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The Case for Green Product Fixing: Reconciling Antitrust Law with Self-Regulation to Combat Climate Change

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THE CASE FOR GREEN PRODUCT FIXING: RECONCILING ANTITRUST LAW WITH SELF-REGULATION TO COMBAT CLIMATE CHANGE

ABSTRACT

As corporations continue to prioritize environmental, social, and governance (ESG) improvements alongside profit, cooperation with competitors may be an important part of their toolbox. In particular, cooperation can help to advance initiatives like the elimination of an unsustainable product type, which is a drastic step a corporation likely would not take on its own for fear of hurting its bottom line and customer loyalty. The issue is that agreements among competitors to engage in such steps may violate antitrust laws, as suggested by the Justice Department in the Trump administration and numerous state attorneys general.

This Comment uses the term "green product fixing" to refer to the practice of a business entering into agreements with its competitors regarding environmentally-focused product standards and identifies two principal reasons why antitrust law may spell trouble for green product fixing. First, antitrust case law is clear that self-regulation in the form of extra-governmental product standards and codes of conduct is a violation of the Sherman Antitrust Act. Second, while the law does have some room to permit agreements that would otherwise be unlawful, based on certain offsetting procompetitive benefits, factors like a reduction in carbon emissions or pollution would not be considered as procompetitive benefits under the current application of United States antitrust law.

This Comment argues that a different type of analysis from that traditionally used in antitrust law is necessary with respect to green product fixing. The traditional analysis focuses on consumer welfare but does not capture the benefit to consumers, as members of society, from the reduction in negative externalities resulting from a cooperation agreement. This Comment proposes balancing the traditional analysis with consideration of environmental benefits that trickle down to consumers. It also evaluates potential avenues for legislative and judicial implementation of such an analysis.

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INTRODUCTION

Lawmakers, regulators, and corporate attorneys have all warned of the risk that businesses may violate antitrust laws with their environmental, social, and governance (ESG) initiatives.[1] By collaborating with competitors and harnessing their market power, businesses and investors can catalyze large-scale changes in the practices of their customers, suppliers, and portfolio companies, reducing or eliminating unsustainable production and consumption habits.[2] However, such use of market power as a blunt instrument is precisely what antitrust law aims to prevent.[3] With the increasing politicization of ESG and an emerging bipartisan consensus in favor of more aggressive antitrust enforcement, the ESG-antitrust tension is likely to grow in the years ahead.[4]

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1 *See, e.g.*, Maxine Joselow, *GOP to Probe 'Cancer' of Climate-Friendly Investing After Midterms*, WASH. POST (Nov. 2, 2022, 6:00 AM), https://www.washingtonpost.com/climate-environment/2022/11/02/esg-investing-republicans-midterms/ (Republican senator accusing "BlackRock and other Wall Street firms of 'acting like a climate cartel'"); Lina Khan, *ESG Won't Stop the FTC*, WALL ST. J. (Dec. 21, 2022, 5:10 PM), https://www.wsj.com/articles/esg-wont-stop-the-ftc-competition-merger-lina-khan-social-economic-promises-court-11671637135 (Federal Trade Commission Chair stating that "[t]he antitrust laws don't permit us to turn a blind eye to an illegal deal just because the parties commit to some unrelated social benefit"); *Antitrust Law and ESG Initiatives: A Rapidly Evolving Legal Landscape*, DAVIS POLK (Nov. 28, 2022), https://www.davispolk.com/insights/client-update/antitrust-law-and-esg-initiatives-rapidly-evolving-legal-landscape (law firm recommending that "firms contemplating joining ESG initiatives should seek advice to understand the global antitrust landscape").

2 *See* OECD COMPETITION DIV., ENVIRONMENTAL CONSIDERATIONS IN COMPETITION ENFORCEMENT 8, 14, 34 (Dec. 2021), https://www.oecd.org/daf/competition/environmental-considerations-in-competition-enforcement-2021.pdf.

3 *See, e.g.*, Fashion Originators' Guild of Am. v. Federal Trade Comm'n, 312 U.S. 457, 466 (1941) (affirming finding by Federal Trade Commission that association of garment manufacturers violated Sherman Act where they "exercised sufficient control and power . . . 'to exclude from the industry those manufacturers and distributors who do not conform to the rules and regulations of' the association").

4 *See* Saijel Kishan & Danielle Moran, *Republicans Ramp Up Anti-ESG Campaign for 2023*, BLOOMBERG (Dec. 29, 2022, 6:00 AM), https://www.bloomberg.com/news/articles/2022-12-29/republicans-prepare-to-ramp-up-their-anti-esg-campaign-in-2023; Benjamin H. Patton et al., *Biden's 2021 ESG Orders Set Stage for Environment, Health and Safety Battles*, REED SMITH, https://www.reedsmith.com/en/perspectives/energy-commodities-outlook-2021/2021/12/bidens-2021-esg-orders-set-stage-for-environment-health-and-safety-battles (Dec. 7, 2021) ("The Biden administration is using regulatory bodies . . . to promote environmental, social and governance (ESG) policy objectives."); Exec. Order No. 14036, 86 Fed. Reg. 36988 (July 9, 2021) ("[I]t is the policy of [the Biden] Administration to enforce the antitrust laws to combat the excessive concentration of industry [and] the abuses of market power."); Lauren Feiner, *House Republicans Lay Out Their Antitrust Agenda for Tech Giants*, CNBC (July 7, 2021, 12:25 PM), https://www.cnbc.com/2021/07/07/house-republicans-lay-out-tech-antitrust-agenda.html.

The ESG-antitrust conflict is bad for businesses and bad for the planet.[5] Corporations face growing pressure from regulators, consumers, shareholders, and stakeholders to meet ambitious ESG targets.[6] Collaboration with competitors will often be critical to meeting those targets.[7] In the environmental arena, coordinated private sector action is a vital complement to government action in addressing the urgent challenge of climate change.[8] If antitrust law frustrates collaboration on environmental initiatives, the consequences may be felt throughout society.[9]

Nonetheless, corporations should not be given carte blanche to violate antitrust laws any time that they can connect a business practice to ESG.[10] After all, an integral objective of antitrust law is consumer protection,[11] which could itself be considered an ESG interest.[12] Moving forward, antitrust law should not betray the meritorious objectives that it currently serves, but it must remain flexible enough to support instances of competitor collaboration that materially advance the fight against climate change and other ESG priorities.[13]

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5 *See* DAVIS POLK, *supra* 1; Paul Balmer, *Colluding to Save the World*, 47 ECOLOGY L. CURRENTS 219, 229 (2020) (stating that "the specter of antitrust liability" means that "[c]ompanies could be discouraged from moving forward on climate, at a time when bold action is needed most").

6 *See* Leo E. Strine et al., *Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective* Caremark *and EESG Strategy*, 106 IOWA L. REV. 1885, 1886–87 (2021). Proponents of ESG-conscious corporate strategy suggest that paying attention to ESG factors is not only matter of social consciousness, but also supports a business's long-run financial performance. *See id.* at 1887.

7 *See* OECD COMPETITION DIV., *supra* note 2, at 8.

8 *See* ORG. FOR ECON. CO-OPERATION & DEV., PRIVATE SECTOR ENGAGEMENT TO ADDRESS CLIMATE CHANGE AND PROMOTE GREEN GROWTH, PRIVATE SECTOR PEER LEARNING POLICY BRIEF 4 at 1, https://www.oecd.org/dac/peer-reviews/Policy-Brief-4-Private-Sector-Engagement-to-Address-Climate-Change-and-Promote-Green-Growth.pdf.

9 *See generally* U.S. GLOB. CHANGE RSCH. PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT 12 (2018), https://nca2018.globalchange.gov/downloads/NCA4_Report-in-Brief.pdf; Akihiko Nishio, *When Poverty Meets Climate Change*, WORLD BANK (Nov. 5, 2021), https://blogs.worldbank.org/climatechange/when-poverty-meets-climate-change-critical-challenge-demands-cross-cutting-solutions.

10 *See* Makan Delrahim, *DOJ Antitrust Division: Popular Ends Should Not Justify Anti-Competitive Collusion*, USA TODAY (Sept. 12, 2019, 7:31 PM), https://www.usatoday.com/story/opinion/2019/09/12/doj-antitrust-division-popular-ends-dont-justify-collusion-editorials-debates/2306078001/ ("The loftiest of purported motivations do not excuse anti-competitive collusion among rivals.").

11 *See* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (citing ROBERT BORK, THE ANTITRUST PARADOX 66 (1978)).

12 *See, e.g.*, Press Release, Fin. Conduct Auth., FCA Proposes New Rules to Tackle Greenwashing (Oct. 25, 2022), https://www.fca.org.uk/news/press-releases/fca-proposes-new-rules-tackle-greenwashing/.

13 *See* Balmer, *supra* note 5, at 220 ("Our antitrust laws must evolve to reflect the changing nature of corporate purpose and corporate social activism.").

This Comment considers a specific instance of ESG-related competitor collaboration that can be referred to as "green product fixing."[14] Green product fixing occurs by way of agreements among competitors on product standards related to carbon emissions or other environmental impacts, in circumstances where such standards have not been implemented by legislation or regulation or the competitors agree to adhere to stricter standards than those that have been implemented by legislation or regulation.[15]

The objective of green product fixing is to effect industry-wide change in the characteristics of a product, thus improving the product's environmental impact.[16] Examples include car manufacturers agreeing to maintain emissions standards more stringent than those mandated by law or regulation[17] and manufacturers of plastic products agreeing on design standards that would facilitate increased recycling.[18] Such initiatives have already attracted antitrust scrutiny, which does not bode well for even more ambitious initiatives that could follow.[19] In early 2022, a group of insurers dropped its plan to cease offering insurance of coal shipments, based on legal advice that the plan might violate

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14 *Cf.* United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927) (examining price-fixing agreement and declaring that "the aim and result of every price-fixing agreement . . . is the elimination of one form of competition").

15 *See, e.g.*, Juliet Eilperin & Steven Mufson, *Justice Dept. Launches Antitrust Probe of Automakers Over Their Fuel Efficiency Deal with California*, WASH. POST (Sept. 6, 2019, 5:34 PM), https://www.washingtonpost.com/climate-environment/justice-dept-launches-antitrust-probe-of-automakers-over-their-fuel-efficiency-deal-with-california/2019/09/06/29a22ee6-d0c7-11e9-b29b-a528dc82154a_story.html (discussing car manufacturers who agreed with the State of California that they would only produce vehicles meeting certain fuel efficiency standards that exceeded expected federal requirements); Lauren Hirsch, *Large Insurers Are Hatching a Plan to Take Down Coal*, N.Y. TIMES (Nov. 23, 2021), https://www.nytimes.com/2021/11/23/business/dealbook/insurance-companies-coal.html (discussing "a pledge signed by eight of the world's largest insurers and reinsurers who have committed to have underwriting portfolios with net-zero greenhouse gas emissions by 2050"); Elizabeth Paton et al., *When Does Collaboration Become Collusion?*, N.Y. TIMES (Nov. 7, 2022), https://www.nytimes.com/2022/11/07/fashion/fashion-industry-antitrust-sustainability.html (reporting on the publication of an open letter by fashion houses expressing shared commitment to changing industry practices to be more sustainable).

16 *See* Jeffrey Martino & Grant Murray, *Prevent Antitrust Laws from Complicating Business Sustainability*, BLOOMBERG (Dec. 16, 2022, 4:00 AM), https://news.bloomberglaw.com/us-law-week/prevent-antitrust-laws-from-complicating-business-sustainability (illustrating continuum of types of ESG-related competitor cooperation and related antitrust risk).

17 *See* Eilperin & Mufson, *supra* note 15.

18 Currently, a small minority of plastic waste around the world is recycled. *See* Mo Chatterji, *How Rivals Can Work Together to Stop Plastic Waste*, WORLD ECON. F. (May 19, 2021), https://www.weforum.org/agenda/2021/05/how-rivals-can-work-together-to-stop-plastic-waste/. One reason for the low rate of recycling is a lack of uniformity in the design of plastic packaging. *See id.* If there were greater uniformity in design, it would be easier for consumers to recognize which products are recyclable. *See id.* Design uniformity also enables recycling facilities to operate more efficiently and cost-effectively. *See id.*

19 *See* Eilperin & Mufson, *supra* note 15.

antitrust laws.[20] In the automotive industry, similarly radical plans might call for capping the size of vehicles manufactured or moving to selling only electric vehicles earlier than would otherwise be required by law or regulation.[21]

The environmental case for green product fixing writes itself. If insurers can effectuate a reduction in use of coal or if car manufacturers can stop Americans from driving supersized vehicles, the country's output of carbon emissions will decrease.[22] Collaboration among competitors is the only way to achieve those outcomes.[23] Surveys suggest that consumers desire more sustainable products.[24] However, faced with the choice of higher prices for such products or the inconvenience of adjusting to a sustainable product that is smaller or otherwise different from a traditional product, the same consumers may continue to purchase the traditional product if it remains available on the market in substantial quantities.[25] Use of unsustainable traditional products will only decline if a critical mass of manufacturers make the shift from traditional products to more sustainable products.[26] As Bill Gates put it, "few companies will make a bet on inventing zero-emissions technology if their competitors can undersell them with fossil-fuel products."[27]

The legal challenge to green product fixing comes from case law that classifies private governance of standard-setting as a violation of antitrust law.[28] In the fight against climate change, some private governance is a necessary

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[20] *See* Alastair Marsh, *Net-Zero Insurers Uncover New Climate Adversary in Antitrust Law*, BLOOMBERG (Jan. 19, 2022), https://www.bloomberg.com/news/articles/2022-01-19/net-zero-insurance-coal-exit-plans-impeded-by-antitrust-laws#xj4y7vzkg.

[21] *See* ABA Antitrust Law Section, *Antitrust and Sustainability: Part of the Solution or Part of the Problem?*, YOUTUBE, at 24:00 (July 14, 2022), https://www.youtube.com/watch?v=ykNhjDbvysM (introducing "simplified example" of car industry players agreeing to limit size of vehicles).

[22] *See* Martin Armstrong, *Which Passenger Cars Pollute the Most?*, WORLD ECON. F. (Apr. 22, 2022), https://www.weforum.org/agenda/2022/04/most-polluting-passenger-cars/ (discussing how "a small car emits 2,040 kilograms less CO2 per year than a pickup truck").

[23] *See* OECD COMPETITION DIV., *supra* note 2, at 6 (discussing how "[i]n some situations, market failures may exist that make co-operation and synergies between businesses the best way to achieve economic efficiency or reach scale in alignment with environmental goals").

[24] *See* Greg Petro, *Consumers Demand Sustainable Products and Shopping Formats*, FORBES (Mar. 11, 2022, 1:01 PM), https://www.forbes.com/sites/gregpetro/2022/03/11/consumers-demand-sustainable-products-and-shopping-formats/?sh=3fd376b06a06 (reporting three-quarters of consumers surveyed say that sustainability is somewhat or very important to them when they make purchases).

[25] *See* OECD COMPETITION DIV., *supra* note 2, at 13.

[26] *See* BILL GATES, HOW TO AVOID A CLIMATE DISASTER 189–90 (2021).

[27] *Id.*

[28] *See, e.g.*, Fashion Originators' Guild Am. v. Fed. Trade Comm'n, 312 U.S. 457, 467 (1941); Nat'l Soc'y Pro. Eng'rs v. United States, 435 U.S. 679, 690, 695 (1978); Fed. Trade Comm'n v. Ind. Fed'n Dentists, 476 U.S. 447, 459 (1986). *But see* Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 759 (1999).

complement to public governance.[29] This Comment calls on Congress and the federal courts to carve out an exception to the case law on private governance to permit socially beneficial green product fixing, without jettisoning the consumer protection values that are fundamental to antitrust law.[30]

Other commentators have identified the ESG-antitrust clash and proposed solutions from the perspective of "universal owners."[31] This Comment adds to that literature by addressing the ESG-antitrust clash from the perspective of businesses seeking to engage in green product fixing.[32] Given the complexity of the antitrust laws, the vociferousness of antitrust-focused criticism of ESG initiatives, and the ubiquity of antitrust due diligence in business decision-making, it is beneficial for scholarship to consider the ESG-antitrust interaction in the context of specific types of business activity.[33] This Comment also proposes a unique set of factors that should be used to evaluate collaborations involving green product fixing and evaluates multiple means of implementing that analytical framework.[34]

This Comment proceeds in four parts. Part I provides an overview of the aspects of antitrust law that preclude green product fixing, in particular the case law that holds "private governance" to be an antitrust violation. Part II explains why private governance is a necessary component of the global effort to fight climate change. Part III lays out the framework that antitrust enforcers should use to evaluate competitor collaborations that involve green product fixing. Part IV discusses the means by which that framework could be implemented.

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29 *See infra* Part II.

30 *See infra* Parts III, IV.

31 *See* Amelia Miazad, *Prosocial Antitrust*, 73 HASTINGS L.J. 1637, 1692 (2022); Balmer, *supra* note 5, at 220; Inara Scott, *The Trouble with Boycotts: Can Fossil Fuel Divest Campaigns Be Prohibited?*, 57 AM. BUS. L.J. 537, 543 (2020). The term "universal owners" refers to asset managers like BlackRock, whose portfolios are so large and diversified that they encompass large swaths of the world economy. *See* Miazad, *supra*, at 1641.

32 *See infra* Part II.

33 *See, e.g.*, Joselow, *supra* note 1.

34 *See infra* Parts III, IV. Other commentators have proposed administrative solutions to update the antitrust treatment of ESG initiatives. *See* Miazad, *supra* note 31, at 1692–94. This Comment devotes less attention to administrative measures as a means of implementing ESG-friendly antitrust policy. *See infra* Part IV. The challenge to green product fixing comes from Supreme Court case law that classifies private governance as an antitrust violation. *See, e.g.*, Fashion Originators' Guild Am. v. Fed. Trade Comm'n, 312 U.S. 457, 467 (1941). Even if federal antitrust enforcers were to declare that they will no longer bring cases against certain types of competitor collaboration, such cases could still be brought by state attorneys general or private parties. *See* 15 U.S.C. § 15(a), 15(c) (Sherman Act provisions for suit by state attorneys general and private parties). Consequently, a judicially or legislatively implemented carve-out for green product fixing would provide more security for businesses seeing to engage in such collaboration and is the focus of this Comment. *See infra* Part IV.

I. ANTITRUST LAW'S CURRENT APPLICATION PRECLUDES GREEN PRODUCT FIXING

There are three relevant aspects of antitrust law to this Comment's discussion of green product fixing. First, as currently applied by federal courts and administrative agencies, antitrust statutes classify many forms of self-regulation and "private governance" of industry standards as anticompetitive conduct subject to the Sherman Antitrust Act.[35] Second, while some anticompetitive conduct may be evaluated under the "rule of reason," which provides for consideration of offsetting procompetitive effects, the procompetitive effects that antitrust regulators can consider under the rule of reason do not include the conduct's social benefit.[36] Third, and perhaps more encouragingly, "outlier" cases and the "constitutional" nature of the Sherman Act provide an opening for the Supreme Court to fashion an antitrust exception for green product fixing.[37]

A. Foundations of Cartel Regulation

At the time the Sherman Antitrust Act was enacted, Americans used the term "combination" to refer to mergers, acquisitions, and anticompetitive practices.[38] "Tight combinations" were the firms formed by mergers or acquisitions, and included "the trusts that sprang up in the 1880s and quickly dominated national markets in key commodities," such as Standard Oil.[39] "Loose combinations," or

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35 *See, e.g.*, Nat'l Soc'y Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978) ("[N]o elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."); Am. Soc'y Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 571 (1982) ("[A] standard-setting organization . . . can be rife with opportunities for anticompetitive activity."); Marianne K. Smythe, *Government Supervised Self-Regulation in the Securities Industry and the Antitrust Laws: Suggestions for an Accommodation*, 62 N.C. L. REV. 475, 479 (1984) (noting "the many judicial opinions over the past century in which voluntary self-regulatory efforts . . . have been struck down as violating federal antitrust laws").

36 *See generally* FED. TRADE COMM'N & DEP'T OF JUST., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (Apr. 2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf (describing types of agreements that the Federal Trade Commission and Department of Justice challenge as per se illegal and those that they analyze under the rule of reason and listing factors that those agencies consider in rule of reason analysis).

37 *See* Appalachian Coals v. United States, 288 U.S. 344, 358 (1933) (finding that the defendants' plan that "eliminate[d] competition among the defendants themselves" did not violate the Sherman Act); *see also* Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CAL. L. REV 263, 266–70 (1986).

38 WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 9 (1965).

39 Thomas C. Arthur, *The Core of Antitrust and the Slow Death of Dr. Miles*, 62 SMU L. REV. 437, 441 (2009).

alliances among businesses without unification of ownership, were also part of the mischief targeted by the early antitrust statutes.[40]

The nineteenth century's "loose combinations" are today's cartels.[41] Cartels are one of three principal targets of contemporary antitrust law.[42] In the first decades after the enactment of the Sherman Antitrust Act, the Supreme Court held that coordination among competitors on matters such as tender offers and ticket prices violated the statute.[43] Such cases established the basic principle that the Sherman Act prohibits cooperation among competitors that influences price, output, or other market conditions.[44]

B. Self-Regulation Can Be an Antitrust Violation

Over time, anti-cartel principles have expanded to preclude certain forms of self-regulation, particularly agreements among industry peers to fix codes of conduct or product standards that exceed the requirements imposed by the government through legislation and regulation.[45] Historically, industry participants have engaged in such self-regulation in circumstances where there was no applicable government regulation.[46] In those circumstances, the concern arises that industry participants may seek to get out ahead of anticipated government regulation and set standards that are more lenient than those the government might set.[47] In the case of green product fixing and other

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40 *See* HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY 72–73 (1955).

41 *See* John A. MacKerron, Book Review, 37 AM. J. LEGAL HIST. 369 (1993) (reviewing TONY FREYER, REGULATING BIG BUSINESS: ANTITRUST IN GREAT BRITAIN AND AMERICA, 1880-1990 (1992)).

42 *See* Aaron Edlin & Rebecca Haw, *Cartels by Another Name*, 162 U. PA. L. REV. 1093, 1095 (2014) (characterizing regulation of cartels as the "one principal success" of the Sherman Act). *See generally* Arthur, *supra* note 39, at 437 ("From its nineteenth century beginnings to the present, American antitrust law has dealt with the problem of monopoly power created by cartels, large horizontal measures, and predatory exclusion.").

43 Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 242–43 (1899) (analyzing collusion by pipemakers in bids for municipal contracts); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 340–43 (1897) (finding that railroad companies violated Sherman Act with price-fixing agreement, even if the prices fixed were reasonable).

44 *See* PHILLIP AREDA ET AL., ANTITRUST ANALYSIS 87–96 (8th ed. 2022).

45 *See, e.g.*, Fashion Originators' Guild Am., Inc. v. Fed. Trade Comm'n, 312 U.S. 457, 464–65 (1941); Nat'l Soc'y Pro. Eng'rs v. United States, 453 U.S. 679, 694–95 (1978).

46 *See, e.g.*, *Trans-Missouri Freight Ass'n*, 166 U.S. at 340–43; *Fashion Originators' Guild Am.*, 312 U.S. at 461 (noting that garment manufacturers developed measures targeting "style piracy," i.e., the production of knockoff garments, that was not prohibited by any governmental measure).

47 *See, e.g.*, Bennett H. Goldstein & Howell H. Howard, Comment, *Antitrust Law and the Control of Auto Pollution*, 10 ENV'T L. 517, 519–25 (describing efforts of automotive industry to develop pollution control standards that paralleled efforts of California government and "[f]rustration with the industry's inability to make speedy progress").

cooperative ESG initiatives, the concern may be the opposite, namely that businesses will set environmental standards more stringent than those imposed by the government.[48] Nonetheless, Supreme Court precedent suggests that the Court may find such initiatives to violate antitrust law, notwithstanding any socially beneficial intent or results.[49]

The message from this strand of the antitrust case law is that businesses must leave governance to the government.[50] The Supreme Court sent that message for the first time in 1899.[51] In its decision in *Addyston Pipe*, the Court wrote that "any agreement or combination which directly operates . . . upon . . . an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce to that extent and to the same extent *trenches upon the power of the [ ] legislature and violates [the Sherman Antitrust Act]*."[52] Since then, while some courts of appeals have recognized that self-regulation in standard-setting can have procompetitive effects and evaluated self-regulatory agreements under the rule of reason (rather than holding it to be per se illegal), courts have generally found private governance unlawful under the Sherman Act.[53] This trend in the case law contributes to the challenging antitrust landscape for green product fixing, although there are outlier cases and other arguments that could allow green product fixing to escape condemnation.[54]

After *Addyston Pipe*, the Supreme Court did not look at another case dealing with private governance until 1941 when it decided *Fashion Originators' Guild of Am.*, a case involving the association of garment workers known as the Fashion Originators' Guild of America (FOGA).[55] In an effort to eradicate the manufacture of knockoff goods, which FOGA termed "style piracy," FOGA's members collectively declined to sell to retailers who also sold knockoffs of FOGA members' products.[56] The Supreme Court found that this conduct was

48 *See, e.g.*, Eilperin & Mufson, *supra* note 15.

49 *See, e.g.*, *Nat'l Soc'y Pro. Eng'rs*, 453 U.S. at 684–86.

50 *See Fashion Originators' Guild Am.*, 312 U.S. at 465.

51 *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 242–43 (1899).

52 *Id.* (emphasis added).

53 *See, e.g.*, Craftsmen Limousine, Inc. v. Ford Motor Co., 363 F.3d 761, 774 (8th Cir. 2004).

54 *Compare* Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756 (1999) (holding that the association's guidelines restricting dentists from publicizing prices did not violate the Sherman Act), *with Nat'l Soc'y Pro. Eng'rs*, 453 U.S. at 681, 684–94 (holding that the engineering society violated the Sherman Act when it adopted a code of conduct that precluded its members from participating in competitive bidding processes).

55 *Fashion Originators' Guild of Am.*, 312 U.S. at 461.

56 *Id.* ("Petitioners call this practice of copying unethical and immoral . . . although they admit that their 'original creations' are neither copyrighted nor patented, and indeed assert that existing legislation affords them no protection against copyists.").

contrary to the policy of the Sherman and Clayton Acts because the Guild "exercised sufficient control and power in the women's garments and textile business 'to exclude from the industry those manufacturers and distributors who do not conform to the rules and regulations of [FOGA].'"[57] Quoting from its decision in *Addyston Pipe*, the Court wrote that FOGA was acting "in reality as an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce . . . and thus 'trenches upon the power of the national legislature.'"[58] The Court also rejected FOGA's arguments that its conduct was not barred by the Sherman Act because it did not fix prices or output and was a reasonable means of addressing "the devastating evils growing from the piracy of original designs."[59]

The concern about "extra-governmental" regulation has also appeared in subsequent Supreme Court opinions about private governance.[60] In the *National Society of Professional Engineers* case, the Society argued that the provision in its code of conduct that prohibited its members from engaging in competitive bidding processes was not an unreasonable restraint of trade because if engineering contracts were awarded on the basis of the lowest price, the public would be exposed to the dangers stemming from shoddy engineering work.[61] The Court was unimpressed with that argument and rejected the notion that protection of the public from dangerous goods or services could justify a restraint of trade.[62] Foes of ESG may argue that an antitrust carve-out for green product fixing would amount to an exception to the Sherman Act allowing businesses to self-regulate goods and services that they perceive as dangerous by virtue of adverse environmental effects.[63]

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[57] *Id.* at 466.

[58] *Id.* at 465 (quoting Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 242 (1899)).

[59] *Id.* at 467.

[60] In light of this recurring theme in the private governance case law, this Comment directly addresses the question of whether, as a normative proposition, the private sector should be permitted to regulate environmental product standards through green product fixing. *See infra* Part II.

[61] Nat'l Soc'y Pro. Eng'rs v. United States, 435 U.S. 679, 681, 684–85 (1978) ("The question is whether the [association's] canon may be justified under the Sherman Act, because it was adopted by members of a learned profession for the purpose of minimizing the risk that competition would produce inferior engineering work endangering the public safety.").

[62] *Id.* at 695–96 ("The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute.").

[63] *See id.*

Antitrust cases that involve industry coalitions fixing product safety standards present a similar fact pattern to that of green product fixing.[64] *Craftsmen Limousine v. Ford Motor Co.* dealt with an initiative by Ford aimed at improving the safety of limousines.[65] While Ford did not manufacture limousines, it sold vehicles to independent coachbuilders who converted those vehicles into limousines.[66] Following a series of nationally publicized limousine accidents in the 1980s, Ford assembled an engineering task force that identified best practices that would ensure the safety of Ford vehicles converted into limousines.[67] Ford subsequently established a "Qualified Vehicle Modifier" program, under which Ford distributed literature to coachbuilders describing the best practices identified by the engineering task force.[68] Ford made monetary payments to coachbuilders that followed the practices set out in the literature.[69] A coachmaker that had not participated in Ford's Qualified Vehicle Modifier program brought suit alleging that Ford had mobilized a boycott of its business, by instrumentalizing an industry consortium and pressuring industry publications to exclude advertisements of its limousines.[70]

In assessing Ford's conduct, the court suggested that conduct might be construed as "'exclusion by the joint setting and enforcement of standards,'" but acknowledged that such standards could have procompetitive effects that should be balanced against the anticompetitive nature of the "exclusion" in rule of reason analysis.[71] The court specifically noted the effect of safety standards on consumer confidence in the industry: a poor safety record could undercut consumer confidence in limousines of any brand, decreasing sales for everyone in the industry, while a strong safety record would have the opposite effect.[72] Recognizing the potential for those procompetitive effects, the appeals court overruled the trial court's determination that Ford's conduct was per se illegal and remanded the case for reconsideration under the rule of reason.[73]

While *Craftsmen Limousine* may offer some hope that green product fixing's procompetitive effects would allow it to survive scrutiny under the rule of

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[64] *See, e.g.*, Craftsmen Limousine, Inc. v. Ford Motor Co., 363 F.3d 761 (8th Cir. 2004).
[65] *Id.* at 765.
[66] *Id.* at 764.
[67] *Id.* at 764–65.
[68] *Id.* at 765.
[69] *Id.*
[70] *Id.* at 774.
[71] *Id.*
[72] *Id.*
[73] *Id.* at 774–77.

reason, other cases provide reason for caution.[74] In *Indiana Federation of Dentists*, a group of dentists agreed they would all decline to provide patients' x-rays to insurers.[75] This step was significant because it was industry standard for insurers to require dentists to submit patients' x-rays with reimbursement requests, as a means for the insurer to validate that the patient had received the "least expensive yet adequate treatment."[76] The Supreme Court found that this agreement was a restraint on competition because it amounted to denial of a service (cooperation with insurers' requests) sought by the dentists' customers.[77]

Analyzing the agreement under the rule of reason, the Court declined to characterize the dentists' agreement as a boycott, which would have made it per se illegal but nonetheless concluded that the agreement certainly had an anticompetitive character and that no credible evidence of procompetitive effects had been provided.[78] The Court rejected an argument by the dentists that their agreement was not an antitrust violation because it did not actually result in increased prices for dental services.[79] It found that "the Federation would still not be justified in deciding on behalf of its members' customers that they did not need the information."[80] If the information were not useful for customers, rather than colluding to withhold the information, the dentists should have relied on market forces to eliminate demand for the information.[81] This precedent indicates that action by competitors to deny consumers the opportunity to obtain certain products would be construed as an antitrust violation, regardless of what room for argument may exist when competitors take more moderate actions such as setting standards.[82]

C. Antitrust Analysis Does Not Consider Social Benefit

In reviewing whether any instance of competitor cooperation violates the antitrust statutes, the Department of Justice (DOJ) or the Federal Trade

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74 *See* Fed. Trade Comm'n v. Ind. Fed'n Dentists, 476 U.S. 447, 458–59 (1986).

75 *Id.* at 451.

76 *Id.* at 449. Dentists concerned about this practice have viewed it "as a threat to their professional independence and economic well-being." *Id.*

77 *Id.* at 457.

78 *Id.* at 459.

79 *Id.* at 461–62.

80 *Id.* at 462.

81 *Id.* ("The Federation is not entitled to pre-empt the working of the market by deciding for itself that its customers do not need that which they demand.").

82 *See id.* at 459 (citation omitted) ("[A]n agreement limiting consumer choice by impeding the 'ordinary give and take of the market place' cannot be sustained under the Rule of Reason.").

Commission (FTC) will first consider whether the agreement is a per se violation of the Sherman Act.[83]

To determine whether an agreement is a per se violation of the Sherman Act, a court must consider whether it "facially appears to be one that would always or almost always tend to restrict competition and decrease output."[84] To hold that an agreement is per se illegal, a court must find that its "negative impact on competition is immediately discernible and the [agreement] has no redeeming virtue."[85] In that analysis, the focus is on the effect of the agreement, though the purpose of the agreement is also relevant because it tends to show effect.[86] While the use of a per se rule may appear to contravene the Supreme Court's holding in *Standard Oil* that "the rule of reason becomes the guide" in judicial assessment of alleged violations of the Sherman Act,[87] the Court has also justified the use of a per se rule as a means of strengthening the Sherman Act and avoiding unnecessary prolonged inquiries.[88]

The antitrust case law has established certain categories of per se illegal conduct.[89] Price-fixing agreements are per se illegal regardless of whether the price fixed is reasonable.[90] Arrangements among competitors to allocate

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83 FED. TRADE COMM'N & DEP'T OF JUST., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 3 (2000) [hereinafter *FTC DOJ Guidelines*]. Agreements among competitors are within the scope of antitrust law regardless of whether the "competitors" are actual or potential competitors. *Id.*

84 Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979) (noting that alternative framing of this question is whether the purpose of the agreement is "to threaten the proper operation of our predominantly free-market economy").

85 Craftsmen Limousine, Inc. v. Ford Motor Co., 363 F.3d 761, 773 (8th Cir. 2004).

86 *Broadcast Music, Inc.*, 441 U.S. at 19–20 (citing United States v. U.S. Gypsum Co., 438 U.S. 422, 436 n.13 (1978)). *But see Craftsmen Limousine*, 363 F.3d at 773 ("[P]er se analysis does not allow inquiry into the intent behind the restraint, its pro-competitive justifications, or its actual effect on competition.").

87 Standard Oil Co. v. United States, 221 U.S. 1, 66 (1911).

88 N. Pac. R.R. Co. v. United States, 356 U.S. 1, 5 (1958); *see also Craftsmen Limousine*, 363 F.3d at 772 (noting that choice of mode of analysis–between per se violation and rule of reason analysis–is a question of law and reviewed de novo on appeal; hybrid mode known as "quick look" analysis also appropriate in some cases); Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 726 (1988) ("[T]here is a presumption in favor of a rule-of-reason standard.").

89 *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 213 (1940); United States v. Topco Assocs., 405 U.S. 596, 607–08 ("It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act."); *Craftsmen Limousine*, 363 F.3d at 773 (finding that because per se analysis imposes a presumption of illegality, "the per se analysis is appropriate only where 'experience with a particular kind of restraint enables the court to predict with confidence that the rule of reason will condemn it" (quoting Ariz. v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 343 (1982))).

90 *Socony-Vacuum Oil Co.*, 310 U.S. at 212–13; *see also* United States v. Sealy, Inc., 388 U.S. 350, 355 (1967) ("These activities . . . constitute a violation of the Sherman Act. Their anticompetitive nature and effect are so apparent and so serious that courts will not pause to assess them in light of the rule of reason.").

"territories" (i.e., to allow one competitor dominion over a particular territory and thus eliminate free competition within that territory) are also per se illegal.[91] Other per se illegal practices include group boycotts and tying arrangements.[92]

Per se illegal price-fixing agreements include agreements to restrict output of a product.[93] The rationale for this treatment is that an agreement to restrict output is a necessary component of an agreement to fix an inflated price—if a competitive level of output were allowed to prevail, market forces would eventually drive prices down.[94] This rule makes it likely that an agreement among competitors to cease or restrict production of unsustainable products (e.g., large vehicles) would be found to be per se illegal.[95] Price-fixing would not only be the effect of such an agreement but would *also* be the purpose of the agreement. Absent a change to the current price and quantity landscape, consumers are unlikely to reduce their consumption of unsustainable products. Consequently, such an agreement would be per se illegal under the current form of antitrust analysis, notwithstanding the fact that it is motivated by sustainability objectives rather than pure profit-seeking behavior on the part of the companies involved.[96]

Competitor cooperation to reduce the impact of unsustainable products may also take the form of an agreement to refuse to engage in certain types of

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91 *Sealy*, 388 U.S. at 357–58 ("Within settled doctrine, they are unlawful under § 1 of the Sherman Act without the necessity for an inquiry in each particular case as to their business or economic justification, their impact in the marketplace, or their reasonableness."); *Topco Assocs.*, 405 U.S. at 598–604, 608 (describing allocation of territories by consortium of grocery stores). This conduct is known as a horizontal restraint on trade, because it is "an agreement between competitors at the same level of the market structure." *Topco Assocs.*, 405 U.S. at 608. An agreement between "persons at different levels of the market structure, e.g., manufacturers and distributors" is known as a vertical restraint on trade. *Id.* Some circuits have also recognized the existence of a third type of agreement, called a hub and spoke conspiracy, that involves both horizontal and vertical agreements. *See In re* Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1192 (9th Cir. 2015).

92 *Craftsmen Limousine*, 363 F.3d at 773. *But see* Scott, *supra* note 31, at 552–53 (noting that "[r]ecent cases have applied a hybrid per se/rule of reason approach" in respect of boycotts); Nynex Corp. v. Discon, Inc., 525 U.S. 128, 135 (1998) (finding that per se rule only applies to boycotts under horizontal agreements among direct competitors). A tying arrangement is a situation in which a seller requires, as a condition of the sale of one product, that its customer enter into an agreement to purchase a second product. ANTITRUST DIV: U.S. DEP'T OF JUST., ANTITRUST ISSUES IN THE TYING AND BUNDLING OF INTELLECTUAL PROPERTY RIGHTS (Aug. 8, 2023), https://www.justice.gov/sites/default/files/atr/legacy/2007/04/18/chapter_5.pdf.

93 Westinghouse Elec. Corp., v. Gulf Oil Corp., 588 F.2d 221, 226 (7th Cir. 1978) (finding that lower court erred in treating "conspiracy to fix prices and conspiracy to restrict output [as] distinct offenses").

94 *Id.*

95 *See id.*

96 *See generally* Delrahim, *supra* note 10 (discussing how a group of the world's biggest insurers and reinsurers has had to purposely limit the scope of their pledge to eliminate greenhouse gas emissions to avoid potential violations of antitrust rules).

financial transactions.[97] Such an agreement would likely be construed as a group boycott, particularly if it involved companies who collectively held substantial market power, and therefore would be per se illegal.[98]

If an agreement among competitors were to survive the per se analysis, it would be reviewed under the rule of reason.[99] Although it has not been expressly characterized as a balancing test, rule of reason analysis is in essence a comparison of the anticompetitive and procompetitive effects of a restraint on trade.[100] In considering the procompetitive benefits of a restraint on trade, a court must consider not only whether those benefits exist, but whether the anticompetitive measures are stricter than is necessary to achieve the procompetitive effects.[101]

The defendant in an antitrust suit has the burden of showing procompetitive justifications for its conduct.[102] "Procompetitive benefits are those that 'enhance[] consumer welfare and competition in the marketplace' and are 'consistent with the procompetitive aspirations of antitrust law.'"[103] The policy underlying this rule is that competitors should be encouraged to collaborate where collaboration advances their profit-oriented business goals.[104] Rule of reason analysis is a flexible and fact-intensive inquiry.[105] An agreement may be analyzed under the rule of reason if it would otherwise be per se illegal but is "reasonably related to, and reasonably necessary to achieve procompetitive benefits from" cooperative activity among competitors.[106]

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97 *See, e.g.*, Marsh, *supra* note 20.

98 *See* Scott, *supra* note 31, at 543, 546.

99 *See* Craftsmen Limousine, Inc. v. Ford Motor Co., 363 F.3d 761, 772 (8th Cir. 2004).

100 *See FTC DOJ Guidelines*, *supra* note 83, at 4 ("Rule of reason analysis focuses on the state of competition with, as compared to without, the relevant agreement.").

101 *See* NCAA v. Alston, 141 S. Ct. 2141, 2162 (2021).

102 Wisconsin v. Indivior, Inc., 622 F. Supp. 3d 22, 49–50 (E.D. Pa. 2022).

103 *Id.* at 50 (quoting Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 309 (3rd Cir. 2007)).

104 *See FTC DOJ Guidelines*, *supra* note 83, at 1 (explaining that collaboration can help competitors "to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs").

105 *Id.* at 3. As usual in such inquiries, no one factor is dispositive. *Id.* at 4. However, the DOJ and FTC must confine themselves to analysis of factors that are "necessary to make a sound determination of the overall *competitive* effect of the relevant agreement" (i.e., there is no room to consider other policy interests such as sustainability). *Id.*

106 *Id.*

The starting point in rule of reason analysis is "an examination of the nature of the relevant agreement."[107] In the ESG context, that starting point would effectively amount to a presumption that competitor cooperation is unlawful because agreements to restrict the output of an unsustainable product or service are classified by the case law as highly anticompetitive.[108] In assessing the anticompetitive nature of an agreement, the DOJ and FTC also conduct an analysis of the relevant market and consider the market power of the parties to the agreement.[109] That assessment is also likely to pose a challenge to competitor cooperation on ESG initiatives.[110] A broader coalition of companies participating in a given initiative means it will be simultaneously more likely to materially advance ESG objectives, and more likely to have an anticompetitive character.[111] In both cases, the causal factor is the market power of the parties to the agreement.[112]

On the other side of the rule of reason equation are the potential procompetitive benefits of cooperation.[113] Procompetitive benefits of cooperation are viewed through the lens of consumer welfare.[114] Benefits that the DOJ and FTC may consider in their analysis include efficiencies that allow competitors to bring products to market faster or offer products that are cheaper or more valuable to consumers.[115] Procompetitive benefits of cooperation may also take the form of joint research and development that enables participants "to lower prices, improve quality, or bring new products to market faster."[116] In addition to the nature of procompetitive benefits, antitrust enforcers consider the timing of those benefits, specifically whether the benefits "would be timely,

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107 *Id.* In particular, the antitrust enforcers look out for agreements that would have the effect of "increasing the ability or incentive . . . to raise price or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement." *Id.* These effects may stem from agreements' restriction of firms' independent decision making or the subjugation of key production instruments or assets to common control—tactics reminiscent of the days of the trusts. *Id.*; *see also* KENNETH M. PARZYCH, A PRIMER TO ANTITRUST LAW AND REGULATORY POLICY 30 (1987).

108 *See FTC DOJ Guidelines*, *supra* note 83, at 4; Westinghouse Elec. Corp, v. Gulf Oil Corp., 588 F.2d 221, 226 (7th Cir. 1978).

109 *FTC DOJ Guidelines*, *supra* note 83, at 4.

110 *See* Sean Silverthorne, *Should Industry Competitors Cooperate More to Solve World Problems?*, HARV. BUS. SCH. (Aug. 28, 2017), https://hbswk.hbs.edu/item/should-industries-forgo-competition-to-solve-the-world-s-biggest-problems.

111 *See id.*

112 *See id.*; *FTC DOJ Guidelines*, *supra* note 83, at 4.

113 *See FTC DOJ Guidelines*, *supra* note 83, at 5–6.

114 *See id.* at 6.

115 *Id.*

116 *Id.*

likely, and sufficient to deter or counteract any anticompetitive harms."[117] That aspect of the rule of reason analysis may be yet another challenge to ESG initiatives, which necessarily entail a change in the market landscape today as a means of realizing social benefit at some point in the future.

D. Glimmers of Hope: California Dental, BMI, NCAA*, and* Appalachian Coals

1. California Dental*: An Outlier Case*

In *California Dental*, unlike in *National Society of Professional Engineers*, the Supreme Court found that a professional association's restriction on advertising by its members did not violate the antitrust laws.[118] The California Dental Association, an association comprised of roughly three-quarters of dentists practicing in California, subjected its members to a code of ethics that imposed restrictions on the content of their advertising and required them to submit proposed advertisements to the association for review.[119] Like FOGA, the Association established a system for investigating and adjudicating possible violations of this code.[120] The FTC brought a complaint alleging that the Association had, under the code of ethics, "unreasonably restricted two types of advertising: price advertising, particularly discounted fees, and advertising relating to the quality of dental services."[121] The FTC found that those advertising restrictions violated the Sherman Act.[122] The Ninth Circuit affirmed, finding, among other things, that the "restrictions on discount advertising . . . 'amounted in practice to a fairly "naked" restraint on price competition itself.'"[123]

In reviewing the conclusions of the FTC and the Ninth Circuit, the Supreme Court acknowledged its holding in *National Society of Professional Engineers*, in which it held that agreements among competitors to suppress price advertising have a fundamentally anticompetitive character.[124] The Court's conclusion that the restrictions on dental advertising did not violate the Sherman Act was

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117 *See id.* at 11.
118 Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 759–65 (1999).
119 *Id.* at 759, 760–61.
120 *Id.* at 761–62.
121 *Id.* at 762.
122 *Id.* at 762–63.
123 *Id.* at 763.
124 *Id.* at 770.

supported by its findings of unique characteristics of the market for dental services.[125] The Court went so far as to find that price advertising could, in fact, be a danger to competition in that market, writing that "[i]n a market for professional services, in which advertising is relatively rare and the comparability of service packages not easily established, the difficulty for consumers or potential competitors to get and verify information about the price and availability of services magnifies the dangers to competition associated with misleading advertising."[126] The Court noted that consumers have limited information concerning the quality of advertised dental services, and in any event, most consumers do not have the specialized knowledge required to assess such information.[127] Accordingly, a party offering dental services could gain an unfair advantage over its competitors using misleading advertising.[128] In that sense, the Court found the California Dental Association's restrictions on advertising preserved, rather than inhibited, competition.[129]

While the outcome of *California Dental* was a departure from the trend in private governance cases, the Court seemingly arrived at its opinion using a standard that balanced anticompetitive and procompetitive effects under the rule of reason.[130] In upholding the Dental Association's advertising restriction, the Court approvingly characterized the rule as one that reflects "the prediction that any costs to competition associated with the elimination of across-the-board advertising will be outweighed by gains to consumer information (and hence competition) created by discount advertising that is exact, accurate, and more easily verifiable."[131]

With the Dental Association's code cast in that light, the Court reached a result that is a logical—even straightforward—application of antitrust law but still inconsistent with the result in *National Society of Professional Engineers*.[132] The restriction on competitive bidding that was at issue in *National Society of Professional Engineers* was also a restriction of price competition by "members

[125] *Id.* at 771–72.
[126] *Id.* at 772.
[127] *Id.*
[128] *Id.*
[129] *Id.* at 771.
[130] *See id.* at 775.
[131] *Id.* (adding that "[a]s a matter of economics this view may or may not be correct, but it is not implausible, and neither a court nor the Commission may initially dismiss it as presumptively wrong").
[132] *Compare id.* (suggesting that procompetitive effects of restricting misleading advertising outweigh anticompetitive effects of general restriction on advertising), *with* Nat'l Soc'y Pro. Eng'rs v. United States, 435 U.S. 679, 695–96 (1978) (rejecting arguments for restriction on engineer participation in competitive bids).

of a learned profession"[133] in circumstances where it would be difficult for customers to verify claims made about the quality of advertised services.[134] Accordingly, one could expect competitive bidding in the engineering field to have the same anticompetitive effect as unrestricted advertising in the dental field.[135] A provider of engineering services could gain an unfair advantage over its competitors by offering a deeply discounted price in a competitive bid and reducing the quality of its work to deliver services at the discounted price without sacrificing its profit margin.[136] This scenario is similar to what Supreme Court found might happen absent the California Dental Association's restriction on advertising.[137] However, the Court found the California Dental Association's restriction to be more procompetitive than anticompetitive, and found the National Society of Professional Engineers' restriction unlawfully anticompetitive.[138]

The divergence between the results of *California Dental* and *National Society of Professional Engineers* is significant in considering the antitrust treatment of green product fixing. Favorable analogies can be drawn between green product fixing and the Dental Association's advertising restriction.[139] The probable outcome in circumstances where competitors do not agree on standards and other measures to improve the ESG impact of their business operations is a continuation of unsustainable business practices that could eventually have consequences that are world-altering.[140] The challenges of a changing climate

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133 *Nat'l Soc'y Pro. Eng'rs*, 435 U.S. at 679, 681.

134 *Id.* at 692–93.

135 *Compare id.* at 692–95, *with Cal. Dental Ass'n*, 526 U.S. at 784–85 (Breyer, J., dissenting).

136 *See Nat'l Soc'y Pro. Eng'rs*, 435 U.S. at 693.

137 *See Cal. Dental Ass'n*, 526 U.S. at 772.

138 *See id.* at 775; *Nat'l Soc'y Pro. Eng'rs*, 435 U.S. at 695–96. *California Dental* was an exception to what many lawyers understood as a trend of the Court construing restrictions on advertising as an unlawful restraint of trade. Timothy J. Muris, California Dental Association v. Federal Trade Commission*: The Revenge of Footnote 17*, 8 SUP. CT. ECON. REV. 265, 268 (2000). Some scholars speculate that this decision might reflect the Court's consideration for the nature of dentistry as a "learned profession." *Id.* at 266–68. This speculation was advanced by a footnote in *Goldfarb v. Va. State Bar*, that suggested the Sherman Act may apply differently in "a profession as distinguished from a business." 421 U.S. 773, 788 n.17 (1975). However, prior to *California Dental*, the Supreme Court had not applied antitrust law to professions any differently than other industries, though it did decline to extend First Amendment protection to restrictions on attorney advertising. Muris, *supra*, at 267.

139 *See Cal. Dental Ass'n*, 526 U.S. at 775.

140 *See generally* U.S. GLOB. CHANGE RSCH. PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT 25–32 (2018) (discussing anticipated effects of climate change over the next century, including adverse effects on human health, infrastructure, and economic growth).

will create significant challenges and costs for businesses.[141] Those costs may be tolerable for the largest players, but fatal for their smaller competitors, and thus a danger to competition.[142] Consequently, green product fixing would, like the Dental Association's advertising restriction,[143] avoid a greater harm to competition and have procompetitive aspects that should be considered in antitrust analysis.

If a group of competitors used that reasoning to defend allegations that a challenged ESG initiative violated the antitrust statutes, they would face two obstacles. First, they would need to overcome their (questionable) reliance on *California Dental*, a case that diverges from the remainder of case law on private governance. Second, they might be faced with a court that is not prepared to recognize the harm from negative externalities to climate change as an anticompetitive effect that could lawfully be offset by competitor cooperation that is facially anticompetitive.[144] In *California Dental*, the anticompetitive and procompetitive effects of the advertising restriction were two sides of the same coin: the effects would be realized at the same time.[145] In the ESG context, the market effects of competitor cooperation, including restriction of supply and price increases, would be felt as soon as the cooperation began.[146] However, the full benefit of that cooperation, including the preservation of competition that it would effectuate by forestalling climate change and other negative externalities, would not be felt until some point in the future.[147] Quantifying the procompetitive benefits of the cooperation, in order to conduct the detailed analysis required by the rule of reason, may also be a challenge.[148] There are

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141 Rose Celestin, *Climate Change Will Cost Companies $1.3 Trillion By 2026*, FORBES (Mar. 5, 2021), https://www.forbes.com/sites/rosecelestin/2021/03/05/climate-change-will-cost-companies-13-trillion-by-2026/?sh=3d79f53d6cdc.

142 *See* Jeff Wilser, *How Small Businesses Can Have a Big Impact in the Climate Fight*, TIME (Oct. 13, 2022), https://time.com/6213434/climate-change-action-companies-businesses/ ("Small businesses have less resilience than larger corporations.").

143 *See Cal. Dental Ass'n*, 526 U.S. at 775.

144 *See FTC DOJ Guidelines*, *supra* note 83, at 23 (listing of procompetitive effects that may be considered in rule of reason analysis).

145 *See Cal. Dental Ass'n*, 526 U.S. at 775.

146 *See* Tamara Charm et al., *Understanding and Shaping Consumer Behavior in the Next Normal*, MCKINSEY & CO. (July 24, 2020), https://www.mckinsey.com/capabilities/growth-marketing-and-sales/our-insights/understanding-and-shaping-consumer-behavior-in-the-next-normal ("Companies can nudge consumers toward new habits through product innovation.").

147 *See generally* U.S. GLOB. CHANGE RSCH. PROGRAM, *supra* note 140, at 34 (emphasizing that "the severity of future impacts [of climate change] will depend largely on actions taken to reduce greenhouse gas emissions and to adapt to the changes that will occur"); Celestin, *supra* note 141 (projecting corporate revenue losses attributable to climate change over a five-year period).

148 *FTC DOJ Guidelines*, *supra* note 83, at 24.

enough vulnerabilities in an argument based on the *California Dental* reasoning that a litigant relying on a lower federal court to green-light green product fixing based on such an argument would be using a risky strategy. A more decisive intervention by Congress or the Supreme Court may be required if green product fixers are to escape condemnation under the antitrust statutes.[149]

2. BMI *and* NCAA*: An Opening Under the Rule of Reason*

While social benefit is not sufficient as a procompetitive justification to offset the potentially anticompetitive nature of green product fixing under the rule of reason, consumers' expressed desire for green products may allow green product fixing to gain a foothold in the rule of reason.[150] Supreme Court precedent indicates that some restriction of competition is tolerated if it enables a new product to be brought to market.[151] In *BMI*, the Supreme Court found that blanket licensing arrangements, even if they were "'price fixing' in the literal sense," were not a naked restraint of trade and may have been justified by market conditions that came about "[w]ith the advent of radio and television networks."[152] The Court accordingly overruled a lower court finding that blanket licensing was per se illegal and remanded the case for consideration under the rule of reason.[153] Similarly, in *NCAA*, the Court noted that the private governance orchestrated by the NCAA was vital to preserving "the integrity of the 'product'" of college athletics and therefore "widen[s] consumer choice . . . and hence can be viewed as procompetitive."[154]

When businesses cannot practically introduce new sustainable products on their own, green product fixing is like league sports: an activity that "can only be carried out jointly."[155] This reasoning provides a means for a court to condone green product fixing without deviating from the existing rule of reason. A court could recognize that green product fixing has procompetitive benefits insofar as it enables businesses to introduce the sustainable products that are desired by consumers.

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149 *See infra* Part IV.

150 *See* Petro, *supra* note 24.

151 *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979); Nat'l Collegiate Athletic Ass'n v. Bd. Regents Univ. Okla., 468 U.S. 85, 102 (1984).

152 *Broad. Music*, 441 U.S. at 8–21.

153 *Id.* at 24–25.

154 *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 101–02.

155 *Id.* at 101 (quoting ROBERT BORK, THE ANTITRUST PARADOX 278 (1978)).

3. Appalachian Coals*: SCOTUS Can Shift the Antitrust Playing Field*

Aside from the substance of the consumer welfare-focused analysis, which the DOJ and FTC reflect in their current application of antitrust law, an important lesson for the ESG movement from antitrust history is the potential for large-scale shifts in the law—at least where the Supreme Court is willing to set those shifts in motion. Given the vague language of the Sherman Act, the Supreme Court has opted to treat it as a quasi-constitutional statute, interpreting it without regard to legislative history or other common tools of statutory construction.[156] This approach has at times led the Court to set aside its own precedent and declare that agreements previously found to be precluded by the Sherman Act are in fact permitted under the Act.[157]

In particular, in its 1933 *Appalachian Coals* decision, a cartel case, the Supreme Court addressed an industry agreement that amounted to price fixing and wrote of self-regulation in markedly more positive language than it employed in earlier opinions.[158] The Court's opinion may have been influenced by economic conditions at the time; the Court noted that with the Great Depression underway, the condition of the coal industry prior to entering into the agreement that was challenged in the case had "for many years . . . been indeed deplorable."[159]

Given the anomalous nature of the Supreme Court's decision in *Appalachian Coals* and the general terms on which that decision is justified, antitrust practitioners would probably counsel clients that relying on *Appalachian Coals* to justify green product fixing under antitrust law would be a risky strategy.[160] However, this decision has yet to be overruled and has meaningful factual parallels to green product fixing—as an anti-cartel case brought in circumstances where it could reasonably be said that desperate times call for desperate

156 *See* Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359–60 (1933).

157 *See, e.g.*, *id.* at 356–58, 377–78 (finding that joint establishment by coal producers of "exclusive selling agency" with potential to raise prices above competitive levels did not violate Sherman Act despite precedent that found similar arrangements did violate Sherman Act).

158 *See id.* at 360. In its 1933 opinion, the Court found that "[t]he mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it." *Id.* Further, the Court noted that "[g]ood intentions will not save a plan otherwise objectionable; but knowledge of actual intent is an aid in the interpretation of facts and prediction of consequences." *Id.* at 372. Lastly, the Court found "[a] coöperative [sic] enterprise, otherwise free from objection . . . is not to be condemned as an undue restraint merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities." *Id.* at 373–74.

159 *Id.* at 361.

160 *See id.* at 360, 372–74.

measures.[161] As such, *Appalachian Coals* gives the Supreme Court an opening to carve out an exception from antitrust law for green product fixing.[162]

II. PRIVATE GOVERNANCE IS THE RIGHT TOOL TO FIGHT CLIMATE CHANGE

This Part addresses two questions that present a meaningful philosophical challenge for green product fixing. The first question is why companies cannot pursue green product improvements independently.[163] The second question is whether sustainability standards set by private sector coalitions would amount to "an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce . . . and thus 'trenches upon the power of the national legislature.'"[164]

A. *Going It Alone Doesn't Work*

The interests protected by antitrust law are significant, so it is reasonable to ask before carving out an "ESG exception" from antitrust law whether it is necessary to do so.[165] Put differently, do businesses really need to coordinate with their competitors to introduce more sustainable products and practices, or can they do so independently?[166] In the case of green product fixing, the answer is that businesses can introduce, and have introduced, sustainable products independently.[167] Consumer uptake of those products has been insufficient to support the sort of large-scale, industry-wide transformation that is needed to further the fight against climate change.[168] As one example, hybrid, electric, and

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161 *See* Shubha Ghosh, *Relaxing Antitrust During Economic Downturns*, 68 ANTITRUST L.J. 111, 112–13 (2000).

162 *See infra* Part IV (discussing potential implementation of provision for green product fixing by Supreme Court).

163 *See generally* David Young et al., *How to Build a High-Impact Sustainability Alliance*, BCG (Feb. 14, 2022), https://www.bcg.com/publications/2022/how-to-build-sustainability-alliance ("To achieve sustainability . . . companies must act aggressively—and collectively—to transform their ecosystems.").

164 Fashion Originators' Guild Am., Inc. v. Fed. Trade Comm'n, 312 U.S. 457, 465 (1941).

165 *See* Khan, *supra* note 1 ("The world faces challenges that demand policy solutions beyond what merger enforcement can provide. Finding those solutions is often a job for legislators and other policy makers.").

166 *See id.* ("Corporations . . . are free to pursue policies that they believe will make the world a better place. Just don't expect that to save an illegal merger.").

167 *See, e.g.*, Rebecca Matulka, *The History of the Electric Car*, ENERGY.GOV (Sept. 15, 2014), https://www.energy.gov/articles/history-electric-car (noting that American automakers began developing electric vehicle prototypes in the 1970s and hybrid electric vehicles have been widely available since at least 2000, when Toyota began selling the Prius in the United States).

168 *See, e.g.*, *The Electric-Vehicle Revolution Is Not Happening Fast Enough*, THE ECONOMIST (June 2, 2022), https://www.economist.com/graphic-detail/2022/06/02/the-electric-vehicle-revolution-is-not-happening-fast-enough.

small vehicles have been widely available in the United States for more than two decades, yet Americans continue to purchase supersized cars and trucks in droves.[169] The scale of the shift in consumption habits needed in some industries is so large that businesses in those industries would need to substantially reduce or even phase out sales of their most unsustainable products.[170] If those products are popular as well as unsustainable, businesses will be reticent to discontinue them for fear of putting themselves at a competitive disadvantage.[171] Competitor collaboration eliminates the potential for competitive disadvantage.

It is also noteworthy that many consumers desire more sustainable products and are even willing to pay a premium for such products.[172] Thus, a market in which businesses do not offer more sustainable products, simply out of fear of competitive harm, fails those consumers.

B. Self-Regulation Is a Necessary Complement to Government Action on Climate Change

Green product fixing amounts to industry self-regulation of product standards.[173] But unlike the Fashion Originators' Guild's campaign against style pirates, green product fixing would not "trench[] upon the power of the national legislature."[174] Rather, green product fixing and other private sector actions would be a meaningful, necessary complement to government initiatives and regulation targeting climate change.[175]

European government officials have recognized the important role that the private sector can play in supporting public sector efforts on climate change. European officials have publicly acknowledged that private sector support will be essential for the European Union countries to meet the target of a carbon-

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169 Matulka, *supra* note 167.

170 *See The Electric-Vehicle Revolution Is Not Happening Fast Enough*, *supra* note 168 (explaining that governments need to increase their new-car share of electric-vehicles to 60% by 2050—at current rates the International Energy Agency expects a new-car share of electric-vehicles of 22–35% by 2030).

171 *See* Marlene Cimons, *Why Big Name Brands Lose Out By Going Green*, NEXUS MEDIA NEWS (Sept. 6, 2019), https://nexusmedianews.com/why-big-name-brands-lose-out-by-going-green-d3e52b5c505c/.

172 Petro, *supra* note 24 (noting recent survey data that showed "[t]wo-thirds of consumers say they will pay more for sustainable products, with equally two-thirds of retailers believing that consumers will not pay more for sustainable products").

173 *Cf.* Saule T. Omarova, *Wall Street as Community of Fate: Toward Financial Industry Self-Regulation*, 159 U. PA. L. REV. 411, 412–17 (2011) (casting industry self-regulation as a source of "new, creative ways to reinvigorate and strengthen the foundation of government regulation").

174 Fashion Originators' Guild Am., Inc. v. Fed. Trade Comm'n, 312 U.S. 457, 465 (1941).

175 *See* ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 8.

neutral continent by 2050.[176] That understanding prompted European officials to issue revised guidelines on the application of European competition law that specifically addressed "sustainability agreements."[177]

Like the European Union, the U.S. government has publicly committed to addressing climate change, including with a 2050 "net zero" target.[178] Legislators and successive presidential administrations have spoken of reducing carbon emissions as a policy priority,[179] and a majority of American citizens are concerned about the effects of climate change.[180] Here, as in Europe, corporations are significant generators of carbon emissions and other contributors to climate change[181] and they play an important role in shaping individuals' consumption habits.[182] If they are not part of the solution to climate change, they will continue to be part of the problem.

To some extent, Congress and federal government agencies can mandate corporations to be part of the solution through legislation and regulation. However, Congress and these agencies lack the time, resources, and industry-specific expertise to regulate product standards at the level of detail necessary to

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176 *See Executive Vice-President Vestager Champions Green Deal in Policy Announcement*, LATHAM & WATKINS (Sept. 30, 2021), https://www.latham.london/2021/09/executive-vice-president-vestager-champions-green-deal-in-policy-announcement/.

177 *Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizonal Co-Operation Agreements*, COM (2023) (June 1, 2023) [hereinafter European Commission].

178 *See President Biden Announces New Initiatives at COP27 to Strengthen U.S. Leadership in Tackling Climate Change*, WHITE HOUSE (Nov. 11, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/11/11/fact-sheet-president-biden-announces-new-initiatives-at-cop27-to-strengthen-u-s-leadership-in-tackling-climate-change/.

179 *See, e.g.*, *id.*

180 Alec Tyson & Brian Kennedy, *Two-Thirds of Americans Think Government Should Do More on Climate*, PEW RSCH. CTR. (June 23, 2020), https://www.pewresearch.org/science/2020/06/23/two-thirds-of-americans-think-government-should-do-more-on-climate/ (reporting that sixty-five percent of individuals surveyed agreed that federal government is doing too little to fight climate change).

181 Thin Lei Win, *Multinational Companies Account for Nearly a Fifth of Global CO2 Emissions, Researchers Say*, REUTERS (Sept. 8, 2020), https://www.reuters.com/article/us-climatechange-companies-emissions-trf/multinational-companies-account-for-nearly-a-fifth-of-global-co2-emissions-researchers-say-idUSKBN25Z1W6; *see also Sources of Greenhouse Gas Emissions*, EPA, https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions (last updated Apr. 28, 2023) (indicating that less than thirteen percent of U.S. greenhouse gas emissions in 2021 came from residential sources).

182 *See* Charm, *supra* note 146.

effect change in the sustainability of entire industries.[183] Such regulation can instead be left to businesses, who in many cases have conducted studies about the environmental impact of their operations that enable them to determine appropriate standards more accurately than a government agency could.[184] Additionally, because large businesses are transnational actors, standards fixed by an industry coalition could effect change on a global scale, while governmental attempts to establish and enforce international sustainability standards have historically been fraught with complications.[185]

III. Deciding When to Allow Green Product Fixing

This Part sets out factors that should guide the determination of whether to permit a particular instance of green product fixing. Congress could codify these factors in a statute and direct the DOJ or FTC to apply them when evaluating competitor collaborations involving green product fixing.[186] Alternatively, these factors could form the basis for judicial analysis of green product fixing that is alleged to violate the antitrust statutes. The means by which this analytical framework could be implemented are discussed further in Part IV.

A. Harmonizing Sustainability Goals and Consumer Welfare

In addressing any instance of competitor cooperation, the law must balance two values. On one side of the balance is the concern for consumer welfare (quantified in economic variables) which has dominated antitrust policy for

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183 *See* Debra A. Valentine, Former Gen. Couns., Fed. Trade Comm'n, Public Statement at The Interdisciplinary Center Herzlia: The Arison School of Business and The Israeli Antitrust Authority Seminar on New Developments in Anitrust Policy (May 24, 1998) ("To begin with, the private sector has substantial 'hands-on' experience, which often enables it to address a problem more capably than could a government agency . . . . In addition, an industry's self-regulatory efforts are often quicker, more flexible, less adversarial, and therefore less burdensome, than governmental regulation.").

184 *See id.*

185 *See* Lindsay Maizland, *Global Climate Agreements: Successes and Failures*, CFR, cfr.org/backgrounder/paris-global-climate-change-agreements (last updated Nov. 4, 2022).

186 *Cf.* 15 U.S.C. § 18a (assigning responsibility to Federal Trade Commission and Assistant Attorney General in charge of the Antitrust Division of the Department of Justice for receipt of premerger notification and merger review under antitrust statutes).

several decades.[187] On the other side of the balance is the environmental benefit of the cooperation, which may itself be a societal and consumer benefit.[188]

The concern on the consumer welfare side of the balance is straightforward: it is undesirable for consumers to have to pay more for goods or face reduced supply of goods that they desire.[189] In the sustainability context, such an outcome may also be particularly unfair to consumers.[190] If corporations have profited for years from selling unsustainable goods and services, why should consumers bear the burden of those goods and services becoming more sustainable? There are ways for the corporation to assume that burden even if it were not permitted to cooperate with its competitors.[191] It could offer a new sustainable product at an artificially low price for a period, to build customer loyalty.[192] Alternatively, it could undertake activities, such as purchasing carbon offsets, to counteract the effects of continuing to market an unsustainable product.[193] Those steps might impose considerable costs on the corporation.[194] But it may be more reasonable

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[187] *See generally* Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Luncheon Keynote Address at the George Mason Law Review Antitrust Symposium: Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get (Feb. 15, 2019) (comparing consumer welfare standard to total welfare standard).

[188] *See* European Commission, *supra* note 177 (explaining that sustainability objectives can be pursued with different types of cooperation agreements and cooperation agreements can address situations where markets and regulation have failed to deliver optimal environmental outcomes).

[189] *See FTC DOJ Guidelines*, *supra* note 83, at 6 (noting that competitor collaboration may harm consumers "by increasing the ability or incentive profitably to raise price above or reduce output . . . below what likely would prevail in the absence of the relevant agreement").

[190] *See, e.g.*, Scott Hardman et al., *A Perspective on Equity in the Transition to Electric Vehicle*, 2 MIT SCI. POL'Y REV. 46, 46–49 (2021) (highlighting the high concentration of luxury models in the electric vehicle market as an impediment to electric vehicle uptake by middle and lower-income households).

[191] *See, e.g.*, *Why Investing in Sustainable Business Is Good for Business*, UNILEVER (Sept. 23, 2022), https://www.unilever.com/news/news-search/2022/why-investing-in-sustainable-business-is-good-for-business/ (noting that Unilever has unilaterally unveiled a Climate Transition Action Plan and that improving sustainability of the company's products is an element of that action plan).

[192] *See* Alexis Benveniste, *Average Americans Can't Afford to Buy Green*, BLOOMBERG (Mar. 7, 2019), https://www.bloomberg.com/news/articles/2019-03-07/it-s-not-cheap-being-a-green-consumer#xj4y7vzkg (noting the possibility of green entrepreneurs charging "cut-rate prices").

[193] *See* Robin Pomeroy, *Carbon Offsets–How Do They Work, and Who Sets the Rules?*, WORLD ECON. F. (Sept. 2, 2022), https://www.weforum.org/agenda/2022/09/carbon-offsets-radio-davos/ (explaining the mechanics of offsets, which "occur when a polluting company buys a carbon credit to make up for the greenhouse gas it has emitted" and that "money [is] used to fund action . . . that remove[s] the same amount of carbon out of the air, or to prevent carbon emissions").

[194] *See* William Boulding & Markus Christen, *First-Mover Disadvantage*, HARV. BUS. REV. (Oct. 2001), https://hbr.org/2001/10/first-mover-disadvantage (explaining that "pioneers" of sustainable products face higher production costs than "followers" who introduce sustainable products later).

for the corporation to bear the costs if the corporation has previously been the one to reap the benefits of sales of its unsustainable product.[195]

On the other hand, the benefits of unsustainable products likely accrue to both consumers and producers. If producers were obliged to cover the true social cost of bringing their products to market, including negative externalities like pollution and carbon emissions, they would almost certainly pass on at least some of that cost to consumers, as they do with other production costs.[196] Accordingly, it is likely that consumers save money when producers are not required to cover the true social cost of producing their products.[197] However, it may still be inequitable to require consumers to bear the costs of improving product sustainability if the consumers are less able than producers to do so. The consumer welfare inquiry in antitrust law is confined to the consumer's future welfare, as reflected in prices and output upon completion of a business contract or combination.[198] It does not consider the possibility that a future change in the consumer's welfare is an offset to an artificial and unsustainable increase in the consumer's welfare in the past, e.g., as a result of negative externalities not being reflected in the price for a good.[199]

Given the emphasis on consumer welfare in contemporary antitrust case law, the balancing analysis in respect of sustainability agreements should be done with a finger on the scale in favor of consumer welfare.[200] Even aside from the dominance of consumer welfare in antitrust orthodoxy, antitrust law is not environmental protection law. Reasonable minds can disagree, and have disagreed, about who, and what, antitrust law is meant to promote and protect.[201] However, it would be illogical for antitrust law to prioritize unrelated policy objectives (even meritorious ones) above the values antitrust law is supposed to uphold.

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[195] *See* John Alexander, *Environmental Sustainability Versus Profit Maximization*, 76 J. BUS. ETHICS 155, 156 (2007).

[196] *See* Thomas Helbling, *Externalities: Prices Do Not Capture All Costs*, FIN. & DEV., https://www.imf.org/external/pubs/ft/fandd/basics/pdf/helbling-externalities.pdf (last visited Nov. 8, 2022).

[197] *See id.*

[198] *See FTC DOJ Guidelines*, *supra* note 83, at 10.

[199] *See id.*

[200] *See* Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 847–48 (2014).

[201] *Compare* ROBERT BORK, THE ANTITRUST PARADOX 425 (1993) (promoting the consumer welfare standard), *with* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 803 (2017) (arguing that the consumer welfare standard is not fit for use in the contemporary economy).

How, then, can the "environmental benefit" side of the balance ever come out on top? The answer is that the environmental benefit may also be a benefit to consumer welfare. If a product is unsustainable, then, by definition, it cannot be produced indefinitely. There will come a point at which the product will no longer be available, or it is prohibitively expensive, perhaps due to scarcity of raw materials or new environmental regulations that restrict its sale. That unavailability or price increase could be a loss to consumers, the magnitude of which may exceed any short-term loss to consumer welfare that results from a group of competitors' agreement to discontinue an unsustainable product.

Consumers may also bear costs resulting from an unsustainable product by virtue of being taxpayers and inhabitants of the planet Earth.[202] As climate change and other environmental disasters worsen, governments will likely need to undertake large-scale remediation and disaster relief programs at taxpayer expense.[203] Studies have also projected increased costs that households will incur as a result of resource scarcity and recovery from natural disasters spurred by climate change.[204] Consequently, the "environmental benefit" side of the balance in the antitrust analysis of sustainability agreements can be seen as a proxy for future consumer welfare.

In short, antitrust enforcers evaluating a sustainability agreement must decide whether the environmental benefit, assuming some of it will accrue to consumers, justifies the short-term consumer welfare loss. While antritrust enforcers could theoretically perform this evaluation mathematically, the complexity of the factors involved, and the seriousness of the interests at stake, call for a more nuanced analysis by an agency or court. Section B discusses a framework for such analysis proposed by the European Union's competition regulator. Section C proposes factors to be used in the U.S. antitrust analysis.

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[202] *See* Kevin Rennert et al., *Comprehensive Evidence Implies a Higher Social Cost of CO_2*, 610 NATURE 687, 687, 691 (2022).

[203] Candace Vahlsing & Danny Yagan, *Quantifying Risks to the Federal Budget from Climate Change*, THE WHITE HOUSE (Apr. 4, 2022), https://www.whitehouse.gov/omb/briefing-room/2022/04/04/quantifying-risks-to-the-federal-budget-from-climate-change/. Climate change also has the potential to reduce U.S. GDP; the annual revenue loss to the federal budget resulting from climate change could reach $2 trillion per year by the end of this century. *Id.*

[204] *See, e.g.*, PAUL WATKISS ET AL., CLIMATE CHANGE IMPACTS ON THE FUTURE COST OF LIVING 26 (Mar. 2016), https://www.climatejust.org.uk/sites/default/files/FINAL%20Watkiss%20report%2030032016.pdf (projecting a nine percent increase in food bill for average family by 2050).

B. *A Model from Abroad: Europe's Horizontal Guidelines*

On March 1, 2022, the European Commission[205] launched a public consultation on a draft revision of the document commonly known as the Horizontal Guidelines.[206] The Horizontal Guidelines set out the Commission's view as to the type of agreements between competitors that are permitted and prohibited under Article 101 of the European Union treaty, [207] which is analogous to Section 1 of the Sherman Act in the U.S. Unlike any pronouncement by the DOJ or FTC, the Horizontal Guidelines can be taken as a definitive statement of competition policy in Europe.[208] In contrast to the U.S., where multiple regulators, state attorneys general, and private parties can all bring lawsuits under the antitrust statutes,[209] in the EU system, the European Commission is the only competition law enforcer, and private parties' ability to sue under competition law is more limited.[210] Consequently, the Commission's view of competitors' conduct is determinative of whether they face antitrust litigation arising from that conduct.[211] The Commission adopted the revised Horizontal Guidelines on June 1, 2023.[212]

The revised Horizonal Guidelines include a new chapter dealing with sustainability agreements, which are defined as "agreements between

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205 The European Commission can be described as the executive branch of the European Union government. *About the European Commission*, EUR. COMM'N, https://commission.europa.eu/about-european-commission_en (last visited Jan. 6, 2023). It consists of twenty-seven Commissioners, who set the political and strategic direction of the Commission, and a number of administrative departments and agencies. *How the Commission is Organised*, EUR. COMM'N, https://commission.europa.eu/about-european-commission/organisational-structure/how-commission-organised_en (last visited Jan. 6, 2023). Among those agencies is the Directorate-General for Competition, which is the enforcer of the European Union's competition law. *Competition*, EUR. COMM'N, https://commission.europa.eu/about-european-commission/departments-and-executive-agencies/competition_en (last visited Jan. 6, 2023).

206 *Antitrust: Commission Invites Comments on Draft Revised Rules on Horizontal Cooperation Agreements Between Companies*, EUR. COMM'N, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1371 (last visited Jan. 6, 2023). The full name of the Horizontal Guidelines is the "Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements." European Commission, *supra* note 177, at 1.

207 *Id.* at 6.

208 *See generally* Andre Fiebig, *The Increasing Importance of EU Competition Law for U.S. Companies*, 2016 BUS. L. TODAY 1 (2016) (analyzing how the European Union and United States tackle international antitrust claims with their differing antitrust regimes).

209 15 U.S.C. §§ 4, 15, 15c, 56(a)(2).

210 Fiebig, *supra* note 208, at 3.

211 *See id.*

212 *Antitrust: Commission Adopts New Horizontal Block Exemption Regulations and Horizontal Guidelines*, EUR. COMM'N, https://ec.europa.eu/commission/presscorner/detail/en/IP_23_2990 (last visited Aug. 10, 2023).

competitors that pursue sustainability objectives."[213] After acknowledging that sustainability agreements may be a useful tool as the EU works toward a target of net-zero carbon emissions by 2050, the revised guidelines set out the treatment of various types of sustainability agreements under Article 101.[214]

The revised guidelines do not create an exception from the provisions of Article 101 for sustainability agreements.[215] The guidelines provide examples of sustainability agreements that fall outside the scope of Article 101.[216] They also explain how sustainability agreements may satisfy the provisions of Article 101(3) of the EU treaty.[217] Article 101(3) provides that agreements with anticompetitive effects may be permitted if they meet specified criteria, including "promoting technical or economic progress."[218]

The foundational differences between European and U.S. competition law somewhat limit the utility of the revised Horizontal Guidelines as a model for U.S. law. Because the U.S. does not have a single antitrust enforcer and allows for antitrust suits by state attorneys general and private parties, [219] guidelines released by the DOJ or the FTC (or the DOJ and FTC together) would probably not provide companies with sufficient comfort to cooperate with their competitors on sustainability initiatives—at least without strong grounding for those guidelines in the antitrust case law. Additionally, the Sherman Act does not have any provision analogous to Article 101(3).[220]

Nevertheless, there are principles reflected in the revised Horizontal Guidelines that merit consideration in the U.S. For example, the guidelines recognize that "sustainability agreements can "have positive effects on competition [and] contribute to sustainable development by enabling the

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213 European Commission, *supra* note 177, at 146. In context, the term "sustainability" appears to be intended to refer to environmental conservation efforts, particularly "the ability of society to consume and use the available resources today without compromising the ability of future generations to meet their own needs." *Id.*

214 *Id.* at 158–62.

215 *Id* at 147 ("Agreements that restrict competition cannot escape the prohibition laid down in Article 101(1) simply by referring to a sustainability objective.").

216 *Id.* at 148. (stating that Section 9.2 sets out "examples of sustainability agreements that are unlikely to raise competition concerns" because they "do not negatively affect parameters of competition, such as price, quantity, quality, choice or innovation").

217 *Id.* at 154–62.

218 Consolidated Version of the Treaty on the Functioning of the European Union, art. 101(3), May 5, 2008 O.J. (C 115) 88–89.

219 *See* 15 U.S.C. §§ 15, 15c (provision for suits by private parties and state attorneys general).

220 *See* Sherman Antitrust Act, 15 U.S.C §§ 1–38 (1890).

development of new products or markets, increasing product quality or improving conditions of supply or distribution."[221] Those efficiencies may qualify as procompetitive effects in U.S. antitrust analysis.[222] The revised Horizontal Guidelines also discuss the requirement that consumers receive "a fair share of the resulting benefit" from any agreement permitted under Article 101(3), confirming that the "fair share" may be a societal benefit such as reduced carbon emissions.[223]

C. Factors for U.S. Antitrust Analysis

Because there is no established safe harbor in U.S. antitrust law like the EU's Article 101(3) under which to analyze sustainability agreements, a court or agency reviewing an agreement may be guided by the overall principle of balancing consumer welfare against sustainability benefits.[224] In that balancing, the consumer welfare analysis can be carried out using the established methods that focus on price and output, while the sustainability benefit analysis can follow a sequential process considering three factors.[225]

1. Consumer Welfare

On the consumer welfare side of the balance, because the antitrust rule of reason analysis is essentially an inquiry into consumer welfare, the question is whether the cooperation agreement would be permitted under the rule of reason if it had no sustainability benefit. All the usual considerations under the rule of reason, including price and output effects and offsetting procompetitive effects, are relevant here.[226] If the standard rule of reason analysis shows that there is no potential harm to competition from the proposed cooperation agreement, the inquiry ends there without any need to consider the sustainability benefit factors.[227]

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221 European Commission, *supra* note 177, at 151.

222 *See FTC DOJ Guidelines*, *supra* note 83, at 5–6.

223 European Commission, *supra* note 177, at 157, 160 (discussing the example of "drivers purchasing less polluting fuel are also citizens who would benefit from cleaner air"). There are specific requirements that must be met if collective benefits are to be taken into account. *Id.* at 160–61.

224 *See supra* Part III.A.

225 *See infra* Part III.C.2.

226 *FTC DOJ Guidelines*, *supra* note 83, at 10–25.

227 *See id.*

Positive externalities from cooperation may literally be a benefit to consumer welfare.[228] However, such benefits are not considered in the current consumer welfare-driven antitrust analysis and thus are treated by this Comment as factors relating to sustainability benefit.[229]

2. Sustainability Benefit

Courts and agencies evaluating the sustainability benefit of a cooperation agreement should consider the nature and extent of the agreement's contribution to environmental outcomes, the necessity of the agreement to improved environmental outcomes, and the consumer benefit from those improved outcomes.

Proponents of cooperation should be required to quantify the probable environmental benefit of a cooperation agreement, such as reduced carbon emissions or waste runoff.[230] This environmental benefit may be, but does not need to be, one that counteracts or compensates for the previous negative environmental effects of the product or service that is the subject of the cooperation agreement. As a threshold matter, evidence concerning the environmental benefit is significant for two reasons. First, it demonstrates that there is, in fact, a benefit that outweighs the potential anticompetitive harm resulting from the cooperation agreement. Second, it is a factor that can be balanced in a relatively straightforward manner against the consumer welfare variables. If the proposed cooperation is likely to lead to drastic inflation in prices or contraction of supply, with only a de minimis improvement in environmental outcomes, the inquiry could end there. In some cases, the nature of the environmental outcome affected may also be relevant. For example, if an agreement has the potential to slow the depletion of a natural resource that is important to many people, even a small improvement could be enough to justify further consideration.

Once the environmental benefit of the cooperation agreement is established, the next question should be the necessity of the cooperation agreement to the

[228] *See supra* Part III.A.

[229] *See infra* Part III.C.2.

[230] *See supra* Part II.B; *see also* European Commission, *supra* note 177, at 154–55 (establishing the requirement for proponents of sustainability agreements that restrict competition to establish that the agreement will result in "efficiency gains," which may include lowering pollution or reducing supply chain disruption).

achievement of that environmental benefit.[231] Here, the proponent of cooperation should not be required to show that cooperation is the only way of achieving the benefit in question. Rather, there should be a sliding scale between this "necessity" factor[232] and the potential anticompetitive harm from cooperation. If the potential anticompetitive harm is severe, courts should be reticent to condone cooperation as long as there are some other means for the competitors to achieve the benefit in question. On the other hand, if the potential anticompetitive harm is slight, it could be reasonable for a court to permit the cooperation agreement even if there are other means by which the competitors could achieve the benefit in question, particularly if those other means would be more costly or otherwise more onerous than the cooperation agreement. In either case, the question would be whether there are other means available to the competitors. In almost every case, there are likely to be theoretical alternatives such as enactment of legislation or regulation. Requiring competitors to abstain from cooperation on the basis of a theoretical alternative would unreasonably stymie socially and environmentally beneficial efforts.

Finally, courts and agencies should evaluate the extent to which the environmental benefits accrue to consumers.[233] Here, those passing judgment on cooperation agreements must consider consumers as individuals who inhabit Earth and not merely individuals who purchase a particular product.[234] The inquiry becomes not only whether cooperation will cause the price of a product to increase or its quantity to decrease but also whether cooperation will decrease the likelihood of the consumer's hometown being underwater in thirty years or their car being prohibitively expensive to run when fossil fuels dwindle.[235]

3. *Avoiding Uncertainty*

Admittedly, these factors leave considerable room for parties to present dueling empirics and for judges to reach divergent conclusions on the

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[231] *See* European Commission, *supra* note 177, at 155–57 (discussing the requirement under European revised Horizontal Guidelines that sustainability agreement be "indispensable" to achievement of sustainability objectives to be permitted under Article 101).

[232] *Id.*

[233] *See supra* Part III.A.

[234] *See* European Commission, *supra* note 177, at 160 ("[D]rivers purchasing less polluting fuel are also citizens who would benefit from cleaner air.").

[235] *See generally* Denise Lu & Christopher Flavelle, *Rising Seas Will Erase More Cities by 2050, New Research Shows*, N.Y. TIMES (Oct. 29, 2019), https://www.nytimes.com/interactive/2019/10/29/climate/coastal-cities-underwater.html; Ama Lorenz, *When Will We Run Out of Fossil Fuels?*, FAIR PLANET (Apr. 30, 2023), https://www.fairplanet.org/story/when-will-we-run-out-of-fossil-fuels/.

significance and balancing of the factors. While the recognition of these factors by statute or Supreme Court ruling may at first give comfort to corporations seeking to cooperate with their competitors on sustainability initiatives, there is potential for these factors to create a new jungle of antitrust case law. This outcome would leave corporations and their lawyers with as much uncertainty as ever as to how any given agreement might fare under antitrust law.

There are a few steps that could contribute to avoiding such an outcome. First, if Congress enacts legislation to deal with this issue, it could empower the FTC to establish thresholds, sliding scales, and analytical methods for each part of the analysis, allowing corporations to calculate numerically whether an agreement would be permitted.[236] Second, absent Congressional or regulatory action, the Supreme Court and federal appeals courts should be mindful of the precedential effect of their early opinions applying this framework and set out their reasoning in a way that it can be readily applied to future cases.[237] Finally, for the framework to truly be predictable for private sector actors, courts must refrain from the sort of reinterpretation and tenuous reading of case law that has at times appeared in other parts of antitrust case law.[238]

IV. LEGALIZING GREEN PRODUCT FIXING

This Part discusses three ways that Congress or federal courts could implement legal protection for green product fixing. First, Congress could enact a statute permitting green product fixing in appropriate circumstances. Second, if the Supreme Court were to grant certiorari to a green product fixing case, the Court could carve out an exception from the antitrust statutes for green product fixing, relying on the latitude that it has given itself to take a "constitutional common law" approach when interpreting antitrust law. Finally, a lower federal court deciding a green product fixing case could evaluate that collaboration under the rule of reason and find that it is justified by procompetitive benefits. These alternative solutions could provide varying levels of certainty to businesses considering green product fixing as part of their ESG efforts.

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236 *See FTC DOJ Guidelines*, *supra* note 83, at 25–27 (describing "safety zones" of activity in which businesses can be certain that they will not face antitrust litigation).

237 *See* Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 269 (1990) (discussing uncertainty that arose from dueling interpretations of Sherman Act in early years of antitrust law).

238 *See, e.g.*, Appalachian Coals, Inc. v. United States, 288 U.S. 344, 373, 376 (1933); Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 779 (1999).

A. Legislative Implementation

Congress could pass a statute carving out cooperation agreements that advance sustainability objectives from the antitrust laws. This legislative approach would provide significantly more certainty for corporate actors than judicial implementation would.[239]

To facilitate the nuanced review described in Part III, the statute should provide for notification to a designated agency of the proposed cooperation agreement.[240] This procedure would be similar to the merger review process that is already required in some instances under the Hart-Scott-Rodino Act.[241] Following notification, the agency could undertake a review of the competitive effects (i.e., consumer welfare impact) and sustainability benefit of the proposed agreement and issue an opinion as to whether it is permitted.[242] The factors used in that analysis should be specified in the statute.[243] To provide further certainty to the business community, the statute could also direct the agency to further codify analytical methods and numerical thresholds and sliding scales by regulation.[244]

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[239] *See* Alexander J. Kraszewski, *". . . No, the Other Common Law": Antitrust as Equity Jurisprudence*, 29 GEO. MASON L. REV. 1149, 1150 (2022) (proposing alternative to the view that general language of the Sherman Act renders antitrust a "common law statute" field). Whatever the explanation for the significant amount of antitrust doctrine that has been left to the courts to establish, a more detailed statute may be required to give corporate counsel sufficient comfort to undertake green product fixing initiatives given vocal threats from regulators, state attorneys general, and others in government to target ESG efforts with antitrust law. *See, e.g.*, *Attorney General Brnovich Announces Action to Stop Coercive Investment Practices*, ARIZ. ATT'Y GEN. (Nov. 17, 2021), https://www.azag.gov/press-release/attorney-general-brnovich-announces-action-stop-coercive-investment-practices ("Arizona Attorney General . . . announced he is looking into ESG investing practices by major firms, including their membership in the investor-led initiative, Climate Action 100+.").

[240] The designated agency would likely be one or both of the DOJ and FTC. However, the statute or operational practice by the agencies may need to provide for the involvement of the Environmental Protection Agency or other environmental experts, as the DOJ and FTC likely lack the expertise to fully analyze the sustainability agreement of proposed cooperation agreements.

[241] *See generally Premerger Notification and the Merger Review Process*, FED TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review-process (last visited Jan. 8, 2023) (describing premerger notification and the merger review process). Parties to certain large mergers and acquisitions must make a filing with the DOJ and FTC providing details of the proposed transaction. *Id.* The agencies then conduct an antitrust review of the proposed transaction within specified timeframes. *Id.*

[242] *Cf. No Action Letters*, INVESTOR.GOV, https://www.investor.gov/introduction-investing/investing-basics/glossary/no-action-letters (last visited Feb. 6, 2023).

[243] *Cf. DOJ FTC Guidelines*, *supra* note 83, at 25 (discussing measures that "provide participants in a competitor collaboration with a degree of certainty").

[244] *See supra* Part III.C.3.

B. Judicial Implementation: Supreme Court

The Supreme Court has established that the Sherman Act is a quasi-constitutional statute and has permitted certain forms of competitor cooperation based on reasoning that diverges from the rest of the antitrust case law.[245] Accordingly, if a relevant case came before it, there is precedent that the Court could establish a new framework applicable to cooperation agreements promoting environmental objectives. Of course, the Court may be reticent to do so and diverge from the long line of strongly worded "private governance" case law.[246] It is arguable, however, that there are meaningful factual distinctions between green product fixing and the business conduct that the Court analyzed in previous private governance cases. For example, unlike the members of the FOGA, companies that engage in green product fixing are not constructing a self-regulatory system as an alternative to availing of the benefits of government-sponsored regulation.[247]

Even if the Court is not convinced that green product fixing is factually distinguishable from more pernicious forms of private governance, it could still carve out an exception of the *Appalachian Coals* variety.[248] In *Appalachian Coals*, the Court accepted that a price-fixing arrangement was lawful based on the notion that "[t]he restrictions the [Sherman] Act imposes are not mechanical or artificial."[249] With the U.S. now facing a climate challenge as vexing as the economic challenge that it faced at the time *Appalachian Coals* was decided,[250] the Court could liberate green product fixing from "mechanical or artificial" antitrust analysis and implement an enlightened form of antitrust analysis that permits green product fixing where the conditions described in Part III of this Comment suggest that green product fixing should be permitted.[251] Underlying the Court's historic hostility to private governance is the notion that regulation

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245 *See, e.g.*, Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359–60, 377 (1933).

246 *See, e.g.*, Fashion Originators' Guild Am., Inc. v. Fed. Trade Comm'n, 312 U.S. 457, 465 (1941); Nat'l Soc'y Pro. Eng'rs v. United States, 453 U.S. 679, 695–96 (1978).

247 *See Fashion Originators' Guild Am.* 312 U.S. at 461 (noting that FOGA members had not patented or trademarked the designs that they were seeking to prevent "style pira[tes]" from copying).

248 *Appalachian Coals*, 288 U.S. at 361.

249 *Id.* at 360 ("Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness.")

250 *See id.* at 359 (noting "deplorable conditions" facing the coal industry); *see also* Sheldon Kimmel, *How and Why the* Per Se *Rule Against Price-Fixing Went Wrong*, 19 SUP. CT. ECON. REV. 245, 248 (2011) (noting the "consensus in [] scholarly writings" is that "*Appalachian Coals* is . . . due not to facts or law but due to the shock of the Depression").

251 *Appalachian Coals*, 288 U.S. at 360.

of commerce is the exclusive province of the legislature.[252] An unquestioning application of that notion to green product fixing would ignore the context in which green product fixing occurs.[253] The Court should recognize that some degree of self-regulation in the context of efforts to address climate change would be logical, efficient, and popular.[254]

C. Judicial Implementation: Lower Federal Courts

If a case involving an ESG-focused cooperation agreement does not reach the Supreme Court, a lower court could still apply social benefit factors in its analysis of the case. To do so, however, a court would need to be convinced that it could do so, notwithstanding the case law that has tended to preclude consideration of non-economic benefits and private governance.[255]

This result could be reached in one of two ways. A court could look to precedent such as *California Dental* to carve out an exception from the private governance case law.[256] Alternatively, a court could be convinced that the cooperation agreement is permissible under the rule of reason.[257] The latter approach would require evidence of procompetitive benefits from the cooperation agreement, which might take the form of increased availability of sustainable products that consumers desire and which would not be brought to market absent the cooperation agreement.[258]

CONCLUSION

Several interests would be harmed if antitrust law frustrates green product fixing and other environment-focused self-regulatory initiatives. Corporations would miss out on opportunities to bring innovative products to market and improve the sustainability of their operations. Consumers will not receive the more sustainable products they desire. Society will continue to suffer the consequences of ever-increasing carbon emissions and other environmental waste and destruction.

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252 *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 242–43 (1899).

253 *See, e.g.*, Valentine, *supra* note 183.

254 *See id.*; Tyson & Kennedy, *supra* note 180.

255 *See FTC DOJ Guidelines*, *supra* note 83 at 4; *Fashion Originators' Guild Am.*, 312 U.S. at 457.

256 Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 771–73 (1999).

257 Standard Oil Co. N.J. v. United States, 221 U.S. 1, 66 (1911) (establishing rule of reason as "the guide" in determining whether contracts violate the Sherman Act).

258 *See DOJ FTC Guidelines*, *supra* note 83; Petro, *supra* note 24.

All the same, federal judges and legislators should not create a blanket exception from the antitrust laws for any agreement with a green stamp on it. The consumer welfare interests promoted by antitrust law are worthy ones, particularly as many American households struggle with the highest inflation rates in decades. The traditional considerations underlying antitrust analysis should not be jettisoned. Rather, they should be tempered with an appreciation of the potential of private governance to complement legislative and regulatory efforts to fight climate change. Such an enlightened approach will allow antitrust law to continue protecting consumers and preserve competition today without unduly restricting the environmental efforts that will benefit consumers and competition in the future. Congress and the federal courts should act within the bounds of their authority to codify that enlightened approach, recognizing that although it is a departure from contemporary antitrust orthodoxy, it is consistent with antitrust history and principles.

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