The Di ibr ion of Pa Tele i ion in he Uni ed S a e : Le an Un hackled Ma ke lace Decide

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*P ofe o , So h e en La School, Lo Angele , Califo nia. I e ed a a con r l-an fo he lain iff in *Brantley v. NBC Universal, Inc.* I am g a efi l fo efi l com-

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Introduction

I a no ede ian an i i . Aiming a ha Sena o John McCain ha called an inj ice . . . in ic ed on he Ame ican eo le,,[1] he cla ac ion com lain alleged ha o e fi l ele i ion o-g amme e e fo cing la ge and n ield b ndle of TV channel on di ib o and l ima el he con me , i h o e a men ha likel amo n o en of billion of dolla each ea .[2] The com lain alleged cla ic indicia of an icom e i i e inj , incl ding he ma i e o e cha ge , he e ion of com e i ion among di ib o , he lo of con me choice, and (indi ec l) he dead eigh o o lo hen con me cho e no o b c ibe. The o en ial im o of hi ca e d a fed e en majo ca el ca e in hich damage , e en o e a e iod of ea , eldom each he billion-dolla ma k.

Con me di a e fo he ele han ine and e en i e channel offe ing ha long been foc ed on he di ib o . I a onl o decade ago ha a ele i ion di ib ion a domina ed b nde e fo m-ing, locall licen ed cable TV mono oli . Toda , al ho gh acco n of di ib o ab e con in e,[3] he e i o o ni fo gen ine com e-i ion among di ib o . The high ice and lack of con me choice a e occa ioned, in la ge a , no b he di ib o , b b o e fi l ele i ion og amme ho fo ce he b ndle .

The con me cla ac ion com lain in *Brantley v. NBC Universal, Inc.*[4] a di mi ed befo e he me i co ld be add e ed a ial o e en on a mma j dgmen mo ion. On he face, he Nin h Ci c i

1. Joe Flin , *McCain Targets Cable Channel Bundling*, L.A. TIMES, Ma 10, 2013, a B1.

2. The e ima e i e lained in Pa I.E. *infra*.

3. A majo conce n emain he e ical in eg a ion of man di ib o in o o-g amming and In e ne e ice . *See* SUSAN CRAWFORD, CAPTIVE AUDIENCE: THE TELE-COM INDUSTRY IN THE NEW GUILDED AGE (2013) (de c ibing he mono ol i k a i ing f om con ol of In e ne i eline b la ge, e icall in eg a ed fi m). *See also* Com-ca Co . . Beh end, 133 S. C . 1426 (2013) (an n cce fi l con me cla ac ion in hich Philadel hia-a ea lain iff alleged ha Comca , i h 69% of he local ma ke , had e e ci ed i o e o e en i al di ib o f om b ilding com e ing ne - o k); GAO, Re o o he Ac ing Chai oman of he Fede al Comm nica ion Commi ion, Video Ma ke lace 10 (2013) (de c ibing he i anc of AT&T and Ve i on o e and hei fibe o ic ne o k).

4. 675 F. 3d 1192 (9 h Ci . 2012).

anel deci ion a j ano he failed She man Ac cla ac ion i . The lain iff e e e i en , n cce fi ll a ealing he di mi al, ﬁling o cce i e e i ion fo ehea ing en banc and, hen he e failed, ﬁling an abo i e e i ion fo ce io a i o he S eme Co . Ye , he e effo e e o no a ail. When he S eme Co denied ce io a i in No embe 2012,[5] he ca e, ini ia ed ﬁ e ea ea lie , a o e . The a e n i a familia one: hen he S eme Co ha g an ed e ie , i ha led fa o abl fo defendan in a long ing of an i ca e b o gh b i a e lain iff .[6]

Brantley ha ecial igniﬁcance beca e of he im o ance of he i e i ai ed in he di ib ion of a ele i ion og amming in he Uni ed S a e . U ing la gel blic eco d ma e ial , I begin he e i h an o e ie of he ind and i com e i i e e fo mance, i h ecial foc on he fo ced b ndling b og amme . I hen n o he Brantley o , e amining he com lain , he Nin h Ci c i ' holding, and c i ici m of ha holding. Finall , I e amine commen a o i e of Brantley. Tha e amina ion in i e ome b oade e ec- ion on he ele anc of he no cen - l She man Ac e e i- men . F om hi an i e ec i e, he Nin h Ci c i ' holding e - e en a me ic lo l cabined ca ego i a ion ha igno e he fi ndamen al goal of he She man Ac : o main ain com e i ion and en e ha i di ci line a od c ' de elo men , od c ion, and di - ib ion (incl ding b ndling and icing deci ion), he eb ma imi - ing he alloca ion of good and e ice and e en ing e loi a i e eal h an fe . I concl de ha a e a lica ion of he She man Ac offe he be ol ion fo nlocking com e i ion and e ol ing he n il-no in ac able com e i i e i e in ele i ion di ib ion.

I. The Distribution of Pay Television in the United States

A. The History of Forced Bundling Restraints

F om i na cen ea in he mid- en ie h cen , he cable ele- i ion ind ha offe ed cable channel in b ndle , e i ing con-

5. 133 S. C . 573 (2012).

6. The e ce ion a Ame ican Needle, Inc. . Na ional Foo ball Leag e, 560 U.S. 183 (2010). The mo ecen S eme Co ling again i a e lain iff came in

sumers to purchase a large number of channels in order to receive the few that they actually watch.[7] Television viewers of the sort who chafed under the high cost of buying the entire bundled package, known as expanded basic cable, faced two obstacles to effective antitrust relief. The first hindrance was that cable distributors of an earlier era were government-licensed monopolists. Indeed, as recently as 1992, locally-licensed cable television providers controlled 95% of the pay television market.[8] Fostering competition in the face of government-sanctioned local monopolies was a potentially intractable problem for antitrust courts. Second, given the limited technology available in earlier years, defendants could offer a potentially powerful defense: forced tiered bundles were arguably an efficient method of distribution. Today, neither obstacle prevents effective antitrust relief.

De i e an inf a c e condi ci e o com e i ion, oda ' di ib- o canno com e e meaningf ll i h one ano he beca e o e f l og amme e en i , em lo ing a e ie of a allel con ac i h all di ib o . Toda , e en o e f l og amme acco n fo abo 95% of all ele i ion ie ing ho in he Uni ed S a e .[12] The Brantley com lain alleged ha e of he e m NBC Uni e al (no o ned b Comca Cable Comm nica ion , LLC, ano he named de- fendan), Viacom Inc., The Wal Di ne Com an , Fo En e ainmen G o , Inc., and Time Wa ne Inc. o ned one o mo e m ha e channel ha allo ed he m o dic a e b ndling and ie ing e ic- ion o di ib o .[13] Each of he e o e f l og amme , le e ag- ing he demand fo i mo o la channel , effec i el fo ced ca iage of all of i channel in b ndle eci ed b he og amme . The oblem i e ace ba ed b he b an ial e ical in eg a ion of di ib o and og amme . Acco ding o he FCC' 2012 e o , 127 na ional ne o k e e o ned b he e la ge a ele i ion di ib o , incl ding e en -eigh o ned b Comca , he la ge di ib o .[14]

The ma ke o e o e ed b a og amme de end ima il on he o la i of he one o mo e channel ha i di ib e . If a di - ib o doe no ca a channel ha i b c ibe i h o a ch, i i k lo ing ma ke ha e o i al di ib o ha do o ide he chan- nel. Thi le e age i o enl ackno ledged and lamen ed b di ib - o ho a e bjec o i .[15] One indica ion of he eng h of he o- g amme ' le e age i he abili o demand and ecei e highe a men fo a o la channel e en hen he ma ke ha e fo ha channel i declining.[16] Faced i h a lo in ma ke ha e, a elle in

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12. FCC, FOURTEENTH REPORT, *supra* no e 9, a 8765 66.
13. Thi d Amended Com lain , *supra*

a more competitive market would have an incentive to lower, not raise, its prices.

Even a small programmer may enjoy substantial leverage over distributors if it offers a popular channel that distributors must carry in order to compete for subscribers. That monopoly leverage is by itself not anticompetitive. One would expect the programmer to demand a premium price for the channel, a price that distributors would willingly pay as long as it could be passed on to consumers without a substantial loss in subscriptions. The problem becomes more complex, however, if distributors are offering channels in very large bundles such as an expanded basic tier that includes sixty or more channels. Now the programmer with its popular channel has an incentive not just to demand a high price, but also to demand a tiering restriction: that its channel be included in the expanded basic tier. In isolation, the programmer's demand is relatively unproblematic. The industry-wide picture, however, is that every programmer now makes similar demands, the tiers grow increasingly large, and consumers end up with the unwieldy and expensive bundles that characterize contemporary television distribution.

Especially troublesome conduct is that of the large programmers, who insist not only that their popular channels, but also a large number of relatively unknown channels, be included in the expanded basic tier. In the pending Cablevision suit, the complaint alleges that Viacom requires its distributors to include not only its four most popular channels, but also up to a dozen other relatively unknown channels, some or all of which the distributors would not choose to purchase

In effect, the two monopolies need each other and are likely to negotiate terms that are less extreme than in a one-sided monopoly. After 1992, as satellite providers and phone companies began making inroads on the local cable company's market share, the bilateral monopoly no longer existed. As powerful programmers are in the driver's seat now and able to whipsaw a recalcitrant distributor by threatening to refuse to supply a high demand channel.[19] The threat is compelling because the distributors risk losing substantial market share to rivals. More competition among distributors has had the perverse effect of increasing the leverage of upstream programmers, contributing to the high prices and unyielding bundles that shape today's market.

B. A Pricing Model Skewed to Capture Consumer Surplus

Prog ammer con end ha he offer channel on an á la car e ba i hile offe ing b an ial di co n o di ib o illing o cha e a f ll b ndle of he og ammer' channel (mi ed b ndling).[22] Di ib o co n e ha he á la car e ice a e ohibi i el e en i e. Cable i ion, in i 2013 com lain again Viacom, alleged ha he og amme a cha ging mo e fo le he enal fo a ackage ha incl ded onl Viacom' fo o la ne o k e ceeded Cable i ion' en i e ann al b dge fo og amming h nd ed of channel lea ing Cable i ion no choice b o cha e he m ch la ge b le co l b ndle ha incl ded he fo o la ne o k and en o mo e lo demand channel .[23]

The con me l ca ed h o gh he fo ced b ndle i likel o a b an iall among c ome . Acco ding o a December 2012 anal i , he a e age ho ehold aid a o ima el $90 a mon h fo cable og amming, of hich nea l half i allo ed o o channel eg la l a ched b onl 15 20% of con me .[24] The ame o ce e ima ed ha a e age con me bill ill i e o $125 e mon h o e he ne h ee ea , he b lk of hi inc ea e o ing f om highe fee ha cable di ib o m a fo o og amming.[25]

The im ac of in e od c ice di c imina ion i e ace ba ed b he info ma ion a mme ie a ocia ed i h cha ing n ield b ndle of channel . Faced i h a cha e deci ion in ol ing 100 o mo e channel and changing con en and ice o e ime, man con me , in a ac ice kno n a ancho icing,[26] ma im l e he a ailable TV di ib o ' ice a a mea e of al e. In

22. Joe Flin , Viacom is sued over TV 'bundles', L.A. TIMES, Feb. 27, 2013, a B1.

23. Amended Com lain , Cablevision, supra no e 16, ¶¶ 8, 126 et seq. The com lain al o alleged on info ma ion and belief ha he enal amo n e ceeded he ad e i ing e en e ha Viacom ecei ed fo Cable i ion' ca iage of he lo demand channel . Id. ¶ 8.

24. Joe Flin & Meg Jame , Sports Cost, Even If You Don t Watch, L.A. TIMES, Dec. 2, 2012, a A1. A Co Cable e e en a i e e ima ed ha in he So he n Califo nia ma ke , mo e han half of b c ibe fee o f om o og amming ha onl 15 o 20% of ie e eg la l a ch. Id. (o ing Co Cable e eo i e Bob Wil on). A J l 2013 d of Lo Angele -a ea con me ho ed ha 59% of e onden o ld b c ibe o ba ic o og amming and 29% o ld b c ibe o e mi m o og amming. P C, Consumer Intelligence Series, Video Content Consumption, available at h :// . c.com.

25. Id. (ci ing info ma ion f om a ma ke e b a ma ke e ea ch f m (NPD G o)).

26. See Ma H ffman, Marrying Neo-Chicago With Behavioral Antitrust, 78 ANTITRUST L.J. 105, 129 30 (2012) (de c ibing ome of he li e a e add e ing he ice f aming effec kno n a ancho icing).

fact, because all distributors are subject to virtually the same forced bundling practices, there is little variation in distributor prices.[27]

Consider the distinction between pricing in book publishing and pricing in pay television. Popular books can be sold at a higher price than less-wanted titles, but the differential in pricing is typically narrow. A publisher makes money on popular books primarily by selling more of them. For the most popular books, such as a Harry Potter novel, dealers may cut their margins, offering the book at a discount in order to bring more customers into the store. This stands in contrast to television bundling practices where channels with high viewer-loyalty are bundled with less popular channels, forcing viewers with a wide variety of interests to subscribe to many channels they have little or no interest in watching. Even a viewer with no interest in sports programming may still be willing to pay the high price of a bundle, which contains other programming that the viewer does wish to watch.

Television programmers have a dual source of revenue for their offerings. They make money by selling advertising and this revenue source is closely linked to the number of viewers, but also by charging distributors a per-subscriber fee for channels. According to the FCC, 42% of 2010 network revenue came from advertising and 55% came from subscription fees, with subscriber fees rising more rapidly than advertising revenue.[28]

The variation in charges for channels can be substantial. New launch channels of independent programmers often must pay distributors to have their channels carried.[29] Fees for other channels range from $0.01–5.00 per month.[30] A viewer who has no interest in sports will pay the cost of the sports programming that is never viewed. Even sports fans vary. A viewer who may prefer a particular sport, or professional teams over college teams, or vice versa, will have to pay for sports programming seldom or never watched. The basic implica-

27. Another device described in the literature, dual pricing, may also play a role in the instated price consumers pay. *See id.* Some distributors advertise a monthly price that includes a bundle of channels, hoping to capture a consumer decision before adding additional charges for HD service, the use of a digital recorder, or for hookups to more than one television set.

28. FCC, FOURTEENTH REPORT, *supra* note 9, at 8772 (Table 27).

29. *See id.*

30. *Id.* There were approximately 100 million pay-TV subscribers in the U.S. as of 2010. *Id.* at 8662 n.60. ESPN currently charges $5 per month for its network and is reported to earn 15% of all cable network revenues. *Id.* at 8779. If each of the 100 million subscribers pays $0.01 per month to receive a network, that would produce an annual revenue stream of $12 million each year. At $5 per month, ESPN would generate $6 billion in annual revenue if all 100 million subscribers paid for its network.

ion fo con me ice and choice a e ob io : a con me ha onl one meaningf l al e na i e he can o he co d b declining o b an a ele i ion og amming. An inc ea ing n mbe of con- me ha e cho en hi o ion,[31] and b e e ol i likel o inc ea e.

dling (elling channel bo h á la ca e and in b ndle), o ided ha he di co n fo b ndled offe ing co e onded o efficiencie gene a ed b b ndled elling. Ra he han in i e en i e li iga ion o e co efficiencie , a j dicial dec ee migh im l limi he i e of o- g amme b ndle and ohibi di co n abo e a e limi . Fo e am- le, a og amme o ld e an á la ca e ice fo each channel, bjec o i igh o b ndle channel oge he a long a he di co n fo he b ndle did no e ceed a ecified e cen age (e.g., 10%) of he m of he indi id al ice fo he incl ded channel . Com e i ion a he di ib o le el o ld ill allo con me demand o di ci line he á la ca e ice e b he og amme . Unde ch a mechani m, he og amme i likel o be e a ded ima il ba ed on he n mbe of ie e of he channel, no on he in en i of a con me lo al o ha channel. P og amme o ld ill ha e a ong incen i e o o- ide o la og amming hile ie e o ld ha e mo e choice, mo e lo co o ion , and b an ial con me l a ing .

I migh be a g ed ha a lea ome con me , e ha a b an- ial e cen age, efe la ge b ndle and he lo e e channel co ha o f om he e b ndle . If o, he ma ke o ld e ond. La ge b n- dle o ld ill be offe ed b a lea ome di ib o ho o ld ca e o hi con me efe ence. The final na e, i e, and icing of b n- dle o ld be de e mined ima il b con me demand.

C. Impact on Distributors and Independent Programmers

Di ib o fo ced o b ndle a e denied an effec i e com e i i e ool: he abili o offe c omi ed o á la ca e ackaging ha co ld a ac ne ie e o e ain o en ie e di g n led b he high- iced and n ield b ndle . The inabili o com e e on e m mo de i ed b con me i a ba ie o en and ma ke en- e a ion fo di ib o .[35] Di ib o can heo e icall com e e on ice b , a a ac ical ma e , he fo ced b ndle lea e he di ib o li le con ol o e ei he he i e of he b ndle o he ice cha ged fo i . Al ho gh di ib o can e and in o og amming and add chan- nel o he b ndled ackage,[36] he canno meaningf ll ed ce he

35. An AT&T e e en a i e, efe ing o he hen edgling U- e e di ib o , ook no e of he e ain facing a ne di ib o : We ill be ha o offe á la ca e og amming a long a e a e able o ob ain acce o he og amming in ha manne . Commen of Robe Q inn, Senio Vice P e iden of AT&T, *quoted in* Thi d Amended Com lain , *supra* no e 11, ¶ 44.

36. FCC, FOURTEENTH REPORT, *supra* no e 9, a 8651. Time Wa ne Cable, fo e - am le, ha ag eed o a he Lo Angele Lake o e $3 billion o ca he eam' game e cl i el . L.A. TIMES, *supra* no e 24.

i e of he ackage offe ed o con me i ho e cl ding o la
channel ha b c ibe an o a ch. Re e en a i e of di ib -
o f e en l com lain abo he em,[37] b n il ecen l eemed
n illing o challenge he og amme di ec l . The el c ance ma
em f om e ical in eg a ion man di ib o a e al o og am
o ide and he ongoing b ine ela ion hi be een di ib -
o and og amme . In Feb a 2013, an inde enden and non-
e icall in eg a ed di ib o , Cable i ion, led i in he So he n
Di ic of Ne Yo k alleging ha Viacom had iola ed fede al and
a e an i la b fo cing Cable i ion o acce en o mo e le e-
al ed Viacom channel in o de o ob ain Viacom' fo mo o la
channel .[38] T o of he fo la ge di ib o (Di ecTV and Time Wa -
ne Cable) ha e anno nced hei o fo he i .[39] The mo e agg e -
i e an i-b ndling ance of di ib o obabl a a ked b a -
idl inc ea ing cable bill and he inc ea ing n mbe of c ome ha
decline o cha e he inc ea ingl n ield and e en i e b ndle .

The ela i e nifo mi of ackage and ice ac o di ib o i
facili a ed b e of mo -fa o ed-na ion cla e .[40] A di ib o ag ee

di ib ion ca aci i h lo demand channel ha di ib o
o ld no i h o ca and con me do no i h o a ch. Hem -
hill and W ha e oin ed o ha hi o of a allel e cl iona
cond c can be ea ie o im lemen and mo e ha mf l han a allel
high ice .[42] The heigh ened ha m f om hi e cl iona cond c

and di ibu o i e high acco ding o one e o , 81.4% com-
a ed o 23.1% in he Uni ed S a e .[48] Canada' high e cen age of e ical in eg a ion, ho e e , ma be mi iga ed b ela i el lo con-
cen a ion le el . A of 2012, Bell Media, he la ge of Canadian media fi m , con olled 28.6% of ha na ion' TV ie ing ma ke .[49]

Canadian di ibu o ha e fo ome ime offe ed channel on a mo e cu omi ed ba i ha allo con u me mo e choice . A 2006 FCC e-
o de c ibed Canadian di ibu o ha e u i e he u cha e of an in-
e en i e ba ic bu ndle, hen allo cu ome o add channel in mall cu omi ed bu ndle .[50] The Canadian Radio- ele i ion and Telecommu -
nica ion Commi ion (CRTC) ha aken e o en u e ha all a -TV
ie e can u cha e malle , cu omi ed ackage of channel .[51] The malle bu ndle ou ld come a a highe e -channel fee, bu ha fee can be mo e han off e b u cha ing a malle bu ndle. An e am le of hi model i a a elli e di ibu o in Canada, Sha Di ec , hich no offe ba ic ackage linked o choice fo addi ional ecial bu n-
dle and o e fi f channel a ailable on an á la ca e ba i .[52]

E. Anticompetitive Effects of Forced Bundling Reassessed

E ima e of he co of he fo ced bu ndling ha e a ied idel . In 2006, an FCC e o di ec ed an indu -fu nded u a e u d and,

48. Daniel Tence , Concentration of Media Ownership In Canada Worst in G8 For TV Industry, Study Says, HUFFINGTON POST CANADA

ba ed on ome adj ed anal i , concl ded ha á la ca e offe ing co ld od ce e l anging f om 4% highe ice o 13% lo e ice (i h a dec ea e in h ee o of fo ca e).[53] In 2013, a ock anal e ima ed ha á la ca e ale of a ele i ion o ld e- l in a $70 billion ann al e en e lo o ele i ion og amme .[54] An e ima e ha he a ing o ld be minimal o e en nega i e can- no e ec o en ma ke condi ion , he e almo half of he con- me ' bill co e o ele i ion ha man o ome do no a ch. Since 2006, he e lo ion in egional and na ional o ne - o k ha been he majo de e minan of b c i ion fee ha ha e been i ing a ice he na ion' ann al in a ion a e.[55] If almo half of he ann al fee go o a fo o ele i ion, and man ie - e don' i h o a ch o og amming, he e i an ob io lo o con me ha , ca io l , one can e ima e a in e ce of $10 bil- lion a ea (ha fig e e e e en le han 10% of ann al b c i ion fee aid b U.S. con me).

The ock anal ' e ima ed $70 billion ann al lo of e en e fo TV og amme i oo high. The e ima e i a a en l ba ed on he a m ion ha all b ndling, e en malle mo e o omi ed b ndle ha o ld be a ac i e o con me , o ld be ohibi ed. Tha e l i nlikel . A em of mi ed b ndling in hich á la ca e ice a e linked o a og am' o la i ho ld be e mi ed b an an i dec ee. In addi ion, f eel com e ing di ib o o ld con in e o offe b ndle ha o ld a ac and e ain b c ibe . In a ic la , he ma ke ing li e a e gge ha mall b ndle of channel ca - ing ela ed og amming o ld i e in a mo e com e i i e en i- onmen .[56] P og amme o ld ce ainl lo e e en e if com e i ion e ailed, b he co ld inc ea e e channel di ib ion fee o off- e ome of hi lo . A og amme ' mo o la channel o ld con in e o command high b c i ion fee ; le o la channel migh no i e, b ch channel gene a e lo e ad e i ing e e- n e and an lo e en e o ld be a lea a iall off e b a ing

53. FCC, FURTHER REPORT, *supra* no e 21, a 7 14.

54. R an Fa ghnde , *High Cost of Offering Pay-TV à la carte*, L.A. TIMES, a B3 (J l 16, 2013) (o ing La a Ma in, a ock anal i h Needham & Co.). *See also* G ego S. C a fo d & Ali Y kogl , *The Welfare Effects of Bundling in Multichannel Television Markets*, 102 AM. ECON. REV. 643 (2012) (concl ding ha á la ca e o ld be elfa e dec ea ing ba ed on he a m ion ha ie e ie each ho of ele i ion ie ing e all).

55. GAO, Video Ma ke lace, *supra* no e 3, a 16 (fi nding a 33.5% inc ea e in ice fo e anded ba ic cable TV d ing he ea 2005 o 2011, com a ed o a 15.5% inc ea e in he con me ice inde).

56. *See* no e 72 73 and accom an ing e *infra*.

from no longer producing the channel. The stock analysts' estimates also apparently does not factor in the likely increase in advertising revenues that would follow from more attractive packaging of television programming. More subscribers would increase television viewing and the advertising revenues that go to programmers.

A more meaningful measure of the overcharge from forced bundling would be to compare pay-TV prices in the United States and Canada. The Canadian benchmark can provide a rough approximation of how much consumers would save under a system that gives consumers more choice. The Canadian example is the best available national comparison for the U.S. system. Much of the English language programming available in Canada is the same or similar to that available in the United States. Regulators in both countries restrict carriage of certain channels, but neither nation directly regulates pay-TV prices. Similar cultural values, income levels, and broadcasting technology are likely to lead to similar standard and HD programming choices. Local news and sports programming will be different, but that is true regionally within a country as well as across borders. With roughly ten times the population base, United States distributors may have a larger base of programming to choose from, but even modern technology limits a distributor's ability to increase the number of channels. There are also limits to how much television an individual can watch. The average U.S. viewer chooses among roughly seventeen channels,[57] and there is no reason to believe this number differs substantially in Canada.

With over 100 million U.S. pay-TV subscribers doling out an average of $1080 per year, U.S. pay-TV viewers are paying $108 billion

deduct a further 5% from this amount, leaving a total overcharge of $342 per year per U.S. viewer. When this amount is multiplied by the 100 million subscribers, the total annual overcharge would be $34.2 billion.[59]

It is possible that U.S. viewers are more likely than their Canadian counterparts to pay extra for premium channels, skewing the comparison of monthly rates. Assuming that this is the case (I found no documentation to support or refute this), the differential between U.S. and Canadian rates can cautiously be reduced by a further 20%, lowering it from $34.2 billion to $27.4 billion. The range of estimated overpayments would then fall somewhere within these high and low figures.

consumers a meaningful à la carte option). U.S. consumers may have more choice for distribution (as many as four or five distributors) than their Canadian counterparts, a circumstance that would allow competitive forces greater play in the U.S. It is thus possible that removal of the forced bundle would save U.S. consumers even greater amounts. In addition, the range of $27 to $34 billion annual overcharge does not include the deadweight loss for U.S. consumers who do not subscribe because of the high cost. Connor and Lande have examined the literature on wealth transfer and deadweight losses based on a survey of cartel cases and found that the estimates of deadweight loss range from $3 to $20 for every $100 in overcharges.[61] Transferring these estimates to the $34.2 billion estimated annual overcharge for a television, the deadweight loss is likely to be in the range of $1 billion to $6.8 billion. Based on these numbers, the total welfare losses from

anal i concl ded ha fo he 2000 Ol m ic game in Sidne A a-
lia, NBC and i affilia ed ne o k ho ed 441 ho of co e age,
com a ed o he 1309 ho ho ed b he CBC. U.S. ci i en li ing
nea he Canadian bo de of en efe ed he CBC' co e age no onl
beca e i a mo e com ehen i e, b al o beca e e en e e
ho n li e a he han on a dela ed ba i .[62] Ye , fo igh o ele i e
he 2000 Ol m ic , NBC aid $705 million o he In e na ional Ol m-
ic Commi ee, hile he CBC aid onl $32 million. On a e ca i a
ba i , he co a $2.47 e e on in he Uni ed S a e b onl
$1.07 e e on in Canada.[63] U.S. con me did no a hi emi m
di ec l , b did o indi ec l h o gh highe TV b c ibe fee , e-
d ced co e age, co e age of fe e li e e en , and he hea do e of
ele i ion comme cial fo e en ca ied on NBC' non- a channel.[64]

Fo he 2012 Ol m ic , Canadian a ched eleca o ided b
CTV Ol m ic , a con o i m o gani ed b Bell Media and Roge
Media. Thi ime, he con o i m e o edl o bid he CBC fo b oad-
ca ing igh ,[65] b he U.S./Canada diffe en ial in co e e iden
emained. The con o i m e o edl aid $63 million fo he b oad-
ca ing igh ,[66] an a e age of $1.80 e Canadian. NBC, he U.S.
b oadca e , aid $1.18 billion fo i igh , o an a e age of $3.73 e
U.S. e iden . Thi ime, bo h he Canadian and U.S. b oadca e claimed
o ha e o ided mo e han 5500 ho of o al co e age. The Canadian
b oadca e lo mone hile NBC claimed o ha e b oken e en.[67]
One e lana ion fo he e e l i ha U.S. con me a highe
ele i ion b c i ion fee han hei Canadian co n e a .[68]

Thi com a i on of U.S./Canada Ol m ic co e age highligh he le e age ha o o gani a ion (ch a o leag e , eam , o he IOC) o e in nego ia ing ele i ion igh . Thi le e age o ld be a fac o ega dle of di ib ion ac ice , b he fo ced b ndling e ace ba e he le e age, allo ing he o o gani a ion (and he og amme ho ob ain e cl i e igh) o e ac con- me l f om he ie ing blic.

A econd e am le d a on he Lo Angele ele i ion ma ke . In a

A og amme ac ing alone o abandon b ndling and ie ing e ic-
ion o ld ob ain fe of he e off e ing bene beca e la ge b n-
dle o ld emain he no m. Vie e o ld ill be nable o ge
mall, c omi ed ackage ha co ld b an iall inc ea e he n m-
be of b c ibe . Wi ho he e off e ing bene , each og amme
ha a einfo ced incen i e o con in e b ndling ac ice .

G. Efficiency Defenses for Programmer-Forced Bundles

Va io ef ciencie ha e been gge ed a j i ca ion fo he
og amme ' la ge b ndle . Ho enkam ha a g ed ha e channel
co a ing ma e lain h a cable com an b ndle la ge n mbe
of channel in o a ingle ackage.[78] Once he igni can co of cable
in alla ion i aid, adding addi ional channel co e li le mo e
han he licen ing fee.[79] Ho enkam ' a g men eem mo e di ec ed
o di ib o im o ed b ndling han o he fo ced og amme im-
o ed b ndling ha i he ba i of he an icom e i i e concе n. I i
co ec ha di ib o o ld ha e o ai e e channel b c ibe
fee if onl a fe channel e e cha ed. Di ib o , ho e e ,
a e no con en i h he la ge n ield b ndle ha o e f l o-
g amme fo ce on hem. Man di ib o no an o be elea ed
f om he fo ced b ndling, a e idenced b he Cablevision i and
blic a emen eac ing o i . The co a m ion nde l ing
Ho enkam ' a g men a e al o e ionable. Wi h he hea de-
mand of high-de ni ion (HD) digi al laced on he em, and he
com e ing need fo band id h e i ed o o ide In e ne acce , Ca-
ble i ion claim ha Viacom' fo ced b ndle com el he di ib o
ei he o e and ca aci a con ide able co o ail o he og am-
ming ha he o ld efe o offe .[80] Licen ing fee , hich Ho en-
kam men ion in a ing, a e e b an ial and inc ea ing a idl ;
Cable i ion claim ha i og am licen ing fee amo n o o e a
billion dolla a ea .[81] Th , hile he e i h o he oin ha a
la ge b ndle can be o ided mo e ef cien l han indi id al channel
ale , og amme fo ced b ndling i nei he e i ed no j i ed b
hi ef cienc . To he e en a di ib o i he o ca e hi ef -
cienc , i o ld ill be f ee o offe a o ia e b ndle once o-
g amme enfo ced b ndling cea ed.

78. He be Ho enkam , Antitrust and Nonexcluding Ties 2 3 (Oc . 2012), available at h :// a e . n.com/ ol3/ a e .cfm?ab ac _id=2143869.
79. Id.
80. Amended Com lain , Cablevision, supra no e 16, ¶¶ 33, 139.
81. Id. ¶ 34.

Denni Ca l on and Michael Waldman ha e gge ed ha he ef-
cienc mo likel o a l o og amme enfo ced b ndle i ha e-
la ed o ea ch and o ing co .[82] The a g men i ha beca e ele-
i ion channel a in ali and deg ee of efe ence, b b ndling
hem oge he ; og amme and di ib o can a e he co of o -
ing hem in o a o ia e al e ca ego ie hile con me a e

efficiencie a i ing o of he join od c ion and ma ke ing of a clo el ela ed g o of channel . The ESPN famil of channel , fo e am le, ma do lanning and od c ion h o gh common em lo ee ha o k in e changeabl fo he ela ed channel . The efficiencie linked o od c ion and ma ke ing, ho e e , o ld dimini h b an iall hen a la ge g o of ela i el n ela ed channel i b ndled oge he . S ch efficiencie co ld no e lain h , a alleged in he **Cablevision** com lain , a o e fi l ele i ion og amme o ld ice a mall b n-dle of o la channel a a ice ha a l e ceed he co of a la ge b ndle ha incl de he o la channel allegedl b an amo n ha e ceed he di ib o ' en i e ann al og amming b dge .[84]

II. The *Brantley* Litigation

A. The Complaint

In 2007, a cla of con me b o gh a She man Ac ac ion alleg-ing ha o e fi l ele i ion og amme em lo con ac o i ion ha fo ce di ib o , and h o gh hem con me , o cha e he en i e la e of e anded ba ic cable offe ing . The na e of he e-ain a de c ibed in a ag a h 4 of he Thi d Amended Com lain , Com e i ion among di ib o fo con me b ine **has been sig-nificantly suppressed and eliminated** beca e . . . [di ib o '] c ea-i i in offe ing malle ackage o channel on an nb ndled ba i ha been ci c m c ibed b he con ac be een each di ib o and each og amme , hich ohibi ch offe ing .[85]

The com lain alleged no ho i on al con i ac , b did allege in-e de enden cond c among he defendan og amme in im o ing a allel e ical b ndling e ain on ele i ion di ib o : Each og amme ac ed i h he kno ledge and an ici a ion ha each o he majo og amme ill do like i e.[86] If di ib o e e f ee o de ign di ib ion ackage in a manne ha ma imi ed con me b c i ion , he benefi f om hi inc ea ed o o ld o o

84. Amended Com lain , **Cablevision**, **supra** no e 16, ¶ 8. Viacom co ld a g e ha i i a ing di ib o o ca hei lo demand channel , an efficien e l beca e i allo Viacom o make ome ad e i ing e en e on he e channel . The com-lain , ho e e , alleged on info ma ion and belief ha he enal amo n e ceed an ad e i ing e en e ha Viacom ecei ed f om ca iage of he e channel . **Id.** Mo e e , he fo ced incl ion of he e channel i a he e en e of channel of inde-enden og amme o en iall mo e a ac i e o con me (and ha o ld gene a e la ge ad e en e fo he inde enden og amme). Di ib o o ld no choo e o ca Viacom' lo demand channel b fo he high enal he o ld ha e o a (and a on o con me) o e cl de hem.

85. Thi d Amended Com lain , **supra** no e 11, ¶ 4.

86. **Id.** ¶ 43.

com e i ion- a di ib o . The com lain o ed he Chai man and

B. The Legal Pedigree for the Brantley Complaint

Unlike *Brantley*

ing can inc ea e he ocial co of ma ke o e b facili a ing ice di c imina ion, he eb inc ea ing mono ol o e ha he o ld be ab en he ie.[98]

The ice di c imina ion effec of ing ha e h been a ge ed b he Co bo h fo e i emen ie (in a- od c ice di c imina ion) and fo fi ll-line fo cing ie (in e od c ice di c imina ion). In bo h ca e , he e eal h an fe effec a e likel o be a ima (if no he e-dominan) inj o com e i ion. B , bo h ie a e likel al o o ha e e cl iona effec . In *Brantley*, he lain iff alleged he e e cl iona

C. The Ninth Circuit's Opinion

In Oc obe of 2009, he di ic co di mi ed he com lain i h ej dice, ling ha a iable Sec ion 1 ing com lain e i ed an allega ion of fo eclo e among upstream ele i ion og amme .[102] The Nin h Ci c i af med.[103] The o inion eci ed h ee a ea in hich She man Ac Sec ion 1 claim a e cogni able: (1) a ho i on al con i ac ; (2) a e ical con i ac in ol ing ing cond c ha fo e-clo e i al f om a ici a ion in he ied od c ma ke ; o (3) a e ical con i ac ha facili a e ho i on al coll ion.[104] On o occa-ion , he o inion ackno ledged e e lang age in he com lain alleging com e i i e inj o do n eam di ib o .[105] The anel deci ion hen igno ed i o n de c i ion of he com lain , a ing ha he com lain did no allege an effec . . . on Di ib o ' com-e i ion a o co and ali of e ice,[106] and ha he e i ione di a o an in en o allege ha he ac ice . . . foreclosed i al f om en e ing o a ici a ing in he eam o downstream ma ke , (em ha i added).[107] The Co fi he a ed ha he lain iff ha e no alleged ho com e i ion (a he han con me) i inj ed. The anel conceded he o ibili ha com e i ion co ld be inj ed o ed ced d e o a idel a lied ac ice ha ha m con me , b in i ed ha he com lain doe no incl de an allega ion of inj o com e i ion, a o o ed o inj ie o he lain iff .[108]

III. Evaluating the Ninth Circuit's Opinion

A. Criticism

The Nin h Ci c i ' eading of he com lain a m o ic if no di -ingen o . The S eme Co e i e ha , on a mo ion o di mi , hen add e ing ell- leaded fac al allega ion , a co ho ld a -me hei e aci and hen de e mine he he he la ibl gi e i e o an en i lemen o elief.[109] Se e al age of he **Brantley** com-

lain alleged in g ea de ail, ing he di ib o e ec i e ' o n o d , ho com e i ion among di ib o a nde mined. The lan-
g age of he Nin h Ci c i gge a ie ha he e e me el al-
lega ion of con me ha m n ela ed o inj o com e i ion. To
each hi concl ion, Sec ion 1 of he She man Ac o ld ha e o
be con ed a de ning inj o com e i ion diffe en l in e ical
ca e han in ho i on al ca e (he do n eam inj o di ib o
and con me o ld be cogni able in a ho i on al ca e). Tha i a dif-
c l o i ion o defend.[110]

Brantley a a le-of- ea on ca e. I i ell e abli hed ha nde
he le of ea on, a co ho ld no be cabined in o ic ca ego i a-
ion b ho ld eigh all of he ci c m ance of a ca e in deciding
he he a e ic i e ac ice ho ld be ohibi ed.[111] Di ec e i-
dence of an icom e i i e effec ho ld be f cien o e abli h he
lain iff' ima facie ca e ega dle of he he he e ain i ca e-
go i ed a ho i on al o e ical.[112] The Nin h Ci c i ado ed a ic
ca ego ical ie of he She man Ac hich a a en l allo , in hei
o d , onl fo anda d-i e h ea o com e i ion ch a e cl d-
ing elle of he ied od c o facili a ing ho i on al coll ion.[113]

co ' effo o anal e he com e i i e im lica ion of he n ield b ndle of channel offe ed o con me . The co a ed ha he alleged b ndle o ld e i e con me o cha e lo -demand channel , hich he do no an .[114] The Co en on o e lain ha a b e can ne e be fo ced o a mo e beca e a al ed od c i ied o he ale of an n an ed od c (he highe ice fo he ie o ld im l be a highe cha ge fo he al ed od c).[115] The binar o ld e ec ed in he co ' e am le doe no com o i h eali . Tele i ion con me do no im l b ba ed on he ola o - o i e of high al ed and n an ed channel he make hei cha ing deci ion ba ed on a hole ange of al e efe ence and he info ma ional ac m a ocia ed i h con an l changing con en and icing fo la ge and n ield b ndle .

B. Support for the Ninth Circuit's Opinion

1. ERRORS BASED ON A MISAPPREHENSION OF THE COMPLAINT

The Nin h Ci c i ' deci ion ha i o e .[116] Tha o ma be a ib ed in a o he Nin h Ci c i anel' mi cha ac e i a ion of he com lain . Ca l on and Waldman acce ed he anel' a emen ha hi ca e a abo con me inj i h no alleged inj o com e i ion.[117] C ane a g ed ha **Brantley** a igh l di mi ed because e i in ol ed, a mo , con me eal h inj no linked o an an icom e i i e-elemen .[118] The e a emen a e a a en l ba ed on he Nin h Ci c i ' claim ha he com lain failed o allege ha m o com e i ion a di inc f om inj o con me . A de ailed abo e, ha de c i ion of he com lain i im l ong.[119] E en a o eading demon a e ha he com lain a foc ed on fo ced e ic-

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114. *Id.*

115. *Id.* a 1202 03 (ci ing Hi ch . Ma indale-H bbell, Inc., 674 F.2d 1343, 1349 n.19 (9 h Ci . 1982).

116. Ca l on & Waldman, *supra* no e 82; C ane, *supra* no e 82; Ho enkam , *supra* no e 78.

117. Ca l on & Waldman, *supra* no e 82, a 7 (Ha m o con me elfa e a in- fficien beca e [ ]he e a no allega ion . . . conce ning ha m o com e i ion.).

118. C ane, *supra*

ion on di ib o ho ha e e ea edl and i e blicl lamen ed hei inabili o fa hion channel offe ing e on i e o con me demand.

Pe ha beca e Ca l on and Waldman acce ed he Nin h Ci c i ' mi eading of he com lain , he a g ed ha beha io imila o he b ndled offe ing of a ele i ion o ide icall doe no gi e i e o a g men conce ning an an i iola ion.[120] The offe ed he e am le of a book con aining a collec ion of an a ho ' ho o-ie , none of hich i e a a el bli hed. Con me migh efe o b onl hei o n malle elec ion of he a ho ' o ie , b Ca l on and Waldman concl ded ha e kno of no one ho a g e ha ch beha io . . . ho ld be of e io conce n o he an i a ho i ie .[121]

The e am le i ina . E en clea iola ion of he She man Ac go nchallenged hen he in ol e in igni can and i ola ed an ac-ion .[122] To come clo e o he cond c challenged in Brantley, he e -am le o ld ha e o be modi ed: con me o ld be offe ed, on a ake i o lea e i ba i , a mon hl $90 (oon e ima ed o be $125) m l i- ol me collec ion of ne e a , o ie and ma e ial b a i-o a ho co e ing a ide ange of o ic incl ding o , c en e en , oli ic , hi o , animal beha io , en e ainmen , cooking, eli-gion, and c ional o k ch a m e ie and li e a and omance no el . The book bli he o ld be fo ced, no b con me de-mand, b b eam en i ie ha con olled he a ho ' o k , o incl de all of he e i le oge he in he m l i- ol me collec ion. The cheme o ld ha e o be ind - ide, facili a ed b mo -fa o ed-na ion cla e , o ha each bli he o ld be fo ced o a -emble i all iden ical o k oge he and cha ge nea l iden ical ice , lea ing he con me li le choice among bli he . Mo eo e , hi o ld no be a im le one- ime cha e. In effec , book b e o ld be com elled o join an ongoing book-of- he-mon h cl b in o de o ecei e de i ed ma e ial . Con me co ld choo e among

hei offe ing . Ye inde enden og amme ha e o enl and e ea edl com lained of fo eclo e effec . See supra no e 37 39 and accom an ing e .

120. Ca l on & Waldman, supra no e 82, a 3.

121. Id.

122. T o i al g oce o e endo ho ag ee o he ice of le ce ma ha e commi ed a per se iola ion of he She man Ac , e hei cond c , a long a i i local and i ola ed, i nlikel o be challenged b an i a ho i ie . Indeed, he la go e ning ing cond c con ain i o n h e hold e o e cl de ela i el incon e en ial cond c : nle he e i b an ial comme ce in he ied od c ma ke , he quasi per se le ill no a l o he cond c . See Jeffe on Pa i h Ho . Di . No. 2 . H de, 466 U.S. 2, 12 18 (1984).

for two or three publishers, but this would allow only slight variance in price and no meaningful reduction in the tying bundle that is offered. Each buyer would be faced with the choice of buying, on a recurring monthly basis, an expensive collection of books covering a great many topics in which the buyer has little or no interest or not getting the material the reader wished to read.

2. CLAIMS THAT FORCED BUNDLING IS CONSISTENT WITH TOTAL WELFARE

Crane's and Carlson and Waldman's articles attempted a coherent economic analysis that was absent in Brantley. Both approached the forced bundling with a total welfare analysis based on the perfect price discrimination model. Carlson and Wal[illegible]on implicitly assumed that

(1) forced bundling could be implemented without any decrease in consumer output and even argued that the forced bundling could increase output by causing consumer demand for less liked channels;[123]

mea ed damage ba ed in a on eal h an fe lo e occa ioned b an an i iola ion.[131]

hich i mo ag eeable o he in e e of he hole ocie . [134] Mea-
ing lo of o onl in he ele an con me ma ke (he lo of
con me b c ibe) igno e alloca ion inj in econda o e -
ia eam o do n eam ma ke , ome hing Smi h' de ni ion
did no do. Fo e am le, a ole od ce of ma e e migh ai e
ice n il o begin o dec ea e a a f cien a e o ende f
he ice inc ea e n o able. The decline in o of ma e e i
a lo of o al elfa e, b he e i an e en g ea e eal h an fe lo
o ho e con me ho con in ed o b ma e e a he mono ol
ice. Tha lo o ld de i e con me of find ha he o ld
ha e efe ed o end on o he good and e ice .

The econda o e ia effec of mono ol icing a e am l

C ane' c i i e of he com lain incl ded an anal i of he he a con me can e e be fo ced o b ome hing n an ed. C ane con- ended ha con me on' a mo e han he con ide he od c o be o h, offe ing he e am le of a Bedo in fo ced a g n oin o cha e and. The Bedo in, C ane gge ed, i no eall b ing he and, b b ing hi life.[136] E ending he logic f om he Bedo in' aigh fo a d life o dea h i a ion o he cha e of a com le b ndle of do en of ele i ion channel , C ane concl ded ha he b n- dling di ib o canno cha ge mo e han he b e ' e e a ion ice . . . fo hing ha he b e al e .[137]

Ca l on and Waldman a g ed ha b ndling of ele i ion channel can ac all inc ea e o al elfa e beca e i h b ndle , con me ill end cha ing no onl hei mo efe ed b al o hei lea liked channel , channel liked eno gh o cha e b no a he highe ice offe ed hen old a nb ndled channel .[138]

A ming ha o al elfa e e e he ele an anda d, he logic of he c i ic ' anal e i com elling onl in a ola old in hich he b e ha no econd choice o n anced efe ence . Com le con- me deci ion canno be fo ced in o a bina digi al o ld of one and e o , a im le e -o -no e on e canno ade a el de c ibe he ec m of de i e and io i ie ha g ide con me choice. The c i ic , ho e e , emb aced hi o ld, a ming ha each con- me ha a ed e e a ion ice fo he channel indi id all o fo he la ge and com le b ndle ha i offe ed o hem.

The conce of a e e a ion ice i efi l fo economic modeling hen he e i a ale of a ela i el im le od c (i h no o ional add-on) and hen he ale i i ola ed in ime, i h no d namic ele- men (no ec ing ale i h changing con en and icing). The con- ce a me ha indi id al con me a e info med and make ice h o gh hei o n info med b ing choice . Tha emi e i nde mined b beha io al economic and ma ke ing li e a e ha gge

ual price is reduced.[140] If the price of a bundled package of television channels rises gradually over time (at a rate substantially exceeding inflation), many consumers may accept higher rates as a genuine benchmark of value. Using market options to assess value can be a healthy exercise, but only if competition is preserved as the price regulator. In a well-functioning market, a combination of consumer demand and seller supply sets the competitive price and determines the viability of bundled or unbundled offerings. If competition is thwarted through power abuses, the resultant price and the size of bundled offers will not efficiently allocate. This is precisely what the Brantley complaint alleged and it implicates an injury to total welfare as well as to consumer welfare.

Consider again the validity of a reservation price when the product is complex and involves potential add-ons. There are absolutes in the consumer world,[141] but when entering the purchasing arena for a complex product, the consumer typically brings a series of preferences mitigated by cost awareness and a willingness to buy up or down the prestige ladder based on price and quality preferences. A potential buyer may enter an auto showroom with a definite idea of which model to purchase, including the preferred color and extra equipment. The dealer, however, may not have precisely that model, and the consumer may end up paying more for a vehicle that includes a sunroof and chrome wheels, neither of which the consumer would have chosen to buy had the ideal vehicle been available. In such a transaction, the

a ained b hi an ac ion. To al elfae, a Adam Smi h en i ioned i ,[142] i nde mined.

The occa ional ale of an a omobile i h n aned e a e i - men doe no (and ho ld no) gi e i e o a iable an i claim. There i obabl fficien com e i ion in he e ail a omobile mar- ke (bo h in e b and and in ab and) o di ci line elle ho migh a - em o ell ehicle laden i h n aned e a e i men . B , he fo ced b ndling of ele i ion channel i a diffe en ma e . To analo- gi e Brantley, all a omobile man fac e and hei di ib o o ld be offe ing hei ca laden i h he ame e a e i men , e en ho gh mo con me onl efe a mall f ac ion of hi e i - men . Man of he a o deale migh i h o offe con me he choice of a mo e i ed do n ehicle, b he eam man fac - e o ld ohibi hem f om doing o. All con me , a a e l , a e fo ced o b nea l iden ical e en i e ehicle laden i h e a e i men he do no de i e. A con me can ill decline o b al- oge he ; b hi con me deci ion i a lo of o o dead eigh lo . P ing he e fac oge he , he ind - ide b ndling e i e- men ca e ele i ion con me o a mo e (a eal h an fe inj), ca e ome con me o decline o b c ibe o a -TV (an o e- d c ion and inj o o al elfa e), de i e con me of choice, and fo ce ele i ion di ib o o c ail hei o n com e i ion (e en ing hem f om offe ing malle o c omi ed ackage e on i e o con- me demand). Fo eclo e of di ib o com e i ion i an inj e en nde he na o defini ion of ac ionable ing ged b C ane and Ca l on and Waldman. In addi ion, inde enden eam og am o- ide face enhanced ba ie o en beca e of he b ndling em con olled b o e f l eam og amme .[143]

Con ide no he d namic elemen in ol ed in a eco ing cha e of b ndled ele i ion channel . The con me ' ini ial choice i al- ead com le and o nded i h info ma ional i e . Fo ie e li ing in an ban en i onmen , he e ma be fo o mo e di ib o offe ing b ndle of a ele i ion channel . The di ib o com e e i h one ano he on in od c o offe (a em ing o lock in he con- me b offe ing a di co n ed in od c o ice) and in offe ing an- cilla e ice o od c (he n mbe of ele i ion ecei e ha can

142. See no e 134, supra and accom an ing e .

143. Supra no e 44 47 and accom an ing e . A e io l de c ibed, fo eclo- e of i al og amme a no alleged in Brantley b ha been em ha icall al- leged in Cablevision. See Pa I.C., infra.

be incl ded o he a ailabili and icing of eco ding de ice).[144] The e i li le com e i ion, ho e e , in e m of he na e o e en of he b ndle . Since each di ib o i bjec o he ame le e age f om he la ge og amming m , each end i h a e imila n ield b ndle of channel . In he long n, af e he in od c o di co n ha e e i ed, he con me a a nea iden ical ice o an a ailable di ib o fo he e anded ba ic ie of ele i ion channel . E en he mo a en i e and ell-info med ele i ion con me canno a oid he le e aging o e of he og amme ho fo ce hei b ndle on ecalci an di ib o . The com le i of he an ac ion and he momen m a ocia ed i h a ing i h a ackage ma nde mine a ional choice. The con me ma g dg ingl acce inc ea e in he n mbe and co of channel ha , o e ime, a e g ad all added o he ackage. In he con e of hi com le and d namic en i onmen in ol ing ec ing cha e , channel added o d o ed i ho he con me con en , and con an l e cala ing ice , he conce of a e e a ion ice ha li le ele ance. The con me i a ice ake , no a ice make .

Man of he info ma ional i e facing he con me ma be ie ed a con me o ec ion i e . Fo an i , he alien i e i he c al com onen o he e info ma ional oblem . F eed f om he fo ced-b ndling e ain and he facili a ing mo -fa o ed na ion con ac , inde enden di ib o ho e no e en i el in ol ed in og amming and conf on ing no con ic of in e e o ld e ond o con me demand b offe ing malle , mo e c om i ed and con me f iendl ackage . The canno do o beca e of he le e age e e ci ed b la ge og amme , and i i in hi e ec ha an i ha a clea ole o la .

The bo om line i ha he conce of e e a ion ice ma be com elling hen he od c offe ing i im le and hen he e i no d namic elemen o he ale . The ec ing b ndled ale of h nd ed of ele i ion channel , i h he ice and offe ing changing o e ime, mo decidedl doe no he e c i e ia. Al ho gh calc la ion of he o al elfa e of con me a e dif c l o make, o al elfa e ill no be enhanced if di ib o a e hackled and nable o de ign ackage ha a e e on i e o con me demand.[145] Each ime a con me decide o c he co d, ha elfa e i f he ed ced.

144. FCC, FOURTEENTH REPORT, *supra* no e 9, ¶¶ 86 88, a 38 39 (de c ibing me hod of ice com e i ion among di ib o).

145. I am indeb ed o P of. Eine Elha ge fo hi in igh in an a e n bli hed man c i . Eine Elha ge,

3. CLAIMS THAT FORCED BUNDLING MAY INCREASE CONSUMER SURPLUS

Carl on and Waldman offered an e am le o ho ha b ndled ele- i ion ale are nlikel o harm con mer elfare, and can e en in- crea e con mer elfare.[146] In heir h o he ical, 1000 con mer are offered a b ndle ha incl de ESPN and en o her channel . Each con mer al e ESPN and i illing o a $15 a mon h o recei e i . Preference arie for each of he en o her channel : a di inc

discrimination. Elsewhere, Carlton and Waldman agreed that the price discrimination feature of bundled selling is designed to capture con-

lained in Pa I.G., *infra*, he e a e ndeniable efficiencie a ocia ed i h b ndled ale b di ib o , b ho e efficiencie do no e lain h og amme hold be allo ed o fo ce b ndling on he di ib- o , ho hold be allo ed o f eel decide hen and ha o b n-

eam and do n eam foreclo e inj .[155] Tha bo h do n-
eam di ib o and eam og amme ha e no endo ed
he Cablevision i challenging Viacom' b ndling ac ice i one
indica ion of he eali of he e foreclo e inj ie . I i dif c l o
nd an e am le of a ie-in ha im lemen in e od c ice di c i-
mina ion ha doe no ha e likel foreclo e inj a he eam
le el, he do n eam le el, o bo h le el .

The e a e, ho e e , com elling ea on o ecogni e he inj
o ing f om in e od c ice di c imina ion a a alid and inde-
enden ba i fo condemning a ing a angemen . The ima allo-
ca i e ha m f om ch a ie i eal h an fe and dead eigh lo o
con me , no he foreclo e inj o a i al og amme . While a
foreclo e inj i mo e likel o gge a d ag on inno a ion, ch
a ho ing ha ne e been e i ed o demon a e an icom e i i e ef-
fec in o he con e (ch a he la go e ning ho i on al e ain
o e ical e ain ch a e ale ice main enance). In addi ion,
oof of he e i i e foreclo e inj ill no al a be ea . In
Brantley, he con me lain iff and hei a o ne had dif c l ge -
ing inde enden eam og amme o eak fo he eco d, e -
ha beca e he did no i h o jeo a di e hei abili o nd coo -
e a i e di ib o , man of hem in eg a ed in o og amming.[156]
Recogni ing ha ie-in can ha e an icom e i i e effec h o gh
ice di c imina ion o ld no o en he oodga e ha c i ic fea

ince Loew's, b ha e e l ackno ledged ha ie-in can in-
c ea e he ocial co of ma ke o e b facili a ing ice di c imi-
na ion, he eb inc ea ing mono ol o o e ha he o ld be
ab en he ie.[157] The Co ' a emen a and emain o nd an i-
olic .

mo n fo a bill ha o ld e i e á la ca e og amming.[158] Failing all of hi , al ho gh i ma ake a decade o mo e fo hi o ha en, he ma ke lace ma l ima el fo ce g ea e con me choice a mo e and mo e con me o he co d in fa o of In e ne o ion fo ele i ion og amming. The She man Ac , ho e e , o ide a be e an e .

The bila e al mono ol in ele i ion di ib ion ha e i ed befo e he ea l 1990 a fa f om ideal fo TV con me . I did, ho e e , o ide one bene . Po e f l og amme i h o la channel co ld no n o gh hod o e he local mono oli cable o ide . The o needed each o he and e e likel o nego ia e e m le ha mf l o con me elfa e han o ld occ i h nchecked mono ol o e . Af e 1992, com e i ion in di ib ion ha ho ld ha e bene ed con me o ened elfa e o come . No he mono ol o e of a og amme i h a m -ha e channel i em lo ed o hi a com e ing di ib o in o bmi ion o he icing and b ndling e m ha e e he o e f l og amme ' el h in e e .

If effec i el em lo ed, he She man An i Ac o ide a e effec i e emed fo he e nega i e elfa e effec . B enjoining og amme ' b ndling and ie ing e ic ion , he di ib o o ld be f ee o make hei o n b ndling and di ib ion deci ion in a manne ha e ond o con me demand. Di ib o ho e e n e on i e o con me in e e o ld ickl lo e ma ke ha e. Con me e o ld be back in d i e ' ea i ho in i e go e nmen eg la ion. Tha ' j a Sena o She man o ld ha e in ended.

158. See Flin , supra no e 1 (de c ibing he Tele i ion Con me F eedom Ac of 2013, hich i he bill in od ced b Sena o John McCain).