TOWARD A *PER SE* RULE AGAINST PRICE GOUGING

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I. INTRODUCTION

The antitrust laws in the United States do not prohibit price gouging. But they could.[2] Surge pricing — the use of algorithms to charge high prices in response to unexpected surges in demand — could, for example, constitute conduct illegal *per se* under Section 2 of the Sherman Act.[3]

Surge pricing is price gouging, in that it exploits the power created by unexpected shortages. As such, surge pricing harms consumers, who are better off as a group if firms simply sell out during a demand surge. But unlike low-tech price gouging, surge pricing also exhibits the element of anticompetitive conduct required for antitrust liability.[4] The algorithms used in surge pricing execute much more quickly than can human beings, allowing gouging to kick in sooner in response to unexpected shortages, and therefore reducing the period of time during which the effects of competition in the pre-shortage period carry over into the shortage period to discipline prices. It follows that surge pricing is anticompetitive in effect.

But antitrust could go even further, to ban all price gouging, whether enabled by technology or not, if antitrust would only more fully embrace the spirit of its consumer welfare standard by doing away with the requirement of proof of anticompetitive conduct that today severely limits antitrust's ability to protect consumers.[5] Absent the anticompetitive conduct requirement, antitrust could hold firms liable based solely on proof of market power combined with any act, such as the charging of higher prices, that harms consumers.

Price gouging would be an excellent candidate for condemnation under such an expanded antitrust regime because price gouging is easy to identify, allowing antitrust to sidestep the problem of distinguishing cost-driven price increases from consumer-harmful price increases that

2 This article draws heavily from, and indeed restates, many of the arguments in Ramsi A. Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, 105 Iowa L. Rev. 1759 (2020), Ramsi A. Woodcock, *The Antitrust Duty to Charge Low Prices*, 39 Cardozo L. Rev. 1741 (2018), Ramsi A. Woodcock, The Economics of Shortages, Law and Political Economy Blog (Jun. 2, 2020), https://lpeblog.org/2020/06/02/the-economics-of-shortages/, and Ramsi A. Woodcock, *The Hidden Shortages of the Market Economy*, Law and Political Economy Blog (Jun. 3, 2020), https://lpeblog.org/2020/06/03/the-hidden-shortages-of-the-market-economy/. Please note that my forthcoming reply in Iowa Law Review Online contains important changes to The Efficient Queue and the Case Against Dynamic Pricing. That reply should be read before consulting the article itself.

3 15 U.S.C. § 2 (2018). For more on surge pricing, see Le Chen et al., *Peeking Beneath the Hood of Uber*, Proceedings of the 2015 ACM Conference on Internet Measurement 495, 495 (2015). For a bit more on *per se* rules under Section 2, see Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, *supra* note 1, at 1777 n.9.

4 See Herbert Hovenkamp, Federal Antitrust Policy, the Law of Competition and Its Practice 356–58 (6th ed. 2020) ("Is Bad Conduct Necessary?").

5 See Ramsi A. Woodcock, *The Antitrust Duty to Charge Low Prices*, *supra* note 2, at 1756–60.

otherwise complicates such a regime.[6] A coincident increase in demand and price reliably signals price gouging, and price gouging is never cost justified and so always harms consumers. Enforcers would also readily be able to identify the price that the court should enjoin the gouger to charge: that is just the price charged before the firm encountered the increase in demand.

II. ANTITRUST'S COMPLICATED POSTURE TOWARD HIGH PRICES

The antitrust laws maintain a complicated posture toward high prices. On the one hand, the power to raise price remains the single most important element of any antitrust case and indeed may fairly be called the supreme evil that antitrust seeks to prevent.[7] The power profitably to raise price must be proven to win any single-firm conduct case.[8] Prophecies about whether the merged firm will have the power profitably to raise prices also govern the outcome of merger cases.[9] And virtually all collusion cases require proof of market power as well.[10] The only exception, the claim of price-fixing, exists because, the courts have said, when firms agree on prices it is obvious that they will agree on higher ones.[11]

On the other hand, it is equally a staple of antitrust law that the power to raise prices — not to mention the act of raising them — is not enough to violate the antitrust laws.[12] Anticompetitive conduct, understood not to include the act of raising prices itself, is required.[13] The reason, as Herbert Hovenkamp has aptly put it, is that "[a]ntitrust, it should be recalled, is designed to be a *market alternative* to price regulation, not merely price regulation by another name."[14] Antitrust cares more than anything about high prices and the distributive consequences of high prices, but antitrust is limited in what it can do about prices by its mission, which is to use competition to influence prices, rather than to dictate prices directly to markets. Accordingly, the requirement of anticompetitive conduct that serves as a precondition for liability in every case ensures that antitrust has a competition-oriented remedy available to push prices down: that of prohibiting the anticompetitive conduct buoying the defendant's prices.[15]

6 Absent an anticompetitive conduct requirement, antitrust liability would turn only on proof of market power and proof of harm to consumers. The latter would amount to the requirement that plaintiff prove that defendant exercised defendant's power to reduce consumer welfare, either by increasing prices or reducing the quality of the product without a cost justification. Cost is difficult to measure. See W. Kip Viscusi et al., Economics of Regulation and Antitrust 539–57 (5th ed. 2018).

7 See John B. Kirkwood, *Market Power and Antitrust Enforcement*, 98 B.U. L. Rev. 1169, 1172 (2018) ("Market power . . . lies at the core of antitrust law.").

8 See Hovenkamp, *supra* note 4, at 103–4.

9 See *id.*

10 See *id.*

11 See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19 (1979) (stating that the *per se* rule applies when a practice would "almost always tend to restrict . . . output," which of course implies that the practice would raise price).

12 See Hovenkamp, *supra* note 4, at 356–58.

13 *See id.*

14 *Id.* at 387 (emphasis in the original).

15 See Andrew I Gavil et al., Antitrust Law in Perspective: Cases, Concepts, and Problems in Competition Policy 1378–79 (3d ed. 2017) (discussing antitrust remedies).

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III. LEGAL AND ECONOMIC DEFINITIONS OF PRICE GOUGING

Antitrust's complex posture toward high pricing — great concern for the problem but limited means of addressing it — makes for an equally complex posture toward that peculiar form of high pricing known as price gouging. In the laws of the United States, price gouging refers to a grab bag of state-level prohibitions on the charging of high prices for certain goods during emergencies.[16] Consumers are suing supermarkets for raising egg prices during the pandemic, for example, in violation of a California law that prohibits increases in excess of 10 percent within 30 days of the declaration of a state of emergency.[17] The California law applies to a broad range of necessities, from food to heating oil, but other states prohibit only gouging on fuel.[18] Still other states make it difficult to prove price gouging for price increases of less than 25 percent.[19]

The economic definition of price gouging is more straightforward. Gouging is the use of price to ration access to a good that is in shortage, where shortage means that demand unexpectedly exceeds supply at the original price set by the seller before the unexpected demand materialized.[20] To understand the implications of this definition, start with a market that is in equilibrium. The sellers in the market choose their prices in anticipation of encountering a certain level of demand. If the market is competitive, those prices will be determined by the market. If the sellers have some power, then they will choose their prices.

Now suppose that demand turns out to be greater than expected, perhaps because a global pandemic has changed consumer purchase habits. Regardless the level of market power the sellers had before the surprise, now each has more power to raise prices. Why? Because supply cannot adjust as quickly as price to the unexpected spike in demand.[21] Particularly in markets in which prices are digitized — including all of online retail — prices adjust at the execution speed of the pricing algorithms that firms increasingly employ to make pricing decisions.[22] But some software services aside, the goods and services firms sell still take days and weeks to produce, and sometimes months cost-effectively to ship from their places of manufacture around the world.[23]

Until supply has time to adjust, sellers have power to raise their prices in response to the surge in demand.[24] But the market does not *require* that they raise their prices, which creates the freedom, and moral implications, that turn the morally-neutral practice of charging higher prices into the morally-freighted practice of price gouging. Firms do not need to raise prices in a shortage if they do not wish to raise them because when they chose their original prices, firms would have taken their costs into account, ensuring that their original prices cover their costs.[25] Firms will survive whether they raise prices in a shortage or they do not.

That has a profound implication. It means that the market power created by shortage is one of the few instances in economics in which power can reliably be perceived by anyone, even the man on the street. The act of jacking up prices in response to a surge in demand sends an

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16 For a state survey, see *Price Gouging Laws by State*, Findlaw, https://consumer.findlaw.com/consumer-transactions/price-gouging-laws-by-state.html (last visited May 18, 2020).

17 See Class Action Complaint at 11, *Adrienne Fraser et al. v. Cal-Maine Foods Inc. et al.*, No. 3:20-cv-02733 (N.D. Cal. Apr. 20, 2020); Cal. Penal Code § 396(b).

18 See Indiana Code § 4-6-9.1-2 (2018).

19 See Kansas Stat. Ann. § 50-6,106(b)(1) (stating that only an increase in excess of 25 percent creates a prima facie case of price gouging).

20 See Woodcock, *The Economics of Shortages*, *supra* note 2; Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, *supra* note 1, at 1766 (articulating this definition in the context of dynamic pricing).

21 See Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, *supra* note 2, at 1766–67.

22 See *id.* at 1766–70 (listing markets in which surge pricing technologies are currently employed).

23 See *id.*

24 See *id.* at 1770–72.

25 See *id.* at 1774–75.

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unambiguous signal that a firm has chosen to exercise shortage-created market power.[26] The price increase cannot be necessary to cover existing costs, because the original price was sufficient to do that. And the price increase cannot be needed to cover an increase in costs, because not enough time has elapsed for the firm to produce additional output and incur those costs. The inability of supply to adjust, and the concomitant absence of additional production costs, is, after all, what it means to be in a shortage.[27] An increase in prices alongside an unexpected increase in demand can therefore only be driven by the profit motive. It is for this reason that the public attaches the vehemently pejorative term "gouging" to price increases of this kind. By contrast, outside of the shortage context, an increase in prices could be driven by costs, and so does not attract universal condemnation.[28]

The economic problem faced by a firm encountering an unexpected surge in demand is at its heart that of rationing.[29] The surge means that there are more buyers willing to buy at the seller's chosen price than there are goods available. The question for the seller is how to ration access to the goods. Charging a higher price — price gouging — is one approach.[30] That rations access based on willingness to pay, which is often a proxy for wealth. Not raising prices and letting the goods sell out — the approach preferred by the public — rations instead based on place in line, which is often, though not always, less of a proxy for wealth.[31]

Because it involves an allocative choice that is not fully determined by market forces, rationing is an inherently political activity.[32] That explains why so many state legislatures have voted to condemn rationing with price in emergencies, particularly with respect to necessities.[33] Justice suggests that necessities should not be allocated based on the buyer's station in life whenever the market does not so require.

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26 I would distinguish this sort of power from the power over price created by scarcity more generally. Scarcity-based power arises when the excess of demand over supply is expected but the seller is unable to increase output for technical reasons or because of the nature of the good (e.g., the good is land). By contrast, shortage-based power arises from an unexpected excess of demand. See *infra* note 36. Thus the homeowner who asks a high price because he knows his location is unique exercises scarcity-based power whereas the homeowner who initially asks a low price, thinking his location is poor, but revises it upward after discovering that there is great demand for his house, exercises shortage-based power. See *infra* Part VI.

27 See Woodcock, *The Economics of Shortages*, *supra* note 2.

28 See, e.g. Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 Ariz. St. L.J. 293, 321–24 (2019) (arguing that recent evidence of increased markups across the economy may not reflect increasing market power because fixed costs may have increased as well).

29 See Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, *supra* note 1, at 1782–83.

30 See *id.* at 1784–87.

31 See *id.*

32 For a broader pocket of political discretion in the interstices of the market, see Ramsi A. Woodcock, *The Antitrust Case for Consumer Primacy in Corporate Governance*, 10 UC Irvine L. Rev. 1403–26, 1444–49 (2020) (arguing that the broader question of whether a firm should extract any amount of surplus from the market in the form of profits is not determined by efficiency requirements, particularly where firms have the power to personalize prices).

33 *Price Gouging Laws by State*, *supra* note 15 (listing price gouging laws in 36 states and the District of Columbia).

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IV. ANTITRUST LIABILITY FOR PRICE GOUGING

A. No Antitrust Liability for Price Gouging under Current Law

Do the antitrust laws have the power to punish firms that choose to ration with price, instead of place in line? Price gouging during shortages is an exercise of market power, satisfying one of the two elements required for antitrust liability.[34] Price gouging is not driven by cost increases. The only reason sellers can gouge is that neither they nor their competitors can increase supply in the short run, reducing competition and creating power over price. But the anticompetitive conduct element is missing in price gouging.[35] A genuine shortage is unexpected, meaning not created by sellers, whether through anticompetitive conduct or otherwise.[36] If demand were to outstrip supply because the seller were affirmatively to restrict supply by producing less and taking steps to prevent competitors from filling the gap, then there would be anticompetitive conduct.[37] But that is not the context of price gouging.

There is, however, one possible exception.

B. Toward a Per Se Rule against Surge Pricing

I argue in a recent law review article that surge pricing — the use of algorithms to price gouge — should satisfy antitrust's anticompetitive conduct requirement.[38] Surge pricing algorithms automatically increase prices in responses to surges in demand, allowing firms to price gouge in markets in which they would have been too slow to gouge in the past and to increase the speed with which they gouge in markets in which they would have gouged anyway.[39] Uber made surge pricing famous when the company starting using it to increase rideshare prices during peak demand periods, such as during bad weather.[40] But Uber is not alone in engaging in surge pricing; firms across the economy appear to be adopting the practice.[41]

Surge pricing is anticompetitive conduct because it is quick. Price gouging has always been a part of markets, because it always has been possible to raise prices faster than output during times of shortage. But surge pricing increases the gap between the moment when a firm can respond to surging demand by increasing prices and the moment when firms and their competitors can respond by increasing output.[42] Once upon a time it took a day or a week to change price labels. Often retailer management did not know there was a run on a particular product until it had run its course and inventories were depleted. With digital pricing and algorithms, firms can now identify demand surges as they unfold and adjust prices in real time.[43] That is anticompetitive, because surge pricing extends the period during which a seller can take advantage of the lack of competition made possible by an unexpected increase in demand.

34 See Hovenkamp, *supra* note 4, at 103–4 (discussing the market power requirement).

35 See *id*. at 356–58 (discussing the conduct requirement).

36 If the shortage is expected, then the charging of high prices counts not as price gouging but rather as the extraction of scarcity rents. See David J. Teece & Mary Coleman, *The Meaning of Monopoly: Antitrust Analysis in High-Technology Industries*, 43 Antitrust Bull. 801, 818 (1998) (calling these "Ricardian [scarcity] rents"). The same arguments that support the extension of the antitrust laws to prohibit price gouging may also apply to the extraction of scarcity rents, but that is not the subject of this article. See Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, *supra* note 1, at 1793–96 (arguing that antitrust should reach scarcity rents).

37 See Hovenkamp, *supra* note 4, at 358–59 (defining "exclusionary conduct").

38 See Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, *supra* note 2, at 1766–82.

39 See *id*. at 1766–70.

40 See Ben Popper, *Uber Surge Pricing: Sound Economic Theory, Bad Business Practice*, The Verge (2013), https://www.theverge.com/2013/12/18/5221428/uber-surge-pricing-vs-price-gouging-law.

41 See Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, *supra* note 2, at 1766–70 (describing adoption by businesses ranging from theme parks to apartment complexes); Stephan Liozu, *Penetration of the Pricing Function among Global Fortune 500 Firms*, J. Revenue Pricing Mgmt. 6 (2019) (finding that 22 percent of global Fortune 500 firms have in excess of 20 "dedicated pricing professionals," suggesting these firms use "revenue management" technologies).

42 See Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, *supra* note 1, at 1766–67.

43 See *id*. at 1770–72.

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To be sure, allowing firms to move quicker to exploit shortage-based market power is not the same thing as directly sabotaging competitors by refusing to sell them essential inputs.[44] But the distinction is not meaningful. Antitrust's mission is to use competition to restrain market power.[45] It follows that antitrust should intervene to stop defendants from engaging in activities that reduce the effects of competition, even if those activities do not directly harm competition in the sense of forcing a competitor out of the market. A firm that lacks the technology to raise prices quickly in response to a shortage experiences the lingering effects of competition for a longer period after the onset of the shortage than does a company that can adjust prices quickly. Antitrust can therefore prolong the twilight of competition after the arrival of a shortage by prohibiting surge pricing.

The argument is not as novel as might at first appear, because antitrust's *per se* rule against price-fixing is similar in kind.[46] For price-fixing does not normally spring whole from competitive markets. Instead, it is a way for firms to strengthen and institutionalize collusion that started as merely parallel conduct.[47] The price fixing does not harm competition directly — the firms have already stopped competing and started tacitly colluding — but instead strengthens or prolongs the effects of a pre-existing ebb in competition.[48] That makes price-fixing quite like surge pricing, a practice that magnifies the effects of a preexisting collapse in competition, rather than a practice that harms competition directly. Like the power incident to shortage, conscious parallelism is legal, but enhancing or prolonging its effects through a price fixing agreement is not.[49] Prolonging and enhancing the effects of shortage-based power through surge pricing should receive similar treatment.

C. Price Gouging Almost Always Harms Consumers

1. Price Gouging Harms Consumers Statically

Surge pricing should not just be illegal under the antitrust laws, but illegal *per se*, just like price fixing. The Supreme Court has said that a practice should be illegal *per se* when it always or almost always harms consumers.[50] That is true of price gouging generally, and certainly of price gouging achieved with surge pricing algorithms.[51] In choosing to ration with price, the seller forces the group that can afford to pay the ration price to pay prices in excess of the original low price that the firm could charge were the firm to ration based on place in line.[52] Thus surplus is transferred from consumers as a group to the firm in the form of profits, which is precisely the sort of wealth transfer that the antitrust laws seek to prevent.[53] To be sure, some consumers who would be able to buy at the gouging price may not be able to buy at the low price, because they may not get in line quickly enough. But others who could not afford to buy at the gouging price will be able to buy at the low price, and so in aggregate consumer surplus will be greater at the low price than at the gouging price, other than in some special cases.[54] It follows that whenever a firm engages in surge pricing, the firm harms consumers, by prolonging the period during which consumers face prices designed to ration access to the good.

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44 See Hovenkamp, *supra* note 4, at 381–87 (discussing refusals to deal).

45 See *id.* at 387.

46 See *id.* at 327–35 (discussing the *per se* rule against price fixing).

47 See *id.* at 202 (describing "parallel behavior" by firms as the norm and conspiracy as adding to that parallelism).

48 See *id.*

49 See *id.*

50 See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19 (1979).

51 For a graphical demonstration of the consumer harm incident to price gouging, see Woodcock, *The Economics of Shortages*, *supra* note 2.

52 See Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, *supra* note 2, at 1770–71.

53 See John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 Notre Dame L. Rev. 191, 201–6 (2008).

54 Consumer welfare is not *necessarily* greater under rationing via first-come-first-served relative to rationing with price because the value placed on the product by those who get in line first may be less than the value placed on the product by those who would buy at the ration price. Consider the following example. Suppose that there are only two units of a good available, but that there are three consumers who are willing to pay the good's original, pre-shortage, price of $1. The first consumer places a value of $100 on the good. The second consumer places a value of $3 on the good. And the third consumer places a value of $2 on the good. At the ration price of $3, consumer welfare in aggregate is $97. At the original price, consumer welfare is greater if the first two consumers get in line first ($101), and if the first and third consumers get in line first ($100), but less if the second and third consumers get in line first ($3).

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2. Price Gouging Does Not Help Consumers Dynamically

Defenders of price gouging argue that any static harms to consumers from gouging are more than offset by dynamic benefits, because gouging acts as a signal to suppliers to ramp up production or to shift higher-cost inventories into the market.[55] If sellers gouge in the early stages of the shortage, they argue, the price they charge will serve as a rough indicator of the maximum price that other sellers will be able to charge if they enter the market.[56] That conveys valuable information upon which the market can act.[57] Sellers will enter the market, selling at prices slightly below the gouging price, until eventually price is driven down to a new equilibrium and the shortage disappears.

Many scholars uncritically accept this account of price gouging.[58] But the account does not actually establish that gouging is *better* for consumers than charging low prices, only that gouging is one way of achieving long-run equilibrium.[59] It turns out that charging a low price, rationing based on place in line, and letting the good sell out is just as good a way to signal the need for market entry.[60] When a firm does not raise prices during a demand surge, and just lets the good sell out, the fact that the good sells out conveys to other sellers the same information that a gouging price would convey to them: that demand exceeds supply and some reward can therefore be expected for entering the market.[61]

The only difference between gouging and selling out as signaling mechanisms is that selling out tells sellers that they are likely to be able to sell at a price a little above the current (low) price, whereas gouging tells sellers that they are likely to be able to sell at a price a little below the current (high) price.[62] A consequence of this difference is that selling out may even be a more efficient way of achieving long-run equilibrium. Both selling out and gouging serve to induce entry into the market, but selling out at low prices induces the lowest-cost entry to take place first because the sell-out price conveys information about the minimum price that new entrants can charge if they enter the market, rather than information about the maximum price that new entrants can charge, as happens with gouging. That is an advantage from an efficiency perspective, and good for consumers, because it means that consumers will face lower prices as the market adjusts to a new equilibrium.

It was once the case that charging low prices and rationing based on place in line carried with it a special efficiency penalty, because waiting in lines is a waste of time.[63] It was common to hear free-market economists marvel at the parsimony of a price system that could embody in a single number — price — all the information that the market might need to adjust to unexpected spikes in demand, whereas by contrast price-regulated markets subjected consumers to endless lines.[64]

The internet has almost completely eliminated the inefficiency associated with rationing based on place in line.[65] Whereas a customer facing a shortage 20 years ago had to go down to the store, and perhaps get there early and wait, only to learn that the shortage item had sold out, today the customer logs into an online store and instantaneously obtains an answer to the question whether he will be able to buy.[66] This is true not only for items sold online but also for items sold in stores, as many retailers now allow customers to reserve items online for in-store

55 See, e.g. J.D. Tuccille, *Price-Gouging Laws Will Do More Harm Than Good During the Coronavirus Pandemic*, Reason (Mar. 16, 2020), https://reason.com/2020/03/16/price-gouging-laws-will-do-more-harm-than-good-during-the-coronavirus-pandemic/ (stating that price gouging "tells manufacturers and distributors that they should increase production").

56 See *id.*

57 See *id.*

58 See, e.g. Antony Davies & James Harrigan, '*Price Gouging' During Crisis a Good Thing*, TribLIVE, https://triblive.com/opinion/antony-davies-james-harrigan-price-gouging-during-crisis-a-good-thing/.

59 See Woodcock, *The Economics of Shortages*, *supra* note 2; Woodcock, *The Hidden Shortages of the Market Economy*, *supra* note 2.

60 See Woodcock, *The Economics of Shortages*, *supra* note 2.

61 See *id.*

62 See Woodcock, *The Hidden Shortages of the Market Economy*, *supra* note 2.

63 See Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, *supra* note 2, at 1789–90.

64 See, e.g. F. A. Hayek, The Fatal Conceit: The Errors of Socialism 86–87 (2011).

65 See Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, *supra* note 2, at 1789–93 (discussing the "low cost of queuing in the information age").

66 See *id.*

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pickup.[67] Today rationing based on place in line is an efficient alternative to rationing with price, making efforts to use surge pricing to enhance the practice of ration pricing a good candidate for *per se* condemnation under existing single-firm conduct rules in antitrust.

V. TOWARD A *PER SE* RULE AGAINST PRICE GOUGING GENERALLY

A *per se* rule against surge pricing would reach a practice that appears to be taking root across the economy, but it would fall far short of a general ban on price gouging, because it would not prevent price gouging by conventional, non-algorithmic means. Under a *per se* rule against surge pricing, supermarkets would not be able to build surge pricing into their pricing algorithms, for example. But if the manager of a particular branch were to watch a run on eggs develop in Aisle Two, he would still be free to impose a surcharge without violating the antitrust laws, although state price gouging laws might limit his options.

Antitrust can go further to ban all price gouging, but only if antitrust at last comes to terms with the radical implications of the "Chicago revolution" that brought the consumer welfare standard to antitrust starting in the 1970s.[68]

Before that revolution, courts thought the mission of the antitrust laws was to promote competition regardless of the effect on the welfare of consumers.[69] Thus at the time a court would have thought little of breaking up a large firm in order to enable competitors to enter the market, even if the large firm was better positioned to provide the highest-quality products to consumers at the lowest prices.[70] That approach changed in the 1970s, with the introduction of the consumer welfare standard, which holds that antitrust should promote competition only when competition is consistent with maximizing consumer welfare in the sense of ensuring that consumers receive the highest quality products at the lowest possible prices.[71] The consumer welfare standard created the obsessive focus on prices, and the power to raise them, that characterizes antitrust today, effectively adding market power to anticompetitive conduct as a second independent requirement for antitrust liability to exist.[72]

The addition of this requirement caused many anticompetitive activities that once would have run afoul of the antitrust laws no longer to do so, because the firms engaging in them did not have the power to harm consumers.[73] But what antitrust observers have so far failed to appreciate is that if the consumer welfare concept may be used to roll back antitrust enforcement, there is no principled reason why it should not be used to expand enforcement as well.[74] A commitment to protecting consumers, coupled with the ability to revise old rules, would seem to demand that antitrust eliminate the anticompetitive conduct requirement and condemn market power even when there are no tools available for the court to use to eliminate the power through competition and the court can therefore only remedy the violation by dictating lower prices.[75]

Eliminating the conduct requirement would transform antitrust from competition regulator to economy-wide price regulator. Consistent with antitrust's roots in competition policy, enforcers of this new regime would still be required to use competition to reduce power whenever possible. But now enforcers would be able to fall back on price regulation whenever no avenue for the promotion of competition is available

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67 See Woodcock, *The Economics of Shortages*, *supra* note 2.

68 See Woodcock, *supra* note 2, at 1756–60. For the Chicago revolution, see generally George L. Priest, *Bork's Strategy and the Influence of the Chicago School on Modern Antitrust Law*, 57 J.L. & Econ. S1 (2014).

69 See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (Supreme Court 1958) (stating that "the policy unequivocally laid down by the [Sherman] Act is competition" rather than low prices or high product quality).

70 See Gavil et al., *supra* note 15, at 486–89 (discussing the Alcoa case).

71 See Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 Loy. Consumer L. Rev. 336, 338–48 (2010) (surveying the development of case law and practice).

72 Proof of market power had long been required in single-firm conduct cases (under the "monopoly power" moniker, but power did not become a general antitrust requirement until the need to prove it was extended to most collusion cases as part of the Chicago revolution. See Gregory J. Werden, *Demand Elasticities in Antitrust Analysis*, 66 Antitrust L.J. 363, 373–74 (1998) (tracing the first use of the term "market power" to a 1969 case).

73 See Priest, *supra* note 68, at S3–7 (cataloguing Chicago-driven changes to the antitrust laws).

74 See Woodcock, *supra* note 2, at 1756–60.

75 See *id.*

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to them. European Union competition law already takes this approach.[76] I have argued that antitrust could take baby steps in this direction by eschewing injunctive price setting and instead relying on nominal damages and the symbolism of an adverse judgment to punish excessive pricing.[77] Such an approach would minimize error costs, because firms subject to mistaken findings of liability could simply pay the dollar in damages and carry on.[78]

But in some contexts, including price gouging, the danger of error is so low that a light touch is unnecessary.[79] An enforcer need only observe a spike in demand, and a coincident spike in price before supply can adjust, in order to identify gouging. Because the pre-shortage price must have been chosen to cover costs, there can be no question that the price increase is unnecessary, and therefore harmful to consumers, and consequently no need for enforcers to engage in the difficult process of measuring costs that normally bedevils price regulation schemes.[80] That makes price gouging of any kind, not just surge pricing, an ideal first target for an expanded antitrust willing to take the consumer welfare standard beyond the confines of antitrust's legacy competition remit to dictate consumer-friendly pricing.

The gouging context is also peculiarly amenable to a new price regulatory role for antitrust, because the consumer-friendly price the court would need to dictate is directly observable: it is the price that the seller charged immediately before the unexpected surge in demand.

VI. A *PER SE* RULE AGAINST PRICE GOUGING WOULD TRANSFORM THE ECONOMY

The advantage of using antitrust to pursue price gouging is that antitrust's laser focus on consumer welfare would allow antitrust to do a better job of isolating genuine cases of gouging than do state gouging statutes today.

State gouging statutes tend to be both overbroad and under-broad. They tend to be over-broad because they apply for arbitrarily-fixed time periods, but price gouging exists only while the market is unable to increase supply.[81] Once new supply comes online, the cost of that new supply may push prices up and firms should be able to incorporate those costs into prices. State price gouging laws also tend to be under-broad because they apply only to certain products and only to price increases in excess of a certain percentage.[82] But the economic definition of price gouging does not distinguish between the nature of the product at issue or the magnitude of the price increase. Using a price increase of *any* amount to ration access to *any* product in short supply is price gouging in the economic sense, and harms consumers.

An antitrust prohibition on price gouging would eliminate the mismatch between actual price gouging and state price gouging laws. Governed by the consumer welfare standard, an antitrust prohibition would apply only during periods of genuine shortage, before manufacturing and distribution processes can respond to demand. After that, antitrust would not prevent prices from rising to enable firms to bring higher-cost inventories to market to satisfy demand. In the California egg case, for example, it would be illegal gouging in antitrust terms for supermarkets to raise prices on existing egg inventories in response to pandemic-driven demand surges. But it would not be an antitrust violation to raise prices in order to acquire new inventories. By contrast, California's price gouging law would likely condemn both the shortage-driven price increase and the cost-driven price increase without distinction.[83]

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76 At least on paper. Actual cases are few. See Liyang Hou, *Excessive Prices within EU Competition Law*, 7 European Competition Journal 47, 47–51 (2011).

77 See Woodcock, *supra* note 2, at 1772–80.

78 See *id*. at 1776, 1778.

79 I have argued that data-driven personalized pricing is another example of a consumer-harmful pricing practice that courts can safely ban. See Ramsi A. Woodcock, *Personalized Pricing as Monopolization*, 51 Conn. L. Rev. 311, 319–20 (2019).

80 See Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, supra note 2, at 1770–71, 1777.

81 See, e.g. Cal. Penal Code 396(b) (prohibiting price gouging for 30 days after declaration of a state of emergency).

82 See, e.g. *id*. (restricting coverage to an enumerated list of product categories and requiring an increase in price in excess of 10 percent).

83 In theory, a defendant can use evidence of cost increases to escape liability under the California law. See *id*. (exempting cost-driven price increases). But proving costs is hard. By contrast, under an antitrust prohibition on price gouging, the defendant would only need to show that the defendant raised prices on new inventory, rather than old pre-shortage inventory, in order to escape liability, because antitrust's consumer welfare standard would allow antitrust to apply the economic definition of price gouging and honor its implications.

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But an antitrust prohibition on price gouging would also extend far beyond state price gouging laws to cover conduct that Americans do not normally associate with gouging, even though the conduct qualifies as such in the economic sense.[84] Consider the stock market. Price increases in stocks are often triggered by unexpected increases in demand. Moreover, the time required for firms to issue additional shares is often counted in months and years. It follows that any investor who offers shares at the market price, but ends up selling at a higher price due to a surge in demand, is gouging.[85] Making a profit on a sale of shares never violates state price gouging laws, but it would violate an antitrust rule against price gouging.

So too would a great many real estate transactions.[86] Any homeowner who lists a home at one price, but sells at a higher price because buyers have gotten into a bidding war over the home, gouges the winning bidder.[87] Needless to say, state gouging laws do not apply, but an antitrust rule against price gouging would. Incorporating a rule against price gouging into the antitrust laws would transform the economy from one that rations based on willingness to pay, and by extension based on wealth, to one that rations on the more egalitarian basis of first-come-first-served.[88]

VII. CONCLUSION

The pandemic-related shortages currently rippling through the economy make this an ideal moment for antitrust enforcers to experiment with antitrust condemnation of price gouging. Antitrust's consumer welfare standard would allow antitrust to do that with a combination of focus and breadth that state price gouging statutes lack.

84 See Woodcock, *The Hidden Shortages of the Market Economy*, *supra* note 2.

85 See *id.*

86 See *id.*

87 See *id.*

88 See *id.*

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