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The Distribution of Pay Television in the United States: Let an Unshackled Marketplace Decide

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Introduction

It was no pedestrian antitrust suit. Aiming at what Senator John McCain has called an "injustice . . . inflicted on the American people,"[1] the class action complaint alleged that powerful television programmers were forcing large and unwieldy bundles of TV channels on distributors and ultimately the consumer, with overpayments that likely amount to tens of billions of dollars each year.[2] The complaint alleged classic indicia of anticompetitive injury, including the massive overcharges, the suppression of competition among distributors, the loss of consumer choice, and (indirectly) the dead weight or output loss when consumers chose not to subscribe. The potential import of this case dwarfed even major cartel cases in which damages, even over a period of years, seldom reach the billion-dollar mark.

Consumer distaste for the elephantine and expensive channel offerings has long been focused on the distributor. It was only two decades ago that pay television distribution was dominated by underperforming, locally licensed cable TV monopolists. Today, although accounts of distributor abuse continue,[3] there is opportunity for genuine competition among distributors. The high prices and lack of consumer choice are occasioned, in large part, not by the distributors, but by powerful television programmers who force the bundles.

The consumer class action complaint in *Brantley v. NBC Universal*[4] was dismissed before the merits could be addressed at trial or even on a summary judgment motion. On the surface, the Ninth Circuit panel

1. Joe Flint, *McCain Targets Cable Channel Bundling*, L.A. TIMES, May 10, 2013, at B1.

2. The estimate is explained in Part I.E. *infra*.

3. A major concern remains the vertical integration of many distributors into programming and Internet services. *See* SUSAN CRAWFORD, CAPTIVE AUDIENCE: THE TELECOM INDUSTRY IN THE NEW GUILDED AGE (2013) (describing the monopoly risks arising from control of Internet pipeline by large, vertically integrated firms). *See also* Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013) (an unsuccessful consumer class action in which Philadelphia-area plaintiffs alleged that Comcast, with 69% of the local market, had exercised its power to prevent rival distributors from building competing networks); GAO, Report to the Acting Chairwoman of the Federal Communications Commission, Video Marketplace 10 (2013) (describing hesitancy of AT&T and Verizon to expand their fiber optic networks).

4. 675 F. 3d 1192 (9th Cir. 2012).

decision was just another failed Sherman Act class action suit. The plaintiffs were persistent, unsuccessfully appealing the dismissal, filing two successive petitions for rehearing en banc and, when these failed, filing an abortive petition for certiorari to the Supreme Court. Yet, these efforts were to no avail. When the Supreme Court denied certiorari in November 2012,[5] the case, initiated five years earlier, was over. The pattern is a familiar one: when the Supreme Court has granted review, it has ruled favorably for defendants in a long string of antitrust cases brought by private plaintiffs.[6]

Brantley has special significance because of the importance of the issues it raised in the distribution of pay television programming in the United States. Using largely public record materials, I begin here with an overview of the industry and its competitive performance, with special focus on the forced bundling by programmers. I then turn to the *Brantley* story, examining the complaint, the Ninth Circuit's holding, and criticism of that holding. Finally, I examine commentary supportive of *Brantley*. That examination invites some broader reflection on the relevancy of the now century-plus Sherman Act experiment. From this antitrust perspective, the Ninth Circuit's holding represents a meticulously cabined categorization that ignores the fundamental goals of the Sherman Act: to maintain competition and ensure that it disciplines a product's development, production, and distribution (including bundling and pricing decisions), thereby maximizing the allocation of goods and services and preventing exploitative wealth transfers. I conclude that a truer application of the Sherman Act offers the best solution for unlocking competition and resolving the until-now intractable competitive issues in television distribution.

I. The Distribution of Pay Television in the United States

A. The History of Forced Bundling Restraints

From its nascent years in the mid-twentieth century, the cable television industry has offered cable channels in bundles, requiring con-

5. 133 S. Ct. 573 (2012).

6. The exception was *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010). The most recent Supreme Court rulings against private plaintiffs came in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), a 5–3 decision enforcing a contractual waiver of class action rights as a bar to Sherman Act class action notwithstanding individual costs of arbitration that would exceed any possible recovery, and *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013), a 5–4 decision holding that the Sherman Act class action plaintiffs had failed to outline a method for determining damages for Philadelphia-area customers subject to Comcast's alleged unlawful monopolistic practices.

sumers to purchase large numbers of channels in order to receive the few that they actually watch.[7] Television viewers of the past who chafed under the high cost of buying the entire bundled package, known as expanded basic cable, faced two obstacles to effective antitrust relief. The first hindrance was that cable distributors of an earlier era were government-licensed monopolists. Indeed, as recently as 1992, locally-licensed cable television providers controlled 95% of the pay television market.[8] Fostering competition in the face of government-sanctioned local monopolies was a potentially intractable problem for an antitrust court. Second, given the limited technology available in earlier years, defendants could offer a potentially powerful defense: forced tiered bundles were arguably an efficient method of distribution. Today, neither obstacle prevents effective antitrust relief.

The government-licensed cable distributor is no longer a monopolist. One in three consumers can choose among four or more distributors: a licensed cable company, a local telephone company that distributes programming with fiber optic cables, and two national satellite providers; most of the remaining consumers have three distributors to choose from.[9] The share of pay television subscribers held by traditional cable distributors fell steadily over the past two decades, dropping to 57% in 2012.[10]

The second obstacle to antitrust relief, the technological limits on providing customized viewing to individual viewers, is also largely gone. More sophisticated technology makes it efficient to offer smaller and individually tailored packages to consumers. As detailed below, distributors have openly declared their readiness to provide such packages. The *Brantley* complaint alleged that some television distributors outside the United States already provide television programming à la carte or in smaller packages.[11]

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7. The history of cable television was surveyed in *Cablevision Sys. Corp. v. Federal Communications Comm'n*, 597 F.3d 1306 (D.C. Cir. 2010).

8. *See id.* at 1308-09.

9. GAO, Video Marketplace, *supra* note 3, at 9; FCC, Fourteenth Report: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 27 FCC Rcd. 8610, 8627 (2012). The two largest cable TV providers are Comcast (with an estimated 22.8 million subscribers in 2010) and Time Warner Cable (estimated 12.4 subscribers in 2010). The satellite providers are Direct TV (estimated 19.2 million in 2010) and Dish (estimated 14.1 million in 2010). *Id.* at 8668–69.

10. GAO, Video Marketplace, *supra* note 3, at 9.

11. Third Amended Complaint, ¶ 45, Brantley v. NBC Universal, Inc., 675 F.3d 1192 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 573 (2012) (No. CV 07-06101 CAS).

Despite an infrastructure conducive to competition, today's distributors cannot compete meaningfully with one another because powerful programmers prevent it, employing a series of parallel contracts with all distributors. Today, seven powerful programmers account for about 95% of all television viewing hours in the United States.[12] The *Brantley* complaint alleged that five of these firms—NBC Universal (now owned by Comcast Cable Communications, LLC, another named defendant), Viacom Inc., The Walt Disney Company, Fox Entertainment Group, Inc., and Time Warner Inc.—owned one or more "must have" channels that allowed the firm to dictate bundling and tiering restrictions to distributors.[13] Each of these powerful programmers, leveraging the demand for its most popular channels, effectively forced carriage of all of its channels in bundles specified by the programmer. The problem is exacerbated by the substantial vertical integration of distributors and programmers. According to the FCC's 2012 report, 127 national networks were owned by the five largest pay television distributors, including seventy-eight owned by Comcast, the largest distributor.[14]

The market power possessed by a programmer depends primarily on the popularity of the one or more channels that it distributes. If a distributor does not carry a channel that its subscribers wish to watch, it risks losing market share to rival distributors that do provide the channel. This leverage is openly acknowledged and lamented by distributors who are subject to it.[15] One indication of the strength of the programmer's leverage is the ability to demand and receive higher payments for a popular channel even when the market share for that channel is declining.[16] Faced with a loss in market share, a seller in

12. FCC, FOURTEENTH REPORT, *supra* note 9, at 8765–66.

13. Third Amended Complaint, *supra* note 11, ¶ 2. The complaint further alleged that, of the roughly sixty channels available in the basic and expanded basic tiers in the Los Angeles area, thirteen are entirely or partly owned by NBC Universal, nine by Viacom, seven by Fox, eleven by Disney, and sixteen by Turner and Liberty Media combined. *Id.* ¶ 42.

14. FCC, FOURTEENTH REPORT, *supra* note 9, at 8629. Time Warner Cable has, within the past two years, purchased exclusive rights to telecast the Los Angeles Lakers basketball games and the Los Angeles Dodgers baseball games. The contract to televise Dodger games reportedly provides for payment of $7 billion or $8 billion dollars over the 25-year life of the contract. *See* Joe Flint & Bill Shaikin, *Dodgers' TV Deal Could Be Game Changer*, L.A. TIMES, Jan. 23, 2013, at A1.

15. See notes 37, 84–88 *infra* and accompanying text.

16. In its Sherman Act suit against Viacom, Cablevision alleges that Viacom has demanded increased payments for its four most popular channels even as the market share for those channels has declined. Amended Complaint, ¶¶ 42, 44, 46, 48, Cablevision Systems Corp. v. Viacom Int'l, Inc., Civil Action No. 13 CIV 1278 (LTS) (JLC) (S.D.N.Y. July 16, 2013).

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a more competitive market would have an incentive to lower, not raise, its prices.

Even a small programmer may enjoy substantial leverage over distributors if it offers a popular channel that distributors must carry in order to compete for subscribers. That monopoly leverage is by itself not an antitrust issue. One would expect the programmer to demand a premium price for the channel, a price that distributors would willingly pay as long as it could be passed on to consumers without a substantial loss in subscriptions. The problem becomes more complex, however, if distributors are offering channels in very large bundles such as an expanded basic tier that includes sixty or more channels. Now the programmer with its popular channel has an incentive not just to demand a high price, but also to demand a tiering restriction: that its channel be included in the expanded basic tier. In isolation, the programmer's demand is relatively unproblematic. The industry-wide picture, however, is that every programmer now makes similar demands, the tier grows increasingly large, and consumers end up with the unwieldy and expensive bundle that characterizes contemporary pay television distribution.

Especially troublesome conduct is that of the large programmers, who insist not only that their popular channels, but also a larger number of relatively unknown channels, be included in the expanded basic tier. In the pending *Cablevision* suit, the complaint alleges that Viacom requires its distributors to include not only its four most popular channels, but also up to a dozen other relatively unknown channels, some or all of which the distributor would not choose to purchase or include in the expanded basic tier.[17] When Viacom's behavior is multiplied by the restrictions of other programmers with must have channels, the market is powerfully distorted.

While increased competition among distributors may be a welcome development, that increased competition has given even greater leverage to the powerful programmer. Prior to 1992, if a programmer with a high demand channel wanted access to viewers in any geographic area, it had to deal with a local monopolist—the licensed cable TV provider. The outcomes of negotiations between an upstream and downstream monopolist (bilateral monopoly), although not as favorable for consumers as competition, are likely to be less injurious to welfare than when only one of the parties enjoys monopoly power.[18]

17. *Id.* ¶ 1.
18. F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE, 519–21 (3d ed. 1990).

In effect, the two monopolists need each other and are likely to negotiate terms that are less extreme than in a one-sided monopoly. After 1992, as satellite providers and phone companies began making inroads on the local cable company's market share, the bilateral monopoly no longer existed. A powerful programmer was in the driver's seat now and able to whipsaw a recalcitrant distributor by threatening to refuse to supply a high demand channel.[19] The threat is compelling because the distributor risks losing substantial market share to rivals. More competition among distributors has had the perverse effect of increasing the leverage of upstream programmers, contributing to the high prices and unwieldy bundles that shape today's market.

B. A Pricing Model Skewed to Capture Consumer Surplus

Economics and marketing literature distinguishes between pure bundling and mixed bundling. Pure bundling occurs when the component products are not sold individually. Mixed bundling occurs when a seller offers the bundled products separately as well as in bundled form. If the prices charged for individual items are unreasonably high, what may appear superficially as mixed bundling can operate as pure bundling.

The forced bundling of television channels allows programmers of popular channels to capture consumer surplus—the difference between the actual price charged and the price that would be charged under competitive conditions. Instead of a metering based primarily on use, the forced bundling allows charges based in part on the intensity of consumer loyalty to the programming. Employing a device known as inter-product price discrimination,[20] programmers group together a bundle of channels knowing that, given diverse preferences, there will likely be at least one channel in the bundle to which a consumer will have an intense loyalty and a corresponding willingness to pay a high price.[21]

19. The whipsawing technique was in evidence in August of 2013, when CBS forced cable distributor Time Warner Cable to pay $2 per month per subscriber to carry the CBS broadcast channel. The cable distributor lacked substantial leverage in this dispute because, without the CBS channel, irate customers of the distributor could have switched to another distributor. Joe Flint, *CBS scores from Time Warner deal*, L.A. TIMES, Sept. 4, 2013, at B1 ("CBS hit its target of more than $2 per subscriber per month over the life of the deal").

20. The first explanation of this form of price discrimination is attributed to George J. Stigler, United States v. Loew's, Inc., *A Note on Block-Booking*, 1963 SUP. CT. REV. 152. For a refinement of this theory and a summary of the literature, see Einer Elhauge, *Tying, Bundled Discounts and the Death of the Single Monopoly Profit Theory*, 123 Harv. L. Rev. 397, 405–07 (2009).

21. The use of bundling to effect inter-product price discrimination in the sale of pay-TV is explained in FCC, FURTHER REPORT ON THE PACKAGING AND SALE OF VIDEO PROGRAMMING SERVICES TO THE PUBLIC, at 31–32 (2006).

Programmers contend that they offer channels on an à la carte basis while offering substantial discounts to distributors willing to purchase a full bundle of the programmer's channels (mixed bundling).[22] Distributors counter that the à la carte prices are prohibitively expensive. Cablevision, in its 2013 complaint against Viacom, alleged that the programmer was charging more for less—the penalty for a package that included only Viacom's four popular networks exceeded Cablevision's entire annual budget for programming hundreds of channels—leaving Cablevision no choice but to purchase the much larger but less costly bundle that included the four popular networks and ten or more low demand channels.[23]

The consumer surplus captured through the forced bundles is likely to vary substantially among customers. According to a December 2012 analysis, the average household paid approximately $90 a month for cable programming, of which nearly half is allotted to sports channels regularly watched by only 15–20% of consumers.[24] The same source estimated that average consumer bills will rise to $125 per month over the next three years, the bulk of this increase flowing from higher fees that cable distributors must pay for sports programming.[25]

The impact of inter-product price discrimination is exacerbated by the information asymmetries associated with purchasing unwieldy bundles of channels. Faced with a purchase decision involving 100 or more channels and changing content and prices over time, many consumers, in a practice known as "anchor pricing,"[26] may simply use the available TV distributors' prices as a measure of value. In

22. Joe Flint, *Viacom is sued over TV 'bundles'*, L.A. TIMES, Feb. 27, 2013, at B1.

23. Amended Complaint, *Cablevision*, *supra* note 16, ¶¶ 8, 126 *et seq*. The complaint also alleged "on information and belief" that the penalty amount exceeded the advertising revenues that Viacom received for Cablevision's carriage of the low demand channels. *Id.* ¶ 8.

24. Joe Flint & Meg James, *Sports Cost, Even If You Don't Watch*, L.A. TIMES, Dec. 2, 2012, at A1. A Cox Cable representative estimated that in the Southern California market, more than half of subscriber fees flow from sports programming that only 15 to 20% of viewers regularly watch. *Id.* (quoting Cox Cable executive Bob Wilson). A July 2013 study of Los Angeles-area consumers showed that 59% of respondents would subscribe to "basic sports" programming and 29% would subscribe to "premium sports" programming. PwC, *Consumer Intelligence Series*, *Video Content Consumption*, *available at* http://www.pwc.com.

25. *Id.* (citing information from a market survey by a market research firm (NPD Group)).

26. *See* Max Huffman, *Marrying Neo-Chicago With Behavioral Antitrust*, 78 ANTITRUST L.J. 105, 129–30 (2012) (describing some of the literature addressing the price framing effects known as anchor pricing).

fact, because all distributors are subject to virtually the same forced bundling practices, there is little variation in distributor prices.[27]

Consider the distinctions between pricing in book publishing and pricing in pay television. Popular books can be sold at a higher price than less wanted titles, but the differential in pricing is typically narrow. A publisher makes money on popular books primarily by selling more of them. For the most popular books, such as a "Harry Potter" novel, dealers may cut their margins, offering the books at a discount in order to bring more customers into the store. This stands in contrast to television bundling practices where channels with high viewer loyalty are bundled with less popular channels, forcing viewers with a wide variety of interests to subscribe to many channels they have little or no interest in watching. Even a viewer with no interest in sports programming may still be willing to pay the high price of a bundle, which contains other programming that the viewer does wish to watch.

Television programmers have a dual source of revenue for their offerings. They make money by selling advertising—and this revenue source is closely linked to the number of viewers—but also by charging distributors a per-subscriber fee for channels. According to the FCC, 42% of 2010 net revenues came from advertising and 55% came from subscription fees, with subscriber fees rising more rapidly than advertising revenue.[28]

The variation in charges for channels can be substantial. New launch channels of independent programmers often must pay distributors to have their channels carried.[29] Fees for other channels range from $0.01–5.00 per month.[30] A viewer who has no interest in sports will pay the cost of the sports programming that is never viewed. Even sports fans overpay. A viewer who may prefer particular sports, or professional teams over college teams, or vice versa, still has to pay for sports programming seldom or never watched. The basic implica-

27. Another device described in the literature, drip pricing, may also play a role in the inflated prices consumers pay. *See id*. Some distributors advertise a monthly price that includes a bundle of channels, hoping to sway a consumer decision before adding additional charges for HD service, the use of a digital recorder, or for hookups to more than one television set.

28. FCC, FOURTEENTH REPORT, *supra* note 9, at 8772 (Table 27).

29. *See id*.

30. *Id*. There were approximately 100 million pay-TV subscribers in the U.S. as of 2010. *Id*. at 8662 n.60. ESPN currently charges $5 per month for its network and is reported to earn 15% of all cable network revenues. *Id*. at 8779. If each of the 100 million subscribers pays $0.01 per month to receive a network, that produces an annual revenue stream of $12 million each year. At $5 per month, ESPN would generate $6 billion in annual revenue if all 100 million subscribers paid for its network.

tions for consumer price and choice are obvious: a consumer has only one meaningful alternative—she can "cut the cord" by declining to buy any pay television programming. An increasing number of consumers have chosen this option,[31] and buyer revolt is likely to increase. A DirecTV executive, noting the steady increases in the costs of sports programming, concluded that the large, forced bundle was not "a model consumers can continue to support."[32]

Following the model for book publishing, a competitively superior pricing mechanism for television would reward the programmer with higher advertising and subscriber fees based on the number of viewers.[33] The intensity of the viewers' attachment to the program should not be exploited through a price-discrimination scheme that decreases output and captures consumer surplus. Although the *Brantley* litigation had not reached a stage that forced the parties to address the appropriate remedy, the best approach would be to free distributors of the bundling and tiering restrictions imposed by programmers, allowing distribution decisions to be made at the distribution level by those likely to be most responsive to consumer demand. Any distributor's attempt to impose an unwieldy bundle or an oppressive price would be punished by a shift of consumer purchases to a more responsive distributor.[34]

Programmers could still charge higher prices for popular programming, but could no longer impose bundling restrictions to engage in inter-product price discrimination or to raise the costs of rival programmers. Programmers might still be permitted to offer mixed bun-

31. *Id*. at 8670 (citing a source reporting that 13% of consumers who have broadband cut the cord in a single year). Writing in August of 2013, one industry analyst concluded: "Over the past twelve months, an estimated 898K households have cut the cord. In the twelve months ending a year ago, only 455K households cut the cord. The pace is accelerating." Craig Moffett, *U.S. Pay-TV: The Pace of Cord Cutting Quickens*, MOFFETT RESEARCH LLC (Aug. 6, 2013).

Another measure of the extent of cord cutting (or the reluctance of potential customers to purchase pay-TV) is the percentage of occupied households that have pay-TV. One source reports that this percentage dropped from 87.3% in the first quarter of 2010 to 84.7% by the last quarter of 2012. *SNL Kagan Reports U.S. Multichannel Video Subscriber Universe Eked Out A Gain in 2012*, *available at* http://www.prweb.com/releases/2013/3/prweb10549257.htm.

32. Flint & James, L.A. TIMES, *supra* note 24 (citing observations of Direct TV Executive Vice President Dan York).

33. Relief in an antitrust suit should focus on the pricing and bundling mechanisms employed by programmers. While potential abuses by distributors cannot be ruled out, once freed of programmer restraints, competition among distributors could discipline offerings in a manner that minimizes the need for regulation.

34. An FCC report discussed some of the customized bundling options that could appeal to consumers. FCC, FURTHER REPORT, *supra* note 21, at 37–44. The 2013 study of Los Angeles-area consumers found 73% of respondents preferred to customize their packages. *Video Contents Consumption*, *supra* note 24.

dling (selling channels both à la carte and in bundles), provided that the discount for bundled offerings corresponded to efficiencies generated by bundled selling. Rather than invite extensive litigation over cost efficiencies, a judicial decree might simply limit the size of programmer bundles and prohibit discounts above a set limit. For example, a programmer would set an à la carte price for each channel, subject to its right to bundle channels together as long as the discount for the bundle did not exceed a specified percentage (e.g., 10%) of the sum of the individual prices for the included channels. Competition at the distributor level would still allow consumer demand to discipline the à la carte prices set by the programmer. Under such a mechanism, the programmer is likely to be rewarded primarily based on the number of viewers of the channel, not on the intensity of a consumer's loyalty to that channel. Programmers would still have a strong incentive to provide popular programming while viewers would have more choice, more low cost options, and substantial consumer surplus savings.

It might be argued that at least some consumers, perhaps a substantial percentage, prefer large bundles and the lower per channel cost that flows from these bundles. If so, the market would respond. Large bundles would still be offered by at least some distributors who would cater to this consumer preference. The final nature, size, and pricing of bundles would be determined primarily by consumer demand.

C. Impact on Distributors and Independent Programmers

Distributors forced to bundle are denied an effective competitive tool: the ability to offer customized or à la carte packaging that could attract new viewers or retain current viewers disgruntled by the high-priced and unwieldy bundles. The inability to compete on terms most desired by consumers is a barrier to entry and market penetration for distributors.[35] Distributors can theoretically compete on price but, as a practical matter, the forced bundles leave the distributor little control over either the size of the bundle or the price charged for it. Although distributors can expand into programming and add channels to the bundled package,[36] they cannot meaningfully reduce the

35. An AT&T representative, referring to the then fledgling U-verse distributor, took note of the restraints facing a new distributor: "We will be happy to offer à la carte programming as long as we are able to obtain access to the programming in that manner." Comments of Robert Quinn, Senior Vice President of AT&T, *quoted in* Third Amended Complaint, *supra* note 11, ¶ 44.

36. FCC, FOURTEENTH REPORT, *supra* note 9, at 8651. Time Warner Cable, for example, has agreed to pay the Los Angeles Lakers over $3 billion to carry the team's games exclusively. L.A. TIMES, *supra* note 24.

size of the package offered to consumers without excluding popular channels that subscribers want to watch. Representatives of distributors frequently complain about the system,[37] but until recently seemed unwilling to challenge the programmers directly. The reluctance may stem from vertical integration—many distributors are also program providers—and the ongoing business relationships between distributors and programmers. In February 2013, an independent and non-vertically integrated distributor, Cablevision, filed suit in the Southern District of New York alleging that Viacom had violated federal and state antitrust law by forcing Cablevision to accept ten or more lesser-valued Viacom channels in order to obtain Viacom's four most popular channels.[38] Two of the four largest distributors (DirecTV and Time Warner Cable) have announced their support for the suit.[39] The more aggressive anti-bundling stance of distributors probably was sparked by rapidly increasing cable bills and the increasing number of customers that decline to purchase the increasingly unwieldy and expensive bundles.

The relative uniformity of packages and prices across distributors is facilitated by use of most-favored-nation clauses.[40] A distributor agrees to carry channels on price and bundling terms subject to the programmer's commitment that it will grant the distributor any more-favorable terms offered to a rival distributor. Programmers will vigorously resist offering any distributor more favorable terms, lest they be forced to offer the same concessions to all other distributors. Most-favored-nation clauses have generated litigation.[41] Their use may facilitate the setting of identical prices and bundling terms, undermining consumer choice and the possibility of smaller and less expensive bundles.

Independent programmers also are injured by the current system. Powerful programmers of must-have channels can fill the available

37. Complaints of small and rural distributors are described in FCC, FOURTEENTH REPORT, *supra* note 9, at 8761–62. *See also* the discussion of the *Brantley* Complaint, at Part II.A. *infra*.

38. Joe Flint, *Viacom is Sued, supra* note 22.

39. *Id*. (quoting a Direct TV statement: "There is no question that the current all-or-nothing system dictated by programmers is completely broken . . . . [F]or programmers to force this system on all pay-TV customers, just so they can line their pockets with extra profits, is shameful"). The largest and most vertically integrated distributor, Comcast, has not voiced support for the lawsuit.

40. GAO, Video Marketplace, *supra* note 3, at 19. For a description of the potential impact of most-favored-nation clauses, *see* C. Scott Hemphill & Tim Wu, *Parallel Exclusion*, 122 YALE L. J. 1182, 1208–09 (2013).

41. Dish Network has sued ESPN claiming $152 million in damages based on the alleged failure to provide Dish with the same favorable terms offered to rival distributors. *See* Richard Vanderford, *Dish Tells Jury ESPN Favored Rivals in Licensing Deal*, LAW 360, Feb. 11, 2013, available at www.law360.com/articles/414285/dish-tells-jury-espn-favored-rivals-in-licensing-deal.

distribution capacity with low demand channels that distributors would not wish to carry and consumers do not wish to watch. Hemphill and Wu have pointed out that this sort of parallel exclusionary conduct can be easier to implement and more harmful than parallel high prices.[42] The heightened harm from this exclusionary conduct flows from stifling new and innovative programming from anyone other than the powerful programmers. The authors concluded that the drag on innovation in industries subject to rapid technological change is the "supreme evil" that antitrust should address.[43]

Although foreclosure of rival programmers was not the focus in *Brantley*, there is ample indication that this foreclosure is occurring. The owners of Wealth TV, for example, have publicly complained about these difficulties.[44] Goolsbee, in his 2007 study contracted by the FCC, found evidence that cable distributors are more likely to carry their own channels rather than those of rival programmers except in areas where there is adequate competition from satellite systems.[45] Another FCC report explained that additional mainstream programming may not be carried by distributors because they prefer niche programming thought more likely to attract subscribers for the large bundles.[46] The *Cablevision* complaint alleged the names of a number of upstream programmers that may have faced disproportionate distribution barriers because of the large number of low demand channels included in Viacom's forced bundle.[47]

D. The U.S. and Canadian Systems Compared

Distribution of television programming in Canada differs markedly from the United States. Vertical integration of Canadian programmers

42. Hemphill & Wu, *supra* note 40, at 1210–20, 1235 ("A scheme of parallel exclusion may be more harmful than one of parallel pricing, yet easier to maintain.")

43. *Id*. at 1212.

44. FCC, FOURTEENTH REPORT, *supra* note 9, at 8635. *See also* the complaints of the Chief Operating Officer of Ovation TV, whose arts and entertainment channel had been dropped by distributor Time Warner Cable. David Lazarus, *Give TV Subscribers More Choices*, L.A. TIMES, May 7, 2013, at B1.

45. *See* AUSTAN GOOLSBEE, VERTICAL INTEGRATION AND MARKET FOR BROADCAST AND CABLE TELEVISION PROGRAMMING (Apr. 2007) (study commissioned by the FCC). Goolsbee's study also found a lack of evidence for efficiencies in vertical integration between program providers and distributors, a finding consistent with anticompetitive gains from vertical integration.

46. FCC, FURTHER REPORT, *supra* note 21, at 32. At least one independent programmer has expressed support for the Cablevision antitrust suit against Viacom. Joe Flint, L.A. TIMES, *supra* note 22 (quoting Chad Gutstein, chief operating officer of the arts channel Ovation: "The U.S. TV market is not a free market and we support Cablevision's effort to draw attention to the anticompetitive practices that keep independent networks like Ovation from competing on a level playing field.").

47. Amended Complaint, *Cablevision*, *supra* note 16, ¶¶ 158–63.

and distributors is very high—according to one report, 81.4% compared to 23.1% in the United States.[48] Canada's high percentage of vertical integration, however, may be mitigated by relatively low concentration levels. As of 2012, Bell Media, the largest of Canadian media firms, controlled 28.6% of that nation's TV viewing market.[49]

Canadian distributors have for some time offered channels on a more customized basis that allows consumers more choices. A 2006 FCC report described Canadian distributors that require the purchase of an inexpensive basic bundle, then allow customers to add channels in small customized bundles.[50] The Canadian Radio-television and Telecommunications Commission (CRTC) has taken steps to ensure that all pay-TV viewers can purchase smaller, customized packages of channels.[51] The smaller bundles would come at a higher per-channel fee, but that fee can be more than offset by purchasing a smaller bundle. An example of this model is a satellite distributor in Canada, Shaw Direct, which now offers basic packages linked to choices for additional specialty bundles and over fifty channels available on an à la carte basis.[52]

E. Anticompetitive Effects of Forced Bundling Reassessed

Estimates of the cost of the forced bundling have varied widely. In 2006, an FCC report dissected an industry-funded private study and,

48. Daniel Tencer, *Concentration of Media Ownership In Canada Worst in G8 For TV Industry, Study Says*, HUFFINGTON POST CANADA, (August 13, 2012), *available at* http://www.huffingtonpost.ca/2012/08/13/concentration-media-ownership-canada_n_1773117.html.

49. *Id.*

50. FCC, FURTHER REPORT, *supra* note 21, ¶¶ 99–100, at 42-43.

51. Michael Lewis, *CRTC rulings promise more channel choice for consumers*, TORONTO STAR (July 20, 2012), *available at* http://www.thestar.com/business/2012/07/20/crtc_rulings_promise_more_channel_choice_for_consumers.html. *See also* CRTC, *CRTC takes action to ensure a wide choice of television programming on all platforms* (Sept. 21, 2011), *available at* http://www.crtc.gc.ca/eng/com100/2011/r110921.html (calling on Bell Canada, Quebecor Media, Rogers Communications and Shaw Communications to "give Canadians more flexibility in choosing the individual services they want" and requiring the firms to report on compliance by April 1, 2012).

52. As of May 29, 2013, Shaw Direct was offering a small package with "up to" fifty-five standard definition and seventeen HD channels for $33.89 per month (amounts in Canadian dollars). Shaw also offered five levels of choice packages (ranging from $63.62 to $97.96 per month). Each included a basic package of 120 or more standard and HD channels supplemented by consumer choice among thirteen specialty bundles (each with five to ten channels covering areas such as sports, movies, or news). For example, the $63.62 per month plan allowed consumers to choose, at no extra cost, any three of the thirteen bundles. A mid-priced plan ($82.81 per month) allowed the consumer to choose any nine of the thirteen bundles. A viewer that had no interest in high-cost sports programming would be free to pick specialty packages that did not include sports channels. <http://www.shawdirect.ca/english/default.asp>. As of Jan. 2, 2014, Shaw still offered similar choices among the thirteen specialty bundles, albeit at prices that were $3 to $4 higher than seven months earlier. *Id.*

based on some adjusted analysis, concluded that à la carte offerings could produce results ranging from 4% higher prices to 13% lower prices (with a decrease in three out of four cases).[53] In 2013, a stock analyst estimated that à la carte sales of pay television would result in a $70 billion annual revenue loss to television programmers.[54] Any estimate that the saving would be minimal or even negative cannot reflect current market conditions, where almost half of the consumer's bill covers sports television that many customers do not watch. Since 2006, the explosion in regional and national sports networks has been the major determinant of subscription fees that have been rising at twice the nation's annual inflation rate.[55] If almost half of the annual fees go to pay for sports television, and many viewers don't wish to watch sports programming, there is an obvious loss to consumers that, cautiously, one can estimate as in excess of $10 billion a year (that figure represents less than 10% of annual subscription fees paid by U.S. consumers).

The stock analyst's estimated $70 billion annual loss of revenue for TV programmers is too high. The estimate is apparently based on the assumption that all bundling, even smaller more customized bundles that would be attractive to consumers, would be prohibited. That result is unlikely. A system of mixed bundling in which à la carte prices are linked to a program's popularity should be permitted by any antitrust decree. In addition, freely competing distributors would continue to offer bundles that would attract and retain subscribers. In particular, the marketing literature suggests that small bundles of channels carrying related programming would survive in a more competitive environment.[56] Programmers would certainly lose revenue if competition prevailed, but they could increase per channel distribution fees to offset some of this loss. A programmer's most popular channels would continue to command high subscription fees; less popular channels might not survive, but such channels generate lower advertising revenues and any lost revenue would be at least partially offset by savings

53. FCC, FURTHER REPORT, *supra* note 21, at 7–14.

54. Ryan Faughnder, *High Cost of Offering Pay-TV à la carte*, L.A. TIMES, at B3 (July 16, 2013) (quoting Laura Martin, a stock analyst with Needham & Co.). *See also* Gregory S. Crawford & Ali Yurukoglu, *The Welfare Effects of Bundling in Multichannel Television Markets*, 102 AM. ECON. REV. 643 (2012) (concluding that à la carte would be welfare decreasing based on the assumption that viewers view each hour of television viewing equally).

55. GAO, Video Marketplace, *supra* note 3, at 16 (finding a 33.5% increase in prices for expanded basic cable TV during the years 2005 to 2011, compared to a 15.5% increase in the consumer price index).

56. *See* notes 72–73 and accompanying text *infra*.

from no longer producing the channel. The stock analyst's estimate also apparently does not factor in the likely increase in advertising revenues that would flow from more attractive packaging of television programming. More subscribers would increase television viewing and the advertising revenues that flow to programmers.

A more meaningful measure of the overcharges from forced bundling would be to compare pay-TV prices in the United States and Canada. The Canadian benchmark can provide a rough approximation of how much consumers would save under a system that gives consumers more choice. The Canadian example is the best available national comparison for the U.S. system. Much of the English language programming available in Canada is the same or similar to that available in the United States. Regulators in both countries require carriage of certain channels, but neither nation directly regulates pay-TV prices. Similar cultural values, income levels, and broadcasting technology are likely to lead to similar standard and HD programming choices. Local news and sports programming will be different, but that is true regionally within a country as well as across borders. With roughly ten times the population base, United States distributors may have a large base of programming to choose from, but even modern technology limits a distributor's ability to increase the number of channels. There are also limits to how much television an individual can watch. The average U.S. viewer chooses among roughly seventeen channels,[57] and there is no reason to believe this number differs substantially in Canada.

With over 100 million U.S. pay-TV subscribers doling out an average of $1080 per year, U.S. pay-TV viewers are paying $108 billion each year for subscription television. In Canada, the average consumer pays only $720 (Canadian) per year.[58] These numbers are approximations and subject to rapid change, as subscription rates rapidly rise in both countries. Still, they provide a rough guide to the magnitude of overpayments occasioned by forced bundling. Working from these figures, the average U.S. consumer is paying $360 per year more than her Canadian counterpart.

Exchange rates over the past five years tend to value the Canadian dollar one or two percentage points higher, so one can cautiously de-

57. Lazurus, *supra* note 44. Martin and Medina estimate that the average household chooses among twelve to fourteen channels over a month. Laura Martin & Dan Medina, Needham Insights, *The Future of TV: The Invisible Hand* 14 (June 22, 2012).

58. Shaikin & Flint, *supra* note 14 (reporting average $90 U.S. bill); Jamie Sturgeon, *Prodded by Regulators, Bell Unbundles its TV Networks*, FINANCIAL POST (July 20, 2012), *available at* http://business.financialpost.com/2012/07/20/canadian-tv-viewers-to-have-more-choice-but-at-a-cost/ (reporting an average $60 Canadian bill).

duct a further 5% from this amount, leaving a total overcharge of $342 per year per U.S. viewer. When this amount is multiplied by the 100 million subscribers, the total annual overcharge would be $34.2 billion.[59]

It is possible that U.S. viewers are more likely than their Canadian counterparts to pay extra for premium channels, skewing the comparison of monthly rates. Assuming that this is the case (I found no documentation to support or refute it), the differential between U.S. and Canadian rates can cautiously be reduced by a further 20%, lowering it from $34.2 billion to $27.4 billion. The range of estimated overpayments would then fall somewhere within these high and low figures.

It could be argued that the lower payments in Canada are insufficient to maintain the level of innovative programming generated in the United States and expected by U.S. viewers. Although the most popular U.S.-generated programming is typically available in both countries, it is possible that U.S. viewers are subsidizing this programming that is then made available at lower cost to Canadian consumers. Canadian pay-TV subscribers, however, apparently still pay enough to support a great deal of programming targeted to Canadian audiences. The argument that innovation would be stifled by allowing consumers more choice runs squarely into the reality that the parallel exclusionary conduct is a drag on independent programming. By excluding or raising barriers for independent programming, the exclusionary conduct is likely to limit the introduction of both high quality and low cost alternative programming.[60] The high returns of forced bundling favor only the established programmers and may be squandered on x-inefficiencies (wasteful conduct associated with monopoly power). The level of investment in programming and the selection of which channels are to be distributed should be based on a competitively disciplined pay television market in which consumers, not powerful programmers, make the choices.

There are several reasons why the Canadian benchmark may understate the loss for U.S. consumers. Canadian regulation itself is a political compromise. While Canadian consumers have more bundling choices than their U.S. counterparts, the Canadian system offers neither pure à la carte pricing nor mixed bundling (that would provide

59. The ESPN network alone adds approximately $5 to the average subscriber bill, yet, as noted above, only 15–20% of consumers watch sports programming regularly. If 50 million subscribers (half the total pay-TV subscribers in the U.S.) made the decision to drop ESPN coverage, the annual savings would be $3 billion ($5 per month × 12 months × 50 million subscribers).

60. Hemphill & Woo, *supra* note 40, at 1210–11 (noting that innovation of both high quality and low cost substitutes could be harmed by parallel exclusionary conduct).

consumers a meaningful à la carte option). U.S. consumers may have more choices for distribution (as many as four or five distributors) than their Canadian counterparts, a circumstance that should allow competitive forces greater play in the U.S. It is quite possible that removal of the forced bundles would save U.S. consumers even greater amounts. In addition, the range of $27 to $34 billion annual overcharge does not include the deadweight loss for U.S. consumers who do not subscribe because of the high costs. Connor and Lande have examined the literature on wealth transfer and deadweight losses based on a survey of cartel cases and found that the estimates of deadweight loss range from $3 to $20 for every $100 in overcharges.[61] Transferring these estimates to the $34.2 billion estimated annual overcharge for pay television, the deadweight loss is likely to be in the range of $1 billion to $6.8 billion. Based on these numbers, the total welfare losses from forced bundling are likely to be $28 billion to $41 billion annually. This figure still does not include the loss suffered by consumers from inability to receive programs from independent broadcasters such as Wealth TV or Ovation that, in the absence of the forced bundling, might be more widely carried by distributors. It is difficult to calculate the value of this lost programming.

When powerful programmers dictate programming, the result can be overinvestment in the wrong type of programming or in other x-inefficiencies. Programmers themselves are subject to the leverage exercised by sports teams, which have a cadre of loyal fans. These fans are a small percentage of total television viewers, but many are likely to make purchasing decisions solely on the basis of whether a distributor offers television coverage. In bidding against one another to obtain exclusive televising rights, programmers may themselves be exploited to overpay. Consider two examples: one involving TV coverage of the Olympics and a second involving exclusive television rights for Los Angeles professional sports teams.

The Canadian Broadcasting Corporation (CBC), owned and controlled by the Canadian government, has, on occasion, been the sole bidder for carriage of the Olympic games in Canada. This contrasts with the United States, where competing networks typically bid against one another to obtain televising rights for the Olympic Games. One

61. John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 460–61 (2012). The deadweight loss from overpriced TV bundles may be substantial. The FCC cited one source that calculated that 13% of all broadband Internet users had cut the cord in a single year. FCC, FOURTEENTH REPORT, *supra* note 9, at 8670.

analysis concluded that for the 2000 Olympic games in Sidney Australia, NBC and its affiliated networks showed 441 hours of coverage, compared to the 1309 hours showed by the CBC. U.S. citizens living near the Canadian border often preferred the CBC's coverage not only because it was more comprehensive, but also because events were shown live rather than on a delayed basis.[62] Yet, for rights to televise the 2000 Olympics, NBC paid $705 million to the International Olympic Committee, while the CBC paid only $32 million. On a per capita basis, the cost was $2.47 per person in the United States but only $1.07 per person in Canada.[63] U.S. consumers did not pay this premium directly, but did so indirectly through higher TV subscriber fees, reduced coverage, coverage of fewer live events, and the heavy dose of television commercials for events carried on NBC's non-pay channel.[64]

For the 2012 Olympics, Canadians watched telecasts provided by CTV Olympics, a consortium organized by Bell Media and Rogers Media. This time, the consortium reportedly outbid the CBC for broadcasting rights,[65] but the U.S./Canada differential in cost per resident remained. The consortium reportedly paid $63 million for the broadcasting rights,[66] an average of $1.80 per Canadian. NBC, the U.S. broadcaster, paid $1.18 billion for its rights, or an average of $3.73 per U.S. resident. This time, both the Canadian and U.S. broadcasters claimed to have provided more than 5500 hours of total coverage. The Canadian broadcasters lost money while NBC claimed to have broken even.[67] One explanation for these results is that U.S. consumers pay higher television subscription fees than their Canadian counterparts.[68]

62. Queenie Ng, *United States and Canadian Olympic Coverage: A Tale of Two Monopolists*, 8 SW J. L. & TRADE AM. 251, 261–63 (2002).

63. *Id.* at 255 (concluding that the per capita cost of U.S. Olympic coverage of the 2000 Sydney games was 2.3 times as much as Canadian coverage).

64. The CBC was a monopsonist in purchasing Olympic coverage from the IOC monopolist. The CBC's monopsony leverage created a bilateral monopoly and may have benefitted Canadian consumers in obtaining more coverage for less.

65. *See* Canadiansportmedia, *IOC Rejects CBC/Bell Olympic Bid*, A ROGUE POINT (Jan. 17, 2012), *available at* http://canadiansportsfan.wordpress.com/2012.01/07/ioc-rejects-cbcbell-olympic-bid/.

66. Bob Mackin, *CBC regains Olympics Broadcast Rights*, TORONTO SUN (Aug. 1, 2012), *available at* http://torontosun.com/2012/08/01/cbc-regains-olympics-broadcast-rights.

67. *Id.* (Reporting that the Canadian Consortium lost more than $20 million); *Comcast: NBC Universal Broke Even on London Olympics, Expects Profits From Future Games*, HOLLYWOOD RPTR., *available at* http://www.hollywoodreporter.com/news/comcast-nbcuniversal-london-summer-olympics-breakeven-383380 (quoting Comcast CFO: "the London Olympics were breakeven when you take into account other Olympics-related revenues that are booked over multiple quarters"). NBC uses the summer Olympics to promote its fall television programming.

68. *See supra* note 58.

This comparison of U.S./Canada Olympic coverage highlights the leverage that sports organizations (such as sports leagues, teams, or the IOC) possess in negotiating television rights. This leverage would be a factor regardless of distribution practices, but the forced bundlings exacerbate the leverage, allowing the sports organizations (and the programmers who obtain exclusive rights) to extract consumer surplus from the viewing public.

A second example draws on the Los Angeles television market. In a bidding war, Time Warner Cable won the exclusive right to broadcast baseball games of the Los Angeles Dodgers for the next twenty-five years and will reportedly pay the Dodgers $7 billion to $8 billion.[69] In a separate deal, the same distributor won the exclusive rights to broadcast Los Angeles Lakers basketball games for a reported $3 billion. According to one source, these two transactions alone are likely to add $8 a month to Southern Californians' pay-TV bills, regardless of whether they watch any of the contests.[70]

Future allocation distortions from such transactions cannot be accurately predicted, but it seems likely that overpayments to sports franchises distort the market for the sports television, with ripple effects on the remainder of television programming. While the athletes and team owners may benefit, these overpayments will substantially raise cable TV bills and may price many viewers out of the market. If distributors were allowed to offer these sports channels as à la carte offerings,[71] overall viewing of these games would not necessarily decrease. Fans of these teams would still have an incentive to make the à la carte purchase, even at a higher per channel cost, perhaps lowering their overall cable bill by not purchasing channels they seldom or never watch. Programmers, however, could no longer spread the cost of televising a particular team's games among millions of subscribers who have no interest in watching the games. The direct involvement of consumers in choosing which channels they wished to purchase would produce much needed competitive discipline, making it less likely that pro-

69. Shaikin & Flint, *supra* note 14.

70. Lazarus, *supra* note 44. In a consumer class action suit, the two Time Warner Cable contracts have been challenged as a violation of California's Unfair Competition statute. *See* Fischer v. Time Warner Cable, Inc., No. BC512259 (Cal. Sup. Ct., Los Angeles).

71. A Dish network senior vice president, speaking to the desirablity of à la carte offerings of the L.A. Lakers games, lamented that Time Warner Cable refuses to make this option available ("I would do that deal in a heartbeat."). Flint & James, *supra* note 24.

grammers would pay non-competitive rates for exclusive sports coverage.

F. Why Programmers Continue to Require Bundling

Aside from obvious revenue gains, programmers may continue to bundle because they are familiar with longstanding bundling practices and fear the uncertainty of a more competitively disciplined world. Much of the additional revenue that programmers receive may be spent on sports programming or in-house programming ventures that a more competitively disciplined system would not support. The economics and marketing literature suggests, however, that the loss of revenue from abandoning forced bundling may be at least partially offset by increased output from a system more responsive to consumer demand. One analysis showed that pure bundling is likely to be more profitable than individual component sales when there is complementarity among the bundled products, but not when the bundled items are regarded as substitutes.[72] Another analysis showed that mixed bundling revenues, although less than pure bundling revenues, will decrease less when bundles consist of items that are relatively consistent in their appeal.[73] Under this analysis, the loss from a mixed bundling strategy would likely be lessened if programmers or distributors offered smaller bundles that had relatively consistent appeal in the channels offered. For example, a smaller bundle made up of only sports offerings would probably do better than one that included both cooking shows and sports offerings.

Time Warner Cable CEO Glenn Britt has argued that programmers should shut down less popular networks, lower costs, and offer consumers lower prices. "The companies involved would make just as much money as they do now because of the costs."[74] Indeed, if smaller, more customized bundles were the norm, cable distributors could sell more television as more viewers subscribed at reduced prices; consumer choice would be a controlling discipline on prices and availability of programs. Advertising revenues that flowed to pro-

72. Peter T.L. Popkowski Leszczyc & Gerald Häubl, *To Bundle or Not to Bundle: Determinants of the Profitability of Multi-Item Auctions*, 74 J. OF MARKETING 110, 120 (July 2010). If pure bundling is the most profitable strategy for programmers, that result is consistent with a finding that the additional revenues generated are associated with anticompetitive injury, including deadweight and consumer welfare loss.

73. Anita Elberse, *Bye-Bye Bundles, The Unbundling of Music in Digital Channels*, 74 J. OF MARKETING 107, 121 (May 2010).

74. Bloomberg News, *Time Warner CEO: There are too many Networks*, CRAIN'S NEW YORK BUSINESS (May 23, 2012), *available at* http://www.crainsnewyork.com/article/20120523/MEDIA_ENTERTAINMENT/120529942>.

ducers would likely increase as more viewers watched the programs, offsetting at least some of the loss that producers suffered because the producers could no longer charge discriminatory high prices for the bundled packages.

Representatives of programmers, however, continue to oppose any change in the current system, which has the momentum of decades behind it.[75] A Fox Entertainment Executive recently told stockholders that he has no fear that consumers will revolt against high prices and unwieldy bundles of channels: "People will give up food and a roof over their head before they give up TV," he said.[76] The executive's confident prediction may or may not prove accurate, but there is no doubt that powerful programmers will resist change. Each programmer has an independent incentive to require distributors to bundle all of the programmer's channels, including low demand channels. This makes sense to the programmer because even low demand channels can generate significant subscription and advertising revenues. Pay-TV programmers obtain over 40% of their revenues from advertising.[77] In the short term, the status quo maintains or enhances revenues for leverage-wielding programmers. The inability to price based on the viewer's intensity of loyalty would end much of the price discrimination that currently brings supracompetitive profits to these programmers and supports in-house programming operations.

In the longer term, continued programmer insistence on bundling is a non-sustaining business model leading to collective suicide. The short-term greed of programmers may simply accelerate cord-cutting and a shift away from pay-TV. There is, however, an interdependence to the programmer's opposition to change. If all programmers simultaneously dropped forced bundling and tiering restrictions, distributors could package programming more attractively and draw additional subscribers. The programmer's lost revenue could be at least partially offset by more subscribers paying for popular programming and increased viewing of pay-TV, producing higher advertising revenues.

75. *See* Hemphill & Wu, *supra* note 40, at 1226–30 (describing the recidivism tendencies among firms accustomed to parallel conspiracy conduct). Programmers contend that they do not compel distributors to purchase bundles, but merely offer discounts when the distributor chooses to purchase a full selection of channels offered by the programmer. *Flint*, *supra* note 21. Programmers also contend that the large bundles lower transaction and production costs. FCC, FOURTEENTH REPORT, *supra* note 9, at 8762–63.

76. Meg James, *Fox's Chase Carey calls à la carte programming 'a fantasy'*, L.A. TIMES, Aug. 8, 2013, *available at* http://articles.latimes.com/2013/aug/08/entertainment/la-et-ct-foxs-chase-carey-calls-ala-carte-a-fantasy-20130808.

77. *See supra* note 28 and accompanying text.

A programmer acting alone to abandon bundling and tiering restrictions would obtain few of these offsetting benefits because large bundles would remain the norm. Viewers would still be unable to get small, customized packages that could substantially increase the number of subscribers. Without these offsetting benefits, each programmer has a reinforced incentive to continue bundling practices.

G. Efficiency Defenses for Programmer-Forced Bundles

Various efficiencies have been suggested as justifications for the programmers' large bundles. Hovenkamp has argued that "per channel cost savings may explain why a cable company bundles large numbers of channels into a single package."[78] Once the significant cost of cable installation is paid, "adding additional channels costs very little more than the licensing fee."[79] Hovenkamp's arguments seem more directed to distributor imposed bundling than to the forced programmer imposed bundling that is the basis of the anticompetitive concern. It is correct that distributors would have to raise per-channel subscriber fees if only a few channels were purchased. Distributors, however, are not content with the large unwieldy bundles that powerful programmers force upon them. Many distributors now want to be released from the forced bundling, as evidenced by the *Cablevision* suit and public statements reacting to it. The cost assumptions underlying Hovenkamp's argument are also questionable. With the heavy demands of high-definition (HD) digital placed on the system, and the competing need for bandwidth required to provide Internet access, Cablevision claims that Viacom's forced bundles compel the distributor either to expand capacity at considerable cost or curtail other programming that they would prefer to offer.[80] Licensing fees, which Hovenkamp mentions in passing, are very substantial and increasing rapidly; Cablevision claims that its program licensing fees amount to over a billion dollars a year.[81] Thus, while there is truth to the point that a larger bundle can be provided more efficiently than individual channel sales, programmer forced bundling is neither required nor justified by this efficiency. To the extent a distributor wishes to capture this efficiency, it would still be free to offer appropriate bundles once programmer enforced bundling ceased.

78. Herbert Hovenkamp, *Antitrust and Nonexcluding Ties* 2–3 (Oct. 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2143869.
79. *Id.*
80. Amended Complaint, *Cablevision, supra* note 16, ¶¶ 33, 139.
81. *Id.* ¶ 34.

Dennis Carlton and Michael Waldman have suggested that the efficiency most likely to apply to programmer enforced bundles is that related to search and sorting costs.[82] The argument is that because television channels vary in quality and degrees of preference, by bundling them together, programmers and distributors can save the cost of sorting them into appropriate value categories while consumers save search costs of determining which channels to buy. There are fundamental difficulties with this suggestion. The first is that program providers that market their channels to distributors are already placing a value on individual channels. This is necessarily the case for small independent programmers who have only one or two channels to offer. For larger programmers offering a forced bundle, the hard-nosed and intensive negotiations between programmers and distributors involve careful discussions of the value of each channel. Programmers monitor who watches a program and how much advertising revenue it generates. Viewership ratings are often in the public domain, and published sources even discuss the cost of individual channels.[83] Whatever the cost of sorting by value, many distributors openly seek the opportunity to sell individual channels or smaller, customized packages. As far as consumer searching costs, while some consumers may prefer a blanket purchase of a large bundle of channels, increasing numbers of cost conscious consumers have demonstrated their displeasure with the large forced bundles by shaving or cutting the cord.

The more fundamental flaw in both Hovenkamp's and Carlton and Waldman's efficiency speculations is that they fly in the face of the most basic tenet of the economics and law governing our free market system. The competition paradigm is to let the marketplace determine the size and pricing of bundles. Once the forced bundling restraints are lifted, distributors will be free to experiment with various bundled or unbundled offers. Consumers who do not wish to bear search costs would still have bundling choices. Distributors who saw substantial efficiencies in bundling as opposed to à la carte sales would be free to experiment with bundled offerings to see whether consumers were receptive.

Although not mentioned by Hovenkamp or Carlton and Waldman, from the programmer's point of view, there are credible claims of limited

82. Dennis W. Carlton & Michael Waldman, Brantley Versus NBC Universal: *Where's the Beef?*, 8 COMPETITION POL'Y INT'L 1, 8–9 (2012) (citing Roy W. Kenney & Benjamin Klein, *The Economics of Block Booking*, 26 J. LAW & ECON. 49, 497–540 (1983). Crane offered a list of the possible efficiency benefits of tying, but does not suggest that any one of them could explain the forced bundles of channels. Daniel Crane, *Tying and Consumer Harm*, 8 COMPETITION POL'Y INT'L 27, 33 (2012).

83. FCC, FOURTEENTH REPORT, *supra* note 9, at 8771–72.

efficiencies arising out of the joint production and marketing of a closely related group of channels. The ESPN family of channels, for example, may do planning and production through common employees that work interchangeably for the related channels. The efficiencies linked to production and marketing, however, would diminish substantially when a large group of relatively unrelated channels is bundled together. Such efficiencies could not explain why, as alleged in the *Cablevision* complaint, a powerful television programmer would price a small bundle of popular channels at a price that vastly exceeds the cost of a larger bundle that includes the popular channels—allegedly by an amount that exceeds the distributor's entire annual programming budget.[84]

II. The *Brantley* Litigation

A. The Complaint

In 2007, a class of consumers brought a Sherman Act action alleging that powerful television programmers employ contract provisions that force distributors, and through them consumers, to purchase the entire slate of expanded basic cable offerings. The nature of the restraint was described in paragraph 4 of the Third Amended Complaint, "Competition among distributors for consumer business *has been significantly suppressed and eliminated* because . . . [distributors'] creativity in offering smaller packages or channels on an unbundled basis has been circumscribed by the contract between each distributor and each programmer, which prohibits such offerings."[85]

The complaint alleged no horizontal conspiracy, but did allege interdependent conduct among the defendant programmers in imposing parallel vertical bundling restraints on television distributors: Each programmer acted "with the knowledge and anticipation that each other major programmer will do likewise."[86] If distributors were free to design distribution packages in a manner that maximized consumer subscriptions, the benefit from this increased output would flow to

84. Amended Complaint, *Cablevision*, *supra* note 16, ¶ 8. Viacom could argue that it is paying distributors to carry their low demand channels, an efficient result because it allows Viacom to make some advertising revenues on these channels. The complaint, however, alleged on information and belief that the penalty amount exceeds any advertising revenue that Viacom received from carriage of these channels. *Id.* Morever, the forced inclusion of these channels is at the expense of channels of independent programmers potentially more attractive to consumers (and that would generate larger ad revenues for the independent programmer). Distributors would not choose to carry Viacom's low demand channels but for the high penalty they would have to pay (and pass on to consumers) to exclude them.

85. Third Amended Complaint, *supra* note 11, ¶ 4.

86. *Id.* ¶ 43.

competition-savvy distributors. The complaint quoted the Chairman and CEO of defendant EchoStar (Dish Network), "Unfortunately, the largest programmers, particularly those that own a big network, have the muscle to control the way that pay television providers offer programming to consumers . . . . [B]undling of must-have and other content in a single deal is a well-established problem in the industry . . . . [R]estrictions on how . . . [distributors] present their packages curtail the ability of [distributors] to design alternative programming packages."[87]

The complaint also quoted a spokesman for the Broadband Service Providers Association, which largely represents telephone companies that distribute television programming through fiber optic lines: "Wholesale programming practices that include tying and bundling of content and the required placement on particular tiers constrain the way [distributors] can package their services to subscribers and their ability to respond to consumer demand in their competitive [distribution] markets."[88] There were several pages of similar quotes in the complaint.[89]

From the outset of the litigation, the parties disagreed whether a Sherman Act Section 1 complaint alleging industry-wide vertical restraints required an allegation of foreclosure in the *upstream* market for television programmers. The district court agreed with defendants that the case was for a tying violation that required upstream foreclosure. Plaintiffs amended the complaint to include such an allegation, then dropped this amendment, entering into a stipulation that anticipated the filing of motions that would allow definitive resolution of the foreclosure issue.[90]

In its final form, the Third Amended Complaint omitted any claim of foreclosure of upstream programming rivals, but strongly and repeatedly alleged injury to distributors flowing from the vertically-imposed contractual restraints.[91]

87. *Id.* ¶ 44.

88. *Id.*

89. *Id.* ¶¶ 4, 44. Petitioners crafted the complaint as a rule of reason claim, abjuring any reliance on the modified per se rule that governs tying conduct. *See* Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984). Although the forced vertical bundling restraints at issue had similarities to certain types of tying conduct, a critical distinction was that the industry-wide and interdependent nature of the restraints generated cartel-comparable injury not present in routine tying cases.

90. Lead counsel for the plaintiffs explained that establishing foreclosure of upstream programmers would require substantial time and expense and lacked relevance in a consumer class action seeking relief focused on consumer choice and overcharge. *Brantley v. Universal*, Petition for Certiorari, Appendix at 68.

91. Third Amended Complaint, *supra* note 11, ¶ 3 (absent the vertical restraints, distributors "would develop ways to differentiate themselves," by offering smaller bundles or à la carte channels; *Id.* ¶ 4 ("competition among distributors . . . has

B. The Legal Pedigree for the Brantley Complaint

Unlike *Brantley*, most of the Supreme Court's tying cases have involved requirements ties. By setting a high price on the complementary tied product used in conjunction with the tying product, this device can be used to discriminate against intensive users of the tying product (sometimes referred to as intra-product price discrimination).[92] The forced bundles at issue in *Brantley* involved no complementary products and no requirements tying. The Court's most prominent bundling case involving this sort of full-line forcing is *United States v. Loew's, Inc.*,[93] where the Court found that powerful movie distributors had violated Section 1 of the Sherman Act by compelling television stations to purchase for screening bundles of low-demand movies in order to obtain high demand movies. The Court did not mention inter-product price discrimination, instead resting its conclusion on the foreclosure effect of the bundles on programmers who competed for television airtime with the movie distributors.[94] Assessing the decision afterwards, economist George Stigler offered an alternative explanation. The bundling was harmful, Stigler wrote, because of the inter-product price discrimination associated with the use of such bundles, effectively forcing the purchaser to pay more based on the diverse but intense loyalty that each purchaser had for one or more of the movies in the bundle.[95] Stigler's theory has since been refined and developed in the economics literature.[96] The theory also gained currency in Supreme Court opinions, including a dissenting opinion of Justice White in *Fortner Enters., Inc. v. United States Steel Corp.*[97] and the majority opinion of Justice Stevens in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*. Citing Stigler, Justice Stevens wrote that

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been significantly suppressed and eliminated because their creativity in offering smaller packages or channels on an unbundled basis has been circumscribed" by the restraints); *Id.* ¶ 43 (the restraints have "eliminated competition among and between the distributors"); *Id.* ¶ 44 ("but for programmer coercion . . . [distributors] would offer such unbundled cable channels to consumers").

92. Elhauge, *supra* note 20, at 427–29 (describing the price discrimination associated with requirements ties). Examples of Supreme Court cases involving requirements ties include *Illinois Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006); *Int'l Salt Co. v. United States*, 332 U.S. 392 (1947); *Int'l Bus. Machs. Corp. v. United States*, 298 U.S. 131 (1936); and *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917).

93. 371 U.S. 38 (1962).

94. *See id.* at 48–49.

95. Stigler, *supra* note 20, at 153.

96. Elhauge has reviewed the relevant literature and extended the analysis. Elhauge, *supra* note 20, at 405–06.

97. 394 U.S. 495, 513–14 (White, J., dissenting) ("Tying arrangements may be used . . . as a counting device to effect price discrimination [requirements ties]; and they may be

tying "can increase the social costs of market power by facilitating price discrimination, thereby increasing monopoly profits over what they would be absent the tie."[98]

The price discrimination effects of tying have thus been targeted by the Court both for requirements ties (intra-product price discrimination) and for full-line forcing ties (inter-product price discrimination). In both cases, these wealth transfer effects are likely to be a primary (if not the predominant) injury to competition. But, both ties are likely also to have exclusionary effects. In *Brantley*, the plaintiffs alleged these exclusionary effects on the downstream competition among distributors. The defendants, however, argued that the price discrimination effects were not cognizable under antitrust law and that (based primarily on *Loew's*) only foreclosure of an upstream competitor was sufficient to state a case for tying.[99] That argument found traction in the district court and on appeal.

The plaintiffs, in addition to relying on price discrimination and downstream foreclosure injury, also rested their case on the industry-wide and interdependent nature of defendants' conduct. The plaintiffs stressed the majority opinion in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc*., where the Court took special note of the anticompetitive risks when a vertical restraint was industry-wide in scope.[100] The *Brantley* complaint stressed that injuries to competition arising from this case were comparable to those of a cartel: higher prices, foreclosure injury to downstream competition, and loss of consumer choice. The plaintiffs relied on the Court's venerable teaching that a rule of reason case is not based on "formalistic line drawing" but on "demonstrable economic effect."[101]

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used to force a full line of products on the customer so as to extract more easily from him a monopoly return on one unique product in the line").

98. 466 U.S. 2, 14–15 (1984). *See also id*. at 13 n.19, at 35 (O'Connor, J. concurring) ("purpose of tying law" is "to identify and control those tie-ins that have demonstrable exclusionary impact in the tied product market, or that abet the harmful exercise of market power that the seller possesses in the tying product market").

99. *Loew's* focused on upstream foreclosure because there was little direct impact of the restraints on downstream consumers. While consumers might have reduced television choices as the result of upstream foreclosure of programmers, the *Loew's* Court was not dealing with direct pricing or forced bundling issues on downstream consumers (there were no consumer subscription fees and a viewer could freely switch channels or turn off the set if the offerings were not attractive). In contrast, the forced bundling in *Brantley* involved direct and substantial downstream anticompetitive effects on both distributors and consumers, including increased prices, decreased output, limited consumer choice, and foreclosure of downstream competition.

100. 551 U.S. 877, 897 (2009) (an industry-wide restraint "should be subject to more careful scrutiny").

101. *Id*. at 887–88 (quoting Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58–59 (1977).

C. The Ninth Circuit's Opinion

In October of 2009, the district court dismissed the complaint with prejudice, ruling that a viable Section 1 tying complaint required an allegation of foreclosure among *upstream* television programmers.[102] The Ninth Circuit affirmed.[103] The opinion recited three areas in which Sherman Act Section 1 claims are cognizable: (1) a horizontal conspiracy; (2) a vertical conspiracy involving tying conduct that forecloses rivals from participation in the tied product market; or (3) a vertical conspiracy that facilitates horizontal collusion.[104] On two occasions, the opinion acknowledged express language in the complaint alleging competitive injury to downstream distributors.[105] The panel decision then ignored its own description of the complaint, stating that the complaint did not allege "any effect . . . on Distributors' competition as to cost and quality of service"[106] and that the petitioners "disavow any intent to allege that the practices . . . *foreclosed* rivals from entering or participating in the upstream or *downstream* markets" (emphasis added).[107] The Court further stated that the plaintiffs "have not alleged how competition (rather than consumers) is injured." The panel conceded the possibility that "competition could be injured or reduced due to a widely applied practice that harms consumers" but insisted that "the complaint does not include any allegation of injury to competition, as opposed to injuries to the plaintiffs."[108]

III. Evaluating the Ninth Circuit's Opinion

A. Criticism

The Ninth Circuit's reading of the complaint was myopic if not disingenuous. The Supreme Court requires that, on a motion to dismiss, "when addressing well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."[109] Several pages of the *Brantley* com-

102. Brantley v. NBC Universal, Inc. Petition for Certiorari, *supra* note 90, App. 42–63.

103. Brantley v. NBC Universal, Inc. (*Brantley II*), 675 F. 3d 1192 (9th Cir. 2012). An earlier opinion reaching the same result was withdrawn. Brantley v. NBC Universal (*Brantley I*), 649 F.3d 1078 (9th Cir. 2012).

104. *Brantley II*, 675 F.3d at 1198–1200.

105. *Id*. at 1196 ("Plaintiffs allege that these business practices impair competition among Distributors for consumer business"); *id*. at 1201 (paraphrasing the Complaint's allegation that the bundling restraints limit "the manner in which Distributors compete with one another in that Distributors are unable to offer à la carte programming").

106. *Id*. at 1203–04.

107. *Id*. at 1201.

108. *Id*. at 1203–04.

109. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

plaint alleged in great detail, using the distributor-executives' own words, how competition among distributors was undermined. The language of the Ninth Circuit suggests a view that these were merely allegations of consumer harm unrelated to injury to competition. To reach this conclusion, Section 1 of the Sherman Act would have to be construed as defining injury to competition differently in vertical cases than in horizontal cases (the downstream injury to distributors and consumers would be cognizable in a horizontal case). That is a difficult proposition to defend.[110]

Brantley was a rule-of-reason case. It is well established that under the rule of reason, a court should not be cabined into strict categorizations but should weigh "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited."[111] "Direct evidence of anticompetitive effects should be sufficient to establish the plaintiff's prima facie case regardless of whether the restraint is categorized as horizontal or vertical."[112] The Ninth Circuit adopted a strict categorical view of the Sherman Act which apparently allows, in their words, only for "standard-issue threats to competition" such as excluding "sellers of the tied product" or facilitating "horizontal collusion."[113] In fact, the complaint alleged classic anticompetitive injuries comparable to those of a cartel—including overpayments, loss of consumer choice, and foreclosure injury at the distributor level.

The panel's failure to take the complaint at face value also generates confusion and uncertainty about the precedential effect of the ruling. If the Court's ruling was based on its mistaken view that the complaint did not allege any harm to competition at the downstream or upstream level, then, the palpable injustice notwithstanding, the decision could be read narrowly and consistently with preexisting law. If, on the other hand, the court is holding that harm to downstream competition is not cognizable under a Section 1 vertical restraints case, the holding is at once illogical and potentially broader and more pernicious in its implications.

The panel's rigid decision allowed it to avoid any meaningful and coherent economic analysis. This same rigidity was evident in the

110. The leading antitrust treatise makes the point that "horizontal and vertical restraints do not always threaten competition in different ways, or call for different analysis." 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1503a, at 392 (3d ed. 2010).

111. Leegin Creative Products, Inc. v. PSKS, Inc., 551 U.S. 877, 885 (2007) (quoting Continental TV, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

112. Mark Lemley & Christopher Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1265 (2008).

113. *Brantley II*, 675 F.3d at 1201.

court's effort to analyze the competitive implications of the unwieldy bundles of channels offered to consumers. The court stated that the alleged bundles would require consumers to purchase "low-demand channels, which they do not want."[114] The Court went on to explain that a buyer can never be forced to pay more because a valued product is tied to the sale of an unwanted product (the higher price for the tie would simply be a higher charge for the valued product).[115] The binary world reflected in the court's example does not comport with reality. Television consumers do not simply buy based on the polar opposites of high valued and unwanted channels—they make their purchasing decisions based on a whole range of value preferences and the informational vacuums associated with constantly changing content and pricing for large and unwieldy bundles.

B. Support for the Ninth Circuit's Opinion

1. ERRORS BASED ON A MISAPPREHENSION OF THE COMPLAINT

The Ninth Circuit's decision has its supporters.[116] That support may be attributed in part to the Ninth Circuit panel's mischaracterization of the complaint. Carlton and Waldman accepted the panel's statement that this case was about consumer injury with no alleged injury to competition.[117] Crane argued that *Brantley* was rightly dismissed because it involved, at most, consumer wealth injury not linked to any "anticompetitive-element."[118] These statements are apparently based on the Ninth Circuit's claims that the complaint failed to allege harm to competition as distinct from injury to consumers. As detailed above, that description of the complaint is simply wrong.[119] Even a cursory reading demonstrates that the complaint was focused on forced restric-

114. *Id.*

115. *Id.* at 1202–03 (citing Hirsch v. Martindale-Hubbell, Inc., 674 F.2d 1343, 1349 n.19 (9th Cir. 1982).

116. Carlton & Waldman, *supra* note 82; Crane, *supra* note 82; Hovenkamp, *supra* note 78.

117. Carlton & Waldman, *supra* note 82, at 7 (Harm to consumer welfare was insufficient because "[t]here was no allegation . . . concerning harm to competition.").

118. Crane, *supra* note 82, at 32. Crane also argued that the important principle of *Brantley* is that harm to consumer welfare, when there is no reduction of "the competitiveness of any market, is not cognizable under the antitrust laws." *Id.* at 27.

119. Crane also described the plaintiff's decision to drop allegations of foreclosure of upstream programmers as flowing from discovery that showed no such foreclosure. *Id.* at 28 & n.6 (citing the panel's decision, 675 F.3d at 1196). This statement is inaccurate. When the plaintiffs lead attorney explained the decision to drop an allegation of upstream foreclosure injury, he cited the lack of relevance of such foreclosure in a consumer class action, but also emphasized his conviction that such foreclosure could be demonstrated if more expensive and time consuming discovery were pursued. There are tactical difficulties in getting independent programmers to testify in court against the very programmers and distributors they must work with to distribute

tions on distributors who have repeatedly and quite publicly lamented their inability to fashion channel offerings responsive to consumer demand.

Perhaps because Carlton and Waldman accepted the Ninth Circuit's misreading of the complaint, they argued that behavior similar to the bundled offerings of pay television providers typically does not give rise to "arguments concerning an antitrust violation."[120] They offered the example of a book containing a collection of an author's short stories, none of which is separately published. Consumers might prefer to buy only their own smaller selection of the author's stories, but Carlton and Waldman concluded that "we know of no one who argues that such behavior . . . should be of serious concern to the antitrust authorities."[121]

The example is inapt. Even clear violations of the Sherman Act go unchallenged when they involve insignificant and isolated transactions.[122] To come close to the conduct challenged in *Brantley*, the example would have to be modified: consumers would be offered, on a take it or leave it basis, a monthly $90 (soon estimated to be $125) multi-volume collection of new essays, stories and materials by various authors covering a wide range of topics including sports, current events, politics, history, animal behavior, entertainment, cooking, religion, and fictional works such as mysteries and literary and romance novels. The book publishers would be forced, not by consumer demand, but by upstream entities that controlled the authors' works, to include all of these titles together in the multi-volume collection. The scheme would have to be industry-wide, facilitated by most-favored-nation clauses, so that each publisher would be forced to assemble virtually identical works together and charge nearly identical prices, leaving the consumer little choice among publishers. Moreover, this would not be a simple one-time purchase. In effect, book buyers would be compelled to join an ongoing book-of-the-month club in order to receive desired materials. Consumers could choose among

their offerings. Yet independent programmers have openly and repeatedly complained of foreclosure effects. See *supra* notes 37–39 and accompanying text.

120. Carlton & Waldman, *supra* note 82, at 3.

121. *Id.*

122. Two rival grocery store vendors who agree to fix the price of lettuce may have committed a *per se* violation of the Sherman Act, yet their conduct, as long as it is local and isolated, is unlikely to be challenged by antitrust authorities. Indeed, the law governing tying conduct contains its own threshold test to exclude relatively inconsequential conduct: unless there is substantial commerce in the tied product market, the *quasi per se* rule will not apply to the conduct. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12–18 (1984).

four or five publishers, but this would allow only slight variance in price and no meaningful reduction in the unwieldy bundle that is offered. Each buyer would be faced with the choice of buying, on a recurring monthly basis, an expensive collection of books covering a great many topics in which the buyer has little or no interest or not getting the materials the reader wished to read.

2. CLAIMS THAT FORCED BUNDLING IS CONSISTENT WITH TOTAL WELFARE

Crane's and Carlton and Waldman's articles attempted a coherent economic analysis that was absent in *Brantley*. Both approached the forced bundling with a total welfare analysis based on the perfect price discrimination model. Carlton and Walton implicitly assumed that:

(1) forced bundling could be implemented without any decrease in consumer output and even argued that the forced bundling could increase output by capturing consumer demand for "least liked channels;"[123]

(2) the total welfare model is the most salient measure of anticompetitive injury, even if that model ignores the much more substantial wealth transfer injury to consumers[124] and obvious and substantial allocative distortions in upstream or downstream markets; and

(3) consumers have a well-defined reservation price (the highest price a consumer is willing to pay) not only for a simple one-time sale of a single product, but also for a very large and complex bundle of television channels, the contents and price of which are constantly changing.

If the seller can find and set the exact reservation price for each buyer, the seller could capture all available consumer surplus without any decrease in output. The inter-product price discrimination achieved through forced bundling might, in theory, achieve or at least approach this "perfect" price discrimination. This result, however, assumes the prescience of the seller in determining each consumer's reservation price and an uncanny ability to set bundled prices at precisely the level that matches each consumer's reservation price. In a real world of complex and nuanced consumer information and preferences, attaining these goals is impossible. Indeed, insofar as the forced channel bundles are

123. *Carlton & Waldman*, *supra* note 82, at 7.

124. *Carlton & Waldman* also argued that the forced bundling could increase consumer welfare, an argument addressed in the following section.

concerned, the evidence is clear: output for pay television is decreased as more and more consumers cut the cord. The *Brantley* complaint alleged that consumers are deprived of attractive, more customized and lower cost offerings, a deprivation that would necessarily decrease total output of pay television. The FCC agrees, having concluded in its 2012 report that many customers are "cord shaving."[125] So do distributors, who have signaled their fear of customers rejecting the elephantine bundles through public statements and through their support of the *Cablevision* suit against Viacom.[126] To be sure, the loss of output may be explained as a standard consumer response in a competitive market when suppliers offer prices not in line with consumer demand. Such an argument suggests a "cellophane fallacy"—a flawed assumption that output loss signals the need for a broader market definition—that Richard Posner and others have identified and criticized.[127] The evidence that this is not a competitive market, in particular the uniform industry-wide practices and the inability of willing distributors to offer smaller customized packages of channels, is a powerful demonstration that the loss of subscribers is a deadweight loss to society.

Total welfare is, in any event, a decidedly inadequate measure of anticompetitive injury and not the law of the land. The wealth transfer (consumer welfare) loss from an abusive exercise of market power is likely to far outweigh any deadweight loss (reduction of sales flowing from the supracompetitive price).[128] In their study of the damages from cartels, Connor and Lande canvassed other surveys and conclude that the deadweight or total welfare loss from cartels ranges from 3–20% of the wealth transfer loss.[129] The Supreme Court has recognized consumer welfare as the relevant antitrust standard[130] and has

125. FCC, FOURTEENTH REPORT, *supra* note 9, at 8670–71.

126. See *supra* notes 38–39 and accompanying text.

127. RICHARD POSNER, ANTITRUST LAW 150–51 (2d ed. 2001) (pointing out that reduced output associated with a monopolist's price increase can be a manifestation not of the need for a broader market definition but that the monopolist is exceeding the limits of monopoly pricing and causing substantial deadweight loss).

128. In the neo-classical economist's model, monopoly profits (wealth transfer) are represented by a triangle that may have twice the volume of the triangle representing allocative or deadweight losses. *See* DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 135, fig. 5.2 (2d ed. 1994) (depicting monopoly profit maximization). If the wealth transfer gain for the monopolist does not exceed the deadweight loss from increased prices, it is no longer profitable for the monopolist to raise its price.

129. Connor & Lande, *supra* note 61, at 460–61.

130. NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 107 (1984); Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 367 (1982); Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979). The Justice Department and FTC's merger guidelines also recognize consumer welfare as a governing standard. U.S. Department

measured damages based in part on wealth transfer losses occasioned by an antitrust violation.[131] Indeed, while Crane suggested that the loss of consumer welfare by itself is not sufficient to state an antitrust claim,[132] he never challenged the premise that loss of consumer welfare is a relevant standard for determining injury to competition. Carlton and Waldman went to lengths to explain why consumer welfare is not necessarily harmed by the bundling of television channels,[133] implicitly acknowledging the relevance of the consumer welfare standard.

The reduction-in-output definition of welfare ostensibly offers a relatively easy test for a court to apply and a politically attractive choice for those who would minimize the role of antitrust. In many cases, the wealth transfer injury that typically goes hand in hand with the loss of output makes the choice between the two standards a moot point. Equating market output with welfare, however, disrespects the competitive paradigm. The antitrust laws protect competition, not a given seller's output in its favorite market. An allocation of goods and services as it would occur in a competitive economy across all markets is the only proper measure of efficient allocation. Here are two fundamental ways in which a narrow output definition strays from that norm: (1) increased output in a particular market may occur if the consumer is forced to make a second or third choice purchase decision that would not be forced on the consumer under more competitive conditions; and (2) increased output in a particular market, if it occurs at supracompetitive prices, will rob consumers of wealth that would have been used to make purchases in other markets (output will be decreased in those non primary markets).

Measuring allocation across the economy as a whole is consistent with the welfare standard Adam Smith described: that monopoly frustrates an allocation of resources "as nearly as possible in the proportion

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of Justice and Federal Trade Commission, Horizontal Merger Guidelines (Aug. 19, 2010) (§1 recognizes that a merger may enhance market power by making it more likely "to encourage one or more firms to raise price, diminish output, diminish innovation or otherwise harm consumers"; see also the discussion of efficiencies defenses in §10, stressing that efficiencies "must be passed through to customers").

131. Compensation to the victims of anticompetitive conduct, a measure that includes lost consumer surplus, has long been a prime goal of antitrust enforcement. Blue Shield of Virginia v. McCready, 457 U.S. 465, 472 (1982) (describing the twin goals of antitrust as deterrence and providing "ample compensation to the victims of antitrust violations").

132. Crane, *supra* note 82, at 32 ("Tying arrangements that do not diminish the competitive functioning of the market" should not be condemned because they "merely result in some possible extraction of consumer surplus").

133. Carlton & Waldman, *supra* note 82, at 7–8.

which is most agreeable to the interests of the whole society."[134] Measuring loss of output only in the relevant consumer market (the loss of consumer subscribers) ignores allocation injury in secondary or tertiary upstream or downstream markets, something Smith's definition did not do. For example, a sole producer of mattresses might raise prices until output begins to decrease at a sufficient rate to render further price increases unprofitable. The decline in output of mattresses is a loss of total welfare, but there is an even greater wealth transfer loss to those consumers who continued to buy mattresses at the monopoly price. That loss would deprive consumers of funds that they would have preferred to spend on other goods and services.

The secondary or tertiary effects of monopoly pricing are amply demonstrated in the forced bundling of large numbers of unrelated television channels. This process, in addition to driving many consumers to cut the cord, has substantial allocative effects on both upstream and downstream markets. As the *Cablevision* complaint alleges, independent upstream program providers find it more difficult to find space in the bundle and may not be able to enter or penetrate the market. There is also substantial indication of overpayment for Olympic coverage and other sporting events, a distortion occasioned in part by the supracompetitive subscription rates that consumers pay for large bundles of channels. Downstream from the programmers, new or efficient distributors who might offer higher quality signals or more attractive packages of channels may also find it difficult to enter or penetrate the market. At the consumer level, consumers suffer not only deadweight loss (by not subscribing) but also much more substantial wealth transfer losses (estimated based on the Canadian benchmark to be between $27 billion and $34 billion per year). The secondary or tertiary allocative effects of this wealth transfer loss will be reflected in lower consumer dollars flowing to other uses such as restaurants, movies, vacations, or other use of wealth transfer dollars. These distortions do not reflect the use of resources "most agreeable to the interests of the whole society" that Adam Smith envisioned. All of these secondary and tertiary distortions would be ignored or discounted if welfare were measured solely by output in the relevant consumer market.[135]

134. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, 594–95 (Mod. Lib. Ed. 1937).

135. An output definition of antitrust injury as embraced in the Crane and Carlton & Waldman critiques is also inconsistent with the Ninth Circuit's holding in *Brantley* that vertical restraints are unlawful when they result in upstream foreclosure. Such foreclosure may or may not be linked to a loss in consumer output—upstream foreclosure

Crane's critique of the complaint included an analysis of whether a consumer can ever be forced to buy something unwanted. Crane contended that consumers won't pay more than they consider the product to be worth, offering the example of a Bedouin forced at gunpoint to purchase sand. The Bedouin, Crane suggested, is not really buying the sand, but buying his life.[136] Extending the logic from the Bedouin's straightforward life or death situation to the purchase of a complex bundle of dozens of television channels, Crane concluded that the bundling distributors cannot charge more than the "buyer's reservation price . . . for things that the buyer values."[137]

Carlton and Waldman argued that bundling of television channels can actually increase total welfare because with bundles, consumers will end up purchasing not only their most preferred but also their "least liked channels," channels liked enough to purchase but not at the higher price offered when sold as unbundled channels.[138]

Assuming that total welfare were the relevant standard, the logic of the critics' analyses is compelling only in a polar world in which the buyer has no second choices or nuanced preferences. Complex consumer decisions cannot be forced into a binary digital world of "ones and zeros"—a simple yes-or-no response cannot adequately describe the spectrum of desires and priorities that guide consumer choice. The critics, however, embraced this world, assuming that each consumer has a fixed reservation price for the channels individually or for the large and complex bundle that is offered to them.

The concept of a reservation price is useful for economic modeling when there is a sale of a relatively simple product (with no optional add-ons) and when the sale is isolated in time, with no dynamic element (no recurring sales with changing content and pricing). The concept assumes that individual consumers are informed and make prices through their own informed buying choices. That premise is undermined by behavioral economics and marketing literature that suggests that consumers are informed by, and make decisions in the context of, the benchmark prices that are offered to them.[139] When multiple products are involved in the sale, the consumer's consciousness of individ-

could alter the channels provided without any necessary loss in the number of channels provided or the number of viewers who subscribe.

136. Crane *supra* note 82, at 30.

137. *Id.*

138. Carlton & Waldman, *supra* note 82, at 7.

139. Akshay R. Rao & Kent B. Monroe, *The Effect of Price, Brand Name, and Store Quality: An Integrative Review*, 26 J. OF MARKETING RES. 351 (1989). *See also* Huffman, *supra* note 26, at 127–28 (describing anchor pricing literature).

ual prices is reduced.[140] If the price of a bundled package of television channels rises gradually over time (at a rate substantially exceeding inflation), many consumers may accept higher rates as a genuine benchmark of value. Using market options to assess value can be a healthy exercise, but only if competition is preserved as the price regulator. In a well-functioning market, a combination of consumer demand and seller supply sets the competitive price and determines the viability of bundled or unbundled offerings. If competition is thwarted through power abuses, the resultant prices and the size of bundled offers will not efficiently allocate. This is precisely what the *Brantley* complaint alleged and it implicates an injury to total welfare as well as to consumer welfare.

Consider again the validity of a "reservation price" when the product is complex and involves potential add-ons. There are absolutes in the consumer world,[141] but when entering the purchasing arena for a complex product, the consumer typically brings a series of preferences mitigated by cost awareness and a willingness to buy up or down the prestige ladder based on price and quality preferences. A potential buyer may enter an auto show room with a definite idea of which model to purchase, including the preferred color and extra equipment. The dealer, however, may not have precisely that model, and the consumer may end up paying more for a vehicle that includes a sunroof and chrome wheels, neither of which the consumer would have chosen to buy had the ideal vehicle been available. In such a transaction, the dealer sells extra equipment (and gets a higher price than the consumer would have preferred to pay). A second, third, or fourth best choice for a consumer need not involve the purchase of a wholly unwanted good—merely one that under more competitive circumstances would not have been the choice. Television viewers may place some minimum value on some of the hundred plus channels that they receive in the bundle, but it would not be the consumer's choice to purchase these additional channels. The consumer is forced to buy a Cadillac or no vehicle at all when she would really prefer to buy a Chevrolet. A perfect or even second best allocation of goods and services is not

140. Stefan Stremersch & Gerard J. Tellis, *Strategic Bundling of Products and Prices: A New Synthesis for Marketing*, 66 J. of Marketing 55, 69 (Jan. 2002) ("Consumers who buy a bundle of products at a bundled price perceive far greater ambiguity on the sunk cost of their purchase than do consumers presented with separate product prices").

141. Many consumers, for example, would never purchase tobacco products for personal use.

attained by this transaction. Total welfare, as Adam Smith envisioned it,[142] is undermined.

The occasional sale of an automobile with unwanted extra equipment does not (and should not) give rise to a viable antitrust claim. There is probably sufficient competition in the retail automobile market (both interbrand and intrabrand) to discipline sellers who might attempt to sell vehicles laden with unwanted extra equipment. But, the forced bundling of television channels is a different matter. To analogize *Brantley*, all automobile manufacturers and their distributors would be offering their cars laden with the same extra equipment, even though most consumers only prefer a small fraction of this equipment. Many of the auto dealers might wish to offer consumers the choice of a more stripped down vehicle, but the upstream manufacturers would prohibit them from doing so. All consumers, as a result, are forced to buy nearly identical expensive vehicles laden with extra equipment they do not desire. A consumer can still decline to buy altogether, but this consumer decision is a loss of output or deadweight loss. Putting these facts together, the industry-wide bundling requirements cause television consumers to pay more (a wealth transfer injury), cause some consumers to decline to subscribe to pay-TV (an output reduction and injury to total welfare), deprive consumers of choice, and force television distributors to curtail their own competition (preventing them from offering smaller or customized packages responsive to consumer demand). Foreclosure of distributor competition is an injury even under the narrow definitions of actionable tying urged by Crane and Carlton and Waldman. In addition, independent upstream program providers face enhanced barriers to entry because of the bundling system controlled by powerful upstream programmers.[143]

Consider now the dynamic element involved in a recurring purchase of bundled television channels. The consumer's initial choice is already complex and surrounded with informational issues. For viewers living in an urban environment, there may be four or more distributors offering bundles of pay television channels. The distributors compete with one another on introductory offers (attempting to lock in the consumer by offering a discounted introductory price) and in offering ancillary services or products (the number of television receivers that can

142. *See* note 134, *supra* and accompanying text.

143. *Supra* notes 44–47 and accompanying text. As previously described, foreclosure of rival programmers was not alleged in *Brantley* but has been emphatically alleged in *Cablevision*. *See* Part I.C., *infra*.

be included or the availability and pricing of recording devices).[144] There is little competition, however, in terms of the nature or extent of the bundles. Since each distributor is subject to the same leverage from the large programming firms, each ends up with a very similar unwieldy bundle of channels. In the long run, after the introductory discounts have expired, the consumer pays a nearly identical price to any available distributor for the expanded basic tier of television channels. Even the most attentive and well-informed television consumer cannot avoid the leveraging power of the programmers who force their bundles on recalcitrant distributors. The complexity of the transaction and the momentum associated with staying with a package may undermine rational choice. The consumer may grudgingly accept increases in the number and cost of channels that, over time, are gradually added to the package. In the context of this complex and dynamic environment involving recurring purchases, channels added or dropped without the consumer's consent, and constantly escalating prices, the concept of a reservation price has little relevance. The consumer is a price taker, not a price maker.

Many of the informational issues facing the consumer may be viewed as consumer protection issues. For antitrust, the salient issue is the structural component to these informational problems. Freed from the forced-bundling restraints and the facilitating most-favored-nation contracts, independent distributors—those not extensively involved in programming and confronting no conflict of interest—would respond to consumer demand by offering smaller, more customized and consumer friendly packages. They cannot do so because of the leverage exercised by large programmers, and it is in this respect that antitrust has a clear role to play.

The bottom line is that the concept of reservation price may be compelling when the product offering is simple and when there is no dynamic element to the sales. The recurring bundled sale of hundreds of television channels, with the price and offerings changing over time, most decidedly does not fit these criteria. Although calculations of the total welfare of consumers are difficult to make, total welfare will not be enhanced if distributors are shackled and unable to design packages that are responsive to consumer demand.[145] Each time a consumer decides to cut the cord, that welfare is further reduced.

144. FCC, FOURTEENTH REPORT, *supra* note 9, ¶¶ 86–88, at 38–39 (describing methods of price competition among distributors).

145. I am indebted to Prof. Einer Elhauge for his insights in an as yet unpublished manuscript. Einer Elhauge, *Rehabilitating* Jefferson Parish: *Why Ties Without a*

3. CLAIMS THAT FORCED BUNDLING MAY INCREASE CONSUMER SURPLUS

Carlton and Waldman offered an example to show that bundled television sales are unlikely to harm consumer welfare, and "can even increase consumer welfare."[146] In their hypothetical, 1000 consumers are offered a bundle that includes ESPN and ten other channels. Each consumer values ESPN and is willing to pay $15 a month to receive it. Preference varies for each of the ten other channels: a distinct group of 10% likes each of the ten channels and is willing to pay up to $12 for that one channel, but only willing to pay $1 each for the remaining nine channels. Tracking the example, if ESPN and each of the remaining channels are sold as a bundle, the distributor could maximize profits by charging each of the 1000 consumers $36—$15 for ESPN, plus $12 for the second highly-preferred channel, plus $9 ($1 each) for the remaining nine channels. Carlton and Waldman concluded that this bundling increases total (social) welfare because, with individual pricing, the ten non-ESPN channels would be priced at $12 each and not sold to 90% of the consumers who value these channels at only $1 each. By bundling, the distributor implements perfect price discrimination that captures consumer surplus and offers the nine least preferred channels to each consumer at a price the consumer is willing to pay.

Carlton and Waldman then changed their hypothetical to assume that 10% of the consumers have a higher reservation price—$2 each—for the nine least-preferred channels. The distributor would not raise its $36 bundled price; to do so would risk losing the other 90% of the consumers who only value the nine channels at $1 each. The 10%, as a result, would enjoy a consumer surplus because they would be willing to pay $45 for the bundle, but would be charged only $36.[147]

The hypothetical, however, fails to demonstrate that, as a matter of theory or practice, consumer welfare would be increased. Carlton and Waldman assumed that there is no consumer welfare loss associated with their hypothetical bundle (and a gain if some consumers are willing to pay more for certain less-desired channels). At best, this example demonstrates that the consumer welfare loss from the bundling will be less severe because the seller is unable to implement perfect price

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Substantial Foreclosure Share Should Not Be Per Se Legal. Elhauge concludes that the forced bundling of TV channels will likely decrease total welfare.

146. Carlton & Waldman, *supra* note 82, at 6–7.

147. *Id*. at 7.

discrimination. Elsewhere, Carlton and Waldman agreed that the price discrimination feature of bundled selling is designed to capture consumer surplus.[148] To ignore this dominant feature of bundled sales and argue, even hypothetically, that this pricing could increase consumer welfare is highly implausible. Imperfections in the price discrimination implemented through bundling may reduce the consumer welfare loss, but cannot reasonably be viewed as eliminating the entire revenue gain that the price discrimination is designed to capture.

ESPN can command a high price not simply because it is of interest to a significant number of subscribers, but because those viewers have an intense loyalty to the programming. Only 15–20% of subscribers are estimated to watch sports programming regularly.[149] If we make the cautious assumption that there are 50% of subscribers who have at least one household member who watches sports regularly, that means that the other 50% of subscribers will be paying well over half of their monthly bill to support programs they seldom or never watch. Even if consumer interest in non-sports programming is sufficient to retain most or all of the 50% of the subscribers who don't watch sports, the premium they would be forced to pay is a substantial loss of consumer surplus. Some sports aficionados would also lose surplus. There are many who watch particular teams, particular sports, or college sports as opposed to professional sports (or vice versa). For these sports viewers, forcing them to buy a bundled package that includes many expensive channels that they would not watch is still a consumer welfare loss. Thus, even if Carlton and Waldman are correct that there are modest consumer surplus gains from offering a few "least-liked" channels in the bundled package, it is extremely unlikely that these small gains would offset the overall consumer welfare loss associated with the high price for the bundled sale.

The Carlton and Waldman example also assumed the ability of the distributor to price in a way that maximizes return without any loss of output. Each of the 1000 consumers in their example will continue to buy cable TV because the distributor is able to discern and then price in a manner that comes close to, but does not exceed, the reservation price for each viewer. In the real world, that is impossible. The forced bundles, in addition to reducing consumer subscriptions, will also alter the output of programming itself. The bundles may exclude channels

148. *Id*. at 4–5 ("perfect price discrimination means that the monopolist extracts all the potential surplus from consumers").

149. See *supra* note 24 and accompanying text.

that the viewer would prefer to watch.[150] Because programmers want to include niche channels that are likely to increase the number of subscribers, they may exclude channels of interest to mainstream viewers who already subscribe.[151]

Each of the hypothetical 1000 consumers will have differing preferences, varying financial capabilities, and highly differentiated information in making a purchase decision. For example, a consumer may be willing to pay $1 each for the non-preferred channels, but that willingness may be grudging. The consumer may vastly prefer not to be forced to buy them at all. As pointed out above, the concept of a reservation price, while a useful tool in modeling the one-time sale of a single item, breaks down when the complexities of the product tend to overwhelm the available information and absorption abilities of the average consumer and when there is a dynamic element (regular repeated purchases with content and price varying over time).

4. ABSENCE OF ANTICOMPETITIVE EFFECTS

Having ruled out the price discrimination theory of bundling as a cognizable injury to competition, Carlton and Waldman were unable to identify any other economic model that demonstrated anticompetitive injury from the forced bundling. That is unremarkable. The complexity of the bundled sale of television channels does not lend itself to easily understandable economic models susceptible to deductive proof. The *Brantley* litigation, because it was dismissed before discovery was completed and before any summary judgment could be weighed, did not force either side to pin down economic theories of competitive or anticompetitive effects. The plaintiffs, however, in addition to relying on inter-product price discrimination, emphasized their willingness to show direct evidence of anticompetitive effects, including evidence of higher prices, reduced output, loss of consumer choice, and increased barriers to entry and reduced competition in the distribution market.

5. HOVENKAMP'S CRITIQUE

Addressing the *Brantley* decision, Hovenkamp has argued that the forced bundling could have been justified by the efficiencies associated with bundled sales as compared to à la carte sales.[152] As ex-

150. FCC, FURTHER REPORT, *supra* note 21, at 30–31: Amended Complaint, *Cablevision, supra* note 16, ¶¶ 135 *et seq*.
151. FCC, FURTHER REPORT, *supra* note 21, at 31.
152. Hovenkamp, *supra* note 78, at 2.

plained in Part I.G., *infra*, there are undeniable efficiencies associated with bundled sales by distributors, but those efficiencies do not explain why programmers should be allowed to force bundling on the distributors, who should be allowed to freely decide when and what to bundle. Hovenkamp also observed that the *Brantley* complaint was dismissed because the plaintiffs "could not identify any independent program providers who were foreclosed or excluded by the arrangement."[153] That is one possible reading of the opinion. The Ninth Circuit, however, affirmed dismissal despite the complaint's emphatic allegations that there were substantial foreclosure effects at the distribution level. Hovenkamp does not address the important question whether tying law should be concerned only with upstream exclusionary effects while ignoring comparable effects in downstream distribution.

Hovenkamp concluded by observing that the "*Brantley* plaintiffs simply want the seller to offer a smaller product than it wants to offer."[154] While the comment is superficially accurate, it views the competitive landscape solely through the eyes of the programmers and misses the core concerns with the forced bundling. The *Brantley* complaint alleged classic antitrust injuries including loss of consumer surplus, loss of total surplus, loss of consumer choice, and foreclosure injuries at the downstream distributor level. Smaller bundles and more consumer choice are the likely result of mitigating these very substantial injuries to competition. That's what the *Brantley* plaintiffs sought.

C. The Future of the Price Discrimination Theory of Tying

Crane as well as Carlton and Waldman argued that price discrimination effected through tying arrangements should not be actionable unless there is additional competitive injury associated with the conduct. The loss of consumer surplus, they argued, is widespread and not sufficient to trigger antitrust intervention; they asserted without support that widely employed tying arrangements are usually efficient and that false positives are a major risk if price discrimination effected through tying were condemned.

In most cases, this debate may seem inconsequential. Most tying that effects inter-product price discrimination is likely to have foreclosure injuries. Indeed, notwithstanding the Ninth Circuit's flawed reading of the complaint, downstream foreclosure injuries were amply pled in *Brantley*. The *Cablevision* complaint against Viacom alleges both

153. *Id*. at 4.
154. *Id*. at 12.

upstream and downstream foreclosure injury.[155] That both downstream distributors and upstream programmers have now endorsed the *Cablevision* suit challenging Viacom's bundling practices is one indication of the reality of these foreclosure injuries. It is difficult to find an example of a tie-in that implements inter-product price discrimination that does not have likely foreclosure injury at the upstream level, the downstream level, or both levels.

There are, however, compelling reasons to recognize the injury flowing from inter-product price discrimination as a valid and independent basis for condemning a tying arrangement. The primary allocative harm from such a tie is wealth transfer and deadweight loss to consumers, not the foreclosure injury to a rival programmer. While a foreclosure injury is more likely to suggest a drag on innovation, such a showing has never been required to demonstrate anticompetitive effects in other contexts (such as the law governing horizontal restraints or vertical restraints such as resale price maintenance). In addition, proof of the requisite foreclosure injury will not always be easy. In *Brantley*, the consumer plaintiffs and their attorneys had difficulty getting independent upstream programmers to speak for the record, perhaps because they did not wish to jeopardize their ability to find cooperative distributors, many of them integrated into programming.[156] Recognizing that tie-ins can have anticompetitive effects through price discrimination would not open the floodgates that critics fear. Congress has singled out tying (but not most other conduct that can diminish consumer surplus) for antitrust scrutiny through enactment of Section 3 of the Clayton Act. Tying is a behavior that businesses and their counselors can easily identify. Where such tying is efficient, the defendant can make this showing as a defense in any tie-in case (an efficient tie is a basis for arguing that the tying and tied products should not be considered distinct, and that well-informed buyers are not forced to accept an anticompetitive bundling). Where, as in *Brantley*, the competitive injury to consumers is industry-wide and substantial, the case ought not to rise or fall based solely on whether the plaintiffs can show foreclosure effects on upstream competitors.

Ultimately, the Supreme Court has the last word on what constitutes unlawful tying. The Court has not addressed a block booking case

155. Amended Complaint, *Cablevision, supra* note 16, ¶¶ 158–163, 171.
156. Independent programmers may feel less constrained in openly supporting Cablevision in its suit against Viacom. A number of major distributors have already expressed support for this suit.

since *Loew's*, but has expressly acknowledged that tie-ins "can increase the social costs of market power by facilitating price discrimination, thereby increasing monopoly profits over what they would be absent the tie."[157] The Court's statement was and remains sound antitrust policy.

IV. Reflections on the Future of Pay-TV and Antitrust

Brantley was a case of moment. It could potentially have restructured the marketing model for pay television channels and saved consumers tens of billions of dollars annually. Reading the "restraint of trade" language of Section 1 of the Sherman Act with a blank slate (without a century plus of complicating jurisprudence), it is difficult to see how one could exculpate this conduct, and even more difficult to comprehend a dismissal of the litigation on a motion to dismiss before the record could be fully developed. The Ninth Circuit's decision in *Brantley* was based on a transparent misreading of the complaint, muddled and incorrect principles of antitrust law, and incoherent or unexplained economic analysis.

The Chicago School's enduring contribution to antitrust has been to establish the primacy of economic analysis. *Brantley* violated that primacy. Although economists do not always agree on antitrust policy, under any credible definition of welfare, including the narrow total welfare definition, the *Brantley* complaint alleged facts that would establish huge welfare losses for U.S. consumers. Part I uses the public record to describe the current state of television distribution, and shows that the forced bundles generate enormous overcharges, reduce output, deprive consumers of choice, and undermine opportunities for independent programmers and innovative distributors. In addition, that record is consistent with a conclusion that forced bundles have led to overinvestment in programming and other x-inefficiencies. The scale of these losses suggest yet another loss for antitrust. Had *Brantley* been allowed to proceed, the case could have provided a seminal gain for consumers and proof that antitrust can still be relevant in peoples' lives.

If antitrust law is moved to irrelevancy, society will nonetheless find ways of adjusting. The Federal Communications Commission may follow the lead of their Canadian counterpart and impose regulation that fosters genuine consumer choice. Congress could step in if support

157. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14–15 (1984).

mounts for a bill that would require à la carte programming.[158] Failing all of this, although it may take a decade or more for this to happen, the marketplace may ultimately force greater consumer choice as more and more consumers cut the cord in favor of Internet options for television programming. The Sherman Act, however, provides a better answer.

The bilateral monopoly in television distribution that existed before the early 1990s was far from ideal for TV consumers. It did, however, provide one benefit. Powerful programmers with popular channels could not run roughshod over the local monopolist cable provider. The two needed each other and were likely to negotiate terms less harmful to consumer welfare than would occur with unchecked monopoly power. After 1992, competition in distribution that should have benefitted consumers worsened welfare outcomes. Now the monopoly power of a programmer with a must-have channel is employed to whipsaw competing distributors into submission to the pricing and bundling terms that serve the powerful programmer's selfish interests.

If effectively employed, the Sherman Antitrust Act provides a very effective remedy for these negative welfare effects. By enjoining programmers' bundling and tiering restrictions, the distributors would be free to make their own bundling and distribution decisions in a manner that responds to consumer demand. Distributors who were unresponsive to consumer interests would quickly lose market share. Consumers would be put back in driver's seat without intrusive government regulation. That's just as Senator Sherman would have intended.

158. *See* Flint, *supra* note 1 (describing the "Television Consumer Freedom Act of 2013," which is the bill introduced by Senator John McCain).