FROM MEDAL COUNT TO MARKET SHARE: HOW THE OLYMPICS REMIND US WHAT ANTITRUST LAW IS ALL ABOUT

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Competition is in the spotlight, both in terms of the historic cases filed, legislative proposals made, and perhaps most notably: The Tokyo 2020 Olympics. These new spectators are asking questions like: What is competition law? Why does it matter? How does it apply here? This article will explore why big doesn't always equal bad, comparing companies that have excelled and risen to the top of their markets with one of the greatest American Olympian of all time – Jesse Owens. Competition, whether in the Olympics or law, produces excellence. Next, the article will explain where it goes wrong – when someone tries to rig the game rather than compete on the merits – using another example, Tonya Harding. Using these two figures, we will explore the purpose and the heart of antitrust law.

I. INTRODUCTION

These days, competition is in the spotlight in terms of the historic cases filed, legislative proposals made, and perhaps most notably: The Tokyo 2020 Olympic Games.

The Tokyo 2020 Olympic Games have been a welcome reminder of the strength of the human spirit during trying times, but what can the excellence of the world's top athletes teach us about antitrust law? While the Olympics might be more entertaining, at their core, antitrust law and the Olympics are founded on the same principle: free and fair competition. From there, we then can juxtapose good and bad Olympic competitors with good and bad economic actors to reach a deeper understanding of the value of competition and the importance of protecting it.[2]

In 1914, the Olympic Congress gathered in France to plan the upcoming 1916 games, celebrate the 20th anniversary of the founding of the Olympic Movement, and to officially unveil for the first time the now iconic Olympic Rings symbol. The participants sought to establish a uniform set of rules to govern the competition, providing clarity and predictability for athletes and host countries alike.[3]

At the same time, thousands of miles away in Washington D.C., another group of distinguished statesmen were also gathered to establish rules to protect robust and fair competition. Both the Clayton Act, 15 U.S.C § 12-27, and the Federal Trade Commission Act, 15 U.S.C. §§ 41-58, were enacted in 1914 by the 63rd Congress and signed into law by President Woodrow Wilson. Each Act sought to build upon late nineteenth century "trust-busting," one by placing restrictions on anticompetitive mergers and the other by empowering a new federal agency to prevent unfair methods of competition.

The goals of the two groups were the same: to establish a playbook so that competitors could take on one another fairly and determine the best among them in a legitimate way. The Olympics are compelling entertainment, an international celebration, and a showcase of the best that competition can offer. By collectively agreeing to basic rules, the entire globe can come together to watch our best athletes compete. Similarly, by preserving free and fair competition, antitrust law allows businesses to showcase the best through innovative products and services that earn customer loyalty and market share, rather than cheating or rigging the system in their favor.

II. BACKGROUND: THE EVOLUTION OF ANTITRUST

Antitrust law does not exist in a vacuum. As the product of political, economic, and social upheaval, it has evolved over time, rising and falling in salience as it both produces and reacts to change. There have been several moments in history when antitrust law, its principles, and a common understanding of its goals have all been in flux. In general, these moments can be categorized into four distinct and cyclical eras[4]:

1) The Birth of Antitrust 1890-1920,
2) The New Deal Era 1920-1940,
3) The "Golden Era" of Antitrust Enforcement 1940-1979, and
4) The Modern Consumer Welfare Standard 1979-present.

As we enter a potential fifth era, it is important to consider that even as the methods and messages of antitrust law have changed over time, the core goal of preserving free and fair competition has remained.

"Anti-trust" law itself is somewhat of a misnomer. When the three core statutes comprising federal antitrust law were passed, public concern was focused on the "trusts," the behemoth conglomerates that controlled the means of production in several major American industries. To an early twentieth-century small businessman, consumer, or politician, "anti-trust" was a simple proxy for "pro-competition," as the absence of the former was generally known to mean the preservation of the latter.[5] In much of the world, as in the title of this publication, "antitrust"

2 It is important to note that throughout this article we use the Olympics as a metaphor and illustrative tool, not to suggest that perfect competition is attainable. John J. Miles, *The goals of antitrust*, 1 Health Care and Antitrust L. § 1:4 (2021).

3 *VI Olympic Congress—Paris 1914*, International Olympic Committee (Aug. 16, 2021, 8:12am) Paris 1914.

4 Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, Harvard Business Review (Dec. 15, 2017), https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement.

5 Barak Orbach, How Antitrust Lost Its Goal, 81 Fordham L. Rev. 2253 (2013).

thought is known as competition law and policy. Concerned with competition, Congress drafted, debated, and passed the three core statutes of federal antitrust law: the Sherman Act, the Clayton Act, and the Federal Trade Commission Act. With the big stick of President Theodore Roosevelt, Standard Oil was broken up, and Justice Louis Brandeis warned of *A Curse of Bigness*. This was the era that created competition law in the United States.

Even during the New Deal Era, as times changed and different national issues took precedence over antitrust, competition remained at the forefront of economic policy. During the mid-twentieth century "Golden Era," the courts were bold in their interpretations and applications of the statutes, watching the rise of major corporations with a skeptical eye. In the modern era, courts have now adopted the consumer welfare standard first espoused by Robert Bork in *The Antitrust Paradox*. Critics argue that this standard doesn't do enough to protect competition itself, while proponents argue that it facilitates the ultimate goal of competition: lower prices, efficient output, innovative business, and consumer choice. Either way, we can all agree that competitors must be fair, allowing others into the market. In athletics, we already know what anticompetitive instincts can produce.

III. UNFAIR COMPETITION: WHAT TONYA HARDING AND JESSE OWENS CAN TEACH US

What would happen if an Olympic competitor tried to rig the competition in his or her favor, long before the torch was even lit? In 1994, ice-skater Tonya Harding's ex-husband hired a hitman to eliminate Harding's U.S. competition, Nancy Kerrigan, before the upcoming 1994 Winter Olympic Games in Norway.[6] On January 6, 1994, hitman Shane Stant clubbed Kerrigan's right leg with a police baton at her final practice before the U.S. Women's Championships.[7] While Kerrigan recuperated, Harding won the U.S. Women's Championships.[8] Although the attack prevented Kerrigan from competing in the U.S. Women's Championships, she luckily recovered in time to compete in the upcoming Olympics.[9]

Like allegations of bid rigging and other antitrust crimes, the attack resulted in criminal indictments and plea bargains. Harding pled guilty to hindering the investigation and was sentenced to probation. She was also forced to resign from the U.S. Figure Skating Association, thereby withdrawing her from the World Championships.[10] Stant and his driver pled guilty to conspiring to assault Nancy Kerrigan while her ex-husband, Jeff Gillooly, and her bodyguard, both, pled guilty to racketeering for crafting the plan.[11]

Harding's involvement in planning the attack has not been proven, but, because at the very least we can say this was done on her behalf (willingly or not,) this story still provides a useful parallel to examine rigged competition and actions taken to harm competitors.

In contrast, the many Olympians who choose to honor the Games, competing fairly, remind us that it is about more than who walks away with the gold medal. While not everyone wins, it is through competition that some of the world's greatest athletes have achieved coveted awards and set new records in their fields, marking their achievements in the history books and rewarding their struggle. While there are many greats to choose from, Jesse Owens and his story stand out not just because of his achievements but what they came to mean. On May 25, 1935, Jesse Owens, an African-American Ohio State freshman from Alabama, tied a world record and set three new world records at a Big-Ten track and field meet in less than an hour.[12] To this day, no one has tied this achievement.[13] Owens followed this impressive feat by winning four gold medals at the 1936 Olympic Games in Berlin, Germany. [14] It was at the 1936 Olympics, also known as the "Nazi Olympics," where the Chancellor of Ger-

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6 Laura Barcella, *'I, Tonya': What You Need to Know About Tonya Harding and Nancy Kerrigan: How two star skaters turned into rivals – and changed the way the world watched the Olympics*, Rolling Stone, Dec. 6, 2017, 'I, Tonya': Inside Real Tonya Harding, Nancy Kerrigan Story - Rolling Stone.

7 *Id.*

8 *Id.*

9 *Id.*

10 Michael Lloyd, *Tonya Harding-Nancy Kerrigan: Harding found guilty of hindering investigation*, The Oregonian, Jan. 01, 2014 (updated Jan 10, 2019).

11 The Associated Press, *Figure Skating; Kerrigan Attacker and Accomplice Sent to Jail*, The N.Y. Times, May 17, 1994.

12 *Jesse Owens*, Ohio History Central (Aug. 15, 2021, 1:06pm) Jesse Owens - Ohio History Central.

13 *Jesse Owens Biography*, Olympics (Aug. 15, 2021, 1:08pm) Jesse Owens Biography, Olympic Medals and Records (olympics.com).

14 *Resources*, Jesse Owens Memorial Park (Aug. 15, 2021, 1:09pm) Resources : Jesse Owens Museum (jesseowensmemorialpark.com).

many, Adolf Hitler, planned to showcase the superiority of the Aryan race.[15] Owens succeeded on merit alone, disproving Hitler's racist ideology four times, and his record of four athletic gold medals was unmatched for almost fifty years.[16] Owens later received many awards, but it is worth noting that he was awarded the Medal of Freedom, the highest civilian honor in the U.S., by President Ford in 1976.[17]

Throughout U.S. antitrust policy debates, scholars have disagreed on how to best realize the goal, but they all agree with one thing: competition is the goal. On August 27, 1953, the U.S. Attorney General appointed the National Committee to Study the Antitrust Laws, and after nineteen months of work the report was published.[18] The committee was made up of 59 lawyers, law professors, and economists.[19] The report opened with this simple, defining statement, "The general objective of the antitrust laws is promotion of competition in open markets."[20] The U.S. Supreme Court echoed this in a 1963 opinion, writing, "Subject to narrow qualifications, it is surely the case that competition is our fundamental national economic policy, offering as it does the only alternative to the cartelization or governmental regimentation of large portions of the economy."[21] Even now, in 2021, our antitrust textbooks teach, "The antitrust laws are equally designed to maintain the competitive order and provide the means of keeping competition free."[22] Perhaps it is because the system is organized around competition that we impose game-like rules, similar to those governing other competitive endeavors.[23]

Competition in and through the Olympics has produced the world's greatest athletes, and it is that same competitive force, which is and should remain fundamental to our economy. In order to do that, our laws have to keep that primary objective in focus. Competition in open markets results in innovation, lower prices, and better-quality products from which consumers can choose. For purposes of antitrust law, competition and its purpose are defined, "as a process of rivalry among sellers (the definition applied by most courts), is simply a means to this end. Thus, competition viewed as rivalry among firms is not an end in itself, but rather a process to maximize consumer welfare."[24] The definition of competition alone tells us that the process is the point. There is no means by which we can ensure that a "best" or "perfect" product will be created, but the process of competition ensures that, at the very least, competitors are incentivized to work towards that ideal.

In the market context, anticompetitive conduct occurs where a competitor "contravenes or disavows the fundamental fact of the competitive order, viz., the competitive struggle, and attempts instead to dominate market conditions."[25] The goal is similarly to handicap or eliminate the Kerrigans. When this occurs, it is impossible to tell if "the best" has truly won out, like when Harding won the U.S. Women's Championship in 1994. We cannot know if Kerrigan would have won because she was prevented from even competing. What we do know is that when anticompetitive conduct occurs, competition is stifled, and even the possibility of the positive outcomes of competition are destroyed.

If we are not ensuring that markets operate competitively, then we are disincentivizing and undermining the entire process. As Callman has explained, "It is the primary function of the law of unfair competition to safeguard the competitive community against methods of trade and business that are destructive of equal opportunity in honest competition, and to protect free enterprise from such practices."[26] Imagine if Tonya Harding had been allowed to compete in another Olympics. Not only would there have been a moral outcry against her participation, but neither her competitors nor her spectators would have trusted the integrity of the competition. Protecting the competitive process ensures that competitors achieve based on their merits, not on that of their hitmen.

15 *Id.*

16 *Biography*, Jesse Owens Biography, Olympic Medals and Records (olympics.com).

17 About Jesse Owens, Jesse Owens: Olympic Legend (Aug. 15, 2021, 1:11pm) About | Jesse Owens.

18 Report of the U.S. Attorney General's National Committee to Study the Antitrust Laws (Mar. 31, 1955) The Attorney General's National Committee to Study the Antitrust Laws - Google Books.

19 Thomas E. Kauper, The Report of the Attorney General' National Committee to Study the Antitrust Laws: A Retrospective 100 Mich. L. Rev. 1867 (2002).

20 Report of the National Committee to Study the Antitrust Laws at 1.

21 *U.S. v. Philadelphia Nat. Bank*, 374 U.S. 321, 372, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963).

22 Louis Altman & Malla Pollack, *The character of the antitrust laws—Freedom of competition*, 1 Callmann on Unfair Comp., Tr. & Mono. § 4:1 (4th Ed.) (2021).

23 Altman & Pollack, *The character of the antitrust laws—Competitive and anticompetitive conduct* ,1 Callmann on Unfair Comp., Tr. & Mono. § 4:2 (4th Ed.) (2021).

24 Miles, *The goals of antitrust*, 1 Health Care and Antitrust L. § 1:4 (2021); see also See F.M. Scherer & David Ross, Industrial Market Structure and Economic Performance, 15-16 (3d ed. 1990); *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995).

25 Altman and Pollack, § 4:2.

26 Altman and Pollack, § 4:1.

We know that competition is the goal, but it can be easy to lose sight of this when reviewing pages of proposed legislation, sifting through the "legalese," and trying to determine the ultimate effect. Nevertheless, we can look to our Olympic greats for inspiration to keep up the work. As Jesse Owens said, "We all have dreams. But in order to make dreams come into reality, it takes an awful lot of determination, dedication, self-discipline, and effort."[27]

IV. GETTING BACK TO OUR ROOTS: THE SHARED PURPOSE OF THE ENFORCEMENT COMMUNITY

It is an exciting and engaging time to be a practitioner of antitrust law. Journalists, academics, politicians, and the business community alike are all concerned with what many see as a rise in monopoly power. Headlines about Big Tech have re-introduced many to an area of law that the general public considered only in history class, if we're lucky, and certainly wasn't considered a sexy area of law (except for the few of us, of course, who live and breathe it.) Yet, debates now rage over the sufficiency of the consumer welfare standard, the adequacy of the statutes as written, and the capability of enforcers. Lost in all the noise, however, is a shared understanding of our common goal: the preservation of fair competition. No matter which particular theory of antitrust you personally espouse, we can all agree that our role is to prevent the Tonya Hardings of corporations from abusing their market power or rigging the system to suppress competition and all of its myriad benefits. Instead, antitrust enforcers should diligently protect competition so that the Jesse Owenses of commerce can flourish.

V. CONCLUSION

Using competition, the core value of our antitrust laws, as a lens, we can evaluate current antitrust laws and new legislative proposals to see if they are fulfilling their purpose. Are our markets currently competitive? How will this legislative proposal increase competition? How will this merger potentially decrease it? Also, next time your friends ask you what it is you do or what's going on with antitrust policy debates, at least you'll have a new Olympic metaphor to explain it.

27 *Resources*, Resources : Jesse Owens Museum (jesseowensmemorialpark.com).

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