MAKING SENSE OF MONOPOLIZATION

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For monopolists of all kinds, the monopolization offense in Section 2 of the Sherman Act defines the contour between lawful competition and illegitimate foul play. It applies to everything from pricing decisions to acquisitions of promising rivals. It sets the ground rules for our most prominent and powerful digital platforms, and for monopolists throughout our economy. And yet we are strikingly unsure of what it really means.

The monopolization offense requires monopoly power plus a conduct element, which the Supreme Court defined seminally in *United States v. Grinnell Corp.* as "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[1] But this definition makes no sense: virtually *every* business seeks to win share from competitors—it willfully seeks monopoly—including through superior products and business acu-

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[1] United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

men. No one thinks that "willfulness" in chasing monopoly is bad or rare. Every monopolization defendant claims that its conduct facilitates "superior" operation. And if the use of "acumen" is exculpatory, then what remains? The first half of the Court's binary is not necessarily bad, the second part is not necessarily good, and they are in no real tension.

Confusion breeds confusion: puzzles pervade our monopolization cases. In *United States v. Microsoft Corp.*, the D.C. Circuit held that a plaintiff need not prove what would have happened but for the defendant's conduct; a few years later the same court appeared to dismiss the FTC's case in *Rambus Inc. v. FTC* for failure to do just that.[2] In *McWane, Inc. v. FTC*, the Eleventh Circuit held that monopolization requires only consumer harm, not competitor harm; in *FTC v. Qualcomm*, the Ninth Circuit indicated the contrary.[3] The Second Circuit has held that monopolization liability is reserved for conduct lacking any legitimate business purpose; other circuits have suggested that intention is irrelevant.[4] Some courts suggest that Section 2 always demands weighing harms and benefits; others disdain that approach.[5] And so on.

The sorry state of monopolization doctrine has been an open secret in antitrust circles for many years. A few years ago, Thomas Lambert wryly pointed out that the "problem with Section 2" was that "nobody knows what it means."[6] Ten years before that, Einer Elhauge confessed that "[i]t is time . . . to acknowledge that the emperor has no clothes," and that monopolization doctrine was just a "barrage of conclusory labels."[7] And twenty years before *that*, Steven Salop and Thomas Krattenmaker condemned monopolization's "substantial disarray."[8]

For decades, we have managed with the help of two crutches. The first has been doctrine: a taxonomy of micro-rules for specific practices (exclusive dealing, tying, and so on) that rely on analogies to familiar markets and practices rather than first principles of monopolization law. The second crutch has

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[2] *Compare* United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001), *with* Rambus Inc. v. FTC, 522 F.3d 456, 463 (D.C. Cir. 2008).

[3] *Compare* McWane, Inc. v. FTC, 783 F.3d 814, 835–36 (11th Cir. 2015), *with* FTC v. Qualcomm Inc., 969 F.3d 974, 992 (9th Cir. 2020).

[4] *Compare In re* Adderall XR Antitrust Litig., 754 F.3d 128, 133 (2d Cir. 2014), *with* SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 969 (10th Cir. 1994), *and* A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1402 (7th Cir. 1989).

[5] *Compare Microsoft*, 253 F.3d at 58–59, *with* Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1075 (10th Cir. 2013).

[6] Thomas A. Lambert, *Defining Unreasonably Exclusionary Conduct: The "Exclusion of a Competitive Rival" Approach*, 92 N.C. L. REV. 1175, 1177 (2014).

[7] Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 342 (2003).

[8] Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209, 211 (1986).

been a robust presumption of lenity in close or novel cases, driven by fears of deterring vigorous competition, particularly in new or high-tech markets.[9]

But the crutches are crumbling. Old taxonomies have lost their persuasive grip as scholars, legislators, and the public doubt whether markets defined by network effects, lock-in, platform dynamics, and other digital novelties should really be approached with rules forged in markets for steel, oil, and agricultural products. And the view that it is generally better to risk a bit too much private monopoly rather than a bit too much state action has fractured entirely.

The result is deep confusion, not just about the legality of many practices on the digital frontier, but about the standards courts, agencies, and businesses should use to appraise them. When can a dominant social network buy an emerging threat with competitive promise but an uncertain future?[10] When can a dominant search engine give a hand up to its own services, and not those of rivals?[11] When can a dominant chip manufacturer structure patent licenses in ways that tax and suppress rivals' sales?[12] To tackle these puzzles, we need precisely what we lack: a clear sense of the principles at the heart of the monopolization offense.

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This article sketches the outline of a solution. It offers a reconstruction of the monopolization offense, and particularly its conduct requirement.[13] I will make three claims. First, I will offer an account of the neglected *concept* of monopolization, specifying and distinguishing among its three separate components: (1) a concern with a wrong called "exclusion," as distinct from mere competitive failure; (2) a concern with the harms of monopoly; and (3) a concern to protect competitive freedom, even for monopolists. I will show that each of these projects is deeply embedded in our tradition: in legislative history; in early adjudication before the accretion of modern doctrine; in moral and political theory of commerce; and in our tangled modern cases. I will argue that any plausible account of monopolization must reflect each of these dimensions.

My second claim offers a theory of the monopolization offense that would improve its clarity, vigor, and coherence. A monopolization plaintiff must establish, in addition to monopoly, just three elements: (1) *exclusion* (substantial

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[9] *See, e.g.*, FTC v. Qualcomm Inc., 969 F.3d 974, 990–91 (9th Cir. 2020).

[10] *See* FTC v. Facebook, Inc., 560 F. Supp. 3d 1 (D.D.C. 2021).

[11] *See* Complaint, Colorado v. Google LLC, No. 1:20-cv-3715 (D.D.C. Dec. 17, 2020).

[12] *See Qualcomm*, 969 F.3d at 997–1003.

[13] The concept of monopoly presents many complexities of its own—*see, e.g.*, *Facebook*, 560 F. Supp. 3d at 15–20 (dismissing the FTC's first complaint against Facebook)—but I will set these aside in this article.

impairment of a rival's ability or incentive to compete); (2) *contribution to monopoly* (a substantial contribution to the danger that monopoly will be acquired or maintained); and (3) *unprivileged conduct* (behavior outside a narrow zone of per se legality). Nothing else is required. If those are established, the defendant may establish an affirmative defense of *justification* if it can show that the conduct will benefit, not harm, consumers.

This approach, which I call the "dangerous exclusion" framework, implies the rejection of some widely shared beliefs about monopolization, including the belief that Section 2 lacks unifying principles. Among other things, a plaintiff need not show that rivals have lost sales or market share; that specific outcomes like price or output have already been measurably affected; or that the conduct would be irrational but for its exclusionary tendency. Nor need a plaintiff disprove benefits merely asserted by a defendant. I will identify ways in which this framework implies that existing doctrine should be improved or harmonized, and ways in which it helps address problems in the digital economy, from nascent competitor acquisitions to the misuse of intellectual property.

My final claim is methodological. I will defend qualitative adjudication as antitrust's core method, against *both* the left-wing call for a rulemakers' antitrust, grounded in concentration ratios, market shares, and bright lines, *and* the right-wing push for an econometricians' antitrust, grounded in prognostications of price and output. I will argue that the search for easy antitrust threatens serious harm, while the idea that econometrics can supplant law misunderstands both law and economics. The fragile quantifications of economic modeling make a wonderful servant but an indecisive master.

I. THE MONOPOLIZATION MORASS

Despite more than a century of adjudication and scholarship, the monopolization offense is haunted by deep ambiguity. We know that monopoly power is needed, but the conduct element—the prohibited *means* of acquiring or maintaining monopoly—remains obscure.

A. The Rise of the Digital Economy and the Turn to Antitrust

The digital revolution has been accompanied by an outpouring of protests from across the political spectrum that we have a Big Tech problem and should do something about it.[14] Commentators frequently claim that a small number of digital service providers have acquired too much power (financial,

[14] *See, e.g.*, PETER J. HASSON, THE MANIPULATORS: FACEBOOK, GOOGLE, TWITTER, AND BIG TECH'S WAR ON CONSERVATIVES (2020); RANA FOROOHAR, DON'T BE EVIL: HOW BIG TECH BETRAYED ITS FOUNDING PRINCIPLES—AND ALL OF US (2019).

political, cultural, and so on) and that we need to radically rethink our regulatory approach to digital platforms that are unusually complex, mobile, or powerful. We hear that we live in a "new Gilded Age," with digital platforms in place of Rockefellers and Carnegies.[15] And these concerns join with broader diagnoses: rising concentration, increasing markups, harmful mergers, and a migration of profit from labor to capital, from which many scholars infer a trend toward monopoly across the economy.[16] A coalition of "neo-Brandeisian" critics have blamed a multi-generational antitrust failure and called for drastic reform.[17]

The result has been the most intense re-examination of antitrust law in decades: blockbuster litigation against Facebook and Google;[18] high-profile antitrust hearings in Congress, leading to numerous proposals for deep reform;[19] the appointment of prominent neo-Brandeisians to senior administration roles;[20] and a broad executive order inviting sweeping change.[21] The conjunction of public attention, bipartisan appetite for reform, and the opening of deep questions about antitrust's fundamentals has set the stage for a renegotiation of its foundational political bargain.[22] "Not since 1912," as Carl Shapiro has observed, "have antitrust issues had such political salience."[23]

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[15] *See, e.g.*, TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 14 (2018).

[16] *See, e.g.*, JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY ch. 1 (2019); Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. ECON. 561 (2020); JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015); *see also* Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714 (2018) (noting limits of evidence).

[17] *See, e.g.*, MATT STOLLER, GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY (2019); Wu, *supra* note 15, at 15; Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMP. L. & PRAC. 131 (2018); Daniel Kishi, *Time for a Conservative Anti-Monopoly Movement*, AM. CONSERVATIVE (Sept. 19, 2017).

[18] *See, e.g.*, FTC v. Facebook, Inc., 560 F. Supp. 3d 1 (D.D.C. 2021); New York v. Facebook, Inc., 549 F. Supp. 3d 6 (D.D.C. 2021); Complaint, United States v. Google LLC, No. 1:20-cv-03010 (D.D.C. Oct. 20, 2020); Complaint, Colorado v. Google LLC, No. 1:20-cv-3715 (D.D.C. Dec. 17, 2020); Complaint, Texas v. Google LLC, No. 4:20-cv-00957 (E.D. Tex. Dec. 16, 2020).

[19] *See, e.g.*, SUBCOMM. ON ANTITRUST, COMMERCIAL, AND ADMIN. LAW OF THE H. COMM. ON THE JUDICIARY, 116TH CON., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS (Oct. 2020) [hereinafter HJC STAFF REPORT]; Rachel Lerman, *Big Tech Antitrust Bills Pass First Major Hurdle in House Even as Opposition Grows*, WASH. POST (June 24, 2021).

[20] *See* David McCabe & Cecilia Kang, *Biden Names Lina Khan, a Big-Tech Critic, as F.T.C. Chair*, N.Y. TIMES (June 17, 2021); Cecilia Kang, *A Leading Critic of Big Tech Will Join the White House*, N.Y. TIMES (Mar. 5, 2021).

[21] Exec. Order No. 14036, 86 Fed. Reg. 36,987 (July 9, 2021) (Promoting Competition in the American Economy).

[22] Jonathan B. Baker, *Preserving a Political Bargain: The Political Economy of the Non-Interventionist Challenge to Monopolization Enforcement*, 76 ANTITRUST L.J. 605 (2010).

[23] Shapiro, *supra* note 16, at 715.

The new generation of reformers and enforcers faces a wild frontier of practices, transactions, and behaviors of uncertain legality: acquisitions of upstart businesses that could become serious rivals in future; platform practices like "self-preferencing" of its own services at the expense of rivals; and the aggressive use of IP to exclude. Such practices provoke a common refrain: *can they really do that? Don't we have antitrust laws for this kind of thing?*

To answer those questions—to tell businesses when to knock it off, to tell consumers and rivals what their rights are, and to give straight answers to legislators about what our antitrust system does and does not do, and what might need changing—we need a clear sense of what, at root, the monopolization offense is supposed to be doing. But that turns out to be hard to find.

B. Monopolization in Crisis

The nub of the problem is that, while the Sherman Act has prohibited monopolization (and attempts and conspiracies to monopolize) for more than 130 years, the core idea of "monopolization" remains maddeningly elusive.

1. *The Mysticisms of Monopolization*

To see the confusion, let's start with the Court's definition of monopolization. The offense requires, in addition to monopoly power, "the *willful acquisition or maintenance of that power* as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[24] This opening prayer has been repeated in countless cases.[25]

But the dichotomy is false. The question of whether monopoly power has been "willful[ly] acqui[red] or maint[ained]" is orthogonal to the question of whether the conduct involves "a superior product, business acumen, or historic accident." A company can willfully acquire or maintain monopoly by offering a better product or price, thus satisfying *both* of the purported alternatives in the Court's test; conversely, a company can fail to acquire or maintain such power despite having behaved badly, satisfying *neither* prong.[26] The displacement of rivals and being a "better competitor" are not in tension: they go hand in hand.

Confusion and false-binary rhetoric of this kind infects monopolization doctrine root and branch. Courts approach monopolization analysis with a tan-

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[24] United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966) (emphasis added).

[25] *See, e.g.*, Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 447–48 (2009); Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004); Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481 (1992).

[26] *See, e.g.*, Elhauge, *supra* note 7, at 261.

gle of enigmatic terms: "exclusionary conduct," "anticompetitive conduct," "harm to the competitive process," and so on.[27] But virtually everyone who has focused on the issue admits that these are conclusory labels applied to a decision made on other grounds—and that it is not clear what those grounds are.[28]

The most intuitive options turn out to be quite unsuitable. It has been a ground rule of antitrust for a long time that injury to *competitors* alone does not imply illegality;[29] mere contribution to monopoly power cannot be enough unless we are to abandon the conduct element altogether and punish monopoly, which we have never done;[30] and intent to "smash" competitors and so on is entirely consistent with healthy competition.[31] As Judge Easterbrook has put it, "[c]ompetitive and exclusionary conduct look alike."[32] So where is monopolization hiding?

2. *Evolution, Revolution, and Reaction: Section 2 Scholarship*

The antitrust literature has produced much thoughtful and reflective work—including a number of necessary reference points for anyone thinking about Section 2—but no consensus about the definition of monopolization's conduct requirement, other than that it is notoriously elusive.[33]

Modern scholarship has unfolded against the backdrop of antitrust's modern history, which begins with the famous "Chicago revolution" of the 1960s–80s. A brilliant cadre of Aaron Director's students, pointing to some mid-century enforcement excesses,[34] argued that aggressive competition was generally good for consumers, even when it harmed less efficient rivals, and

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[27] *See*, *e.g.*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 595–96, 605 n.32 (1985).

[28] This has been widely noted. *See*, *e.g.*, Lambert, *supra* note 6, at 1177; Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147, 147–48 (2005); Elhauge, *supra* note 7, at 257–68.

[29] *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977).

[30] *See Trinko*, 540 U.S. at 407.

[31] *See*, *e.g.*, SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 969 (10th Cir. 1994).

[32] Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 972 (1986).

[33] *See, e.g.*, Lambert, *supra* note 6, at 1177 (citing examples); Hovenkamp, *supra* note 28, at 147–48 (same); Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435, 435 (2006); Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 5 (2004).

[34] *See, e.g.*, Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. REV. 1843, 1848 (2020) (mid-20th century courts "often either used no economics or poor economics"); WU, *supra* note 15, at 103–04 (the Justice Department was "out of control").

that state intervention was more commonly harmful than helpful.[35] Chicago wrought rapid change, as its ideas and adherents were received into the judiciary and federal government: by the end of 1979, Bork's *The Antitrust Paradox* had already been cited three times with approval in Supreme Court opinions, including by a unanimous Court for Bork's central thesis that the Sherman Act was intended to maximize consumers' economic welfare.[36] For the next four decades, the Chicagoan view formed the baseline for antitrust argument and adjudication, above all in monopolization cases.[37]

Since that time, antitrust scholarship has seen the emergence and interaction of three broad traditions, each with something to say about monopolization. At the cost of some caricature, I will call them the evolutionary (or post-Chicago), revolutionary (or neo-Brandeisian), and conservative (or neo-Chicago) traditions.

a. Evolution: Post-Chicago

From the very start, Chicago's rise was accompanied by a critical counter-tradition. Much of this work accepted the primacy of consumer welfare, but emphasized ways in which the broad laissez-faire prescriptions of Chicago antitrust failed to protect consumers from harm even on that metric.[38]

This tradition has produced multiple efforts at a general theory of Section 2. In 2003, Einer Elhauge argued that conduct should be "per se legal if its exclusionary effect on rivals depends on enhancing the defendant's efficiency," but "per se illegal if its exclusionary effect on rivals will enhance monopoly power regardless of any improvement in defendant efficiency."[39] But this test

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[35] *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1979); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979); Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696 (1986).

[36] Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 700 n.* (1978) (Blackmun, J., concurring in part and concurring in the judgment); United States v. U.S. Gypsum Co., 438 U.S. 422, 442 (1978).

[37] *See, e.g.*, William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1140 (1989) (noting that 1981–88 saw "the smallest number of [Section 2] prosecutions the . . . agencies have initiated in any eight-year period since 1900").

[38] *See, e.g.*, HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008); Jonathan B. Baker, *Recent Developments in Economics that Challenge Chicago School Views*, 58 ANTITRUST L.J. 645, 646 (1989); Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 CALIF. L. REV. 917 (1987).

[39] Elhauge, *supra* note 7, at 330.

has not been broadly adopted, perhaps because of difficulties in applying it in practice to conduct with mixed effects.[40]

A broader vision of monopolization emerges from the writings of Steven Salop and his collaborators. He embraces a balancing approach: whether "the conduct on balance likely harms rather than benefits consumers."[41] The D.C. Circuit's *Microsoft* decision arguably implies something similar.[42] And with Andrew Gavil, Salop has proposed a variety of ways to correct courts' systematic preference for defendants in monopolization cases.[43]

But the direct prediction of welfare impacts is virtually always a heroic task. In even the simplest antitrust case, measuring welfare stakes with anything like real accuracy would mean assessing: (1) real market participants' real demand functions; (2) the outcomes that have resulted or will result from the challenged conduct; (3) the outcomes that would result if the challenged practice or transaction were prohibited; and (4) the welfare implications of the intervention itself, including its tendencies to encourage or deter *other* conduct, monitoring costs, etc. This enterprise is routinely implausibly demanding.[44] It also seems inconsistent with what courts actually do in Section 2 cases, which is often more intricate than simply weighing competing tendencies.[45]

b. Revolution: Neo-Brandeis

In the last few years, the evolutionary conversation between Chicago and post-Chicago has been upended. A group of critics has called for wide-ranging changes to antitrust law and practice, aiming to realize aspects of Louis Brandeis's views of monopoly and society.[46] The core of this "neo-Brandei-

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[40] *Compare id.* at 320 (efficiency-enhancing conduct can be per se lawful even when rivals are excluded), *with id.* at 328 (impairment of rivals can be per se unlawful even when own efficiency improves).

[41] Steven C. Salop & Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 GEO. MASON L. REV. 617, 652 (1999).

[42] United States v. Microsoft Corp., 253 F.3d 34, 58–59 (D.C. Cir. 2001); *see infra* Part II.C.4.

[43] Andrew I. Gavil & Steven C. Salop, *Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis: Revitalizing the Rule of Reason for Exclusionary Conduct*, 168 U. PA. L. REV. 2107, 2131–42 (2020).

[44] *See, e.g.*, Hovenkamp & Scott Morton, *supra* note 34, at 1876; Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 10 (1984).

[45] *See, e.g.*, Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438 (2009); Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[46] Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, 64 ANTITRUST BULL. 479 (2019); Zephyr Teachout, *Antitrust Law, Freedom, and Human Development*, 41 CARDOZO L. REV. 1081, 1104 (2020); WU, *supra* note 15; Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017); Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235 (2017).

sian" project is the view that modern competition policy has fallen into a long decline, betrayed by Chicago economics and weak enforcers.[47] Lina Khan declares modern antitrust "enfeebled" and "defanged."[48] Sandeep Vaheesan claims that modern consumer-welfare antitrust rests on a "bed of nonsense," and calls for a "fundamental remaking of the field."[49] And so on.

Work to date in this tradition has been quicker to make such criticisms than to offer a reconstructive vision—particularly in the context of monopolization law—or to identify specific principles against which antitrust should be measured. The literature does not yet contain anything we could call a Neo-Brandeisian theory of monopolization.

But we can infer some fundamentals. The neo-Brandeisian agenda is above all an antimonopoly program, calling for more antitrust enforcement, and more aggressive rules, across the board.[50] Remedies should be broader, with more breakups.[51] Rules of decision should generally be in the nature of bright-line rules, flatly or presumptively prohibiting certain practices rather than requiring assessment of effects in individual cases.[52] Congress should impose a "no fault" ban on durable monopolies, which should be dissolved and ordered "to freely license all their technologies[.]"[53]

The neo-Brandeisian project fuses two strands of work. The first is a vein of essentially traditional post-Chicago work, arguing that existing law should be modified to better protect consumers.[54] But the second strand, which seems more central to the neo-Brandeisian project, is truly radical: it rests not on consumer welfare grounds, which neo-Brandeisians broadly reject,[55] but on an effort to promote deconcentration for its salutary social effects, *even if by doing so we harm citizens as consumers*. Some of these, like the dissolution of enduring monopolies, fall outside antitrust, in that they are not offered as—and probably could not be accepted as—applications of the Sherman or Clay-

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[47] Khan & Vaheesan, *supra* note 46, at 294; WU, *supra* note 15, at 16.

[48] Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J. F. 960, 964, 978 (2018), www.yalelawjournal.org/forum/the-ideological-roots-of-americas-market-power-problem.

[49] Vaheesan, *supra* note 46, at 479–80.

[50] WU, *supra* note 15, at 16; Khan, *supra* note 46, at 790–97.

[51] WU, *supra* note 15, at 131–33.

[52] Open Markets, *Restoring Antimonopoly Through Bright-Line Rules*, PROMARKET (Apr. 26, 2019), www.promarket.org/2019/04/26/restoring-antimonopoly-through-bright-line-rules/; ZEPHYR TEACHOUT, BREAK 'EM UP: RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY 214 (2020) (stating the FTC "should lay out very particular clear, bright-line rules—like speed limits—against certain kinds of 'vertical' behavior"); Khan & Vaheesan, *supra* note 46, at 280; WU, *supra* note 15, at 129 (advocating for a per se ban on mergers that reduce "major firms" to fewer than four).

[53] Open Markets, *supra* note 52; *see also* Khan & Vaheesan, *supra* note 46, at 285.

[54] *See*, *e.g.*, Khan, *supra* note 46, at 791–92.

[55] *See, e.g.*, Vaheesan, *supra* note 46, *passim*; WU, *supra* note 15, at 135–39.

ton Acts.[56] Others, though, are true antitrust prescriptions, including calls to enforce Section 2 through bright-line prohibitions.

Two factors have limited the impact of this more radical strand on monopolization doctrine to date. The first is its generality: the lack of a worked-out account of what Section 2 can and should do. (What conduct should be banned? Why? When is breakup in the public interest?[57]) The second is the contingency of many of the school's claims on a break with existing doctrine: it is not clear that most, or even many, neo-Brandeisian prescriptions about what antitrust law "should" do are really intended to be acceptable to courts today.[58]

At this point, the remarkable success of the neo-Brandeisian project has primarily been in helping to start a wide-ranging and important conversation raising questions about antitrust's fundamentals, rather than offering a successful set of answers to those questions. The school's leaders have so far proposed neither an account of what conduct antitrust law should and should not prohibit, nor clear principles on which antitrust doctrine should be based.

c. Reaction: Neo-Chicago

A school of conservative commentators—including Judge Douglas Ginsburg, Joshua Wright, and FTC Commissioner Christine Wilson—have defended the core Chicago position.[59] Antitrust should be slow to intervene, they urge, including because "the economic system corrects monopoly more readily than it corrects judicial errors," and "the costs of monopoly wrongly permitted are small, while the costs of competition wrongly condemned are large."[60]

Gregory Werden, for example, argues that the lodestar for monopolization liability should be whether the challenged conduct makes "no economic sense" but for its tendency to exclude.[61] This resembles existing law in areas

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[56] *See, e.g.*, Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019) (proposing structural separation rules).

[57] *See, e.g.*, Shapiro, *supra* note 16, at 743 ("Simply saying that Amazon has grown like a weed, charges very low prices, and has driven many smaller retailers out of business is not sufficient. Where is the consumer harm?").

[58] *See, e.g.*, Vaheesan, *supra* note 46, at 494 (calling for "fundamental reconstruction" of antitrust).

[59] *See, e.g.*, Joshua D. Wright & Murat C. Mungan, *The Easterbrook Theorem: An Application to Digital Markets*, 130 YALE L.J. F. 622 (2021), www.yalelawjournal.org/forum/the-easter brook-theorem; Christine S. Wilson, Comm'r, U.S. Fed. Trade Comm'n, Remarks at the Global Competition Law Lecture Series, Why They Built the Fence: Understanding Modern Antitrust Law (Nov. 19, 2020).

[60] Easterbrook, *supra* note 44, at 15.

[61] Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 ANTITRUST L.J. 413, 414 (2006).

where antitrust is most deferential—refusal to deal, for example—but would be a serious retreat in other areas (it could make tying, bundling, and exclusive dealing virtually per se legal). It also often would be difficult to apply.[62] And Werden concedes that this test "may not be useful in every Section 2 case,"[63] inviting the question of what might help us determine when it *is* useful, and what we should use when it is not. Other conservative visions are similarly slender.[64]

Two recent contributions on the subject of consummated acquisitions—an essay by Judge Ginsburg and Koren Wong-Ervin, and another by Timothy Muris and Jonathan Nuechterlein—have crystallized three facets of Chicago orthodoxy on Section 2. First, liability depends on proof of "anticompetitive effects" on outcomes like output and price; second, a plaintiff must generally prove that the challenged conduct was the but-for cause of such effects; and, third, monopolization law should be no more demanding than merger law, as the latter "was enacted to lower the burdens in merger cases."[65]

Chicagoan perspectives have profoundly shaped Section 2 law, but they are criticized by an increasingly broad coalition for several reasons: for overweighting the harms of "false positives"; for reducing nuanced economics to flat laissez-faire prescriptions (or standards that amount to the same thing); and for paralyzing antitrust in markets where effects are unpredictable or hard to quantify.

C. THE COSTS OF CONFUSION

The battle over monopolization's muddled meaning is costly and harmful. It leaves courts to rely on ciphers,[66] or on hollow standards like "no legitimate purpose" tests,[67] and to tolerate conduct that harms competition and consum-

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[62] *See* Lambert, *supra* note 6, at 1197–99 (noting this).

[63] Werden, *supra* note 61, at 433.

[64] *See, e.g.*, U.S. Dep't of Justice, *Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act* ix (2008) (withdrawn 2009) (proposing the "substantially disproportionate" test); Janusz A. Ordover & Robert D. Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 YALE L.J. 8, 9–10 (1981) (proposing profit sacrifice standard); RICHARD A. POSNER, ANTITRUST LAW (2001) (positing equally efficient competitor standard).

[65] Douglas H. Ginsburg & Koren W. Wong-Ervin, *Challenging Consummated Mergers Under Section 2*, COMPETITION POL'Y INT'L, May 2020, at 5; *see also* Timothy J. Muris & Jonathan E. Nuechterlein, *First Principles for Review of Long-Consummated Mergers*, 5 CRITERION J. ON INNOVATION 29, 35–36, 39–40 (2020).

[66] *See, e.g.*, Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd. Co., 838 F.3d 421, 438 (3d Cir. 2016) ("Anticompetitive conduct . . . is generally defined as conduct to obtain or maintain monopoly power as a result of competition on some basis other than the merits. . . . [It is] conduct which unfairly tends to destroy competition itself.") (cleaned up).

[67] *See, e.g.*, Morris Commc'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1295 (11th Cir. 2004) (Section 2 punishes "conduct without a legitimate business purpose") (citation omitted); *In re*

ers.[68] It encourages bad behavior, as confusion and indeterminacy soften the deterrent from practices that would turn out to be unlawful, and it creates an aura of legal risk around practices that might be unpopular but should not be illegal. Thus, a double harm: more unlawful conduct and less procompetitive innovation. And if courts are known to systematically favor defendants, as Salop and Gavil indicate,[69] then we should expect more unlawful, unpunished conduct. The digital economy's players would surely be better behaved if the rules were clearer.

Confusion also distorts the work of the federal agencies. Antitrust enforcement decisions—above all, an enterprise in allocating scarce resources—necessarily reflect the likelihood of ultimate success. Noble failures consume dollars and personnel that could have been put to other uses. Thus, uncertainty tends to deter monopolization enforcement in favor of, say, merger or cartel cases. The result is less enforcement and more bad behavior.[70]

Finally, confusion threatens to misdirect the political energy currently available for reform. How can Congress assess the "existing law" without a clear sense of what it really is and does? And more broadly, confusion about what monopolization does—or plausibly could do—hampers broader debates about regulation of "big tech." It is time for a new approach.

II. DANGEROUS EXCLUSION

This Part sketches an outline of a solution. I will claim that the key to the law of monopolization is found in the *concept* of monopolization, and particularly the insight that its conduct component has three distinct dimensions. Distinguishing among them, and setting other contenders aside, allows us to make sense of monopolization, improve doctrine, and respond to new practices.

A. THE CONCEPT OF MONOPOLIZATION

Long before courts and scholars had raised up the crazy cathedral of Section 2 doctrine, there was an intelligible concept of monopolization which—from the very beginning—reflected three simultaneous projects. The first

Inclusive Access Course Materials Antitrust Litig., No. 20-6339, 2021 WL 2419528, at *14 (S.D.N.Y. June 14, 2021) (same).

[68] *See, e.g.*, FTC v. Qualcomm Inc., 969 F.3d 974, 1000 (9th Cir. 2020) (taxing rivals); FTC v. Facebook, Inc., 560 F. Supp. 3d 1, 19–22 (D.D.C. 2021) (conditioning).

[69] Gavil & Salop, *supra* note 43, *passim*.

[70] Nevertheless, agency inaction in monopolization cases since *Microsoft* is routinely overstated. In fact, the federal agencies have filed more than 30 monopolization cases since *Microsoft* was filed in May 1998, including the 23 FTC complaints and 9 DOJ complaints alleging monopolization collected in the Appendix, *infra*. I have not attempted to be exhaustive, and even this list may be under-inclusive.

could be called a consequentialist one (that is, concerned with effects): an effort to guard against *contribution to monopoly power*. The second could be called a deontological project (that is, concerning the inherent normative character of particular acts): protection of a *right to compete*—even for monopolists. The third could be called an instrumental normativity (that is, concerning a relationship between conduct and effects): prohibition of the wrong of *exclusion*—impairment of ability or incentive to compete—distinct from mere competitive loss.

1. *The Sherman Act*

The legislative history of the Sherman Act has often been dismissed by those on the left and the right alike as a hopeless tangle,[71] but the debates contain much that is illuminating and amply show monopolization's three-dimensional nature.

The anchor of all legislative debate was consensus opposition to what we now call monopoly (and monopsony) power, by reason of its harmful tendencies.[72] The legislators broadly understood that the absence of competition created power to impose adverse terms of dealing—higher price, worse quality, lower output—on trading partners, and intended the antitrust project to provide some protection against this.[73] This concern is a close fit with monopoly power in the economic sense[74]: Senator John Sherman himself emphasized

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[71] *See, e.g.*, WU, *supra* note 15, at 32 ("Let us not spend any more time on the impossible task of trying to find the true original meaning of the Sherman Act.").

[72] *See, e.g.*, 21 CONG. REC. 2460 (1890) (statement of Sen. John Sherman) ("[No social problem] is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition."); 21 CONG. REC. 2647 (1890) (statement of Sen. Zebulon Vance) ("We are all enemies to these illegal combinations of capital which devour the substance of the people and grind the faces of the poor."); 21 CONG. REC. 6313 (1890) (statement of Rep. James Kerr) ("It was stated in this Chamber and to the people that the trusts were crushing the life-blood out of the people[.]").

[73] 21 CONG. REC. 2457 (1890) (statement of Sen. John Sherman) ("[A trust] dictates terms to transportation companies, it commands the price of labor without fear of strikes, for in its field it allows no competitors. . . . [I]t tends to advance the price to the consumer of any article produced[.]"); 21 CONG. REC. 2461 (1890) (statement of Sen. John Sherman quoting Sen. James Z. George) ("They increase beyond reason the cost of the necessaries of life and business, and they decrease the cost of the raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy and increase the price of what they sell."); 21 CONG. REC. 4092 (1890) (statement of Rep. William Wilson) ("[A] trust is the latest and most perfect form of combination among competing producers to control the supply of their product, in order that they may dictate the terms on which they shall sell in the market and may secure release from . . . competition[.]").

[74] Sherman's very first bill, introduced on August 14, 1888, was more explicit: it prohibited arrangements tending "to prevent full and free competition" and "which tend to advance the cost to the consumer[.]" *See* Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359, 363–64 (1993).

that the bill would not affect "combinations in aid of production *where there is free and fair competition*."[75]

But in 1890 the term "monopoly" also had a second inflection that may not be obvious today. Certainly, it meant substantial freedom from competitive constraint. But it *also* implied—by virtue of its roots in the practice of the British Crown[76]—what I will call an element of *exclusion*: restriction of rivals' ability or incentive to compete.[77] To Senator Sherman, this idea was central: "if [a] business is lawful and open to competition with others with like skill and capital, it cannot be dangerous."[78] Senator William Stewart made the same point: "'Monopoly' . . . is something created by law which gives a special privilege. Of course *it can not apply when all the world can go into the manufacture*."[79] Congressman Charles Culberson pointed to Webster's definition of "monopoly"—including an "*exclusive* right of trade"—to illustrate the meaning of "monopolization."[80]

A third dimension, too—a distinction by reference to the character of conduct—recurs through the debates, as participants emphasized that the bill preserved the "right" to undertake core competitive activities without interference.[81]

The resulting triple sense of "monopoly" and "monopolization" is captured by an exchange on the day the bill passed the Senate. Senator John Edward Kenna of West Virginia asked whether a citizen who obtained control of a market "by virtue of his superior skill" would violate the law, and was told by Senator George Edmunds of Vermont (the likely drafter of the ultimate legis-

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[75] 21 CONG. REC. 2457 (1890) (statement of Sen. John Sherman) (emphasis added).

[76] William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 363–64 (1954).

[77] Early examples are legion. *See, e.g.*, Camblos v. Philadelphia & R.R. Co., 4 F. Cas. 1089, 1102 (C.C.E.D. Pa. 1873) ("The ordinary modern practical use of the word 'monopoly' is in the sense of an exclusive profit . . . grant[ed] . . . by the state[.]"); Nusbaum v. Emery, 18 F. Cas. 490, 491 (C.C.N.D. Ill. 1873) (stating patentee may choose to "monopolize the manufacture of his patented article"); United States v. Kochersperger, 26 F. Cas. 803, 803 (C.C.E.D. Pa. 1860) (positing that "monopoly" used to mean "exclusive" rights).

[78] 21 CONG. REC. 2457 (1890) (statement of Sen. John Sherman).

[79] 21 CONG. REC. 2644 (1890) (statement of Sen. William Stewart) (emphasis added).

[80] 21 CONG. REC. 4090 (1890) (statement of Rep. Charles Culberson).

[81] *See, e.g.*, 21 CONG. REC. 2457 (1890) (statement of Sen. John Sherman) ("It is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances. This is industrial liberty and lies at the foundation of the equality of all rights and privileges."); 21 CONG. REC. 4090 (1890) (statement of Rep. Charles Culberson) ("I am inclined to think that the Standard Oil Company can sell its product at just such prices as it pleases[.]"); 21 CONG. REC. 5954 (1890) (statement of Rep. Elijah Morse) (emphasizing businesses' "right to control the price at which their goods shall be sold, the right to say they shall not enter into ruinous competition, [and] the right to exact a fair and living profit on the sale of their goods").

lation[82]) that "[a]nybody who knows the meaning of the word 'monopoly,' as the courts apply it, would not apply it to such a person at all[.]"[83] He went on: "in the case stated *the gentleman has not any monopoly at all*. . . . He has not done anything but compete . . . ."[84] Senator George Frisbie Hoar chimed in with the view of the Judiciary Committee, which had written the text of Section 2. To him, "monopoly" meant "the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him."[85] He went on:

> [A] man who *merely by superior skill and intelligence,* a breeder of horses or raiser of cattle, or manufacturer or artisan of any kind, *got the whole business* [= economic monopoly] *because nobody could do it as well as he could* [= through fair competition] *was not a monopolist*, but that [i.e., unless] it involved something like the *use of means which made it impossible for other persons to engage in fair competition* [= exclusion of rivals] like the engrossing, the buying up of all other persons engaged in the same business.[86]

As perfect a picture as one could wish of monopolization's triune character.

2. *The First Generation of Antitrust Litigation*

The early courts appreciated monopolization's three-dimensional nature. First, they saw that the Act was intended to guard against the acquisition and maintenance of monopoly power, and specifically the harms that arise from freedom from competition.[87] It was soon cited for the idea that trusts were a public "evil."[88] This understanding was strengthened by developments in price

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[82] *See* HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 212 (1955).

[83] 21 CONG. REC. 3151 (1890) (statement of Sen. George Edmunds).

[84] *Id.* at 3151–52 (emphasis added).

[85] *Id.* at 3152 (statement of Sen. George Hoar).

[86] *Id.* (emphasis added).

[87] *See, e.g.*, Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 50 (1911) (noting fear that concentrated economic power "would be exerted to oppress individuals and injure the public"); N. Sec. Co. v. United States, 193 U.S. 197, 339 (1904); United States v. Am. Naval Stores Co., 172 F. 455, 458 (C.C.S.D. Ga. 1909); *see also, e.g.*, ARTHUR J. EDDY, 2 THE LAW OF COMBINATIONS: EMBRACING MONOPOLIES, TRUSTS, AND COMBINATIONS OF LABOR AND CAPITAL; CONSPIRACY, AND CONTRACTS IN RESTRAINT OF TRADE 1331 (1901) (explaining anti-combination measures are intended "to protect the consumer against maintenance of price at abnormal levels").

[88] *See* Am. Biscuit & Mfg. Co. v. Klotz, 44 F. 721, 725 (C.C.E.D. La. 1891); *see also, e.g.*, Pearsall v. Great N. Ry. Co., 161 U.S. 646, 676 (1896) ("There is, and has been for the past 300 years, both in England and in this country, a popular prejudice against monopolies in general, which has found expression in innumerable acts of legislation. We cannot say that such prejudice is not well founded.").

theory illuminating the relationship between competition, market power, and consumer harm.[89]

Second, the courts generally understood that the target was not just monopoly power, but the monopolist's use of exclusionary restraints augmenting it.[90] When the term "monopolization" was applied to collusion, such behavior typically included measures to exclude third parties: for example, in *United States v. Jellico Mountain* in 1891, the term "monopolization" was applied to a cartel protected by exclusivity commitments;[91] likewise, in *United States v. Hopkins* in 1897, a district court concluded that a cartel was "a combination to restrict, control, and *monopolize*" when supported by a boycott.[92] Exclusion was contrasted with mere competitive failure.[93]

Third, courts also appreciated the third dimension of monopolization: congressional intent to avoid punishing the attainment of monopoly through faultless means. The court in *United States v. American Naval Stores Co.* captured it neatly:

> Since the size of the business alone is not necessarily illegal, it is the crushing of competition, *by means of force, threats, intimidation, fraud, or artful and deceitful means and practices*, which violates the law. . . . The size of business, and the gaining of business popularity, fair dealing, sagacity, foresight, and *honest business methods*, even if it should result in acquiring the business of competitors, would not make an illegal monopoly.[94]

Numerous other courts made the same point.[95] The end of antitrust's first generation in the courts came in 1911 with—of course—the Supreme Court's

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[89] *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937, 218 (1991).

[90] *See, e.g.*, United States v. MacAndrews & Forbes Co., 149 F. 823, 834 (C.C.S.D.N.Y. 1906).

[91] United States v. Jellico Mountain Coal & Coke Co., 46 F. 432, 436 (C.C.M.D. Tenn. 1891).

[92] United States v. Hopkins, 82 F. 529, 535–36 (C.C.D. Kan. 1897) (emphasis added), *rev'd on other grounds*, 171 U.S. 578 (1898); *see also* W.W. Montague & Co. v. Lowry, 193 U.S. 38, 46 (1904) (condemning cartel supported by exclusionary restraints); Anderson v. United States, 171 U.S. 604, 619 (1898) (stating that the agreement lacked "every ingredient of monopoly" in part because "[e]very one can become a member"); *In re* Greene, 52 F. 104, 117 (C.C.S.D. Ohio 1892) (noting there is no illegality when customers retained "perfect liberty" to deal with rivals).

[93] *See, e.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323 (1897) ("In any great and extended change in the manner or method of doing business it seems to be an inevitable necessity that distress, and, perhaps, ruin, shall be its accompaniment, in regard to some of those who were engaged in the old methods. . . . It is wholly different, however, when such changes are effected by combinations of capital whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold[.]").

[94] United States v. Am. Naval Stores Co., 172 F. 455, 458–59 (C.C.S.D. Ga. 1909) (emphasis added).

[95] *See, e.g.*, Bement & Sons v. Nat'l Harrow Co., 186 U.S. 70, 93 (1902) (explaining liberties of patentholder); *Trans-Missouri Freight*, 166 U.S. at 299 (discussing liberties to price, price-discriminate, and refuse to deal); *In re Greene*, 52 F. at 115–16 (C.C.S.D. Ohio 1892) (stating

decision in *Standard Oil Co. of New Jersey v. United States*, in which the Department of Justice challenged an array of anticompetitive and exclusionary practices by the Standard Oil trust.[96] I will resist the temptation to tumble into that rabbit-hole, other than to point out that, in summarizing the Court's lengthy decision, Chief Justice White emphasized each element of our framework: (1) Standard Oil had by its scheme achieved "greater power . . . than would otherwise have arisen" (i.e., had augmented its monopoly power); (2) it had done so "not as a result of normal methods of industrial development" (i.e., through unfair means); and (3) its actions formed part of a scheme for "excluding others from the trade" (i.e., exclusion).[97] Monopolization was three-dimensional from the start.

B. Monopolization's Moral Triple Helix

No part of monopolization's threefold framework was truly original with the 51st Congress. Each strand of the triple helix was deeply grounded in American thinking and writing about the morality and legality of commerce. What follows, of course, is far from exhaustive: I claim only that the three themes that I am foregrounding are important, and strikingly consistent, focal points in the intellectual heritage of monopolization.[98]

1. *The Harms of Monopoly*

The most straightforward of the three strands—concern with the harmful effects of monopoly power—had been widely if generally understood long before 1890. Although technical formulations of the relationship between competition, market power, and price were still emerging at the end of the 19th century,[99] the general tendency of monopoly toward higher price, worse quality, and scarcity had long been known. In no less a year than 1776 had Adam Smith described the tendency of exclusionary rights to increase prices above "natural" levels.[100]

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high market share is not a "monopoly" absent restraints on rivals); *id.* at 115 (positing no congressional intent to prohibit acquisition of market power by "legitimate means and lawful methods"); *see also* United States v. Am. Tobacco Co., 221 U.S. 106, 180 (1911) ("[T]he words 'restraint of trade' should be given a meaning which would not destroy the individual right to contract[.]"); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 78 (1911) ("[O]ne of the fundamental purposes of the [Sherman Act] is to protect, not to destroy, rights of property.").

[96] *Standard Oil*, 221 U.S. at 1, 31.

[97] *Id.* at 75.

[98] Citations to correspondence in this section are, unless otherwise attributed, to the superb database maintained by the National Archives at founders.archives.gov.

[99] HOVENKAMP, *supra* note 89, at 216–21, 273–74.

[100] 1 ADAM SMITH, THE WEALTH OF NATIONS bk. I, ch. VII (Edwin Cannan ed., Univ. of Chicago Press 1976) (1776). Smith's work was known, and well regarded, by the Founders. *See, e.g.*, Samuel Fleischacker, *Adam Smith's Reception Among the American Founders, 1776–1790*, 59 WM. & MARY Q. 897, 903 (2002).

The Founders treated this relationship as a fact of life. James Madison wrote in an essay that "[t]he spirit of monopoly" had created "an artificial scarcity of commodities wanted for public use, the consequence of which has been an increase of their price"[101]; Alexander Hamilton's *Report on Manufactures* argued that, while tariffs limit competition in the short term, "internal competition . . . soon does away every thing like monopoly, and by degrees reduces the price of the article to the minimum of a reasonable profit on the capital employed"[102]; and even Washington himself, while in the field with the Revolutionary army, despaired of "the artificial scarcity created by monopolies."[103] When negotiating trade with Prussia; Benjamin Franklin, Thomas Jefferson, and John Adams rhapsodized that "[a] free competition between buyers & sellers, is the most certain means of fixing the true worth of merchandize," while monopoly rights were "the most powerful engine ever employed for the suffocation of commerce."[104]

Distaste for monopoly power was embroidered throughout the commercial life of the young Republic. When exclusive rights were granted to private persons, the result was often popular complaint.[105] And efforts to ameliorate the harms of monopoly have been a steady theme in economic regulation, from early efforts at price and wage control[106] to state railroad rate regulations.[107]

Nor were these concerns narrowly "economic." Opposition to monopoly has long been entwined with fears of its tendency toward inequality and corruption.[108] Flagrant abuses by "big rail" and "big oil," including outright brib-

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101 James Madison, *Money*, *in* 21 FED. RSRV. BANK OF MINNEAPOLIS Q. REV. 6 (1997) (publishing essay of around Sept. 1779–Mar. 1780).

102 ALEXANDER HAMILTON, U.S. DEP'T OF THE TREASURY, DOC. NO. 172, REPORT ON THE SUBJECT OF MANUFACTURES (Dec. 5, 1791).

103 Letter from George Washington to Henry Laurens (Nov. 11, 1778); *see also, e.g.*, Letter from George Washington to Moustier (Aug. 17, 1788) (commenting that "even partial monopolies are pernicious").

104 Letter from John Adams, Ben Franklin & Thomas Jefferson, American Comm'rs to Baron von Thulemeier (Mar. 14, 1785).

105 *See* Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983, 1109 et seq. (2013); THORELLI, *supra* note 82, at 37; *see also* Camblos v. Philadelphia & R.R. Co., 4 F. Cas. 1089, 1101 (C.C.E.D. Pa. 1873) ("[A] wiser policy and a decent regard for public interests, and for public opinion, prevent any direct and avowed establishment of monopolies . . . .").

106 *See, e.g.*, Jonathan Grossman, *Wage and Price Controls During the American Revolution*, 96 MONTHLY LAB. REV. 3 (1973); Breck P. McAllister, *Price Control by Law in the United States: A Survey*, 4 L. & CONTEMP. PROBS. 273 (1937).

107 *See, e.g.*, HOVENKAMP, *supra* note 89, at chs. 12–13; RICHARD FRANKLIN BENSEL, THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877–1900, 117–24 (2000).

108 *See, e.g.*, Pearsall v. Great N. Ry. Co., 161 U.S. 646, 677 (1896) ("There are . . . thought to be other dangers to the moral sense of the community incident to such great aggregations of wealth[.]").

ery, poured fuel on this fire in the years approaching the passage of the Sherman Act.[109]

2. *The Right to Compete*

Since long before 1890, American legal and political thought had prized the liberty of the citizen to undertake profitable economic activity—even at the expense of others, and even to the point of amassing great wealth.

It is well known that the language of Lockean "natural" economic rights of property and exchange—and claims about the pre-political status of such rights—have had an important place in the vocabulary of American political thought since before the Revolution.[110] More concretely, American lawyers and writers had long believed that an individual right to engage in commerce was protected as a matter of fundamental law.[111] And indeed the English common law had afforded a modest presumption against restrictions of such freedom, and provided a basis for limiting or invalidating certain private restraints.[112] It also provided some grounds to challenge patent monopolies (intended to incentivize innovations, but often abused[113]), although the strength of this mixed tradition was routinely overstated.[114] After the Civil War, this tradition resonated strongly with the emerging "free labor" movement.[115]

In the earliest years of the American project, unrestrained commercial freedom was still marked by an unwelcome moral odor: exploitation, including excessive prices, had long been condemned by European moralists, and this tradition informed various early American efforts to limit prices and wages.[116] But the sense that profit-seeking should be seriously condemned did not long

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[109] THORELLI, *supra* note 82, at 85–91; Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America's Infrastructure*, 95 MARQ. L. REV. 1151, 1156–58 (2012).

[110] *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 155 (1992); James W. Ely, Jr., *"To Pursue Any Lawful Trade or Association": The Evolution of Unenumerated Rights in the Nineteenth Century*, 8 U. PA. J. CONST. L. 917, 918–21 (2006).

[111] *See, e.g.*, THORELLI, *supra* note 82, at 51 (noting this belief).

[112] A leading early example was *Dyer's Case* (1415).

[113] *See, e.g.*, Tailors of Ipswich, 77 Eng. Rep. 1218 (1614); Darcy v. Allin, 77 Eng. Rep. 1260 (1603).

[114] This practice owed much to Edward Coke. *See* 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 181–85 (ch. 85) (W. Clarke & Sons 1817) (1644).

[115] HOVENKAMP, *supra* note 89, at 222.

[116] *See, e.g.*, Grossman, *supra* note 106; E.A.J. JOHNSON, AMERICAN ECONOMIC THOUGHT IN THE SEVENTEENTH CENTURY 127, 206 (1961); *see also* THOMAS AQUINAS, 2 THE SUMMA THEOLOGICA, Second Part of the Second Part, Q.77, arts. 1, 4 (Fathers of the Eng. Dominican Province trans., Benziger Bros. ed., 1947); ARISTOTLE, *Nichomachaean Ethics Book V*, *in* 2 THE COMPLETE WORKS OF ARISTOTLE 5 (W.D. Ross trans., Jonathan Barnes ed., 1984).

survive. By the Revolution, the moral taint of profit was already fading even in England, as part of what E.P. Thompson has called a general "demoralizing of the theory of trade and consumption."[117] Locke himself, in a 1695 essay, defined a "just" price as a market rate, disclaiming any limit on just profits.[118] Even Jefferson, leading antimonopolist as he was, saw no wrong in exploiting a lawful monopoly.[119]

From the 18th century onward, moral theorists began to articulate ways in which profit-seeking could be thought actively virtuous, and to lay the foundation for the exceptional place of the market in moral philosophy.[120] In 1714 Bernard Mandeville had argued that private vice might make for public virtue, as individual self-interested work led to the division of labor and the greater satisfaction of wants.[121] This idea flowed through the work of Hume[122] and Smith,[123] and resonated with the obvious truth that self-interest was helping to build America.[124]

Competitive freedom had a political valence as well as a legal and moral one. As the 19th century unfolded, the claim of freedom to pursue gain through one's own labor drew strength from emerging "Jacksonian" concerns about the special-interest capture of the state.[125] Jackson himself proclaimed that "[i]f we can not . . . make our Government what it ought to be, we can at least take a stand against all new grants of monopolies and exclusive privileges[.]"[126] It was but a short step to the idea that the state ought to be "neutral," abstaining equally from oppressing the poor and expropriating the rich.[127] This, of course, would become the birthing vibe of constitutional lib-

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[117] E.P. Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, 50 PAST & PRESENT 76, 89 (1971). I owe this reference to Sanjukta Paul.

[118] John Locke, VENDITIO (1695), *reprinted in* LOCKE: POLITICAL ESSAYS 339 (Mark Goldie ed., Cambridge Univ. Press 1997).

[119] *See* Letter from Thomas Jefferson to P. & V. French & Nephew (July 13, 1785) ("[W]hile the purchase of tobacco is monopolized by a company . . . they doubtless are at liberty to fix such places and terms of purchase as may enable them to make good their engagements with government.").

[120] *See generally* BERNARD HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER (2012).

[121] BERNARD MANDEVILLE, THE FABLE OF THE BEES: OR, PRIVATE VICES PUBLICK BENEFITS (1714).

[122] *See, e.g.*, 3 DAVID HUME, A TREATISE OF HUMAN NATURE 342–45 (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press 2007) (1740).

[123] SMITH, *supra* note 100, bk. IV, ch.II.9 at 456.

[124] *See, e.g.*, JOHNSON, *supra* note 116, at 86–87.

[125] *See* Herbert Hovenkamp, *Inventing the Classical Constitution*, 101 IOWA L. REV. 1, 27, 52–53 (2015).

[126] Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983, 1027 (2013).

[127] *See* HORWITZ, *supra* note 110, at 23; *see also, e.g.*, John F. Dillon, *Property—Its Rights and Duties in Our Legal and Social Systems*, 29 AM. L. REV. 161, 173 (1895) ("Discriminating

erty of contract,[128] resonating with prominent (but increasingly controversial[129]) theories disfavoring interference with "natural" inequalities.[130]

But this view contained the seeds of its own negation. As concentrations of private economic power began to emerge—supported by ostensibly "neutral" property and contract law—fear of private concentration gradually supplanted fear of direct state action.[131] This was fueled by the dawning recognition that the "neutrality" of government involved extensive sponsorship of private actors (through subsidies, outright corruption, and the common law itself),[132] by rising demand for protection against private discrimination,[133] and by unprecedented industrial scale.[134] The new inequalities sharply challenged the premise of equal bargaining power in classical thought.[135] In time, they would encourage legal-realist insights that the law itself concealed dynamics of interest and coercion.[136]

A divide was emerging between the "conservative" and "formalist" jurists who believed that neutral law was possible and necessary,[137] and "realists" and "progressives" who denied it.[138] A similar tension—between the conservative imperative to protect "natural" competitive rights, and the progressive project of attempting to manage the resulting harms—was forged into the

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legislation for the benefit of the rich against the poor, or in favor of the poor against the rich, is equally wrong and dangerous.").

[128] *See, e.g.*, Allgeyer v. Louisiana, 165 U.S. 578, 590–91 (1897); Frisbie v. United States, 157 U.S. 160, 165 (1895); Loan Ass'n v. Topeka, 87 U.S. 655 (1875).

[129] HOVENKAMP, *supra* note 89, at 182.

[130] *See* THORELLI, *supra* note 82, at 109, 113.

[131] Claudio J. Katz, *Protective Labor Legislation in the Courts: Substantive Due Process and Fairness in the Progressive Era*, 31 L. & HIST. REV. 275, 285 (2013); *see also* HENRY C. ADAMS, THE RELATION OF THE STATE TO INDUSTRIAL ACTION (1887) 59–64, 82–84; HORWITZ, *supra* note 110, at 66, 80–85.

[132] *See*, *e.g.*, Calabresi & Leibowitz, *supra* note 126, at 1023–42 ("partial" laws); THORELLI, *supra* note 82, at 85–91 (outright corruption); HORWITZ, *supra* note 110, at 36 (hand of state policy in "private" law).

[133] *See*, *e.g.*, Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205 (2014).

[134] This was fueled by industrial and technological change, the rise of general incorporation statutes, and a grand merger wave. *See, e.g.*, BENSEL, *supra* note 107, ch. 5; NAOMI R. LAMOUREUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904 (1985).

[135] HORWITZ, *supra* note 110, at 33–34.

[136] *See* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

[137] HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 49 (1993) (noting struggles to distinguish "neutral" from "class" legislation).

[138] Thomas B. Colby & Peter J. Smith, *The Return of* Lochner, 100 CORNELL L. REV. 527, 541–43 (2015); James W. Ely, Jr., *The Progressive Era Assault on Individualism and Property Rights*, 29 SOC. PHIL. & POL'Y 255, 255–58 (2012); Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 N.Y.U. J.L. & LIBERTY 115, 155–57 (2010).

idea of monopolization at the heart of the Sherman Act.[139] We might justly call it the original antitrust paradox.

3. *The Wrong of Exclusion*

American writers on commerce had long reserved particular venom for exclusion: that is, the suppression of the ability or incentive to compete of persons willing and able to do so. The most prominent source of such restraints in early American history was, of course, the British Crown, with its patent monopolies and exclusive trading charters. The colonies had chafed under imperial restrictions;[140] once independence was won, many in the Founding generation doubted the wisdom and legality of state restrictions on commercial freedom.[141]

Jefferson was a particularly committed opponent of such government restraints: he repeatedly argued that the Constitution should contain an antimonopoly clause,[142] and doubted that monopolies were worth having even for inventions.[143] Madison supported patents for innovation only cautiously: he insisted that they should be subject to revocation by the state, at a price fixed in advance, to limit the danger they could pose to the public.[144]

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[139] *See supra* Part II.A.

[140] *See, e.g.*, THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA 23 (1774) ("[L]et them not think to exclude us from going to other markets to dispose of those commodities which they cannot use, or to supply those wants which they cannot supply.").

[141] *See, e.g.*, Letter from James Madison to James Monroe (Aug. 7, 1785), *in* 8 THE PAPERS OF JAMES MADISON, 10 MARCH 1784 – 28 MARCH 1786, 333–36 (Robert A. Rutland & William M. E. Rachal eds., 1973) ("Much indeed is it to be wished, as I conceive, that no regulations of trade, that is to say, no restriction or imposts whatever, were necessary. A perfect freedom is the System which would be my choice."); Undated Note of Alexander Hamilton (Mar. 31, 1784), *in* 3 THE PAPERS OF ALEXANDER HAMILTON, 1782–1786, 528 (Harold C. Syrett ed., 1962) ("I have considered the Patent to Mr. Woolley and am in doubt whether it is valid or not so far as it gives an exclusive right of ferriage; as this may be construed into a monopoly.").

[142] *See, e.g.*, Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *in* 10 THE PAPERS OF JAMES MADISON, 27 MAY 1783 – MARCH 1788, 335–39 (Robert A. Rutland et al., eds., 1977) (Constitution); Letter from Thomas Jefferson to Alexander Donald (Feb. 7, 1788), *in* 12 THE PAPERS OF THOMAS JEFFERSON, 7 AUGUST 1787 – 31 MARCH 1788, 570–72 (Julian P. Boyd ed., 1955) (same); Letter from Thomas Jefferson to C.W.F. Dumas (Feb. 12, 1788), *in* 12 THE PAPERS OF THOMAS JEFFERSON, 7 AUGUST 1787 – 31 MARCH 1788, 583–84 (Julian P. Boyd ed., 1955) (same); Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON, 27 MARCH 1789 – 30 NOVEMBER 1789, 364–69 (Julian P. Boyd ed., 1958) (Bill of Rights).

[143] Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* 6 THE PAPERS OF THOMAS JEFFERSON, 11 MARCH – 27 NOVEMBER 1813, 379–86 (J. Jefferson Looney ed., 2009) ("[I]t may be observed that the nations which refuse monopolies of invention, are as fruitful as England in new and useful devices."); *see also* Letter from John Adams to Benjamin Waterhouse (Sept. 19, 1805) ("May it not be a question whether, the lucrative monopolies called Patents, have done more hurt than good?").

[144] James Madison, Excerpt from the Detached Memoranda (ca. Jan. 31, 1820), *in* 1 THE PAPERS OF JAMES MADISON, RETIREMENT SERIES, 4 MARCH 1817 – 31 JANUARY 1820, 600–27 (David B. Mattern, J.C.A. Stagg, Mary Parke Johnson & Anne Mandeville Colony eds., 2009)

More generally, exclusive commercial privilege was associated with a tradition that the Revolution had repudiated. The guilds never took root in America, and as Gordon Wood writes, "storms of protest" greeted efforts to confer exclusive commercial rights, as they were "repugnant to the spirit of American republicanism, which does not admit of granting peculiar privileges to any body of men."[145] The Old World powers were routinely identified with the vilified "spirit of Monopoly" in contrast to America's republican liberties.[146] Madison famously railed: "That is not a just government . . . where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations[.]"[147]

Throughout this period, exclusion—in the elusive sense of a burden on entry or competition, as distinguished from mere competitive loss—was widely understood as a definitional element of monopoly. For example, in defending the national bank, Hamilton argued:

> [T]he bill neither prohibits any State from erecting as many banks as they please, nor any number of Individuals from associating to carry on the business: & consequently is free from the charge of establishing a monopoly: for monopoly implies a *legal impediment* to the carrying on of the trade by others than those to whom it is granted.[148]

("In all cases of monopoly, not excepting those specified in favor of Authors & inventors, it would be well to reserve to the State, a right to terminate the monopoly by paying a specified and reasonable sum."); Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 11 THE PAPERS OF JAMES MADISON, 7 MARCH 1788 – 1 MARCH 1789, 295–300 (Robert A. Rutland & Charles F. Hobson eds., 1977) ("With regard to monopolies they are justly classed among the greatest nuisances [sic] in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced? Would it not suffice to reserve in all cases a right to the public to abolish the privilege at a price to be specified in the grant of it?"); *see also* James Madison, Bill for Granting James Rumsey a Patent for Ship Construction (Nov. 11, 1784), *in* 8 THE PAPERS OF JAMES MADISON, 10 MARCH 1784 – 28 MARCH 1786, 131–33 (Robert A. Rutland & William M.E. Rachal eds., 1973).

145 GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 319 (1991) (cleaned up); *see also* J.A.C. Grant, *The Gild Returns to America, I*, 4 J. POL. 303, 309 (1942).

146 *See, e.g.*, Letter from Charles Pinckney to James Madison (Sept 14., 1801), *in* 2 THE PAPERS OF JAMES MADISON, SECRETARY OF STATE SERIES, 1 AUGUST 1801 – 28 FEBRUARY 1802, 112–13 (Mary A. Hackett et al. eds., 1993) (noting "the astonishing spirit of Monopoly" in England); Thomas Jefferson, Enclosure Jefferson's Outline of Policy on the Mississippi (Aug. 2 1790), *in* 17 THE PAPERS THOMAS JEFFERSON 6 JULY – 3 NOVEMBER 1790, 113–17 (Julian P. Boyd ed., 1965) ("[Great Britain's] governing principles are Conquest, Colonization, Commerce, Monopoly."); Letter from John Jay to Thomas Jefferson (Apr. 24, 1788), *in* 4 THE SELECTED PAPERS OF JOHN JAY 1785–1788, 698–99 (Elizabeth M. Nuxoll ed., 2015) ("The Spirit of Monopoly and Exclusion, has prevailed in Europe too long to be done away at once"); *see also* American Commissioners to De Thulemeier (Mar. 14, 1785), *in* 8 THE PAPERS OF THOMAS JEFFERSON 25 FEBRUARY – 31 OCTOBER 1785, 26–33 (Julian P. Boyd ed., 1953) (criticizing reservation of exclusive rights "to particular persons or descriptions of persons" as fruit of "a very remote & unenlightened period").

147 James Madison, *Property* (Mar. 29, 1792), *in* 1 THE FOUNDERS' CONSTITUTION: MAJOR THEMES 598 (Phillip B. Kurland & Ralph Lerner eds., 1987).

148 Alexander Hamilton, Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank (Feb. 23, 1791).

Early dictionaries make the same point.[149]

Exclusion was *also* often regarded as a precondition for illegality of what we would today call collusion. At common law, cartelization was not usually unlawful unless further acts were done to deter competition.[150] Labor combinations and strikes, for example, were generally lawful unless the workers took action to prevent strikebreaking by others.[151] This history remains visible in our use of the phrase "*restraint* of trade" to describe illegal collusion.[152]

By 1890, the freedom to compete robustly with rivals had for centuries coexisted uneasily in the fabric of tort law with the idea of the wrongfulness of exclusion. The common law had long distinguished between mere competitive injury, which was not actionable, and conduct that was tainted with some independent impropriety—such as the violation of vested or customary rights—which could result in liability. In 1309, for example, the Prior of Coventry recovered in trespass from a seller who had competed outside the Prior's market, violating his customary and exclusive rights.[153] That case was distinguished a century later when the proprietors of a school sued a competitor for eating into their profits, on the ground that harm from competition was not actionable.[154] But between the extremes of mere competition and independently actionable nuisance, liability for disadvantaging a rival was a quagmire.[155]

By 1890 it could not be said that the common law, or anyone else, had theorized a line between "mere competition" and improper exclusion in terms that the Sherman Act legislators could be said to have known and adopted. The idea of freedom to compete—necessarily at the expense of rivals—and the idea of the wrongness of market exclusion simply coexisted: and *both* were woven into the federal antitrust statute. It would be up to the courts to define an accommodation between them.

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[149] *See, e.g.*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. rev. 1768) (defining "monopoly" as an "exclusive privilege of selling any thing"); 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defining "monopoly" as, in part, "[t]he sole power of vending any species of goods," whether obtained by private misconduct or public license).

[150] *See, e.g.*, HOVENKAMP, *supra* note 89, at 215; *see also* Deuber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co., 66 F. 637, 644 (2d Cir. 1895) (denying liability for price fixing absent exclusion).

[151] HOVENKAMP, *supra* note 89, at 214–15; WILLIAM HOWARD TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 97 (1914).

[152] *See, e.g.*, N. Sec. Co. v. United States, 193 U.S. 197, 404 (1904) (Holmes, J., dissenting) (emphasis added).

[153] Prior of Coventry v. Grauntpie, B. & M. 669, 669–71 (1309).

[154] Hamlyn v. More, B. & M. 671 (1410).

[155] *See, e.g.*, Tarleton v. McGawley, 170 Eng. Rep. 153 (1794); Garret v. Taylor, 79 Eng. Rep. 485 (K.B. 1621); Samford's Case, B. & M. 673 (1584); *see also* Letwin, *supra* note 76; Hazel Carty, *The Economic Torts and English Law: An Uncertain Future*, 95 KY. L.J. 845, 848 (2007).

C. A Better Doctrinal Framework

Seeing these three concerns as monopolization's foundation stones helps us to untangle some of the riddles of existing Section 2 doctrine, and to reformulate it in a way that more accurately captures the distinct inquiries that should lie at the heart of every monopolization case.

1. *Dimension One: Exclusion*

As we have already seen, the idea of exclusion—a restraint on rivals' ability or incentive to compete—was inherent in the term "monopoly" long before Senator Sherman introduced his bill.[156] Exclusion continues to be a definitional element of monopolization law, distinct from concern with monopoly (or economists' "market power"); impacts on price, etc.; and distinct from merely losing sales (which need not diminish ability or incentive to compete).

Exclusion need not be complete: material burden is sufficient.[157] In easy cases, a defendant excludes directly;[158] more commonly, this happens indirectly, by changing trading partners' or regulators' incentives. In exclusivity cases, for example, a monopolist changes the incentives of suppliers or distributors to discourage dealing with rivals.[159] Sham practices involving governmental (or standard setting) processes work the same way.[160] Impairment of *incentive* and of *ability* are equally exclusionary: acquisitions are exclusionary,[161] as are pay-for-delay deals.[162] A $50 threat and a $50 bribe are equally pernicious.

It is in this sense, and only this sense, that an *actual* "anticompetitive effect" is required for monopolization liability. To be sure, as Judge Ginsburg

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[156] *See supra* notes 77–80 and accompanying text.

[157] *See, e.g.*, Hovenkamp, *supra* note 28, at 159–60; United States v. Microsoft Corp., 253 F.3d 34, 64 (D.C. Cir. 2001) ("[A]lthough Microsoft did not bar its rivals from all means of distribution, it did bar them from the cost-efficient ones").

[158] *See, e.g.*, Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

[159] *See, e.g.*, United States v. Dentsply Int'l, Inc., 399 F.3d 181, 192 (3d Cir. 2005); McWane, Inc. v. FTC, 783 F.3d 814, 834 (11th Cir. 2015); *see generally* Krattenmaker & Salop, *supra* note 8.

[160] *See, e.g.*, Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177–78 (1965); FTC v. AbbVie Inc., 976 F.3d 327, 346 (3d Cir. 2020).

[161] *See, e.g.*, FTC v. Facebook, Inc., No. 20-3590, 2022 WL 103308, at *11 (D.D.C. Jan. 11, 2022); United States v. Grinnell Corp., 384 U.S. 563, 576 (1966); United States v. S. Pac. Co., 259 U.S. 214, 230–31 (1922); United States v. Reading Co., 253 U.S. 26, 63 (1920); United States v. Union Pac. R. Co., 226 U.S. 61, 85–86 (1912); United States v. Am. Tobacco Co., 221 U.S. 106, 182–83 (1911); Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 354 (1909); N. Sec. Co. v. United States, 193 U.S. 197, 343 (1904).

[162] The complaint in *Actavis* charged monopolization as well as restraint of trade. *See* Second Amended Complaint ¶¶ 109–112, FTC v. Watson Pharm., Inc., No. 1:09-CV-00955 (N.D. Ga. May 28, 2009) (*Actavis*).

and Koren Wong-Ervin have pointed out, the D.C. Circuit in *Microsoft* repeatedly emphasized the "anticompetitive effect" of the defendant's practices.[163] And the *Microsoft* court said that this involved "harm to the competitive process"—a phrase with a notoriously elusive meaning.[164]

But the meaning of the term "anticompetitive effect" as actually applied in *Microsoft* is very far from clear. In general, the court appears to have used that term to mean either: (1) a meaningful impact on potential rivals' ability or incentive to compete (i.e., exclusion), or (2) a bare inference from that fact.[165] The court did *not* find that the plaintiff had proven an actual impact on overall competitive conditions in the operating system market that Microsoft was alleged to be monopolizing (i.e., anything to do with the nature, magnitude, or likelihood of any actual contribution to monopoly power or effects on ultimate market outcomes like price or output of operating systems) in order to determine whether an "anticompetitive effect" had been shown in the market as a whole. In other words, the court used the term "anticompetitive effect" in many instances to mean harm to an individual competitor.

A claim of exclusion presupposes that the plaintiff can identify a baseline or counterfactual against which exclusionary impact can be measured. This baseline is both descriptive, in that it makes a claim about what the defendant would in fact have had the ability and incentive to do as an alternative to the challenged conduct, and normative, in that the purported antitrust wrong lies in the defendant's deviation from that alternative course. In many cases, such as a traditional raising-rivals'-costs challenge, this baseline might be obvious:

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[163] *See* Ginsburg & Wong-Ervin, *supra* note 65, at 2–3 (citing United States v. Microsoft, 253 F.3d 34, 58–79 (D.C. Cir. 2001)).

[164] *Microsoft Corp.*, 253 F.3d at 58.

[165] *See, e.g.*, *id.* at 61 (inferring anticompetitive effect from the fact that "the license restriction prevents many OEMs from pre-installing a rival browser" without separately evaluating the resulting impact on operating system competition); *id.* at 62 ("The anticompetitive effect of the license restrictions is, as Microsoft itself recognizes, that OEMs are not able to promote rival browsers, which keeps developers focused upon the APIs in Windows."); *id.* at 63 (noting the "marginal anticompetitive effect of prohibiting the OEMs from substituting a different interface automatically upon completion of the initial boot process"); *id.* at 65 (noting, under the subtitle "Anticompetitive effect of integration," that "[the relevant conduct] reduces the usage share of rival browsers not by making Microsoft's own browser more attractive to consumers but, rather, by discouraging OEMs from distributing rival products. . . . Because Microsoft's conduct, through something other than competition on the merits, has the effect of significantly reducing usage of rivals' products and hence protecting its own operating system monopoly, it is anticompetitive"); *id.* at 72 ("Because, by keeping rival browsers from gaining widespread distribution (and potentially attracting the attention of developers away from the APIs in Windows), the deals have a substantial effect in preserving Microsoft's monopoly, we hold that plaintiffs have made a prima facie showing that the deals have an anticompetitive effect."). The crucial point is that in each of these instances, the "anticompetitive effect" is either an incidence on rivals or a bare inference from that incidence. In no case does the court seem to be independently testing or evaluating the magnitude or likelihood of any contribution of the defendant's conduct to a change in competitive conditions in the operating system market.

simply the hypothetical world in which the defendant did not engage in the challenged conduct. In more complicated cases, though, a plaintiff may have to plead and prove that in the baseline world, the defendant would have had the ability and incentive to take or continue some affirmative action: making sales to a rival, offering products separately or unconditionally, and so on. Some of these more complicated cases may implicate the competitive privilege, discussed below, while in others it may be hard to show that the defendant would in fact have rationally acted in the manner posited by the plaintiff.[166]

Exclusion is a fairly inclusive criterion, but it is not unbounded. Lost share or lost sales alone—even to the point of market exit—will not satisfy it. In a case of predation, for example, it is satisfied not by rivals' mere loss of share but by their loss of viable scale, or the creation of entry barriers that hinder re-entry, or the generation of other obstacles that impede their future competitiveness.

Rambus exemplifies the exclusion requirement.[167] Rambus had not disclosed its patent portfolio to a standard-setting organization, despite its obligation to do so under the organization's rules: it revealed its intellectual property only after the organization had incorporated it into the standard and thus given Rambus monopoly power.[168] But when the FTC sued, the D.C. Circuit held that Rambus had *not* violated Section 2. The lack of a finding that the deception had actually caused Rambus's IP to be incorporated into the standard—thus impacting rivals' ability or incentive to compete—was fatal.[169] No exclusion; no monopolization.[170]

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[166] I am grateful to Doug Melamed for encouraging me to bring this out more clearly. The dangerous-exclusion framework, as I present it here, applies a fairly broad exclusion test, with privilege limiting the scope of monopolization liability. But the construction of the baseline world requires a plaintiff to focus on the conduct of the defendant rather than the conduct's impact on a rival. It thus approaches the domain of the privilege. Indeed, the privilege can be understood as an effort to capture the idea that in some cases the counterfactual in an exclusion claim can be attacked not just on descriptive grounds, but on normative grounds: that is, on the basis that the defendant ought not be held liable for having acted as it did or for having deviated from a baseline on which it was not required to stay.

[167] Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008).

[168] *Id.* at 459–61.

[169] *Id.* at 463.

[170] *Id.* at 464–67; *see also Microsoft*, 253 F.3d at 71 (stating that "substantial, deleterious impact" on rival is needed).

2. *Dimension Two: Contribution to Monopoly*

It is widely agreed that there must be a "causal link" between the exclusion and the acquisition or maintenance of monopoly power:[171] what is controversial is just how demanding this threshold is.[172]

This threshold is most famously described in the D.C. Circuit's decision in *Microsoft*. As the court explained, it is enough to show that conduct is, in general terms, reasonably capable of making a significant contribution to monopoly:

> Microsoft points to no case, and we can find none, standing for the proposition that, as to § 2 liability in an equitable enforcement action, plaintiffs must present direct proof that a defendant's continued monopoly power is precisely attributable to its anticompetitive conduct. . . . To require that § 2 liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct would only encourage monopolists to take more and earlier anticompetitive action.
>
> Given this rather edentulous test for causation, the question in this case is not whether Java or Navigator would actually have developed into viable platform substitutes, but (1) *whether as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power and* (2) *whether Java and Navigator reasonably constituted nascent threats at the time Microsoft engaged in the anticompetitive conduct at issue.*[173]

The findings of fact in *Microsoft* itself—upon which the entire D.C. Circuit agreed en banc, and without dissent, that causal contribution to monopoly *had* been established—drive this point home. The district court had found that neither of Microsoft's two victims (Netscape's Navigator and Sun's Java) was yet a serious competitor or likely to become such. They were just promising upstarts which could, if successful, have facilitated competition with Microsoft's monopoly. Of Navigator, the court found that it had "the potential" to diminish barriers to entry that protected Microsoft's monopoly; that it was succeeding rapidly in the browser space and was "particularly well positioned" to support competitive offerings; and that Microsoft was "deeply concerned that Netscape was moving its business in a direction that could diminish the applications barrier to entry."[174] Of Java, the court found that the Java ecosystem was being developed with the "ultimate ambition" of allowing cross-platform applications and that that path was plausible; again, the court

[171] *See*, *e.g.*, NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998).

[172] The discussion above focuses on the standard for liability and injunctive relief, not money damages.

[173] *Microsoft*, 253 F.3d at 79 (emphasis added).

[174] United States v. Microsoft Corp., 84 F. Supp. 2d 9, 28–29 (D.D.C. 1999).

emphasized that "Microsoft executives were deeply worried about the potential of [Java] to diminish the applications barrier to entry."[175] The court expressly found that each had "a long way to go before they might imperil the applications barrier to entry."[176] There were no measurable effects on competitive outcomes like price or output in the operating system market.

No one could sensibly claim that in *Microsoft* the evidence showed that it was *more likely than not* that the targets of the conduct would, but for the conduct, have eroded Microsoft's operating system monopoly. Rather, it was and is enough that conduct is, "as a general matter . . . the type of conduct that is reasonably capable of contributing significantly to [monopoly]."[177] This is generally established when the challenged conduct materially softens the competitive threat faced by a monopolist—by a strong impact on one or more important rivals, or by conduct that raises the costs of access to inputs, customers, or distribution for many actual or potential rivals in a manner that softens their ability to exert pressure (i.e., "substantial foreclosure").[178]

Importantly, this precludes—among other things—any strict requirement that a plaintiff must also prove an actual effect on *outcomes* of the competitive process, such as prices, output, or innovation,[179] despite occasional intimations to the contrary.[180] Proof of exclusion and of a tendency to make a sufficient contribution to the dangers of monopoly is sufficient: evidence of outcome effects, as *Microsoft* and other cases show—and as Douglas Melamed and Richard Gilbert have recently underlined[181]—are not required.[182]

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[175] *Id.* at 29–30.

[176] *Id.* at 30.

[177] *Microsoft*, 253 F.3d at 79.

[178] Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961); McWane, Inc. v. FTC, 783 F.3d 814, 835 (11th Cir. 2015); United States v. Dentsply Int'l, Inc., 399 F.3d 181, 191 (3d Cir. 2005).

[179] *See infra* Part II.C.4.

[180] *See, e.g.*, FTC v. Facebook, Inc., No. 20-3590, 2022 WL 103308, at *13 (D.D.C. Jan. 11, 2022) (indicating that "[t]he agency will need to substantiate" allegations of actual quality reductions).

[181] Richard J. Gilbert & A. Douglas Melamed, *Innovation Under Section 2 of the Sherman Act*, 84 ANTITRUST L.J. 1, 10–11 (2021).

[182] *Microsoft*, 253 F.3d at 79; *see also, e.g.*, United States v. Grinnell Corp., 384 U.S. 563 (1966) (affirming monopolization verdict without reference to evidence of competitive outcomes on price or output); Am. Tobacco Co. v. United States, 328 U.S. 781, 810 (1946) ("Neither proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential competitors is essential . . . ."); *McWane*, 783 F.3d at 839 ("While it is true that there could have been other causes for the price behavior, the government need not demonstrate that the Full Support Program was the sole cause—only that the program 'reasonably appeared to be a significant contribution to maintaining McWane's monopoly power.' ") (cleaned up); *Dentsply*, 399 F.3d at 191 (recognizing that the relevant effects test under Section 2, assuming monopoly is established, is "whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit").

To rein in this version of Section 2's causal contribution test, commentators have offered three arguments. The first is that the causal standard in *Microsoft* was unique because of the special facts of that case, including the purported absence of justifications.[183] The second invokes *Rambus* as support for a strict but-for/balance-of-probabilities standard of causation.[184] The third argues that reaching so broadly would make Section 2 more aggressive than the merger control statute—Section 7 of the Clayton Act—when the latter was intended to reach beyond the Sherman Act.[185] We take them in turn.

First, the claim that the reasonably-capable/significant-contribution standard is original with *Microsoft* and unique to its peculiar facts is so plainly incorrect that it is bewildering to find it made at all. It is decidedly *not* novel with *Microsoft*: it is found in the Areeda treatise at least as early as 1978 and was widely adopted in federal law by multiple circuit courts of appeal in the early 1980s.[186] Moreover, it has been repeatedly reaffirmed, including by the First,[187] Third,[188] Fifth,[189] Sixth,[190] Tenth,[191] and Eleventh Circuits.[192] Certainly, this is not a special standard crafted for *Microsoft*. And, as Melamed notes, "the *Microsoft* court did not suggest anywhere in its lengthy opinion that its discussion of injury to competition and causation applied only to conduct found to have no benefits at all."[193]

Second, the argument from *Rambus* fails too. A direct conflict between *Rambus* and *Microsoft* would be bizarre: *Microsoft* was decided en banc; *Rambus* by a panel of the same court a few years later. It is hard to believe

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[183] Ginsburg & Wong-Ervin, *supra* note 65, at 39; Jonathan Jacobson & Christopher Mufarrige, *Acquisitions of "Nascent" Competitors,* ANTITRUST SOURCE (Aug. 2020), www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/2020/august-2020/aug20_full_souce.pdf.

[184] Ginsburg & Wong-Ervin, *supra* note 65, at 4; Muris & Nuechterlein, *supra* note 65, at 36–37.

[185] Ginsburg & Wong-Ervin, *supra* note 65, at 2; Muris & Nuechterlein, *supra* note 65, at 38–39.

[186] Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 230 (1st Cir. 1983); S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co., 740 F.2d 980, 999 n.19 (D.C. Cir. 1984); C.E. Servs., Inc. v. Control Data Corp., 759 F.2d 1241, 1247 n.7 (5th Cir. 1985); Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co., No. 82-2105, 1986 WL 30775, at *7 (10th Cir. Mar. 31, 1986), *modified on reh'g*, 817 F.2d 639 (10th Cir. 1987).

[187] Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1182 (1st Cir. 1994).

[188] United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005).

[189] Retractable Techs., Inc. v. Becton Dickinson & Co., 842 F.3d 883, 891 (5th Cir. 2016).

[190] Realcomp II, Ltd. v. FTC, 635 F.3d 815, 830 (6th Cir. 2011) (applying *Microsoft* test for causation).

[191] Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Pro. Publ'ns, Inc., 63 F.3d 1540, 1553 (10th Cir. 1995).

[192] McWane, Inc. v. FTC, 783 F.3d 814, 833 (11th Cir. 2015) (applying *Microsoft* test for causation).

[193] A. Douglas Melamed, Mergers Involving Nascent Competition 11 (Mar. 2, 2022) (unpublished manuscript) (on file with author).

that the *Rambus* panel intended to abrogate *Microsoft* or that it was unaware of what *Microsoft* had said about causation. The possible tension disappears when *Rambus* is read as a case dealing with exclusion—whether Rambus had burdened anyone's ability or incentive to compete—and *Microsoft* as focused on contribution to monopoly as a *consequence* of exclusion.[194] (Of course, on a broader and less charitable reading of *Rambus*, it was simply a regrettable and puzzling departure from the orthodoxy expressed in *Microsoft*.)

Third—while Section 7 was indeed intended to reach beyond Section 2—what I describe here as dangerous exclusion should, when accomplished by acquisition, violate *both* provisions of law. This is consistent with the purpose of Section 7, which was clearly aimed at incipient harms.[195] The statute forbids mergers whose effect "may be" substantially to lessen competition, or to "tend to create a monopoly."[196] Acquisitions by a monopolist that are reasonably capable of contributing significantly to monopoly presumptively violate this standard.[197] To the extent that existing merger law is otherwise, the problem seems to be judicial resistance to Congress's explicit direction.[198] That is bad enough, but to push Section 2 into error for the sake of consistency would be worse.

Finally, the reading I offer here has the happy effect of bringing Section 2 into some harmony with Section 1. In *FTC v. Actavis, Inc.*, the Supreme Court considered "reverse payments" made by a patent-holder to a generic manufacturer in order to settle infringement litigation brought by the patent holder against the generic.[199] The concern is that the holder of a dodgy patent may be paying off a would-be competitor and splitting the profits of undeserved mo-

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[194] *See* Hemphill and Wu agree. *See* C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879, 1899–1900 (2020).

[195] *See*, *e.g.*, United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 589 (1957). The Clayton Act did not displace the Sherman Act's application to mergers. *See* S. REP. NO. 81-1775, at 5 (1950).

[196] 15 U.S.C. § 18; *see also*, *e.g.*, Herbert Hovenkamp, *Prophylactic Merger Policy*, 70 HASTINGS L.J. 45 (2018); Milton Handler & Stanley D. Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629 (1961).

[197] *See*, *e.g.*, United States v. AT&T, Inc., 916 F.3d 1029, 1045 (D.C. Cir. 2019) ("[T]he court does not hold that quantitative evidence of price increase is required in order to prevail on a Section 7 challenge."); Hospital Corp. of Am. v. FTC, 807 F.2d 1381, 1389 (7th Cir. 1986) ("Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market.").

[198] *See, e.g.*, FTC v. Steris Corp., 133 F. Supp. 3d 962 (N.D. Ohio 2015); *see also* H.R. REP. NO. 81-1191, at 8 (1949) ("[Under the 1950 Clayton Act amendments] it would be unnecessary for the Government . . . to show that as a result of a merger the acquiring firm had already obtained such a degree of control that it possessed the power to destroy or exclude competitors or fix prices.").

[199] FTC v. Actavis, Inc., 570 U.S. 136, 140–41 (2013).

nopoly.[200] But an antitrust challenge faces a threshold question: must a plaintiff show that, but-for the deal, the patent would *likely* have been invalidated? The Court said no: competition is harmed when a patent-holder suppresses the risk of competition, even if the risk is only "small," as "the payment (if otherwise unexplained) likely seeks to prevent *the risk of competition*," and "that consequence constitutes the relevant anticompetitive harm."[201] Section 2 recognizes the same thing.

3. *Dimension Three: Unprivileged Conduct*

The third of monopolization's dimensions—the nature of the conduct—is one of its most elusive. We have seen that it is foundational to the idea of monopolization that there are, crudely, good ways and bad ways to achieve and maintain monopoly.[202] The concept of a distinction between good means and bad means is also captured by familiar tests for conduct that is "exclusionary" or "predatory," rather than the result of "industry," "acumen," or "merits competition."[203]

Broadly speaking, there are two obvious ways in which we could register the character of conduct in monopolization doctrine. The first is to define a sphere of "bad" conduct, and treat it unfavorably: for example, to provide, as Muris suggests, that "only 'bad' conduct . . . is illegal."[204] The other is to define what counts as "good" conduct and to treat it favorably.

The first option fails to survive contact with our tradition: it is elementary that there is no inherent limitation on the forms of conduct that can constitute monopolization.[205] As long ago as *Standard Oil*, Chief Justice White described Section 2 as a catch-all backstop to Section 1, intended to "embrac[e] all attempts to reach the end prohibited by the first section . . . even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the [first]

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200 *See generally* C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 N.Y.U. L. REV. 1553 (2006).

201 *Actavis*, 570 U.S. at 157 (emphasis added).

202 *See, e.g.*, Letter from Thurman Arnold to Alfred Friendly (Aug. 9, 1961) (indicating that monopoly is obtained "through greater efficiency in operation and distribution" not unlawful), *quoted in* Spencer Weber Waller, *The Antitrust Legacy of Thurman Arnold*, 78 ST. JOHN'S L. REV. 569, 611–12 (2004).

203 *See, e.g.*, Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 894 (9th Cir. 2008); Monsanto Co. v. Scruggs, 459 F.3d 1328, 1338–39 (Fed. Cir. 2006); Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 522 (5th Cir. 1999).

204 Timothy J. Muris, *The FTC and the Law of Monopolization*, 67 ANTITRUST L.J. 693, 695 (2003).

205 United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) ("[T]he means of illicit exclusion . . . are myriad."); Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1087 (D.C. Cir. 1998) (anticompetitive conduct comes "in too many different forms" for exhaustive definition).

section."[206] In other words, Section 2 was not aimed at a specific category of inherently bad acts. Nor did it represent an effort to prohibit acts by reason of their bad intent.[207]

Moreover, Section 2 liability is routinely imposed for conduct that is not inherently harmful or bad: for example, exclusive dealing, tying, and mergers are common, often beneficial, and contrary to no clear moral norm.[208] The idea that Section 2 is limited to conduct lacking any legitimate business purpose does not survive contact with that tradition.[209]

But the second option—the idea of a "privileged" sphere, in which a monopolist need not fear liability[210]—fits fairly well. The idea of a *right to compete*, even if competitors fail and monopoly power results, is central, whether described as "competition on the merits," "industry," or a "superior product."[211] As Judge Diane Wood has put it, "[E]ven a monopolist is entitled to compete."[212] The Senate was reassured on the day it passed the Sherman Act that it "need not be disturbed" by fears for the trader who "has not done anything but compete."[213]

A number of the Court's leading monopolization cases exhibit the same through-line concept of a narrow zone of competitive privilege. *Grinnell*, for example, for all its unhelpfulness, implies that the use of certain means—"superior product, business acumen, or historic accident"—is lawful even if monopoly results.[214] The Court's starting-point case for refusals to deal, *United States v. Colgate & Co.*, alludes to a "long recognized right of [a] trader . . . freely to exercise his own independent discretion as to parties with whom he will deal[.]"[215] *Verizon Communications, Inc. v. Law Offices of Cur-*

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206 Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 61 (1911).

207 *See, e.g.*, 21 CONG. REC. 2456 (1890) (statement of Sen. John Sherman) ("[T]he intention of the combination is immaterial. . . . It is the tendency of a corporation, and not its intention, that the courts can deal with.").

208 *See, e.g.*, ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 270 (3d Cir. 2012); David S. Evans & Michael Salinger, *Why Do Firms Tie? Evidence from Competitive Markets and Implications for Tying Law*, 22 YALE J. ON REG. 37 (2005).

209 *But see, e.g.*, *In re* Adderall XR Antitrust Litig., 754 F.3d 128, 133 (2d Cir. 2014) (stating that Section 2 liability requires "conduct without a legitimate business purpose that makes sense only because it eliminates competition").

210 For a related concept, see Popofsky, *supra* note 33, at 442.

211 The privilege test immunizes a zone of ordinary commercial behavior while preserving a standard-based approach to liability outside the safe harbors. *See* Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 84 (2007) (describing this as the optimal approach).

212 Goldwasser v. Ameritech Corp., 222 F.3d 390, 397 (7th Cir. 2000).

213 21 CONG. REC. 3151–52 (1890) (statement of Sen. George Edmunds).

214 United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

215 United States v. Colgate & Co., 250 U.S. 300, 307 (1919) (stating that the Sherman Act was intended to "preserve the right of freedom to trade"). The opinion includes some qualifying

tis V. Trinko, LLP implies an affirmative right to charge monopoly prices.[216] And in *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, the Court found for the defendant entirely because each part of the challenged price-squeeze—an upstream high price and a downstream above-cost low price—was beyond the reach of antitrust law by virtue of its nature, not its effects.[217]

We can outline the core of the privilege. Section 1's per se rule applies when "considerable experience" teaches that a practice "would be invalidated in all or almost all instances under the rule of reason."[218] A natural starting point for a rule of per se legality under Section 2 would cover practices for which "considerable experience" showed that the conduct in question was: (1) ubiquitous in practice; (2) beneficial or benign for consumers in virtually all cases; and (3) such that judicial scrutiny would present an undue social cost.[219] This is a narrow set: practices in a grey area would not qualify.

The core of this privilege includes unconditional decisions about prices and output: Section 2 has long respected the freedom to set a price,[220] to make unconditional buying or selling decisions,[221] and generally to terminate the supply of a product or service.[222] (Conditional dealing—when a monopolist announces or applies a condition that may harm competition, such as exclusivity—is decidedly *not* privileged.[223]) Entry into, or exit from, a line of com-

language—including reference to "the absence of any purpose to create or maintain a monopoly"—but the opinion's tenor is unmistakable. *Id.*

216 540 U.S. 398, 407 (2004).

217 555 U.S. 438, 453–54 (2009).

218 Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886–87 (2007).

219 *See, e.g.*, *Trinko,* 540 U.S. at 414–15; Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993); Mark S. Popofsky, *Section 2, Safe Harbors, and the Rule of Reason*, 15 GEO. MASON L. REV. 1265, 1278–96 (2008).

220 *See, e.g.*, ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 275 (3d Cir. 2012); Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 901 (9th Cir. 2008); *see also* 21 CONG. REC. 4090 (1890) (statement of Rep. Charles Culberson) ("[T]he Standard Oil Company can sell its product at just such prices as it pleases.").

221 *See, e.g.*, NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 137 (1998) ("The freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage.").

222 *See, e.g.*, Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1071–73 (10th Cir. 2013); Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 485 (7th Cir. 2020).

223 *See, e.g.*, Lorain Journal Co. v. United States, 342 U.S. 143, 155 (1951); McWane, Inc. v. FTC, 783 F.3d 814, 820–21 (11th Cir. 2015); DEP'T OF JUSTICE, COMPETITION AND MONOPOLY 119 & nn.3–4 (2008) (withdrawn 2009). *But see* FTC v. Facebook, Inc., 560 F. Supp. 3d 1, 21–25 (D.D.C. 2021).

merce is privileged.[224] So, too, is advertising, if truthful or nearly so.[225] Some suggest that "product design decisions" should be privileged,[226] but my framework suggests that blanket immunity for this category would be too broad, given its breadth and its scope for novel mischiefs in a digital economy.[227]

One important dimension of the privilege is the negative one: the privilege to *refrain* from certain kinds of affirmative conduct. In failure-to-assist cases of various kinds, courts have repeatedly referred to the limits of monopolization doctrine in terms of the lack of duty—under at least most circumstances—to do or refuse to do something, or the "right" to act in particular ways that do not advantage rivals.[228] Debates about the right scope of these doctrines can probably best be understood as debates about the appropriate bounds of the privilege.

The privilege is limited by its underlying logic: it does *not* cover conduct that is not ubiquitous, is not virtually always beneficial or benign for consumers, or could reasonably be supervised by courts. The lack of privilege for below-cost pricing,[229] or for certain kinds of refusal to deal,[230] are best understood as efforts to articulate reasonably administrable boundaries of this zone.

4. *Justification and the Role of Outcome Effects*

The treatment of justification is a notoriously tangled area of Section 2 law. I will argue here—in a more explicitly normative register—for a simple rule that reflects the settled welfarist turn in modern antitrust law, as well as the post-Sherman Act recognition that "monopolization" may not always be harmful to consumers, without undermining the structure elaborated above.

The existence of a justification test is implied by a set of basic ideas: that antitrust rules, including Section 2, should be understood to prohibit practices

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[224] *See, e.g.*, *In re* Asacol Antitrust Litig., 233 F. Supp. 3d 247, 268 (D. Mass. 2017); *In re* Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig., 64 F. Supp. 3d 665, 682 (E.D. Pa. 2014); Steamfitters Loc. Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 925 n.7 (3d Cir. 1999).

[225] *See*, e.g., Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Labs., 850 F.2d 904, 916 (2d Cir. 1988); *see also* Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 323 F.3d 366, 371 n.7 (6th Cir. 2003).

[226] *See, e.g.*, Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 999–1000 (9th Cir. 2010); Hovenkamp, *supra* note 28, at 158.

[227] *See, e.g.*, New York *ex rel.* Schneiderman v. Actavis PLC, 787 F.3d 638, 654 n.26 (2d Cir. 2015); United States v. Microsoft Corp., 253 F.3d 34, 65 (D.C. Cir. 2001).

[228] *See*, *e.g.*, United States v. Colgate & Co., 250 U.S. 300, 307 (1919); Olympia Equip. Leasing v. Western Union Tel., 797 F.2d 370, 375 (7th Cir. 1986).

[229] Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–26 (1993); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 549 U.S. 312, 325 (2007); *see also* Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 904 (9th Cir. 2008) (stating that *Brooke Group* is justified on "cost-benefit" grounds).

[230] *See*, *e.g.*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 597 (1985).

and transactions by reason of their tendency to cause harm; that, all else equal, it is desirable for antitrust rules to avoid prohibiting or punishing conduct that is beneficial; and that, in some cases, even conduct that falls outside the competitive privilege, and contributes to monopoly by excluding rivals, may nevertheless be beneficial overall. It follows from these three premises that it may be desirable for antitrust doctrine, including Section 2 doctrine, to make room for some kind of case-by-case appraisal of the merits and harms of the individual practice or transaction at issue.[231]

The most appealing version of the substantive justification standard is something like the following: when a factfinder is confident that a practice or transaction is overall beneficial for consumers—in an economic welfare sense across the foreseeable future—it ought not be condemned. That principle is consistent with the core aim of the antitrust enterprise, and the deepest commitment of modern doctrine, that antitrust should leave market participants better, not worse, off.[232] This assessment turns on the overall tendency of the practice or transaction, compared with the most likely but-for alternative and judged ex ante: in the interests of good incentives, conduct that ex ante appeared overall beneficial for consumers, but turned out in practice to be harmful, ought not be condemned.[233] Benefits that would have been achieved by less restrictive means are not cognizable.[234]

Justification is an affirmative defense, and the burden of persuasion lies with the defendant, after the plaintiff has established a prima facie case by showing monopoly power, exclusion, contribution to monopoly, and lack of competitive privilege. This approach rejects the notion, given currency by *Microsoft*, that a defendant need only identify a directional or categorical benefit (and perhaps produce a little evidence) in order to force a plaintiff to

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[231] Of course, the concept of "overall" benefit implicates complex questions of balancing, particularly when a practice or transaction has different effects on different groups of market participants. *See generally* Steven C. Salop, Daniel Francis, Lauren Sillman & Michaela Spero, *Rebuilding Platform Antitrust: Moving on from* Ohio v. American Express, *infra* this issue, 84 ANTITRUST L.J. 883 (2022).

[232] *See, e.g.*, *supra* Part II.A.1; THORELLI, *supra* note 82, at 227 ("There can be no doubt that the Congress felt that the ultimate beneficiary in this whole [antitrust legislation] process was the consumer, enjoying a continuous increase in production and commodity quality at progressively lowered prices."); 21 CONG. REC. 2456 (1890) (statement of Sen. John Sherman) (stating an expectation that act would condemn practices of "injurious" tendency); 21 CONG. REC. 2654–55 (1890) (agreeing to an amendment proposed by Senator Aldrich exempting combinations with good effects on prices or wages).

[233] *See* Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 341–43 (2006).

[234] *See* C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927 (2016).

prove overall net harmful effects: effectively, to *disprove* the possibility that benefits might outstrip harms.[235]

To endorse this means rejecting some alternatives that others have favored. It cannot be enough simply to have a "legitimate" purpose: we long ago abandoned any effort to distinguish among subjective intentions to prosper at rivals' expense, and it would obviously harm predictability to treat identical practices or transactions differently by reason of subjective occurrent thoughts. Nor can we immunize conduct with a marginal efficiency gain, regardless of the harm: many forms of monopolization often have an efficiency benefit of some kind, even alongside greater harm.[236] We can also rule out benefits enjoyed as a citizen rather than as a consumer or worker, like social equity or national security, which threaten to create a politicized free-for-all.[237]

The allocation of the burden of proof to the defendant is critical. *Microsoft* contains some language suggesting that a defendant need only "assert" a nonpretextual benefit to flip the burden back to the plaintiff to show that the procompetitive benefit is actually outweighed by outcome harms.[238] This language or its equivalent has often been repeated, including—alas—in the recent *FTC v. Shkreli* decision.[239] But there are compelling reasons to reject this approach, and require a defendant to show not just the existence of a justification, but its sufficiency.[240] Indeed, it is not at all clear that in *Microsoft* itself

[235] *See* United States v. Microsoft Corp., 253 F.3d 34, 58–59 (D.C. Cir. 2001) ("[T]he plaintiff, on whom the burden of proof of course rests . . . must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect. . . If the monopolist asserts a procompetitive justification—a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal—then the burden shifts back to the plaintiff to rebut that claim. . . . [I]f the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.").

[236] *See, e.g.*, A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles*, 73 ANTITRUST L.J. 375, 377 (2006) ("Most conduct that excludes rivals . . . provides some efficiency benefits[.]").

[237] I set aside the question of when the public interest can fairly be considered by a court in shaping relief.

[238] *See Microsoft*, 253 F.3d at 58–59; *supra* note 235 and accompanying text. It is actually not quite clear what the court said or meant in *Microso ft*. The court called for rule-of-reason balancing only if the justification defense was "unrebutted," without explaining what would count as "rebuttal." Would a showing of exclusion, contribution to monopoly, and lack of privilege constitute rebuttal, making weighing unnecessary? The court also relied on unexplained phrases like "competition on the merits" and "harm to the competitive process."

[239] FTC v. Shkreli, No. 20-cv-00706, 2022 WL 135026, at *33 (S.D.N.Y. Jan. 14, 2022) (defendant's obligation is to "proffer" a justification).

[240] *Standard Oil* is sometimes cited for an outcomes-based rule of reason, but this is an anachronistic application of the term. *Standard Oil* appears to use the phrase "rule of reason" to mean only that the Act does not categorically ban all restraints, but rather requires a more discriminating approach, focused on impacts on the competitive process. *See*, *e.g.*, Standard Oil Co. of N.J.

the court regarded "assertion" as enough to discharge the defendant's burden.[241] In at least one place the court appeared to reject a claimed procompetitive justification for failure to "specif[y]" or "substantiate[ ]" some "general claims" of procompetitive benefit from a challenged practice.[242]

First, the Supreme Court has (at least arguably) said so, in a neglected aspect of the most recent of its Section 2 cases to turn, on a full trial record, on justification. In *Aspen Skiing*, the defendant monopolist ski resort operator had terminated a profitable cooperative joint-ticketing enterprise with the plaintiff ski resort, and when sued for monopolization the defendant raised defenses of legitimate business justifications.[243] These were—despite the Court's odd language[244]—efficiency justifications of the usual kind: that "usage [of the joint ticket] could not be properly monitored," including because it was "cumbersome" to do so, and that the plaintiff was offering "inferior skiing services" from which the defendant was trying to protect its brand.[245] The record appears to have been murky.[246] But the Court affirmed on the ground that "[the defendant] *did not persuade the jury that its conduct was justified* by any normal business purpose[.]"[247] Some post-*Microsoft* courts have made the same point.[248]

Second, our framework implies that the prima facie monopolization offense does not depend upon injury to the end results of competition, such as price, quality, or output. There is no point at all in having a flexible causation standard short of a but-for test if a plaintiff must show actual but-for effects on outcomes.[249] This approach captures the intent of the Sherman Act legislators, who, as we have seen, focused on processual concerns like exclusion and contribution to monopoly.[250] There is no suggestion that they, or courts, ex-

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v. United States, 221 U.S. 1, 62 (1911); United States v. Am. Tobacco Co., 221 U.S. 106, 179 (1911).

[241] I owe this point to Doug Melamed.

[242] *Microsoft Corp.*, 253 F.3d at 66.

[243] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608–11 (1985).

[244] *Id.* at 608 (stating defendant "fail[ed] to offer any efficiency justification").

[245] *Id.* at 609–10.

[246] *Id.* at 609 (record demonstrated that "the problems were much overemphasized by Ski Co. officials, and were mostly resolved as they arose"); *id.* at 610 (inferiority argument "supported in the record by little more than vague insinuations, and . . . sharply contested by numerous witnesses").

[247] *Id.* at 608 (emphasis added).

[248] *See, e.g.*, Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 488 (7th Cir. 2020) (stating that the defendant bears the burden of "proving procompetitive justification"); McWane, Inc. v. FTC, 783 F.3d 814, 840–42 (11th Cir. 2015); United States v. Dentsply Int'l, Inc., 399 F.3d 181, 196 (3d Cir. 2005); New York v. Actavis, PLC, No. 14-Civ-7473, 2014 WL 7015198, at *41 (S.D.N.Y. Dec. 11, 2014) (noting that "the procompetitive benefits of the business justification must outweigh the anticompetitive effects").

[249] *See supra* Part II.C.2.

[250] *See supra* Part II.A.1.

pected plaintiffs to show that competitive outcomes like prices had *actually* been driven to unreasonable levels.[251] Some correctly feared that such a requirement would become a mountain that no plaintiff could climb: "[a plaintiff] had better be dead than have to do that," as one Congressman put it.[252] Rather, the phrase "anticompetitive effect" is often used to refer to exclusionary effect—that is, incidence on rivals—not effects on competitive outcomes.[253]

Third, it is consistent with the use of the "affirmative defense" category elsewhere in the law. Affirmative defenses are those that "suggest some [additional] reason," apart from simple denial of the basic offense, "why there is no right of recovery,"[254] particularly when the relevant facts and evidence are within the defendant's knowledge or reach.[255] The burden of proving such defenses is routinely placed on defendants, even in criminal cases.[256]

That shoe fits well here. A defendant usually has enormous advantages in access to relevant evidence: justifications typically relate to an improvement in the efficiency of the defendant's own operations, leaving a defendant uniquely placed to prove the nature and magnitude of that effect. It strains reason to require a plaintiff to *disprove* them, either out of the gate or after a defendant has simply cried "free riding," brandished an email or two, and

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[251] *See*, *e.g.*, Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457, 467 (1941) (concluding that violation of Sherman or Clayton Acts may exist "even though a combination may temporarily or even permanently reduce the price of the articles manufactured or sold"); United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383, 400 (1912) (condemning consolidations that created monopoly power even though this had not yet been used to foreclose competitors by charging higher prices); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 340 (1897) (holding no unreasonable price effects test under Section 1); United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 427 (2d Cir. 1945) ("[I]t is no excuse for 'monopolizing' a market that the monopoly has not been used to extract . . . more than a 'fair' profit.").

[252] *See* 21 CONG. REC. 5959 (1890) (Rep. Charles A. Hill rejecting the idea that a plaintiff "must go into the courts, and there at his own expense, after years of litigation running through all the courts, from the circuit to the Supreme Court of the United States, find out as best he can from judicial authority whether or not [resulting] rates are reasonable and just"; Rep. John Pickler interjecting "He had better be dead than have to do that"; and Rep. Hill commenting "You can readily see what a burden that would impose upon an individual, what a risk he would take upon himself, and how reluctant he would be to enter upon an investigation of that kind at his own expense. . . . The practical effect of this is to place this matter of railroad rates almost exclusively in the hands of the railroad companies."); *see also id.* at 5951.

[253] *See*, *e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 61–62, 65 (D.C. Cir. 2001) (using the term primarily in this sense; note also that any outcome effects in *Microsoft* were in the *browser* market, not the monopolized operating systems market).

[254] 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE CIVIL PROCEDURE § 1271 (2022).

[255] *Id.*

[256] *Id.*; Physicians Healthsource, Inc. v. A-S Medication Sols., LLC, 950 F.3d 959, 964–65 (7th Cir. 2020); Vincent v. Yelich, 718 F.3d 157, 166 (2d Cir. 2013).

ridden off into the sunset, leaving a plaintiff to try to calculate and balance relative magnitudes.[257]

But the *Microsoft* formulation, taken literally, threatens such a result in almost every real case. A defendant can almost always "assert" a directional efficiency justification, not least because the term "free riding" can be applied to almost any example of a competitor profitably doing something that the monopolist could prevent or appropriate.[258] *Any* act of monopolization—however flagrant and socially harmful—has *at least* the effect of increasing incentives to invest in the underlying monopoly, by making that monopoly more profitable.[259] So in practice a plaintiff ends up forced to disprove the possibility of net benefit in virtually every case on a mere assertion standard.

Fourth, pragmatic considerations point the same way. We are concerned here with cases in which a plaintiff has already established exclusion, contribution, and lack of privilege, and a defendant has named a countervailing beneficial effect, but not proven that the good effects outweigh the bad ones. The problem bites when the evidence of respective magnitudes is inconclusive: if the defendant's burden is of production only, it wins; if it is one of persuasion, the plaintiff wins. This situation is most likely to occur in markets like digital ones, in which competitive futures are least predictable, and in which innovation and product change are key dimensions of competition.[260] Tolerating conduct amounting to prima facie monopolization when we are least certain it is worth the trade seems to have things backwards.

Fifth, and finally, this outcome would be consistent with authority indicating that, under Section 1 also, a defendant must prove the sufficiency—and not just the existence—of a justification.[261]

For all these reasons, then, and notwithstanding anything in *Microsoft*, requiring a defendant merely to produce some evidence of a justification will not do: the defendant must persuade the factfinder that the benefits of its conduct will outshine the harms. This approach will augment monopolization's

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[257] *See also* Gavil & Salop, *supra* note 43, at 2137–38 (criticizing merely "categorical" defense claims).

[258] *See*, *e.g.*, Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 485 (1992) (noting and rejecting a "free riding" defense).

[259] *See generally infra* Part III.D.

[260] *See, e.g.*, John M. Newman, *Antitrust in Digital Markets*, 72 VAND. L. REV. 1497 (2019); Terrell McSweeny & Brian O'Dea, *Data, Innovation, and Potential Competition in Digital Markets*, CPI ANTITRUST CHRON., Feb. 2018.

[261] *See*, *e.g.*, *In re* Se. Milk Antitrust Litig., 739 F.3d 262, 272 (6th Cir. 2014); Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1024 (10th Cir. 1998); United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993); Paschall v. Kansas City Star Co., 727 F.2d 692, 702 (8th Cir. 1984).

reach on the right margin: cases where there is demonstrable offense to competition, and scant reason to tolerate it.[262]

D. The Necessity of Adjudication

This approach to monopolization, which relies centrally on common law adjudication, runs contrary to the views of both revolutionaries and reactionaries. If there is one point of agreement between the loudest participants in today's antitrust conversation—at both ends of the political spectrum—it is that antitrust should be rescued from the courts where possible. Conservatives would have courts abstain unless expert economists can quantify effects on price, output, and so on, as what cannot be quantified cannot be known with confidence, and what cannot be known with confidence ought not be a basis for enforcement action.[263] Conversely, revolutionaries would give a central role to bright-line rules and to "simple presumptions" fashioned by Congress or the agencies.[264]

But the dangerous-exclusion framework rejects both versions of this anti-adjudicative trend. It yokes monopolization analysis to a set of practical questions: does the conduct make it harder for rivals to compete? Is this effect reasonably capable of contributing significantly to monopoly? Is it outside a zone of legally privileged conduct? These questions are within the compass of a lay judge or jury using the ordinary tools of adjudication: evidence and testimony about how conduct will or could affect the operation of businesses.

Start with the challenge from the right. How could it be that courts ought not, ultimately, defer to expert economists in an area like antitrust? The starting point is that "monopolization"—unlike "market power" or "monopoly"—is not an economic concept at all. It is a *legal* one. There is no "correct economic view" about what monopolization law should be. Even if there were, it is not obvious that that view should govern the legal enterprise of antitrust any more than it should govern matters of tax, tort, or the law of the Fourteenth

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[262] *See*, *e.g.*, Noah J. Phillips, Comm'r, Fed. Trade Comm'n, Reasonably Capable? Applying Section 2 to Acquisitions of Nascent Competitors, Remarks at Antitrust in the Technology Sector: Policy Perspectives and Insights from the Enforcers (Apr. 29, 2021) ("The adjustment I propose [for non-consummated mergers] is for cases with compelling evidence that a nascent rival is one of only a few firms with a decent chance of meaningfully competing against the monopolist and that the merger could generate significant cognizable efficiencies. . . I may not have a good sense of what the merger's net effect will be, but concern about false positives is sufficiently low, and the importance of fostering competition sufficiently high, to resolve any ambiguity against the merger.").

[263] *See, e.g.*, Easterbrook, *supra* note 44, at 4–9.

[264] *See, e.g.*, Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. Chi. L. Rev. 357 (2020); Khan & Vaheesan, *supra* note 46, at 279; Open Markets, *supra* note 52; *see also* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 Yale L.J. 175 (2021).

Amendment. Economics can offer an account of harm (borrowed from utilitarian moral theory) and a discipline of modeling that helps us think rigorously about the relationships between phenomena. But several serious problems prevent us from giving the antitrust keys to the economists and taking the rest of the day off.

First, actual short-run harm in the economic sense is not *sufficient* to constitute monopolization—otherwise we would condemn mere monopoly, price increases, and so on. "Economics" cannot tell us when harmful conduct should be permitted, or how to trade off short-term effects against longer-term ones, or virtually-certain effects against less likely ones.[265]

Second, economists are accustomed to aggregating harms and benefits in ways that are helpful (and often necessary) for workable modeling, but that are non-obvious and non-neutral. Welfarist economics is founded on ordinal information—individuals' preference rankings—which can only be aggregated into cardinal terms ("this transaction will cause $X harm and $Y benefits *overall*") by deciding whose welfare will count and how to aggregate it. These tasks are prior to economic analysis, and there is no neutral way to do them.

Third, there is the enormous practical problem: the significant gap that virtually always separates what we can measure (or model) from a specific antitrust puzzle in the real world. Economic modeling is often immensely helpful, but it is also hard, expensive, and at a remove from reality. Modeling the effects of a horizontal merger with differentiated products can be challenging; modeling the effects of a vertical merger is often a nightmare; and modeling a vertical merger with nonlinear pricing is a moonshot, even to predict only short-run price effects. And modeling things like real innovation and non-price competition with anything like confidence is implausible. This creates room, *within* "economics," for deep disagreement about the implications of evidence and analysis in most real-world cases and for rules intended to help resolve them. It is rare that a professional consensus exists on the decisive questions raised by concrete cases: Is *this* transaction harmful overall? What would *that* business do if that practice were prohibited? Can we infer harm or benefit from *these* documents? [266]

In virtually any real controversy, thoughtful economists will disagree, and a judgment *even about whether some practice is likely to be "economically harmful"* must be made on some basis *other than* just "the economics" in

[265] For a very thoughtful examination of some of the complexities, see Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1 (2016).

[266] Judges can be poorly placed to distinguish between "mainstream" and "fringe" views. *See* Rebecca Haw, *Adversarial Economics in Antitrust Litigation: Losing Academic Consensus in the Battle of the Experts*, 106 NW. U. L. REV. 1261, 1268–70 (2012).

some objective sense. A commitment to consumer welfare does not entail a specific methodology for defining or measuring it.[267] If we want to take seriously dynamics that are hard to model (such as innovation) or measure (such as quality effects), that means taking authority away from models.[268]

I am not claiming that antitrust can or should be liberated from economics, as such. That would not be possible even if it were desirable. Even the common law incorporated economic ideas and concepts; our statutory antitrust certainly does. My own framework tests for economic phenomena (like exclusion and for contribution to monopoly power) and sets up traditional economic welfare analysis as the basis for a justification defense. Rather, my point is about decisional authority in specific controversies: that it is generally a mistake to think of a judge in an antitrust case as trying to resolve a debate about a "right answer" in economics. What antitrust cases require is adjudication: making and explaining a decision that is reasoned transparently from appropriate premises.[269] Where economic consensus truly exists about the answer in a concrete case, courts will generally follow it, at least in the long run;[270] otherwise, it is enough for a court to explain its choice among plausible views.

Fetishizing quantification, in particular, is affirmatively harmful. It risks giving judges and juries a "CSI-effect" impression that numbers are especially reliable and distracting from equally (or more) important ordinary-course evidence, while enormously inflating the expense of antitrust litigation for businesses, consumers, and agencies.[271] Qualitative judgment can no more be avoided in an antitrust case than can the question of what constitutes "reason-

[267] *See, e.g.*, Herbert Hovenkamp, *Fact, Value, and Theory in Antitrust Adjudication*, 1987 DUKE L.J. 897, 902 (1987) ("The consumer welfare principle does not dictate that neoclassical models are better than postclassical ones.").

[268] *See, e.g.*, Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 284 (1985) ("When [complexity increases], the value of economic models begins to diminish in relative importance.").

[269] *See, e.g.*, Richard B. Katskee, *Science, Intersubjective Validity, and Judicial Legitimacy*, 73 BROOK. L. REV. 857, 860–65 (2008); *see generally* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 1–64 (1981) (noting a "triadic" function of courts).

[270] *See, e.g.*, Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) on nonprice vertical restraints); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (overruling Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) on minimum RPM); State Oil Co. v. Khan, 522 U.S. 3 (1997) (overruling Albrecht v. Herald Co., 390 U.S. 145 (1968) on maximum RPM); *see also, e.g.*, Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1295 (2004) ("The Supreme Court does not buck public opinion for long, but ultimately comes into step with it[.]").

[271] *See, e.g.*, FED. TRADE COMM'N OFF. OF INSPECTOR GEN., AUDIT OF FEDERAL TRADE COMMISSION EXPERT WITNESS SERVICES, OIG REPORT NO. A-20-03 (2019) (noting significant increase in expert spend obligations); *see also* Steven C. Salop & Fiona Scott Morton, *The 2010 HMGs Ten Years Later: Where Do We Go from Here?*, 58 REV. INDUS. ORG. 81 (2021).

able care" in a negligence case or a "compelling government interest" in a strict scrutiny case. There is also a fairness interest in play that seems compromised unless an antitrust judge can articulate and "own" the basis for the resolution of points of contestation in his or her own words.

The challenge from the left should be resisted with equal firmness, for the neo-Brandeisian case for a primarily rule-based antitrust is equally seductive and equally dangerous. The idea of just banning a list of unappealing practices is not a new one.[272] The problem is that—perhaps beyond a couple of fairly easy examples like fast-food non-competes[273]—no-one has any idea how to do this across the board without causing real economic harm.[274] This problem cannot be shrugged away.[275]

Moreover, a rule-based antitrust law is foreign to our tradition. Judicial development is not just a long-standing feature of our law (although it is that); it was also the intent of Congress in passing the Sherman Act (and rejecting the model used in the Interstate Commerce Act of 1887).[276] Our monopolization tradition is one of adjudication, not administration.[277]

And to the extent that these proposed rules would just create *presumptions* of illegality—with an opportunity for justification on the back end—it is not clear why such a presumption should turn on the *form* of the conduct rather than the more relevant questions of exclusion, contribution to monopoly, and privilege, as I suggest above.[278] This low-carb version also seems unlikely to

[272] *See, e.g.*, Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 99–102 (1911) (Harlan, J., dissenting) (arguing that Congress had intended literally to ban all "restraints").

[273] *See, e.g.*, Chopra & Khan, *supra* note 264, at 373.

[274] *See, e.g.*, Mark S. Popofsky, *supra* note 33, at 460–62 (arguing that a single rule would not make consumers better off).

[275] *See* Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 55 (2007) ("[Antitrust] governs too vast and complex an array of business practices to be reduced to . . . rules").

[276] *See, e.g.*, 21 CONG. REC. 2460 (1890) (statement of Sen. John Sherman) ("I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case."); 21 CONG. REC. 2644 (1890) (statement of Sen. William Stewart) ("Whether [the statute] is to abolish all the laws of all the States which have organized corporations, and the patent laws of the United States, which create the greatest monopolies of the country, will be left for the courts to construe[.]"); 21 CONG. REC. 4089 (1890) (statement of Rep. Charles Culberson) ("Now, just what contracts, what combinations in the form of trusts, or what conspiracies will be in restraint of the trade or commerce mentioned in the bill will not be known until the courts have construed and interpreted this provision."). For a contrary view, see Paul, *supra* note 264, at 220–26.

[277] THORELLI, *supra* note 82, at 230 ("[N]ot a single [legislative proposal] called for commission-type regulation.").

[278] *See, e.g.*, Khan & Vaheesan, *supra* note 46, at 280 ("[S]imple presumptions of illegality, *subject to rebuttal through the introduction of credible business justifications,* should govern, at a minimum, horizontal mergers in concentrated markets, monopolization, and vertical restraints.") (emphasis added).

lighten the adjudicative load much. Rules are most plausibly helpful as tools tailor-made—following appropriate investigation and consultation[279]—for specific problems in specific markets: a modest complement, not a general substitute, for antitrust.[280]

III. MONOPOLIZATION IN THE DIGITAL ECONOMY

I have shown, I hope, that the dangerous-exclusion framework is a fitting and appealing vision of monopolization, but I have not yet shown that it can help us navigate real problems on the digital frontier and elsewhere. In this Part, I turn the dangerous-exclusion lens briefly on some concrete questions and puzzles.

A. Acquisitions of Nascent and Potential Threats

One of the most urgent questions in modern antitrust debate is: when may a monopolist acquire a nascent or potential competitor? Can such transactions even be analyzed under Section 2?

This is a controversial matter. On the one hand, as we have seen, prominent conservative voices—and some Clayton Act merger cases[281]—seem to demand a fairly robust showing of actual effects, perhaps including a provable link to specific, measurable changes in competitive outcomes like price.[282] At the other end of the spectrum, the leading treatise proposes that such acquisitions should be unlawful where there is a "more-than-fanciful" chance of competition.[283] Other perspectives are in between: Scott Hemphill and Tim Wu, for example, emphasize the importance of an "anticompetitive plan"—an effort "to eliminate a competitive threat"—in assessing such deals,[284] while Melamed would impose liability only if the acquired firm has a "unique, differentiated path" to become a threat or is "among a relatively small number of firms reasonably able to do so."[285]

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[279] *See, e.g.*, Blake Emerson, The Public's Law: Origins and Architecture of Progressive Democracy 172–76 (2019) (discussing participatory rulemaking).

[280] *See* Tim Wu, *Antitrust Via Rulemaking: Competition Catalysts*, 16 Colo. Tech. L.J. 33, 49–54 (2017).

[281] *See generally, e.g.*, United States v. Marine Bancorp., Inc., 418 U.S. 602 (1974); Yamaha Motor Co. v. FTC, 657 F.2d 971 (8th Cir. 1981); Tenneco, Inc. v. FTC, 689 F.2d 346 (2d Cir. 1982); FTC v. Steris Corp., 133 F. Supp. 3d 962 (N.D. Ohio 2015).

[282] *See supra* note 65 and accompanying text.

[283] 3 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 701d (2022).

[284] Hemphill & Wu, *supra* note 194, at 1903–04.

[285] Melamed, *supra* note 193, at 6.

The dangerous-exclusion framework can help us navigate this terrain. Through this lens a court applying Section 2 should ask five questions, of which the first, third, and fifth will be dispositive in practice.

1. *Monopoly power.* First, of course, the court should determine whether the acquirer (or the target[286]) has monopoly power. This is a demanding test, and will often be critical, although it has not been the focus of my attention here.

2. *Exclusion.* Second, the court must determine whether the acquisition excludes one or more rivals. So long as the target can sensibly be described as an actual or potential competitive threat of the acquirer, the question is self-answering in the affirmative. Acquisitions *invariably* have the effect of eliminating any incentive for the target to compete with its acquirer, much more surely than the conclusion of an exclusive deal with its suppliers or the imposition of a tying arrangement upon its customers.[287]

3. *Contribution to monopoly.* Third, the court must determine whether the acquisition is reasonably capable of making a significant contribution to monopoly power. This will often be decisive. It should suffice to show that the acquisition has materially softened the threat to monopoly.[288] Relevant factors could include: evidence of the target's ability and incentive to exert significant competitive pressure on the monopolist over the foreseeable future; evidence suggesting that the target would actually compete with, or continue to compete with, the monopolist; and evidence of the ability and incentive of *other* firms to provide competitive discipline in the wake of the acquisition.[289] Because this test is aimed at weighing the acquisition's overall contribution to the dangers of monopoly, contributions to substantial monopolies are more dangerous than those to fragile or marginal ones. Thus, a "sliding scale" that more closely scrutinizes acquisitions by more complete or durable monopolists may be appropriate.[290]

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[286] This analysis applies equally to the case of a monopolist *being acquired by* a nascent or potential threat.

[287] *See supra* Part II.C.1; *see also*, *e.g.*, United States v. Grinnell Corp., 384 U.S. 563 (1966); N. Sec. Co. v. United States, 193 U.S. 197, 326–27 (1904).

[288] *See supra* Part II.C.2. I take this to be broadly equivalent to Hemphill and Wu's "serious" or "sufficiently substantial" test. *See* Hemphill & Wu, *supra* note 194, at 1888, 1892.

[289] Hemphill and Wu imply that courts should apply different tests depending on whether "innovation" plays a "major role" in competition. Hemphill & Wu, *supra* note 194, at 1889. I would not do so. There are many ways to be a significant threat, and it is not obvious why we would want courts to allow some such acquisitions based on whether the court thinks that the incumbent's particular threat involves "innovation" of a desirable or currently important kind. Famously, many of the most valuable disruptions may not involve improvements on an axis emphasized by incumbent rivalry. *See, e.g.*, CLAYTON M. CHRISTENSEN, THE INNOVATOR'S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL (2016).

[290] *See, e.g.*, Michael R. Moiseyev, *Potential and Nascent Competition in FTC Merger Enforcement in Health Care Markets*, CPI ANTITRUST CHRON., May 2020, at 1, 6.

Importantly for digital markets, the contribution-to-monopoly question asks much more than whether the target is similar to the monopolist. In fact, a focus on similarity may be actively misleading in digital markets. In digital markets characterized by strong network effects, a monopolist may be *least* concerned about close copies.[291] Rather, the most important competitive threats to dominance in such markets may be from products or services that are differentiated or even complementary in some ways today—such that they can gain competitive scale despite the monopolist's network effects—but where there are specific, plausible grounds to think that the target could, after achieving scale, move into more direct competition by adding features or spinning out a new offering.[292]

At a minimum, this reality—and general merger policy—disfavors any additional requirement that the target be the most dangerous to the incumbent, that the incumbent be the "most threatened" competitor, or similar.[293] It is possible for an incumbent to face multiple significant competitive threats along different dimensions in product-space, and for it to be unlawful to acquire *any*.[294]

Ultimately, assessing an acquisition's overall contribution to monopoly requires a court to estimate a kind of "expected threat value" for the acquisition: a combined function of: both parties' expected ability and expected incentive to compete over the foreseeable future; the nascent rival's expected impact on competition if its efforts are successful; and the expected likelihood of another serious competitive threat emerging to replace the competition that the acquisition eliminated. Of course, this is not a quantitative assessment, though it might have some quantitative inputs: at the bottom line the court is asking whether, in light of all the relevant information, the deal appears reasonably capable of making a significant contribution to monopoly power.[295]

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[291] For a thorough overview, see generally Peter S. Menell, *Economic Analysis of Network Effects and Intellectual Property*, 34 BERKELEY TECH. L.J. 219 (2019).

[292] *See, e.g.*, Complaint ¶ 7, FTC v. Facebook, Inc., No. 1:20-cv-3590 (D.D.C. Dec. 9, 2020) ("Despite strong network effects, important competitive threats to a dominant personal social networking provider can emerge, particularly . . . if the newcomer is differentiated from the incumbent in a manner that exploits the technological or social transition."); *see also* Mark A. Lemley & Andrew McCreary, *Exit Strategy*, 101 B.U. L. REV. 1, 96–97 (2021) (describing concerns relating to the acquisitions of "adjacent startups").

[293] *See* Hemphill & Wu, *supra* note 194, at 1892 (suggesting that "the firm or firms most threatened" by the nascent rival should be precluded from purchasing it); *see also* Melamed, *supra* note 193, at 9 (disfavoring liability if "several potential competitors" exist).

[294] *See, e.g.*, Stephen Mohr, *The Closest Competitor Is Not the Only Competitor*, FTC COMPETITION MATTERS (Dec. 9, 2019), www.ftc.gov/enforcement/competition-matters/2019/12/closest-competitor-not-only-competitor; Melamed, *supra* note 193 (manuscript at 6) (target(s) must be uniquely situated or at least "among a relatively small number of firms reasonably able to" become a substantial competitor).

[295] Melamed, Hemphill, and Wu make the same point. *See* Melamed, *supra* note 193, at 5 (arguing that "the focus ought to be on the expected value of the acquisition comparing the

In conducting this assessment, it is worth remembering that a monopolist may obtain extra insulation from future competitive threats by keeping the acquired nascent competitor "frozen in place" at scale, and differentiated from the acquiring monopolist, to deter the emergence of future threats from the same area of the market. In this way, a former competitive threat can be turned into a protective bulwark, with the acquisition serving not only to eliminate today's rival, but helping to deter tomorrow's as well. (To pick a prominent example: assuming the truth of the allegations in the FTC's complaint, Facebook's acquisitions of Instagram and WhatsApp did not simply eliminate the competitive threat from those two businesses: holding them in place at vast scale in photo-sharing and mobile messaging also helped to ensure that future threats to Facebook's social-networking monopoly from photo-sharing and mobile messaging were significantly less likely.) Any assessment of contribution to monopoly should include such second-order effects in appropriate cases.

The dangerous-exclusion model does not support an independent role—of the kind that I take Hemphill and Wu to suggest—for intent or an anticompetitive plan. But it does suggest that agencies and factfinders should distinguish evidence of *subjective purpose*, which is not particularly helpful and which may mislead,[296] from evidence of *expectation*, which is enormously probative. Agencies and courts rely on expectation evidence all the time, including in bread-and-butter HSR merger cases where the expectations of customers, competitors, suppliers, and party executives are frequently center-stage.[297] It will often be critical in nascent-competition cases: evidence that a dominant firm expected that a target would come to present a serious competitive threat, and that an acquisition or other practice would successfully dampen or extinguish that threat, should be taken very seriously indeed.[298]

4. *Privilege.* The court must also determine whether the conduct is privileged: but this question will be self-answering in most acquisition cases. Acquisitions by their nature are not privileged conduct beyond the reach of the monopolization offense.[299] It is hard to imagine anything *less* plausibly described as inherently beyond the reach of Section 2 than a monopolist's acquisition of a competitor.

likelihood and magnitude of efficiency benefits from the acquisition with the likelihood and magnitude of benefits to competition and welfare in its absence"); Hemphill & Wu, *supra* note 194, at 1890 ("Even a modest probability of a highly detrimental outcome is a large loss, in expected value terms.").

[296] *See*, *e.g.*, McWane, Inc. v. FTC, 783 F.3d 814, 840 (11th Cir. 2015).

[297] For recent examples, see FTC v. Thomas Jefferson Univ., 505 F. Supp. 3d 522, 527 (E.D. Pa. 2020); FTC v. Peabody Energy Corp., 492 F. Supp. 3d 865, 891 (E.D. Mo. 2020).

[298] *See, e.g.*, FTC v. Facebook, Inc., 560 F. Supp. 3d 1, 6–9 (D.D.C. 2021); *McWane*, 783 F.3d at 840 (relying on expectation evidence under the label of "intent").

[299] *See supra* note 161 (citing cases).

5. *Justification.* If the first four questions are resolved in favor of the plaintiff, the defendant will have an opportunity to establish justification. As described above, this requires that the defendant establish that efficiencies arising from the transaction will be such that, by sharpening competition, the transaction will benefit consumers overall, sufficient to dispel concerns about contribution to danger.[300] Any such efficiencies must be merger-specific against a baseline of what the target—*and acquirer*—would have done but-for the merger.[301]

B. PLATFORM COMPETITION

Platform competition—or competition among "multisided" businesses that connect groups of users or trading partners—is a prominent theme in many digital and high-tech markets, though of course there are many non-platform digital markets (and vice versa). For example, a search engine connects users, website publishers, and advertisers; a ridesharing platform connects riders and drivers; an e-commerce platform connects consumers and merchants. Such dynamics complicate traditional economic analysis by breaking traditional relationships among cost, price, output, and welfare (e.g., the profit-maximizing way to run a platform might involve setting a zero or negative price to one group of users, and making it up on the other side), and they complicate legal analysis by making some traditional rules difficult to apply.[302]

To illustrate the application of the dangerous-exclusion framework, I will take just two special "platform problems" for monopolization law: first, whether the controversial practice of "self-preferencing" is or can be a violation of Section 2; and second, whether entry itself by a dominant platform can constitute monopolization, as some have claimed.

1. *Self-Preferencing*

Perhaps no practice in the digital economy has attracted as much attention as "self-preferencing": a platform's preferential treatment of its own integrated product or service over competing products or services offered over the platform. For example, a search engine could treat its own travel or shopping results more favorably than those of third parties; an e-commerce platform

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[300] *See supra* Part II.C.4.

[301] *See*, *e.g.*, U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (2010), www.ftc.gov/system/files/documents/public_statements/804291/100819hmg.pdf.

[302] The literature on platform competition and antitrust is plentiful. *See generally*, *e.g.*, Salop et al., *supra* note 231; Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142 (2018); David Evans & Richard Schmalensee, *The Antitrust Analysis of Multisided Platform Businesses*, *in* 1 THE OXFORD HANDBOOK OF INT'L ANTITRUST ECON. 404 (Roger D. Blair & D. Daniel Sokol eds., 2014); Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS'N 990 (2003).

could display its own in-house products more favorably than others'; and so on.

Concern about such practices is pervasive. The European Commission's action against Google in the *Google Shopping* case is premised on the theory that this violates Article 102 of the Treaty on the Functioning of the European Union (TFEU), Europe's equivalent of Section 2.[303] The lawsuit led by Colorado includes allegations that Google's search engine marketing tool unlawfully interoperates on preferential terms with its search engine.[304] The House Judiciary Committee identified and criticized numerous instances of such practices by prominent digital platforms,[305] and called for "clarifying" Section 2's (purported) prohibition of self-preferencing.[306]

Through the lens of dangerous exclusion, and assuming monopoly power, we know what to ask: whether the conduct has an exclusionary incidence, whether it is reasonably capable of contributing to monopoly, and whether it is within the zone of competitive privilege. And we see that the paradigm case—in which a platform monopolist merely deals with third parties on terms X and with its integrated divisions on terms Y, where Y is more favorable than X—does not look much like what we have described as dangerous exclusion.

First, the idea that a monopolist is excluding rivals—that is, impairing their ability or incentive to compete, compared to the counterfactual—solely because it does not treat them as favorably as it treats its internal production is not particularly plausible: our conception of exclusion is broad, but not *that* broad, among other things because such even-handedness is vanishingly rare in the economy. Virtually *every* vertically integrated enterprise in the economy treats its own divisions better than third parties,[307] for an array of obvious theory-of-the-firm reasons as well as the fact that an integrated business is aiming to optimize overall profit, not the separate profit of each division.[308] Section 2 has never been a tool for trading partners to get equal treatment with

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303 Case AT.39740—Google Search (Shopping), Comm'n Decision (June 27, 2017), ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf.

304 Complaint ¶¶ 152–167, Colorado v. Google LLC, No. 1:2020-cv-03715 (D.D.C. Dec. 17, 2020).

305 HJC STAFF REPORT, *supra* note 19, at 6 ("Whether through self-preferencing, predatory pricing, or exclusionary conduct, the dominant platforms have exploited their power in order to become even more dominant."); *see also id.* at 16, 99, 120, 187–96, 213–17, 242–43.

306 *Id.* at 20–21.

307 *See* D. Bruce Hoffman & Garrett D. Shinn, *Self-Preferencing and Antitrust: Harmful Solutions for an Improbable Problem*, CPI ANTITRUST CHRON., June 2021.

308 For an overview, see JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION ch. 4 (1988); Irwin M. Stelzer & Richard Schmalensee, *Potential Costs and Benefits of Vertical Integration*, 52 ANTITRUST L.J. 249 (1983).

an in-house division: to call denial of such treatment "exclusion" seems to stretch the term—capacious as it is on my definition—past breaking.

Recall that the core of the exclusion element is some kind of suppression of the ability or incentive of rivals to compete: suppression, that is, not compared with the ability or incentive of the monopolist, but compared with the ability or incentive that the rivals would enjoy but for the challenged practice or transaction. But a bare self-preferencing claim conflates the two. The premise of such a claim must be that, in the relevant "baseline" but-for world, the monopolist would treat the rival identically with its own division. By analogy to *Aspen Skiing*, the gravamen of a pure self-preferencing case would be *not* that the monopolist has stopped giving the rival the valuable commercial right it had hitherto found it rational to extend to its competitor (i.e., the right to participate in a bundled ticket), but that the monopolist is refusing to allow the rival to sell tickets to the monopolist's *own* mountain as a second branch of the monopolist's own sales division, regardless of whether there is any world in which a rational ski operator (or anyone else) would voluntarily enter into such a relationship.

Second, there is great force to the idea that the right to deal more favorably with your own division than with others is at the heart of competitive privilege, and thus per se beyond the scope of Section 2. Much of the whole point of engaging in industrial organization is that "special" treatment becomes possible within the bounds of the firm, and this in turn is at the core of many of the basic benefits that corporate organization can offer.[309] There is also considerable, albeit imperfect, evidence suggesting that vertical integration reduces a variety of costs.[310] (Recall that I am not talking about vertical *mergers* or *acquisitions* that would take a previously unintegrated division off the market.) Our regard for the internal operation of an integrated business enterprise extends to complete exemption from scrutiny for the purported "prime evil" of antitrust—collusion[311]—and it seems odd to allow intracorporate price fixing but condemn intracorporate favorable dealing,[312] to say nothing of the unthinkably vast costs of policing such allegations. Mere intrafirm preference is ubiquitous, usually beneficial, and uncongenial to judicial

[309] *But see generally* Paul, *supra* note 54 (arguing that this preference for the corporate form is not self-evident and may not be desirable).

[310] *See generally* Timothy F. Bresnahan & Jonathan D. Levin, *Vertical Integration and Market Structure* 853, *in* HANDBOOK OF ORGANIZATIONAL ECONOMICS (Robert Gibbons & John Roberts eds., 2012) (reviewing evidence and acknowledging its limitations).

[311] As noted above, though, exclusion may in fact have a better claim to that title. *See supra* Part II.B.3; *see also* Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527, 542 (2012).

[312] Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984).

micromanagement: *exactly* the kind of thing our zone of per se legality is for.[313] Liability for mere self-preferencing thus seems implausible.

The dangerous-exclusion model suggests two limited but important exceptions to this general observation. The first is *deceptive self-preferencing*. If the dominant platform is deceiving consumers or trading partners—knowingly making false statements—there is no privilege.[314] Exclusion, too, is possible, against a plausible counterfactual: arising from the gap between what trading partners are promised and what they get.

The second exception is *targeted discrimination against rivals* (or those dealing with rivals) and particularly *conditional dealing*. If the core case of self-preferencing involves treating one's own integrated divisions favorably and all others unfavorably, the case of targeted discrimination involves treating all third parties favorably and treating actual or potential competitors (or their trading partners) unfavorably. The most pernicious version of this conduct involves the monopolist making what is in effect an open offer: desirable terms are available to those who do not compete with me; undesirable terms will result if you compete (or deal with those who do). Like any other bribe or threat that softens rivals' incentives, this kind of conditioning can result in Section 2 liability.[315] The "exclusion" here comes not from the unfavorable treatment as such, but from the prior application of a condition that changes the incentives of other market participants.[316] Such conditional dealing is not privileged.[317]

2. *Entry Theories: Vertical Integration and Duplication*

Another prominent theory of competitive harm involves harmful entry or expansion by a dominant platform: either in competition with third parties on its platform, or in "predatory" imitation of competitors on or off the platform.[318] Some have suggested that such conduct represents unlawful monopo-

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313 *See supra* Part II.C.3.

314 *See, e.g.*, Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Labs., 850 F.2d 904, 916 (2d Cir. 1988).

315 *See, e.g.*, Lorain Journal Co. v. United States, 342 U.S. 143, 152–55 (1951); United States v. Dentsply Int'l, Inc., 399 F.3d 181, 193–94 (3d Cir. 2005); ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 287 (3d Cir. 2012). *But see* FTC v. Facebook, Inc., 560 F. Supp. 3d 1, 21–30 (D.D.C. 2021).

316 McWane, Inc. v. FTC, 783 F.3d 814, 821 n.3 (11th Cir. 2015) ("[T]he goal of the program was not necessarily to enforce the punishments but to dissuade customers from leaving McWane in the first place.").

317 *See supra* note 223 and accompanying text.

318 *See, e.g.*, Dana Mattioli, *How Amazon Wins: By Steamrolling Rivals and Partners*, WALL ST. J. (Dec. 22, 2020); Billy Gallagher, *Copycat: How Facebook Tried to Squash Snapchat*, WIRED (Feb. 16, 2018), www.wired.com/story/copycat-how-facebook-tried-to-squash-snapchat.

lization, particularly when it involves using data gathered by the platform, and/or pricing targeted to draw demand away from its rivals.[319]

The dangerous-exclusion model encourages us not to agonize over most such claims. This conduct—entry by new products, including in cheaper imitation of rivals—is at the heart of the competitive privilege.[320] The fact that it happens at all is the essence of competition; the fact that it is done well (i.e., with the benefit of accurate data about what people want), or at a desirable price, makes it better, not worse. My model provides no basis to criticize competitive entry.

By way of exception, though, our model implies at least one plausible theory of harm. I noted above that *conditional dealing* is beyond the privilege, and have also pointed out that a monopolist platform can violate Section 2 by offering to provide certain valuable platform services to a third party on the condition that it refrain from competing or from dealing with competitors.[321]

It requires little additional thought to see that the same evil can be worked in another way. Suppose that a monopolist platform offers to provide valuable services to a third party only on the condition that the competitor provide information and data that, in practice, will significantly limit its incentive to compete against the monopolist platform in other markets (e.g., by effectively empowering the monopolist platform to detect and then capture profits revealed by the competitor's investment). In principle, this could constitute monopolization: *not* by virtue of the platform's entry or entry threat, both of which are procompetitive in isolation, but by virtue of the competition-softening effects of the condition. It could be a hard case to prove, and countervailing efficiencies may arise from the access to and use of the data, but it is a respectable theory of monopolization.[322]

C. INTELLECTUAL PROPERTY EXCEPTIONALISM

Antitrust cases on the digital frontier often involve the invocation of intellectual property as a defense to allegations of monopolization. This can arise,

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[319] *See, e.g.*, Khan, *supra* note 46, at 781–83.

[320] *See supra* Part II.C.3.

[321] *See supra* note 315 and accompanying text.

[322] During the editing of this article, a similar theory was articulated by the DOJ in *UnitedHealth Group*. *See* Complaint ¶ 88, United States v. UnitedHealth Grp., Inc., No. 1:22-cv-00481 (D.D.C. Feb. 24, 2022) ("Post-transaction, United would have access to its health insurer rivals' proprietary edits through ClaimsXten. With this data, UnitedHealthcare would have the ability to disadvantage its rivals, including by mimicking their innovative policies to make their rivals' healthcare plans less attractive to customers (relative to UnitedHealthcare). This would reduce the rivals' incentives to innovate in claims edits, which would also reduce innovation in commercial health insurance plan and provider network design. As a result, United would no longer independently pursue commercial health insurance innovation as it would have absent this inside information of its rivals.").

for example, when a monopolist acquires monopoly power over competing technologies by deceiving a standard-setting organization about the existence of intellectual property or the terms on which it will license it—monopolization-by-misrepresentation of the clearest kind[323]—or when a monopolist uses a patent licensing agreement as a vehicle for exclusion.[324]

The issue on the table is whether and to what extent the hand of antitrust should be stayed in the presence of actual or claimed IP rights. The claim that patent law has or should have a suppressive effect on antitrust—particularly in the context of standard-setting organizations and particularly when the conduct at issue is that of patent-holders—was for some years the official position, and a flagship policy, of the DOJ Antitrust Division, outlined by Assistant Attorney General Makan Delrahim in a series of speeches and amicus briefs.[325]

The core claim here is that the presence (or invocation) of a patent right should create a zone of presumptive freedom from antitrust that other rights or commercial liberties—contract rights, property rights, tort rights, or even the ordinary everyday liberties of running a business and making decisions about price, output, quality, and so on—do not enjoy. This claim could be based in a view about the statutory dignity of the Patent Act, the importance of the dynamic benefits of encouraging innovation and investment, or the availability of other remedies. Delrahim in fact stressed all three of these, pointing to: (1) "the fundamental right to exclude," grounded in the Patent Act; (2) the Framers' constitutional commitment to incentivizing investment through patent monopoly protection; and (3) the availability of contract and other common-law remedies.[326] The Division's output, collectively, suggests that antitrust should stay out of cases involving, among other things: patent holdup (in which a patent holder increases prices after securing monopoly), FRAND violations (in which a patent holder violates a previous commitment to make licenses available on fair, reasonable, and non-discriminatory terms), and pat-

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[323] *See, e.g.*, Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 314 (3d Cir. 2007). Such a theory was alleged but not proved in *Rambus*. *See* Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008); *see also* FED. TRADE COMM'N, STATEMENT OF THE COMMISSION IN THE MATTER OF UNION OIL COMPANY OF CALIFORNIA AND CHEVRON/UNOCAL (Aug. 2005).

[324] *See*, *e.g.*, FTC v. Actavis, Inc., 570 U.S. 136, 140–41 (2013).

[325] *See*, *e.g.*, Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks at the University of Pennsylvania Law School, The "New Madison" Approach to Antitrust and Intellectual Property Law (Mar. 16, 2018) [hereinafter Delrahim, "New Madison"]; Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks at the IAM's Patent Licensing Conference, Antitrust Law and Patent Licensing in the New Wild West (Sept. 18, 2018); Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Presentation at the 19th Annual Berkeley-Stanford Advanced Patent Law Institute, "Telegraph Road": Incentivizing Innovation at the Intersection of Patent and Antitrust Law (Dec. 7, 2018) [hereinafter Delrahim, "Telegraph Road"].

[326] Delrahim, "Telegraph Road," *supra* note 325.

ent royalties (in which the practice inflates payments levied under cover of a patent license).

The dangerous-exclusion framework helps us to think more clearly about this idea. Plainly, this is not a proposition about whether the relevant conduct is exclusionary or whether it contributes to monopoly. (In the absence of those things, there would be no need for special treatment, as there would be no monopolization liability anyway: for example, a bare royalty overcharge is no more unlawful than any other excessive price.[327]) Rather, in its strong form, it amounts to a claim of privilege: the idea that there is something in the exploitation of IP that compels special deference from the antitrust laws.[328]

The dangerous-exclusion model strongly suggests that this is wrong. Recall that my conception of the privilege includes only conduct with which we are sufficiently familiar to be confident that it is sufficiently ubiquitous, beneficial, and unsuitable for judicial scrutiny that it merits immunity from Section 2's otherwise plenary reach.[329]

There is no reason to think that conduct relating to IP rights should fall into this category when the same conduct in connection with any other right or freedom would not. On the contrary, the very core of the historical idea of monopolization, and of the common law upon which the monopolization statute was expressly intended to draw,[330] *was precisely* exclusion of competitors through the use of such rights: literal patent monopolies.[331] (Nor is modern IP quite so different from those older grants as might be thought: by 1700 "the royal letter-patent had been converted into a more or less modern version of the patent, justifiable only by a solid contribution to economic development."[332])

Moreover, the use of IP rights, and conduct that "exploits" such rights by increasing the return from them, is not different in any relevant respect from the use or exploitation of any other right, or indeed from the use or exploitation of any other commercial freedom resting on the common law. These are all state-created, policy-driven legal entitlements,[333] often conferred to en-

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[327] *See supra* note 220 and accompanying text.

[328] *See, e.g.*, Delrahim, "New Madison," *supra* note 320, at 5 (referring to "the fundamental right to exclude").

[329] *See supra* Part II.C.3.

[330] *See supra* Part II.B.

[331] *See supra* Part II.B.1. Most of the verb's pre-1890 judicial uses relate to use and abuse of patent rights; *see, e.g.*, Manning v. Cape Ann Isinglass & Glue Co., 16 F. Cas. 643, 643 (C.C.D. Mass. 1879) ("[A]n inventor should not monopolize what he has neglected to patent for a considerable time, if, in the meantime, the public have acquired the knowledge of it[.]").

[332] Letwin, *supra* note 76, at 359.

[333] *See generally, e.g.*, HARCOURT, *supra* note 120 (examining and criticizing market naturalism).

courage investment. Thus, for example, a monopolist aiming to enforce an exclusive-dealing (or price-fixing) contract may have a "right" to do so in contract law. The monopolist engaging in conditional dealing—say, tying—has a "right" to do so by virtue of property law. The monopolist engaging in sham litigation is exercising a "right" of access to the courts. And yet, on appropriate facts, liability beckons. *All* monopolization cases involve profitable use of affirmative legal entitlements.[334] But antitrust liability is orthogonal to the allocations of rights and duties in property, tort, contract, and other systems.[335]

Likewise, in all monopolization cases the conduct—if left unchallenged—could conceivably encourage more investment in similar monopolies. Bank robbery, if it comes to it, is often a profitable use of a shotgun: allowing more bank robbery would no doubt encourage investment and innovation in the field of shotgun manufacture. This is no reason for special treatment.

So, when this issue is correctly seen as a claim of privilege, its rejection follows: patent rights may, of course, play a key role in case-specific claims of justification,[336] but they are not special.[337] The same conclusion is thoroughly buttressed by the long history of monopolization (and other antitrust) liability for various forms of IP misuse, including the Supreme Court's emphasis in *Actavis* that a patent-infringement settlement, itself an exercise of the statutory right to license, can violate the antitrust laws.[338] The *Microsoft* court, too, gave patent exceptionalism short shrift.[339]

One final reason not to bend antitrust's knee to intellectual property: antitrust litigation is a poor place to tell an IP *right* from an IP *claim*. Special

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[334] *See, e.g.*, N. Sec. Co. v. United States, 193 U.S. 197, 352 (1904) (acknowledging that the unlawful combination "may have been for the pecuniary benefit of those who formed or caused it to be formed").

[335] *See, e.g.*, Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457, 468 (1941) ("[E]ven if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law."); United States v. Union Pac. R. Co., 226 U.S. 61, 86 (1912) ("That the purchase was legal in the state where made, and within corporate powers conferred by state authority, constitutes no defense[.]").

[336] *See, e.g.*, 1-800 Contacts, Inc. v. FTC, 1 F.4th 102, 119 (2nd Cir. 2021).

[337] *See, e.g.*, Elhauge, *supra* note 7, at 276, 304 (making similar observations).

[338] *See* FTC v. Actavis, Inc., 570 U.S. 136 (2013); 35 U.S.C. § 261; *see also, e.g.*, United Shoe Mach. Corp. v. United States, 258 U.S. 451, 463–64 (1922) ("[T]he rights secured by a patent do not protect the making of contracts in restraint of trade, or those which tend to monopolize . . . .").

[339] United States v. Microsoft Corp., 253 F.3d 34, 63 (D.C. Cir. 2001) ("Microsoft's primary copyright argument borders upon the frivolous. The company claims an absolute and unfettered right to use its intellectual property as it wishes: '[I]f intellectual property rights have been lawfully acquired,' it says, then 'their subsequent exercise cannot give rise to antitrust liability.' That is no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability.").

deference to IP will, in practice, mean special deference to the *assertion* of IP, and this in turn will encourage defendants to cloak practices beneath a fake IP veneer. *Qualcomm* itself was an extreme case: the FTC alleged that an anticompetitive surcharge had merely been labeled a component of patent royalties, although it had nothing to do with the defendant's (genuine and valuable) patents. The Ninth Circuit's broadly written opinion suggested that monopolists are free to impose such surcharges on purchases from rivals so long as they are wise enough to bundle those surcharges into "genuine" patent licenses.[340] That strains common sense, and it promises trouble.

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The approach to monopolization that I propose does not answer every question or solve every problem, on the digital frontier or elsewhere. But it structures the enterprise in the right way and invites courts and agencies to grapple with the right difficulties. It offers a reasonably coherent framework that materially improves on what we have; it is neither senselessly pro-plaintiff nor unduly demanding; and it is comprehensible, consistent with our tradition, and relatively easy to understand, criticize, and reform. It is time to set aside the Court's false binaries and to dispense with ciphers like "predatory conduct" or "merits competition." What Section 2 forbids is dangerous exclusion.

[340] FTC v. Qualcomm Inc., 969 F.3d 974, 1000 (9th Cir. 2020) (acknowledging that surcharging rivals' sales can in principle be anticompetitive, but noting that Qualcomm's license fee was not a surcharge because "[w]hen Qualcomm licenses its SEPs to an OEM, those patent licenses have value," regardless of whether the value of the patents accounted for the size of the purported license payment).

APPENDIX

Selected Federal Monopolization Complaints Since *United States v. Microsoft Corp.,* No. 98-1232 (May 18, 1998)

FEDERAL TRADE COMMISSION

1. Intel Corp., FTC Dkt. No. 9288 (June 8, 1998), www.ftc.gov/sites/default/files/documents/cases/1998/06/intelcmp_0.pdf.

2. Rambus Inc., FTC Dkt. No. 9302 (June 18, 2002), www.ftc.gov/sites/default/files/documents/cases/2002/06/020618admincmp.pdf.

3. Bristol-Myers Squibb Co., FTC Dkt. No. C-4076 (Apr. 14, 2003), www.ftc.gov/sites/default/files/documents/cases/2003/04/bristol myerssquibbcmp.pdf.

4. Union Oil Co. of Cal., FTC Dkt. No. 9305 (Mar. 4, 2003), www.ftc.gov/sites/default/files/documents/cases/2003/03/030304uno caladmincmplt.pdf.

5. FTC v. Ovation Pharms., Inc., No. 0:08-cv-06379 (D. Minn. Dec. 16, 2008), www.ftc.gov/sites/default/files/documents/cases/2008/12/081216ovationcmpt.pdf (Ovation Pharmaceuticals was acquired by Lundbeck in 2009, during the course of this case. Case name updated to *FTC v. Lundbeck, Inc*. following acquisition.)

6. Intel Corp., FTC Dkt. No. 9341 (Dec. 16, 2009), www.ftc.gov/sites/default/files/documents/cases/091216intelcmpt.pdf.

7. FTC v. Watson Pharms., Inc., No. CV-09-00598 (C.D. Cal. Jan. 29, 2009), www.ftc.gov/sites/default/files/documents/cases/2009/02/090202androgelcmpt_0.pdf.

8. Transitions Optical, Inc., FTC Dkt. No. C-4289 (Apr. 22, 2010), www.ftc.gov/sites/default/files/documents/cases/2010/04/100427trans opticalcmpt.pdf.

9. McWane, Inc., FTC Dkt. No. 9351 (Jan. 4, 2012), www.ftc.gov/sites/default/files/documents/cases/2012/01/120104ccwanestaradmin cmpt.pdf.

10. IDEXX Labs., FTC Dkt. No. C-4383 (Feb. 11, 2013), www.ftc.gov/sites/default/files/documents/cases/2013/02/130212idexxcmpt.pdf.

11. FTC v. AbbVie Inc., No. 2:14-cv-05151 (E.D. Pa. Sept. 8, 2014), storage.courtlistener.com/recap/gov.uscourts.paed.495407.1.0.pdf.

12. FTC v. Cardinal Health, Inc., No. 15-CV-3031 (S.D.N.Y. Apr. 20, 2015), www.ftc.gov/system/files/documents/cases/150420cardinalcmpt.pdf.

13. FTC v. Endo Pharms. Inc., No. 2:16-cv-01440 (E.D. Pa. Mar. 30, 2016), www.ftc.gov/system/files/documents/cases/160331endocmpt.pdf.

14. Victrex plc, FTC Dkt. No. C-4586 (July 13, 2016), www.ftc.gov/system/files/documents/cases/160714victrexcmpt.pdf.

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