proponents of the merger will have an opportunity to show compensating efficiencies. But the magnitude of the efficiencies must be sufficiently large to offset any predicted price increase. In sum, the merger will be permitted only where there is no consumer harm, regardless of the size of the efficiencies.”).

169. See HORIZONTAL MERGER GUIDELINES, *supra* note 168, § 12 (describing a merger of the only two buyers of an agricultural product in a relevant geographic market and noting that it would have anticompetitive effects even if it did not hurt consumers; specifically, it would “depress the price paid to farmers for this product, causing a transfer of wealth from farmers to the merged firm and inefficiently reducing supply”).

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fied, “competitive process” would be an appropriate goal, congruent with the fundamental objectives described above. But if “competitive process” refers only to a process of rivalry, and any limitation on this rivalry is objectionable regardless of the consequences, the term is not only too narrow, but also affirmatively harmful.

2. CONSUMER WELFARE, SUPPLIER WELFARE, AND TOTAL WELFARE

Collusion to control a powerful customer, if it satisfied the requirements set forth in Part V, would raise supply prices, increase output or innovation, and frequently lower prices or enhance choice downstream. These effects would increase the welfare of suppliers and the welfare of consumers. They would also increase total welfare because, if the collusion met the requirements of Part V, it would counteract the inefficient exercise of buyer power without harming downstream consumers. In short, collusion to control a powerful customer, if it satisfied the criteria of Part V, would advance all the welfare goals of antitrust.

3. PROTECTING CONSUMERS FROM ANTICOMPETITIVE CONDUCT

Finally, such collusion would not offend the fundamental goal of antitrust law. As described above, in a sell-side case like e-books, that goal is to protect consumers from anticompetitive conduct—conduct that creates market power, transfers wealth from consumers to producers, and fails to provide consumers with compensating benefits. Collusion to control a powerful customer, if it satisfied the criteria of Part V, would not constitute such conduct. It would not transfer wealth from consumers, and it would not harm them on balance. While it would create upstream market power, it would provide consumers with compensating benefits, counteracting the anticompetitive exercise of buyer power by increasing output and frequently lowering prices or enhancing innovation.¹⁷⁰

In the e-books case, in contrast, the publishers’ collusion, abetted by Apple, did not meet the requirements of Part V. Instead, it almost certainly harmed consumers and was properly condemned.

170. Collusion to control a powerful customer would of course harm that customer. That creates an issue because it normally makes sense to pursue the fundamental goal of antitrust law by examining the effects of the challenged conduct on direct purchasers, not ultimate consumers. See Kirkwood, *supra* note 98, at 2450 (noting that while ultimate consumers are the protected class, it simplifies litigation, increases business certainty, and generally reaches the right result to focus the inquiry on direct purchasers). In this context, however, conduct cannot be judged anticompetitive because it hurts the direct purchaser, for the direct purchaser is the source of the problem and the purpose of the collusion is to counteract the undesirable effects of its power.

IV. THE ASSERTED NEED TO CONTROL AMAZON

Although Amazon is a powerful buyer, it exerts countervailing power, not monopsony power. As a result, the publishers could not justify their collusion on the ground that it would counteract the undesirable effects of monopsony power. The more plausible justification, judged by the number of critics who asserted it, was that Amazon was engaged in predatory pricing. In fact, though, the evidence strongly suggests that Amazon was selling popular e-books below cost in order to stimulate sales of Kindles (and other Amazon products), not to drive out rival e-book sellers and raise prices. In other words, it is likely that Amazon was engaged in loss leading rather than predatory pricing, and loss leading is ordinarily procompetitive.¹⁷¹ Moreover, even if Amazon had been engaged in true predation, the remedy was a lawsuit, not collusion.

Amazon's exercise of countervailing power was more troubling. By reducing publisher margins, it could have curtailed the number of new titles produced and reduced the welfare of consumers and authors. There is no evidence, however, that Amazon's demands for concessions actually resulted in any reduction in consumer choice. While that could happen in the future, the danger was reduced by the decline in Amazon's market share and the entry of major new rivals such as Apple, Google, and Microsoft. Amazon's buying power, in short, did not justify a conspiracy that imposed immediate and substantial price increases on consumers.

A. *Monopsony Power*

As Part III.B indicated, the defense for collusion that has the greatest support in the literature is the defense for small, powerless suppliers facing a monopsonist. In the e-books market, however, Amazon did not have monopsony power—the kind of buyer power that is symmetric to monopoly power, modeled in economic textbooks, and fundamental to the thesis of the scholars cited above.¹⁷²

171. As explained below, loss leading is usually procompetitive because the sale of a few products below cost is often an effective promotional device: it causes consumers to buy other products from the seller. And, unlike predatory pricing, it does not normally drive out (or otherwise harm) rival sellers and thus does not result in an eventual supracompetitive price increase on the products sold below cost. While loss leading can sometimes have a predatory impact, the circumstances required for predatory loss leading did not appear to be present with Amazon's e-book pricing.

172. When Blair and Harrison refer to monopsony, they mean textbook monopsony power. See BLAIR & HARRISON, *supra* note 134, at 41–67 (“Economic Theory of Monopsony”) (reproducing the textbook model). So does Campbell. In explaining the advantages of bilateral monopoly over a “monopsonist buying from competitive suppliers,” he relies on textbook monopsony analysis. For example, he states: “In the case of one buyer and many sellers, the classical monopsony buyer

In the textbook monopsony model, a single buyer purchases from a competitive tier of suppliers, each without market power and each producing on an upward-sloping marginal cost curve.¹⁷³ In this model, the buyer will purchase less than the competitive or efficient quantity,¹⁷⁴ and collusion by the suppliers is likely to reduce this problem, raising output up to—or at least closer to—the competitive level.¹⁷⁵ But neither the e-books market nor the print books market matches the monopsony model. On the demand side, the suppliers—book publishers—are not perfectly competitive; they do not all produce the same homogenous product. To the contrary, their products are differentiated, each with some degree of market power.¹⁷⁶ On the supply side, the publishers do not normally confront rising marginal costs as they increase the output of a particular title. Rather, over a large range of output, their marginal costs are flat.¹⁷⁷ Together, these two factors—some market power and constant marginal costs—mean that publishers, unlike the competitive sellers of the monopsony model, price above marginal cost. In this respect, book publishers are like software publishers: they incur substantial fixed costs to develop and market a product but can generate another copy of the product at a low marginal cost, sometimes near zero. In this situation, both types of publishers, in order to cover their fixed costs, must price above marginal cost.¹⁷⁸

stops buying before reaching the competitive level of purchases.” Campbell, *supra* note 143, at 521.

173. See *supra* note 111 and accompanying text.

174. See *supra* note 112 and accompanying text.

175. See *supra* notes 135, 147–49 and accompanying text.

176. See Mellsop & Counsell, *supra* note 148, at 6 (“[T]he evidence suggests that [book] publishers are likely to have some market power of their own . . . [since they are] the copyright holder for particular titles.”).

177. In the case of an e-book, the marginal cost to the publisher of generating an additional copy for a consumer is near zero and does not change as more copies are downloaded. See Epstein, *supra* note 9 (“But the marginal price for the production of an additional eBook is close to zero . . .”). In the case of a print book, the marginal cost is higher, but still constant over the usual range of output. See Mellsop & Counsell, *supra* note 148, at 6 (noting that publishers typically price books on a per unit basis, which they characterize as “simple variable cost pricing,” implying that variable costs—and thus marginal costs—do not rise with output).

178. Baker, Farrell, and Shapiro state that “in [their] experience” suppliers with market power commonly price above marginal cost and identify “vendors of business software” as an example:

While marginal cost pricing no doubt arises in some cases, in our experience suppliers with market power that negotiate customer-specific prices very often charge each customer a price for marginal units that is well above marginal cost. . . .

Likewise, vendors of business software that negotiate individual prices with corporate customers do not routinely charge them zero (marginal cost) for each additional “seat” or user of that software.

Baker, Farrell & Shapiro, *supra* note 145, at 640. While the authors limit their assertion to suppliers that “negotiate customer-specific prices,” the point is broader. *Id.* If marginal costs are low and flat over the relevant range of output, suppliers must price above those costs to cover their fixed expenses, whether or not they negotiate customer-specific prices.

If book publishers are pricing above marginal cost, then a price cut induced by a powerful buyer like Amazon would not, as in the monopsony model, lead to a reduction in output.¹⁷⁹ Instead, it may generate an increase in output, since the buyer's own marginal costs fall with a decline in the price it pays for a key input. In other words, if Amazon pays less, on a per unit basis, for books, its own marginal costs will fall, which is likely to cause it to lower its retail prices, leading to greater unit sales. In this setting, the appropriate model of buyer power is not monopsony power, but countervailing power, and the exercise of countervailing power may result in greater output and lower retail prices. In this context, therefore, collusion by suppliers to offset buyer power may not be desirable; it may eliminate the procompetitive effects of countervailing power. While countervailing power can also have anticompetitive effects, and collusion to offset it might be justifiable, that requires a more complicated analysis.¹⁸⁰ The point here is that the best established buyer power justification for collusion—the monopsony power justification—was unavailable to the book publishers. The most frequently asserted justification, discussed next, also appeared inapt.

B. *Predatory Pricing*

Many critics of the e-books case argued that Amazon was engaged in predatory pricing and that collusion to halt this conduct was desirable. They claimed that forcing Amazon to raise its prices helped preserve brick-and-mortar booksellers and insulate consumers from an Amazon monopoly.¹⁸¹ This possible justification, however, suffers from two serious problems: it was almost certainly not supported by the evidence, and it appears incorrect as a matter of antitrust policy.

179. In the monopsony model, in which suppliers face rising marginal costs, a price reduction ordinarily causes them to curtail output. When they are paid less, their profit-maximizing level of output falls. An exception can occur if the monopsonist has so much power that it can make “all or nothing” demands on the suppliers, confronting them with the choice of accepting the monopsonist's price or selling nothing at all. In the extreme case, the monopsonist can force the suppliers to produce the competitive level of output at a price that covers only their variable costs, depriving them of their entire producers surplus. See BLAIR & HARRISON, *supra* note 134, at 83–84. This case did not occur in book publishing because a price this low would completely remove the publishers' incentive to develop new books. They could not defray any of their fixed costs of selecting, editing, and producing new titles. On the other hand, in exercising the type of buyer power it did have—countervailing power—Amazon might have made demands on the publishers that reduced their margins and caused them to curtail the number, quality, or variety of new titles they produced. That concern is discussed in Part IV.C below.

180. See *infra* Part IV.C.

181. See *supra* notes 10–15. More recently, Paul Aiken, Executive Director of the Authors Guild, summed up the argument: “If the publishers colluded, it was to blunt Amazon dominance.” David Streitfeld, *E-Book Ruling Gives Amazon an Advantage*, N.Y. TIMES, July 11, 2013, at A1, available at <http://www.nytimes.com/2013/07/11/business/e-book-ruling-gives-amazon-an-advantage.html>.

1. UNSUPPORTED BY THE EVIDENCE

Critics of the government's case fastened on Amazon's huge share of e-book sales and its below-cost pricing of many titles. From these facts, the critics argued that Amazon was engaged in predatory pricing and intended to build a durable monopoly.¹⁸² The evidence indicates, however, that it would be very difficult to establish the elements of a predatory pricing case.

i. Dangerous Probability of Monopolization

To prove that Amazon's pricing violated Section 2 of the Sherman Act, a plaintiff would have to show, first of all, that Amazon's conduct created a dangerous probability of monopoly power.¹⁸³ Its large share of the e-books market would help establish that element. The Justice Department defined the relevant market as the sale in the United States of trade books in electronic formats, and Apple (the only defendant to litigate) did not dispute that definition.¹⁸⁴ In that market, at the time the publishers and Apple were conspiring, Amazon's share was almost ninety percent,¹⁸⁵ which is more than enough, looking at share alone, to infer actual monopoly power and, even more clearly, a dangerous probability of such power.

Amazon could not build a durable monopoly, however, without substantial barriers to entry, and these are less clear. To be sure, it engaged in below-cost pricing and, if that were sufficiently pervasive and persistent, it might create a reputation for predation that would deter entry. But, as noted below, its below-cost pricing was limited in scope and significant entry occurred while it was going on. In the face of such entry, which reduced Amazon's market share by a third, it would be difficult to demonstrate a dangerous probability of actual monopolization.¹⁸⁶

182. See, e.g., Hiltzik, *supra* note 8 ("Amazon's \$9.99 price often meant it was selling books at a loss, presumably to cement its dominance of a market that it then controlled to the tune of 90%.").

183. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993) (stating that "§ 2 of the Sherman Act . . . condemn[s] predatory pricing when it poses 'a dangerous probability of actual monopolization'" (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 455 (1993))).

184. See *United States v. Apple*, 952 F. Supp. 2d 638, 694 n.60 (S.D.N.Y. 2013). Trade books, whether in print or electronic format, "consist of general interest fiction and non-fiction books" and "are to be distinguished from 'non-trade' books such as academic textbooks, reference materials, and other texts." *Id.* at 648 n.4.

185. *Id.* at 649 ("Through 2009, Amazon dominated the e-book retail market, selling nearly 90% of all e-books.").

186. See *supra* note 74 and accompanying text ("[I]t is undisputed that Amazon's market share in e-books decreased from 90 to 60 percent in the two years following the introduction of agency pricing."). This does not mean that entry was extremely easy or that every potential entrant was

ii. Below-Cost Pricing

A predatory pricing plaintiff must also show that the defendant engaged in below-cost pricing.¹⁸⁷ On many of Amazon's sales of e-books, this element could be established. Prior to 2009, publishers discounted their e-books to reflect the lower costs of electronic production and distribution—Amazon's \$9.99 price at the time was roughly equivalent to its acquisition cost.¹⁸⁸ But, beginning in 2009, when publishers removed this discount, the price Amazon paid rose several dollars, yet Amazon continued to offer many newly released and bestselling e-book titles for \$9.99. At that point, the district court found, Amazon was pricing below cost.¹⁸⁹

Amazon did not, however, price all its e-books below cost. To the contrary, the Justice Department investigated the issue and found that, when total e-book revenues were compared to total acquisition costs, Amazon had not incurred losses.¹⁹⁰ Judge Cote did not affirm this conclusion, declaring instead that this case was not the occasion to determine whether Amazon's pricing was an unfair trade practice or otherwise illegal.¹⁹¹ But she repeatedly referred to Amazon's aggressive pricing as "loss leading," not predatory pricing,¹⁹² and never indicated that it had caused an overall loss to Amazon's e-book business.¹⁹³ By

equally well positioned to capture market share. Apple obtained substantial concessions from the publishers because it was America's best-known high-tech firm and was ready to introduce another innovation: the iPad. If numerous entrants could have achieved what Apple promised, the publishers would not have made such substantial concessions to Apple. Instead, they would have turned to another potential entrant.

187. *Brooke Group*, 509 U.S. at 222 ("[A] plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs.").

188. *See Apple*, 952 F. Supp. 2d at 649 (describing the pre-2009 discount and stating: "With a digital book discount, Amazon's \$9.99 price point roughly matched the wholesale price of many of its e-books.").

189. *See id.* at 650 (stating that once the e-book discount was eliminated, "the wholesale price that Amazon paid for an e-book would be set at several dollars above Amazon's \$9.99 price point," causing Amazon to sell many e-books at a "loss").

190. *See* Response of Plaintiff United States to Public Comments on the Proposed Final Judgment, *supra* note 5, at 21–22 ("In the course of its investigation, the United States examined complaints about Amazon's alleged predatory practices and found persuasive evidence lacking. As is alleged in the Complaint, the United States concluded, based on its investigation and review of data from Amazon and others, that "[f]rom the time of its launch, Amazon's e-book distribution business has been consistently profitable, even when substantially discounting some newly released and bestselling titles.").

191. *Apple*, 952 F. Supp. 2d at 708.

192. *E.g., id.* (referring to "Amazon's choice to sell NYT Bestsellers or other New Releases as loss leaders"); *id.* at 650 (stating that Amazon "continued to sell many NYT Bestsellers as loss leaders at \$9.99").

193. In fact, she noted in an earlier decision that "none of [the public comments attempt] to show that Amazon's e-book prices as a whole were below its marginal costs." Opinion & Order, *supra* note 4, at 40. To be sure, Amazon need not have priced all its e-books below cost in order to

using the term “loss leading,” Judge Cote implied that Amazon’s below-cost pricing was (a) selective rather than pervasive, and (b) not intended to generate monopoly power. That is, its goal was not to drive out rival e-book retailers and thereby gain the power to raise e-book prices to monopoly levels, but to stimulate additional sales, at existing prices, of other products sold by Amazon, particularly its Kindles. This suggests that Amazon’s behavior also failed to satisfy the final element of a predatory pricing claim—recoupment.¹⁹⁴

iii. Recoupment

Amazon could recoup its investment in below-cost pricing of e-books either by selling more Kindles and other Amazon products (loss leading), or by raising the price of e-books above the competitive level (predatory pricing). Several considerations suggest that Amazon was pursuing the first strategy, not the second. The difference matters, of course, both legally and normatively, because loss leading, unlike predatory pricing, does not normally cause consumer harm.

First, like Judge Cote, a number of commentators characterized Amazon’s aggressive pricing as loss leading, not predation.¹⁹⁵ Second, as these commentators recognized, loss leading readily fits the facts because Amazon has never sold all of its e-books below cost, which is an approach it might take if it was determined to impose maximum losses on competing e-book sellers. Third, as the price of e-readers has fallen—and thus the gains from promoting the sale of these devices have diminished—Amazon has cut back its discounting of e-books. Critics of the e-books case claimed that if pricing authority were ever returned to Amazon, it would resume—or even intensify—its aggressive pricing of

engage in an effective predatory strategy. If an entrant offered only the most popular e-books, it could be excluded by selective price cutting, just as it could be excluded by loss leading, as noted below. But neither strategy would exclude entrants who offer a broad range of e-books. Moreover, as the next section details, several large firms entered—or remained—in the market despite Amazon’s price cutting, suggesting that Amazon’s strategy, whatever it is called, was not an effective exclusionary device.

194. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (stating that, under Section 2 of the Sherman Act, the final “prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a . . . dangerous probability, of recouping its investment in below-cost prices”).

195. See, e.g., Jim Milliot, *The Fight for the Future*, PUB. WKLY. (Feb. 8, 2010), <http://www.publishersweekly.com/pw/print/20100208/41971-the-fight-for-the-future.html> (“Amazon has been losing on the \$9.99 e-books, but was willing to let them be loss leaders to grab market share, sell more Kindles, and, according to Hildick-Smith [founder of the research firm Codex Group], increase the overall amount of money consumers spend at Amazon on e-books and print books.”); Rich & Stone, *supra* note 62, at B5 (“Because Amazon has discounted the price of most new and popular e-books on its Kindle e-reader to \$9.99, it loses money on most of those sales. Amazon’s goal has been strategic: it aims to establish a low price for e-books that will have the ancillary benefit of helping it sell more Kindle devices.”).

e-books.¹⁹⁶ By most accounts, that has not happened.¹⁹⁷ Instead, prices of many popular e-books appear to be higher than they were prior to the introduction of the agency model in 2010.¹⁹⁸ And that has coincided with a fall in the price of Kindles, suggesting that Amazon's pricing of e-books has been driven by the profits it could make selling Kindles, rather than by the returns it could achieve if it attained monopoly power in the e-books market.¹⁹⁹ In addition, Amazon would put a dent in its pro-consumer image if it ever raised e-book prices sharply, indicating, yet again, that its goal was to sell more Kindles and other products, not to exploit consumers.²⁰⁰

Finally, the prospect of an Amazon monopoly has diminished as several other firms, large and small, have entered the e-books market. Apple entered when it launched the iPad and, while that entry was artifi-

196. See Brian X. Chen & Julie Bosman, *Trial on E-Book Price-Fixing Puts Apple in the Spotlight*, N.Y. TIMES, June 3, 2013, at B1, available at <http://www.nytimes.com/2013/06/03/technology/e-book-antitrust-case-against-apple-to-begin.html?pagewanted=all> ("After the lawsuit was filed, the expectation was that e-book prices would drop sharply; the publishers that settled agreed to allow retailers to discount their e-books for two years.").

197. *Id.* ("But the price drop has still not happened."); David Streitfeld, *Little Sign of a Predicted E-Book Price War*, N.Y. TIMES, Dec. 24, 2012, at B1, available at <http://www.nytimes.com/2012/12/24/technology/e-book-price-war-has-yet-to-arrive.html?pagewanted=all> ("Right about now, just as millions of e-readers and tablets are being slipped under Christmas trees, there was supposed to be a ferocious price war over e-books. . . . But doomsday has not arrived, at least not yet.").

198. *Id.* ("As four of the publishers have entered into settlements with regulators and revised the way they sell e-books, prices have selectively fallen but not as broadly or drastically as anticipated. . . . Amazon, for instance, is selling Michael Connelly's new mystery, "The Black Box," for \$12.74. New best sellers by David Baldacci and James Patterson cost just over \$11."); Laura Hazard Owen, *Free is Not the Magic Number: New Trends in eBook Pricing*, GIGAOM (May 30, 2013, 11:49 AM), <http://gigaom.com/2013/05/30/free-is-not-the-magic-number-new-trends-in-ebook-pricing/> ("Following big publishers' settlements with the Department of Justice in the ebook pricing case, the prices of their ebooks have settled as well—'slightly north of pre-agency' prices, Tamblyn said.") (quoting Michael Tamblyn, Kobo's chief content officer); Joe Nocera, *Amazon's 'Bullying' Tactics*, N.Y. TIMES, May 31, 2014, at A19, available at <http://www.nytimes.com/2014/05/31/opinion/nocera-amazons-bullying-tactics.html> (noting that after the settlements, "Amazon has not entirely reverted back to \$9.99 e-books"). *But see* Bill Baer, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Public and Private Antitrust Enforcement in the United States: Remarks as Prepared for Delivery to European Competition Forum 2014, at 8 (Feb. 11, 2014), available at <http://www.justice.gov/atr/public/speeches/303686.pdf> ("In the months since the conspiracy was halted and competition restored, the average price of the top 25 best-selling e-books dropped to around \$6.47.").

199. Streitfeld, *supra* note 197 ("'The pricing war hasn't happened because Amazon can't afford it,' said Nate Hoffelder of the Digital Reader, a site devoted to e-book news and opinion. 'The money Amazon lost on e-book discounts in 2008, 2009 was covered, at least in part, by the high price of Kindle hardware,' he said. 'Now that the Kindle is being sold so cheap, Amazon no longer has the hardware income to act as a cushion.' . . . When the Kindle made its debut it was a big hit at \$399. The cheapest model is now \$69. Barnes & Noble is selling its cheapest Nook for \$79, discounted from \$99.").

200. See Nocera, *supra* note 198, at A19 ("But its goal is not to raise prices, which is contrary to Amazon's pro-consumer culture.").

cially supported by its conspiracy with the publishers, it has remained in the market after the collusion ended and Amazon regained its pricing freedom. Microsoft entered indirectly by investing \$300 million in Barnes & Noble.²⁰¹ This partnership promised to strengthen both firms as competitors in the e-book market, giving Barnes & Noble additional capital for its Nook division and allowing Microsoft to offer Barnes & Noble's library of e-books on its own tablet.²⁰² Two other large firms, Google and Sony, also moved into the e-books market,²⁰³ and a smaller firm, Kobo, sells e-books in a consortium with the American Booksellers Association, the trade group of independent brick-and-mortar bookstores.²⁰⁴ Because of the presence of so many significant firms in the e-books market,²⁰⁵ some of which entered when Amazon was charging \$9.99,²⁰⁶ it is unlikely that Amazon's low pricing has created a danger-

201. Opinion & Order, *supra* note 4, at 38 (“Barnes & Noble was able to attract a \$300 million investment from Microsoft in order to compete with Amazon even after the filing of the proposed Final Judgment shed doubt on the future of e-books agency pricing . . .”).

202. See Response of Plaintiff United States to Public Comments on the Proposed Final Judgment, *supra* note 5, at 6 (“According to public reports, Microsoft has invested hundreds of millions of dollars in Barnes & Noble’s digital book business, a business that Microsoft valued at \$1.7 billion. Microsoft soon thereafter announced it would sell a tablet computer, named Surface, that will compete against the iPad and serve as an e-reader.”); Ingrid Lunden, *Microsoft Makes \$300M Investment in New Barnes & Noble Subsidiary to Battle with Amazon and Apple in E-Books*, TECH CRUNCH (Apr. 30, 2012), <http://techcrunch.com/2012/04/30/microsoft-barnes-noble-partner-up-to-do-battle-with-amazon-and-apple-in-e-books> (“One of the first benefits for customers will be a NOOK application for Windows 8, which will extend the reach of Barnes & Noble’s digital bookstore by providing one of the world’s largest digital catalogues of e-Books, magazines and newspapers to hundreds of millions of Windows customers in the U.S. and internationally.”) (quoting joint press release of Barnes & Noble and Microsoft).

203. See Response of Plaintiff United States to Public Comments on the Proposed Final Judgment, *supra* note 5, at 6 (“Google, already an e-book content provider, also announced after the settlement that it would for the first time sell a tablet, called Nexus 7. The Nexus 7 is designed to compete directly against Amazon’s Kindle Fire and bring more business to Google Play, Google’s online store that sells e-books and other digital content.”); Reply Memorandum in Support of the United States’ Motion for Entry of Final Judgment at 8, *United States v. Apple, Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013) (No. 12-cv-2826) (referring to “Sony’s release of a new e-reader”). *But see* L. Gordon Crovitz, *The Antitrust Book Boomerang*, WALL ST. J., June 2, 2014, at A13, available at <http://online.wsj.com/articles/gordon-crovitz-the-antitrust-book-boomerang-1401661151> (noting that Sony and Samsung have now exited the e-reader market).

204. Yvonne Zipp, *The Novel Resurgence of Independent Bookstores*, CHRISTIAN SCI. MONITOR (Mar. 17, 2013), <http://www.csmonitor.com/USA/Society/2013/0317/The-novel-resurgence-of-independent-bookstores> (“In November, Kobo, a Toronto-based e-reading company, partnered with the ABA to sell e-readers and e-books at independent stores. So far, about 450 have signed on.”).

205. See Jeffrey A. Trachtenberg, *Amazon Struggles to Crack Publishing*, WALL ST. J., Oct. 18, 2012, at B1, available at <http://online.wsj.com/news/articles/SB10000872396390444592704578062631678116120> (“Amazon, Barnes & Noble, Apple, Google and Sony are now competing to sell both e-books and digital devices such as e-readers and tablets.”).

206. See Opinion & Order, *supra* note 4, at 38 (noting that “Barnes & Noble and Google had either entered or planned to enter the e-books market well before the Agency Agreements were signed”).

ous probability of monopolization. The new entrants have substantially reduced Amazon's share²⁰⁷ and would be poised to take even more business should Amazon ever attempt to charge monopoly prices.²⁰⁸ Moreover, in an adjacent market, the retail sale of print books, independent bookstores have undergone a minor resurgence.²⁰⁹

In sum, considerable evidence suggests that Amazon was engaged in loss leading, not predatory pricing. To be sure, loss leading may sometimes be anticompetitive. Persistent loss leading may drive out small firms with limited product lines,²¹⁰ and their demise could harm some consumers if those firms offered distinctive services that the market was unlikely to replace. But that concern was minimal here since most of Amazon's rivals were large and sold e-readers as well as e-books. As a result, Amazon was almost certainly using loss leading not as a predatory device but as an efficient promotional tool, drawing consumers to its website to buy products they might not otherwise purchase.²¹¹ Thus, the publishers could not defend their conspiracy by

207. See *supra* note 74 and accompanying text.

208. Barnes & Noble, of course, has been losing money in its attempts to develop new e-readers. See Joshua Brustein, *Barnes & Noble Won't Stop Making New Money-Losing Nooks*, BLOOMBERG BUSINESSWEEK (Feb. 26, 2014), <http://www.businessweek.com/articles/2014-02-26/barnes-and-noble-wont-stop-making-new-money-losing-nooks>. But, despite its struggles, Barnes & Noble remains a substantial presence in the e-books market. See Bosman, *supra* note 72 (according to the chain's executives, its market share is now twenty percent).

209. See Zipp, *supra* note 204 (describing a "quiet resurgence of independent bookstores"); see also *id.* ("Sales at independent bookstores rose about 8 percent in 2012 over 2011, according to a survey by the American Booksellers Association (ABA). . . . 'I think the worst days of independents are behind them,' says Jim Milliot, coeditorial director for Publishers Weekly magazine."); see also *id.* ("In 2009, the low point for its membership, the ABA had 1,401 members with 1,651 locations across the United States. Since then, the ABA has seen three straight years of growth. As of May 2012, it had 1,567 members with 1,900 locations.").

More recently, Jennifer Enderlin, the publisher of St. Martin's Press Paperbacks and Griffin, commented: "'Independents seem to be having a good run right now . . . They're having a nice renaissance.'" Julie Bosman, *Booksellers Wary About Holiday Sales*, N.Y. TIMES, Dec. 16, 2013, at B1, available at <http://www.nytimes.com/2013/12/16/business/booksellers-wary-about-holiday-sales.html?pagewanted=all>. The threat to independents from e-books was receding because e-book sales had stopped growing. See *id.* ("The Association of American Publishers, which collects monthly data from about 1,200 publishers, said last month that e-book sales had been flat or in decline for most of 2013."). Enderlin thought e-book sales were finding their own level and would "start affecting print books in a good way." *Id.*

210. See Shaun D. Ledgerwood & Wesley J. Heath, *Rummaging Through the Bottom of Pandora's Box: Funding Predatory Pricing Through Contemporaneous Recoupment*, 6 VA. L. & BUS. REV. 509, 540 (2012) (noting that a small firm with a limited product line, and no other means of responding to loss leading by a larger rival, would "face the choice of perpetually absorbing losses or shutting down for an indeterminate period of time"); Albert A. Foer & Tyler Patterson, *E-books and Amazon: The Need to Hear Two Hands Clapping*, COMPETITION. L. INSIGHT, July 31, 2012, at 8, 9 ("[T]he multiproduct distributor's ability to cross-subsidize particular products by below-cost sales will drive out single-product firms.").

211. Ledgerwood and Heath argue that loss leading is harmful, despite its promotional value to consumers—a benefit they describe as "large"—because loss leading reduces allocative

pointing to Amazon's below-cost prices. Those prices were much more likely to be beneficial to consumers than predatory. But even if they had been predatory, Amazon's behavior would not have justified collusion.

2. INCORRECT AS A POLICY MATTER

Suppose that Amazon was engaged in an unmistakable case of predatory pricing, selling e-books below their incremental cost with the goal—and the prospect—of securing monopoly power in the e-books market. Would that behavior warrant the publishers' collusion? Judge Cote said no. Upholding the Justice Department's original settlements, she stated: “[E]ven if Amazon *was* engaged in predatory pricing, this is no excuse for unlawful price-fixing. . . . The familiar mantra regarding ‘two wrongs’ would seem to offer guidance in these circumstances.”²¹² Later, in her decision finding Apple liable, she was even more emphatic:

If Apple is suggesting that Amazon was engaging in illegal, monopolistic practices, and that Apple's combination with the Publisher Defendants to deprive a monopolist of some of its market power is pro-competitive and healthy for our economy, it is wrong. This trial has not been the occasion to decide whether Amazon's choice to sell NYT Bestsellers or other New Releases as loss leaders was an unfair trade practice or in any other way a violation of law. If it was, however, the remedy for illegal conduct is a complaint lodged with the proper law enforcement offices or a civil suit or both. Another company's alleged violation of antitrust laws is not an excuse for engaging in your own violations of law.²¹³

Judge Cote's conclusion echoes Supreme Court precedent.²¹⁴ It is

efficiency. Ledgerwood & Heath, *supra* note 210, at 540–41. They note, using a simple welfare model, that if a firm sells a product for less than its marginal cost, it produces an inefficiently large quantity of the product, lowering allocative efficiency. *See id.* at 536–38. But allocative efficiency is not all that matters for total welfare or consumer welfare. Productive efficiency also counts. And loss leading is likely to increase productive efficiency because a profit-maximizing firm would not ordinarily choose it unless it were cheaper or more effective than other promotional devices. If loss leading were banned, therefore, retailers would find it harder or more expensive to promote their products, which could reduce both consumer welfare and total welfare. In the terms that Ledgerwood and Heath use, the promotional value of loss leading is likely to outweigh its adverse impact on allocative efficiency.

Areeda and Hovenkamp assert, moreover, that “no one has yet adduced any empirical evidence that the hypothesized evils of loss-leader selling occur with any frequency. Vague complaints of ‘unfair loss-leader tactics’ are much more common than actual examples of consumer acceptance being destroyed, rival dealers ruined, or manufacturers prejudiced.” 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1619, at 206 (2d ed. 2004); *see also id.* ¶ 1633d (rejecting loss leading as a justification for resale price maintenance, at least presumptively).

212. Opinion & Order, *supra* note 4, at 40.

213. United States v. Apple, 952 F. Supp. 2d 638, 708 (S.D.N.Y. 2013).

214. *See* FTC v. Indiana Fed'n of Dentists, 476 U.S. 457, 465 (1986) (“That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors

also correct as a matter of antitrust policy, at least where two conditions hold: (1) the customer's behavior is a clear violation of existing law, and (2) the colluding suppliers would enhance their downstream market power by colluding. The first condition implies that a lawsuit, by a government or private plaintiff, is very likely to stop the customer's behavior. The second indicates that collusion is likely to do more harm than good. While it may halt the customer's anticompetitive conduct, it would also, by increasing downstream market power, enable the colluders to exploit ultimate consumers. Where both conditions hold, a lawsuit is plainly preferable to collusion.

Suppose, however, that the customer's conduct was not clearly illegal—that it was likely to be anticompetitive but unlikely to violate existing law. This is a real possibility in the area of predatory pricing, where many scholars maintain that prevailing law, which requires below-cost pricing,²¹⁵ is too restrictive. As they explain, it is quite possible for a dominant firm to use aggressive price cutting to exclude entrants and harm consumers without incurring losses.²¹⁶ In such cases, collusion to control a customer's conduct could compensate for a gap in the law and produce a procompetitive result. But if the customer's conduct was truly predatory, it would produce supracompetitive profits for the customer, and the suppliers would frequently want to share in those profits. In many cases, in other words, the profit-maximizing outcome for the suppliers would not be to prevent the achievement of downstream market power but to exploit it themselves.²¹⁷ In these cases, collusion by the suppliers would not benefit consumers and may well make

to prevent it."); *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457, 468 (1941) ("[E]ven if copying [original fashion designs] were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law.").

215. See *supra* note 187 and accompanying text.

216. See, e.g., Jonathan B. Baker, *Predatory Pricing After Brooke Group: An Economic Perspective*, 62 ANTITRUST L.J. 585, 591 (1994); Patrick Bolton, Joseph F. Brodley & Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2271 (2000); Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 YALE L.J. 941, 944 (2002); John B. Kirkwood, *Controlling Above-Cost Predation: An Alternative to Weyerhaeuser and Brooke Group*, 53 ANTITRUST BULL. 369, 382–86 (2008).

217. See *infra* note 274 (explaining that the existence of downstream market power changes the profit-maximizing outcome for the upstream suppliers, inducing them to restrict rather than increase output). That would not be the case where the suppliers, through effective tacit coordination, already exert all the market power available in their vertical channel. In such a case, the suppliers would have no interest in seeing a customer increase its own market power downstream, since that would result in double marginalization. But in the more usual case, in which competition among the suppliers prevents them from capturing all the available market power, they would have an interest in seeing their customer capture unexploited power, provided they share in it. They would have an even greater interest in exercising all of this power themselves, and they may be able to do so if they are allowed to collude.

them worse off. Thus, even if a powerful customer is engaged in anticompetitive but not illegal predation, it is wise policy to preclude the suppliers from colluding in response.

The policy issues are more difficult when the problem is not a dominant customer's resort to predatory pricing, but its exercise of buying power. Unlike predatory pricing, which antitrust law attempts to control, albeit imperfectly, the exercise of buyer power is subject to little or no constraint. While exclusionary conduct that creates or maintains monopsony power may violate the antitrust laws,²¹⁸ the exploitation of existing buyer power is generally not prohibited.²¹⁹ Thus, when a powerful buyer has acquired and maintained its power legally, suppliers facing that buyer cannot be told to control that buyer by bringing an antitrust lawsuit challenging its exploitation of that power. Collusion may be the only remedy. Part V explores whether and when it might be a desirable remedy. The next section addresses the remaining issue of Part IV—whether Amazon's buyer power provided a justification for the publishers' collusion.

C. Countervailing Power

When Amazon exerts buying power, it wields countervailing power, not monopsony power. But the exercise of countervailing power can be anticompetitive. Section 1 recounts why so many in the industry—publishers, authors, and rival booksellers—were concerned about Amazon's exercise of countervailing power. Section 2 evaluates whether Amazon's behavior actually resulted in consumer harm or posed a sufficient risk of it that the e-books conspiracy was warranted.

1. EXISTENCE AND POTENTIAL ADVERSE EFFECTS

Amazon's dominant position at the time of the publishers' conspiracy suggested it could exert considerable countervailing power. Its share

218. See *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 315 (2007) (indicating that a large buyer that acquires monopsony power through predatory bidding may violate Section 2 of the Sherman Act).

219. A possible exception is section 2(f) of the Robinson-Patman Act, 15 U.S.C. § 13(f) (2012). A large buyer may violate section 2(f) if it uses its countervailing power to induce a supplier to grant it a price concession that is not made available to competing buyers. It is difficult, however, to bring a successful suit under section 2(f) because the plaintiff must show that the buyer knew, or should have known, that the concession it induced was illegal. Because powerful buyers often obtain concessions by requiring suppliers to compete for their business, and a concession given to meet competition is not illegal, a powerful buyer frequently has a good faith belief that the concession it obtained was legal. See John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?*, 72 ANTITRUST L.J. 625, 629 n.7 (2005). The publishers could not realistically control Amazon's buying power through section 2(f).

of e-book sales was a striking ninety percent.²²⁰ Moreover, it had repeatedly utilized the leverage this share conferred, refusing to deal with publishers that failed to bend to its demands and depriving them, while the cut off lasted, of a very large portion of their expected e-book revenues.²²¹ As Apple's counsel put it, Amazon's large share makes it "an essential partner to any publisher, and, as a result, it has significant leverage to dictate terms in its negotiations. And when publishers resist, Amazon makes them pay."²²² Writing for the *New York Times*, David Carr agreed: "Amazon has used its market power to bully and dictate."²²³

In early 2012, for example, Amazon's contract with the Independent Publishers Group ("IPG") came up for renewal and Amazon pressed IPG for better terms. When it resisted, Amazon removed the buy buttons from almost 5,000 IPG e-books.²²⁴ And Amazon continued to refuse to sell IPG e-books for three months, until IPG came to terms.²²⁵ In one instance, Amazon turned off the buy buttons for the titles of a British publisher for more than a year.²²⁶ And, in the most dramatic example, Amazon removed the buy buttons on all of Macmillan's titles, e-book and print, when the publisher demanded that Amazon move to the agency model.²²⁷ Amazon soon capitulated, of course, when it learned that several other publishers would insist on the same model,²²⁸ but this episode showed that Amazon felt it had enough buying power to cut off one of America's leading publishers.

The publishers feared that, unless Amazon's buying power were

220. See *supra* note 185 and accompanying text. In addition, Amazon had a significant share of total trade book sales. As of April 2012, its share was estimated at twenty to twenty-five percent. See Amy Martinez, *Amazon.com Trying to Wring Deep Discounts from Publishers*, SEATTLE TIMES (Apr. 2, 2012), http://seattletimes.com/html/business/technology/2017889877_amazonpublisher02.html. In the last two years, that share has grown. See Packer, *supra* note 33 ("Amazon constitutes a third of one major house's retail sales on a given week . . ."); Nocera, *supra* note 198 ("Publishers Weekly reports that in March, Amazon commanded 41 percent of all new books sold . . .").

221. See *infra* notes 224–28 and accompanying text.

222. Apple Inc.'s Tunney Act Comment, *supra* note 6, at 7–8.

223. Carr, *supra* note 8.

224. *Id.*

225. Jeffrey A. Trachtenberg, *Amazon, Publisher Settle Digital Books Dispute*, WALL ST. J. (May 25, 2012, 6:53 PM), <http://online.wsj.com/news/articles/SB10001424052702304840904577426830792316616>.

226. Comments of The Authors Guild, *supra* note 7, at 3 ("Amazon has continuously used its market leverage, in the U.S. and abroad, to dictate terms to its suppliers by removing buy buttons, in at least one instance punishing a recalcitrant British publisher for more than a year . . ."); see also *id.* at 5 (noting that Amazon also removed "buy buttons in the United Kingdom from hundreds of Bloomsbury titles while in negotiations with the publisher").

227. See *supra* note 62 and accompanying text.

228. See *supra* notes 63–64 and accompanying text.

controlled, it would only grow, threatening to reduce the revenues and profits of the publishers even more. This fear was plausible for two reasons. First, when Amazon uses its buying power to obtain a lower price, it gains an advantage over less powerful retailers like independent book-sellers, and it can use that advantage to outcompete them in the marketplace, raising its market share and increasing its buying power still further, putting itself in a position to extract even lower prices. Buyer power, in short, can create a self-reinforcing cycle. Second, as noted earlier, publishers' marginal costs are typically low and flat.²²⁹ As a result, they remain vulnerable to the exercise of buying power so long as their prices remain above marginal cost.²³⁰ It is no surprise, then, that Steve Jobs warned HarperCollins that if it did not control Amazon's pricing and growth, Amazon would soon be telling the publisher that it would no longer be paying it as much.²³¹

Amazon's buying power troubled the publishers because of its direct threat to their profits. But it also concerned them—and other industry observers—because of its potential threat to a vibrant and diverse book publishing industry. The central concern was that Amazon's growing exercise of its power as a buyer would ultimately result in

229. See *supra* note 177 and accompanying text.

230. They remain vulnerable because, if a large buyer credibly threatens them with a choice between either doing no business at all with that buyer or doing significant business at a lower price, they will choose the lower price, so long as it is above marginal cost, since that is the more profitable option. For this reason, Epstein states: "But the marginal price for the production of an additional eBook is close to zero, so the retailers know that if they pay very little under this model the publishers will have no choice but to go along with the low prices." Epstein, *supra* note 9. Of course, publishers have some leverage too, both because they offer titles that no other publisher offers and because, if they are forced to price too low, they will be unable to cover their fixed costs and may curtail their development of new titles or even exit. As a result, it is unlikely that Amazon could or would force publishers to price at or very close to marginal cost. But the point is still valid: the publishers are more vulnerable to buyer power than they would otherwise be because they normally price substantially above marginal cost, enabling them to grant a price concession and still maintain a positive margin.

231. In an email to James Murdoch of News Corp, the parent of HarperCollins ("HC"), Steve Jobs wrote:

As I see it, HC has the following choices:

1. Throw in with apple and see if we can all make a go of this to create a real mainstream ebooks market at \$12.99 and \$14.99.
2. Keep going with Amazon at \$9.99. You will make a bit more money in the short term, but in the medium term Amazon will tell you they will be paying you 70% of \$9.99. They have shareholders too.

Quoted in *United States v. Apple*, 952 F. Supp. 2d 638, 677 (S.D.N.Y. 2013) (omitting the third choice). Like many other powerful buyers, Amazon has asked publishers for a variety of different concessions, not just price cuts. See Packer, *supra* note 33 (describing Amazon's demands for "ever larger co-op fees[,] . . . better shipping terms," and substantial "'marketing development funds'").

a decline in the number and variety of titles produced by the industry.²³² This reduction in consumer choice could occur through three distinct routes. First, by forcing publishers to accept less money for their books, Amazon's buying power would reduce the profitability of book publishing, which could cause publishers to develop fewer new titles and take fewer risks, concentrating on proven authors and formats and experimenting less with new writers or approaches.²³³ Second, if Amazon pays less for books, authors will also suffer, and the decline in their royalties may reduce the number and quality of new titles they produce.²³⁴ Third, Amazon's buying power threatens the viability of independent bookstores, since they are in no position to negotiate comparable discounts, and their decline would make it harder for consumers to discover new titles.²³⁵ Brick-and-mortar retailers, both independents and chains, provide a convenient and comfortable space in which consumers can inspect and sample new books.²³⁶ If the number of physical bookstores dropped sharply, there would be "a lot less space devoted to showcasing a large number of titles," according to an independent bookseller in Seattle.²³⁷

232. As Packer put it, "the big question is not just whether Amazon is bad for the book industry; it's whether Amazon is bad for books." Packer, *supra* note 33.

233. One might ask why Amazon would want to curtail the development of new titles, since that would reduce Amazon's sales in the future. There are two possible answers. One is that Amazon is more concerned with the near term than the long term, interested in achieving strong current profits even if that has some adverse impact on its future results. Second, consumers can easily tell when they are getting a good price from Amazon, but they cannot easily judge whether the array of titles has been restricted. Price is both more salient for consumers and more readily evaluated than the extent of variety, so long as significant variety remains. Both factors may cause Amazon to press for price cuts even if that results in less innovation in the long run. On the other hand, Amazon would not want to suffer a *substantial* reduction in its future sales. As a result, its willingness to demand concessions from publishers would always be limited.

234. See Epstein, *supra* note 9 ("[L]ower royalties translate into lower level of production of new books It is plausible that . . . higher royalties increase the number of titles available . . .").

235. Although the number of independents has risen recently, see *supra* note 204, during the prior two decades, their ranks were decimated. See Kirkwood, *supra* note 27, at 1510 n.103 (noting that the membership of the American Booksellers Association fell from a high of 5,200 in 1991 to 1,791 in 2005).

236. See Letter from Scott Turow, *supra* note 11:

Marketing studies consistently show that readers are far more adventurous in their choice of books when in a bookstore than when shopping online. In bookstores, readers are open to trying new genres and new authors: it's by far the best way for new works to be discovered. . . . A robust book marketplace demands both bookstore showrooms to properly display new titles and online distribution for the convenience of customers.

Indeed, the demise of Borders unexpectedly illustrated this phenomenon. See Streitfeld, *supra* note 181. ("When Borders collapsed two years ago, analysts said there was an unexpected consequence to the loss of 400 stores: the e-book growth rate began to taper off, as readers could no longer examine new titles before ordering them from Amazon.")

237. Streitfeld, *supra* note 181 (quoting J. B. Dickey, owner of the Seattle Mystery Bookshop).

These concerns helped motivate the publishers' decision to impose an agency model on Amazon and force it to raise its retail prices. As Judge Cote found, the publishers were upset by Amazon's \$9.99 price for e-books primarily because it undermined their ability to charge much higher prices for new hardcover titles.²³⁸ But they also believed it threatened "the viability of the brick-and-mortar stores in which hardcover books were displayed and sold."²³⁹ And they "feared Amazon's growing power in the book distribution business. They were concerned that, should Amazon continue to dominate the sale of e-books to consumers, it would start to demand even lower wholesale prices for e-books"²⁴⁰ The resulting conspiracy enabled the publishers to deal with these fears. By forcing Amazon to charge more for bestselling and newly released e-books, they encouraged Apple's entry and Barnes & Noble's growth, both of which reduced Amazon's market share and its leverage as a buyer. Moreover, by raising the retail price of e-books, the publishers curbed Amazon's threat to brick-and-mortar retailers. But it is difficult to conclude that the publishers' conspiracy was justified.

2. INADEQUATE JUSTIFICATION

While there were plenty of reasons to be concerned about the impact of Amazon's countervailing power on consumer choice, no one—not the publishers themselves, nor the Authors Guild, Apple, Barnes & Noble, independent booksellers, or other critics of the e-books case—submitted evidence that Amazon's leverage as a buyer had actually caused a reduction in the number, diversity, or quality of titles published. On the contrary, there was unmistakable evidence that Amazon's introduction of the Kindle, and the other e-readers that soon followed, had resulted in an explosion of e-book titles.²⁴¹ As a result, the concessions Amazon induced were more likely to have been procompetitive, enabling Amazon to lower prices to consumers without significantly reducing choice. Indeed, in *The Everything Store*, Brad Stone writes that Amazon habitually passes concessions on to consumers: "The publishers had seen over many years what Amazon did with . . . [its] additional leverage. It exacted more concessions and passed the savings on to customers in the form of lower prices and shipping discounts"²⁴²

238. See *supra* note 94.

239. *United States v. Apple*, 952 F. Supp. 2d 638, 649 (S.D.N.Y. 2013).

240. *Id.*

241. See *supra* note 78.

242. STONE, *supra* note 1, at 256; see also *id.* at 278 ("As suppliers had learned over the past decade, no matter the category, Amazon wielded its market power neither lightly nor gracefully, employing every bit of leverage to improve its own margins and pass along savings to its customers.").

Amazon's countervailing power, moreover, was not unlimited. It had cut off—and brought to terms—the Independent Publishers Groups and some smaller publishers here and in the United Kingdom.²⁴³ But its refusal to deal with Macmillan was short-lived and unsuccessful,²⁴⁴ and it had not attempted to cut off any large publisher like Random House or Simon & Schuster. To be sure, its inability to force Macmillan to back down was due to Macmillan's agreement with the other conspirators. Had Macmillan been acting alone, Amazon almost certainly would have been able to get its way. But it was unclear whether Amazon could wield comparable power against the largest publishers.

Amazon's market share, moreover, was eroding. Barnes & Noble entered before the conspiracy began, and Microsoft and Google entered soon after it ended.²⁴⁵ Amazon now has to face Apple, Barnes & Noble, Google, Kobo, and Microsoft,²⁴⁶ leading one observer to characterize the e-books market as "ultracompetitive."²⁴⁷ The presence of all these rivals gives the publishers numerous alternatives to Amazon. Further, independent bookstores are growing again,²⁴⁸ mitigating, for a time at least, the concern that Amazon will destroy this important channel for the presentation and distribution of print books. As noted earlier, moreover, Amazon itself would not want to cause a major reduction in the availability of new titles, since that would produce an unacceptable reduction in its future sales.

In sum, neither the critics of the e-books case nor the publishers could make a compelling case that unless Amazon's countervailing power were controlled, consumer choice would suffer materially, either

When Amazon obtains a concession from a publisher, there are only three possibilities. First, the concession is cost justified. That is, it reflects cost savings the publisher realizes in selling large volumes to Amazon. If so, the publisher can grant the concession—and Amazon can pass it on to consumers—without reducing the profits the publisher would have earned if it had sold the same books to smaller buyers. Second, the concession causes a reduction in the publisher's supracompetitive profits. A publisher may earn supracompetitive profits because of oligopolistic coordination with other publishers or because some of its titles are exceptionally popular. If so, the publisher can grant the concession—and Amazon can pass it on—without depriving the publisher of a competitive return on innovation. Third, the concession reduces the publisher's profits below the competitive level, diminishing its incentive and ability to innovate. In this case, Amazon can pass the concession onto consumers, but it would hurt them in the long term because of a decline in the number or quality of new titles. Only the third possibility would reduce innovation. While none of the three can be ruled out without more information, the third possibility seems the least likely for the reasons noted in the text.

243. See *supra* notes 224–26 and accompanying text.

244. See *supra* notes 227–28 and accompanying text.

245. See *supra* notes 201–03.

246. See *supra* notes 203–05.

247. Jeffrey A. Trachtenberg, *New Barnes CEO Must Analyze Nook*, WALL ST. J. (Jan. 9, 2014), <http://online.wsj.com/news/articles/SB20001424052702303848104579308291857560248>.

248. See *supra* note 209.

in the short term or the foreseeable future.²⁴⁹ While Amazon's substantial market share and relentless demands for concessions made it impossible to rule out future effects, their likelihood was not great enough to warrant a conspiracy that imposed immediate and substantial price increases on consumers. In the e-books case, in short, Amazon's buyer power did not justify collusion.

In other cases, however, collusion to control a powerful customer may be warranted. To help identify the necessary circumstances, Part V begins by highlighting the principal reasons why the collusion in the e-books case was properly condemned.

V. LIMITED DEFENSE FOR COLLUSION TO CONTROL BUYER POWER

The e-books conspiracy was unwarranted for three main reasons. First, though Amazon is a powerful buyer, it lacked the traditional and most dangerous type of buyer power—monopsony power. Had Amazon possessed such power, predictable anticompetitive consequences would have followed and collusion to reverse those consequences might have been desirable. Second, while Amazon does possess the other type of buyer power—countervailing power—no one showed that it had caused harm to innovation, diversity, or choice. Because the exercise of countervailing power is frequently procompetitive, collusion should not be allowed to offset it unless there is clear evidence of competitive harm. Finally, by colluding, the publishers and Apple acquired downstream market power. That normally, if not always, renders upstream collusion impermissible, because it gives the colluders the ability and the incentive to exploit consumers.

In short, the absence of monopsony power, the lack of demonstrable harm from the exercise of countervailing power, and the creation of downstream market power rendered the e-books collusion unacceptable. If two of these factors had been reversed—the third and either of the first two—a defense for supplier collusion to counteract buyer power might have been appropriate. The following sections develop such a defense. It is not designed to capture every situation in which collusion to control a powerful customer would be desirable, since such a defense might be asserted too frequently and be too hard to resolve. To reduce these concerns, the elements of the defense have been narrowed and

249. See Foer & Patterson, *supra* note 210, at 10 (“[W]e do not at this point in time have evidence of monopsonistic abuse or even a dangerous probability of it.”); see also Packer, *supra* note 33 (describing the growing dependence of publishers on Amazon and the increasing concessions it demands, but also noting the huge selection of books it has made available to consumers at low prices). “Amazon has made it possible for hundreds of thousands of writers frustrated with the limits of traditional publishing to have their work read.” Packer, *supra* note 33.

simplified to reach only the clearest cases of procompetitive collusion. As a result, the defense would be very difficult to establish. When it could be established, however, consumers, competition, and efficiency would benefit.

The proposed defense would have three elements. *First*, colluding suppliers would have to show that their customer had buyer power—either monopsony power or countervailing power. In addition, the suppliers would have to show that this power, of whatever type, was legally acquired, substantial, persistent, and durable. *Second*, the suppliers must demonstrate that their collusion, by offsetting such power, likely enhanced downstream competition. That is, they must show that it likely increased output, lowered downstream prices, widened consumer choice, or otherwise benefited consumers.²⁵⁰ If the buyer had monopsony power, an increase in output could be inferred, rather than affirmatively demonstrated. If the buyer had countervailing power, however, the suppliers would have to demonstrate that the customer's exercise of such power had curbed innovation in the past and that collusion was likely to increase it. *Third*, the suppliers must show that their collusion did not create downstream market power.

A. Buyer Power

The first element requires the suppliers to show that their largest customer possessed either monopsony power or countervailing power.²⁵¹ In addition, to exclude cases in which such power ought not to be counteracted by collusion—because it was based on illegal conduct, was modest, was a reward for superior performance, or would disappear on its own—the suppliers must also prove that the customer's power met four requirements: it was legally acquired, substantial, persistent, and durable.

1. EXISTENCE OF BUYER POWER

Suppliers must prove that their customer possessed either monopsony power or countervailing power.

i. Monopsony Power

To establish that a customer had monopsony power, the suppliers

250. In cases of monopsony power, the suppliers' collusion would also protect themselves from exploitation, a basic goal of antitrust in buy-side cases. *See supra* note 164.

251. To keep the defense narrow and targeted at the worst instances of buyer power, it should be limited to cases in which a single large customer, acting unilaterally, possessed monopsony power or countervailing power. If the market contained other customers, colluding suppliers could not take advantage of them. To the contrary, they would be ineligible for the defense if they offered the smaller customers less favorable terms than they offered the largest customer.

must show that, in the absence of collusion, they were vulnerable to the exercise of monopsony power. This means that, acting individually, they lacked market power and operated on an upward-sloping marginal cost curve. In addition, the customer must possess the unilateral power to profitably depress the price it pays them below the competitive level. That is, it can lower the price below the competitive level without causing so many suppliers to turn to other customers or withhold supply altogether that the price reduction is unprofitable.²⁵² In short, the upstream market must be consistent with the textbook monopsony model.

ii. Countervailing Power

If the suppliers assert that their customer possessed the more common form of buyer power—countervailing power—they must establish that they were vulnerable, in the absence of collusion, to the exercise of this type of power. This requires showing that they possessed market power, that the customer could play them off against each other or otherwise exert leverage over them, and that, as a result, they could be induced to grant a lower price or more favorable non-price terms to the customer. Although suppliers can have market power—and be vulnerable to the exercise of countervailing power—even if their marginal costs are rising, suppliers with market power (like the book publishers) usually have constant marginal costs over the pertinent range of output, making it easier for the customer to use its leverage to induce a price cut or other concession from them.²⁵³

2. CHARACTERISTICS

In addition to establishing that the customer had buying power, the suppliers must show that this power was legally acquired, substantial, persistent, and durable.

i. Legally Acquired

Suppliers must establish that their customer had acquired or preserved its buying power through legal means rather than anticompetitive conduct. Legal means might involve procompetitive conduct like innovation or structural factors like economies of scale or government regu-

252. The suppliers may be able to establish the customer's monopsony power through direct evidence. For example, they may be able to show that market output and prices are below the competitive level or, in a more extreme case, that the customer had so much monopsony power that it was able to engage in all-or-nothing contracting, forcing prices down to the level of each supplier's average total costs. For a more detailed discussion of the requirements and effects of monopsony power, see Kirkwood, *supra* note 27, at 1495–1500.

253. For a more detailed analysis of countervailing power, see *id.* at 1500–12.

lation, but the precise means are less important than what the suppliers must be able to disprove—that their customer’s power was attributable to anticompetitive behavior. For as Judge Cote stressed in her e-books decision, where customer power is dependent on anticompetitive behavior, the preferable remedy is not collusion to combat the power but an antitrust lawsuit to combat the behavior.²⁵⁴ Of course, not every lawsuit is successful, either in establishing liability or achieving effective relief. But suppliers should not be entitled to collude when anticompetitive behavior was responsible for their customer’s buying power and an antitrust challenge to that behavior was reasonably likely to produce meaningful relief.²⁵⁵

ii. Substantial

Like the market power of a seller, the power of a buyer, whether monopsony power or countervailing power, is a matter of degree, and relatively small degrees of buyer power should not justify collusion. Collusion is too dangerous to allow when buyer power is modest. As Hovenkamp noted, moreover, if any amount of buyer power is sufficient to excuse a supplier conspiracy, suppliers caught colluding will always point to a customer with some power.²⁵⁶ For both reasons, the amount of buyer power required to permit collusion should be substantial. To make this concrete, suppliers should ordinarily have to show a market share, in a relevant purchasing market, of at least seventy percent in the case of monopsony power and forty percent in the case of countervailing power. Market share alone, of course, does not establish power; colluding suppliers would have to demonstrate, using whatever evidence suffices, that they faced a customer that actually possessed monopsony power or countervailing power. But the level of power required should be considerable, and these market share thresholds suggest the magnitudes that should be demanded.²⁵⁷

254. See *supra* notes 212–13 and accompanying text.

255. If the government opposes supplier collusion on this ground, it would have to explain why it had not brought an action challenging the customer’s behavior.

256. See *supra* note 125 and accompanying text.

257. It is quite possible for a buyer to exercise monopsony power or countervailing power with a market share below these thresholds. See Peter C. Carstensen, *Buyer Power, Competition Policy, and Antitrust: The Competitive Effects of Discrimination Among Suppliers*, 53 ANTITRUST BULL. 271, 295 (2008) (stating that a “striking thing” about recent cases involving buyer power is “the relatively modest market shares” required to exert such power); Kirkwood, *supra* note 27, at 1503–04 (citing the conclusions of numerous commentators that a buyer can wield significant countervailing power with a market share of thirty percent or less); Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L.J. 1509, 1532 (2013) (describing as a “trap” the view that a “50% market share is insufficient for monopsonization claims”). This is another way in which the proposed defense is conservative, intended only to reach the clearest instances of undesirable buyer power.

iii. Persistent

A customer's power should also be persistent and durable. The durability requirement, discussed below, is intended to rule out cases in which a customer's power is unlikely to last. The persistence requirement is needed for a different purpose—to make sure that buyers that attain a powerful position through superior efficiency, innovation, or other procompetitive behavior receive an adequate reward for their efforts. Some buyers that acquire power legally benefit from a combination of good fortune and competent performance. Others, however, achieve their positions through expensive and risky investments that result in better products or more efficient production. Those investments might not be made if, whenever they paid off, colluding suppliers were entitled to a share of the profits.

The issue could be addressed through a comprehensive, case-specific inquiry. Colluding suppliers could be required to identify every procompetitive investment that had contributed substantially to their customer's buying power and show that the customer had already earned profits sufficient to compensate it for the costs and risks it had incurred in making each investment. Such a detailed inquiry, however, would greatly, if not impossibly, complicate the litigation of a defense that ought to be narrow and simple.²⁵⁸ A better approach would be to require suppliers to identify the most recent procompetitive investment that contributed substantially to the customer's power and show that their collusion had begun at least five years thereafter. Five years—the typical planning horizon—provides a reasonable measure of the time needed to provide a firm with substantial compensation for a procompetitive investment.²⁵⁹

258. See Richard M. Brunell, *Appropriability in Antitrust: How Much is Enough?*, 69 ANTITRUST L.J. 1, 18 (2001) (“The difficulties of any case-by-case evaluation of the appropriate reward for a particular investment are manifold.”).

259. If there is evidence that a longer period would be superior, it should be substituted. The point is to provide an objective measure that can be used in litigation. The patent period is considerably longer, of course, but when a patent expires, others are free to copy the patented invention. Here, suppliers could not copy a customer's invention after five years; they could only collude to counteract the customer's exercise of buyer power, which would limit—but not eliminate—the future compensation it received for its investment.

Professor Wu recommends a similar rule of thumb—a persistence period of a few years—in determining when to bring an enforcement action against a dominant firm. He writes:

If we are speaking of a rule of thumb I'd suggest the following: The monopolist should be profitable before enforcement is countenanced. Waiting through a few years of dominance is likely a good idea. But ultimately, once the monopolist has earned back its investments, all talk of forbearance to preserve incentives to innovate must come to an end.

Tim Wu, *Taking Innovation Seriously: Antitrust Enforcement If Innovation Mattered Most*, 78 ANTITRUST L.J. 313, 327–28 (2012).

To illustrate the approach, recall that Amazon introduced the Kindle, the first widely popular e-reader, in 2007, yet the publishers forced the agency model on Amazon in 2010, just three years later. Because the conspiracy occurred less than five years after this significant innovation, the publishers would not be entitled to the proposed defense.

iv. Durable

Finally, colluding suppliers must prove that the customer's power was durable. If, instead, its power was likely to be eroded in the near future by market forces, a price fixing conspiracy would not be warranted.²⁶⁰ Suppliers should have to establish, therefore, not only that they faced a customer with substantial, persistent, and legally acquired buying power, but also that, at the time they began to collude, this power was likely to last for the foreseeable future. In other words, there was no good reason to expect that new entry, rival expansion, technological change, or a shift in demand would undercut the customer's power.²⁶¹

B. *Likely Procompetitive Effects*

The second element of the defense requires the suppliers to show that their collusion was likely to enhance downstream competition. That is, that it was likely to increase downstream output, lower downstream prices, enhance innovation, or otherwise benefit consumers.²⁶² This element can be inferred where the customer had monopsony power and the suppliers establish the first and third elements of the defense. Where these conditions are met, counteracting monopsony power is likely to be procompetitive. If, however, the customer possessed countervailing power, which is often procompetitive, offsetting such power may not be desirable, even if the power meets the four prerequisites. As a result, the suppliers would have to satisfy additional requirements.

260. See *supra* note 131 and accompanying text.

261. In some cases the most likely source of new entry will be the suppliers themselves. According to Professor Carstensen, before the advent of good roads and trucks, farmers needed to sell their grain to very proximate elevators. And due to economies of scale, the nearby elevators were often few in number, typically one or two, giving them significant monopsony power over the local farmers. In response, the farmers frequently built their own elevators, increasing the outlets for their grain and raising the prices they received. See Email from Peter C. Carstensen to author (Dec. 19, 2013) (on file with author). This example underlines the point that collusion to offset buyer power is warranted only when new entry—including new entry by the suppliers themselves—is unlikely.

262. The collusion would of course benefit the suppliers. This benefit would have antitrust value where the suppliers would otherwise be exploited by the unjustified exercise of monopsony power. See *supra* note 164 (describing the fundamental goal of antitrust law in buy-side cases).

1. MONOPSONY POWER

Counteracting monopsony power is likely to be desirable when the monopsony power is legally acquired, substantial, durable, and persistent. In such cases, there is no good reason to exempt the monopsony power from the counteracting force of supplier collusion.²⁶³ Instead, the exercise of such monopsony power depresses both the output produced by suppliers and the price paid to them below the competitive level, and injures the suppliers, economic efficiency, and downstream consumers.²⁶⁴ In these circumstances, supplier collusion that limits the exercise of monopsony power is likely to be procompetitive. As many scholars have shown, when a monopsonist is confronted by a single supplier, the two of them have a powerful incentive to increase output since their joint profits are maximized at the competitive level of output, not the monopsony level.²⁶⁵ While they may not achieve this optimal level, due to imperfections in the bargaining process, their negotiations are likely to lead to an increase in output and thus an improvement in the well-being of suppliers, consumers, and society.²⁶⁶ Accordingly, if suppliers collude to confront a customer with substantial, persistent, durable, and legally acquired monopsony power, their collusion is likely to be procompetitive.

As a result, proof that a customer has monopsony power and that this power satisfies the four prerequisites set forth above would suffice to create the inference that collusion by the suppliers to counteract this power would be procompetitive. In these circumstances, colluding suppliers would have both the ability and the incentive to reach a bargain with the customer that increased output.²⁶⁷

2. COUNTERVAILING POWER

If a customer's power is countervailing power rather than monopsony power, the exercise of that power may be beneficial. When a cus-

263. This assumes that the collusion does not enable the suppliers to create downstream market power. If it did, the defense would be unavailable.

264. The impact on downstream consumers is unlikely to be substantial if the monopsonist has no downstream market power. But there is likely to be some adverse effect. The exercise of monopsony power results in a reduction in the quantity of inputs purchased by the monopsonist, and that normally lowers the quantity of output it produces. That lower output, in turn, will result in some increase in downstream prices, so long as the market demand curve is downward sloping. In other words, even if the monopsonist competes downstream with many other firms—and thus has no individual market power—its exercise of monopsony power upstream is likely to reduce the total quantity of output that reaches final consumers, putting some upward pressure on downstream prices.

265. See *supra* part III.B and especially notes 135 & 147.

266. See *supra* part III.B and especially notes 148–49 and accompanying text.

267. Again, assuming the collusion does not generate downstream market power.

tomers has countervailing power, its suppliers have market power by definition and reducing that power will frequently be procompetitive, leading to greater output and lower prices. In a number of circumstances, however, the exercise of countervailing power can be anticompetitive, producing higher prices downstream, diminished consumer choice, reduced innovation, or other adverse effects.²⁶⁸ The issue is when, if ever, to allow suppliers to collude to control such power.

In the e-books case, the greatest concern with Amazon's exercise of countervailing power was that it would harm innovation.²⁶⁹ By lowering the revenues of publishers, and the incomes of authors who depended on those revenues, Amazon's countervailing power could reduce the incentive of publishers and authors to create new books. In addition, as many scholars have emphasized, innovation is the dimension of competition that contributes the most to long-run consumer welfare, not only in the production and sale of e-books but throughout the economy.²⁷⁰ Thus, if collusion to offset countervailing power is ever to be allowed, it ought to be when that power threatens the rate of innovation. At the same time, given the frequent benefits of countervailing power, and the complexity of determining when it is harmful,²⁷¹ it is probably unwise, at least initially, to allow suppliers to collude to offset other undesirable effects of countervailing power. Instead, the defense should be limited to cases in which countervailing power has harmed innovation.

Determining that would be complicated enough. As the critics of the e-books case made clear, a powerful customer may deprive suppliers of the profits they need to make costly and risky investments in research and development ("R&D"). But not every reduction in profits is harmful. When a customer uses its leverage to force suppliers with market power to lower their prices closer to the competitive level, it may simply increase output and reduce downstream prices, without any adverse impact on innovation. To determine when the exercise of countervailing power has harmed innovation, rather than simply mitigated supracom-

268. See Kirkwood, *supra* note 27, at 1536–58 (describing and analyzing ten scenarios in which the exercise of countervailing power by a buyer reduces competition, either downstream or upstream, and harms consumers or small suppliers).

269. See *supra* Part IV.C.1.

270. See 2B PHILLIP E. AREEDA, HERBERT HOVENKAMP & JOHN L. SOLOW, ANTITRUST LAW ¶ 407a, at 34 (3d ed. 2007) ("[T]echnological progress contributes significantly more to consumer welfare than does the elimination of non-competitive prices."); C. Scott Hemphill & Tim Wu, *Parallel Exclusion*, 122 YALE L.J. 1182, 1211 (2013) ("New products and services drive economic growth, and economic analysis suggests that technological change ultimately dominates price effects in its long-run contribution to welfare. A remarkable consensus across a spectrum of economic opinion takes dynamic harms and benefits as far more important than static ones.") (citing numerous sources).

271. See Kirkwood, *supra* note 27, at 1536–58 (discussing the issues presented by each of the anticompetitive theories of countervailing power).

petitive pricing, it is necessary to determine the level of profits needed to induce research and development, an inquiry fraught with uncertainty because it would entail an inquiry into the costs, risks, and rewards of each type of R&D the suppliers might undertake. Since a thorough attempt to resolve that issue would be protracted and complex, it is undesirable to require it. Instead, it is better to adopt a simpler and more concrete approach—an approach that turns on the past impact of countervailing power on innovation. Specifically, collusion to offset a customer's countervailing power should be allowed only when the suppliers can demonstrate that this power had adversely affected their development of better products or processes in the past. Put differently, unless suppliers with market power can establish that their innovative output fell as a result of the past exercise of countervailing power, they could not collude to counteract it.²⁷²

Even this, however, would not be sufficient. A demonstrated past impact on innovation would not be adequate to justify supplier collusion because collusion itself can have an adverse effect on innovation. As Professor Baker has explained, the state of competition in a market affects the rate of innovation primarily by influencing two factors: (1) the profits a firm can expect by innovating, and (2) the intensity of rivalry in the market.²⁷³ Both motivate innovation. The former (expected profits) provides a carrot, while the latter (the likelihood of losing market share to firms that are more successful) furnishes a stick. Collusion by suppliers would affect both factors: by curbing buyer power, it would raise the expected profits of innovation, but, by reducing rivalry among the firms, it would diminish the pressure to innovate. And that could be a significant problem. The suppliers' ultimate goal, after all, is to maximize their own profits, not serve consumers, and they may decide they are more likely to maximize their profits if they spend less money trying to take sales from each other through innovation.

Accordingly, suppliers should not be allowed to collude to offset a customer's countervailing power unless they can show not only that this power had an adverse effect on their innovation in the past, but also that, in the future and despite their collusion, the suppliers would still face substantial pressure to innovate. In other words, suppliers must show that, even though they are colluding, competition from other sources would still supply a spur to innovate. How would they do that? One way

272. In the e-books case, for example, the publishers could have met this test if they had been able to show that Amazon had demanded concessions that caused them to issue fewer new titles, limit the diversity of those titles, abandon certain types of books, or slow the development of improved e-readers.

273. See generally Jonathan B. Baker, *Beyond Schumpeter v. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575, 587 (2007); see also Baker, *supra* note 103, at 561–62.

would be to prove that the powerful customer competes downstream with other firms that purchase inputs from different suppliers. Suppose that suppliers A, B, and C face powerful customer K, and that K's exercise of countervailing power, by limiting the profits of A, B, and C, has reduced their rate of innovation. Suppose also that K competes in the downstream market with firms X, Y, and Z, who buy inputs from different suppliers and who have an established track record of innovation. In this setting, A, B, and C would still face substantial pressure to innovate, despite their collusion, because, if they did not, they and their powerful customer K could lose business to X, Y, and Z. In this circumstance, A, B, and C might be able to justify their collusion. They would have to show that the increase in profits they realized by colluding, coupled with the continuing downstream pressure they felt to innovate, outweighed the loss in rivalry among them. They might make this showing by proving that, in the past, their rate of innovation had been highly sensitive to the profits they earned. By colluding, in other words, they restored the profits that enabled them to innovate in the past, but, by colluding, they did not eliminate the spur to innovate that other firms supplied.

The required showings are highly demanding and could not be met except in unusual cases, if at all. But that is appropriate. When a customer has countervailing power, its suppliers already have market power and their ability to enlarge this power through collusion should not be tolerated except in extraordinary cases. At the same time, however, if the necessary circumstances are present and can be demonstrated—past adverse effect on innovation, substantial remaining pressure to innovate, innovation highly sensitive to profitability—collusion to counteract countervailing power would be desirable. It would promote innovation and benefit consumers.

C. *No Downstream Market Power*

The final element of the defense is the absence of downstream market power. Suppliers should not be allowed to collude in response to a customer's power, no matter how large, if their collusion would enable them to exercise downstream market power. For in that case, they would acquire the ability and the incentive to exploit consumers.

The reason to allow suppliers to collude in the face of a powerful buyer is that such collusion can correct a market failure—the existence of anticompetitive buyer power—and improve both competition and consumer welfare. To be sure, the collusion is itself an interference with the market, but if the colluders' incentives are aligned with those of consumers, the outcome is likely to benefit consumers (as well as suppliers) and promote downstream competition. But if the collusion creates a

third market failure—downstream market power that did not already exist—there is no longer any alignment of consumers’ and suppliers’ interests. To the contrary, the colluders would increase their profits by exercising that downstream market power and harming consumers.²⁷⁴

Supplier collusion could create downstream market power that did not already exist in three principal ways.²⁷⁵ First, the colluding suppliers could raise prices beyond what is necessary to counteract the anticompetitive effects of the buyer’s power, raising the buyer’s input costs and causing it to increase its downstream prices. Second, supplier collusion could reduce competition downstream between the powerful customer and its rivals. In the e-books case, for instance, the publishers imposed the agency model on Amazon and other e-book retailers and then raised retail prices. This created downstream market power because it eliminated price competition between Amazon, the aggressive discounter, and other retailers, by removing Amazon’s ability to set retail prices. The publishers then exercised the resulting market power by using the agency model—a form of resale price maintenance—to elevate retail prices.

Third, supplier collusion could create downstream market power in an unrelated market. Suppose that the suppliers sell their product in two markets: in the first, they face a powerful customer; in the second, they sell to customers that lack any significant power as buyers or sellers. In the first, their collusion may create no downstream market power. In the second, however, the suppliers may exert downstream power and raise

274. To see the transformative effect of downstream market power, imagine again that instead of an input market consisting of a group of suppliers facing a powerful buyer, there is a single, vertically integrated firm that produces the inputs and uses them to manufacture a final product. As pointed out previously, if that firm had no downstream market power, it would maximize its profits by producing at the point where its marginal cost equals the downstream market price—the competitive outcome. *See supra* note 135. But if the firm had downstream market power, it would maximize its profits by producing at a lower output and charging a higher price. Thus, if supplier collusion creates downstream market power, that power changes the joint profit-maximizing outcome and makes the ideal result for the suppliers and their customer—the result that would give them the most profits to divide up—a supracompetitive price downstream.

275. Downstream market power may already exist when the suppliers begin to collude. If so, the powerful customer would ordinarily be exercising that power, and collusion by the suppliers would enable them to share in the profits. But it would not usually make consumers worse off, so long as the customer was already exercising all the available downstream market power. The third element of the defense, therefore, is designed to exclude cases in which supplier collusion would create new downstream market power—power that is not already being exercised.

Even in cases of pre-existing downstream market power, consumers could be worse off if the bargaining between the colluding suppliers and the customer misfires—if it not only fails to increase output but actually results in reduced output. In that event, consumer prices would rise. But as explained above, bilateral bargaining between colluding suppliers and a powerful customer is likely to produce an increase in output, even if it does not achieve the joint profit maximizing outcome, so long as no new downstream market power is created.

prices to consumers. This assumes, of course, that the second market is a relevant antitrust market, a market in which significant downstream power could be exercised.²⁷⁶

In all three scenarios, the creation of downstream market power allows colluding suppliers to enhance their profits by raising downstream prices. The suppliers benefit, of course, but allowing them to benefit at the expense of consumers would not further the fundamental objectives of antitrust law. As explained earlier,²⁷⁷ the paramount goal of antitrust in a buy-side case is to protect *powerless* suppliers from the exercise of unjustified *monopsony* power. This goal does not apply at all to suppliers with market power facing a buyer with countervailing power. As a result, in that setting, the overarching objective of antitrust law is to benefit consumers, not suppliers. Moreover, when powerless suppliers do face a buyer with monopsony power, protecting the suppliers from exploitation would have value, but there is no evidence that Congress wanted to allow such suppliers to raise their prices and profits *above* the competitive level. Raising them up to the competitive level would offset the monopsony power and, through a bargain between the suppliers and the buyer that increased output, would ordinarily benefit consumers. Raising them beyond that level would more than offset the monopsony power and would normally cause output to fall and downstream prices to rise. In short, when supplier collusion creates downstream market power, allowing it would frustrate, not further, the objectives of antitrust law.

To be sure, in the third scenario above, in which small suppliers offset monopsony power in one market but exercise downstream market power in another, there is a tradeoff between legitimate supplier benefit in one market and consumer harm in another. But that tradeoff ought to be resolved in favor of the consumers in the second market. Protecting consumers from exploitation at the hands of price fixing sellers is the most basic objective of all antitrust law.²⁷⁸ The Supreme Court has held, moreover, that benefits in one market (the first) cannot justify anticompetitive harm in another (the second).²⁷⁹ In short, suppliers that collude to offset buyer power should not be entitled to a defense if their collu-

276. That must also be true in the first and second scenarios. Supplier collusion cannot create downstream market power unless it is possible and profitable to exercise such power.

277. See *supra* part III.C.

278. See Kirkwood, *supra* note 98, at 2426.

279. See *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 370–71 (1963) (holding that a merger that would create anticompetitive effects in one market cannot be justified by showing that it would produce greater procompetitive effects in another market, for a merger whose effect “may be substantially to lessen competition is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial”) (internal quotation marks omitted). While the Court’s pronouncement may not make much sense from an economic perspective, it

sion creates downstream market power.²⁸⁰

VI. CONCLUSION

Despite the intense criticism that accompanied its filing, the e-books case was almost certainly warranted. The evidence strongly suggests that Amazon was engaged in loss leading, not predatory pricing. New entry into the e-books market, moreover, has diminished the likelihood of an Amazon monopoly and curbed its buyer power. While its countervailing power as a buyer is substantial—and cause for concern—there was no evidence that it had resulted in a decline in the number, variety, or quality of e-books. Instead, the exercise of Amazon’s buying power appears to have brought lower prices to consumers. In contrast, the publishers and Apple, by conspiring to impose the agency model on Amazon and force up its prices, injured consumers directly and substantially.

In the e-books case, in short, the Justice Department was right. But that does not mean, as the existing *per se* rule implies, that collusion to control a powerful customer is never warranted. When buyer power is acquired and maintained legally—but harms consumers, powerless suppliers, or both—there may be no other remedy. This article has attempted to outline a limited but workable defense for such collusion. Because the defense is so demanding, it would rarely be satisfied. But when it is, it would allow suppliers to offset the harmful effects of buyer power and enhance competition and the welfare of consumers.

does support the normative judgment that benefits to suppliers should not ordinarily outweigh exploitation of consumers.

280. The defense could be further restricted by requiring suppliers to provide advance notice to the federal antitrust agencies before engaging in collusion to offset customer power. Advance notice is mandated for substantial mergers. *See* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 395 (7th ed. 2012) (“Parties to transactions that meet the statutory tests and are not otherwise exempted by the H-S-R Act or its regulations must each file a notification and report form and observe a waiting period prior to consummating the transaction.”) (citing 15 U.S.C. § 18a(a)). Advance notice is also required for export cartels. *See id.* at 1198 (“In order to obtain the antitrust immunity provided by the Webb-Pomerene Act, associations must register with the FTC and file annual reports.”) (citing 15 U.S.C. § 65; 16 C.F.R. § 1.42). Advance notice is probably unnecessary, however, in the case of supplier collusion to offset buyer power. The powerful buyer is likely to detect the collusion instantly when suppliers uniformly demand better terms, enabling the buyer to alert the government and both to consider legal action.