2006

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THE MARKET AS INSTRUMENT: A
RESPONSE TO PROFESSOR HARRISON

Shubha Ghosh*

I. INTRODUCTION

Professor Harrison’s article is a provocative response to an often unarticulated question: Why does current antitrust law treat market power as presumptively legal? This question, as posed, is especially vexing given the influence of economic thinking on antitrust doctrine. As Professor Harrison points out, textbook economics teaches that market power in most instances leads to inefficiency. Why then does an antitrust law influenced by economic theory not do more to deter and punish market power?

Professor Harrison does not answer this last question. Instead, his review of recent case law shows, correctly, that federal courts are confused about how to deal with market power. Contemporary antitrust law regulates and punishes the anticompetitive conduct that arises from the possession of market power, rather than the mere possession itself. Professor Harrison concludes from this situation that contemporary antitrust law, while nominally touched by economics, is political in its application. While he does not fully explain the nature of politics in antitrust law, he does offer a solution to this perceived folly. Under his proposed instrumental approach to market power, courts should apply antitrust scrutiny closely when consumers clearly do not benefit from sellers possessing of market power. Courts, however, should leave firms with market power alone when consumers benefit from the presence of market power, such as when the market power is useful for innovation, for realizing the benefits of increasing scale, or for network effects in consumption. Market power that is the result of luck or circumstances, what Professor Harrison calls circumstantial market power, and market power that is justified by buyer decision making or consensual market power are

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3. Harrison, supra note 1, at 1678.
4. See id. at 1708.
5. Id. at 1676.
6. Id. at 1677.
7. Id. at 1681.
8. Id. at 1683.
particularly deserving of condemnation under antitrust law. In short, Professor Harrison’s article does not answer why antitrust law is the way it is but instead suggests how to cure the current ills of what he sees as a politicized antitrust law.

But the ignored “why” question is certainly the interesting question to explore, the $64,000 question (or however much questions go for nowadays). To conclude that antitrust law, by not adequately confronting market power, is informed more by politics than economics ignores tensions within economic thinking about the proper treatment of market power. This tension pervades economic theory and antitrust doctrine and policy. An excellent account of the tension in economic theory is provided by David Warsh, a journalist who writes insightfully about business and economics. Warsh has recently demonstrated that there is a tension in economic theory, originating with Adam Smith, between the benefits of competition and the benefits of large firms. I propose that the contradiction identified by Professor Harrison is a symptom of this broader confusion. Markets work with many small firms competing with each other to provide the best service at the lowest price, but sometimes large firms can produce better goods more cheaply than small ones. So which should the legal system favor: the protection of small firms and competition or the promotion of large firms that can realize economies of scale? As Professor Harrison’s article convincingly and unintentionally shows, the dilemma at the heart of economics unsurprisingly also pervades contemporary antitrust law.

Perhaps it is inevitable that an antitrust law riddled with the contradiction inherent in economic theory leads to what Professor Harrison describes as politicized decision making. This conclusion, however, assumes that the absence of scientific certainty is filled by politics. But that conclusion implicitly assumes that economic inquiry leads to scientific certainty and that political choices are absent from economic and legal analysis. Professor Harrison does not clarify what type of politics informs contemporary antitrust law’s treatment of market power. For some, the Chicago School approach to antitrust represents a series of political choices marked by rightward shifts during the Eighties in the temperaments of the Department of Justice, the Federal Trade Commission, and federal courts. From this perspective, the response to Professor Harrison’s conclusion is mirabile dictu. But there is something deeper going on than just a regime change in antitrust enforcement. What Professor Harrison is noticing are the deep problems in a purely efficiency-minded approach to antitrust law (and law more broadly). Invariably, judgments based on efficiency, however defined, rest on judgments about

9. Id. at 1698.
11. Harrison, supra note 1, at 1712.
distribution: who should get the surplus created by markets? It is not inconsistent for courts to espouse efficiency in antitrust law and to conclude that possession of market power is not actionable.\textsuperscript{13} This paradox can be understood as an attempt to maximize welfare (efficiency) given a particularly desired distribution of well-being.\textsuperscript{14} The explanation for why this particular distribution is desirable is a political one. If that is what Professor Harrison means by a politicized antitrust law (and I am convinced that is what he must mean), then the current confusion in an economically informed antitrust law also reflects the impossibility of implementing the criteria of efficiency without considering questions of distribution.

So, does the combination of Professor Harrison's thesis and my exposition mean that an antitrust law informed by economics is invariably hopeless and ultimately misguided? Should we simply recognize that antitrust is a political, historical, sociological, or some other non-economic phenomenon and work from there? The error is not in developing an economic perspective on antitrust law. Rather, the problem is in reducing antitrust to an idealized model of competition and markets. Ultimately, a correct antitrust decision is one that looks at all dimensions of a business relationship in order to determine the appropriate application of antitrust doctrine. "All dimensions" includes economics. The pertinent question is not whether economics should inform antitrust law, but how. The more difficult question is how to coordinate an economic analysis of antitrust with other perspectives in developing doctrine.

Like Fermat, let me say that I have a remarkable solution to the problem of how to reconcile and unify all fields of human thought, but space limits my ability to tell you the answer. Instead, this paper will address the more narrow question of what kind of economic approach is appropriate to antitrust law. Professor Harrison's article offers a glimpse of the answer in its presentation of a Coasean approach to market power.\textsuperscript{15} I do not completely agree with his analysis, but I do believe that the approach he outlines is a very fruitful path in antitrust theory. Professor Alan Meese is perhaps the most accomplished representative of this approach, which goes alternatively by the labels of transaction cost economics, Coasean theory, or the new institutional economics.\textsuperscript{16} This approach provides a means to bridge economic theories of markets with other disciplinary approaches such as history and sociology. The alternative approach also reconciles the inherent tensions in the traditional economic

\textsuperscript{13} Id. at 239-40.
\textsuperscript{15} Harrison, supra note 1, at 1680-81.
theory of competition and scale that leads to the contradictions that Professor Harrison documents.

The remainder of this paper is divided into four parts. Part Two develops the argument that the tension noted by Professor Harrison is inherent in conventional economic theory of competition and the firm. This part traces the tension back to the Structure- Conduct- Performance approach to antitrust—the dominant economic approach that pre-dated the Chicago School. Part Three explains how the Coasean approach, suggested by Professor Harrison, offers a potentially richer approach to antitrust and resolves the contradiction between competition and large firm size. Part Four further explores alternative economic approaches to antitrust by focusing on the antitrust-intellectual property interface, one of the examples cited by Professor Harrison in his instrumental approach to market power. Part Five concludes with some parting thoughts on instrumentalism in antitrust law.

II. COMPETITION AND FIRM SIZE: HOW THE CHICAGO SCHOOL TRIED TO FINESSE THE STRUCTURE-COMPETITION- PERFORMANCE APPROACH AND FAILED

The Chicago School that rose to the ascendancy in the 1980s is associated with an economic theory of antitrust. However, the Structure- Conduct- Performance ("SCP") school, the dominant approach to antitrust in the Sixties and Seventies, was also informed heavily by economics. The key difference is that the SCP approach was not single-mindedly focused on efficiency as a criteria. Instead, the approach relied on empirical methods guided by a very specific understanding of the structure of markets and competition. The Chicago School grew to ascendancy because of the inability of SCP to fully reconcile the tension in economic theory between competition and firm size. However, the finesse of the Chicago School also failed to resolve the tension, leading to the current contradictory treatment of market power noted by Professor Harrison. The starting point for the SCP approach was the recognition that perfect competition, with its characteristics of full and complete information, costless entry and exit of firms and consumers, and rational maximizing behavior based on well-defined technologies and preferences, would lead to the most efficient distribution of goods in an economy. However, SCP also recognized that real world markets can deviate from perfect

17. Harrison, supra note 1, at 1674-75.
19. Id.
20. Id.
21. Id. at 53-54.
22. Harrison, supra note 1, at 1675.
competition as one or more of the economic assumptions failed to hold. Based on the deviations from the perfectly competitive model, markets can be described by certain well defined structures such as monopoly, monopolistic competition, or oligopoly. Structure would imply certain types of conduct by firms in the market, and this conduct had implications for performance. Under the SPC approach, the key to resolution of a particular antitrust case required the identification of the relevant market structure of the industry at issue, a comparison of the observed conduct of firms in the industry with the performance predicted by the identified structure, and an assessment of market performance as predicted by the deviation of observed conduct from predicted conduct.

There were two big problems with the SCP approach. The first was its focus on the ideal type of the perfectly competitive market. The SCP approach would espouse using antitrust to shape markets as close as possible to the perfectly competitive model. However, the ability to realize perfect competition depends upon the efficient size of firms. The ideal of perfect competition required firms to be relatively small. However, there could be benefits from firms being relatively big. Having larger firms would necessarily imply a different market structure, market conduct, and market performance than what would be desirable under the model of perfect competition. This recognition of alternative market structures leads to the second problem: the proper treatment of oligopoly. The vast majority of markets could be described as oligopolistic markets that were in between the ideal of perfect competition with a large number of firms and monopoly with only one. The problem was that economic theory was not completely clear about the conduct and performance of oligopolies. In some cases, an oligopoly could realize the benefits of perfect competition. In others, an oligopoly could be as pernicious as a monopoly. Since economic theory could not offer guidance on conduct and performance, the SCP approach was unhelpful when antitrust law had to be applied to oligopolistic markets, which described most of the markets that were the subject of antitrust scrutiny.

26. Id.
27. See Dennis W. Carlton & Jeffrey M. Perloff, Modern Industrial Organization 2-4 (2000); Eisner, supra note 12, at 100-03 (describing the SCP approach).
28. See Kovacic & Shapiro, supra note 18, at 51-52 (documenting the aggressive approach to market dominance under the SCP approach that increasingly came in conflict with developments in economic theory holding that “departures from perfect competition are normal”).
30. See id. at 354 (noting that firm size is important in assuring perfect competition).
The problems with SCP illustrate the tension in economic theory between the ideal of perfect competition and firm size. The benefits of relatively large firms implied oligopolistic market structure, which contradicted the ideal of perfect competition. The Chicago School was in part a response to the failures of the SCP approach. Unlike the SCP's approach on structure, the Chicago School focused on behavior and assessed antitrust law in light of a simple question: how would rational firms and consumers behave in the marketplace in order to maximize individual and social welfare? Antitrust should intervene only when rational firms and consumers would act in a way harmful to social welfare as gauged by the competitive process. For instance, the Chicago School would strongly endorse using antitrust law to rout out price fixing among firms in an industry. While it may be individually and jointly rational to engage in price fixing, the marketplace and consumers would be hurt by such rational behavior. Furthermore, certain behavior such as tying and vertical restraints might be both individually rational and welfare enhancing and therefore immunized from antitrust scrutiny. By adopting the assumptions of rational behavior, the Chicago School moved away from the rigid structuralist approach of SCP towards a more flexible, context specific approach. This shift was reflected doctrinally by a move from per se rules to the rule of reason as the standard for antitrust review of business behavior.

A behavioral, as opposed to a structural, perspective on antitrust not only allowed for more flexibility but also allowed for a more realistic understanding of business conduct. Unfortunately, the Chicago School did not resolve the inherent tension between competition and scale in economic theory. For if the approach was correct in assuming rational behavior, then the case could be made that all economic activity could be undertaken by one large firm that produced and distributed all goods and services to consumers. Such a large firm would internalize all the contractual and other externalities that would arise in the marketplace and result, in some situations, in a welfare maximizing outcome. The obvious objection to this arrangement is that a large firm would act like a monopoly in restraining output and raising prices. This objection could be addressed by allowing either for perfect price discrimination by the firm or by strict application of antitrust law to monopolistic behavior.

32. See Kovacic & Shapiro, supra note 18, at 52-53 (documenting the emergence of the Chicago School as a response to the structural approach of antitrust law in the 1970s).
33. See id. at 55-56 (discussing the importance of the assumption of rational behavior in the Chicago School approach and a need for more realistic approaches in the post-Chicago School). See also Franklin M. Fisher, Organizing Industrial Organization: Reflections on the Handbook of Industrial Organization, 1991 BROOKINGS PAPERS ON ECON. ACTIVITY MICROECONOMICS 201, 218 (1991) (contrasting the SCP approach with the Chicago approach, described as "the program of investigating how perfectly rational opponents will behave in overly simplified environments").
34. See, e.g., EISNER, supra note 12, at 180-81.
35. See, e.g., id. at 53-56. For a good example of this shift, see State Oil Co. v. Khan, 522 U.S. 3, 7 (1997) (overturning precedent applying per se treatment of maximum resale price maintenance).
less, the Chicago School did not resolve the basic questions that I have raised in this paper: when is it desirable to have vigorous competition among many firms, and when is it desirable to have a few large firms that can realize the benefits of scale?

Professor Harrison's article fits exactly within the contours of the problem of competition and firm size. If bigness is not per se problematic, then antitrust law will invariably tolerate some market power. The point that this tolerance contradicts economic theory, first of all, confuses monopoly power and market power and, second of all, ignores the debates over competition and firm size in economic theory. As to the first point, the confusion between monopoly power and market power is reflected at the very beginning of Professor Harrison's paper, where he alternates between the two terms. Market power is the ability of a firm or a group of firms to affect some dimension of the market, whether it is price, quantity traded, or some other aspect of the contract between buyers and sellers. Monopoly power is a type of market power which arises when there is a single firm selling in the market. Economic textbooks point out that monopoly power, when exercised in a particular way, can lead to inefficiency in the form of reduced quantity, increased price, and lost consumer surplus. Harrison, however, also points out that market power, including monopoly power, can be the basis for innovation and the realization of the benefits of scale. These benefits, however, depend upon how the market power is exercised.

This last point is key to my argument. The existence of market power does not imply anything about how that power is exercised. To generalize my claim, prescriptions about antitrust enforcement depend on conceptions of competition. If one believes that competition can occur only among several small firms, then the existence of any market power would mandate antitrust scrutiny. I think Professor Harrison has this pre-existing notion of competition. But competition can also exist among large firms. It can exist if there are only two firms in the marketplace. It can also exist if there is only one firm as long as there is the possibility of entry. The questions are how does competition occur and what are the rules of engagement. If one accepts these statements, then antitrust law will invariably tolerate some market power, and the quandary raised by Professor Harrison transforms into a new set of questions. Rather than asking why we tolerate market power, we should be asking what type of competition is desirable, and how can antitrust law help us to reach that. Answering this question will require that we also grapple with the central problem in economics that has appeared throughout this discussion: how

36. Harrison, supra note 1, at 1673 n.3.
37. See, e.g., CARLTON & PERLOFF, supra note 27, at 94-96.
38. Harrison, supra note 1, at 1679.
39. CARLTON & PERLOFF, supra note 27, at 76.
40. Id. at 167-168 (discussing Bertrand model of price war).
41. Id. at 76 (discussing contestable markets).
do we reconcile the benefits of competition with the benefits of large firm size?

The instrumental approach to market power proposed by Professor Harrison provides a basis for reconciling competition with the benefits of large firm size. Under the instrumental approach, market power would be presumptively legal if its presence is related to innovation, productive efficiency, or network effects. More generally, Professor Harrison's solution would allow market power if its benefits to consumers combined with the saved costs of enforcement are greater than the deadweight loss and distributional cost from the presence of market power. The instrumental approach assumes competition to be the default position in the marketplace and allows deviation only when the benefits of market power outweigh the costs, where the benefits can include the benefits of scale. Professor Harrison's approach is tolerant of some market power but only market power that leads to benefits for consumers. The instrumental approach is arguably less tolerant of market power than current antitrust doctrine. The problem is that the instrumental approach offers only a partial answer to the scope of antitrust scrutiny. While the instrumental approach would bring more cases under antitrust scrutiny, it is not clear whether the resolution of the cases would be different from current case law. For example, Professor Harrison is critical of Jefferson Parish Hospital v. Hyde, where the Supreme Court effectively upheld a tying arrangement, for being tolerant of consensual market power or market power that arises from voluntary consumer choice. But he also states that there were alternative paths to the same result that rested on consideration of the hospital's market share. The instrumental approach will not necessarily change the outcomes of many antitrust cases, but it may change the way in which courts perceive market power.

What is perhaps the most frustrating about the instrumental approach is that it offers more of a change in form rather than substance. Shifting the presumption of legality of market power to a rebuttable presumption is an important step, but as currently articulated, the instrumental approach would allow the antitrust defendant to show some benefit to consumers in order to escape antitrust scrutiny. What is helpful about the proposed approach is that it asks us to think about how antitrust should deal with the presence of market power. Related to this question is one of what type of competition antitrust should foster. Professor Harrison provides an important first step in rethinking these questions, and I develop these points in the next section.

42. Harrison, supra note 1, at 1680.
43. See id.
44. Id. at 1680.
45. Id. at 1680-81.
47. Harrison, supra note 1, at 1694-96.
48. Id.
III. COASE TO THE RESCUE?: MARKET POWER AS A BUNDLE OF LEGAL RIGHTS

Professor Harrison contends that the current treatment of market power under antitrust law is inconsistent with economic theory. I have suggested that the inconsistency he identifies is inherent in the tension in economic theory between the benefits of competition and the benefits of large firm size. It is interesting to note that a canonical case for the instrumental theory of market power is the famous opinion by Judge Learned Hand in United States v. Aluminum Co. of America ("Alcoa"). Law and economics scholars are famous for co-opting Judge Hand as one of their own, and so it is not surprising that Professor Harrison turns to Hand for assistance. Although Professor Harrison is critical of the Alcoa opinion for its emphasis on conduct rather than possession of market power, he praises the decision for critically assessing when possession of market power is not justified. What is most interesting about the Alcoa decision, as well as Judge Hand's decisions more broadly, is the nuanced way in which the judge combined an understanding of economics concepts with an assessment of the facts of a case. The judge did not simply grind through the theory or force the facts into the template of an economic model. Instead, he weighed economic theory and business and social facts together to reach a decision. Perhaps what is needed to reconcile the tension between competition and firm size in economics as reflected in antitrust doctrine on market power is to adopt a more pragmatic and ecumenical approach to theory and facts in antitrust jurisprudence. Some guidance on this approach is offered by understanding market power in the language of legal rights and transaction costs following from the work of Ronald Coase.

Professor Harrison suggests such an approach when he frames the presumption of the legality of market power in terms of who should have the right to operate as a monopolist. Professor Harrison sees the problem as one of whether the monopolist should have the right to operate as a monopolist or whether consumers should have the right to be free of a monopoly. In a transaction cost-less world, consumers should always be given the right to be free from a monopoly, since the benefits to consumers from competitive pricing would outweigh the benefits to the monopolist of restricting output and raising price. The only exception to this allocation of the right would be the situation where the rents created by the monopolist would create consumer benefits such as innovation, pro-

49. Id. at 1673.
50. 148 F.2d 416 (2d Cir. 1945).
51. Harrison, supra note 1, at 1687.
53. Harrison, supra note 1, at 1681.
54. Id.
ductive efficiencies, or network effects. In this situation, consumers would benefit from the monopolist having the right and therefore would not purchase the monopolist’s right back through a costless transaction. Therefore, courts should allow market power only when the possession of such power creates benefits for consumers, but otherwise, courts should protect the consumers’ right to be free of market power.

This framing is useful in identifying market power as a bundle of legal rights. If a firm has market power, it has the right to undertake certain acts. Therefore, Professor Harrison is correct in recognizing that market power is essentially a set of rights that the state grants to the holder of market power. However, Professor Harrison’s analysis does not go far enough in identifying what this bundle entails and how it can be allocated. The analysis, first of all, suffers from an imprecision in the definition of the right at issue. The “right to operate as a monopolist” includes many rights. If the right captures pricing or output decisions, it is not clear what difference it makes if the consumer has the right to determine price or output or if the firm or firms have this right. For example, if there is one firm and many consumers, it is not clear why the firm would not simply reject any low price offers made by consumers until all the consumer surplus has been extracted by the firm. In fact, Professor Harrison’s scenario in which consumers would buy the right from the monopolist would essentially entail the consumers transferring the entire consumers’ surplus to the single firm in order to obtain the right. Furthermore, the “right to operate as a monopolist” might entail “the right to exclude new firms from entering the market.” This formulation of the right is the relevant one for an analysis of intellectual property, as I explain in Section Four, but requires inclusion of new entrants as players that bargain with the existing firm and possibly existing consumers in order to determine who values this right the most.

While Professor Harrison is correct in identifying the possession of market power with legal rights, his Coasean analysis superimposes an implicit model of bargaining over the set of legal rights onto an implicit model of competition over the allocation of goods and services. Neither of these models are made particularly clear, and each is important to understand in order to make sense of how antitrust law should deal with market power. If the underlying model of competition is one of many small firms, then the right to be free of a monopolist should arguably be allocated among consumers and possibly new firms to ensure that the model of competition prevails. If the underlying model of competition is one of few firms engaged in a Bertrand price war, then the right to be free of a monopolist should be allocated among possible firms in the marketplace in order to ensure that the price is driven down to marginal cost. The competitive model for the allocation of goods and services will determine how price and quantity are determined. The bargaining model over the distribution of legal rights will determine how surplus will be distributed among the various players in the marketplace. One cannot deter-
mine the regime of legal rights, and hence the distribution of market
power, without some determination of how the competitive process
functions.

The Coasean approach seems to be a hopeless mess, and certainly,

much work needs to be done in sorting through the relationship between

the bargaining model over rights and the competitive model for the allo-
cation of goods and services. But as a practical matter of how to design

the law in order to reflect the theory, Judge Hand may once again offer

some assistance. In Alcoa, Judge Hand adopted a methodology that

looked at business and social facts with the assistance of economic heuris-
tics to sort through the data. An instrumental approach to market power

might follow the lead of Judge Hand. Such an instrumental approach

would focus on the benefits of large firm size and also take into consider-
atation the social and business realities of how competition occurs in a par-
ticular industry. With this set of information, the court can address the

question of how the set of legal rights that give rise to market power

(whether it is the right to exclude, the right to set prices, or the right to
determine output) should be allocated among the relevant players in the
industry. Antitrust treatment of market power would reflect this assign-
ment of rights.

The instrumental approach I am suggesting is different from Professor
Harrison's formulaic approach, but it recognizes his insight that presum-
ing the legality of market power is inconsistent with economic theory.
Furthermore, the approach incorporates both the benefits of competition
and the benefits of firm size by adopting a contextual, rather than struc-
tural, notion of competition. Finally, the approach adopts an implicitly
behavioral approach by formulating conduct into rights and asking
whether a player should have the legal right to engage in certain types of
business conduct, or whether it is an agreement to set prices or the ability
to exclude a competitor or a consumer.

Critics will undoubtedly be concerned with the seeming lack of cer-
tainty in my approach. The problem my approach cures is the tendency
in antitrust law to derive bright line rules from economic models of com-
petition as opposed to the business realities of competition and poten-
tially anti-competitive behavior. For example, consensual market power
would receive more scrutiny under my approach than under current law,
because the threshold question would not be whether consumers con-
sented to purchase from the seller with market power, but whether the
consumer had the right to be free of certain terms in the resulting transac-
tion. In antitrust cases involving exclusionary conduct, such as Aspen Ski-
ing Co. v. Aspen Highlands Skiing Corp.,\textsuperscript{56} Eastman Kodak Co. v.
Image,\textsuperscript{57} and CSU, L.L.C. v. Xerox Corp.,\textsuperscript{58} the question would be
whether the defendant had the right to exclude or whether the exclusion-

\textsuperscript{56} 472 U.S. 585 (1985).
\textsuperscript{57} 504 U.S. 451 (1992).
\textsuperscript{58} 203 F.3d 1322 (Fed. Cir. 2000).
ary behavior had anticompetitive effects in the particular industry. The approach I am proposing shares in spirit with Professor Harrison's approach, but it attempts to address directly the tension in economic theory between competition and firm size that has lead to the problematic treatment of market power in current antitrust law. As one example of the effectiveness of my proposal, I discuss its implications for the treatment of intellectual property under antitrust law in the next section.

IV. INTELLECTUAL PROPERTY, ANTITRUST, AND THE RIGHT TO EXCLUDE

The proper treatment of intellectual property under antitrust law provides a useful illustration of Professor Harrison's thesis and my critique. Professor Harrison argues that the analysis of market power in intellectual property law offers a model for assessing market power in antitrust law. Four features of the treatment of market power in intellectual property law are particularly salient. Intellectual property law recognizes the benefits and costs of exclusivity. Exclusivity within intellectual property law is limited, because in some instances the costs will outweigh the benefits, such as when intellectual property is used to foreclose cumulative invention. More controversially, Professor Harrison asserts that intellectual property recognizes market power as a type of property that can be traded. Finally, a key question for intellectual property law is how exclusivity is to be determined by the allocation of rights among intellectual property owners and users. Except for the point about market power as a type of property, Professor Harrison offers a useful and succinct formulation of intellectual property. However, it is far from clear how this formulation helps in clarifying the analysis of market power in antitrust law. I illustrate the limitation and then suggest a solution.

During the 2005-2006 term, the Supreme Court addressed the issue of whether ownership of a patent created the presumption of market power under antitrust. In Illinois Tool, Inc. v. Independent Ink, Inc., the Court considered a tying claim involving a patented laser printer cartridge and unpatented ink. The plaintiff, Independent Ink, challenged the requirement of Illinois Tool that companies buying its patented cartridge also buy its ink on the grounds that this entailed a leveraging of Illinois Tool's market power in the cartridge market into the market for ink. The district court dismissed the claim, finding that Independent Ink had failed to

59. Harrison, supra note 1, at 1682-83.
60. Id.
61. Id.
62. See id.
63. Id.
64. Id.
66. Id. at 1285.
establish market power. The Federal Circuit, hearing the case on appeal, reversed the district court, citing Morton Salt v. United States, International Salt Co. v. United States, United States v. Loew's, Inc., and Jefferson Parish Hospital District No. 2 v. Hyde—Supreme Court precedents that had been interpreted as creating a presumption of market power from ownership of a patent. The Federal Circuit reasoned that, since Illinois Tool has a patent on the cartridges, the ownership of a patent created a presumption of market power and therefore Independent Ink had made a prima facie case for tying. The Supreme Court vacated and remanded, clarifying a fifty-year precedent by holding that ownership of a patent did not create a presumption of market power and that Independent Ink had to establish market power to make its prima facie case. The Court remanded to allow Independent Ink to introduce evidence of Illinois Tool's market power in the market for cartridges.

Although Professor Harrison does not discuss the case, my educated guess is that he would endorse the Supreme Court's reasoning. Since a patent is a grant of exclusivity that is given to promote innovation, under the instrumental approach, the benefits of market power would outweight the costs, and therefore there should be lower scrutiny and a presumption of legality. Perhaps, Professor Harrison might think that the Court did not go far enough under the terms of the instrumental approach, since the Court simply removed the presumption of market power, and hence illegality, rather than reverse the presumption altogether. But such a broad approach would effectively immunize intellectual property from antitrust scrutiny. It is not clear that Professor Harrison would go so far, but that is the potential danger of the instrumental approach.

The fundamental problem is the assumption that the grant of the patent actually promotes innovation. Certainly, the theoretical and policy justifications for a patent system are to promote innovation. But it is a leap in logic to assume that obtaining a patent means that innovation has occurred. Colleges are meant to promote education and knowledge, but that does not mean the possessor of a lawfully obtained college degree is educated or has knowledge. Of course, it does not mean the opposite either. The presumption of market power from ownership of a patent assumed that the exclusivity given by a patent would necessarily translate into the ability to affect the market for the product. As the scholarly

67. Id.
68. Id.
70. 332 U.S. 392 (1947).
74. Ill. Tool, 126 S. Ct. at 1293.
75. Id.
76. Id.
literature cited by the Supreme Court shows, there is no reason to assume that the ability to keep someone from making, using, selling, or offering to sell your patented invention would foreclose competition from firms that design around the invention or create substitutes. The problem is that the instrumental approach, by equating intellectual property with innovation, can immunize patents from antitrust scrutiny when the patent itself is questionable. Current patent reform debates focus precisely on the issue of whether the current patent system does in fact foster innovation or result in improperly granted rights of exclusivity. Before that debate is resolved, it would be a folly to presume that ownership of a patent promotes innovation and an even greater folly to conclude that ownership of a patent constitutes efficient or legal market power.

It is not completely clear that Professor Harrison would go as far as I am taking the instrumental approach. There are limits within the instrumental approach that would de-ice the slippery slopes. For example, my concerns about improperly granted patents could be incorporated in how courts measure the benefit side of the formula. Antitrust plaintiffs could be allowed to introduce evidence of patent invalidity to rebut any presumptions of legality that may arise from the instrumental approach.

But this modification underscores the point that the market power inquiry is a fact-intensive one. The assignment of legal presumptions should, in part, reflect the burdens of presenting the underlying facts. This feature seems to have been wholly overlooked in the debate over the presumption of market power from patents. One argument in favor of the presumption of market power that was not considered in Illinois Tool is that it places the burden on the patent owner to prove that he does not have market power. Since patents involve fairly complicated technologies and arise from administrative processes that are primarily ex parte, the patent owner may be in the better position to introduce evidence on the nature of the technology, the effected markets, and the validity of the patents. As a general matter, outside the patent context, there is no reason to think why the antitrust defendant would be in a better position than the antitrust plaintiff to introduce evidence of market power. Therefore, from the perspective of evidentiary burdens, Professor Harrison is correct to question the presumption of legality. However, it is still not clear that the instrumental approach fares any better as the example of Illinois Tool shows.

While the question of market power is a fact-intensive inquiry, it is also informed by the allocation of legal rights that make market power actionable. In the case of intellectual property, the legal right, very broadly, is the right to exclude others from using the subject of intellectual property.

78. See Ill. Tool, 126 S. Ct. at 1291 n.4.
More specifically, this right to exclude translates into the exclusive right to make, use, sell, offer to sell, or import for patent law into the exclusive right to copy, distribute, adapt, publicly perform, publicly display, and transmit digitally for copyright law and into the assorted set of rights under trademark law and state intellectual property regimes. A proper analysis of intellectual property and antitrust would require a thorough assessment of each of these rights. But a discussion of the right to exclude from use of intellectual property, at a more general level, illustrates my point.

How should the right to exclude from use of intellectual property be allocated? Under the instrumental approach, the intellectual property owner, who is presumably the creator of intellectual property, should be given the right if the exclusivity promotes innovation, productive efficiency, or network effects and these benefits outweigh the costs associated with the exclusivity. As I have shown above, the instrumental approach can too readily support a right to exclude by not scrutinizing the connection between intellectual property and innovation more closely. It is possible, however, to add greater precision to the instrumental model and identify cases where the right to exclude should be limited in order to promote innovation. In a separate paper, I have made the argument that the right to exclude in copyright can be understood as a restriction on entry into the marketplace. The point generalizes to other forms of intellectual property. Once the right to exclude is recognized as a restriction on entry, the distinction can be made between entry that improves innovation and entry that does not. If entry improves innovation, then the right to exclude should be limited. If entry does not improve innovation, then the right to exclude should be enforced. Since market power is related to the right to exclude, limitations on exclusion translates into removing the presumption of legality of market power and enforcing exclusion translates into recognizing the presumption.

My proposed approach enhances the instrumental approach by recognizing, first, that mere ownership of intellectual property does not imply consumer benefits through innovation. Second, my proposed approach requires more careful analysis of how exercising the right to exclude affects competitive, consumer-benefiting pressures in the marketplace.

Three cases will illustrate the difference between the instrumental approach and my approach. Take the case of Aspen Skiing, a non-intellectual property case. In Aspen Skiing, the antitrust defendant refused to deal with a competitor in the promotion of a ticket that allowed consumers to ski on both the defendant's and the competitor's ski slopes. The exclusionary act by the defendant resulted in losses to consumers from

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83. Id. at 593.
the introduction of an innovative ticket into the marketplace. Therefore, the Court was correct in limiting the right to exclude. Similarly, in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, a case dealing with copyright licenses, the Court correctly permitted certain practices of blanket licensing when there were consumer benefits.

The third case is *Morris Communications Corp. v. Professional Golf Association*, a case not discussed by Professor Harrison. In *Morris*, the Professional Golf Association (PGA) created a real time scoring system and refused to allow Morris, a journalist for a news service, to have access to the real time golf scores. The Eleventh Circuit permitted this exclusion on the grounds that the PGA expended great time and money to create the system and therefore could exclude others from free-riding on its efforts. The court's reasoning illustrates the focus on innovation consistent with the instrumental approach. However, the case also illustrates the dangers of relying solely on the assumption that the new system is innovative. The court failed to take into consideration the consumer benefits from having competing news services and multiple access points to information. I am not suggesting that the outcome of the case would have been different in light of these benefits. My point is that justifying exclusion by an antitrust defendant on the grounds that he has been innovative ignores the consumer benefits from competition in further promoting innovation and its distribution, a potential error from application of the instrumental approach.

V. CONCLUSION

Professor Harrison has presented a thoughtful and important challenge to the presumptive legality of market power in antitrust cases over the past few decades. My comments are meant to elucidate the source of this presumption and possible alternatives. I have presented three points. First, the presumptive legality of market power reflects a tension in economic theory between the benefits of competition and the benefits of large firm size. Second, this tension is reflected in the SCP and Chicago School approaches to antitrust. Third, one possible resolution is to view market power as an issue of legal rights, principally the right to exclude, and to ask how the set of legal rights which constitute market power should be allocated among firms and consumers. The example of intellectual property provided one context within which to examine this rights based approach.

Whatever the differences there are between Professor Harrison's instrumental approach and my proposal, the two share a common spirit. Both recognize that market power and the market as an institution are

84. *Id.* at 606.
86. 364 F. 3d 1288 (11th Cir. 2004).
87. *Id.* at 1293.
88. *Id.* at 1298.
means to an end. Both have similar ends: the promotion of competition, innovation, and benefits to consumers. However, the two approaches demonstrate differences in how to connect the means to a common end. These differences reflect contrasting notions of how the competitive process works and the relationship between intellectual property and innovation. It is hoped, however, that my response to Professor Harrison's thought-provoking article will continue the scholarly conversation on how antitrust law understands and shapes the institution of the market.