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## Teamwork or Collusion? Changing Antitrust Law to Permit Corporate Action on Climate Change

Dailey C. Koga  
dkoga@washlrev.org

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# TEAMWORK OR COLLUSION? CHANGING ANTITRUST LAW TO PERMIT CORPORATE ACTION ON CLIMATE CHANGE

Dailey C. Koga\*

*Abstract:* In an era of apprehension about climate change and the future of our planet, private companies are increasingly recognizing their role in increasing sustainability and lowering carbon emissions. To address this growing concern, some industry leaders are taking unilateral action to implement sustainable practices, but other companies have made agreements to fight emissions together. However, the Sherman Antitrust Act forbids agreements in restraint of trade. Further, antitrust law traditionally has refused to recognize ethical or moral justifications as legitimate reasons to permit anticompetitive agreements. As society's concern for the planet grows and elected leaders move slower than needed to address climate problems, private sector actions take on a special urgency—especially given the massive carbon emissions stemming from corporate activities. This Comment reexamines the constructs and restrictions of antitrust law and identifies a solution that will allow companies to enter agreements aimed at addressing climate change while still upholding antitrust law's primary goal: consumer welfare. Specifically, this Comment proposes an exemption to antitrust law for agreements addressing climate change based on new Dutch guidelines and also provides a framework for companies to combat antitrust challenges to sustainability agreements absent an explicit exemption.

## INTRODUCTION

In July 2019, four automakers—Ford, Volkswagen of America, Honda, and BMW—struck a deal with California to decrease automobile emissions.<sup>1</sup> The deal emerged after the Trump administration announced plans to roll back federal emissions standards from about fifty-five miles per gallon to about thirty-seven miles per gallon.<sup>2</sup> The deal resulted in a new California law that sets emissions standards at fifty-one miles per gallon by the year 2026.<sup>3</sup> The automakers supported this law because the higher standards would create more certainty about future emissions

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\* J.D. Candidate, University of Washington School of Law, Class of 2021. I would like to thank Professor Douglas Ross for his invaluable guidance and insight throughout the drafting process. Additional thanks to the editorial staff of *Washington Law Review* for their thoughtful suggestions and incredible attention to detail.

1. Coral Davenport & Hiroko Tabuchi, *Automakers, Rejecting Trump Pollution Rule, Strike a Deal with California*, N.Y. TIMES (July 25, 2019), <https://www.nytimes.com/2019/07/25/climate/automakers-rejecting-trump-pollution-rule-strike-a-deal-with-california.html?module=inline> [https://perma.cc/CU8D-PGE4].

2. *Id.*

3. *Id.*

standards, which they use to project car manufacturing needs.<sup>4</sup> Given the transportation sector's contribution to carbon emissions, this agreement could help reduce CO<sub>2</sub> levels globally.<sup>5</sup> Despite the benefits of the deal, the Department of Justice (DOJ or Justice Department) opened an investigation in September of the same year to determine whether the automakers violated antitrust laws.<sup>6</sup>

The DOJ subsequently closed its investigation in February 2020 without comment or explanation.<sup>7</sup> Four months later, a whistleblower from the Justice Department's Antitrust Division testified in front of the House Judiciary Committee about his concerns over some of the DOJ's recent antitrust investigations, including the automaker investigation.<sup>8</sup> The Assistant Attorney General for the DOJ's Antitrust Division, Makan Delrahim, responded with a letter, which made clear that the DOJ closed the investigation because the automakers had never entered into an agreement.<sup>9</sup>

Despite the Justice Department's termination of the inquiry, the investigation still raises questions for agreements involving moral or social considerations—specifically those aimed at addressing environmental problems. Litigants have repeatedly tried to establish an exemption for moral or social considerations in Sherman Act analysis.<sup>10</sup> But the Supreme Court made it clear in *National Society of Professional Engineers v. United States*<sup>11</sup> and *FTC v. Superior Court Trial Lawyers*

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4. *Id.*

5. According to the Environmental Protection Agency, the United States contributes 15% of global carbon emissions. See *Global Greenhouse Gas Emissions Data*, U.S. ENV'T PROT. AGENCY [hereinafter *Emissions Data*], <https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data> [https://perma.cc/HR43-LJDN]. Moreover, emissions from transportation make up 28% of the United States' emissions. See *Sources of Greenhouse Gas Emissions*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> [https://perma.cc/CNG8-9TY7].

6. Hiroko Tabuchi & Coral Davenport, *Justice Dept. Investigates California Emissions Pact that Embarrassed Trump*, N.Y. TIMES (Sept. 6, 2019), <https://www.nytimes.com/2019/09/06/climate/automakers-california-emissions-antitrust.html> [https://perma.cc/P887-LRNF].

7. Coral Davenport, *Justice Department Drops Antitrust Probe Against Automakers that Sided with California on Emissions*, N.Y. TIMES (Feb. 7, 2020), <https://www.nytimes.com/2020/02/07/climate/trump-california-automakers-antitrust.html> [https://perma.cc/5FEK-PLPK].

8. See *Oversight of the Department of Justice: Political Interference and Threats to Prosecutorial Independence: Hearing Before the H. Comm. on the Judiciary*, 116th Cong. (2020) [hereinafter *DOJ Oversight Hearing*] (statements of John Elias).

9. Letter from Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., to Honorable Jerrold Nadler, Chairman, and Honorable Jim Jordan, Ranking Member, H. Comm. on the Judiciary (July 1, 2020), <https://www.politico.com/f/?id=00000173-0d14-dd78-a9ff-7fb6e2a70000> [https://perma.cc/SAL5-C9YC].

10. See *infra* section II.B.

11. 435 U.S. 679 (1978).

*Ass'n*<sup>12</sup> that non-economic considerations have no place in Sherman Act analysis.<sup>13</sup> While some lower courts have appeared to consider non-economic factors when they are cleverly framed in economic terms,<sup>14</sup> the Supreme Court has consistently applied the precedent from *National Society of Professional Engineers* and *Superior Court Trial Lawyers* over time.<sup>15</sup>

As the threat of climate change continues to loom, finding a path forward has proven exceedingly difficult. Major corporations contribute a significant amount to climate change but have done little to combat it.<sup>16</sup> However, that could soon change. Larry Fink, CEO of BlackRock Investments, issued his annual letter to CEOs in January 2020 in which he recognized the impact of climate change on business and investment.<sup>17</sup> He also vowed BlackRock's commitment to addressing sustainability.<sup>18</sup> This letter served as a kind of call to action, spurring other large companies to issue statements regarding their own commitment to climate change.<sup>19</sup> But while a company like BlackRock—which manages almost \$7 trillion in investments<sup>20</sup>—can afford to allocate significant resources to

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12. 493 U.S. 411 (1990).

13. See *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 694–95; *Superior Ct. Trial Laws. Ass'n*, 493 U.S. at 421–22.

14. See, e.g., *United States v. Brown Univ.*, 5 F.3d 658, 678–79 (3d Cir. 1993) (ordering the district court to perform a full rule of reason analysis to consider the argument that collusion was necessary to help individuals with lower socioeconomic statuses access Ivy League educations).

15. See Makan Delrahim, *DOJ Antitrust Division: Popular Ends Should Not Justify Anti-Competitive Collusion*, USA TODAY (Sept. 12, 2019), <https://www.usatoday.com/story/opinion/2019/09/12/doj-antitrust-division-popular-ends-dont-justify-collusion-editorials-debates/2306078001/> [<https://perma.cc/5PGX-644M>] (op-ed from the Assistant Attorney General of the DOJ's Antitrust Division justifying the agency's inquiry into an agreement among auto manufacturers and California, stating “[e]ven laudable ends do not justify collusive means in our chosen system of laws”).

16. See, e.g., Matthew Taylor & Jonathan Watts, *Revealed: The 20 Firms Behind a Third of All Carbon Emissions*, THE GUARDIAN (Oct. 9, 2019), <https://www.theguardian.com/environment/2019/oct/09/revealed-20-firms-third-carbon-emissions> [<https://perma.cc/4B9P-88FJ>] (stating that just twenty private companies “can be directly linked to more than one-third of all greenhouse gas emissions in the modern era”).

17. Letter from Larry Fink, Chairman/CEO, BlackRock, to CEOs (Jan. 14, 2020), <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter> [<https://perma.cc/JPA8-WXN3>].

18. *Id.*

19. See, e.g., Amelia Lucas, *Starbucks Aims to Become ‘Resource Positive’ in Climate Push*, CNBC (Jan. 21, 2020), <https://www.cnbc.com/2020/01/21/starbucks-aims-to-become-resource-positive-in-climate-push.html> [<https://perma.cc/C5DP-BJAJ>] (discussing Starbucks's intent to become resource positive and to implement sustainable changes by 2030).

20. Andrew Ross Sorkin, *BlackRock C.E.O. Larry Fink: Climate Crisis Will Reshape Finance*, N.Y. TIMES (Jan. 14, 2020), <https://www.nytimes.com/2020/01/14/business/dealbook/larry-fink-blackrock-climate-change.html> [<https://perma.cc/PBN5-S3FZ>].

sustainability programs, smaller companies may not have that luxury if they are forced to act independently. Permitting agreements between companies to further sustainability programs may enable smaller companies to join in the fight toward a greener future.

This Comment proposes a path forward that would allow companies to enter into agreements while still respecting the fundamental goals of antitrust law.<sup>21</sup> Specifically, this Comment argues that the most appropriate channel for change would be a congressional exemption for sustainability agreements. This Comment further lays out a way for litigants to frame sustainability agreements so that they may survive antitrust scrutiny. Part I of this Comment explains section 1 of the Sherman Act, its history and purpose, and its application. Part II discusses previous attempts to create exemptions to antitrust law based on moral concerns such as building-safety or quality of legal representation. This Part also describes how other countries currently permit sustainability agreements within their antitrust laws. Part III provides an overview of the role of business in the environmental crisis, highlighting the potential impact that corporate action could have on climate change. Looking to other countries for guidance, Part IV proposes a congressional exemption. It then discusses a framework for litigants to use when defending sustainability agreements in antitrust litigation absent a congressional exemption.<sup>22</sup>

## I. SECTION 1 OF THE SHERMAN ACT

Section 1 of the Sherman Act makes illegal “[e]very contract,

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21. This Comment focuses on climate change considerations in Sherman Act section 1 analysis and does not consider potential climate change antitrust violations related to other antitrust laws such as section 2 of the Sherman Act or the Clayton Act. Separate questions may arise if climate change or carbon emissions were to be considered in evaluating violations of section 2 of the Sherman Act or under other antitrust laws like the Clayton Act.

22. Arguments to allow environmental concerns or other moral concerns to play a role in antitrust law have been presented before. *See, e.g.*, David Andrews, *Antitrust Law Meets the Environmental Crisis—An Argument for Accommodation*, 1 *ECOLOGY L.Q.* 840 (1971). The Antitrust Section of the American Bar Association has also examined the intersection of environmental issues and antitrust law in the past. *See generally* Env’t L. Comm., Am. Bar Ass’n, *Report of the Committee on Antitrust Aspects of Environmental Law*, 45 *ANTITRUST L.J.* 355 (1976). One recent article also discusses the intersection of U.S. antitrust law and environmental concerns. *See generally* Paul Balmer, *Colluding to Save the World: How Antitrust Laws Discourage Corporations from Taking Action on Climate Change*, 47 *ECOLOGY L. CURRENTS* 219 (2020). Balmer’s Article furthers the conversation but provides a much broader overview than this Comment. *See generally id.* This Comment builds on Balmer’s Article in many ways, going into further depth on section 1 violations, proposing a specific congressional exemption based on the new Dutch guidelines, and providing a framework for litigants hoping to survive antitrust scrutiny. The concept should continue to be examined and looked at in a serious manner as the search for solutions to the climate crisis intensifies and as governments globally are not doing enough to curb climate change.

combination[,] . . . or conspiracy, in restraint of trade or commerce.”<sup>23</sup> Courts broadly agree that section 1 cannot be read literally to prohibit *every* agreement in restraint of trade because that would restrict nearly all agreements made in the course of business.<sup>24</sup> The Act thus only prohibits persons and organizations from entering into agreements that have anticompetitive effects.<sup>25</sup> Anticompetitive effects typically include higher prices or lower output but can also include a decrease in innovation or other economic harms to consumers.<sup>26</sup> The primary purpose of the Sherman Act and antitrust law is to protect competition.<sup>27</sup> Congress and courts have created a number of exceptions to section 1 including exceptions for sports leagues,<sup>28</sup> labor unions,<sup>29</sup> and states.<sup>30</sup> Courts have also held that agreements or actions protected by the First Amendment are exempt from antitrust law.<sup>31</sup>

#### A. *Section 1 of the Sherman Act Forbids Agreements in Restraint of Trade*

Section 1 of the Sherman Act forbids agreements among individuals or companies that have anticompetitive effects.<sup>32</sup> Some conduct between or among competitors, like price-fixing and market-allocation, is per se illegal under the Sherman Act.<sup>33</sup> Courts evaluate other types of conduct under a rule of reason analysis, weighing the conduct’s anticompetitive effects with any procompetitive justifications.<sup>34</sup> Procompetitive justifications often involve legitimate business reasons for entering into

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23. 15 U.S.C. § 1.

24. *See* *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 98 (1984) (“[E]very contract is a restraint of trade, and as we have repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade.”).

25. AM. BAR ASS’N, *ANTITRUST LAW DEVELOPMENTS 2* (8th ed. 2017) [hereinafter *DEVELOPMENTS*].

26. *See, e.g., Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 21–22 (1979) (considering the innovative nature of blanket licenses to copyrighted music as a procompetitive justification for an agreement that restrained trade).

27. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (“Taken as a whole, the legislative history illuminates congressional concern with the protection of competition, not competitors . . .”).

28. *See Fed. Baseball Club, Inc. v. Nat’l League of Pro. Baseball Clubs*, 259 U.S. 200, 209 (1922).

29. *See* 15 U.S.C. § 17; *United States v. Hutcheson*, 312 U.S. 219, 232 (1941).

30. *See Parker v. Brown*, 317 U.S. 341, 351 (1943).

31. *See E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961).

32. *DEVELOPMENTS*, *supra* note 25, at 2.

33. *See N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

34. *See Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 343–44 (1982).

certain agreements but cannot include ethical or moral considerations.<sup>35</sup> Under the rule of reason, the court weighs the anticompetitive effects with the procompetitive justifications to determine whether the conduct is unlawful under the Sherman Act.<sup>36</sup>

For example, in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,<sup>37</sup> two licensing agencies sold blanket licenses to copyrighted music.<sup>38</sup> Blanket licenses allowed consumers to purchase rights to use all of the songs licensed by the music agency for one fixed price rather than having to purchase rights to each individual song.<sup>39</sup> CBS challenged the licenses, arguing in part that they amounted to illegal price-fixing because they effectively made the license-price for each song equal.<sup>40</sup> After holding that this was not per se unlawful price-fixing, the Supreme Court remanded the case, instructing the lower court to conduct a full rule of reason analysis.<sup>41</sup> The Court reasoned that the blanket licenses were a practical solution to a fundamental problem in the market—consumers could save time and money by purchasing a blanket license rather than a separate license for each song they wanted to use.<sup>42</sup>

Sometimes courts apply a level of scrutiny that falls in between a per se analysis and a rule of reason analysis, known as a “quick look” analysis.<sup>43</sup> Courts apply a quick look analysis when a restraint is “sufficiently anticompetitive on [its] face that [it does] not require a full-blown rule of reason inquiry.”<sup>44</sup> In a quick look analysis, if direct evidence reveals that an agreement has anticompetitive effects, such as raising prices or reducing quantity, the court will invalidate the agreement absent a procompetitive justification, without doing a full market analysis.<sup>45</sup> In other words, the court will not spend time determining the agreement’s relevant market and the agreement’s effects on that market if the

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35. See, e.g., *FTC v. Superior Ct. Trial Laws. Ass’n*, 493 U.S. 411, 421–22 (1990) (“[I]t is not our task to pass upon the social utility or political wisdom of price-fixing agreements.”).

36. See *Nat’l Soc’y of Pro. Eng’rs v. United States*, 435 U.S. 679, 691 (1978).

37. 441 U.S. 1 (1979).

38. *Id.* at 5.

39. *Id.*

40. *Id.* at 6.

41. *Id.* at 24–25.

42. *Id.* at 21–22.

43. See, e.g., *Law v. NCAA*, 134 F.3d 1010, 1020 (10th Cir. 1998) (applying a “quick look” analysis because the restriction on annual compensation for coaches had obvious anticompetitive effects). For a more detailed account of “quick look” analysis, see generally Edward D. Cavanagh, *Whatever Happened to Quick Look?*, 26 U. MIA. BUS. L. REV. 39 (2017).

44. *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 763 (1999) (quoting *Cal. Dental Ass’n v. FTC*, 128 F.3d 720, 727 (9th Cir. 1997)).

45. See *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35–36 (D.C. Cir. 2005).

anticompetitive nature of the agreement is facially obvious.<sup>46</sup>

First and foremost, section 1 requires an agreement.<sup>47</sup> There is a distinct difference in antitrust law between what is known as “conscious parallelism” and an actual agreement in restraint of trade.<sup>48</sup> Conscious parallelism encompasses activity undertaken by multiple firms who have not explicitly agreed to cooperate, but who instead watch each other and move simultaneously.<sup>49</sup> A common example is that of two gas stations on opposite corners of an intersection. If one gas station changes its price, the other gas station would likely do the same. Although it would appear the two gas stations acted in concert, section 1 of the Sherman Act does not condemn such conduct without an actual agreement.

It is often difficult to determine whether two firms entered into an actual agreement or whether they merely engaged in conscious parallelism. To determine whether an agreement exists, courts look for the presence of certain “plus factors.”<sup>50</sup> Relevant plus factors may include (1) whether the firms have opportunities to communicate, such as trade association meetings;<sup>51</sup> (2) whether the conduct the firms engaged in is too complicated to be explained by conscious parallelism;<sup>52</sup> and

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46. *Id.*

47. *See* Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540–41 (1954).

48. *See id.* at 541.

49. *See, e.g., id.* at 541–42 (“[T]his Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense.”).

50. *See* William E. Kovacic, Robert C. Marshall, Leslie M. Marx & Halbert L. White, *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 415 (2011) (explaining that Judge Richard Posner has listed fourteen cartel plus factors: “(1) Fixed relative market shares, (2) Marketwide price discrimination, (3) Exchanges of price information, (4) Regional price variations, (5) Identical bids for nonstandard products, (6) Price, output, and capacity changes at the formation of the cartel, (7) Industry-wide resale price maintenance, (8) Declining market shares of leaders, (9) Amplitude and fluctuation of price changes, (10) Demand elastic at the market price, (11) Level and pattern of profits, (12) Market price inversely correlated with number of firms or elasticity of demand, (13) Basing-point pricing, (14) Exclusionary practices”).

51. *See, e.g., In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 628 (7th Cir. 2010) (explaining that trade association meetings can facilitate price fixing); DEVELOPMENTS, *supra* note 25, at 14–15 (identifying meetings as evidence of an opportunity to collude). This plus factor is generally considered to carry less weight than others and is viewed as insufficient on its own to show collusion. DEVELOPMENTS, *supra* note 25, at 14–15.

52. *See, e.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 n.4 (2007) (“[C]omplex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernable reason, would support a plausible inference of conspiracy.” (quoting Brief for Respondent at 37, *Bell Atl.*, 550 U.S. 544 (No. 05-1126), 2006 WL 3089915, at \*37)). “Conscious parallelism” is sometimes also referred to as “tacit collusion.” *Collusion, Tacit Collusion*, BLACK’S LAW DICTIONARY 332 (11th ed. 2019).

(3) whether the conduct lacks an explanation grounded in efficiency.<sup>53</sup>

Courts also assess whether the industry has factors that make it more susceptible to explicit collusion.<sup>54</sup> Often these factors speak to the industry's ability to solve "cartel problems."<sup>55</sup> Cartel<sup>56</sup> problems include agreeing on terms of the conspiracy, detecting and deterring cheating, and preventing new firms from entering the market.<sup>57</sup> For example, cartels may have a difficult time reaching a consensus on price or output because some firms want a larger share of the market.<sup>58</sup> They may also lack the ability to prevent new entrants into the market that could undercut the cartel.<sup>59</sup>

Certain features of industries help cartels solve these common problems. Markets with few firms, large buyers, consistent demand, opportunities to communicate, difficult entry conditions, and transparent prices are thought to be more susceptible to conspiracy.<sup>60</sup> Additionally, courts consider whether the industry has been subject to conspiracy in the past.<sup>61</sup> When an industry has these particular features, courts are more likely to infer collusive activity.<sup>62</sup>

Sharing information is particularly concerning in section 1 analysis as it provides a clear opportunity for collusion.<sup>63</sup> Information sharing among competitors is not per se unlawful, but it can be used to infer an agreement to fix prices, or it can constitute a standalone violation of section 1.<sup>64</sup>

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53. See, e.g., *In re Text Messaging Antitrust Litig.*, 630 F.3d at 628 (explaining that the defendants increased prices even when costs were falling without an economically sound explanation).

54. Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527, 529 (2013). "Collusion" is a term of art used in antitrust jurisprudence to refer to anticompetitive coordination that violates antitrust law. See generally *Price Fixing, Bid Rigging and Market Allocation Schemes*, U.S. DEP'T OF JUST., <https://www.justice.gov/atr/price-fixing-bid-rigging-and-market-allocation-schemes> [<https://perma.cc/CYQ2-XU2F>].

55. Baker, *supra* note 54, at 529 (explaining that "cartel problems" are "reaching consensus on terms of coordination, deterring cheating on those terms, and preventing new competition").

56. In antitrust jurisprudence, the term "cartel" is used to refer to a group of entities who agree to engage in anticompetitive conduct. See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 592 (1986) (describing an agreement among conspirators to maintain prices above a competitive level as a price-fixing cartel).

57. Baker, *supra* note 54, at 529.

58. See Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?*, 44 J. ECON. LITERATURE 43, 45–46 (2006).

59. See *id.* at 49, 74–75.

60. See *id.* at 49, 57, 61, 64, 69, 74–75.

61. See *id.* at 67.

62. See Kovacic et al., *supra* note 50, at 435.

63. See, e.g., *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 628 (7th Cir. 2010) ("Of note is the allegation in the complaint that the defendants belonged to a trade association and exchanged price information directly at association meetings.").

64. See *Todd v. Exxon Corp.*, 275 F.3d 191, 198–99 (2d Cir. 2001).

Courts consider a number of factors when determining whether an exchange of information violates the Sherman Act, such as the type of information exchanged and the particular features of the relevant industry.<sup>65</sup> Courts view the exchange of price information as particularly suspicious.<sup>66</sup> Some information sharing, like collaboration on research and development, or use of an unbiased organization to set industry standards, is typically permitted.<sup>67</sup>

### B. *Original Intent of the Sherman Act*

Courts frequently inquire into Congress's intent to determine the correct application of a statute, especially when a statute is ambiguous on its face.<sup>68</sup> The brevity of the Sherman Act has increased the focus of both scholars and courts on the original intent of the Act, including whether social and moral factors have relevance in Sherman Act analysis.<sup>69</sup>

Debate surrounding the original intent of the Sherman Act spans far back into the law's history.<sup>70</sup> Indeed, some scholars and courts originally opined that the Sherman Act had social and political aims.<sup>71</sup> But economic theory shifted in the late 1950s and 1960s to reflect what is now known as the "Chicago School of Economics."<sup>72</sup> In the view of the Chicago School, markets self-regulate, consumers are rational beings, and government intervention impedes economic progress.<sup>73</sup> One notable Chicago School antitrust scholar, Robert Bork, authored a groundbreaking article in 1966 arguing that the Sherman Act's legislative history clearly reflected the law's original intent: "the maximization of wealth or consumer want satisfaction."<sup>74</sup>

The Bork and Chicago School model became the majority view of both

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65. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978).

66. *Id.*

67. Inara Scott, *Antitrust and Socially Responsible Collaboration: A Chilling Combination?*, 53 AM. BUS. L.J. 97, 97–98, 98 n.4 (2016).

68. Carlos E. González, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 605 (1996).

69. See generally Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966); Douglas H. Ginsburg, *Bork's "Legislative Intent" and the Courts*, 79 ANTITRUST L.J. 941 (2014).

70. Ginsburg, *supra* note 69, at 942.

71. See *id.*

72. Daniel Yergin & Joseph Stanislaw, *The Chicago School*, in *COMMANDING HEIGHTS* 145, 145–49 (1998), [https://www.pbs.org/wgbh/commandingheights/shared/minitext/ess\\_chicagoschool.html](https://www.pbs.org/wgbh/commandingheights/shared/minitext/ess_chicagoschool.html) [<https://perma.cc/S3Z7-6GX9>].

73. *Id.*

74. Bork, *supra* note 69, at 7. Some scholars even argue that Bork's article changed the opinion of the Court, as it was cited in court opinions and the analysis was quickly adopted by courts. See Ginsburg, *supra* note 69, at 944–45.

courts and scholars, and has held steady over a number of decades.<sup>75</sup> In fact, some courts and scholars have gone to great lengths to emphasize that the original intent of the Sherman Act did not encompass anything beyond consumer welfare.<sup>76</sup> Bork repeatedly emphasized this, explaining that “[t]he legislative history . . . contains no colorable support for application by courts of any value premise or policy other than the maximization of consumer welfare.”<sup>77</sup> Though “consumer welfare” could plausibly be interpreted broadly as encompassing more than just economic well-being, scholars like Bork argue that the legislative history shows that the “meaning was unmistakable.”<sup>78</sup> These scholars argue that courts were not expected or meant to consider non-economic factors, but instead, under the rule of reason, were confined to weighing the economic consequences of agreements.<sup>79</sup>

In contrast to the majority view, some scholars have argued that the Sherman Act’s congressional history reflects populist ideals and Congress was not solely focused on consumer want satisfaction.<sup>80</sup> Specifically, some scholars and judges have argued that the intent of the Sherman Act went beyond the maximization of wealth and courts were meant to consider social and political factors.<sup>81</sup> These scholars, however, are in the minority.<sup>82</sup>

### C. *Exemptions to Sherman Act Section 1*

Congress has the ability to grant exemptions to antitrust law and has done so in the past.<sup>83</sup> The American Bar Association’s Antitrust Section has urged a four-part test by which to judge whether a congressional

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75. Ginsburg, *supra* note 69, at 943–47.

76. Bork, *supra* note 69, at 10.

77. *Id.*

78. *Id.*

79. *Id.* at 10–11.

80. See generally Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359 (1993).

81. See, e.g., GTE Sylvania Inc. v. Cont’l T.V., Inc., 537 F.2d 980, 1019 (9th Cir. 1976) (Browning, J., dissenting), *aff’d*, 433 U.S. 36 (1977) (“The congressional debates reflect a concern not only with the consumer interest in price, quality, and quantity of goods and services, but also with society’s interest in the protection of the independent businessman, for reasons of social and political as well as economic policy.”).

82. See Grandy, *supra* note 80, at 359 (“[T]he ‘Chicago School’ of antitrust has carried the day in both academic and public policy circles, and the conventional wisdom has incorporated Bork’s view of the Sherman Act.”).

83. See, e.g., 15 U.S.C. § 17 (laying out an exemption for labor organizations). For a more comprehensive guide on antitrust exemptions and the kinds of exemptions that exist, see generally DEVELOPMENTS, *supra* note 25, at 1277–1560.

exemption is appropriate.<sup>84</sup> According to the ABA, congressional exemptions should only be granted (1) in rare circumstances after “rigorous consideration of the impact of the proposed exemption or immunity on consumer welfare,” (2) when drafted in the narrowest possible way such that “competition is reduced only to the minimum extent necessary to achieve the intended goal,” (3) the goals of the exemption outweigh the goals of antitrust laws, and (4) the drafted exemption has a sunset provision.<sup>85</sup> This test is not binding, but it spotlights the types of things Congress may consider when determining whether to grant an exemption.

Antitrust exemptions granted by Congress exist in a broad range of industries and frequently reflect an attempt to further national policy interests.<sup>86</sup> Some of these exemptions are unsurprising.<sup>87</sup> Others are more unusual and heavily debated.<sup>88</sup> Labor unions represent one prominent example.<sup>89</sup> Namely, labor unions have the power to reach agreements on behalf of their members “[s]o long as a union acts in its self-interest and does not combine with non-labor groups.”<sup>90</sup> Two other notable exemptions are rooted in two amendments to the U.S. Constitution—the *Noerr-Pennington* doctrine and the state action doctrine.

The *Noerr-Pennington* doctrine<sup>91</sup> clarifies that lobbying is protected by the First Amendment and therefore it cannot be considered a violation of antitrust law.<sup>92</sup> In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,<sup>93</sup> a group of truck operators sued a group of railroads, arguing that their hiring of a public relations firm to “conduct a publicity campaign against the truckers” violated the Sherman Act.<sup>94</sup> The publicity campaign was allegedly aimed at convincing government officials to pass

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84. U.S. DEP’T OF JUST. ANTITRUST DIV., ROUNDTABLE DISCUSSION SERIES ON COMPETITION & DEREGULATION 7 (2018) [hereinafter DOJ ROUNDTABLE], <https://www.justice.gov/atr/page/file/1120641/download> [<https://perma.cc/3NBC-E2ZL>].

85. *Id.* A sunset provision or law is one that “automatically terminates at the end of a fixed period unless it is formally renewed.” *Sunset Law*, BLACK’S LAW DICTIONARY 1737 (11th ed. 2019).

86. *See, e.g.*, DEVELOPMENTS, *supra* note 25, at 1317 (“Concern about the economic well-being of U.S. farmers and ranchers has been a factor in passage of the nation’s major antitrust legislation.”).

87. *See, e.g.*, 15 U.S.C. § 17 (antitrust exemption for labor organizations).

88. *See, e.g., id.* § 1291 (antitrust exemption for televising NFL games).

89. *See id.* § 17; DEVELOPMENTS, *supra* note 25, at 1491–99.

90. *United States v. Hutcheson*, 312 U.S. 219, 232 (1941).

91. The *Noerr-Pennington* exemption is named after a pair of cases that established the doctrine: *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

92. *See E. R.R. Presidents Conf.*, 365 U.S. at 136; *United Mine Workers of Am.*, 381 U.S. at 670.

93. 365 U.S. 127 (1961).

94. *Id.* at 129.

and veto legislation in ways that would be beneficial to the railroads and harmful to the truckers.<sup>95</sup> The Supreme Court ruled in favor of the railroads, holding that “the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.”<sup>96</sup> However, the Court recognized that instances could arise where an effort to influence legislation “is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.”<sup>97</sup> If the lobbying is a “mere sham,” the Sherman Act can be applied appropriately.<sup>98</sup>

In *United Mine Workers of America v. Pennington*,<sup>99</sup> small coal mine operators filed a claim against large coal operators and their union, arguing that the large operators and the union conspired to exclude the smaller, non-union operators from the market.<sup>100</sup> The large coal mine operators’ union successfully petitioned the Secretary of Labor to amend federal law to establish “a minimum wage for employees of contractors selling coal to” the Tennessee Valley Authority<sup>101</sup>—a federally owned power company.<sup>102</sup> The small coal mine operators argued that the change in law would have anticompetitive results because it would directly raise operating costs for all coal mine operators, including the small, non-union operators.<sup>103</sup> Ultimately, those increased operating costs could drive the smaller operators out of business.<sup>104</sup> The lower courts ruled in favor of the small operators, but the Supreme Court reversed and remanded, holding that the lower courts did not properly consider the holding in *Noerr*.<sup>105</sup> The Court made clear again that “[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.”<sup>106</sup>

However, in *Superior Court Trial Lawyers*, the Supreme Court made clear that the *Noerr-Pennington* doctrine does not apply to all lobbying

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95. *Id.*

96. *Id.* at 136.

97. *Id.* at 144.

98. *Id.*

99. 381 U.S. 657 (1965).

100. *Id.* at 659–60.

101. *Id.* at 660.

102. *See* 16 U.S.C. § 831.

103. *United Mine Workers*, 381 U.S. at 664.

104. *Id.*

105. *Id.* at 669–70.

106. *Id.* at 670.

efforts.<sup>107</sup> In this case, a group of court-appointed attorneys<sup>108</sup> conspired to refuse to represent indigent criminal defendants until the District of Columbia raised their compensation.<sup>109</sup> While upholding its decisions in *Noerr* and its progeny, the Court distinguished the boycott in *Superior Court Trial Lawyers*, stating: “[I]n the *Noerr* case the alleged restraint of trade was the intended *consequence* of public action; in this case the boycott was the *means* by which respondents sought to obtain favorable legislation.”<sup>110</sup> Specifically, in *Noerr*, the truckers argued that the result of the railroads’ lobbying—a near monopoly in transportation of goods—would be an unlawful restraint of trade.<sup>111</sup> The Court disagreed because the lobbying was protected, regardless of whether it resulted in a restraint of trade.<sup>112</sup> In contrast, the FTC argued in *Superior Court Trial Lawyers* that the initial agreement between the attorneys to boycott for higher wages was an unlawful restraint of trade.<sup>113</sup> The Court agreed with the FTC that the group boycott was an unlawful agreement that directly resulted in higher prices, rather than a lawful lobbying attempt.<sup>114</sup>

Another constitutional exemption is known as the state action immunity doctrine or *Parker* immunity.<sup>115</sup> Under the state action immunity doctrine, states have immunity for “anticompetitive conduct . . . when acting in their sovereign capacity.”<sup>116</sup> Non-state actors can find protection under the state action exemption if they are “carrying out the State’s regulatory program.”<sup>117</sup> A private party must meet two requirements to invoke state action immunity: (1) the restraint must be “clearly articulated and affirmatively expressed as state policy,” and (2) the state must actively supervise the policy.<sup>118</sup>

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107. See *FTC v. Superior Ct. Trial Laws. Ass’n*, 493 U.S. 411, 424 (1990) (“Respondents’ agreement is not outside the coverage of the Sherman Act simply because its objective was the enactment of favorable legislation.”).

108. These attorneys were not public defenders, but instead were attorneys in private practice who were appointed by the court to represent less serious cases under the District of Columbia’s Criminal Justice Act. *Id.* at 414–15. Pursuant to the Act, the attorneys were compensated \$30 per hour for in-court time and \$20 per hour for out-of-court time. *Id.* at 415. Through the boycott, the attorneys were asking for \$55 per hour for in-court time and \$45 per hour for out-of-court time. *Id.* at 415–16.

109. *Id.* at 415–16.

110. *Id.* at 424–25 (emphasis in original).

111. *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 129 (1961).

112. *Id.* at 136.

113. *Superior Ct. Trial Laws. Ass’n*, 493 U.S. at 418.

114. *Id.* at 425.

115. See DEVELOPMENTS, *supra* note 25, at 1277.

116. *N.C. State Bd. of Dental Exam’rs v. FTC*, 574 U.S. 494, 503 (2015).

117. *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013).

118. *Id.* (quoting *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)).

The Supreme Court first laid out the state action immunity doctrine in *Parker v. Brown*.<sup>119</sup> In *Parker*, the Court upheld a program in California that regulated the amount of raisins each supplier could sell and the price at which they could sell the raisins.<sup>120</sup> The program stemmed from the California Agricultural Prorate Act.<sup>121</sup> The explicit purpose of the Act was to decrease competition among growers in order to stabilize commodity prices.<sup>122</sup> In this case, the Court was unwavering in the Sherman Act's inapplicability to states: "The Sherman Act makes no mention of [states] . . . and gives no hint that it was intended to restrain state action or official action directed by a state."<sup>123</sup>

While the *Noerr-Pennington* and state action immunity doctrines are broad exemptions, exemptions to antitrust law can be narrow and industry-specific.<sup>124</sup> Though some advocates and litigants have tried to establish exemptions to the antitrust laws for moral or social considerations, those efforts have repeatedly failed.<sup>125</sup> The legislature has not granted an exemption for moral considerations, and most courts are hesitant to stray from a long line of precedent and the broad language of the Sherman Act.<sup>126</sup>

## II. ATTEMPTS TO ESTABLISH EXEMPTIONS FOR MORAL CONSIDERATIONS UNDER THE SHERMAN ACT

Courts and antitrust scholars widely agree that the central purpose of antitrust law is to protect competition.<sup>127</sup> Most antitrust scholars thus argue that there is no room in antitrust legal analysis to consider moral, ethical, or social justifications for violations of the Sherman Act.<sup>128</sup>

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119. 317 U.S. 341 (1943).

120. *Id.* at 347–48.

121. *Id.* at 346. This Act authorized the creation of a nine-person, state-run committee and gave that committee the authority to review and grant petitions for prorate programs for agricultural products. *Id.*

122. *Id.*

123. *Id.* at 351.

124. *See, e.g.*, 15 U.S.C. § 1291 (laying out antitrust exemption for telecasting sports games).

125. *See, e.g.*, *FTC v. Superior Ct. Trial Laws. Ass'n*, 493 U.S. 411, 419 (1990) (refusing to accept respondents' social justification for an anticompetitive agreement).

126. *See* 15 U.S.C. § 1 ("Every contract, combination . . . or conspiracy, in restraint of trade . . . is declared to be illegal." (emphasis added)).

127. *See* *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) ("Taken as a whole, the legislative history illuminates congressional concern with the protection of competition, not competitors . . ." (emphasis omitted)).

128. *See, e.g.*, Lee Goldman, *The Politically Correct Corporation and the Antitrust Laws: The Proper Treatment of Noneconomic or Social Welfare Justifications Under Section 1 of the Sherman*

Though litigants have repeatedly attempted to establish an antitrust exemption for agreements involving moral or social considerations, courts have rejected those attempts.<sup>129</sup>

A. *The Scholarly Debate Regarding Moral Considerations in Antitrust Law*

Antitrust scholars have long considered non-economic policy goals to be outside of the purview of the Sherman Act's rule of reason analysis.<sup>130</sup> Many antitrust scholars argue that considering non-economic policy goals would not only be outside of Congress's intent in drafting the Sherman Act, but it would also work directly against the Act's effectiveness.<sup>131</sup> In their famed treatise on antitrust law, Phillip Areeda and Herbert Hovenkamp argue that considering things like the importance of small businesses or income inequality in antitrust law would lead to limitless antitrust challenges to innovative practices and would therefore be contrary to the primary purpose of antitrust law.<sup>132</sup>

Areeda and Hovenkamp also discuss another problem with introducing non-economic policy concerns into antitrust law—differing interest groups.<sup>133</sup> The two argue that it would not be possible to factor in non-economic policy concerns due to the differing goals and opinions of various interest groups. For example, some groups may prefer big businesses, while others may prefer small businesses.<sup>134</sup> This would admittedly complicate antitrust law, which works under the assumption that all consumers want the same things: higher quality, lower prices, and increased innovation.<sup>135</sup>

Despite the frequency with which litigants raise non-economic factors

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*Act*, 13 YALE L. & POL'Y REV. 137, 171–72 (1995) (arguing that social justifications should be left out of antitrust law).

129. See generally *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20 (1912); *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679 (1978); *Superior Ct. Trial Laws. Ass'n*, 493 U.S. 411.

130. See, e.g., *Standard Sanitary Mfg. Co.*, 226 U.S. at 49 (The Sherman Act's prohibitions cannot “be evaded by good motives. The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of the parties, and it may be, of some good results.”); *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 695 (“[T]he statutory policy [of the Sherman Act] precludes inquiry into the question whether competition is good or bad.”).

131. See PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 104–05 (4th ed. 2013).

132. See *id.* at 105 (“A policy more hostile toward innovation is hard to imagine . . .”).

133. See *id.* at 106–08.

134. See *id.*

135. See *id.* at 109.

in antitrust cases,<sup>136</sup> few scholars have come out in support of a social or moral exemption to antitrust laws. However, some scholars have argued that antitrust analysis should include non-economic concerns that affect consumers.<sup>137</sup> Professor Inara Scott argues that antitrust laws should be more flexible to allow for agreements that address important social issues, such as climate change.<sup>138</sup> One of her specific suggestions calls for courts to look at the effect of agreements on the economy as a whole, rather than just on their specific market.<sup>139</sup>

Alternatively, Neil Averitt and Robert Lande have led the push for a broader “consumer choice” method to antitrust analysis instead of the traditional “consumer welfare” method.<sup>140</sup> Averitt and Lande argue that antitrust law should focus on increasing consumer choice rather than the more restrictive model that focuses primarily on decreasing price and increasing output.<sup>141</sup> Much of the literature from Averitt and Lande focuses on section 2 of the Sherman Act, which is outside the scope of section 1, but it still provides a framework for including a broader range of factors in antitrust analysis.<sup>142</sup>

### B. *International Approaches to Environmental Factors in Antitrust Law*

Unlike the United States, other countries allow environmental

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136. See generally *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20 (1912); *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679 (1978); *FTC v. Superior Ct. Trial Laws. Ass'n*, 493 U.S. 411 (1990).

137. See, e.g., Scott, *supra* note 67, at 142–44 (“Antitrust law has the flexibility to allow for certain types of socially responsible collaborations . . .”).

138. *Id.*

139. *Id.* at 143. It is worth noting that this proposition would likely run in direct opposition to the Supreme Court precedent laid out in *United States v. Philadelphia National Bank*, 374 U.S. 321, 370 (1963). In *Philadelphia National Bank*, the Supreme Court enjoined a merger of two banks, striking down the banks’ argument that although they would have a large market share in their local geographical area, the merger would make them more competitive in New York and that New York should thus be considered part of the “relevant market.” *Id.* at 360–62. The Court refused to expand the relevant market analysis, stating “[i]f anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could . . . embark on a series of mergers that would make it end as large as the industry leader.” *Id.* at 370. Nevertheless, an antitrust exemption from Congress could change this precedent, at least in regard to sustainability agreements.

140. Neil W. Averitt & Robert H. Lande, *Using the “Consumer Choice” Approach to Antitrust Law*, 74 ANTITRUST L.J. 175, 175–76 (2007).

141. *Id.* at 175.

142. See generally *id.* at 175–76.

considerations to factor into competition analysis.<sup>143</sup> For example, Australia takes non-economic factors into account in its antitrust analysis by using a public interest test.<sup>144</sup> This test looks similar to the rule of reason analysis that courts use in the United States, except it allows courts to consider non-economic factors.<sup>145</sup> Courts may weigh potential non-economic detriments and benefits so long as those factors would have an effect on the community generally.<sup>146</sup> Australian courts interpret these terms broadly: public benefits can include “anything of value to the community generally . . .” and public detriments can include “any impairment to the community generally.”<sup>147</sup> Some antitrust scholars argue for a similar public interest test to replace current antitrust analysis in the United States.<sup>148</sup> These scholars argue that antitrust law must take into account other, non-economic factors to provide the best and most complete protection for consumers.<sup>149</sup>

South Africa also uses a “public interest” test in its antitrust analysis.<sup>150</sup> When analyzing a merger, courts factor in public interest considerations by examining the effect of the merger on:

- (a) a particular industrial sector or region;
- (b) employment;
- (c) the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market;
- (d) the ability of national industries to compete in international markets; and
- (e) the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically

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143. Most other countries refer to antitrust law as “competition law.” See, e.g., Keith N. Hylton & Fei Deng, *Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and Their Effects*, 74 ANTITRUST L.J. 271, 277 (2007) (calling the Sherman Act a “competition law” and using the terms antitrust law and competition law interchangeably). These terms are largely interchangeable and refer to the same body of law. *Id.*

144. See ORG. FOR ECON. COOP. & DEV., POLICY ROUNDTABLES: HORIZONTAL AGREEMENTS IN THE ENVIRONMENTAL CONTEXT, 29–30 (2010), <http://www.oecd.org/daf/competition/cartels/49139867.pdf> [<https://perma.cc/46ZN-5KF4>].

145. *Id.*

146. *See id.*

147. *See id.* at 30 (quoting *Re 7-Eleven Stores Pty Ltd, Austl. Ass’n of Convenience Stores Inc. & Queensland Newsagents Fed’n*, (1994) ATPR 41,357, 42,677, 42,683 (Austl.)).

148. See, e.g., Maurice E. Stucke, *Reconsidering Antitrust’s Goals*, 53 B.C. L. REV. 551, 618 (2012) (explaining that non-economic factors could be considered under the rule of reason). The movement for a public interest standard in U.S. competition law has garnered intense scrutiny by some antitrust scholars. See, e.g., Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT’L J. INDUS. ORG. 714, 746 (2018) (“Trying to use antitrust to solve problems outside the sphere of competition will not work and could well backfire.”).

149. See, e.g., Stucke, *supra* note 148, at 624 (“Any antitrust policy, which seeks to promote well-being, must balance multiple political, social, moral, and economic objectives.”).

150. Competition Act 89 of 1998 § 12A(3) (S. Afr.).

disadvantaged persons.<sup>151</sup>

For example, in *Walmart Stores Inc. v. Massmart Holdings Ltd.*,<sup>152</sup> a South African court considered a merger between Walmart and Massmart, a South African retailer.<sup>153</sup> After determining that the merger did not pose any competition concerns because Walmart did not yet have a retail presence in South Africa, the court turned its focus to the public interest implications of the merger.<sup>154</sup> The court had some concerns about certain public interest effects of the merger such as employment,<sup>155</sup> collective bargaining,<sup>156</sup> and the effect on local small businesses and suppliers.<sup>157</sup> As a result, the two companies agreed to undertake certain actions as conditions of the merger such as creating jobs, allowing employees to join labor unions, and “support[ing] local suppliers and in particular small businesses and [Broad-Based Black Economic Empowerment Act]<sup>158</sup> suppliers.”<sup>159</sup>

The Netherlands is the first country in the European Union to consider implementing a special analysis for sustainability agreements under its competition law.<sup>160</sup> The Dutch Authority for Competition and Markets (ACM) released the proposal—the Draft Guidelines on Sustainability

151. *Id.* (emphasis omitted). While these factors are certainly important to moving society forward, they are largely outside the scope of this Comment. Further research could be focused on an exemption that could promote small businesses or businesses owned by marginalized groups.

152. No. 73/LM/Dec10 (S. Afr. Competition Tribunal June 29, 2011).

153. *See id.* at 1–2.

154. *See id.* at 9–10 ¶¶ 26–30.

155. *Id.* at 13–20 ¶¶ 39–58.

156. *Id.* at 20–25 ¶¶ 59–71.

157. *Id.* at 26–38 ¶¶ 72–121.

158. The Broad-Based Black Economic Empowerment Act was passed to address some of the hardships suffered by Black South Africans during apartheid. *See* Broad-Based Black Economic Empowerment Act 53 of 2003 (S. Afr.). The Act is aimed at increasing the “participation of [B]lack people in the economy.” *Id.* For more information on the Broad-Based Black Economic Empowerment Act, see generally Andrea Sekai M’Paradzi, BEE – Basis, Evolution, Evaluation: A Critical Appraisal of Black Economic Empowerment in South Africa (2014) (dissertation for Postgraduate Diploma in commercial law, University of Cape Town), [https://open.uct.ac.za/bitstream/handle/11427/4516/thesis\\_law\\_mprand001.pdf;jsessionid=598F0C1A04C67CE53C5B9A774DFFB879?sequence=1](https://open.uct.ac.za/bitstream/handle/11427/4516/thesis_law_mprand001.pdf;jsessionid=598F0C1A04C67CE53C5B9A774DFFB879?sequence=1) [<https://perma.cc/4XQ7-XG5Y>].

159. *WalMart Stores Inc.*, No. 73/LM/Dec10, at 39 ¶ 122 (quoting SACCAWU core bundle for cross examination file record page 2503).

160. HOGAN LOVELLS, COMPETITION LAW AND SUSTAINABLE GROWTH: THE DUTCH COMPETITION AUTHORITY CONSULTS ON GUIDELINES THAT PAVE THE WAY FOR MORE FLEXIBILITY IN THE FIELD I (July 21, 2020) [hereinafter COMPETITION LAW AND SUSTAINABLE GROWTH], [https://www.hoganlovells.com/~media/hogan-lovells/pdf/2020-pdfs/2020\\_07\\_21\\_competition-law-and-sustainable-growth.pdf](https://www.hoganlovells.com/~media/hogan-lovells/pdf/2020-pdfs/2020_07_21_competition-law-and-sustainable-growth.pdf) [<https://perma.cc/7U4F-PPXW>].

Agreements—in July 2020.<sup>161</sup> The ACM presented two types of sustainability agreements that may withstand antitrust scrutiny based on the new guidelines.<sup>162</sup> The first involves agreements that do not have anticompetitive effects and therefore fall outside of antitrust law.<sup>163</sup> The second involves agreements where sustainability benefits outweigh the anticompetitive effects.<sup>164</sup> To fall into the second category, an agreement must meet four criteria: (1) the agreement must have sustainability benefits, (2) the ultimate consumer must receive “a fair share of those benefits,” (3) the restraint on competition is not greater than necessary to achieve those benefits, and (4) the agreement does not eliminate “a substantial part of the products in question.”<sup>165</sup>

The Dutch Guidelines take a broad approach in two main ways.<sup>166</sup> First, they do not require quantitative evidence of sustainability benefits if the companies involved in the agreement enjoy less than 30% combined market share.<sup>167</sup> Second, they take into account the future benefits of the sustainability agreements for future consumers, rather than just the current benefits for current consumers.<sup>168</sup> This means that courts could consider benefits to the environment as a whole, rather than only considering benefits to the current consumer.<sup>169</sup>

Though the ACM is the first competition authority in the European Union to propose such an exception for sustainability agreements, the European Commission has expressed its support of the Dutch Guidelines and is even considering adding a sustainability exception to the Commission’s own competition rules in 2022.<sup>170</sup> Taken together, these countries’ methods could help inform the United States on how to appropriately factor the effects of climate change into antitrust analysis.

### C. *Specific Attempts to Establish Social Exemptions to the Sherman Act*

Litigants have repeatedly attempted to defeat Sherman Act claims by

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161. See generally Autoriteit Consument & Markt, Guidelines on Sustainability Agreements: Opportunities Within Competition Law (July 9, 2020), <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf> [<https://perma.cc/QT44-A2C5>] (draft).

162. *Id.* at 7, 10.

163. *Id.* at 7.

164. *Id.* at 10.

165. *Id.*

166. *Id.* at 11, 13.

167. *Id.* at 13.

168. *Id.* at 11.

169. *Id.*

170. COMPETITION LAW AND SUSTAINABLE GROWTH, *supra* note 160, at 1.

using justifications that traditionally fall outside the scope of antitrust law.<sup>171</sup> Limiting antitrust analysis to economic factors stems back to *United States v. Trans-Missouri Freight Ass'n*,<sup>172</sup> decided in 1897.<sup>173</sup> In that case, Trans-Missouri Freight argued that their rate-setting agreement was procompetitive because the rates they had agreed upon were reasonable and that absent agreed-upon rates, the railroads may experience financial ruin.<sup>174</sup> The Supreme Court refused to entertain that argument, holding explicitly that the concern that the railroads would fail was outside the purview of antitrust law.<sup>175</sup> The Court also held that the reasonableness of the set rates was not an appropriate justification.<sup>176</sup>

The precedent established in *Trans-Missouri Freight* has prospered over time.<sup>177</sup> For example, in *National Society of Professional Engineers v. United States*, a group of engineers agreed to refuse to negotiate rates with customers until the customer selected a specific engineer.<sup>178</sup> This agreement effectively eliminated the competitive process.<sup>179</sup> The engineers claimed that this agreement was necessary to improve the quality of engineering in projects.<sup>180</sup> The Court held that the engineers could not agree amongst themselves to eliminate competition, even if open competition would lead to undesirable results.<sup>181</sup> The Court called the National Society of Professional Engineers' argument "nothing less than a frontal assault on the basic policy of the Sherman Act."<sup>182</sup> Additionally, the Court emphasized that it did not matter that the engineers engaged in "projects significantly affecting the public safety," adding that "[t]he judiciary cannot indirectly protect the public against . . . harm by conferring monopoly privileges

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171. See, e.g., *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 684–85 (1978) (denying National Society of Professional Engineers' argument that the engineers' agreement to end competitive bidding was justified because it would produce higher quality engineering projects).

172. 166 U.S. 290 (1897).

173. *Id.* at 338–39 (striking down argument that the rates agreed upon were reasonable).

174. *Id.* at 310–11.

175. *Id.* at 340–41 ("It may be that the policy evidenced by the passage of the act itself will, if carried out, result in disaster to the roads and in a failure to secure the advantages sought from such legislation. Whether that will be the result or not we do not know and cannot predict. These considerations are, however, not for us.").

176. *Id.*

177. See, e.g., *FTC v. Superior Ct. Trial Laws. Ass'n*, 493 U.S. 411, 424 (1990) (emphasizing that the history of the Sherman Act makes clear that reasonableness of prices does not justify price-fixing).

178. *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 682–83 (1978).

179. *Id.*

180. *Id.* at 684–85.

181. *Id.* at 696 ("[W]e may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition.").

182. *Id.* at 695.

on . . . manufacturers.”<sup>183</sup> Lastly, the Court emphasized that it is the job of the legislature to regulate private industry.<sup>184</sup>

The Supreme Court expressed a similar sentiment about a decade later in *Superior Court Trial Lawyers*.<sup>185</sup> In that case, lawyers participated in a boycott for higher rates of compensation because the District of Columbia was only paying the attorneys \$20 per hour for out-of-court time and \$30 per hour for in-court time.<sup>186</sup> The lawyers argued, in part, that the boycott was justified because it was in the public’s best interest to obtain better legal representation for indigent defendants.<sup>187</sup> The Court ultimately held that this was not a recognizable defense under the Sherman Act, citing *National Society of Professional Engineers*.<sup>188</sup> The Court again emphasized that “[t]he social justifications proffered for respondents’ restraint of trade . . . [did] not make it any less unlawful.”<sup>189</sup>

In both of these cases, the Court clearly aligned itself with the Chicago School<sup>190</sup> and justified not considering social factors because markets self-correct.<sup>191</sup> In *National Society of Professional Engineers*, the Court implied that market forces would put bad engineers out of business.<sup>192</sup> Similarly, in *Superior Court Trial Lawyers*, the Court implied that market forces would help determine the appropriate rate at which to pay the boycotting attorneys.<sup>193</sup>

In some instances, courts have appeared to consider non-economic factors, but those factors were always framed as economic in nature. For example, in *NCAA v. Board of Regents of the University of Oklahoma*,<sup>194</sup> the NCAA restricted the number of college football games that CBS and ABC could televise for NCAA member schools.<sup>195</sup> Although the NCAA still permitted CBS and ABC to negotiate with each school about the price and broadcasting of individual games,<sup>196</sup> the parties could not agree to

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183. *Id.* at 695–96.

184. *Id.* at 689–90.

185. *FTC v. Superior Ct. Trial Laws. Ass’n*, 493 U.S. 411, 423–24 (1990).

186. *Id.* at 415.

187. *Id.* at 419.

188. *Id.* at 423–24.

189. *Id.* at 424.

190. *See supra* notes 72–74 and accompanying text.

191. *Nat’l Soc’y of Pro. Eng’rs v. United States*, 435 U.S. 679, 695 (1978); *Superior Ct. Trial Laws. Ass’n*, 493 U.S. at 424.

192. *Nat’l Soc’y of Pro. Eng’rs*, 435 U.S. at 695.

193. *Superior Ct. Trial Laws. Ass’n*, 493 U.S. at 424.

194. 468 U.S. 85 (1984).

195. *Id.* at 91–94.

196. The NCAA did also set a minimum amount that CBS and ABC were required to pay to schools

televise more games than allowed by the NCAA.<sup>197</sup> The NCAA also required the stations to feature a game from a minimum of eighty-two different member schools on their networks at least once during each two-year period.<sup>198</sup>

The Supreme Court began its analysis of the NCAA's plan by stating that "[h]orizontal price fixing and output limitation are ordinarily condemned as a matter of law under an 'illegal *per se*' approach."<sup>199</sup> The Court then went on to say, "[n]evertheless, we have decided . . . it would be inappropriate to apply a *per se* rule to this case . . . [because the] case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."<sup>200</sup> In its analysis, the Court emphasized that without restraints on competition, the NCAA may cease to exist.<sup>201</sup>

The Court initially stated that its decision was not based on its "respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics" but then quickly changed its tune.<sup>202</sup> Specifically, the Court went on to say that the NCAA markets a "particular brand of football—college football."<sup>203</sup> That brand of football can only be preserved if athletes are unpaid and enrolled in school.<sup>204</sup> Thus, in the view of the Court, "the integrity of the 'product' [could not] be preserved except by mutual agreement [because] if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed."<sup>205</sup> Despite the Court's insistence that its decision to apply a full rule of reason analysis was not focused on amateurism, it focused heavily on the topic throughout its explanation—explaining that without an agreement mandating amateurism, an organization like the NCAA could not exist.<sup>206</sup>

The Supreme Court then proceeded to analyze the NCAA's plan under

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for their allotted games, but the NCAA could negotiate pricing with each school separately. *Id.* at 92–93.

197. *Id.* at 90.

198. *Id.* at 94.

199. *Id.* at 100.

200. *Id.* at 100–01.

201. *Id.* at 101.

202. *Id.*

203. *Id.*

204. *Id.* at 102.

205. *Id.*

206. *Id.* at 117 ("It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.").

a rule of reason analysis.<sup>207</sup> Ultimately, the Court found that the NCAA's conduct violated the Sherman Act because its plan with the television stations was not narrowly tailored, nor was it necessary to preserve competition within the football leagues.<sup>208</sup> Irrespective of its ultimate conclusion, the Court's willingness to conduct a full-blown rule of reason analysis suggests that the Court viewed a largely non-economic factor—amateurism—as a procompetitive justification.

Although most courts have refused to explicitly consider moral or social justifications for anticompetitive conduct, one circuit court opinion stands out: *United States v. Brown University*.<sup>209</sup> In *Brown*, the Third Circuit examined an agreement among Ivy League universities that only allowed the universities to award financial aid based on need and set the amount of financial aid given to commonly-admitted students.<sup>210</sup> The court seemed to accept the school's justification that the agreement increased access to education and diversity in education, even though these factors are largely non-economic in nature.<sup>211</sup> In essence, the court in *Brown* framed increased access to education and diversity in education as economic because they improve the quality of the product and thereby enhance consumer choice.<sup>212</sup> Some scholars have criticized the holding in *Brown* for failing to follow longstanding Supreme Court precedent established in cases like *National Society of Professional Engineers* and *Superior Court Trial Lawyers*.<sup>213</sup>

Despite litigants' repeated attempts and a few cases that seem to stray from the general rule, courts do not consider non-economic factors to be procompetitive justifications for the purpose of antitrust analysis.<sup>214</sup> The belief that antitrust analysis should be limited to economic factors has held strong in over one hundred years of Sherman Act jurisprudence.<sup>215</sup>

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207. *Id.* at 103–20.

208. *Id.* at 117–19.

209. 5 F.3d 658 (3d Cir. 1993).

210. *Id.* at 674–75.

211. *Id.* at 678.

212. *Id.*

213. See, e.g., Michael C. Petronio, Comment, *Eliminating the Social Cost of Higher Education: The Third Circuit Allows Social Welfare Benefits to Justify Horizontal Restraints of Trade in United States v. Brown University*, 83 GEO. L.J. 189, 215 (1994) (“By its ruling, the court has laid the groundwork for a serious deviation from well-accepted antitrust analysis.”).

214. Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 695 (1978) (“[T]he statutory policy [of the Sherman Act] precludes inquiry into the question whether competition is good or bad.”).

215. See *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 338–39 (1897); *FTC v. Superior Ct. Trial Laws. Ass'n*, 493 U.S. 411, 423–24 (1990).

### III. ENVIRONMENTAL AGREEMENTS

Governmental bodies have been particularly slow and ineffective in responding to climate change. Some government leaders have refused to address environmental concerns completely, and a few have even pointed to the private sector as a better avenue for change.<sup>216</sup> The private sector, on the other hand, has increasingly begun to realize its role in the climate crisis—sometimes even viewing sustainability as a profitable endeavor.<sup>217</sup> The automobile industry frames the issue well, emphasizing the impact private industry could have on the climate crisis if given more freedom to address the issue.<sup>218</sup>

#### A. *The Need for Private Contribution to Environmental Protection*

At its core, climate change refers to Earth's rising average temperature.<sup>219</sup> The ten hottest years on record all occurred between 1998 and 2018, with nine out of ten occurring since 2005.<sup>220</sup> The five hottest years on record occurred between 2014 and 2018.<sup>221</sup> Scientists predict that these trends will continue at least through the next decade.<sup>222</sup> They also estimate that humans have caused one degree Celsius of global warming from pre-industrial levels.<sup>223</sup> That increase is expected to reach one-and-a-half degrees Celsius between 2030 and 2052.<sup>224</sup>

Climate change is expected to affect every part of our lives in the coming years—and in many ways it already has.<sup>225</sup> Climate change has caused rising sea levels, loss of various plant and animal species, increased ocean temperatures, heat-related illness and death, reduced food

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216. David Gelles & Somini Sengupta, *Big Business Says It Will Tackle Climate Change, but Not How or When*, N.Y. TIMES (Jan. 23, 2020), <https://www.nytimes.com/2020/01/23/business/corporate-climate-davos.html> [https://perma.cc/WJW8-JE28].

217. See, e.g., Fink, *supra* note 17 (explaining that sustainable investing will be profitable for BlackRock's clients).

218. See Oliver Milman, *Vehicles Are Now America's Biggest CO2 Source but EPA Is Tearing Up Regulations*, THE GUARDIAN (Jan. 1, 2018), <https://www.theguardian.com/environment/2018/jan/01/vehicles-climate-change-emissions-trump-administration> [https://perma.cc/82W4-9J59].

219. *What Is Climate Change? A Really Simple Guide*, BBC NEWS (May 5, 2020), <https://www.bbc.com/news/science-environment-24021772> [https://perma.cc/96DV-9FVE].

220. Anthony Arguez, Shannan Hurley, Anand Inamdar, Laurel Mahoney, Ahira Sanchez-Lugo & Lilian Yang, *Should We Expect Each Year in the Next Decade (2019–28) to Be Ranked Among the Top 10 Warmest Years Globally?*, 101 BULL. AM. METEOROLOGICAL SOC'Y E655, E656 tbl.1 (2020).

221. *Id.*

222. *Id.* at E661.

223. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SUMMARY FOR POLICYMAKERS 4 (Valerie Masson-Delmotte et al. eds., 2018) [hereinafter GLOBAL WARMING].

224. *Id.*

225. *Id.* at 7–10.

availability, reduced levels of drinking water, abnormal weather patterns, increased natural disaster risk, and many other problems.<sup>226</sup> Scientists again predict these trends will continue well into the future.<sup>227</sup> Moreover, climate change disproportionately affects minority groups and impoverished communities.<sup>228</sup>

Slowing climate change remains vital to our survival as a species.<sup>229</sup> Some climate experts have argued that civilization could start to collapse by 2050 if humans do not take immediate action to slow global warming.<sup>230</sup> Two degrees Celsius of global warming poses significantly greater risks than one-and-a-half degrees Celsius.<sup>231</sup> Though some disagreement exists about exactly how much time we have to change the trajectory of global warming or whether we have already reached the tipping point,<sup>232</sup> it is clear that we must take immediate action for any chance of survival.<sup>233</sup>

Despite increased focus on climate change globally, greenhouse gas emissions rose in the United States in 2018 by 2.7%.<sup>234</sup> Some global leaders have shown an unwillingness to address the problem of climate change.<sup>235</sup> Likewise, the initiatives that have been launched by global

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226. *Id.*

227. *Id.*

228. *Id.* at 9. For a more in-depth look on how climate change disproportionately impacts poor and minority communities, see generally S. Nazrul Islam & John Winkel, *Climate Change and Social Inequality* (U.N. Dep't of Econ. & Soc. Affs., Working Paper, Paper No. 152, 2017), [https://www.un.org/esa/desa/papers/2017/wp152\\_2017.pdf](https://www.un.org/esa/desa/papers/2017/wp152_2017.pdf) [<https://perma.cc/MLA5-YT8E>].

229. See GLOBAL WARMING, *supra* note 223, at 7–10.

230. DAVID SPRATT & IAN DUNLOP, BREAKTHROUGH NAT'L CTR. FOR CLIMATE RESTORATION, EXISTENTIAL CLIMATE-RELATED SECURITY RISK: A SCENARIO APPROACH 8–9 (2019), [https://docs.wixstatic.com/ugd/148cb0\\_a1406e0143ac4c469196d3003bc1e687.pdf](https://docs.wixstatic.com/ugd/148cb0_a1406e0143ac4c469196d3003bc1e687.pdf) [<https://perma.cc/4MGB-DQRJ>].

231. See GLOBAL WARMING, *supra* note 223, at 7–10.

232. Fred Pearce, *As Climate Change Worsens, a Cascade of Tipping Points Looms*, YALE ENV'T 360 (Dec. 5, 2019), <https://e360.yale.edu/features/as-climate-changes-worsens-a-cascade-of-tipping-points-looms> [<https://perma.cc/BZ3A-F5ZD>] (“Some tipping points . . . may already have been breached at the current 1 degree C of warming.”).

233. *Id.*

234. Perry Lindstrom, *U.S. Energy-Related CO2 Emissions Rose in 2018 for the First Year Since 2014*, U.S. ENERGY INFO. ADMIN.: TODAY IN ENERGY (Nov. 26, 2019), <https://www.eia.gov/todayinenergy/detail.php?id=42115> [<https://perma.cc/FCR2-8S5Q>].

235. See, e.g., Carolyn Kormann, *When Will Australia's Prime Minister Accept the Reality of the Climate Crisis?*, NEW YORKER (Jan. 15, 2020), <https://www.newyorker.com/news/news-desk/when-will-australias-prime-minister-accept-the-reality-of-the-climate-crisis> [<https://perma.cc/BME7-LLCN>] (describing Australian Prime Minister Scott Morrison's allegiance to the fossil fuel industry); Juliet Eilperin, Josh Dawsey & Brady Dennis, *White House Update of Key Environmental Law Would Exclude Climate Change*, WASH. POST (Jan. 3, 2020, 5:43 PM), <https://www.washingtonpost.com/climate-environment/white-house-update-of-key-environmental-law-would-exclude-climate->

leaders thus far have done little to address the issue.<sup>236</sup>

The Paris Agreement is a prime example of a government-led climate change initiative that is unlikely to achieve its desired climate goals.<sup>237</sup> The agreement involved 196 parties to the United Nations Framework Convention on Climate Change who contracted in December 2015 to implement changes that would limit the global temperature rise to less than two degrees Celsius.<sup>238</sup> The agreement requires each member country to comply with “nationally determined contributions,” which are effectively individual emission-reduction plans.<sup>239</sup> Although the United States is one of the largest emitters of CO<sub>2</sub>,<sup>240</sup> the Trump Administration chose to withdraw from the Paris Agreement.<sup>241</sup> This renders the agreement much less valuable than it would be with American participation.<sup>242</sup>

Domestic efforts to curb climate change have fallen flat as well,<sup>243</sup> and those that have seen success have not gone far enough to address the severity of the climate crisis.<sup>244</sup> Some states have taken steps on their own

change/2020/01/03/35491e10-2e89-11ea-9b60-817cc18cf173\_story.html [https://perma.cc/3RA4-ZRB9] (explaining President Donald Trump’s rollback of Obama-era climate change initiatives).

236. U.N. ENV’T PROGRAMME, EMISSIONS GAP REPORT 2019: EXECUTIVE SUMMARY 4 (2019) [hereinafter EMISSIONS GAP REPORT], <https://wedocs.unep.org/bitstream/handle/20.500.11822/30798/EGR19ESEN.pdf?sequence=13> [https://perma.cc/5S45-EHG7].

237. *What Is the Paris Agreement?*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, <https://unfccc.int/process-and-meetings/the-paris-agreement/what-is-the-paris-agreement> (last visited Nov. 11, 2020).

238. *Id.*

239. *Nationally Determined Contributions (NDCs)*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement/nationally-determined-contributions-ndcs> (last visited Oct. 19, 2020).

240. *Emissions Data*, *supra* note 5.

241. Rebecca Hersher, *U.S. Formally Begins to Leave the Paris Climate Agreement*, NAT’L PUB. RADIO (Nov. 4, 2019, 3:46 PM), <https://www.npr.org/2019/11/04/773474657/u-s-formally-begins-to-leave-the-paris-climate-agreement> [https://perma.cc/8AKF-TFVR].

242. *Id.* The United States, along with other wealthy countries, also pledged to help developing countries meet their emissions goals. *Id.* The loss of the United States from the Paris Agreement thus extends further than our own borders.

243. *Compare* Press Release, The White House Off. of the Press Sec’y, Fact Sheet: President Obama to Announce Historic Carbon Pollution Standards for Power Plants (Aug. 3, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/08/03/fact-sheet-president-obama-announce-historic-carbon-pollution-standards> [https://perma.cc/9R4P-RZ5V] (describing the Obama administration’s Clean Power Plan which set standards to for carbon emissions from power plants), *with* Press Release, The Env’t Prot. Agency Press Off., EPA Finalizes Affordable Clean Energy Rule, Ensuring Reliable, Diversified Energy Resources by Protecting our Environment (June 19, 2019), <https://www.epa.gov/newsreleases/epa-finalizes-affordable-clean-energy-rule-ensuring-reliable-diversified-energy> [https://perma.cc/2SRL-38D2] (describing the Trump administration’s Affordable Clean Energy Rule which replaced the Clean Power Plan, set guidelines for reducing carbon emissions rather than requirements, and left specific action up to the states).

244. *See* EMISSIONS GAP REPORT, *supra* note 236, at 4.

to enact policies to curb emissions,<sup>245</sup> but the efforts of state governments are necessarily limited in scope. Moreover, fewer than half of states have taken the initiative to enact these kinds of policies aimed at curbing CO<sub>2</sub> emissions.<sup>246</sup>

Although climate change has become a global concern with potentially catastrophic consequences, governments have been slow to respond to the impending effects of climate change. Government efforts on the global, national, and state levels have thus far been ineffective at curbing the rise in global temperatures.

### *B. Response of Private Actors to Environmental Concerns*

In contrast to governments, companies have increasingly recognized their role in the climate crisis.<sup>247</sup> Some companies have started to look at becoming more environmentally friendly and enacting sustainability practices, recognizing that these initiatives could lead to long-term profitability.<sup>248</sup> Shareholders and employees also put pressure on corporations to address the climate crisis.<sup>249</sup> Further, many corporations operate on a global scale and a company policy to reduce emissions could thus have an impact beyond the borders of a single country.

At the annual World Economic Forum in January 2020, 140 business leaders vowed “to develop a core set of common metrics to track environmental and social responsibility.”<sup>250</sup> The same week, Steven Mnuchin, the U.S. Treasury Secretary, downplayed the severity of the crisis, stating bluntly: “We don’t believe there should be carbon taxes . . . [w]e think that industry can deal with this issue on its own.”<sup>251</sup>

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245. See, e.g., Chandler Green, *7 Ways U.S. States Are Leading Climate Action*, U.N. FOUND. (May 30, 2019), <https://unfoundation.org/blog/post/7-ways-u-s-states-are-leading-climate-action/> [<https://perma.cc/8Z76-992M>] (explaining how states are taking action on climate change, such as setting higher emissions standards and creating financing opportunities for clean-energy projects).

246. *State Climate Policy Maps*, CTR. FOR CLIMATE & ENERGY SOLS., <https://www.c2es.org/content/state-climate-policy/> [<https://perma.cc/N5NE-GH2D>].

247. See, e.g., Lucas, *supra* note 19 (discussing Starbucks’s new sustainability initiatives and its goal to become “resource positive” by 2030); Sorkin, *supra* note 20 (explaining that BlackRock investments announced it will “make investment decisions with environmental sustainability as a core goal”).

248. See, e.g., Fink, *supra* note 17 (“[W]e believe that sustainable investing is the strongest foundation for client portfolios going forward.”).

249. See, e.g., Colin Lecher, *Thousands of Amazon Employees Ask the Company to Adopt a Climate Change Plan*, THE VERGE (Apr. 10, 2019, 1:22 PM), <https://www.theverge.com/2019/4/10/18304800/amazon-employees-open-letter-climate-change-plan> [<https://perma.cc/P995-3N2Q>] (discussing an open letter from Amazon employees asking the company to take action on climate change).

250. Gelles & Sengupta, *supra* note 216.

251. *Id.*

This contrast provides a glaring example of the different outlooks held by governments and corporations, and demonstrates that even U.S. leadership plans to rely on industry to solve the problem.

Juxtaposed with Mnuchin's statements, in that same month the CEO of BlackRock Investments, Larry Fink, released his annual letter to CEOs emphasizing the company's plan to address climate change.<sup>252</sup> In the letter, Fink stated that "[c]limate change has become a defining factor in companies' long-term prospects."<sup>253</sup> He also notably emphasized that BlackRock will be "making sustainability integral to portfolio construction and risk management; exiting investments that present a high sustainability-related risk."<sup>254</sup> BlackRock's letter informed companies it invests in that they must provide BlackRock with disclosure reports regarding sustainability and climate-related risks.<sup>255</sup> He further stated that BlackRock "will be increasingly disposed to vote against management and board directors when companies are not making sufficient progress on sustainability-related disclosures and the business practices and plans underlying them."<sup>256</sup> Given that BlackRock manages nearly \$7 trillion in investments,<sup>257</sup> the letter is sure to make waves. And in some ways, it already has. Shortly after Fink released his letter, large companies like Microsoft,<sup>258</sup> Delta Airlines,<sup>259</sup> and Starbucks<sup>260</sup> all made new pledges involving climate change. While these entities can afford to take large and costly steps to address their contribution to climate change, smaller companies may not have that option if forced to act unilaterally. In other words, in order for smaller companies to make progress reducing their carbon footprint, they may need to pool their resources with other firms or, at the very least, have assurance that other firms will take similar costly steps.

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252. Fink, *supra* note 17.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. Sorkin, *supra* note 20.

258. Camila Domonoske, *Microsoft Pledges to Remove from the Atmosphere All the Carbon It Has Ever Emitted*, NAT'L PUB. RADIO (Jan. 16, 2020, 2:25 PM), <https://www.npr.org/2020/01/16/796758230/microsoft-pledges-to-remove-from-the-atmosphere-all-the-carbon-its-ever-emitted> [<https://perma.cc/HH64-5M85>].

259. Tracy Rucinski, *Delta to Invest \$1 Billion to Curb Global Air Travel's Climate Impact*, REUTERS (Feb. 14, 2020, 5:03 AM), <https://www.reuters.com/article/us-climate-change-delta-air/delta-to-invest-1-billion-to-curb-global-air-travels-climate-impact-idUSKBN2081FY> [<https://perma.cc/BQV8-7D2L>].

260. Lucas, *supra* note 19.

C. *Scholarly Views on Considering Environmental Policy in Antitrust Law*

The general view among antitrust scholars is that antitrust law is not the proper channel to address regulatory concerns such as environmental policy.<sup>261</sup> Enforcement agencies have viewed agreements involving climate change in the same way as those involving other ethical and social considerations, stressing that the social benefits of the agreements cannot be taken into account as procompetitive justifications.<sup>262</sup> Further, antitrust jurisprudence emphasizes that legislative bodies are better suited to address ethical and moral considerations—not the courts.<sup>263</sup> The DOJ and Federal Trade Commission (FTC) may be similarly unfit to determine such matters through non-enforcement decisions.<sup>264</sup> The Supreme Court has said itself that “we may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition.”<sup>265</sup>

Other scholars argue that antitrust laws can hinder potential solutions to environmental problems.<sup>266</sup> For example, Jonathan Adler argues that many environmental problems can be seen as tragedies of the commons—where every person behaves in a self-interested manner that ultimately creates a detriment to broader society.<sup>267</sup> A tragedy of the commons exists when individuals’ interests are contrary to the community’s interests.<sup>268</sup> In the fishing context, for example, each individual person would benefit from catching as many fish as possible, but broader society would benefit from limiting each person’s fishing to protect the fish population. Adler explains that restraints on fishing can solve the tragedy of the commons

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261. See AREEDA & HOVENKAMP, *supra* note 131, at 104–05.

262. Delrahim, *supra* note 15.

263. See, e.g., *Nat’l Soc’y of Pro. Eng’rs v. United States*, 435 U.S. 679, 689–90 (1978) (stating that arguments by litigants to create exemptions to antitrust law for certain industries should be made to Congress, not the courts); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221–22 (1940) (“Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. . . . If such a shift is to be made, it must be done by the Congress.”).

264. See, e.g., Delrahim, *supra* note 15 (stating that the DOJ Antitrust Division cannot “refrain from examining possible anti-competitive conduct because it would be politically unpopular”).

265. *Nat’l Soc’y of Pro. Eng’rs*, 435 U.S. at 696.

266. See, e.g., Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 176–80 (2019) (explaining that while at times antitrust law can mandate environmentally-friendly behavior, it can also prohibit and disincentivize environmentally-friendly behavior).

267. Jonathan H. Adler, *Conservation Through Collusion: Antitrust as an Obstacle to Marine Resource Conservation*, 61 WASH. & LEE L. REV. 3, 9–10 (2004).

268. See *id.* at 9.

problem of overfishing.<sup>269</sup> Antitrust disallows the creation of some of these community-oriented restraints. Antitrust laws may therefore exacerbate these types of environmental problems.<sup>270</sup>

#### D. *The Auto Industry as a Case Study*

Despite the environmental threat posed by lower emissions standards, the DOJ opened an antitrust investigation into four automakers who came to an agreement with California to heighten vehicle emissions standards.<sup>271</sup> This agreement was in response to the low emissions standards set by the Trump administration—a stark reversal of those set by the Obama administration.<sup>272</sup> The car manufacturers and California stated that an agreement on emissions standards was necessary due to the nature of the car industry.<sup>273</sup> Namely, they argued that the automakers need the ability to predict future emissions standards to develop appropriate technology and begin to manufacture new vehicles.<sup>274</sup> The agreement was therefore touted as one that would provide certainty and stability to industry professionals on top of improving automobile emissions.<sup>275</sup>

The Justice Department was, at least initially, unwilling to accept that argument.<sup>276</sup> Assistant Attorney General Makan Delrahim made multiple statements, citing cases such as *National Society of Professional Engineers* and *Superior Trial Court Lawyers* to support his argument that antitrust has never allowed moral considerations to factor into its analyses of potentially anticompetitive agreements.<sup>277</sup> Throughout the DOJ's investigation, it remained unclear what their legal argument could rest on. If the automakers had agreed with California to increase emissions standards, state action immunity would likely protect the agreement,

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269. *See id.* at 24–25.

270. *Id.* at 25. There is a federal antitrust exemption for fishing cooperatives: The Fisherman's Collective Marketing Act (FCMA), 15 U.S.C. § 521. Adler argues that the exemption is too narrow, in part because members of cooperatives must “deal primarily in the products of its members.” Adler, *supra* note 267, at 39. He provides an example of a catfish processor, Delta Pride Catfish, Inc., that was denied protection under the exemption because it was in agreement with two larger firms that were “more fully integrated” and thus not “farmers” within the definition of the Act. *Id.* at 40.

271. Tabuchi & Davenport, *supra* note 6.

272. *Id.*

273. Davenport & Tabuchi, *supra* note 1.

274. *Id.*

275. *Id.*

276. Delrahim, *supra* note 15.

277. *Id.* (“[T]he Supreme Court has struck down collective efforts by engineers to enhance ‘public safety’ as well as a collective effort by criminal defense lawyers with the goal of improving quality of representation for ‘indigent criminal defendants.’”).

assuming there was ongoing state supervision.<sup>278</sup> Alternatively, if the automakers agreed with each other to petition California for higher emissions standards and California complied, the *Noerr-Pennington* doctrine would likely protect the agreement.<sup>279</sup>

At the time, no evidence seemed to exist that the automakers had agreed amongst themselves at all. In fact, California repeatedly emphasized that each company entered into a separate agreement with the state—not with one another.<sup>280</sup> Thus, many believed the investigation was improper because no agreement between the automakers ever occurred.<sup>281</sup> The DOJ dropped the investigation five months later.<sup>282</sup>

Four months after the DOJ dropped the investigation, a whistleblower from the Justice Department’s Antitrust Division testified in front of the House Judiciary Committee to notify the committee of his concerns over some recent antitrust investigations conducted by the DOJ, including the automaker investigation.<sup>283</sup> The whistleblower, John Elias, expressed his concern that the DOJ had opened the investigation in response to a series of tweets by President Trump<sup>284</sup> without considering the viability of the claim—in contravention of typical DOJ practice.<sup>285</sup> Indeed, the DOJ opened the investigation on August 22, 2019—one day after Trump’s tweets criticizing the automakers’ agreement with California.<sup>286</sup> In

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278. See Herbert Hovenkamp, *Are Regulatory Agreements to Address Climate Change Anticompetitive?*, REGUL. REV. (Sept. 11, 2019), <https://www.theregreview.org/2019/09/11/hovenkamp-are-regulatory-agreements-to-address-climate-change-anticompetitive/> [<https://perma.cc/G59W-BMBL>]; see also *supra* section I.C.

279. See Keith Goldberg, *Trump, DOJ Turn Up Heat on Calif. Car Emissions Deal*, LAW360 (Sept. 6, 2019), <https://www.law360.com/articles/1196186/print?section=California> [<https://perma.cc/LS69-HDPG>]; see also *supra* section I.C.

280. David McLaughlin & Jennifer A. Dlouhy, *Newsom Applauds End of U.S. Probe of Automakers Over California Emissions Deal*, L.A. TIMES (Feb. 7, 2020, 2:16 PM), <https://www.latimes.com/business/autos/story/2020-02-07/us-ends-antitrust-probe-of-automakers-over-california-emissions-deal> [<https://perma.cc/NRA5-N5AQ>].

281. Goldberg, *supra* note 279.

282. Davenport, *supra* note 7.

283. *DOJ Oversight Hearing*, *supra* note 8.

284. See Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 21, 2019, 7:38 AM), <https://twitter.com/realDonaldTrump/status/1164169890917433346> [<https://perma.cc/ZY2U-MWZP>]; Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 21, 2019, 5:01 PM), <https://twitter.com/realDonaldTrump/status/1164311594081247233> [<https://perma.cc/X9AG-AJSB>]; Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 21, 2019, 5:01 PM), <https://twitter.com/realDonaldTrump/status/1164311597587685376> [<https://perma.cc/LT92-LAWD>].

285. *DOJ Oversight Hearing*, *supra* note 8.

286. Ryan Beene, *DOJ Blasted for Automaker Probe Following Angry Trump Tweets*, AUTO. NEWS (June 24, 2020, 4:48 PM), <https://www.autonews.com/regulation-safety/doj-blasted-automaker-probe-following-angry-trump-tweets> [<https://perma.cc/V8NV-YYKV>].

response to the whistleblower's testimony, Assistant Attorney General Delrahim wrote a letter explaining that (1) the investigation was proper and narrowly tailored, (2) the timing of Trump's tweet was purely coincidental, and (3) political appointees are fully capable of running the Justice Department.<sup>287</sup> He also made clear that the DOJ terminated the investigation because the department found that the automakers had never entered into an agreement.<sup>288</sup>

The automakers in this case escaped prosecution, but the DOJ's inquiry alone may have made the agreement less effective than it otherwise would have been. It was reported that at least one car manufacturer backed out of the agreement as a result of the agency's scrutiny.<sup>289</sup> Additionally, California had to go out of its way to emphasize that each company reached a separate agreement with the state.<sup>290</sup> But despite the parties' efforts to ensure the deal would not attract antitrust scrutiny, the DOJ persisted in its investigation.<sup>291</sup> Based on these actions, it seems that the companies felt largely constrained by antitrust laws, struggled to get around them, and still ended up the target of a probe by the DOJ.

The automobile industry is one industry that could be transformed if antitrust regulations were relaxed even slightly. Auto emissions were the largest contributor to greenhouse gas pollution in the United States in 2017.<sup>292</sup> This is true despite efforts by lawmakers and the EPA over the last half-century to curb auto emissions.<sup>293</sup> Further, the frequent change in administration in the US means regulatory standards are constantly shifting. This makes it difficult for industries like the automobile industry to predict future needs and invest in environmentally friendly innovations.<sup>294</sup>

In the case of the automakers in California, an antitrust exemption for agreements with positive environmental effects may have persuaded more than four automakers to join the agreement. But there is, of course, a downside to this type of agreement in the auto industry: higher emissions standards could reduce consumer choice and increase the cost of

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287. Letter from Makan Delrahim, *supra* note 9, at 5–9.

288. *Id.*

289. David Shepardson, *U.S. Ends Antitrust Probe of Four Automakers over California Emissions Deal*, REUTERS (Feb. 7, 2020, 1:56 PM), <https://www.reuters.com/article/us-autos-emissions-antitrust/u-s-ends-antitrust-probe-of-four-automakers-over-california-emissions-deal-idUSKBN2012NP> [<https://perma.cc/J6TQ-2K2D>].

290. McLaughlin & Dlouhy, *supra* note 280.

291. *Id.*

292. Milman, *supra* note 218.

293. *Id.*

294. Davenport & Tabuchi, *supra* note 1.

purchasing a vehicle. This may leave some consumers unable to afford their preferred car. But given the existential threat of climate change, perhaps the long-term benefits outweigh these short-term costs.

Our understanding of both economics and climate change continues to develop. The Chicago School vision of the rational person and self-correcting markets has started to give way to the study of behavioral economics.<sup>295</sup> Even more importantly, climate change continues to worsen, and people generally agree that it poses an existential threat to our planet.<sup>296</sup> Allowing for some cooperation among competitors could help address some of our climate change concerns.

#### IV. SUSTAINABILITY AGREEMENTS WITH OR WITHOUT AN EXEMPTION

Congress has the ability to codify exemptions to antitrust laws and has done so numerous times in the past.<sup>297</sup> Congress should pass an exemption to antitrust law for sustainability agreements using the Dutch Guidelines as a model. This would allow companies to enter into agreements addressing climate change without fear of antitrust litigation. While this type of exemption may increase the risk of cartel behavior, keeping the exemption narrowly tailored and requiring quantitative evidence of sustainability benefits can mitigate those anticompetitive concerns. In the meantime, litigants should frame sustainability agreements in economic terms to survive antitrust scrutiny and can use past precedent as a model to do so.

##### A. *Congress Should Pass a Sustainability Exemption*

Congress should adopt an antitrust exemption for sustainability agreements similar to that proposed in the Netherlands.<sup>298</sup> For agreements that have anticompetitive effects, Congress can require companies to meet the four main requirements suggested by the Dutch: (1) the agreement must have sustainability benefits, (2) the ultimate consumer must receive “a fair share of those benefits,” (3) the restraint on competition must not be greater than necessary to achieve those benefits, and (4) the agreement

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295. Francesca Gino, *The Rise of Behavioral Economics and Its Influence on Organizations*, HARV. BUS. REV. (Oct. 10, 2017), <https://hbr.org/2017/10/the-rise-of-behavioral-economics-and-its-influence-on-organizations> [<https://perma.cc/AGP2-ELRZ>].

296. Moira Fagan & Christine Huang, *A Look at How People Around the World View Climate Change*, PEW RSCH. CTR. (Apr. 18, 2019), <https://www.pewresearch.org/fact-tank/2019/04/18/a-look-at-how-people-around-the-world-view-climate-change/> [<https://perma.cc/6AUQ-XA63>].

297. See *supra* section I.C.

298. See *supra* section II.B.

must not eliminate “a substantial part of the products/services in question.”<sup>299</sup>

While the broad proposal from the Netherlands represents the most ideal solution, Congress could change the exemption in two ways that would be more consistent with current precedent and also limit the risk of cartel behavior. First, the exception could require companies to always have quantitative data showing a certain threshold of environmental benefits, regardless of market share. Requiring quantitative data that shows benefits to a certain threshold could reduce arbitrary results. It could also help to partially ensure that the agreement is not a cover for a cartel in that the environmental impacts would have to be real, not just suggested or purported.

Second, Congress could limit the sustainability benefits analysis to the industry in question. This type of limitation may severely limit the types of agreements companies are permitted to enter into because the agreements would have to have an impact on the specific industry. But it would be closer in line with Supreme Court precedent disallowing procompetitive justifications outside of the industry in question.<sup>300</sup>

Take the automakers’ agreement as an example of how this kind of analysis could work. Imagine that the four car manufacturers had agreed amongst themselves to increase emissions standards rather than each independently conferring with California. Under current antitrust law, it is unlikely that this agreement would be illegal per se because it does not explicitly fix prices or reduce quantity. But under a rule of reason or quick look analysis, the agreement would almost certainly fail. Courts would first examine whether the automakers have market power and whether the agreement has anticompetitive effects. The four automakers at issue here likely have market power,<sup>301</sup> and it would be fairly simple for the government to argue that the agreement would have anticompetitive effects—the agreement could increase the price of automobiles and reduce the number of options on the market. Assuming the court found

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299. COMPETITION LAW AND SUSTAINABLE GROWTH, *supra* note 160, at 2.

300. *See, e.g.*, *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 370 (1963) (holding procompetitive justifications in another market cannot justify anticompetitive effects in the relevant market).

301. *See* Patrick Manzi, *Market Beat*, NAT’L AUTO. DEALERS ASS’N (Apr. 2019), <https://www.nada.org/WorkArea/DownloadAsset.aspx?id=21474858178> [<https://perma.cc/FN3X-7FAN>] (showing the four automakers’ market share is likely around 30%). One major factor in determining whether a group of firms have market power in their relevant market is whether the firms have a substantial share of the market. *See* *Retrophin, Inc. v. Questcor Pharms., Inc.*, 41 F. Supp. 3d 906, 916 (C.D. Cal. 2014). “[M]arket power exists whenever prices can be raised above the levels that would be charged in a competitive market.” *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27 n.46 (1984). Measuring a firm’s or group of firms’ market power is complex and beyond the scope of this Comment.

anticompetitive effects, the automakers would then have the opportunity to put forth procompetitive justifications. Under current antitrust law, it is hard to imagine what those procompetitive justifications could be. Increased innovation may represent the most effective argument, but because the automakers would not actually add a new type of product to the market, that argument would likely be unsuccessful.

In contrast, if Congress granted an exemption similar to the Dutch guidelines, such an agreement could survive antitrust scrutiny if it met the four requirements. First, the companies would have to show, quantitatively, that the agreement would result in lower CO<sub>2</sub> emissions. Given the evidence of vehicles' sizeable contribution to CO<sub>2</sub> emissions,<sup>302</sup> that data likely exists. Second, the automakers would have to show that their consumers would equitably share in the benefits. Consumers would certainly stand to benefit from this agreement. Not only could reduced auto emissions improve air quality and help slow climate change,<sup>303</sup> but car consumers could save money on gas.<sup>304</sup> Third, as in current rule of reason analysis, the companies would have to show that the agreement was no more restrictive than necessary to achieve the benefits in question. This may be a fact-specific inquiry, but with some further guidance, companies could narrowly tailor their agreements to satisfy the third factor.

The fourth factor—whether a substantial number of products would be eliminated—would likely be the most difficult for the automakers to meet. Analyzing this factor may depend on the specific terms of the agreement. But, again, companies may be able to craft agreements to satisfy this factor. For example, if the concern was that increasing auto emissions standards would eliminate nearly all pickup trucks from the market, the agreement could be crafted with different emission standards for sedans, SUVs, vans, and pickup trucks. Having guidelines like those proposed in the Netherlands would allow companies to craft their agreements to meet the four required factors while still allowing them to work together to address climate change.

The most complicated part of implementing this exemption would be the way in which courts could weigh “public interest” factors with economic ones. The benefit of the Dutch model is that it builds in less

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302. See Milman, *supra* note 218.

303. David L. Greene, Charles B. Sims & Matteo Muratori, *Two Trillion Gallons: Fuel Savings from Fuel Economy Improvements to US Light-Duty Vehicles, 1975–2018*, ENERGY POL'Y, July 2020, at 1 (estimating that better fuel economy in automobiles in the United States led to “a reduction of 17 billion tons of CO<sub>2</sub>” between 1975 and 2018).

304. *Id.* (estimating that better fuel economy in automobiles in the United States led to \$4.9 trillion in fuel cost savings between 1975 and 2018).

arbitrary standards than those in the South African and Australian models because of its focus on quantitative data. In fact, the Dutch model fits quite well within the rule of reason analysis currently used by American courts because it could function as a burden-shifting analysis just like the rule of reason. To further address the arbitrariness problem, the exemption could require the sustainability benefits to meet a certain threshold, such as reducing carbon emissions by a certain percentage. In contrast, a simple public interest test would force judges to weigh sustainability against one of the main purposes of antitrust law—preventing unfair competition. Using the Dutch model avoids some of the arbitrariness inherent in the public interest test analysis.

Not only could this exemption fit cleanly into current antitrust law, but it also could be crafted to comply with the American Bar Association’s guidelines for creating antitrust exemptions.<sup>305</sup> First, Congress could effectively consider the potential impact of the exemption on consumer welfare given the wealth of information on the effects of carbon emissions.<sup>306</sup> Second, by including the two alterations mentioned above, Congress could craft a narrow exemption to provide that “competition is reduced only to the minimum extent necessary.”<sup>307</sup> Third, the goals of the exemption—curbing climate change—almost certainly outweigh the goals of antitrust law because climate change amounts to an existential crisis that will annihilate the planet if left unaddressed. And finally, Congress could easily include a sunset provision in the exemption.

Although addressing climate change is vital to the future of the world as we know it, some will likely argue that antitrust law is not the appropriate avenue for tackling the problem. While companies could plausibly make substantial progress in the climate crisis if allowed to enter into agreements such as the one entered into by the automakers in California, permitting agreements among competitors comes with a risk of increased cartel behavior.<sup>308</sup> But if we fail to curb climate change, industry will cease to exist altogether, along with the rest of our planet.

It could also be politically challenging for Congress to pass such an exemption. However, a bill aimed at protecting climate change agreements from the reaches of antitrust law may be more plausible than an omnibus climate change initiative. The bill would not involve spending money or additional restrictions on businesses, which could make it easier to pass than other climate change laws. Thus, even if antitrust law was not

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305. See *supra* notes 84–85, at 38 and accompanying text.

306. See GLOBAL WARMING, *supra* note 223, at 7–10.

307. DOJ ROUNDTABLE, *supra* note 84, at 38.

308. See *supra* section I.A.

originally intended to encompass moral or social considerations, the dire need for action on carbon emissions, and the greater feasibility of an antitrust exemption, indicate that antitrust law may, in fact, be a fitting avenue for combatting climate change.

*B. Litigants Should Frame Sustainability Agreements in Economic Terms*

Absent a congressional exemption, litigants should frame their sustainability agreements in economic terms to effectively survive antitrust scrutiny. Courts widely agree that non-economic factors cannot be considered in antitrust analysis, but litigants could attempt to frame climate change considerations as economic in nature. Cases like *NCAA*, where the litigants framed the uniqueness of the NCAA organization and its capitalization of amateurism in economic terms, should be used as models for how to effectively frame sustainability agreements as economic in nature.<sup>309</sup>

To better explain this type of framing, imagine four coffee shops, one on each corner of a busy intersection. The four companies want to invest in sustainably sourced coffee, but it is more expensive than the coffee they each currently buy. Loyal consumers, even if prices increased at one shop and not others, would continue to frequent their favorite shop—valuing aesthetic, crafty baristas, or something else over price. Thrifty consumers would switch to a less expensive shop. But environmentally conscious consumers may choose to switch to the more environmentally friendly shop—valuing sustainable practices over the increased cost. To avoid losing customers, the four shops agree to all purchase the sustainably sourced coffee.

This type of agreement would be highly suspect under a traditional antitrust analysis, but not per se unlawful. If challenged, the shops could attempt to frame the sustainability benefits in an economic way. For example, the shops could argue that coffee trees may go extinct if the beans are not sustainably sourced. Thus, the entire coffee industry runs the risk of disappearing if they do not make environmentally conscious decisions. The coffee shops could even cite to scientific studies showing the risk to the coffee industry of current farming practices to support their argument.<sup>310</sup> This type of legal approach is not guaranteed to work, though

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309. See *supra* section II.C.

310. See, e.g., Aaron P. Davis, Helen Chadburn, Justin Moat, Robert O'Sullivan, Serene Hargreaves & Eimear Nic Lughadha, *High Extinction Risk for Wild Coffee Species and Implications for Coffee Sector Sustainability*, SCI. ADVANCES, Jan. 16, 2019, at 2 (explaining that at least 60% of coffee species are at risk of extinction, threatening the viability of the coffee sector).

it would fall closely in line with cases like *NCAA*, where the court viewed an arguably social consideration—framed in economic terms—as a procompetitive justification. Given the lack of precedent in the climate change context, the result of such an argument may depend heavily on the court and the effectiveness of the economic framing.

Capitalizing on Supreme Court precedent like *NCAA* could present a strong framework for litigants seeking to survive antitrust scrutiny. Framing an environmental agreement as economically procompetitive may help the agreement survive difficult case law such as *National Society of Professional Engineers* and *Superior Court Trial Lawyers* absent an explicit congressional exemption. In dealing with antitrust challenges to sustainability agreements, litigants should highlight the economic effects that climate change is likely to have on the relevant market and industry.

## CONCLUSION

This Comment has emphasized the importance of allowing corporate collaboration on climate change while maintaining the legitimate goals of antitrust law. Courts have historically been the primary driver for change in antitrust law, but courts are not best suited to address sustainability agreements because of a long line of precedent disallowing moral and ethical considerations in antitrust jurisprudence. Thus, Congress should create an exemption in antitrust law for agreements among companies aimed at curbing climate change. Congress should use the new Dutch guidelines to craft an antitrust exemption for sustainability agreements that is narrowly tailored to mitigate the risk of cartel behavior. Absent a sustainability exemption, companies who find themselves on the wrong side of an antitrust challenge should frame the agreement in economic terms, emphasizing the impact climate change will have on their specific market and industry. Perhaps antitrust law will one day evolve to encompass environmental concerns but, in the meantime, litigants should not hesitate to underscore the extreme economic effects climate change is destined to have on many industries.