Bilal Sayyed: The *Google Search* remedy decision is in, at least from the district court, and there's been some complaining that the court applied too strict a standard in designing a remedy.

Today, I'm joined by Kathleen Bradish, who is the Vice President and Director of Legal Advocacy at the American Antitrust Institute. I said on a recent FedSoc program, Federalist Society program, that I did with Kathleen, that she had written the seminal piece on the standard that the courts are or maybe are instructed to apply in designing remedies, particularly but not necessarily only [in] monopolization cases.[1]

So, as I said, Kathleen is here. She's got a recent paper. The recent paper is *Unrealistic Causation Standards Put Effective Monopolization Remedies at Risk*.[2] It came out just a month ago, probably not in time for Judge Mehta to take a glance at and consider. But I think we'll discuss with Kathleen two questions I have, which is first, what are the legal requirements that may constrain remedies in monopolization cases? And then how might you apply either that standard or criticisms of that standard to what Judge [Amit] Mehta had done in the *Google* case?[3]

This is Bilal Sayyed. This is the Rethinking Antitrust podcast.[4]

Tell us why you wrote this paper. It's not only topical for the *Google* [*Search*] case, but for some of the other big monopolization cases that are out there.[5] So why now? Why are we here discussing this?

---

[1] Federalist Society, Litigation Update: Google Search Remedy Decision (Sept. 4, 2025).

[2] Kathleen Bradish, *Unrealistic Causation Standards Put Effective Monopolization Remedies At Risk* (American Antitrust Institute) (Aug. 18, 2025) ("Unrealistic Causation Standards"), https://www.antitrustinstitute.org/wp-content/uploads/2025/08/AAI-Google-Remedies-White-Paper_Final.pdf.

[3] *United States v. Google, LLC,* 2025 WL 2523010 (D.D.C, Sept. 2, 2025) (Google Search Remedy Opinion); *United States v. Google, LLC*, 747 F. Supp. 3d 1 (D.D.C. 2024) (Google Search Liability Opinion); *United States v. Google, LLC,* 687 F. Supp. 3d 48 (D.D.C. 2023) (Google Search Summary Judgment Opinion); Complaint, *United States v. Google LLC*, Case No. 1:20 -cv-03010 (D.D.C., Oct. 20, 2020).

[4] This is a lightly edited and annotated transcript of the podcast discussion (edited for clarity and to provide citations to cases and other materials referenced in the discussion). The podcast is available at Rethinking Antitrust Podcast #36.

[5] Section 2 enforcement matters being litigated now by the Department of Justice or the Federal Trade Commission, in addition to the two Google matters, include lawsuits against Amazon, Apple, Deere, Live Nation, Meta, Syngenta, and Visa. *See* FTC and Plaintiff States v. Deere Co., Case No. 3:25-cv-50017 (N.D. Illinois, 2025) (Compl.); U.S. v. Visa Inc., Case No. 1:24-cv-07214 (S.D.N.Y. 2024) (Compl.); U.S. and Plaintiff States v. Live Nation Entertainment, Case No. 1:24-cv-03973 (S.D.N.Y. 2024) (Compl.); U.S. and Plaintiff States v.

[00:02:08] ***Kathleen Bradish:*** Well, thanks so much, Bilal. It's a pleasure to be here. So I began this paper as a response as I was thinking about the *Google Search* case and some of the arguments that were being raised, in particular, some of the amicus briefs that I was seeing in the case that seemed to be setting out a kind of rule or a proposed rule for causation standards[6], essentially working from some language in the *Microsoft* case to what Google and some of the amici that were essentially supporting their position would say is a, they call it a but-for causation rule.[7]

I call it in the paper a strict causation rule; that if you can't construct a but-for world in which the conduct is the *only reason* for the anti-competitive conduct, is the *only reason* for the monopoly, then you are limited in the kind of remedies you can impose. This is not where [Judge Mehta] went at all.

I wrote this before the Judge's opinion came out and I thought it was a very dangerous route to go down. I also noted it was something that we were seeing in some of the other cases. It's very similar to arguments that Google is making in the [*Google*] *Ad-Tech* case, which will be going to trial in the next few days on remedies, and the divestiture issue might even be more live there than in the *Google Search* case.[8] I see it as an issue for the *Google Search* case. I see it as an issue certainly for the *Ad-Tech* case and inevitably for some of the other tech cases we're going to see and maybe even other monopolization cases that are in the queue.[9]

Apple, Case No. 2:24-cv-04055 (D.N.J. 2024) (Compl.); FTC and Plaintiff States v. Amazon.com, Inc., Case No. 2:23-cv-01495 (W.D. Wa. 2023) (Compl.); FTC v. Syngenta, Case No. 1:22-cv-00828 (M.D. N.C. 2022) (Amended Compl.); FTC v. Facebook, Inc., Case No.: 1:20-cv-03590 (D.D.C. 2021) (Substitute Amended Compl. for Injunctive and Other Equitable Relief). The FTC is also litigating in its administrative court the *Caremark* matter; that matter alleges unfair methods of competition and unfair practices (15 U.S. §45), but does not include a Sherman Act claim (15 U.S. §§ 1,2). In the Matter of Caremark Rx, et. al., FTC Docket No. 9437 (Compl., Sept. 20, 2024).

[6] *Unrealistic Causation Standards*, *supra*, n. 2, at 3, 4, citing Br. of Bipartisan Former Antitrust Enforcers as Amicus Curiae, United States v. Google, LLC, No. 1;20-cv-0310 (May 6, 2025)

[7] *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc). *See also* Rethinking Antitrust Podcast # 18, Judge Douglas Ginsburg on Antitrust Law and the Tech Industry (Bilal Sayyed and Douglas Ginsburg) (Jan. 24, 2025); Rethinking Antitrust Podcast # 15, The Microsoft Framework: Shaping Antitrust Enforcement Today (Bilal Sayyed, Andy Gavil, and Harry First) (Dec. 4, 2024).

[8] *United States v. Google, LLC*, 778 F. Supp. 3d. 797 (E.D. Va. 2025) (Google Ad-Tech Case Liability Opinion); Complaint, United States v. Google, LLC, Case No: 1:23-cv-00108 (E.D. Va., Jan. 24, 2023). *See also* Rethinking Antitrust # 33: Examining the Ruling in the DOJ's Ad Tech Case (Bilal Sayyed, Derek Moore, and Giovanna Massarotto) (June 24, 2025).

[9] *See* note 5, listing cases.

Because obviously the question of what discretion a court has in shaping the remedy is a very live one and one that doesn't have a lot of very recent court statements about it.

[00:04:09] ***Bilal Sayyed:*** Let me start with what is the second line of your paper and ask how we interpret it, because most of the paper is thinking about how far the Supreme Court ["Court"] guidance goes on this question and, from my perspective, how controlling it is in antitrust remedy considerations. Here's the second sentence. As the Supreme Court observed, an antitrust "suit has been a futile exercise if the government proves a violation but fails to secure a remedy adequate to address it." And that cites to the *DuPont* case from the early 1960s.[10]

When I read that, I said to myself, and maybe this is just me being pigheaded, what does this mean? Why is it understood, or might be understood, to allow for relief that goes beyond the illegal conduct? And here I'm distinguishing between a violation of Section 2[11], and the conduct that is the underlying act that supports the claim. So I think you can read that quote broadly, or you can read it narrowly. And you could also potentially tie it to the acts within the case that the language is tied to. So you start the piece with that language. So what does it mean to you and how should we think about it?

[00:05:58] ***Kathleen Bradish:*** I find the importance of that statement to be that, *as much analytical weight as is given to the finding the violation, there should be as much analytical weight given to making sure the remedy addresses the violation*. So for me, it's very much not just an afterthought, the remedy. It is as much a part of doing the job of the court as finding the violation. So that's, for me, the importance of that quote.

But I think you can extract from that a distinction you raised between the conduct found to be a violation and the violation. This language talks about the violation. So I think it is, in that sense, broader. The Court is saying you have to make sure that the violation itself is remedied. It's not just about stopping the exact type of conduct that was found to be illegal.

And I think that has tremendous support in the case law. In the *United Gypsum* case, the Court went beyond the specific conduct that was found to be illegal and [expanded the district court decree] both geographically and in terms of the conduct itself.[12]

---

[10] *U.S. v. E.I. Du Pont de Nemours*, 366 U.S. 316, 323 (1961).
[11] 15 U.S. §2.
[12] *United States v. United States Gypsum Co.*, 340 U.S. 76 (1950) (granting request by the Department of Justice to have the district court's decree enlarged to include all gypsum products and not just patented gypsum board, to expand the geographic scope of the decree to the United States (and not just the eastern portion of the United States), to include a broader prohibition of concerted practices, and to require broader licensing of patents than the district court).

And that's also true in the *Glaxo* case.[13]

So I think there's a long history, a pretty strong history in the Supreme Court of saying we can't just look at, our power is not limited to, stopping the conduct at issue, but we instead look to the violation writ large, the monopolization, and deal with that.

[00:07:47] ***Bilal Sayyed:*** The causation language that folks like myself might point to, who are a little less disposed to request or believe broad relief is appropriate, and I'll come back to why I think that as a legal matter, but the language or the decision that I would point to is the discussion in the *Microsoft* case and the Appellate Opinion back from ~~2003~~ [2001] which suggests, and I'm going to paraphrase, but I think I'm paraphrasing correctly and fairly, which is that the remedy must be tied to the harm, maybe even the harmful conduct. And that is, or at least has been read as fairly, as narrowing or perhaps inconsistent with the language and the theme we just discussed. So is it that the *Microsoft* court got it wrong, or is it a special case, or can it be aligned with broader Supreme Court doctrine?

[00:08:54] ***Kathleen Bradish:*** Yeah, so I think there are two different, I think of this as two different kind of trains of thought. And this article really is focused on the first, at least it was written from the perspective of the first, which is what kind of discretion does a court have? What can a court do? And what does it have freedom to do? And then there's another question of what is the court required to do under the law?

I think what we saw in the *Google Search* case was Judge Mehta really articulating the first, the freedom that a court has to shape its remedy, as opposed to the second, what are the requirements that it must address when it's shaping the remedy.

So on the question of causal connection, I think, first of all, as an initial matter, DOJ and the states argued, I think pretty well, that the relief they were seeking or that they had made the causal connection, that the *Google Search* case was different in a lot of ways than the *Microsoft* case. There was a lot less speculation about what the competitors looked like, et cetera, in *Google Search* than in *Microsoft*. So I think they made a strong argument that they had met the significant causal requirement. So that aside, I think on causal connection, there's a difference, an important difference between what Google was arguing on causal connection and what *Microsoft* is saying.

And I think Judge Mehta points this out, that there's a difference between requiring that the plaintiffs show a but-for world in which if this conduct hadn't happened, Google wouldn't be a monopolist, versus a significant causal connection. And I think Judge Mehta points out quite

[13] *United States v. Glaxo*, 410 U.S. 52 (1972) (Supreme Court grants the relief the government sought but the district court refused in its decree settling a Section 1 complaint (mandatory, nondiscriminatory sales of the bulk form of Griseofulvin (an active pharmaceutical ingredient) and mandatory reasonable-royalty licensing of the respondents' patents)).

well that if they wanted to say, but-for, there were many ways to say it if they had meant it the way Google tried to interpret it, but instead they said significant, which is more of a, at least for Judge Mehta, seemed to imply a kind of sliding scale approach to causal connection.

So I think you don't necessarily have to say *Microsoft* is wrong. In fact, I think Judge Mehta's opinion shows why *Microsoft* supports more of a proportional, more looser, more discretionary approach to remedy than what Google was asking for, which is you do a cease-and-desist type remedy unless you can show that Google wouldn't have been a monopolist but-for this conduct.

[00:11:58] ***Bilal Sayyed:*** This is something I often have trouble distinguishing about when I think about this. I think of the *Microsoft* opinion as providing a fairly loose standard for liability given what other people have described as the nascent nature of the market. And so the Appellate Court seemed to allow DOJ some leeway in establishing liability. But then it turns around on the remedy and says the remedy needs to be tied, again, my language, paraphrasing, tied closely to the conduct of concern.

And what I heard you just describe with respect to Google's position on remedy, is what's happening sometimes in the remedy discussion [is] sort of a blending of the liability question into the remedy in a way that *Microsoft* tried to make distinct, but that I think in fairness to most of us, we struggle with keeping distinct? And is that one of the reasons, or do you think it's one of the reasons, the discussion around causation standard in remedies has become arguably a little bit muddled?

[00:13:43] ***Kathleen Bradish:*** Yes, for sure. I think there's a lot of blurring the line between liability itself and remedies. I think in the *Microsoft* case itself, the question was divestiture. What Google and its amici, what I saw them trying to do in their filings was not just say divestiture, but any kind of remedy that goes beyond stopping the conduct. Obviously, even the remedies that Judge Mehta ultimately decided upon were not just stopping the illegal conduct but went beyond that.

So, there's the question of was *Microsoft* talking just about divestiture in that case, or was it the position that Google and its amici seemed to advance, which was it [*Microsoft*] talking about anything that wasn't just a cease-and-desist type remedy? So I think that's one question. And I think there's not a lot of basis for extending it further than the question of divestiture itself in that case, which I'll come back to. So, I think that's one. Are we talking about divestiture versus all other kinds of remedies?

Or are we talking about any kind of what I call in the paper restorative remedies, remedies that are meant to take us back to where it was before the conduct or would have been, but if the conduct hadn't happened? So I think that's ~~one~~ [another] question.

On the liability versus remedy issue, there's another pole as well, which wasn't so much an issue in the *Microsoft* case, but, I think is an issue in a lot of the Supreme Court cases, which is, you can talk about causation at the liability stage and causation at the remedy stage. And maybe if you're doing a divestiture, you want to make sure that you're not just ordering a divestiture without having it connected to what went wrong in the case.

But there's also something which maybe we'll talk about later. When you're deciding on liability, the defendant is in one position. It's defending its actions. They haven't been adjudicated legal or illegal at that point. When you're deciding on remedy, the conduct has already been adjudicated to be illegal. And I think sometimes in these discussions, that gets lost. But we see it in the older Supreme Court cases, the defendant isn't there in the same position as it would have been if it were coming in saying it did nothing wrong. It's already been decided.

Maybe this is, I can't comment on the strategy of bifurcating liability and remedy, but it's coming into the remedy phase in many of these cases and a lot of them are bifurcated with an already adjudicated violation. And there's plenty in the case law about, I think in *Ford Motor Company* and some of the other cases about, well, you're not, to paraphrase, you're not coming to us with clean hands.[14]

And it's really once you're in the position of having to face remedies for what you've done wrong, then there's some burden shifting there. And the defendants have some obligation to show why there's a problem.

So there's definitely two forces. There's this, well, if we're going to take a really significant break-up the company remedy, we want to have a significant causal connection. And on the other hand, there's this thing that I think that gets forgotten about once you're an adjudicated violator of the antitrust laws. From an equitable perspective, the burden shifts a bit and should shift. And I think it's generally recognized in the cases that the burden should shift to the defendants to show why a remedy is a problem if it's connected to what they've done.

[00:18:17] ***Bilal Sayyed:*** To help unpack that, let me ask you to talk a little bit about some of the Supreme Court cases that you cite in the paper that I think you believe establish what I would call this looser requirement than maybe *Microsoft* established or certainly that you suggest Google was arguing for. We talked a little bit before taping. I looked at some of those cases and thought two things. One was, these are kind of old. And, more importantly, I think is (people still cite old cases); did it matter what the conduct was when they discussed this language?

[14] *Ford Motor Co. v. United States*, 405 U.S. 562 (1972); *Unrealistic Causation Standards*, *supra*, note 2, at 14-15.

And in particular, I think, you cite *Grinnell*[15], you cite *United Shoe*.[16] There was a lot of conduct in those cases. It wasn't just a particular practice or series of practices. There were acquisitions as well and things that sort of fell, you might say in the middle, acquisition of patents. So, again, if I'm a defendant, I'm going to say these are old cases, but more importantly, they're commenting in the context of a wide range of conduct that has been entered, where that conduct, including acquisitions, has been added into evidence.

You've [the court] now found liability often on a, I don't want to call it a monopoly broth [theory] because that's not what it is, but you've found a lot of conduct that apparently has some contributory factor to the liability finding. And, you take, rather than assign percentages and all, you get to design a remedy that addresses the illegal conduct. I think Google might be saying it's a fairly narrow set of conduct that was at issue. And so, notwithstanding this relatively broad language in earlier cases, it was directed at a different factual setting. So, how much weight should we give to that, to those Supreme Court cases you cite? I went back and read the District Court opinion in *United Shoe;* they didn't place a lot of emphasis on the acquisition activity. But they seem to place some.

[00:21:03] ***Kathleen Bradish:*** It's interesting because in some ways this informs what I tried to do in the paper. Because I think it's one thing to cite the Supreme Court language. It's another thing to look at the facts of the market at issue and the facts of the conduct at issue.

But to start with the Supreme Court language, you can distinguish principles from more fact intertwined aspects of these cases. And I think what we're seeing there, is this kind of principle part of remedies that transcends the specific facts of the case. And that's why some of these cases get cited over and over again. One of the primary insights being, we recognize that we need to go beyond just ending conduct because we recognize that monopolists find other ways, that there's tremendous incentives to do what they're doing, not because they're bad people, but because there are incentives to do it. And if we stop that particular conduct, we know that there will still be incentives to get to the same end by other means. And I think that's a principle, not a fact-specific question. So I think that insight stays true regardless of how old the case is or how remote or odd the facts might seem.

Those kinds of things you see even in, you see that as a through line in the cases like *Glaxo,*[17] which is from the seventies, and you see it in *NCAA vs Alston*,[18] the same idea that there has to be discretion to do what's necessary to end the conduct, and the emphasis on the court's

[15] *United States v. Grinnell*, 384 U.S. 563 (1966).
[16] *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968).
[17] *United States v. Glaxo*, 410 U.S. 52 (1972).
[18] *NCAA v. Alston*, 594 U.S. 69 (2021).

discretion in that light. I think that's a concept that stood the test of time and isn't embedded in its facts.

That said, I do think when you think about remedies and what remedies work and what courts should be free to do or have to do, which are two different questions, the background and the facts matter and you want a standard that adapts to that. And I think one of the dangers, the most dangerous thing about the rule that would say you're limited to cease-and-desist type injunctions is that it takes away all that flexibility, all that ability to adapt to the particular market at issue. It gives no discretion at all to the judge. So a good chunk of my paper is about the specifics of the digital platforms and the tech markets that make it particularly important not to have a very rigid causation standard because there are all these complications both on making sure, first, crafting the remedy and second, making sure that the remedy is effective and administrable.

So all that is to say, I think the principles are there. And if we learn anything from these older cases beyond those principles, it's that we do need to have the flexibility to adapt to a very different fact and market scenario. And we need standards that make sure we can do that.

[00:24:55] ***Bilal Sayyed:*** I want to come to some of the specific discussion you have, but if we are arguing about causation, are we actually arguing about the ability of a court to provide effective relief? Or are those really two different questions? Or is there substantial room for the court to maybe find itself bound by a strict causation requirement, but still build on the language that says relief must be effective? And we don't have to talk about Judge Mehta's decision, but although it sounds like he felt somewhat bound by the language in *Microsoft*, he certainly did not, as you said, and, as DOJ has recognized,[19] he certainly provided relief, awarded relief that went beyond the strict conduct for which Google was found liable.

I'm sort of wondering if this is one issue or is it really two and that the real issue, the more important issue is, can a court order effective relief? I mean, that's a silly question, but I think there's no sense that what the court has done here is beyond the scope of what it could do, even though it went beyond attacking the, addressing only the, I'll call it *de facto* exclusive arrangement. It's interesting. The title, of the paper, *Unrealistic Causation Standards*, which suggests one issue, *Put Effective Monopolization Remedies At Risk,* which suggests an alternative, the tension, between them, if there are two issues.

Maybe that's a way to build into what you get into the paper; strict causation maybe does limit effective remedies, but then you identify what I would call two that are, well, only two of many potential remedies. So maybe that's a background to talk about the where this tension creates the problem.

---

[19] Press Release, *Department of Justice Wins Significant Remedies Against Google* (Sept. 2, 2025).

[00:27:26] ***Kathleen Bradish:*** I think that's exactly right. And in some ways, the causation discussion is a bit of a sideshow to the main question, which is the question of effective relief. And I think part of what I was responding to in the paper is the argument that was being made going into the decision, the Google side, that, well, we can't even think about remedies without our first and primary focus should be this causation question. And then everything else comes after that.

And I think when it comes to the remedy stage, the Supreme Court cases stretching all the way from the earliest cases -- *International Salt*[20], in *United Shoe*, to *Alston* -- are more focused on effective relief, that the primary goal of the remedy stage is to do something that's effective at ending the Section 2 violation. So I agree with you that they are two separate issues, but I think we go wrong when we elevate the causation question over the effective remedies question. And I think the directive of the Supreme Court is that the remedy must be effective.

And we could talk about what are some considerations under that and that you want an effective remedy that's tailored to the harm, but [also that] it's going to be effective. And I think many of these discussions lose track of the effectiveness question or it becomes a secondary question when it should be the primary question.

[00:29:25] ***Bilal Sayyed:*** I didn't spend time looking for this, but right up in the front got this language, the need to put "effectiveness first." That's a powerful quote. But I didn't notice the citations, so I was struggling a little. So let's talk about effectiveness with a little more specificity.

You suggest that basically a strict causation or an unrealistic causation requirement restricts the most potent remedies available. You mentioned divestiture and interoperability requirements. And what struck me about those two choices was a recognition that this is not necessarily a discussion of structural versus non-structural. I assume interoperability requirements are a type of behavioral, right? Since we don't have that break between structural and non-structural relief in your two examples, what is it about a strict causation requirement, that would restrict both a certain type of structural relief and a certain type of behavioral relief that you identify or are concerned about?

[00:30:50] ***Kathleen Bradish:*** I think on the structural versus behavioral issue, there are some out there who are arguing that interoperability is a structural type of relief. So I think there is some kind of middle ground, some ambiguity even in that distinction between structural and behavioral, which I'm not entirely sure is helpful in this context. And I see some of the data sharing as a variant of interoperability. I mean, in its heart of hearts, it's a kind of interoperability in my view.

---

[20] *International Salt v. United States*, 332 U.S. 392 (1947).

[00:31:27] ***Bilal Sayyed:*** I see structural as sort of asset-based. Allowing access to an asset, maybe through sale, maybe through must-carry or must-allow type things. So I agree with you. Licensing of a patent, that strikes me as structural, although a different type. It's not so clearly what we think about in divestiture.

[00:31:54] ***Kathleen Bradish:*** I think in terms of effectiveness, the overriding question is, does the remedy deal with the incentives that gave rise to the conduct to begin with? Because that's what you need to ask, to consider whether the conduct is going to re-occur, how it's going to re-occur, really the question of, have you dealt with the incentive to engage in the conduct?

And that's typically been the distinction from a merger perspective between structural and behavioral. But a structural just takes away, if it's done right, takes away the incentive to use the asset in a way, for example, to use the asset to continue the monopoly conduct. So I think that in terms of effectiveness, the focus on whether the remedy addresses the incentive sufficiently to do the job of fixing the problem and not just looking at the specific manifestation of that incentive, I think that's the key.

And the causation requirement or this kind of strict causation, unless you can tell us, reconstruct this but-for world, it doesn't ask about incentive at all. I think the focus is entirely in the wrong place, because without dealing with the incentive question, whether the relief addresses the incentive, you're not really judging effectiveness. And this kind of causation requirement that's too strict, it overtakes the priority of other things [and] can elevate that specific question over the more fundamental question of whether the incentive still exists to do the thing, the thing that was found to be illegal, and whether, unless we address that incentive, we have any other way to prevent the recurrence of the monopoly conduct, if that makes any sense.

[00:34:18] ***Bilal Sayyed:*** It makes sense. You do talk a lot about incentive in the paper, and just now you've focused on incentive. I think some of the calls, either for structural relief or divestiture, are intended to focus on the ability side, right? To exercise monopoly power [you need] both the ability and incentive. I think of everything [in antitrust] that way. I think ability and incentive is the right way to think about almost all antitrust cases that are not *per se*. And that was a framework I, it's a framework I think worth incorporating into this doctrine of remedies.

There are different ways to stop the conduct that [the district court] found illegal. And I haven't, maybe I've missed it, I just hadn't seen it in the cases set out that way. We have an ability question, we have an incentive question, and I thought that was a way to get at it [the remedy question]. I have so many questions because so much of this turns on a parsing of the language of what the [Supreme] Court said.

I've come to sort of believe you ought to think about effectiveness, and of course it's [the court] constrained. But I think it's constrained not only by some link to the conduct. But also it should be constrained to protect against the loss of efficiencies, whether it's related to the conduct or related to, what you might call this more expansive relief than a cease-and-desist order.

And that's a way to lead in, but maybe it's a separate question, to the error cost framework.[21] As I read the paper, your suggestion, which I think is correct, is that proponents, and I think I'm one of them, of a stricter causation standard, are arguably putting too much emphasis on Type I error. I'd like you to talk about that. I think you suggest that ought not to be the focus or sole focus. And that may be another reason for the courts not to bind themselves to a strict causation standard or a standard that makes effectiveness secondary to proof, because that's what causation is, right? It's a proof standard. So, how do error costs enter into this?

[00:37:15] ***Kathleen Bradish:*** I realize that the error cost discussion has a long, long history. And the reason why I bring it into this paper is because I think it's even more acute in the remedy area than in the liability area.

So what are the error cost issues? The assumption is, well, the market will fix itself, if we don't. And I see this a bit in Judge Mehta's judicial humility. He wrote a lot in his opinion about taking an approach to remedies that shows judicial humility. And one can debate whether he did that or not. But what does that mean in this context? To me, there's two questions there. Is the market going, can we rely on the market, to self-correct? And are we, in this approach to remedies, protecting incentives to innovate, which is clearly an important thing?

So on the first question, the reason why I focus on it is I think we have to level set in the remedy situation. And we're already talking about a market and market facts in which the market hasn't worked. We didn't get to the remedy stage because the market was able to self-correct. We got to the remedy stage because it wasn't [able to self-correct]. So, I think, sometimes we imbibe that error cost analysis, the idea that if we just let things be, they'll correct themselves without thinking about how that changes when you take it out of a liability context and put it in a remedy context. So I think it's important to examine that.

It's important to ask does judicial humility look the same when you're talking about a liability decision as it does when you talk about remedy? Now, you may have [questions] about how do we second guess administrability and those kinds of questions, but the fundamental principle that the markets, if we just let it do its own thing, is going to fix this problem, that seems to be even more questionable in the remedy context than in the liability context. And that I find a bit worrisome about Judge Mehta's opinion.

[21] *Unrealistic Causation Standards*, *supra*, note 2, at 18-20.

He relies a lot on the assumption that AI is going to fix what has gone wrong in search [and] will obviate the need for the more intense remedies he could have chosen. So I think that creeps into his opinion in that way. The second part of that is the incentives to innovate. And I see this a lot in the current tech cases. I think this is pretty specific to the tech cases, or is most acute in the tech cases. Judge Mehta, for example, clearly had a lot of respect for the kind of innovation Google had done in search, the product it had created, all of that. And we can focus on that aspect of the incentive to innovate.

But that's not the only incentive that's at issue here. There's the incentive to innovate of others in the same market. And that may not be as in your face because we haven't seen it. Some of it was killed off. We'll never see it. We'll never know what it was. And you can be blinded by the innovation of the defendant and the monopolist and fail to take into account what was lost in the process. And I think that's also an incredibly important part of remedies and is a little more esoteric. There are, what I point out in the papers, there is a lot of academic work suggesting that competition is good for innovation, that monopolists, if faced with competitive, that they are more likely to innovate, not just this idea that if they can keep more of the returns of their innovation, they'll innovate more, but rather the competition will spur more innovation.[22]

And I thought it was very important and it changed my view to an extent to see some of these studies of the AT&T breakup.[23] Those studies were looking at patents as a proxy for innovation, which of course is imperfect, but it seems like a decent way to at least start looking at it.[24] And in those cases, [they] found that after the breakup, yes, Bell Labs, the number of patents it was taking out went down, but the number of quality patents, according to the study's findings, its criteria for quality patents actually went up and patenting in the space generally went up significantly. And they illustrate this with a number of anecdotal examples, like answering machines, that there was some evidence that AT&T was holding back answering machines for fear that it would affect the use of phones, which seems kind of quaint now. And there was some evidence that cell phones emerged elsewhere, not here, and

---

[22] *Unrealistic Causation Requirements*, *supra* note 2, at 19-21; Carl Shapiro, *Competition and Innovation: Did Arrow Hit the Bull's Eye?*, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY (2011). *See also* Rethinking Antitrust # 31: Innovation and Competition Policy (Bilal Sayyed and Rich Gilbert).

[23] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982).

[24] Martin Watzinger & Monika Schnitzer, *The Breakup of the Bell System and its Impact on US Innovation*, CEPR Discussion Papers 17635 (Nov. 2022). *See also* Martin Watzinger, et. al., *How Antitrust Can Spur Innovation: Bell Labs and the 1956 Consent Decree*, 12 AM. ECON. J.: ECON. POL'Y 328 (2020) (on the effects of the 1956 AT&T Consent Decree, *United States v. Western Electric*, 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. 1956)).

maybe that had something to do with AT&T wanting to keep its monopoly on land [lines], control its particular market.

So those are just anecdotes, of course. But this idea that maybe don't think of innovation just as the innovation of the monopolist that we know has happened and [that] we know about, but the innovations that we don't know that would have happened, but-for the monopoly. At this point, we're dealing with illegal monopolistic conduct. A strong causation requirement makes it very hard to take those aspects into account and really threatens to look kind of myopically at just the one innovator that's in front of the court at the moment.

[00:43:41] ***Bilal Sayyed:*** You mentioned the idea of, restorative, I'm going to say remedies. I sort of wondered if what you meant by restorative, and depending on what you meant by it, is some of that more of a damages calculation, damages issue for affected parties? I'll use the *Microsoft* case as an example. I don't think in the *Microsoft* case, the Justice Department wanted to reestablish Netscape Navigator. Netscape or its parents could seek damages for the conduct if Microsoft had engaged in illegal monopolization.[25] So I wonder here if some of the discussion about the scope of the remedy, effectiveness, causation standard, is sort of, people are arguing about different parts of a response. Here it seems, and I don't know, but it seems to me if there is somebody harmed by the defendant's conduct, the government is largely looking to remove the impediment to protect against a lengthening of the distortion to the market. But private parties can go on their own and try to get, in a sense, compensated for the illegal conduct.

Don't know if that's what you mean by restorative. Some of restorative [discussion] looks backwards to me. We can compensate plaintiffs. But either we can't or we shouldn't try to say, this is what the market would have looked like, so let's put ourselves in a position where that gets replicated. What Judge Mehta has said is the market is developing [and] what I need to [do], my remedies need to be sort of focused on a forward-looking framework, forward-looking outcome, not, and this is my words, I may be using it wrong, not a restorative function. Which can be unsatisfying.

I have talked to people who say, what was the point of bringing this case, if this is the remedy? And I can see a certain class of people saying that, but I don't think that's the right answer, right? This restorative question jumped out at me, and I wondered if that impacts, too, this discussion.

[25] Steve Lohr and David Kirkpatrick, *Microsoft and AOL Time Warner Settle Antitrust Suit*, N.Y. TIMES (May 29, 2003) (Microsoft paid $750 million to AOL to settle allegations of harm to AOL's subsidiary Netscape.).

[00:46:44] ***Kathleen Bradish:*** When I use restorative in the paper, I'm picking up some language that's actually from the Michal Gal [and Nicolas Petit] article that I quote, but it's not meant at all to be backwards looking in the sense that you're talking about, in a let's compensate the competitors that were excluded back in the day.[26]

I think that is the role of damages, private damages litigation, as difficult as that can be sometimes. Very few of the Microsoft cases actually resulted in private damage awards.[27] But by restorative, I rather mean what sometimes they, some people talk about unfettering, they cite the language from *Ford Motor Company,* unfettering the market from the monopolistic conduct,[28] but really asking what market conditions have been created and could continue to live on beyond the conduct to continue excluding competitors.

I thought one of the best illustrations of this is in Steve Salop's working paper, which I cite here in the paper, where he takes the hypothetical that if there's been exclusion for 10 years and there is a 5% chance of entry each year, that's going to give you, over that period of time, from a very small chance of successful entry, there is a decent chance that over time there would have been successful entry.[29] If all you do is undo the conduct and restore that 5% chance, or go back to the situation when there's a 5% chance of entry every year, it's going to take another decade before you get to the place that you would have been had the market not been monopolized illegally or had there not been illegal maintenance of a monopoly.

So I think the idea that you have to do something more, that you have to not just end the conduct, but actually take a look at factors like how long has this conduct been going on, and how likely is it that the defendant won't strictly abide by the consent decree, other factors like that, and say, well, if we're really going to restore competition to what it would have been

---

[26] *Unrealistic Causation Standards*, *supra* note 2, at 6-8; Michal Gal and Nicola Petit, *Radical Restorative Remedies for Digital Markets*, 36 BERKELEY TECH. L. J. 617 (2021).

[27] *See generally,* Andrew Gavil and Harry First, THE MICROSOFT ANTITRUST CASES: COMPETITION POLICY FOR THE TWENTY-FIRST CENTURY (MIT Press, 2014) (distinguishing between corporate settlements, which were often for significant sums, settled other litigation, and often involved licensing agreements, and consumer settlements, which were often for vouchers that could be redeemed for cash after additional purchase, or for free access to software). *See also* John Markoff, *Microsoft to Pay I.B.M. $775 Million in Settlement*, N.Y. TIMES (July 2, 2005) (discussing settlement with IBM, Sun Microsystems ($1.6 billion), Gateway Computer ($150 million), and Novell ($536 million)); Steve Lohr, *Microsoft and Sun End Long Acrimony in Surprise Accord*, N.Y. TIMES (Apr. 3, 2004).

[28] *Ford Motor Co. v. United States*, 405 U.S. 562, 577-78 (1972) ("Antitrust relief should unfetter a market from anticompetitive conduct and 'pry open to competition a market that has been closed by defendants' illegal restraints" (citing *International Salt v. United States*, 332 U.S. at 401).)

[29] Steve Salop, *Microsoft's Economic Infrastructure and Legacy* (Working Paper, April 23, 2025).

had this not happened, we need to do something. We can't just end the conduct and hope the market fixes it. And I think that's a piece of, with looking at, the full context.

I think this applies to what Judge Mehta says because Judge Mehta spends a huge amount of his remedies opinion talking about how long this has been going on, the network effects, all the other complications that are associated with coming to a good remedy here. *But I don't see them playing into the remedy he actually selects.* And that I think is the difference between really doing a restorative analysis and just ending the specific conduct.

[00:50:09] ***Bilal Sayyed:*** Conceptually, I understand what Steve is getting at. And [former FTC Chairman] Joe Simons has something along those lines in a speech where he talked about acquisitions of small entities.[30] But I sort of wondered, I mean, first, how do you evaluate whether it's 5%, 10%? And how does the court accept that as kind of an evidentiary record, right? Assume 10% chance somebody would have entered; you can assume 1% or maybe slightly more than 1%, and at some point, you'll hit a 50% chance that somebody would have entered. So I always thought that was just going to be hard for a court to accept.

I take your point that the remedy should sort of be consistent with the conditions of the industry. That may require a remedy that is beyond just the offending conduct. I thought Judge Mehta tried to do that.

I remember the criticism of the Microsoft remedy that the Justice Department eventually obtained in the *Microsoft* case.[31] I remember a lot of criticism of that.[32] I remember the [Department of Justice] leadership [Charles James] saying, look, we had, in a sense, an adverse

---

[30] Prepared Remarks of FTC Chairman Joseph J. Simons, ABA Section of Antitrust Law Fall Forum 2020(Nov. 12, 2020).

[31] Final Judgment, United States v. Microsoft, Civ. No. 98-1232 (D.D.C. Nov. 12, 2002), approved, *United States v. Microsoft*, 231 F. Supp. 2d 144 (D.D.C. 2002), *aff'd in part and rev'd in part*, *Massachusetts v. Microsoft*, 373 F.3d 1199. The states got slightly different relief after the district court rejected several state's request for broader relief. *See New York v. Microsoft*, 224 F. Supp. 2d. 76 (D.D.C. 2002) (proposed remedy in areas unrelated to monopolization of the operating systems market was unwarranted). A copy of the decree with certain plaintiff states is included in *United States v. Microsoft*, 231 F. Supp. 2d 144 (D.D.C. 2002). *See also New York v. Microsoft*, 531 F. Supp. 2d 141 (D.D.C. 2008) (extending length of the decree by two years).

[32] *See, e.g. The Microsoft Settlement: A Look to the Future*, HEARING BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 117TH CONGRESS (Dec. 12, 2001) (Serial No. J-107-53)); Consumer Federation of America & Consumers Union, Competitive Processes, Anticompetitive Practices and Consumer Harm In the Software Industry: An Analysis of the Inadequacies of the Microsoft-Department of Justice Proposed Final Judgment (Jan. 25, 2002). *See also* Carl Shapiro, *Microsoft: A Remedial Failure*, 75 ANTITRUST L. J. 739 (2009); *compare to* David A. Heiner, Microsoft: A Remedial Success, 78 Antitrust L. J. 329 (2012).

Appellate Court decision. There was a limit to what [the Department of Justice was] going to get.[33]

Now people look back at that case, maybe not the remedy specifically, [and argue] that it did in fact have significant effects on entry by other firms in markets that might have been both undeveloped by Microsoft and that have turned out to be competitive alternatives to Microsoft.[34]

So I think Mehta's decision, whether it's justified or not under the causation standard, I sort of agree with DOJ that they did get relief that, measured against what was likely, as opposed to what they asked for, is at least potentially meaningful in the same way that the Microsoft relief turned out to be viewed as meaningful.

Given the discussion about causation and effectiveness, do you think Judge Mehta thinks he crafted a remedy likely to be ineffective? That he felt constrained? What do you think about the remedy notwithstanding the fight over causation and what the limits are of what he could have done?

[00:53:12] ***Kathleen Bradish:*** I don't know that Judge Mehta felt particularly constrained. I think when you look at the legal analysis of causation and what he is able to do in the remedy, he's very clear that he could have, if he found that the facts supported it, he could have ordered a divestiture. It didn't have to be an acquisition case. He could have done it. That he could have basically done whatever he thought was necessary. And he completely rejects, at least the way that Google and some of its amici formulated [it], the but-for causation standard, or the strict causation [requirement]. And then he really embraces the discretion and then tempers discretion with judicial humility in his mind and comes up with the analysis that he

---

[33] Statement of Charles James, Assistant Attorney General, Antitrust Division, in *The Microsoft Settlement: A Look to the Future*, HEARING BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 117TH CONGRESS (Dec. 12, 2001).

[34] Richard Blumenthal and Tim Wu, *What the Microsoft Antitrust Case Taught Us*, NEW YORK TIMES (May 18, 2018) ("There is now no browser monopoly, and the world has come to rely on the many apps, firms and ideas that were born after Microsoft's control was broken."); *compare to* remarks of William Page, Roundtable: The Legacy of the Microsoft Case, ANTITRUST MAGAZINE (Spring 2021) ("really no way to draw that ... causal relationship" and attributing change to "cross-platform innovation on the internet"); Abigail Slater, Assistant Attorney General, Antitrust Division, Department of Justice, *Unleashing Innovation The American Way: Through Free Market Competition* (Sept. 16, 2025). See also Sruthi Thatchenkery and Riitta Katila, *Innovation and Profitability Following Antitrust Intervention Against A Dominant Platform: The Wild, Wild West?* 44 STRATEGIC MANAGEMENT JOURNAL 943 (April 2023); Giovanna Massarotto, ANTITRUST SETTLEMENTS: HOW A SIMPLE AGREEMENT CAN DRIVE THE ECONOMY (2019) (discussion of effects of significant antitrust monopolization and dominant firm consent settlements).

does in his remedy. So I don't think that this really constrains, [that] he felt constraints. I don't think his opinion constrains any of the other cases going forward. I think it's a pretty open, you do what you gotta do, given the facts of the case standard.

One can take issue with how he did it and the amount of faith he puts in certain market developments. And I think that's where the error cost question comes in. Is it really justified having that much faith in AI? Is it really going to be effective to allow certain kinds of payments to continue with the caveat that you can go back later and if it seems to still be a problem, we can fix it?

Then you run up against the other question, which is, did he do enough, given this large discretion that I think he rightly gives himself, did he do enough to be effective? I wrote this before his opinion [was released], but I look back at the *Glaxo* case, which talks about the Supreme Court's review of a remedy and finds that the remedy there was insufficient and there needed to be certain patent relief, et cetera. And the Court there wrote that most of the decision-making should be made in the district court, but that it's not just an abuse of discretion standard for review, that there's an obligation to intervene to assure effective relief.[35]

And I think that's where, if the DOJ was going to appeal, there's certainly a hook there. Like, is this, a reviewing court, has an obligation to ensure that there was effective relief? Is there too much deference? Is this structure in which payments continue and the court can later come in and do something different if it doesn't work out the way that Judge Mehta thinks it's going to work out? There is this overriding obligation to assure effective relief. And I think that's a question one could ask, that's a question that could be asked on appeal.

[00:56:22] ***Bilal Sayyed:*** As I sort of listened to your review of the decision, there's potentially some risk to Google. I don't think there's much risk that the remedy would be expanded, but there's potentially some risk to Google as potentially a repeat player and others, that to the extent Judge Mehta thought he had a wide berth to craft a remedy, that the Appellate Court reinforces that, even if they don't offer a change. Even without the DOJ press release saying they won significant remedies,[36] I think they would have had a tough time getting a different remedy outcome, a bigger, let's say, remedy outcome. I do sort of wonder if that press release really handicaps them on remedy [appeal], and if, given that, they would actually pursue an

[35] *United States v. Glaxo*, 410 U.S. 52, 64 (1972), discussed, *supra*, at note 13. ("This Court has repeatedly recognized that the framing of decrees should take place in the District rather than in the Appellate Courts' ... [but] has recognized an obligation to intervene in this most significant phase of the case when necessary to assure that the relief will be effective.")
[36] Press Release, *Department of Justice Wins Significant Remedies Against Google* (Sept. 2, 2025).

appeal here. Of course, Google may, but I just wonder what interest the Department of Justice has in seeking to appeal this case.

[00:57:32] ***Kathleen Bradish:*** Well, I think much of what Judge Mehta said in his opinion is helpful for DOJ, certainly in the *Ad-Tech* case and FTC and its cases.[37] So, I think that there are some very good things in the opinion that DOJ should be quite happy about having gotten.

[00:57:54] ***Bilal Sayyed:*** Yeah, sort of the legal framework is there and arguably, I don't want to say they [the district court] didn't get there on the facts, but in a sense, the court thought the facts were such that a broader package of relief wasn't needed. You can fight the facts in another case but having even a district court opinion that says [it] didn't feel constrained is probably a win for DOJ. Maybe that's the right place to end.

Giving Judge Mehta some credit. I don't think he's gotten a lot of credit for the opinion from any side, although I think a lot of people felt Google came out a winner, and [that the] Justice Department across three administrations, it may not have been the best use of resources. I think he probably should get credit. Tough, tough, a lot of facts, a lot of law. It's hard to write the perfect opinion.

[00:59:05] ***Kathleen Bradish:*** This has been a lot of fun. Thanks so much for having me on. And I look forward to seeing how this plays out. We won't have to wait that long to see how it plays out in some of the upcoming cases. Judge Brinkema [in the *Ad-Tech* case] seems to be moving pretty fast. I think we'll see how she feels about some of these arguments pretty quickly.

[00:59:25] ***Bilal Sayyed:*** And at least arguably she's not constrained by the *Microsoft* opinion.[38] All right. So, thank you.

This is Bilal Sayyed. This has been the Rethinking Antitrust Podcast. My guest has been Kathleen Bradish from AAI. Thank you.

[00:59:44] ***Kathleen Bradish:*** Thanks so much, Bilal.

---

[37] See note 5.

[38] The *Microsoft* appellate opinion is from the District of Columbia Circuit, U.S. Court of Appeals; the *Ad-Tech* case is being tried in Eastern District of Virginia, which is in the 4th Circuit.