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Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis:
Revitalizing the Rule of Reason for Exclusionary Conduct

By

Andrew I. Gavil* & Steven C. Salop**

INTRODUCTION

Conservative commentary has long been skeptical of exclusionary conduct allegations, even those involving firms with substantial market power. This conservative critique of antitrust law has been highly influential and has facilitated a transformation of antitrust standards of conduct since the 1970s. The combination of objections from the business community, conservative academic criticism, and political change launched a generation-long movement toward increasingly more permissive standards of conduct.

Although these changes have taken many forms, all were influenced by a common and repeated message: competition law was over-deterrent. It was prone to condemn conduct that was likely beneficial in many instances, or competitively inconsequential at worst. Conservatives attributed this tendency to bright line rules of liability, undemanding burdens of proof of anticompetitive effect, lack of appreciation for efficiency, and the limited competence of antitrust decision-makers to correctly differentiate procompetitive from anticompetitive conduct. These commentators also espoused a range of presumptions that previously suspect types of exclusionary conduct were more likely procompetitive and that even highly concentrated markets were likely to perform well.¹

Critics relied heavily on the assumption that the costs of false positive errors (i.e., erroneous convictions and over-deterrence) far exceeded the costs of false negatives (i.e., erroneous acquittals and under-deterrence). They further assumed that the effects of false positives would be

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¹ In this article, we differentiate “assumptions” from “presumptions”—a term of more specific meaning in the context of litigation and burdens of proof. As we explain in Parts II and III, *infra*, many mistaken conservative assumptions have provided the basis for the equivalent of procompetitive presumptions in antitrust law.

durable because court decisions would have lasting impact. By contrast, they assumed that the effects of false negatives would largely be dissipated by the self-correcting tendencies of markets.²

The proscribed cure was a combination of greater economic sophistication, lessened reliance on bright-line rules of liability, and greater reliance on bright-line rules of *non*-liability. The influence of this approach did not stop with the analysis of particular practices. The emphasis on false positives provided a lodestar for the analysis of various legal rules³ and it became a barometer for measuring the wisdom of prohibitions.⁴ This translated into a higher evidentiary burden on plaintiffs in cases alleging exclusionary conduct, especially a requirement of more economic evidence to support competitive harm allegations.

Many of the assumptions that guided this generation-long retrenchment of antitrust rules were mistaken and advances in the law and in economic analysis have rendered them anachronistic. This is particularly the case with respect to exclusionary conduct.⁵ As Professor Jonathan Baker has observed, rote invocation of error cost analysis can itself produce errors, particularly with respect to exclusionary conduct.⁶ Continued reliance on what are now exaggerated fears of “false positives,” and failure adequately to consider the harm from “false negatives,” has led courts to impose excessive demands of proof on plaintiffs that belie both established procedural norms and sound economic analysis. The result is not better and more reasonable antitrust standards, but instead an embedded ideological preference for non-intervention and a “thumb on the scales”⁷ that creates a tendency toward false negatives, particularly in modern markets characterized by economies of scale and network effects. Indeed, the effect goes well beyond a “thumb,” because it effectively shifts the default presumption from neutral to pro-defense. There are also excessive administrative costs, as ever “more” evidence is

² For one of the oft-cited illustrations of this set of arguments, see Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2 (1984). For a criticism of its approach, see Oliver E. Williamson, *Delimiting Antitrust*, 76 GEO. L.J. 271, 281–89 (1987).

³ For an explanation, see Jonathan B. Baker, *Taking the Error Out of ‘Error Cost’ Analysis: What’s Wrong with Antitrust’s Right*, 80 ANTITRUST L.J. 1, 5–7 (2015).

⁴ See, e.g., *Verizon Comm’ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 414 (2004) (“Mistaken inferences and the resulting false condemnations are especially costly, because they chill the very conduct the antitrust laws are designed to protect The cost of false positives counsels against an undue expansion of § 2 liability.”) (internal quotation mark omitted); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986); *Ball Mem’l Hosp. Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1333–34 (7th Cir. 1986).

⁵ See, e.g., Philippe Aghion & Patrick Bolton, *Contracts as a Barrier to Entry*, 77 AM. ECON. REV. 388 (1987); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power over Price*, 96 Yale L.J. 209 (1986); Eric B. Rasmusen et al., *Naked Exclusion*, 81 AM. ECON. REV. 1137 (1991); Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L.J. 513 (1995); Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837 (1990); B. Douglas Bernheim & Michael D. Whinston, *Exclusive Dealing*, 106 J. POLIT. ECON. 64 (1998).

⁶ Baker, *supra* note 3, at 37 (“In applying decision theory, a neutral economic tool, to the analysis of antitrust rules, contemporary conservatives have made a series of erroneous assumptions, which collectively impart a non-interventionist bias to their conclusions. These assumptions systematically overstate the incidence and significance of false positives, understate the incidence and significance of false negatives, and understate the net benefits of various rules by overstating their costs.”). See also JONATHAN B. BAKER, *THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY* 73–77 (2019) (discussing relationship of error-cost analysis to legal presumptions).

⁷ See Baker, *supra* note 3, at 6.

demanded, without regard for its cost or whether it is likely to significantly improve the accuracy of decisions.

In this article, we build on this prior work to explain how these erroneous assumptions about markets, institutions, and conduct have distorted the antitrust decision-making process and produced an excessive risk of false negatives in exclusionary conduct cases involving firms attempting to achieve, maintain, or enhance dominance or substantial market power. To redress this imbalance, we integrate modern economic analysis and the teaching of decision theory with the foundational conventions of antitrust law, which has long relied on probability, presumptions, and reasonable inferences to provide effective means for evaluating competitive effects and resolving antitrust claims.

In Part I, we review the essential role that probability, presumptions, and inferences have played in shaping antitrust law’s approach to defining evidentiary burdens. In Part II, we briefly explain the role decision theory should play in designing antitrust rules in the context of current case law and economic learning and critically examine the Chicago-School critiques of 1960s antitrust and explain why their relevance is much reduced today. In Part III, we propose a series of guiding principles and advocate for easing of the burdens placed on plaintiffs to establish anticompetitive harm. We propose eliminating continued reliance on the unwarranted assumptions that have raised the plaintiff’s burden in exclusionary conduct cases and tipped the litigation scales in favor of defendants and provide suggestions for how procompetitive presumptions might be more narrowly tailored.

I. THE RULE OF REASON, COMPETITIVE HARM, AND THE ROLE OF PROBABILITY, INFERENCE AND PRESUMPTION

A. The Origins of the Rule of Reason

From its emergence in *Standard Oil*,⁸ the rule of reason has been rooted in probability, not certainty.⁹ The Court explained that conduct could be deemed “unreasonably restrictive of competitive conditions” if it “were of such a character as to give rise to the *inference or presumption*” that it was “restraining the free flow of commerce and *tending to bring about the*

⁸ *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 60 (1911).

⁹ See Jonathan B. Baker & Andrew I. Gavil, *Judge Douglas H. Ginsburg and Antitrust Law’s Rule(s) of Reason*, forthcoming in DOUGLAS GINSBURG: AN ANTITRUST PROFESSOR ON THE BENCH, LIBER AMICORUM - VOL. II (Nicolas Charbit, ed., 2020), <https://ssrn.com/abstract=3349853> (explaining that, *Standard Oil* intended the “rule of reason” to be applied to claims under both Sections 1 and 2); Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards and Microsoft*, 7 GEO. MASON L. REV. 617, 647–48, 659–65 (1999). See also *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (explaining that the Supreme Court in *Standard Oil* used “rule of reason” to “describe the proper inquiry under both” Section 1 and 2 of the Sherman Act).

evils, such as enhancement of prices, which were considered to be against public policy.¹⁰ Seven years later, the Court again emphasized the probabilistic nature of judgments under the rule of reason in *Board of Trade of the City of Chicago*.¹¹ In Justice Brandeis’ “classic” statement of the rule of reason, he explained that the court “must ordinarily consider . . . the nature of the restraint and its effect, *actual or probable*.”¹²

From these two pillars, the modern rule of reason with its focus on competitive effects later developed in *National Society of Professional Engineers*¹³ and *National Collegiate Athletic Association*.¹⁴ Writing for the Court in both cases, Justice Stevens drew heavily on *Standard Oil* and *Chicago Board of Trade*, synthesizing the key elements of presumption, inference, and probability. He explained that unreasonableness could be based on either “the nature or character of the contracts, or . . . on surrounding circumstances giving rise to the *inference or presumption* that they were intended to restrain trade and enhance prices.”¹⁵ Probabilistic assessments of likely competitive harm clearly also are the basis of the “per se rule,” an application of the rule of reason that irrebuttably presumes conduct will restrain competition unreasonably.¹⁶

Although the rule of reason has evolved mainly in the context of Section 1 horizontal restraints law, this learning applies equally to exclusionary conduct cases under both Sections 1 and 2. The burden-shifting rule of reason has been used in concerted exclusionary conduct cases like *Visa*¹⁷ and *RealComp II*.¹⁸ It also has been used to structure the analysis in several leading Section 2 cases involving single firm conduct, including *Microsoft*,¹⁹ *McWane*,²⁰ and *ZF Meritor*.²¹

¹⁰ *Standard Oil*, 221 U.S. at 58 (emphasis added). The Court also noted that the use of “presumptions” in interpreting and applying the Sherman Act was rooted in the common law, on which its core prohibitions were modelled. *Id.* at 52.

¹¹ *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231 (1918) (“*Chicago Board of Trade*”).

¹² *Id.* at 238 (emphasis added). *See also* *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 203 n.10 (2010) (“Justice Brandeis provided the classic formulation of the Rule of Reason in *Board of Trade of Chicago v. United States*.”).

¹³ *Nat’l Soc’y of Prof’l Eng’rs. v. United States*, 435 U.S. 679 (1978) (“*Professional Engineers*”). *Professional Engineers* also emphasized that the rule of reason focuses on competitive effects. *Id.* at 692 (“[T]he purpose of the analysis is to form a judgment about the competitive significance of the restraint.”). *See also* Steven C. Salop, *The First Principles Approach to Antitrust, Kodak and Antitrust at the Millennium*, 68 ANTITRUST L.J. 187 (2000) (advocating “first principles” approach to evaluating market power and anticompetitive effects).

¹⁴ *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984) (“*NCAA*”).

¹⁵ *Professional Engineers*, 435 U.S. at 690 (emphasis added).

¹⁶ *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940) (price-fixing agreements “banned because of their actual or potential threat” to competition); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (agreements highly likely to be anticompetitive are “conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use”).

¹⁷ *United States v. Visa USA, Inc.*, 344 F.3d 229, 238 (2d Cir. 2003).

¹⁸ *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 825–26 (6th Cir. 2011).

¹⁹ *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001).

²⁰ *McWane, Inc. v. FTC*, 783 F.3d 814, 833 (11th Cir. 2015).

²¹ *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 281–82 (3d Cir. 2012).

Indeed, *Standard Oil* involved exclusionary conduct and included claims under both Sections 1 and 2.²²

B. Satisfying the Plaintiff's Burden of Production

As the rule of reason evolved, this reliance on probabilistic assessments of likely harm remained one of its core characteristics. Per se prohibition was reserved for conduct with a very high probability of harm. In other cases, the level of scrutiny and the likelihood of liability were calibrated to the nature and strength of the evidence of probable harm, whether circumstantial or direct, as well as presumptions based on the nature of the restraint, experience and the overarching goals of the Sherman Act.

Presumptions have consistently played a role in antitrust law when the prediction of competitive harm is deemed sound and, in some cases, when combined with some limited market-specific analysis.²³ *NCAA, Indiana Federation of Dentists*,²⁴ and *California Dental*²⁵ further developed that long-standing role. A plaintiff can meet its burden of production through a rebuttable anticompetitive presumption when economic theory predicts a relatively high or “obvious” probability of competitive harm.²⁶ Courts also recognized that a plaintiff could meet its burden of production for competitive harm with a “double inference.”²⁷ Courts could infer market power from high market shares and other factors in a defined market; combining this inference with conduct that has a tendency to be anticompetitive, competitive harm could then be inferred—precisely because that tendency increases in the presence of market power.²⁸ Finally, the Court also recognized that when direct evidence of probable anticompetitive effect is proffered, neither presumption nor inference is required.²⁹

²² See *supra* note 9.

²³ See, e.g., *Nat'l Soc'y of Prof'l Eng'rs. v. United States*, 435 U.S. 679, 693–94 (1978); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 37–38 (D.C. Cir. 2005).

²⁴ *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) (“*Indiana Federation of Dentists*”).

²⁵ *California Dental Ass'n v. FTC*, 526 U.S. 758 (1999).

²⁶ *Id.* at 770. See also *Polygram Holding*, 416 F.3d at 36–37. The strongest rule of reason cases from the perspective of the plaintiff will include *both* direct and circumstantial evidence of harm. See, e.g., *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 827–34 (6th Cir. 2011) (evaluating both direct and circumstantial evidence of competitive harm under the rule of reason). The Supreme Court's decisions in *NCAA* and *Indiana Federation of Dentists* were part of a larger movement to alleviate the burden of production (and proof) on plaintiffs in cases involving relatively more obvious anticompetitive conduct. See Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 755–57 (2012).

²⁷ For an explanation of this “double inference” method of establishing competitive harm, see ANDREW I. GAVIL, ET AL., *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 544–45 (3d ed. 2017).

²⁸ See, e.g., *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 823 (6th Cir. 2011) (“*Realcomp's* substantial market power, combined with the likely anticompetitive tendencies of its policies, rendered the policies unreasonable due to their likely anticompetitive effects.”).

²⁹ *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 109 (1984) (“[W]hen there is an agreement not to compete in terms of price or output, ‘no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.’”) (quoting *Nat'l Soc'y Prof'l Eng'rs*, 435 U.S. at 692); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460–61 (2009) (“[P]roof of actual detrimental effects, such as

In evidentiary terms, direct evidence of probable competitive harm can eliminate the need to rely on circumstantial evidence, and hence either presumption or inference.³⁰ This is not, however, a short cut or “quick look” that somehow avoids a showing of market power.³¹ Quite to the contrary, when direct evidence of competitive harm is available, market power also *has* been shown.³² The Court did not suggest that such direct proof was a requirement of rule of reason analysis, but rather that such proof met the plaintiff’s burden of production and hence eliminated the necessity of reliance on circumstantial evidence.³³

Indeed, direct evidence of anticompetitive effects on price and output also can be sufficient to rebut a defendant’s efficiency justifications. When direct evidence of anticompetitive effects has been shown (and not undermined), the plaintiff in effect has preemptively shown that any procompetitive benefits were inadequate to eliminate the demonstrated anticompetitive effects in the market.³⁴

C. The “Enquiry Meet for the Case”

In moving away from reliance on bright line approaches, the courts continued to use probability assessments to apply the rule of reason flexibly, depending on the strength of the evidence presented by the parties and by recognizing appropriate presumptions. A more precise statement of the “per se rule,” for example, is “per se unreasonableness”—an application of the rule of reason that involves an irrebuttable presumption that the conduct is highly likely to unreasonably restrain competition.³⁵ Similarly, what has been labelled the “quick look” can be understood as courts utilizing a rebuttable presumption when the probability of competitive harm is relatively high, albeit not as high as with per se unreasonableness.

This approach reached fruition in *California Dental Association*.³⁶ The Court made it clear that the rule of reason is a sliding-scale and that evidence of anticompetitive effects varies and

a reduction of output,’ can obviate the need for an inquiry into market power, which is but a ‘surrogate for detrimental effects.’”) (quoting PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1511, at 429 (3d ed. 1986)).

³⁰ Similarly, courts in conspiracy cases do not rely on “plus factor” analysis to infer agreement when there is direct evidence of agreement, such as bylaws or contract, or communications revealing a conspiracy. *See, e.g.*, *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661–62 (7th Cir. 2002) (explaining that direct evidence in Section 1 conspiracy is “evidence tantamount to an acknowledgement of guilt”).

³¹ Assembling direct evidence of harm is not necessarily “quick” relative to the circumstantial route. Obtaining direct proof may require significant investigation and evidence gathering. Direct proof also is likely to involve different economic methods, although there may overlap with direct evidence of market power.

³² *See supra* note 26. *See also infra* note 87.

³³ *See, e.g.*, *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005) (rejecting argument that quick look approach is only available when evidence of actual harm is proffered).

³⁴ *See, e.g.*, *Indiana Fed’n of Dentists*, 476 U.S. at 461 (“The finding of actual, sustained adverse effects on competition in those areas where IFD dentists predominated, viewed in light of the reality that markets for dental services tend to be relatively localized, is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis.”).

³⁵ This view was not entirely new, as the Court had observed in the late 1950s that what was being referred to as the “per se rule” was a “principle of per se unreasonableness.” *See N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

³⁶ *California Dental Ass’n v. FTC*, 526 U.S. 756, 758 (1999).

must be evaluated in the context of each case.³⁷ The strength of any presumption of competitive harm affects the burden on the plaintiff to undertake market analysis. It also correspondingly affects the defendant’s evidentiary burden to rebut evidence or presumption of harm. This is the “enquiry meet for the case.” It synthesized the Court’s previous decisions describing the rule of reason inquiry as focused on the probability—on tendencies—of competitive harm.³⁸ But as the 5-4 division in the Court illustrated, that formulation leaves room for disagreements about the quantity and quality of evidence needed to support an inference of probable competitive harm.

D. Developing New Presumptions

The rule of reason and its presumptions should continue to evolve over time as economic learning advances and courts gain further experience. *Leegin*³⁹ and *Actavis*⁴⁰ invited lower courts to do so: to consider the adoption of appropriate presumptions based on experience in applying the rule of reason (respectively) to intrabrand vertical price agreements and pay-for-delay cases. In this regard, after discussing the decision theory framework and examining certain assumptions made by conservative commentators and the presumptions that flow from those assumptions, we propose principles to guide the evolution of the rule of reason for exclusionary conduct in today’s modern marketplace. Our goal is to avoid the excessive false negatives that are highly likely to flow from unduly permissive antitrust rules grounded in outdated non-interventionist presumptions and assumptions.

II: ACHIEVING A SOUND DECISION-THEORETIC APPROACH TO ANTITRUST LEGAL STANDARDS FOR EXCLUSIONARY CONDUCT

A. Decision Theory and Probabilistic Competitive Harm

It has been recognized for decades that decision theory is useful for understanding and formulating legal standards.⁴¹ Making legal decisions based on probability, inferences and presumptions is consistent with a decision-theoretic approach to legal rules. Decision theory provides a methodology for information-gathering and decision-making when outcomes are uncertain, information is inherently imperfect, and information is costly to obtain. This

³⁷ *Id.* See also *FTC v. Actavis, Inc.*, 570 U.S. 136, 159–60 (2013).

³⁸ This approach also aligned the rule of reason as applied under Section 1 with the structured approaches that the Court, and the lower courts, had been developing in other areas of antitrust law, including monopolization under Section 2. See *Baker & Gavil*, *supra* note 9.

³⁹ *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 898–99 (2007) (“Courts can, for example, devise rules over time for offering proof, *or even presumptions* where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.”) (emphasis added).

⁴⁰ *Actavis*, 570 U.S. at 159–60.

⁴¹ There is a large literature on the application of decision theory to antitrust. See, e.g., Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41 (1999). For further discussion of its application in assigning burdens of proof, see Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738 (2012); Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 YALE L.J. 1254 (2013).

methodology is a rational process in which a decision-maker begins with initial beliefs (i.e., presumptions) based on prior knowledge and then gathers additional information (i.e., evidence) to supplement the presumption in order to make a better, more accurate decision.⁴²

Decision theory recognizes that some erroneous decisions are inevitable because it is not economical, or even possible, to achieve perfect information. Even if the evidence suggests that the conduct in a particular case is beneficial, the conduct actually may be harmful, or vice versa. Formulating an optimal legal standard would involve balancing to the extent possible the expected consumer welfare harm from “false positive” errors (i.e., erroneously prohibiting beneficial conduct) versus “false negative” errors (i.e., erroneously permitting harmful conduct). Analysis of error costs would require information on the incidence and consequences of error. The analysis also would take into account the impact of the legal rule on deterrence, that is, on future participants’ choice of conduct in light of the legal standard.⁴³ It also could take into account the cost of the administrative process, including the cost of delay.

Presumptions also play a key role in setting evidentiary burdens under the rule of reason. The recognition of a presumption is a question of law. The court would identify and gauge the strength of its initial economic presumption regarding the likely competitive impact of the conduct. This presumption would be rationally based on logic, experience, and economic evidence about the industry and the category of conduct.⁴⁴ The presumption regarding the category of conduct could be anticompetitive, procompetitive, or neutral (i.e., equally likely to be anticompetitive or procompetitive). The strength of the presumption would vary with the degree of variation in the likely effects of the conduct. Because any single district court is likely to have very limited information about the probable categorical effects of conduct, appellate courts and the Supreme Court have typically been better positioned to make judgments about presumptions.

⁴² See, e.g., John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1084–86 (1968); MORRIS DE GROOT, OPTIMAL STATISTICAL DECISIONS 135–40 (1970); HOWARD RAIFFA, DECISION ANALYSIS: INTRODUCTORY LECTURES ON CHOICES UNDER UNCERTAINTY 27–33 (1968). In the language of Bayesian probability theory, the decision-maker begins with a “prior” probability, gathers information, and then forms a “posterior” probability by rationally combining the prior probability and the information. Here we are not using “presumption” in the formal legal sense, but as a synonym for “assumptions” or “priors.”

⁴³ Deterrence effects are distinguishable from the issue of judicial errors for a given legal standard. For example, a rule of per se legality would be easy to administer and would not lead a district court to issue erroneous “false convictions.” But, such a legal standard might not be optimal because it would not deter any anticompetitive conduct in that category. For discussion of deterrence, see Ronald J. Allen & Alex Stein, *Evidence, Probability, and the Burden of Proof*, 54 ARIZONA L. REV. 557, 580, 593 (2013). False positives as well as false negatives tend to lead to under-deterrence of anticompetitive conduct in some circumstances. Steven C. Salop, *Merger Settlements and Enforcement Policy for Optimal Deterrence and Maximum Welfare*, 81 FORDHAM L. REV. 2647, 2668–69, 2669 n.60 (2013) (compliance incentives decrease when the probability of error of either type increases).

⁴⁴ A key assumption of decision theory is that the initial presumptions of the court are rational and accurate. Confirmation bias involves (unconsciously) interpreting evidence as supporting one’s prior views, which amounts to dysfunctional Bayesian inference. For one survey, see Raymond S Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GENERAL PSYCHOL. 175 (1998).

A legal standard can be characterized as the combination of the evidentiary preconditions that will trigger a presumption and an evidentiary standard to rebut the presumption.⁴⁵ The optimal evidentiary standard would balance the direction and strength of the presumption with the reliability and cost of the available evidence. For example, suppose that the presumption is that some category of conduct is more likely harmful.⁴⁶ A court could reflect this presumption (i) by treating the presumption as sufficient to satisfy the plaintiff's initial burden, or (ii) by placing a relatively low burden of production of case-specific evidence on the plaintiff. The court also might place a higher burden of production or even persuasion on the defendant to rebut the plaintiff's presumption and case-specific evidence. A stronger presumption and evidence of harm would raise the defendant's rebuttal burden. The plaintiff's burden of producing evidence of competitive harm analogously would be higher for presumptively procompetitive categories of conduct.

The cost of information also suggests the potential benefits from a structured and sometimes truncated process.⁴⁷ As we have noted, the term "per se illegality" describes an irrebuttable presumption of harm for certain categories of conduct. *Philadelphia National Bank*, the FTC and some courts have used the term "inherently suspect" to describe conduct that warrants a strong, but rebuttable presumption of likely harm, given certain other conditions.⁴⁸ In some cases, the presumption may be insufficient by itself to shift the burden but might have a supporting role along with other case-specific evidence. Thus, this decision-theoretic approach can be used to interpret and extend the "sliding scale" approach to applying the rule of reason even in the absence of an anticompetitive presumption.

Under the rule of reason, it might be useful to limit the amount of information necessary to evaluate competitive effect. Demanding more information in some cases can lead to more errors or worsened deterrence. Certain evidence may not be reasonably available or will be unreliable because it (i) too often signals an erroneous conclusion, or (ii) is too likely subject to confusion,

⁴⁵ These evidentiary rebuttal standards would include the respective burdens of pleading, production, and proof for plaintiffs and defendants.

⁴⁶ Such a presumption might not be as simple as "conduct A is so likely to be anticompetitive that we presume it will be," as is the case for some per se prohibitions. It might instead be that "conduct A, in the presence of Facts B, C, and D, is highly likely to be anticompetitive." Such qualified presumptions have been used by the Supreme Court in connection with certain kinds of group boycotts, *see* *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 296–97 (1985), and tying, *see* *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12–16 (1984). They similarly are used in merger law, where the anticompetitive presumption depends on the level of concentration and market shares of the merging firms as well as the change in concentration that the proposed merger will bring about. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963).

⁴⁷ *See* *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (noting that per se presumption "avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries"); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 434 (1990) (observing that the justification for the per se rules is "rooted in administrative convenience").

⁴⁸ *See* *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 32–33 (D.C. Cir. 2005); *In re Detroit Auto Dealers Ass'n, Inc.*, 955 F.2d 457, 470–71 (6th Cir. 1992); *North Texas Specialty Physicians v. FTC*, 528 F.3d 346, 358–59 (5th Cir. 2008).

misinterpretation, or bias by the trial court or jury.⁴⁹ Collecting and presenting additional information is not costless and may have diminishing returns and only marginal benefits, if any.⁵⁰ Moreover, requiring additional evidence disadvantages the plaintiff, which has the initial burden and the ultimate burden of proof. It also can deter meritorious cases, leading to under-deterrence.

B. The Chicago-School's Reliance on Decision Theory to Support its Critique of Antitrust

Chicago-School commentators applied a decision-theoretic framework to argue that antitrust law as it existed in the 1960s tended towards false positives, including over-deterrence of beneficial conduct. They attributed this tendency to a lack of appreciation for efficiency benefits of the allegedly anticompetitive conduct, undemanding burdens of proof on plaintiffs, bright line liability rules, and the limited competence and bias of antitrust decision-makers (i.e., agencies, courts, and juries) in evaluating competitive effects. These commentators also assumed that the costs of false positives far exceeded the costs of false negatives because any anticompetitive effects from under-enforcement would be dissipated by the self-correcting tendencies of markets, whereas false negatives would prove durable due to the longevity of legal precedent.⁵¹

They were especially skeptical of anticompetitive concerns regarding exclusionary conduct. They suggested that complaining rivals were highly likely to be inefficient competitors, who were attempting to use antitrust to prevent more efficient larger firms from competing on the merits to the benefit of consumers.⁵² Intrabrand vertical restraints were assumed to be procompetitive in most cases and potential exclusionary effects were dismissed or ignored.⁵³ Interbrand restraints, such as exclusive dealing, were assumed to be generally efficient, even if used by firms with substantial market power.⁵⁴ Robert Bork argued that foreclosure was illusory

⁴⁹ See FED. R. EVID. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”). See also FED. R. EVID. 702(c) (expert opinion testimony can be excluded if is not “the product of reliable principles and methods”).

⁵⁰ The collection of evidence should be “proportional to the needs of the case,” including “whether the burden or expense of the proposed discovery outweighs its likely benefit.” FED. R. CIV. P. 26(b)(1).

⁵¹ See, e.g., Easterbrook, *supra* note 2, at 2. More recently, see Murat C. Mungen & Joshua D. Wright, *Optimal Standards of Proof in Antitrust* 19–20 (George Mason Univ. Law & Econ. Research No. 19-20, 2019), <https://ssrn.com/abstract=3428771>.

⁵² See, e.g., Easterbrook, *supra* note 2, at 35 (cautioning courts to “treat suits by horizontal competitors with the utmost suspicion”); William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247, 248 (1985) (describing how firms seek antitrust protection from “the unpleasantness of effective competition”).

⁵³ See, e.g., Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67 (1991); Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981).

⁵⁴ Howard P. Marvel, *Exclusive Dealing*, 25 J. L. & ECON. 1 (1982); Benjamin Klein & Andres V. Lerner, *The Expanded Economics of Free-Riding: How Exclusive Dealing Prevents Free-Riding and Creates Undivided Loyalty*, 74 ANTITRUST L.J. 473 (2007); Benjamin Klein & Kevin M. Murphy, *Exclusive Dealing Intensifies Competition for Distribution*, 75 ANTITRUST L.J. 433 (2008).

and could not harm competition because there was only a single monopoly profit.⁵⁵ Commentators also suggested that monopolists drive innovation.⁵⁶

These criticisms and the proposed solution of more permissive antitrust rules and higher burdens of proof have been highly influential. Intrabrand vertical restraints are no longer condemned per se as is also true for most exclusionary group boycotts. The per se prohibition of tying is teetering. Encouraged by *Matsushita*⁵⁷ and *Twombly*,⁵⁸ motions to dismiss and for summary judgment are now more commonly made. Courts and agencies also have become more sophisticated in evaluating economic arguments. Economic testimony is now the norm and subject to *Daubert* challenges.⁵⁹

The assumptions underlying these criticisms also have been very influential in producing a non-interventionist bias in the law. For example, in *Brooke Group*, the Court expressed skepticism that the cigarette oligopolists would be able to coordinate successfully after disciplining a price-cutting rival, despite evidence that they had coordinated historically.⁶⁰ The single monopoly profit theory was treated as a broad guide in Justice O'Connor's concurrence in *Jefferson Parish*⁶¹ and subsequent opinions by Justices Breyer and Sotomayor when they were appellate judges.⁶² The Supreme Court's analysis in *Trinko*⁶³ is partially based on the belief that monopolists are the main engines of future innovation and should be permitted to restrict competition to maintain their innovation incentives.⁶⁴ Several courts concluded that exclusive

⁵⁵ ROBERT H. BORK, THE ANTITRUST PARADOX 137–38; 140, 372 (1978).

⁵⁶ JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 105 (1942). See also Dennis W. Carlton & Ken Heyer, *Extraction v. Extension: The Basis for Formulating Antitrust Policy Towards Single-Firm Conduct*, 4 COMPETITION POL'Y INT'L 285, 290–92 (2008).

⁵⁷ *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585–88 (1986) (revitalizing the use of summary judgment in antitrust cases).

⁵⁸ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–57 (2007) (raising the burden of pleading for plaintiffs to state a claim under Federal Rule 8(a)(2)).

⁵⁹ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). See also FED R. EVID 702.

⁶⁰ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 232 (1993) (describing tacit coordination among oligopolists as a means of recouping losses from predatory pricing as “highly speculative”). But see *id.* at 253–54 (Stevens, J., dissenting) (arguing that the evidence was sufficient to show the required “reasonable possibility” of harm to competition).

⁶¹ *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 36 (1984) (O'Connor, J. concurring) (“The existence of a tied product normally does not increase the profit that the seller with market power can extract from sales of the tying product.”).

⁶² *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 23–24 (1st Cir. 1990) (Breyer, J.); *E & L Consulting, Ltd. v. Doman Indus. Ltd.*, 472 F.3d 23, 30 (2d Cir. 2006) (Sotomayor, J.).

⁶³ *Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398 (2004).

⁶⁴ *Id.* at 407 (“The opportunity to charge monopoly prices—at least for a short period—is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth.”). For a critique of *Trinko*, see Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 41–51 (2004).

dealing contracts with durations of one year or less should be treated as presumptively lawful on the ground that they are easily contestable.⁶⁵

C. The Errors and Inapplicability of the Chicago-School Prescriptions for Current Antitrust Analysis

While the Chicago-School's analysis provided useful criticisms of 1960s legal standards, they have gone too far in various ways. Modern economic analysis has now invalidated many of their criticisms.⁶⁶ The overarching assumption that false positives are more concerning than false negatives because of rapid market self-correction is undermined by the observation that long-lasting cartels with a significant number of participants have been observed. Market dominance can be quite durable, in some instances lasting for decades. Barriers to entry, specifically including barriers resulting from the incumbent monopolist's exclusionary conduct, can prevent market self-correction.⁶⁷

Chicagoans argued that competitor complaints were most likely motivated by the fear of increased competition, which has led to skepticism of such complaints, including denial of standing,⁶⁸ and has been extended to promote ex ante credibility judgments of witnesses, both positive and negative.⁶⁹ In fact, the interests of competitors whose costs are raised by exclusionary conduct are consistent with the interests of consumers whose prices are raised as a result. While antitrust protects "competition not competitors," that does not mean that competitors' interests necessarily are opposed to consumer interests. It is especially suspect when the conduct of a firm with substantial market power has the effect of excluding a rival that is the embodiment of market "self-correction."⁷⁰

Modern analysis also has invalidated the Chicagoan critiques of exclusionary conduct by firms with substantial market power. The claim that anticompetitive exclusion would be

⁶⁵ See, e.g., *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 395 (7th Cir. 1984) (Posner, J.) ("Exclusive-dealing contracts terminable in less than a year are presumptively lawful."). For a discussion of the relevant cases and the critique of this view, see GAVIL, ET AL. *supra* note 27, at 1038–39.

⁶⁶ For an excellent catalogue of these assumptions as they relate both to markets and institutions, see Baker, *supra* note 3, at 8–36 (analyzing nine such "erroneous assumptions"). See also Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527 (2013).

⁶⁷ See BAKER, *supra* note 6, at 17 (citing evidence that cartels, oligopolies, and monopolies have been more durable than predicted by Chicago-School critics). See also Steven C. Salop, *The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test*, 81 ANTITRUST L.J. 371, 391-92 (2017) (describing how foreclosure can be used to thwart market-correcting entry).

⁶⁸ *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104 (1986) (finding the allegations of nation's fifth-largest beef packing company about results of merger of second and third largest beef packing companies were insufficient to show threat of antitrust injury as result of predatory pricing necessary to enjoin merger under Clayton Act). See also Baumol & Ordover, *supra* note 52, at 248–49.

⁶⁹ Some courts have openly questioned the credibility of witnesses employed by the plaintiff as self-interested, yet credited, without similar scrutiny, the testimony of the obviously self-interested parties defending their conduct. See, e.g., *United States v. AT & T Inc.*, 310 F. Supp. 3d 161, 227, 229–30 (D.D.C. 2018), *aff'd sub nom.* *United States v. AT&T, Inc.*, 916 F.3d 1029 (D.C. Cir. 2019).

⁷⁰ See, e.g., *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 951 (6th Cir. 2005) ("[I]n a concentrated market with very high barriers to entry, competition will not exist without competitors").

unprofitable because there is only a single monopoly profit has been shown to be invalid except in one highly unrealistic set of market conditions.⁷¹ It also overlooks the fact that exclusionary conduct can insulate a firm with legitimately-achieved monopoly power from new competitive threats that might weaken or undo its market dominance.⁷² The idea that entrants can overcome exclusives simply by outbidding monopolists for needed inputs fails to recognize that entrants face disadvantages in bidding against monopolists that hold exclusives, even if the exclusives are only short-term.⁷³ This is because a dominant firm typically has more profits to protect by maintaining its monopoly rather than facing a competitive market than an entrant can gain by achieving viability in a competitive market.⁷⁴

Chicagoans similarly overlook a key fact about private antitrust litigation that flows from the asymmetric effects of competition on the profits of the incumbent monopolist versus an entrant or small competitor. Antitrust defendants typically have systematically higher litigation stakes than do private plaintiffs. This asymmetry distorts litigation incentives and likely leads to a higher incidence of false negative errors. In an exclusionary conduct matter, for example, the defendant is attempting to maintain or increase its ability to exercise market power. Its litigation stakes from an injunction are equal to the reduction in profits from its resulting loss in market power. An entrant attempting to weaken that market power by enjoining the conduct so that it can compete in the more competitive market has stakes equal to its competitive profits. These stakes are highly asymmetric because competitive profits typically are much lower than monopoly profits. They also are asymmetric because the benefits of the injunction often would be shared with other competitors. Damages (even if trebled) are a one-to-one transfer payment, which raise the stakes equally to both parties but do not eliminate the asymmetric stakes from the injunction.⁷⁵

Because a defendant with substantial market power has higher stakes in an exclusionary conduct case, it has systematic incentives to invest in higher litigation effort than the plaintiff in order to tilt the outcome somewhat in its favor, relative to the underlying merits of the case. These asymmetric litigation investment incentives have the effect of increasing false negatives and

⁷¹ See, e.g., Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986); Louis Kaplow, *Extension of Monopoly Power through Leverage*, 85 COLUM. L. REV. 515 (1985); B. Douglas Bernheim & Michael D. Whinston, *Exclusive Dealing*, 106 J. POL. ECON. 64 (1998).

⁷² Kaplow, *supra* note 71, at 520–21; Krattenmaker & Salop, *supra* note 71, at 246. See also Dennis W. Carlton & Michael Waldman, *The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries*, 33 RAND J. ECON. 194 (2002).

⁷³ See Salop, *The Raising Rivals' Cost Foreclosure Paradigm*, *supra* note 67, at 407–15. This mistake was evident in Judge Easterbrook's decision in *Paddock Pubs., Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 47 (7th Cir. 1996), where he concluded that that a rival excluded by exclusive contracts should “try to outbid” the two dominant incumbents “in the marketplace, rather than to outmaneuver them in court.”

⁷⁴ Salop, *supra* note 67, at 408–10. In addition, distributors' fears that the entrant will fail can become a self-fulfilling prophecy by leading them to accept exclusives from the monopolist even if the entrant offers a premium.

⁷⁵ Treble damages do increase the incentive to bring cases, which can increase deterrence. But it is unlikely to offset the other deterrence-reducing effects.

reducing false positives.⁷⁶ Many rules of procedure and evidence, despite judicial oversight, also provide ample opportunities for strategic use of litigation to delay, raise plaintiffs' litigation costs and further tilt outcomes. Moreover, by the time a case is decided, a rival may have exited the market or been so hobbled that it no longer poses a significant competitive threat, which renders injunctive relief ineffective. These factors collectively reduce the plaintiff's incentive to bring suit, which leads to further under-deterrence.

It has long been recognized that the *pursuit* of monopoly spurs innovation.⁷⁷ However, this argument is sometimes misinterpreted to suggest that monopoly, once achieved, benefits consumers because the monopolist's future innovation incentives exceed the incentives of their would-be rivals.⁷⁸ In fact, monopolists have less incentive to innovate because they already have a monopoly market share, whereas fringe competitors have the potential to grow their shares. What mainly incentivizes a monopolist is the fear of losing out to new competitors. Moreover, that fear also incentivizes the monopolist to engage in exclusionary conduct to erect barriers against these potential innovators. This incentive can be further amplified if the plaintiff's standard of proof has been raised based on mistaken assumptions.⁷⁹

There are exceptions to the judicial success of these non-interventionist assumptions about exclusionary conduct. In *Actavis*, the Court recognized that an innovator that legitimately has obtained a patent monopoly should not be permitted to strike agreements with potential entrants that would exclude them from the market for some period of time. In *Leegin*, the Court recognized exclusionary conduct concerns from resale price maintenance. It explained how vertical restraints can be used to maintain single firm market power by foreclosing innovative retailers or manufacturers.⁸⁰ Similarly, several circuit courts have recognized the significant anticompetitive concerns from exclusive dealing and similar conduct by firms with substantial market power, especially when implemented in response to new competitive challenges.⁸¹

In *Microsoft*, the D.C. Circuit explained how exclusionary conduct can erect anticompetitive entry barriers to nascent innovation competitors.⁸² The court also rejected a permissible legal rule in favor of applying the structure of the Section 1 rule of reason standard to

⁷⁶ For further analysis, see Erik Hovenkamp & Steven C. Salop, *Asymmetric Stakes in Antitrust Litigation*, (January 5, 2020) (unpublished manuscript) (on file with author).

⁷⁷ SCHUMPETER, *supra* note 56, at 105.

⁷⁸ *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004) (describing the possession of monopoly power as an important element of free-market system).

⁷⁹ See generally Jonathan B. Baker, *Beyond Schumpeter vs Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575 (2007). See also *infra* note 123.

⁸⁰ *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 893 (2007) ("A dominant retailer, for example, might request resale price maintenance to forestall innovation in distribution that decreases costs.").

⁸¹ See, e.g., *McWane, Inc. v. FTC*, 783 F.3d 814 (11th Cir. 2015); *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005); *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002).

⁸² *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001).

Section 2 allegations.⁸³ In *ZF Meritor*, the Third Circuit declined to apply a *Brooke Group*-style price/cost test to loyalty discounts accompanied by other exclusionary contract restrictions, relying instead on a similar, burden-shifting structure.⁸⁴ In *McWane*, the Eleventh Circuit also applied a Section 1 rule of reason approach to exclusive dealing and declined to adopt a procompetitive presumption.⁸⁵ The courts in both *McWane* and *Dentsply* found that the claimed efficiency benefits were invalid or non-existent, as did the *Microsoft* court for most of the challenged restraints.⁸⁶

Despite this progress, the skeptical assumptions of the conservatives continue to run deep in antitrust analysis and law. Plaintiffs continue to face arguments about conduct, institutions, and market structure to persuade courts to impose overly demanding burdens of production and proof. Most recently, in *Ohio v. American Express Company*, the Court declined to rely on direct evidence of anticompetitive effect of the challenged exclusionary vertical restraints in the context of a two-sided platform. It instead mandated that proof of market power through circumstantial evidence in the form of a defined relevant market also was required despite the fact that the direct evidence of anticompetitive effects on consumers also proved that the defendant had market power.⁸⁷

In light of this history, the time has come to consider more systematically how a more modern analysis should be combined with the insights of decision theory to update antitrust presumptions and the burden of proof placed on plaintiffs under the rule of reason in exclusionary conduct challenges. In this way, the sliding-scale “enquiry meet for the case” can be formulated for the current market environment. Analysis based on mistaken assumptions and mistaken applications of decision theory are particularly worrisome in light of the growing role of “new economy” markets that involve network effects and economies of scale that often naturally tip these markets to dominance or monopoly and lead to durable barriers to entry.⁸⁸ These barriers can be maintained or enhanced in the face of innovative potential entrants by technological as well as

⁸³ *Id.* at 59.

⁸⁴ *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 277 (3d Cir. 2012) (“[B]ecause price itself was not the clearly predominant mechanism of exclusion, the price-cost cases are inapposite, and the rule of reason is the proper framework in which to evaluate Plaintiff’s claims.”).

⁸⁵ *McWane*, 783 F.3d at 833–35.

⁸⁶ *Id.* at 840–42; *Dentsply*, 399 F.3d at 196–97; *Microsoft*, 253 F.3d at 62–64; 66–67; 71–72.

⁸⁷ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 n.7 (2018) (emphasis added). As Justice Breyer points out in dissent, the Court’s previous recognition that direct evidence of competitive harm is sufficient to shift a burden of production to the defendant and require a showing procompetitive effects should have been “fully applicable” in the case. *Id.* at 2296 (Breyer, J., dissenting). Breyer further observed that “[t]he majority thus, in a footnote, seems categorically to exempt vertical restraints from the ordinary ‘rule of reason’ analysis that has applied to them since the Sherman Act’s enactment in 1890” and adds that “[o]ne critical point that the majority’s argument ignores is that proof of actual adverse effects on competition *is, a fortiori*, proof of market power. Without such power, the restraints could not have brought about the anticompetitive effects that the plaintiff proved.” *Id.* at 2297.

⁸⁸ In the Second Edition of his antitrust law treatise, Judge Posner recognized the greater concerns about exclusionary conduct in “new economy” markets such as internet platforms with network effects. However, he still proposed that the monopolist is entitled to use practices that are employed widely in industries that resemble the monopolist’s but are competitive. *See* RICHARD A. POSNER, *ANTITRUST LAW* 253–54 (2d ed. 2001).

traditional exclusionary conduct such as exclusive dealing, tying and vertical mergers, as well as by serial acquisition strategies that eliminate the most promising potential competitors.⁸⁹

III. RECOMMENDED GUIDING PRINCIPLES FOR OPERATIONALIZING THE “ENQUIRY MEET FOR THE CASE” FOR ANTICOMPETITIVE EXCLUSIONARY CONDUCT

California Dental,⁹⁰ *Leegin*⁹¹ and *Actavis*⁹² invited courts to continue to formulate evidentiary burdens, including presumptions, as they gain more experience under the rule of reason. In response to that invitation, we propose a set of “guiding principles” for courts evaluating the competitive effects of exclusionary conduct. These proposals reflect decision theory, modern economic analysis and legal precedent, and current market conditions. They are intended to structure the inquiry in a rational way, correcting for the various mistaken assumptions that exaggerate current perceptions of the likelihood of false positives, understate concerns for false negatives, and impose excessive burdens on plaintiffs.

In the conventional rule of reason decision framework, the plaintiff bears the initial burden of producing sufficient evidence of likely competitive harm. It can satisfy this burden with direct or circumstantial evidence, an appropriate anticompetitive presumption, or some combination. If the plaintiff satisfies this requirement, the burden of production shifts to the defendant to provide justifications, that is, sufficient evidence of cognizable procompetitive benefits of the challenged conduct.⁹³ If the defendant satisfies this requirement, the burden of production then shifts back to the plaintiff, who bears the ultimate burden of persuasion by a preponderance of the evidence, i.e., that the conduct is more likely to be anticompetitive than not.

This is a sliding scale standard in that stronger evidence of competitive harm (or a stronger anticompetitive presumption) requires the defendant to produce stronger evidence of efficiency benefits, and *vice versa*. A procompetitive presumption analogously would require the plaintiff to provide stronger evidence of competitive harm. The inevitable uncertainty that accompanies antitrust decision-making requires reasonable means of assessing and determining the probability of competitive harm in the first step, including the relevant presumptions.

⁸⁹ Indeed, while no single acquisition is likely to “substantially lessen competition” and so violate Section 7, the series might be susceptible to analysis as monopolizing conduct under Section 2.

⁹⁰ *California Dental Ass’n v. FTC*, 526 U.S. 756, 779–80 (1999).

⁹¹ *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 879 (2007) (“Courts can, for example, devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.”).

⁹² *FTC v. Actavis*, 570 U.S. 136, 158–60 (2013).

⁹³ A presumption may be rebutted by evidence discrediting its basis or “affirmatively” offsetting its implication. *United States v. Baker Hughes Inc.*, 908 F.2d 981, 991 (D.C. Cir. 1990). If *discredited*, the presumption carries no weight in the post-rebuttal decision process. But, if *offset*, it continues to carry some weight in the decision process.

We propose a number of principles to guide the implementation of this framework, including the allocation of burdens and the adoption of anticompetitive and procompetitive presumptions.

A. Basic Structure of the Inquiry and Allocation of Burdens

1. *The Default Presumption Under the Rule of Reason Should Be “Neutral” Competitive Effects*

Civil antitrust claims generally do not warrant different treatment than any other kind of civil enforcement. The rule of reason benchmark standard requires the plaintiff to prove that anticompetitive effects are “more likely than not,” or, as it applies to all civil antitrust cases, “by a preponderance of the evidence.” This evidentiary standard is consistent with a “neutral” presumption of likely competitive effects, that is, that the category of conduct is no more likely to reduce consumer welfare than to increase welfare.⁹⁴

For example, *Leegin* adopted the conventional rule of reason, which requires the plaintiff to show likely anticompetitive effects by a preponderance of the evidence. While it eliminated the previous anticompetitive presumption, it also detailed circumstances under which minimum resale price maintenance could be anticompetitive, and adopted a neutral *ex ante* presumption, not a procompetitive presumption.

The next several principles explain the appropriate evidentiary burden on the plaintiff.

2. *The Plaintiff’s Evidentiary Burden Should Not Be Elevated Ex Ante*

a. *The Plaintiff’s Evidentiary Burden Should Be Probable Anticompetitive Effects, Not Actual Anticompetitive Effects*

As discussed in Part I, the rule of reason has always focused on probable anticompetitive effects and “tendency.” It should be sufficient for the plaintiff to satisfy its initial burden and shift the burden to the defendant by showing either actual or probable anticompetitive harm, not definitive proof.

b. *The Plaintiff’s Evidentiary Burden Should Not Require Quantification*

Courts should not require quantification of harm as part of the plaintiff’s burden. Quantification evidence of “actual” harm is not required by the leading cases, which simply

⁹⁴ The fact that ties are resolved in favor of the defendant might suggest that the presumption is “marginally procompetitive” rather than “neutral.” If so, the “margin” is considered very small. *But see* Mungen & Wright, *supra* note 50 (advocating a higher than preponderance standard for antitrust).

recognize that direct evidence of likely harm obviates the need for circumstantial proof.⁹⁵ Moreover, imposing a requirement of evidence of actual harm would move the needle from reasonable probability closer to a standard of near-certainty more typically associated with criminal prosecution and likely would lead to excessive false negatives.

A quantification requirement also would add substantial and unnecessary additional cost resulting from discovery and protracted litigation over expert methodologies. No empirical methodology is perfect and complete and accurate information is likely to be rare, so some criticisms can be made of even the most rigorous and careful empirical methodology. Evaluating the importance of the criticisms can be difficult for generalist courts facing significant docket pressures. This distortion is exacerbated by the fact that the standard test for statistical significance of econometric results is focused on avoiding false positives and places no value on avoiding false negatives.⁹⁶

3. *Direct Proof of Market Power or Anticompetitive Effects Should Obviate the Need for Circumstantial Proof*

When reliable direct evidence of market power or anticompetitive effect is presented, courts should not require plaintiffs also to demonstrate market power with circumstantial evidence by defining a relevant market, calculating market shares, and evaluating barriers to entry. As the Court observed in *Indiana Federation of Dentists*, market power inferred from market shares in a defined market is a second best “surrogate” and is unnecessary when more direct evidence of market power or anticompetitive effects is provided.

In evaluating exclusionary conduct, courts also should avoid the false negatives that would result from failing to connect the market power analysis to the allegations of anticompetitive effect. In a monopoly maintenance case, for example, a court should not evaluate the profitability of price *increases* since the allegation centers on conduct designed to prevent price *decreases*.⁹⁷ Courts also should not immunize exclusionary conduct by monopolists by using a threshold market power filter to conclude that a firm lacks monopoly power because it faces competition when it is accused of using that power to impair or destroy those very competitors.

In *American Express*,⁹⁸ the Court required the plaintiff to prove market power in the two-sided platform with circumstantial evidence, despite the fact that direct evidence of anticompetitive effects was provided and should have been sufficient economic proof of market power. Imposing

⁹⁵ Nat'l Soc'y of Prof'l Eng'rs. v. United States, 435 U.S. 679, 690 (1978); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Oklahoma, 468 U.S. 85, 103 (1984); FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460–61 (2009); California Dental Ass'n v. FTC, 526 U.S. 756, 769–70 (1999).

⁹⁶ See Phillip Johnson, Edward Leamer & Jeffrey Leitzinger, *Statistical Significance and Statistical Error in Antitrust Analysis*, 81 ANTITRUST L.J. 641 (2017).

⁹⁷ See Salop, *supra* note 13, at 194–201 (discussing “Cellophane Trap” and variants in a first principles approach).

⁹⁸ Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

that additional requirement is inefficient and merely raises the plaintiff's cost, while potentially masking the defendant's lack of sufficient justification because it prevents the burden from shifting. It makes no economic or legal sense to require inferior evidence when superior evidence already has been provided. If the Court wished to raise the plaintiff's evidentiary burden, it would have been better to require additional evidence of harm, as discussed below.⁹⁹

4. *Courts Should Set a Lower Burden On The Plaintiff in Exclusionary Conduct Cases When the Defendant Has Substantial Market Power*

Anticompetitive effects are more likely when the defendant has substantial market power. Moreover, when the defendant has substantial market power, the asymmetric litigation incentive effects from its higher stakes lead to false negatives. Both of these factors suggest that courts should resist imposing elevated burdens on plaintiffs in such circumstances and should instead impose a lower burden to reflect the greater probability of competitive harm and the distinct challenges of litigation against a dominant firm. This is consistent with the sliding scale and the view that behavior by monopolists should be viewed through a "special lens," precisely because its power may provide it with the ability and incentive to engage in exclusionary conduct.¹⁰⁰ We are not, however, suggesting that substantial market power without additional evidence warrants a presumption of competitive harm.

As we have explained, many of the arguments that firms possessing market power lack incentives to carry out exclusionary conduct have been debunked. Market self-correction requires existing competitors or new entrants that can expand in response to attempts to raise or maintain monopoly prices. But monopoly power includes entry barriers, and exclusionary conduct often raises barriers to entry. If there are no competitors who are not subject to the exclusionary conduct, this self-correction process cannot occur.¹⁰¹

The plaintiff's evidentiary burden also should be reduced to reflect the asymmetric litigation stakes and the associated increased likelihood of false negatives. As discussed earlier, these asymmetric stakes give defendants with substantial market power systematic incentives to invest in relatively greater litigation efforts. These asymmetric litigation incentives tilt outcomes in the direction of excessive false negatives.

Despite the substantial harms caused by monopolizing conduct, the plaintiff's burden in Section 2 monopolization cases often was treated as higher. One reason was grounded in remedial

⁹⁹ See *supra* note 87 (discussing Justice Breyer's criticisms of the majority's approach).

¹⁰⁰ As Justice Scalia observed in *Kodak*: "Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws—or might be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting). See also *United States v. Dentsply Int'l, Inc.* 399 F.3d 181, 187 (3d Cir. 2005) ("Behavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist.").

¹⁰¹ As discussed earlier, counterstrategies by plaintiffs to outbid the monopolist to escape exclusives are unlikely to succeed because of the monopolist's greater stakes. See *supra* text accompanying note 75.

concerns. The traditional remedy for monopolization was “capital punishment,” the disintegration of the firm into separate parts, as in *Standard Oil* or the *AT&T* settlement.¹⁰² But it is now recognized that remedial concerns in Section 2 cases can be separated from liability standards because other equitable remedies, such as divestitures short of complete dissolution or behavioral remedies, may be mandated instead.¹⁰³ A second reason may have been the assumption made explicit by the Court in *Copperweld* that unilateral exclusionary conduct is less of a threat to competition than concerted action under Section 1.¹⁰⁴ But concerted action by rivals in highly competitive markets is unlikely to threaten competition to the same extent as unilateral exclusionary conduct by a firm possessing substantial market power.

5. *The Plaintiff’s Initial Evidentiary Burden Should Be Reduced To Reflect The Possible Absence of a Valid Efficiency Justification*

The conventional statement of the burden-shifting rule of reason typically suggests that the defendant’s justifications must be totally ignored unless and until the plaintiff produces sufficient evidence of competitive harm, where that evidence does not include any reference to the possible lack of cognizable justifications. Such a rigid sequencing approach can lead to excessive false negatives.¹⁰⁵

Evaluating competitive harm first and in isolation in exclusionary conduct cases involving dominant firms is not compelled or even suggested by decision theory¹⁰⁶ and doing so is inconsistent with a sliding scale approach to the burden of proof which evaluates all of the evidence.¹⁰⁷ Moreover, the courts have long acknowledged that evidence of the defendant’s purpose in adopting certain restraints can be probative for evaluating the likelihood of competitive

¹⁰² *United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1981).

¹⁰³ *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 105–07 (D.C. Cir. 2001). *See also* ANDREW I. GAVIL & HARRY FIRST, *THE MICROSOFT ANTITRUST CASES* 237–38 (2014) (discussing theoretical framework for remedies in monopolization cases).

¹⁰⁴ *Copperweld v. Independence Tube Corp.*, 467 U.S. 752, 768–69 (1984).

¹⁰⁵ In his dissent in *McWane*, Commissioner Wright demanded a high evidentiary burden (i.e., “clear evidence”) on the plaintiff to establish competitive harm in the first step to take account of his view that the defendant’s conduct was presumptively procompetitive. He concluded that the plaintiff failed this first step, so he never analyzed the validity of the defendant’s procompetitive claims. In fact, they were found by the Commission (and the Eleventh Circuit) to be pretextual and invalid. But Commissioner Wright never analyzed them or contemplated the possibility that they might be pretextual, thereby setting an overly high bar on the plaintiff’s proof of harm in the first step. *McWane, Inc.*, Docket No. 9351 (F.T.C. Feb. 6, 2014) (Dissenting Statement of Commissioner Joshua D. Wright), <https://www.ftc.gov/public-statements/2014/02/dissenting-statement-commissioner-joshua-d-wright-matter-mcwane-inc>.

¹⁰⁶ *See Beckner & Salop, supra* note 41, at 73.

¹⁰⁷ Sequential analysis fits better in the context of motion practice, such as summary judgment and judgment as a matter of law, both of which specifically test the non-movant’s ability to meet its burden of production.

effects.¹⁰⁸ The absence of a cognizable justification, for example, can strengthen a presumption of harm.¹⁰⁹

If consideration of the justifications is deferred, then the plaintiff's burden to show competitive harm should be set at a low level to account for the fact that any efficiency claims may turn out to be pretextual, invalid or very small, and often are. This approach would allow the sequential burden-shifting structure to be maintained without causing excessive false negatives.¹¹⁰

6. *The Defendant Should Not be Able to Meet its Burden of Production to Show Cognizable Efficiency Benefits Based on Purely Categorical Justifications*

Categorical justifications might be used to support a procompetitive presumption. But general categorical evidence of benefits should not be sufficient to carry the defendant's burden once the plaintiff produces evidence of probable competitive harm. Case-specific evidence then must be produced to support efficiency claims to support the application of the theory to the particular case. Permitting purely theoretical justifications to satisfy the defendant's burden in a particular case would amount to a *sub rosa* presumption and would lead to excessive false negatives. Justifications must be evaluated solely with the case-specific evidence when there is no procompetitive presumption. For example, the fact that some exclusive dealing arrangements may be procompetitive does not mean that the one at issue is procompetitive.

This is consistent with the treatment of theoretical evidence of competitive harm. A plaintiff may be able to defeat a motion to dismiss if it explains its theory of harm and if its claim is supported by allegations sufficient to make the claim plausible. But case-specific evidence is required to avoid summary judgement. The same approach should be followed with respect to theoretical evidence of efficiency benefits.

7. *Courts Should Subject Defendant's Justifications to a Less Restrictive Alternative Standard*

¹⁰⁸ See *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918) 238 (“[K]nowledge of intent may help the court to interpret facts and to predict consequences.”). Applied to Section 2, the Court in *Aspen Skiing* inferred anticompetitive purpose from the defendant's lack of a valid efficiency benefits. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608 n.39 (1985) (“[I]ntent to engage in predation may be in the form of . . . evidence that the conduct was not related to any apparent efficiency.”) (citation omitted). See also *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001). In *McWane* the court discussed the evidence of McWane's anticompetitive purpose in its discussion of the plaintiff's evidence of competitive harm. *McWane, Inc. v. FTC*, 783 F.3d 814, 840 (11th Cir. 2015).

¹⁰⁹ See, e.g., *Nat'l Soc'y of Prof'l Eng'rs. v. United States*, 435 U.S. 679, 693 (1978) (“The Society's affirmative defense confirms rather than refutes the anticompetitive purpose and effect of its agreement.”).

¹¹⁰ See, e.g., Louis Kaplow, *On the Design of Legal Rules: Balancing versus Structured Decision Procedures*, 132 HARV. L. REV. 992, 997–1003 (2019).

Courts should consider whether the claimed procompetitive benefits can be achieved in large part through less restrictive alternatives that involve significantly lessened competitive concerns. For example, once a defendant has shifted the burden back to the plaintiff by showing a procompetitive justification, the plaintiff should be able to shift the burden back to the defendant by identifying a plausible less restrictive alternative. At that point the burden would shift back to the defendant to demonstrate why that alternative is not feasible or would not achieve most or substantially all of the efficiency benefits. This allocation of burdens makes sense since the defendant has superior information regarding efficiencies.¹¹¹

B. Guiding Principles for Adopting Procompetitive Presumptions for Exclusionary Conduct by Firms with Substantial Market Power

1. *Substantial Evidence Should Be Required to Justify Procompetitive Presumptions*

In light of the heightened concern about the anticompetitive effects of exclusionary conduct by firms with substantial market power, adoption of procompetitive presumptions for such conduct should be rare and endorsed only under exceptional circumstances. Compared to the state of antitrust law in the 1960s, defendants today have far more effective and robust procedural options at hand to identify and eliminate truly weak antitrust claims through motions to dismiss, motions for summary judgment, and motions to exclude expert testimony. Procompetitive presumptions, therefore, should be narrowly tailored and justified by substantial theoretical or empirical categorical evidence.

a. *Narrow Categories*

Presumptions involving categories of conduct should be narrowly drawn and courts should be cautious about generalizing either from one type of conduct to another or from conduct in competitive settings to highly concentrated markets. The fact that a class of conduct sometimes creates plausible procompetitive benefits may be a reason to reject an irrebuttable anticompetitive presumption, but it does not justify a procompetitive presumption. Moreover, the fact that certain conduct is carried out by firms lacking market power in competitive markets does not mean that such conduct would be procompetitive in an oligopoly market or when implemented by a firm with substantial market power.¹¹² Thus, while that evidence may be probative in a particular case, where the conditions are sufficiently similar, it cannot justify a procompetitive presumption.

For example, while conceding that vertical intrabrand restraints can have procompetitive virtues and therefore did not warrant per se condemnation, neither *Leegin* nor *Sylvania* endorsed a presumption that they were more likely procompetitive than anticompetitive. Instead, both restored

¹¹¹ Cf. C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927, 982 (2016) (arguing that although plaintiffs bear the burden of persuasion, defendants bear a burden of production). See also Kaplow, *supra* note 110, at 1003–15.

¹¹² It also may be the case that smaller firms are simply imitating the behavior of the dominant firm.

a neutral competitive presumption.¹¹³ Similarly, the fact that certain *intra*brand vertical restraints may be useful in achieving procompetitive efficiencies does not mean that a procompetitive presumption should be applied to *inter*brand vertical restraints. Neither *Leegin* nor *Sylvania* made judgments about interbrand vertical restraints with possible exclusionary effects, such as exclusive dealing or most-favored nation (“MFN”) provisions.¹¹⁴

Similarly, just as the fact that certain conduct is “horizontal” does not automatically justify an anticompetitive presumption, “vertical” conduct should not lead automatically to a procompetitive presumption. Labelling the conduct as “horizontal” or “vertical,” without more, provides insufficient information to formulate any generally applicable presumption. While conduct might be vertical in form, any anticompetitive effects are horizontal.¹¹⁵

b. *False Positives and False Negatives*

Chicago-School claims about false negatives were formulated at a time when courts were relying on relatively low burdens of proof and arguably expansive anticompetitive presumptions, including a number of per se prohibitions. Those concerns are now anachronistic and largely overstated given the evolution of the conventional rule of reason. The enforcement agencies and the courts also have become more knowledgeable and experienced in evaluating economic evidence. For this reason, it makes sense today to assume that the error costs from false positives and false negatives are relatively equal. Substantial evidence about the particular category of conduct should be required, therefore, to justify placing greater weight on false positives.

It will seldom be possible to gauge the impact of alternative legal rules (aside from per se rules) on deterrence. If the legal standard is stable, it is hard to quantify the relative number and competitive impact of additional false negatives versus fewer false positives if the law were made more permissive.¹¹⁶ However, deterrence policy concerns could alter the presumption in highly exceptional circumstances. For example, *Brooke Group* created a procompetitive presumption for price cuts in response to competition that remain above costs, based on the view that such price cuts are a natural competitive response, immediately benefit consumers, and any line drawing by courts would lead to a severe risk of deterring beneficial price cuts.¹¹⁷

¹¹³ Studies of the mixed impact of resale price maintenance on welfare during periods when it was legal were discussed in *Leegin*. *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890–95, 905–07 (2007).

¹¹⁴ *See, e.g.*, *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005) (“Although not illegal in themselves, exclusive dealing arrangements can be an improper means of maintaining a monopoly.”).

¹¹⁵ *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 728–30 (1988).

¹¹⁶ *See, e.g.*, Alexander MacKay & David Aron Smith, *The Empirical Effects of Minimum Resale Price Maintenance* (Nielsen Dataset Paper Series, Paper No. 2-006 (Jun. 16, 2014), <http://alexandermackay.org/files/The%20Empirical%20Effects%20of%20MRPM.pdf>).

¹¹⁷ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–26 (1993).

2. *When an Appropriate Procompetitive Presumption Is Adopted, It Should Raise the Plaintiff's Burden to Show Competitive Harm, Not Append Additional Evidentiary Requirements*

If it is appropriate to place a higher burden of proof on the plaintiff, the rule of reason can accommodate that standard by requiring the plaintiff to prove that the harm is “disproportionately higher” than the benefits, as suggested by Professor Hovenkamp.¹¹⁸ By contrast, in setting a higher burden on the plaintiff (apparently because the conduct was labelled “vertical”), the Court in *American Express* required the plaintiff to prove market power by circumstantial evidence despite the fact that better, direct evidence of anticompetitive effects already was provided.¹¹⁹ Even if it were justified, it would have made more sense for the Court to require a stronger showing of anticompetitive effects, rather than adding unnecessary evidence of market power simply as a make-weight.¹²⁰

As another example, it has been suggested that the plaintiff should be required to provide evidence that the defendant's conduct would make “no economic sense” in the absence of gaining monopoly power in addition to evidence of anticompetitive effects.¹²¹ This approach would redirect the rule of reason inquiry away from its proper, sole focus on competitive effects. Instead of merely showing that the challenged conduct was anticompetitive, plaintiffs also would have to show something completely different: that the conduct would not have been profitable for the dominant firm absent its contribution to the maintenance of market power.¹²²

3. *Alleged Innovation Benefits of Monopoly Should Not Justify a Procompetitive Presumption for Exclusionary Conduct by Firms with Substantial Market Power*

Courts should not permit monopolists to justify exclusionary conduct by arguing that their resulting monopoly profits will spur future innovation. As discussed earlier, economic analysis and associated empirical evidence do not support the general claim that a monopoly market structure leads to more innovation. While firms innovate *in the hopes* of achieving a monopoly, achieving a durable monopoly does not lead to more *future* innovation. To the contrary, significant

¹¹⁸ Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 313 & n.13 (2006).

¹¹⁹ See *supra* note 87.

¹²⁰ *Brooke Group* again is an exception to this principle in that it added the below-cost pricing prong to its standard for evaluation of competitive price cuts.

¹²¹ See, e.g., Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The ‘No Economic Sense’ Test*, 73 ANTITRUST L.J. 413 (2006). See also A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles*, 73 ANTITRUST L.J. 375, 389–403 (2006) (endorsing similar “sacrifice test”).

¹²² The Department of Justice unsuccessfully advocated this test to the Supreme Court in *Trinko*, see 504 U.S. at 407–11, and to the D.C. Circuit in *Microsoft*, which affirmatively rejected it in favor of a focus on competitive effects. *United States v. Microsoft Corp.*, 253 F.3d 34, 58–59 (D.C. Cir. 2001).

evidence suggests that competition, not monopoly, spurs innovation.¹²³ It is fear of losing the monopoly that spurs the monopolist. Moreover, if the exclusionary conduct raises competitors' costs or barriers to entry, innovation by potential rivals would be expected to fall, which would reduce the monopolist's need to innovate. Permitting this justification also is contrary to overarching antitrust policy favoring an unencumbered competitive process. It also distorts the incentives for monopolists in favor of exclusionary strategies rather than competition on the merits.

4. *Complaints About Exclusionary Conduct By a Competitor Neither Justify a Procompetitive Presumption Nor Imposition of a Higher Evidentiary Burden on the Plaintiff*

Competitors serve as an early trip-wire for competitive concerns about exclusionary conduct. The interests of foreclosed competitors are consistent with consumer welfare in exclusionary conduct cases since raising rivals' costs will lead to higher consumer prices, so the rivals' harm is antitrust injury. The shibboleth that antitrust law protects "competition, not competitors" should not be used to dismiss legitimate exclusionary conduct concerns of rivals or to attack the credibility of their testimony on the grounds that it reflects their "self-interests."¹²⁴ Nor should courts treat the testimony of competitor witnesses as less credible than the testimony of the executives of a defendant's company, whose testimony also reflects their own interests, which may be to achieve or maintain market power. "Shoot the messenger" as a defense strategy should be rejected as distraction.

CONCLUSION

The capacity of antitrust law to identify, redress, and deter anticompetitive exclusionary conduct has been systematically weakened over time. While there was a need for certain adjustments fifty years ago, continued reliance on the assumptions and presumptions that led to an overly permissive approach are no longer supportable. The evidentiary burdens courts now impose on plaintiffs are overly demanding and likely lead to under-deterrence. They are also handicapping the ability of antitrust enforcement to respond to the challenges of today's technology-driven economy.

We have explained how current law is flexible enough again to adjust its standards in light of modern economic analysis informed by decision theory. We have also proposed a number of guiding principles to update standards of proof, including the use of presumptions. In this way, the sliding-scale "enquiry meet for the case" can be implemented for the current market environment. As Frank Easterbrook once argued, there is no natural "ratchet" in antitrust law that channels its

¹²³ See Baker, *supra* note 3, at 13–14; Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575 (2007); Carl Shapiro, *Competition and Innovation: Did Arrow Hit the Bull's Eye?*, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY REVISITED 361 (Josh Lerner & Scott Stern eds., 2012).

¹²⁴ *United States v. AT & T Inc.*, 310 F. Supp. 3d 161, 211 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

evolution only in one direction.¹²⁵ For Easterbrook, that meant imposing more demanding standards of proof. But the same lack of ratchet should apply today as the continuing evolution of technology markets and modern economics suggest that greater antitrust vigilance is needed.

¹²⁵ Frank H. Easterbrook, *Is There a Ratchet in Antitrust Law*, 60 TEX. L. REV. 705 (1982).