TRADEMARKS AS COMPETITION LAW: THE ANTI-ANTITRUST

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[Thank you for taking the time to read and share any thoughts that you have. This is largely just a literature review so far along with my core ideas, in order to receive midpoint feedback and course correct as needed. Specific policy suggestions are described briefly at the end.]

Trademark law is frequently described as a subspecies of competition law,[1] having an overarching purpose of promoting competition in the marketplace.[2] But market competition is not, by itself, capable of serving as a unified or well-defined purpose. To start, "promoting competition" is inherently ambiguous; there are many dimensions of competition, with tensions and tradeoffs between strengthening one versus another. Common examples include competition over price versus quality,[3] competition within a brand versus between brands,[4] and competition in the short run

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[1] *See, e.g.*, United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 97 (1918) ("The law of trade-marks is but a part of the broader law of unfair competition . . . ."); S. Rep. No. 1333, 79th Cong., 2d Sess., 1946 U.S.C.C.A.N. 1275 (reporting the bill that would become the Lanham Act, stating that "[u]nfair competition is the genus of which trademark infringement is one of the species"). The titles of leading treatises in the field are particularly telling. *See, e.g.*, 1 CALLMANN ON UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES § 1:1 (4th ed. 2023) (explicitly labeling trademark law part of the "positive law of business competition"); 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 17:24 (4th ed.).
at § 1:10 (similarly labeling violations of trademark law as "examples of unfair competition").

[2] *See, e.g.*, Matal v. Tam, 582 U.S. 218, 225 (2017) ("'[N]ational protection of trademarks is desirable,' we have explained, 'because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation.'") (quoting San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 531 (1987)); Qualitex Co. v. Jacobson Prod. Co., 514 U.S. 159, 164 (1995) ("[T]rademark law . . . seeks to promote competition by protecting a firm's reputation . . . ."); H.R. Rep. No. 219, 79th Cong. 1st Sess. 3 (1945) (reporting the bill that would become the Lanham Act, stating that "[t]rademarks, indeed, are the essence of competition, because they make possible a choice between competing articles by enabling the buyer to distinguish one from the other. . . . This is the end to which this bill is directed."); Christopher Buccafusco et al., *Competition and Congestion in Trademark Law*, 102 TEXAS L. REV. 437, 440 (2024); Daniel M. Lifton, *Towards a Trademark Rule of Reason*, N.Y.U. J. INTELL. PROP. & ENTER. L. 222, 226 (2020) ("The ultimate policy goal of trademark law is to facilitate the functioning of a competitive marketplace.").

[3] *See, e.g.*, Matthew Sipe, *Covering Prying Eyes with an Invisible Hand: Privacy, Antitrust, and the New Brandeis Movement* 36 HARV. J.L. & TECH. 359, 378-79 (2023) ("This is not, in other words, the straightforward case of a producer switching to objectively inferior inputs but charging the same old price because it has no rivals, thereby increasing its profits at the expense of consumer welfare. When a firm instead increases its price and uses it to enhance quality, it may just as easily be in response to the presence of competitive threats.").

[4] *See, e.g.*, United States v. Topco Assocs., Inc., 405 U.S. 596, 612 (1972) ("Like territorial restrictions, limitations on customers are intended to limit intra-brand competition and to promote inter-brand competition.").

versus the long run.[5] Moreover, a greater level of competition is not always desirable—it can create real harm under certain conditions. For example, when economies of scale are so strong as to create a natural monopoly, increasing competition may only lead to higher prices or industry collapse.[6] Trademark law does not explicitly grapple with any of these complexities of competition, it merely gestures at the term from time to time. Thus, commentators reasonably conclude that "trademark law lacks a sufficiently robust theory of legitimate competition against which particular actions can be judged."[7]

But the orthodox theory of trademark law—that of search costs and quality incentives[8]—is no more robust in reality. The orthodox theory does not provide trademark law's actual limiting principles: the most significant outer boundaries, those prohibiting trademarks on generic terms[9] or functional features,[10] resist explanation by

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[5] Patent law embodies this tradeoff, creating short-term monopolies so as to incentivize greater competition over innovation in the long run. *See* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146 (1989) ("From their inception, the federal patent laws have embodied a careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy.").

[6] Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548 (1969) ("If the entire demand within a relevant market can be satisfied at lowest cost by one firm rather than by two or more, the market is a natural monopoly . . . . If such a market contains more than one firm, either the firms will quickly shake down to one through mergers or failures, or production will continue to consume more resources than necessary. In the first case competition is short-lived and in the second it produces inefficient results."); Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974) ("[P]ublic utility companies are natural monopolies created by the economic forces of high threshold capital requirements and virtually unlimited economy of scale. . . . Regulation was superimposed on such natural monopolies as a substitute for competition . . . ."); RICHARD SCHMALENSEE, THE CONTROL OF NATURAL MONOPOLIES 4 (1979).

[7] Mark P. McKenna, *(Dys)Functionality*, 48 HOUS. L. REV. 823, 824 (2012); Christine Haight Farley, *The Lost Unfair Competition Law*, 110 TRADEMARK REP. 739, 745 (2020) ("The idea of unfair competition being the genus or larger category within which we find the specific law of trademarks, suggests that there is a defined category of protections that is more expansive than trademark law. But this category has never been defined in U.S. law. Its boundaries have never been demarcated and its location has never been fixed.").

[8] *See, e.g.*, William Landes & Richard Posner, *The Economics of Trademark Law*, 78 TRADEMARK REP. 267, 276-77 (1988) ("[T]rademarks lower search costs and foster quality control . . . ."); Stacey Dogan & Mark Lemley, *A Search-Costs Theory of Limiting Doctrines in Trademark Law*, 97 TRADEMARK REP. 1223, 1226 (2007) ("By protecting established trademarks . . . [b]oth sellers and buyers benefit . . . Sellers benefit because they can invest in goodwill with the knowledge that others will not appropriate it. Consumers benefit because they do not have to do exhaustive research or even spend extra time looking at labels before making a purchase; they can know, based on a brand name, that a product has the features they are seeking."); Qualitex Co. v. Jacobson Prod. Co., 514 U.S. 159, 163–64 (1995) ("In principle, trademark law, by preventing others from copying a source-identifying mark, 'reduce[s] the customer's costs of shopping and making purchasing decisions,' . . . for it quickly and easily assures a potential customer that this item—the item with this mark—is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past. At the same time, the law helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product.").

[9] United States Pat. & Trademark Off. v. Booking.com B. V., 591 U.S. 549, 551 (2020) ("A generic name—the name of a class of products or services—is ineligible for federal trademark registration.").

[10] *Id.* at 559 n.5 ("[F]unctional features cannot receive trademark protection . . . .").

the orthodox theory alone. Granting trademark protection over generic terms drops search costs to near-zero (by collapsing a market into a single competitor) and granting trademark protection over functional features establishes an incentive to invest in their development (analogous to patent law).[11] Nor has the orthodox theory halted trademark law's considerable expansion: post-sale confusion[12] and dilution[13] are now longstanding and well-recognized causes of action with effectively no grounding in the orthodox theory at all. The theoretical "confusion" in post-sale confusion is unlikely to occur in reality,[14] with courts instead effectively protecting the status and exclusivity of goods—irrespective of search costs or quality incentives.[15] Dilution doctrine,

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[11] *See* Stacey Dogan & Mark Lemley, *A Search-Costs Theory of Limiting Doctrines in Trademark Law*, 97 TRADEMARK REP. 1223, 1241 (2007) ("The genericness [and] functionality . . . doctrines present 'hard cases' precisely because there are search cost rationales on both sides of the argument. . . . [T]he courts have resolved these hard cases in favor of the defendant, withdrawing trademark protection entirely in cases . . . where it ensures competitive access to particular product markets.").

[12] Lanham Act § 32(1), 15 U.S.C.A. § 1114(1), amended 1962, 76 Stat. 769 (eliminating language that required confusion specifically on the part of "purchasers . . . of such goods and services"); *see, e.g.*, Marathon Mfg. Co. v. Enerlite Products Corp., 767 F.2d 214, 221 (5th Cir. 1985) ("Contrary to Enerlite's insistence, Marathon need not prove confusion on the part of actual customers. Prior to 1962, § 32(1)(a) of the Lanham Act . . . required confusion, mistake or deception by 'purchasers as to the source or origin of such goods or services.' In 1962, the quoted words were deleted . . . specifically to allow any kind of confusion in support of a trademark infringement action."); *see, e.g.*, Ferrari S.P.A. v. Roberts, 944 F.2d 1235, 1245 (6th Cir. 1991) ("Since Congress intended to protect the reputation of the manufacturer as well as to protect purchasers, the Act's protection is not limited to confusion at the point of sale. Because Ferrari's reputation in the field could be damaged by the marketing of Roberts' replicas, the district court did not err in permitting recovery despite the absence of point of sale confusion.").

[13] 15 U.S.C. § 1125(c)(1) (protecting "the owner of a famous mark" from unauthorized use "that is likely to cause . . . blurring or . . . tarnishment"); *see generally* Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (1996) (codified in scattered sections of 15 U.S.C.); Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat. 1730 (codified in scattered sections of 15 U.S.C.).

[14] *See* Kal Raustiala & Christopher Jon Sprigman, *Rethinking Post-Sale Confusion*, 108 TRADEMARK REP. 881, 884 (2018) ("The observer must know the attributes of Brand well enough to see them in the purchaser's Not Brand good. But she must not be so sophisticated that she can see any differences in the goods' appearance that may otherwise point out to her that Not Brand is really just a look-alike. Too little sophistication on the part of the observer, and she misses the source-identifying features. Too much, and she spots the knockoff."); Connie Davis Powell, *We All Know It's a Knock-Off! Re-Evaluating the Need for the Post-Sale Confusion Doctrine in Trademark Law*, 14 N.C. J.L. & TECH. 1, 4 (2012) ("Purchasers of high-end goods are less likely to be confused in the post-sale context because of their keen awareness of their preferred brands and their knowledge of the existence and prevalence of counterfeit luxury goods in the marketplace.").

[15] Jeremy Sheff, *Veblen Brands*, 96 MINN. L. REV. 769, 774 (2012) ("Status confusion is the legal theory that most often serves to justify liability against the manufacturers of knockoff luxury branded goods, even though the purchasers of those goods know full well what they are buying."); Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 855 (2010) ("To the extent that these theories make little effort to ground themselves in any notion of search costs, they represent the clearest expression of courts' essentially normative commitment to policing the sumptuary code. . . . In a surprisingly persistent line of cases, . . . [courts] hold that it is simply not fair for a person to acquire the prestige associated with a good . . . without paying the customary price."); *see, e.g.*, Hermes International v. Lederer de Paris Fifth Avenue, Inc., 219 F.3d 104 (2d Cir. 2000); *see e.g.*, Empresa Cubana del Tabaco v. Culbro Corp., 70 U.S.P.Q.2d 1650, 1689 (S.D.N.Y. 2004) ("[T]he consumer may acquire the prestige of smoking a Cuban [cigar] without actually purchasing one."); Mastercrafters

meanwhile, dispenses with even the pretense of preventing consumer confusion or reputational harm,[16] making it only harder still to justify on the traditional basis. Perhaps most troublingly, the orthodox theory falters even in trademark law's heartland. Mark owners' broad power to exclude through likelihood-of-confusion analysis actively hinders the flow of information from anyone else, even when it is accurate.[17] At the same time, owners' nearly unfettered discretion over their marks' use, nonuse, and transfer allows them to conceal material information from consumers when it is in their self-interest to do so.[18] Put differently, trademarks themselves grant considerable power to *raise* search costs and *evade* reputational constraints.

For at least these reasons, commentators have suggested—usually critically—that trademark law has come to resemble a pure property-rights regime, rather than a tool for regulating information in the marketplace.[19] This may be accurate in many

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Clock & Radio Co. v. Vacheron & Constantin-LeCoultre Watches, Inc., 221 F.2d 464, 466 (2d Cir. 1955) ("This goes to show at least that some customers would buy plaintiff's cheaper clock for the purpose of acquiring the prestige gained by displaying what many visitors at the customers' homes would regard as a prestigious article."); Acad. of Motion Picture Arts & Scis. v. Creative House Promotions, Inc., 944 F.2d 1446, 1457 (9th Cir. 1991) ("[T]he Oscar's distinctive quality as a coveted symbol of excellence, which cannot be purchased from the Academy at any price, is threatened.").

[16] 15 U.S.C. § 1125(c)(1) (stating that dilution is actionable "regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury").

[17] *See generally* Deven R. Desai, *An Information Approach to Trademarks*, 100 GEO. L.J. 2119, 2120 (2012) ("[T]rademark law's view of information, source, and sender privileges the mark holder's messages as the one and only—the pure source—for all messages about the mark and treats other communications about the mark as noise. This view reduces the ability for competitors to challenge a mark holder's position in the marketplace and for active consumers to question or celebrate the mark holder's goods, services, or business practices.").

[18] *See generally* Matthew Sipe, *Trademasks*, N.C. L. REV. (forthcoming 2025) ("It increases search costs, rather than reducing them, when a firm adopts a new mark to hide its bad reputation or keeps an old mark despite substantial change. A consumer that wants to avoid brands that have dropped their standards, outsourced, or become more harmful to society must perform new research with every single purchase, rather than relying on marks to communicate product qualities. Likewise, it reduces the incentive for firms to cultivate or maintain a positive reputation when they can simply acquire someone else's—whether the transfer of goodwill is deserved or not—or cash out on a legacy via unwary consumers. Naturally, it also weakens the incentive to avoid creating a negative reputation when any firm is free to abandon its old mark and start afresh with a new one.").

[19] *See, e.g.*, Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1840 (2007) ("Doctrinal innovations like dilution . . . are illegitimate, many commentators suggest, because they reflect a property-based conception of trademarks that is inconsistent with trademark law's core policies . . . ."); Deven R. Desai, *The Chicago School Trap in Trademark: The Co-Evolution of Corporate, Antitrust, and Trademark Law*, 37 CARDOZO L. REV. 551, 553 (2015) ("Dissatisfaction with trademark law has only grown . . . with critics arguing that trademark rights have expanded too far in protecting right holders' interests, have become property rights, and that trademark law does not regulate competition well."); Irene Calboli, *Trademark Assignment "With Goodwill": A Concept Whose Time Has Gone*, 57 FLA. L. REV. 771, 778 (2005) ("[Courts] increasingly protect trademarks beyond consumer welfare . . . adopt[ing] an approach based on property rights . . . ."); Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 405-11 (1990); Michael Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 19-23 (2004); Adam Mossoff, *Trademark as a Property Right*, 107 KENTUCKY L.J. 1 (2018) (recognizing the consensus view among "[m]ost commentators," that

senses, from the trend towards maximum trademark alienability[20] to the almost entirely unregulated nature of certification marks,[21] but it too is an incomplete story. Property rights themselves still rely on some underlying justification, especially the less intuitive property rights that are created in intangibles. Theories of desert via labor,[22] autonomy via personhood,[23] and justice via distribution[24] are only a few examples of philosophies that step in to provide exactly that kind of justification. Moreover, though easily caricatured, property rights are always circumscribed in myriad ways—and the nature of any limit is ultimately determined and explained by the purpose for the right in the first place. In short, there is still a bottom-line rationale to be found somewhere, even if trademarks are correctly viewed as a species of property.

Although trademark law has not explicitly engaged with the complexities and tradeoffs of promoting competition, a competition-law lens can provide a surprisingly clear vision of trademark law and its unusual contours. Antitrust law offers some help in constructing such a lens, precisely because it *has* engaged with those complexities and tradeoffs over the course of its long, winding history. To start, that history provides competing (so to speak) theories of what it might mean to promote

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trademarks should be "primarily a regulatory entitlement" and retreat from propertization, but dissenting from that view via Lockean labor theory).

[20] *See* Mark Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1709 (1999) ("[One] way in which trademarks are increasingly being treated as property involves the sale and licensing of trademarks without the accompanying business or goodwill of the company that developed them. . . . If anything, assignments in gross are vehicles for adding to consumer confusion, not reducing it.").

[21] *See* Jeanne C. Fromer, *The Unregulated Certification Market*, 69 STAN. L. REV. 121, 166 (2017) ("[C]ertification standards, both as depicted in certification mark registrations and as deployed in practice, are frequently kept flexible, vague, or incomprehensive . . . . When certifiers then deploy the standard in ways inconsistent with consumer perceptions, which is possible due to the standard's flexibility, . . . the values of consumer protection and promotion of competition . . . are both undermined"); Margaret Chon, *Certification and Collective Marks in the United States* at 313, in CAMBRIDGE HANDBOOK ON INTERNATIONAL AND COMPARATIVE TRADEMARK LAW (Jane Ginsburg & Irene Calboli, eds., 2020) (observing that, once a certification mark is successfully registered, "neither the USPTO nor any other public agency . . . monitors whether the stated standards continue to be accurate; it is entirely up to a certification holder (or its licensees) to control the quality of these standards").

[22] *See* JOHN LOCKE, TWO TREATISES ON GOVERNMENT 185 (3d ed. 1698) ("The Labour of his body and the Work of his hands, we may say, are properly his. . . And will anyone say he had no right to those acorns or apples he thus appropriated because he had not the consent of all mankind to make them his?").

[23] *See* ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 72-73 (2011) ("People have a desire to carry out projects in the world. Sometimes, those projects require access to and control over external objects. . . . For Kant, this desire must be given its broadest scope, to promote the widest range of human choice, and therefore human projects. . . ."); Frederick Rauscher, *Kant's Social and Political Philosophy*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY 15 (Edward N. Zalta, ed., 2017) ("[Ownership], then, is required by right in order for free beings to be able to realize their freedom by using objects for their freely chosen purposes.").

[24] *See* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 138 (2001) (contrasting "private personal property" against the "right of private property in productive assets," which must only be granted so as to provide the greatest benefit to the least advantaged).

competition at all. From the early to mid-1900s, the dominant theory was essentially populism, defined by a sharp distrust of any concentration of power (especially economic power), as well as an abiding concern with protecting individual liberty through market opportunity.[25] This era of big-is-bad eventually yielded to the Chicago School by the late 1900s, which found its grounding principle for competition in the economic concept of efficiency—"provid[ing] society with the maximum output that can be achieved at any given time with the resources at its command."[26] Further refinement and debate has led to the modern era of antitrust, where efficiency has been replaced by maximizing consumer welfare as the overarching goal.[27] Within the last few years, some politicians and policymakers have argued for a return to antitrust's original, populist moorings, but the longevity and ultimate success of this movement remains to be seen.[28]

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[25] *See, e.g.*, ANDREW I. GAVIL, JONATHAN B. BAKER & WILLIAM KOVACIC, ANTITRUST LAW IN PERSPECTIVE 69 (3d ed. 2017) ("This early association of antitrust with populist themes has remained an enduring feature of public debate over antitrust policy, and remains an important source of the continuing popular appeal of antitrust enforcement, especially against large firms."); 21 CONG. REC. 2456–57 (1890) (statement of Sen. Sherman) ("If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade . . . ."); United States v. Aluminum Co. of Am., 148 F.2d 416, 428 (2d Cir. 1945) ("[G]reat industrial consolidations are inherently undesirable, regardless of their economic results . . . because of the helplessness of the individual before them."); Brown Shoe Co. v. United States, 370 U.S. 294, 345 (1962) (emphasizing the need "to promote competition through the protection of viable, small, locally owned businesses," even if "occasional higher costs and prices might result from the maintenance of fragmented industries and markets."); Louis D. Brandeis, *A Curse of Bigness*, HARPER'S WKLY., Jan. 10, 1914, at 18.

[26] Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 365 (1965); *see also* ROBERT H. BORK, THE ANTITRUST PARADOX (1978); GAVIL ET AL., *supra* note 25, at 72 (noting Frank Easterbrook, Douglas Ginsburg, Richard Posner, Antonin Scalia, and Stephen Williams as other particularly prominent Chicago School judges and justices); Douglas H. Ginsburg, *An Introduction to Bork (1966)*, 2 COMPETITION POL'Y INT'L 225, 227 (2006) (observing that efficiency as the core principle of the antitrust laws went from an entirely "novel" and heterodox theory in the 1960s to "the conventional wisdom of the federal courts" by the late 1970s).

[27] *See* Herbert Hovenkamp, *Antitrust in 2018: The Meaning of Consumer Welfare Now*, 6 WHARTON PUB. POL'Y INITIATIVE ISSUE BRIEFS, no. 8, Sept. 18, 2018, at 1, 1; Sipe, *supra* note 3, at 386 ("Put differently, antitrust law today is largely agnostic about efficiency gains that benefit only producers and are not passed along to consumers. Thus, under the modern consumer welfare standard, antitrust law has tried to promote essentially two things in any given market: high output and low prices.").

[28] *See, e.g.*, Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 717 (2017) (using Amazon's low prices and high output—but overwhelming market share—as a case study in the shortcomings of a consumer welfare standard); Greg Ip, *Antitrust's New Mission: Preserving Democracy, Not Efficiency*, WALL ST. J. (July 7, 2021), https://www.wsj.com/articles/antitrus ts-new-mission-preserving-democracy-not-efficiency-11625670424; *Questions for the Record: Jonathan Kanter, Nominee to Be Assistant Attorney General of the Antitrust Division Before the S. Comm. on the Judiciary*, 117th Cong. 1 (2021), https://www.judiciary.senate.gov/imo/media/doc/Kanter%20Responses%20to%20Q uestions%20for%20the%20Record.pdf (statement of Jonathan Kanter, Then-Nominee Assistant Att'y Gen.) ("In the past, I have voiced concerns that the application of the consumer welfare standard has been inconsistent, vague, and insufficient to keep pace with market realities. Effective antitrust enforcement requires a deep understanding of market realities and facts to determine whether the conduct at issue harms competition and the competitive process."); TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 9-10 (2018); AMY KLOBUCHAR, ANTITRUST:

Whether pursuing overall efficiency or consumer welfare, antitrust law functionally proceeds by solving certain kinds of market failures: unilateral abuses of consumers via market power, and collusive behavior that attempts to approximate the same.[29] Both are fundamentally similar, in that they are situations where an absence of rivals causes harm. The lack of effective competitors—either because the market is concentrated or because would-be competitors are instead cooperators—creates an opportunity to (most straightforwardly) price above marginal cost, which tends to transfer surplus away from consumers to the firms and create an overall deadweight loss.[30] In paradigmatic cases of monopolist pricing or illicit price-fixing, there is no serious tension between an efficiency and a consumer welfare standard; deadweight loss and surplus transfer are both happening.[31] The difference between the two standards arises in hard cases where there are cost savings to be had by restricting output. If the cost savings are great enough, net efficiency may be increased, but consumer surplus is still transferred away to producers due to the restricted output (and, presumably, higher price).[32] A pure efficiency standard would tolerate such moves, whereas a consumer welfare standard would not. Thus, under modern antitrust doctrine, cost savings can be a defense to otherwise suspect conduct, but only *with* a plausible theory of how such savings ultimately inure to the benefit of consumers.[33]

TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE 284 (2022) ("Our nation's antitrust laws should be functional and promote robust competition. Statutory improvements to those laws should highlight a return to curbing . . . behavior that leads to market concentration and consolidation.").

[29] *See* 15 U.S.C. § 1 (making illegal "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce"); 15 U.S.C. § 2 (making it illegal to "monopolize, or attempt to monopolize, or . . . conspire . . . to monopolize.").

[30] *See generally* GAVIL ET AL., *supra* note 25, at 47-51

[31] *See* GAVIL ET AL., *supra* note 25, at 80-83.

[32] *Id.*; *see also* Herbert Hovenkamp, *Antitrust in 2018: The Meaning of Consumer Welfare Now*, WHARTON PUBLIC POLICY INITIATIVE (2018), https://repository.upenn.edu/cgi/viewcontent.cgi?article=1060&context=pennwh artonppi ("This standard dominated antitrust policy in the 1980s and early 1990s, and it is best identified with Robert Bork and his important work, The Antitrust Paradox, in which he permits efficiency claims as an antitrust defense, even when the challenged practice leads to higher prices and causes consumer harm."); William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 21-22 ("Such an approach generally would disregard vertical contractual restraints, vertical and conglomerate mergers, and most claims of illegal monopolization or attempted monopolization. Chicago School scholars typically propose that the attainment of economic efficiency be the exclusive basis for the design and application of antitrust rules.").

[33] *See* FED. TRADE COMM'N & DEP'T OF JUST., 2023 MERGER GUIDELINES at 34 ("Any benefits claimed by the merging parties are cognizable only if they do not result from the anticompetitive worsening of terms for the merged firm's trading partners."); *see, e.g.*, F.T.C. v. University Health, Inc., 938 F.2d 1206, 1223 (11th Cir. 1991) ("[A] defendant who seeks to overcome a presumption that a proposed acquisition would substantially lessen competition must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers.").

In other words, antitrust law demands that firms compete against each other in certain ways. Broadly speaking, it exists in service to overall efficiency, but with tradeoff cases resolved in favor of the consumer. Through this lens, trademark law is revealed to be the functional inverse. That is, its principal function is to *forbid* firms from competing against each other in certain ways. If one firm has rights in a trademark or trade dress, then other firms are prevented from selling goods that incorporate the same language, device, or design. Only Nike can sell NIKE shoes, and the Coca-Cola Company has an absolute monopoly on COCA-COLA soda. All other firms need to sell something else—say, ADIDAS shoes and PEPSI soda. Trademark law, in other words, effectively creates (semi-permeable) market divisions among firms, giving each rightsholder a zone of exclusivity in which they can face no licit competition.[34] With trade dress in particular, a feature may be both highly distinctive and—independently—highly desirable for competitors to use.[35] But the exclusivity granted by trademark law can be extremely powerful, even if its fulcrum is a mere word or logo. When brand differentiation is sufficiently high, other firms' products will not be serious substitutes, even if they are very similar in composition and quality.[36] For many types of goods, moreover, the branding simply *is* the thing being consumed in the first place, making substitution inherently difficult.[37] The facets of trademark law beyond traditional likelihood-of-confusion analysis enlarge the

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[34] *See* Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367, 368 (1999) ("[T]rademark protection can effectively cede control over distinct product markets to individual producers and thereby generate for trademark owners the downward sloping demand curve of a monopolist, with its associated monopoly rents and deadweight losses."); *see generally* EDWARD CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION 204 (1933).

[35] Indeed, this is a core justification for functionality doctrine. In practice, however, functionality doctrine does not actually prohibit trademark eligibility for numerous product features that provide a competitive advantage—including cheaper design choices, organizational tools, and interoperability checks. *See generally* Matthew Sipe, *A Fragility Theory of Trademark Functionality*, 169 U. PA. L. REV. 1825, 1858-73 (2021).

[36] *See* Mark A. Lemley & Mark P. McKenna, *Is Pepsi Really a Substitute for Coke? Market Definition in Antitrust and IP*, 100 GEO. L.J. 2055, 2081 (2012) ("Products and brands today, however, often are far more significantly differentiated. . . . Neuroscience research shows that brands convey emotional content as well as information about product characteristics, and that people react to their favorite brands in ways that mirror their reaction to religious icons. This is why, despite the fact that people tend to prefer Pepsi over Coke in blind taste tests, those exposed to the brand names during the test tend to prefer Coke: exposure to the Coca-Cola brand stimulates a region of the brain not stimulated in blind taste tests. When preferences created by that information or those attachments are substantial and rivals cannot readily attain the same status, then it is simply wrong to say that the brand does not constitute its own relevant market. Demand is not price-elastic between the two. And the trademark itself prevents supply substitution.").

[37] *See* Barton Beebe, The Semiotic Analysis of Trademark Law, 51 UCLA L. REV. 621, 624 (2004) ("[F]irms produce trademarks as status goods, [and] consumers consume trademarks to signal status."); Jeremy N. Sheff, *Veblen Brands*, 96 MINN. L. REV. 769, 794-804 (2012); Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 820 (2010) ("Over the past century, and particularly in . . . urban, industrialized societies . . . , individuals have increasingly acted on this motivation [to differentiate themselves] through the consumption of what they perceive to be and what they believe others perceive to be differentiating goods.").

sphere of anticompetition only further, for example by preventing certain kinds of comparative advertising, internet traffic generation, and critique or commentary.[38]

Like antitrust law, however, the broad contours of trademark law promote efficiency. That is, trademark law's prohibitions on competition target situations where rivalry can actually dissipate wealth. In the case of passing off, multiple firms competing under the same mark would raise information costs for consumers and destroy the original firm's investments in reputation. The same is true for falsely designating a product's origin, characteristics, or connection to particular persons; information costs for consumers are increased by the deception, and any positive reputation (of the region, the characteristics, or the person in question) is placed in jeopardy. In the case of dilution and post-sale confusion, competing uses could reduce the distinctiveness and status value (i.e., overall brand value) of a mark through additional associations and copies. The outer limits of genericness and functionality are readily explained, then, as situations where competition would not lead to wealth dissipation through rivalry.[39] Generic terms and functional features alike are precisely those that hold significant value (communicative, utilitarian, or aesthetic) but do *not* require exclusivity to manifest it.[40] In the case of generic terms in particular, the communicative value (i.e., indicating the class of goods) is actually enhanced by

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[38] *See* Christine H. Farley & Lisa P. Ramsey, *Raising the Threshold for Trademark Infringement to Protect Free Expression*, 72 AM. U. L. REV. 101, 104 (2023) ("Unlike in copyright law, where the broad, statutory defense of copyright fair use is the established test used to address this tension, the federal trademark act does not have a similar "built-in" protection for First Amendment interests. Almost anything that can convey source-distinguishing meaning can qualify as a trademark, the "likely to cause confusion" requirement in the infringement provisions is a broad and ambiguous standard, and the few statutory defenses to infringement (such as descriptive fair use) have a narrow focus. Moreover, the speech-protective trademark rules created by judges only apply in limited circumstances or in some jurisdictions, and often vary in their approach to balancing trademark and free speech rights depending on the circuit where the court is located."); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717 (1999).

[39] Though the courts do not speak in terms of efficiency, genericness and functionality are two areas where competition language is particularly common in the case law. *See, e.g.*, Qualitex Co. v. Jacobson Prod. Co., 514 U.S. 159, 164 (1995) ("The functionality doctrine prevents trademark law, which seeks to promote competition by protecting a firm's reputation, from instead inhibiting legitimate competition by allowing a producer to control a useful product feature."); Kellogg Co. v. Nat'l Biscuit Co., 305 U.S. 111, 118, 59 S. Ct. 109, 113 (1938) ("It equally follows from the cessation of the monopoly and the falling of the patented device into the domain of things public that along with the public ownership of the device there must also necessarily pass to the public the generic designation of the thing which has arisen during the monopoly. 'To say otherwise would be to hold that, although the public had acquired the device covered by the patent, yet the owner of the patent or the manufacturer of the patented thing had retained the designated name which was essentially necessary to vest the public with the full enjoyment of that which had become theirs by the disappearance of the monopoly.'") (quoting Singer Mfg. Co. v. June Mfg. Co., 163 U.S. 169, 185 (1896)); Anti-Monopoly, Inc. v. Gen. Mills Fun Grp., 611 F.2d 296, 301 (9th Cir. 1979) ("The genericness doctrine in trademark law is designed to prevent such anti-competitive misuse of trademarks.").

[40] *See generally* Sipe, *supra* note 35.

ubiquitous use. By contrast, observe that the bars on disparaging and scandalous marks had no plausible efficiency justification, and now they are gone.[41]

Trademark law's dynamic—an inversion of antitrust law's antimonopoly function, but in broad service of efficiency—is different at its core from copyrights and patents. Copyrights and patents are often described as being in tension with antitrust law, but their dynamic is much simpler: copyrights and patents recognize and *knowingly create* the very same harms that antitrust law seeks to avoid (deadweight loss and wealth transfers away from consumers) for a temporary term, in order to create incentives for creation and innovation.[42] The patented drug or copyrighted movie of today would be sold at a drastically lower price and higher output level if every firm were free to compete in the same product market. But the supracompetitive profits enjoyed by the rightsholder allow it to recoup its upfront investment in creation, which spurs such creation to occur in the first place. In other words, copyrights and patents are—in the short run—actually no different than other areas in which antitrust law should intervene by its own efficiency- and consumer-welfare terms. The harms are only justified and tolerated by a long-run view towards economic growth and distribution, whereby everyone eventually gains access to the creative works and scientific innovations that were created, now priced at their trivial marginal cost. Trademark law, with its theoretically infinite term duration, could not proceed on these kinds of incentive-theory terms that trade between the short run and long run. It does not contemplate that its spheres of anticompetition create comparable harms; trademark law's monopolies are supposed to be creating and protecting value on an ongoing basis *themselves*.

Although the basic shape of trademark law can be said to promote efficiency, it inverts antitrust law in another significant way: it systematically prioritizes producer welfare, rather than consumer welfare, when the two are in tension. Two key features of trademark law are of particular importance in this regard, as they mutually reinforce one another: the lack of consumer standing, and the lack of affirmative duties for rightsholders. With respect to standing, courts have officially left producers to police the boundaries of marks amongst themselves, which means that the "self-interest of .

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[41] Matal v. Tam, 582 U.S. 218 (2017); Iancu v. Brunetti, 588 U.S. 388 (2019).
[42] Peter S. Menell, *Intellectual Property: General Theories*, in ENCYCLOPEDIA OF LAW AND ECONOMICS 129, 129 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000) ("Utilitarian theorists generally endorsed the creation of intellectual property rights as an appropriate means to foster innovation, subject to the caveat that such rights are limited in duration so as to balance the social welfare loss of monopoly exploitation."); Fritz Machlup, *An Economic Review of the Patent System*, Study No 15, Subcomm. on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 85th Cong, 2d Sess. 33 (1958) ("The thesis that the patent system may produce effective profit incentives for inventive activity and thereby promote progress in the technical arts is widely accepted.")

. . plaintiff trademark holders determines the range of cases pursued."[43] On some issues—like genericness or functionality—this may not present a serious issue. If one firm wants to trademark a purely generic term or functional feature of the product, their competitors have a strong incentive to intervene and kill the mark; they will be at a significant competitive disadvantage otherwise, so their interests broadly align with that of the consuming public. But other harms that trademarks cause to consumers may not affect competitors at all, or only in an indirect way that creates an insufficient incentive for them to litigate. This is in radical contrast to antitrust law, which not only features full-throated consumer standing, but access-to-justice measures[44] and public enforcement[45] of consumer interests on top. And indeed, trademark rights are accompanied by almost zero affirmative duties. As a result, trademark owners are free to use, abandon, and transfer their marks in strategic ways like stealth rebranding and white labeling that actively manipulate consumer search costs.[46]

Circularity and cumulative advantage only exacerbate this dynamic further. In terms of circularity, owner's rights have expanded by plaintiffs persuading courts to assume certain consumer beliefs—which in turn reifies them, retroactively justifying the expansion. Merchandising rights are the classic example:

> If consumers think that most uses of a trademark require authorization, then in fact they will require authorization because the owner can enjoin consumer confusion caused by unpermitted uses or charge for licenses. And if owners can sue to stop unauthorized uses, then only authorized uses will be seen by consumers, creating or reinforcing their perception that authorization is necessary. This is a "chicken and the egg" conundrum. Which comes first? The trademark right on far-flung items or the license? Licensing itself may affect consumer perception if consumers see a plethora of items with the mark perhaps accompanied by an "authorized by" label.[47]

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[43] *See* Made in the USA Found. v. Phillips Foods, 365 F.3d 278, 281 (4th Cir. 2004) (observing that "the several circuits that have dealt with the question are uniform in their categorical denial of Lanham Act standing to consumers," and collecting cases); *see generally* Michael Grynberg, *Trademark Litigation as Consumer Conflict*, 83 N.Y.U. L. REV. 60, 72 (2008) ("On the most basic level, trademark holders file the lawsuits. Whatever the centrality of consumer protection to trademark law, vindicating this interest is out of consumer hands.").
[44] Specifically, treble damages and automatic attorney's fees for plaintiffs. 15 U.S.C. §§ 15(a), 4304(a).
[45] The antitrust laws are jointly enforced in the public interest by the Department of Justice and the Federal Trade Commission. *See generally* FED. TRADE COMM'N, *The Enforcers*, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers.
[46] *See generally* Matthew Sipe, *Trademasks*, N.C.L.R. (forthcoming 2026), https://ssrn.com/abstract=5112345.
[47] MCCARTHY, *supra* note 1, at § 24:9; *see also* BARTON BEEBE, TRADEMARK LAW: AN OPEN-ACCESS CASEBOOK 513 (10th ed. 2023) ("Trademark commentators have long identified a fundamental problem with basing the subject matter and scope of trademark rights on consumer perception. The problem is that consumer perception is itself based at least in part on what the law allows to occur in

If trademark law had instead led consumer beliefs in the other direction, the result would be cheaper merchandise with no confusion. Meanwhile, in terms of cumulative advantage, trademark doctrines generally afford greater protection to brands with greater value—the rich get richer. The tests for likelihood of confusion all consider the strength of the plaintiff's mark as a factor in favor of confusion;[48] post-sale confusion most typically protects high-status goods;[49] protection against dilution by tarnishment or blurring is exclusively available to particularly "famous" marks;[50] and sufficiently longstanding marks simply become "incontestable," meaning they can't be challenged on most grounds of invalidity.[51] Trademark law is at its strongest, in other words, when the brand in question has the most to lose. The law thus protects large, accrued sums of producer surplus, even if (ironically) the brand is so powerful that its erosion is less plausible in the first place. All of this combined with the lack of consumer standing means that, even if efficiency is the ultimate lodestar, producer welfare consistently wins in edge cases and tradeoff scenarios.

Now with a core goal to orient around, competition law can also provide a framework for assessing and improving trademark law doctrine via decision theory. In short, decision theory offers a rational framework for making choices under uncertainty, where information is imperfect and costly.[52] Decision-makers start with initial beliefs based on prior knowledge (sometimes rising to the level of formal

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the marketplace—and even more problematically, on what consumers *think* the law allows to occur in the marketplace."); Mark Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1708 (1999) ("Ironically, having accepted the merchandising rationale for certain sorts of trademarks, we may find it hard to undo. It is possible that consumers have come to expect that 'Dallas Cowboys' caps are licensed by the Cowboys, not because they serve a trademark function, but simply because the law has recently required such a relationship."); James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 907 (2007) ("[T]rademark's growth is not just the result of formal changes in the positive law. Instead, trademark licensing practices inform trademark law, resulting in an expansive feedback loop . . . . [I]f consumers think that a given use of a mark requires a license from the mark owner, then engaging in that use without a license presents a real risk of liability.").

48 *See* MCCARTHY, *supra* note 1, at § 23:19; *see also* Barton Beebe & Scott Hemphill, *The Scope of Strong Marks: Should Trademark Law Protect the Strong More than the Weak?*, 92 N.Y.U. L. REV. 1339 (2017) (recognizing and critiquing this rule).

49 *See, e.g.*, Rolex Watch U.S.A., Inc. v. Canner, 645 F. Supp. 484, 492 (S.D. Fla. 1986); Hermès Int'l v. Lederer de Paris Fifth Ave., Inc., 219 F.3d 104, 106, 108 (2d Cir. 2000); Polo Fashions, 816 F.2d at 147; A.T. Cross Co. v. Jonathan Bradley Pens, Inc., 470 F.2d 689, 690 (2d Cir. 1972); T&T Mfg. Co. v. A.T. Cross Co., 587 F.2d 533, 535-36 (1st Cir. 1978); Ferrari S.P.A. Esercizio, 944 F.2d at 1238; Rolls-Royce Motors, Ltd. v. A & A Fiberglass, Inc., 428 F. Supp. 689, 694 (N.D. Ga. 1976); *see generally* Jeremy Sheff, *Veblen Brands*, 96 MINN. L. REV. 769, 783 (2012).

50 15 U.S.C. § 1125(c) (entitling the owners of "famous" marks to injunctive relief against the use of any other mark that is "likely to cause dilution by blurring or dilution by tarnishment of the famous mark").

51 15 U.S.C. § 1065; *see generally* MCCARTHY, *supra* note 1, at § 11:44.

52 *See generally* John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1084-86 (1968); MORRIS H. DEGROOT, OPTIMAL STATISTICAL DECISIONS 135-40 (1970).

presumptions), then gather evidence to refine these beliefs for more accurate decisions. Recognizing that perfect information is often unattainable, the theory accepts some errors as inevitable and balances the costs of false positives against false negative errors while considering error frequency, consequences, and the legal rule's impact on future conduct. Antitrust law has incorporated decision theory deeply, through its structure of per se rules, quick-look analysis, and the rule of reason.[53] Per se rules irrebutably presume harms to competition in situations where further factfinding would almost never improve the result (e.g., naked horizontal price-fixing); quick-look analysis employs a truncated review for conduct with obvious anticompetitive effects but at least plausible offsetting efficiencies (e.g., restrictions imposed by professional associations); and the rule of reason uses a comprehensive, case-by-case assessment—weighing procompetitive and anticompetitive effects—to optimize outcomes when no strong priors exist.

Under this typology, trademark law deploys per se rules extensively, in ways that tend to favor trademark owners. On the infringement side, the core likelihood-of-confusion test effectively operates as a per se rule, insofar as it merely checks for a likelihood of confusion, and then on that basis irrebutably presumes that competition has been harmed. Put differently, there is no need at any point to show actual confusion, let alone *actual* harm to competition. The same is true with respect to dilution by blurring or tarnishment; per the statutory text, all that is required is a likelihood of dilution. In cases of post-sale or initial-interest confusion, courts appear to proceed even more categorically. And for all of the above claims, there is never an opportunity to directly introduce or consider potential offsetting, procompetitive benefits. On the validity side, distinctiveness operates as a per se rule in many cases; marks that are suggestive, arbitrary, or fanciful are irrebutably presumed to be distinctive, without any need to empirically demonstrate secondary meaning. Genericness was arguably a per se rule that operated against the interests of trademark owners, but has since been relaxed into a more open-ended analysis. Where trademark law is at its most flexible and ambiguous is in negotiating speech interests. The Lanham Act provides little clarity itself on First Amendment accommodations, leaving courts to apply inconsistent standards, such as the *Rogers v. Grimaldi* test or the nominative fair use doctrine, with varying degrees of consistency and rigor. In cases where trademark law and free expression conflict, some courts emphasize consumer confusion while others prioritize artistic relevance, leading to divergent outcomes in cases involving commercial speech, parody, or satire. This lack of uniformity renders First Amendment defenses in trademark disputes a murky terrain, where litigants face

[53] *See, e.g.*, Andrew I. Gavil & Steven C. Salop, *Probability, Presumptions, and Evidentiary Burdens in Antitrust Analysis: Revitalizing the Rule of Reason for Exclusionary Conduct*, 168 U. PA. L. REV. 2107 (2020); C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41 (1999); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); GAVIL ET AL., *supra* note 25, at 55-59, 85-89.

uncertainty and judicial discretion often dictates results, generating serious chilling concerns.

[From here, my core policy suggestions are fourfold, in descending order of confidence. First, reconsider the per se rule for likelihood of confusion, particularly for nontraditional marks (including certification marks) and confusion theories that go beyond point of sale. Practically, this means allowing rebuttal room to show offsetting procompetitive justifications and/or lack of harm. Second, develop a bright-line rule to accommodate speech concerns. The best contender for this—both in case law and practically—is the idea of "use as a mark" versus not. Third, end self-fulfilling enforcement creep entirely and eliminate certain rules that grant cumulative advantage to rightsholders without improving decision making. Presumptions of validity, for example, are likely justified; enlarged enforcement scope is likely not. Fourth, reconsider the per se rule for distinctiveness (i.e., inherent distinctiveness). That is, demand a showing of secondary meaning on application for all marks. Meanwhile, although per se dilution and open-textured genericness may not give the correct result in all cases, they may actually be justifiable as a matter of error costs, incidence, and uncertainty.]