LAW AND ECONOMICS SEMINAR **Professor Polinsky**
Winter Quarter 2016

January 28, 2016
4:15 - 5:45 pm
Stanford Law School
Room 301

"Taking the Error Out of "Error Cost" Analysis: What's Wrong With Antitrust's Right"

by

Jonathan Baker

(American University Washington College of Law)

<u>Note</u>: It is expected that you will have reviewed the speaker's paper before the seminar. (Note that without the footnotes, the paper is not very long.)

<u>Abstract:</u>

This article catalogs a series of erroneous assumptions about markets and institutions made by today's antitrust conservatives. The erroneous assumptions about markets include claims that markets self-correct, both through entry and because oligopolies compete and cartels are unstable; that markets perform well because monopolies innovate; that monopolies cannot obtain more than a single monopoly profit; and that business practices prevalent in competitive markets cannot harm competition. The erroneous assumptions about institutions include claims that erroneous judicial precedents are more durable than the exercise of market power; that antitrust institutions are manipulated by complaining competitors; that courts cannot tell whether exclusionary conduct harms competition or promotes it; and that courts cannot control the costs of private litigation. These errors inappropriately tilt the application of a neutral economic tool, decision theory, toward non-interventionist outcomes.

TAKING THE ERROR OUT OF "ERROR COST" ANALYSIS: WHAT'S WRONG WITH ANTITRUST'S RIGHT

JONATHAN B. BAKER*

A generation ago, conservative antitrust commentators associated with the Chicago School offered a comprehensive critique of the antitrust doctrines that then prevailed.[1] That critique helped define the Supreme Court's antitrust agenda for the decades that followed.[2] The resulting transformation of antitrust offered much to like, as the prior rules, for all their merits, likely chilled cost reductions and other efficiency enhancing business conduct.[3]

---

* Professor of Law, American University Washington College of Law. The author is grateful to Harry First, Andy Gavil, Rajesh James, Barak Orbach, Eric Rasmusen, Steve Salop, and Spencer Waller.

[1] *E.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978); RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976). *Cf.* George L. Priest, *The Limits of Antitrust and the Chicago School Tradition,* 6 J. COMPETITION L. & ECON. 1 (2009) (emphasizing the Chicago School's political goal of seeking to constrain governmental intervention). The Chicago School of antitrust analysis, an intellectual movement of lawyers and economists loosely associated with the University of Chicago, has dominated antitrust thinking since the mid- to late-1970s. Some economists who belonged to that movement were also part of the similarly named Chicago School of industrial organization economics, which flourished until the mid-1970s. *Cf.* Richard Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979) (tracing the influence of Chicago School industrial organization economists (including Ward Bowman, Aaron Director, John McGee, George Stigler, and Lester Telser) on Chicago School antitrust thinking but drawing no distinction between the economic school and the antitrust school (which also reflected important contributions from others, including Robert Bork and Richard Posner)).

[2] The transition from antitrust's structural era to the Chicago School era that began during the late 1970s is described in Jonathan B. Baker, *A Preface to Post-Chicago Antitrust*, *in* POST-CHICAGO DEVELOPMENTS IN ANTITRUST LAW 60 (Antonio Cucinotta, Roberto Pardolesi & Roger Van den Bergh eds., 2002). The Chicago School's economic critique of the prior rules complemented the Harvard School's administrability critique. *See generally* William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1 (2007).

[3] Jonathan B. Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 FORDHAM L. REV. 2175, 2185 (2013).

When contemporary conservatives defend this transformation and call for rule modifications that would further insulate business conduct from antitrust intervention, however, they are working from a doctrinal starting point vastly different, and far more hospitable to defendants, than the competition doctrines that prevailed during the 1970s. As discussed below, today's antitrust conservatives' advocacy of further changes to antitrust rules is based on a series of erroneous assumptions about markets and institutions. 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. Collectively, these errors inappropriately tilt the application of a neutral economic tool, decision theory, against antitrust intervention.

I. THE CONSERVATIVE ANTITRUST PROGRAM AND THE ERROR COST FRAMEWORK

In *The Antitrust Paradox*, arguably the most influential and comprehensive statement of the Chicago School vision, Robert Bork asserted that antitrust law should be reformed and refocused to strike at only three classes of behavior: "naked" horizontal agreements to fix prices or divide markets,[4] horizontal mergers to duopoly or monopoly, and a limited class of exclusionary conduct (consisting primarily of predation by abuse of governmental processes).[5] A reformed and refocused antitrust would "abandon its concern with such beneficial practices as small horizontal mergers, all vertical and conglomerate mergers, vertical price maintenance and market division, tying arrangements, exclusive dealing and requirement contracts, 'predatory' price-cutting, price 'discrimination,' and the like."[6] This agenda largely targeted exclusionary conduct offenses for abandonment: when the practices that Bork identified harm competition, they often do so by excluding actual or potential rivals.[7]

---

[4] Bork defined a "naked" agreement as one that is not ancillary to cooperative productive activity engaged in by the firms, BORK, *supra* note 1, at 263, and so does nothing more than eliminate competition. *Id.* at 264. Bork provided an extensive and sympathetic discussion illustrating the possible efficiencies arising from agreements among rivals to fix prices or divide markets. *Id.* at 429–40.

[5] *Id.* at 406; *see id.* at 347–64 (describing concern with abuse of process); *see also* Posner, *supra* note 1, at 933 ("By 1969 . . . an orthodox Chicago position (well represented in the writings of Robert Bork) had crystallized: only explicit price fixing and very large horizontal mergers (mergers to monopoly) were worthy of serious concern.").

[6] BORK, *supra* note 1, at 406; *see also id.* at 157 (With respect to exclusive dealing, "The real danger for the law is less that predation will be missed than that normal competitive behavior will be wrongly classified as predatory and suppressed."); *cf.* Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981) (calling for the abandonment of antitrust prohibitions on all restrictions on distributors imposed by manufacturers, including exclusive sales territories and resale price maintenance).

[7] Jonathan B. Baker, *Exclusion as a Core Competition Concern,* 78 ANTITRUST L.J. 527, 533–35 (2013). Bork recognized that disruption of optimal distribution patterns could, in theory,

Since the publication of *The Antitrust Paradox*, the Supreme Court has substantially reduced the antipathy that antitrust law previously held toward the practices that Judge Bork targeted.[8] The Court has done so through a series of Chicago School-influenced antitrust landmarks. These decisions, among other things, relaxed the rule governing non-price vertical restraints,[9] raised barriers to plaintiffs seeking to prove predatory pricing,[10] and overruled the nearly century-old rule declaring resale price maintenance illegal per se.[11] Although

---

harm competition, but he suggested that anticompetitive outcomes were implausible. *See* BORK, *supra* note 1, at 156 (noting limits to the anticompetitive theory and a further complication). Notwithstanding Bork's general skepticism about the merits of suits challenging exclusionary conduct, including unilateral refusals to deal, *see id.* at 156, 346, he concluded that the Supreme Court had properly decided *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). BORK, *supra* note 1, at 344–46. Years after writing *The Antitrust Paradox*, Bork found another example of anticompetitive exclusionary conduct in *United States v. Microsoft Corp.*, 253 F. 3d 34 (D.C. Cir. 2001) (en banc) (per curiam), where he represented one of Microsoft's excluded rivals, Netscape. Judge Posner, writing at about the same time as Judge Bork, was more receptive to the likelihood of anticompetitive exclusion and the value of antitrust enforcement against it. *Compare, e.g.*, POSNER, *supra* note 1, at 186 (predatory pricing is not inevitably irrational), *with* BORK, *supra* note 1, at 155 (predatory pricing is "most unlikely to exist").

[8] The Court did so mainly by modifying prior antitrust rules incrementally. William H. Page, *Legal Realism and the Shaping of Modern Antitrust,* 44 EMORY L.J. 1, 51 (1995) (The Supreme Court altered doctrine primarily by formulating "subsidiary decisional rules that govern the application of the rules of liability, that define the types of harms that are compensable in private suits, and that determine the sufficiency of evidence to go to the jury"); *id.* at 70 ("The Court's hesitancy to formulate rules of per se legality based upon Chicago's theoretical insights reflects the response of legal process jurisprudence to the realist critique of judging. . . . The Court has chosen to defer to its established Sherman Act precedents, adapting the existing fabric of doctrine to current economic wisdom, but leaving sweeping legal change to Congress."); *see* Bruce H. Kobayashi & Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century*, 78 ANTITRUST L.J. 147, 153 (2012) ("The courts have not . . . adopted rules of per se legality or broad safe harbors, as some associated with the Chicago School have advocated."). Indeed, on several occasions, the Court modified rules in small steps when the government had advocated larger ones. In *Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), the Court declined to reconsider the per se rule against resale price maintenance, although the Solicitor General urged it to do so. *See id.* at 761 n.7. Similarly, the Court did not adopt the "no economic sense" test that the government proposed in its *Trinko* amicus brief. Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner at 15–20, Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (No. 02-682), *available at* www.justice.gov/atr/cases/f201000/201048.pdf.

[9] Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

[10] Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); Matsushita Elec. Indus. Co., v. Zenith Radio Corp., 475 U.S. 574 (1986); Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438 (2009). These Chicago-oriented decisions were also influenced by antitrust's Harvard School. Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

[11] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)). The majority opinion in *Leegin* cited Posner four times and Bork three times (and the dissent cited each twice). *See Leegin*, 551 U.S. at 889 & 897; *id.* at 913–14 (Breyer, J., dissenting). Although *Leegin* represents a doctrinal shift toward reduced antitrust enforcement, it expressly endorses one basis for antitrust enforcement that the Court's prior resale price maintenance decisions did not: *Leegin* articulates and accepts exclusionary theories of anticompetitive effect in addition to collusive theories. *Leegin*, 551 U.S. at 893–94. Other landmark Supreme Court decisions advancing the Chicago

the Court has not declared any of the practices that Bork targeted legal per se, its decisions have substantially narrowed the practical scope of potential liability for these practices.[12]

Thirty-five years after the publication of *The Antitrust Paradox*, antitrust conservatives in general continue to support Bork's program of focusing antitrust on anticompetitive horizontal price fixing and market division and horizontal mergers leading to monopoly or duopoly, while circumscribing or abandoning antitrust's concern with small horizontal mergers, price discrimination, and exclusionary conduct.[13] To defend those views, and to support their advocacy of further modifications to antitrust rules, conservatives frequently adopt a decision-theoretic framework often termed "error cost" analysis. That framework was first employed in the law and economics literature by Richard Posner during the 1970s[14] and introduced into mainstream antitrust scholarship by Paul Joskow and Alvin Klevorick in 1979.[15] Modern antitrust commentators often reference Frank Easterbrook's adoption of the framework in a widely cited article published in 1984.[16]

School antitrust program but not directly targeting the practices Judge Bork singled out include *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (introducing the antitrust injury doctrine), and *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979) (limiting the per se prohibition against horizontal price fixing to naked restraints). *See generally* Baker, *supra* note 2, at 66–67 (brief survey of Chicago-influenced doctrinal changes).

[12] Plaintiffs rarely succeed today when attacking non-price vertical restraints, alleging predatory pricing, or challenging unilateral refusals to deal by dominant firms absent a prior voluntary course of dealing. Vertical mergers are almost never challenged in court. The government largely avoids price discrimination lawsuits under the Robinson-Patman Act, though private enforcement remains active. While the practical scope of liability has narrowed in these areas, it is has not disappeared. *See, e.g.*, United States v. Dentsply Int'l, Inc., 399 F.3d 181 (3d Cir. 2005) (exclusive dealing); LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003) (bundled discounts); United States v. Visa U.S.A., Inc., 344 F.3d 229 (2d Cir. 2003) (conduct tantamount to an exclusionary group boycott); *see also* Jonathan B. Baker, *Comcast/NBCU: The FCC Provides a Roadmap for Vertical Merger Analysis*, ANTITRUST, Spring 2011, at 36 (vertical merger enforcement).

[13] *Cf.* Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 ANTITRUST L.J. 241, 242 (2012) (finding little or no practical difference between today's self-described "neo-Chicagoans" and the historical Chicago School of antitrust). As discussed in Part II.B.4 below, the antitrust conservatives on the Supreme Court have gone beyond Bork's playbook in preferring administrative regulation to antitrust.

[14] Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

[15] Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213, 222–25 (1979).

[16] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); *see, e.g.*, David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 73, 74–75 & n.8 (2005) (highlighting decision-theoretic aspects of Easterbrook's article); Fred S. McChesney, *Easterbrook on Errors*, 6 J. COMPETITION L. & ECON. 11, 14–16 (2010) (same); Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 153, 158–59 (2010) (same); *cf.* Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. 75, 97 (2010) (observing

The error cost perspective evaluates antitrust rules—whether considered individually or as a whole—based on whether they minimize total social costs. The relevant costs include costs of "false positives" (finding violations when the conduct did not harm competition), costs of "false negatives" (not finding violations when the conduct harmed competition), and transaction costs associated with use of legal process.[17] False positives and false negatives are harmful to the economy as a whole for reasons that go beyond the conduct in the case under review:[18] False positives and false negatives may chill benefi-

that "Judge Easterbrook's policy views on error have been enormously influential within the United States," analyzing a range of rules, and concluding that most account appropriately for the balance of rule-specific error costs). Citing Easterbrook's "pioneer[ing]" role in using the error cost approach, Commissioner Joshua Wright describes the use of the approach within antitrust as "distinctively Chicagoan," Wright, *supra* note 13, at 247–48, without noting Joskow and Klevorick's prior use, *supra* note 15.

[17] These transaction costs go beyond the costs of litigation. They also include, for example, costs associated with information gathering by potential litigants and the institution specifying decision rules. *See* C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41, 43–52 (1999); Baker, *supra* note 7, at 574 & n.226. To the extent that uncertainty about legal rules chills beneficial conduct or means that those rules fail to deter harmful conduct, the error cost analysis should account for both of those consequences. *Cf.* Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2571 (2013) ("If one seeks to minimize error costs . . . without considering the accuracy benefits [predicted benefits of 'getting it right'], one inevitably gets less enforcement activity than should otherwise be the case."). Yet a recent call to restrict the enforcement of FTC Act Section 5 discusses the possible chill to beneficial conduct resulting from legal uncertainty without considering the possibility that uncertainty also reduces deterrence benefits. Joshua Wright, Comm'r, Fed. Trade Comm'n, Remarks at the Executive Committee Meeting of the New York State Bar Association's Antitrust Section: Section 5 Recast: Defining the Federal Trade Commission's Unfair Methods of Competition Authority 7–8 (June 19, 2013) (transcript available at www.ftc.gov/speeches/wright/130619section5recast.pdf).

[18] From an economic perspective, antitrust rules benefit society primarily by deterring harmful conduct. *See generally* Jonathan B. Baker, *The Case for Antitrust Enforcement*, J. ECON. PERSP., Autumn 2003, at 27; *cf.* Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738 (2012) (highlighting a tradeoff between the benefits of deterrence and costs of chilling beneficial conduct that arises when the burden of proof in adjudication is set to maximize social welfare). Accordingly, the evaluation of error costs must look to the consequences of the decision or legal rule for conduct by other firms, not simply to the incidence of the decision on the parties to the case. For example, restricting analysis to the parties before the court would yield the misimpression that draconian punishments for parking in front of a fire hydrant will eliminate error costs. The prospect of such punishments would lead to 100% compliance with the no-parking rule, so there would be no court cases, no possibility for a court erroneously to convict or acquit a defendant, and no litigation expenditures. Yet such punishments would also chill parking in front of a hydrant when its social benefits (e.g., allowing a doctor to arrive in time to save a life) would outweigh its social costs. Such punishments would also discourage socially beneficial parking *near* hydrants (by drivers who fear that an aggressive parking enforcer would wrongly conclude that the hydrant is blocked and that a court would uphold the ticket). Restricting analysis to the parties before the court would yield the same misimpression with respect to an enforcement policy taken to the opposite extreme: A complete absence of enforcement of the rule prohibiting parking in front of hydrants would also lead to no court cases, and so would generate no judicial errors and no transaction costs of litigation. Yet such a rule would not deter parking in front of hydrants when the social cost (the cost of impeding fire department access in the event of a fire discounted by the probability that a need for access would arise) would exceed the social benefit.

cial conduct by other economic actors (potentially in other industries) that must comply with the rule; these errors may also fail to deter harmful conduct by other economic actors to which the same rule would apply. False positives and false negatives do not neatly map to overdeterrence and underdeterrence, respectively, however, because the deterrence consequences of legal errors depend in part on the way that those errors affect the marginal costs and benefits of conduct undertaken in the shadow of the law.[19]

Contemporary antitrust conservatives have relied on the error cost framework to advocate various antitrust rules that would place a "thumb on the scales" in favor of permitting firms to engage in much of the conduct that Judge Bork perceived as beneficial. These rules would, among other things, find a tying violation only when the efficiency benefits offsetting plausible competitive harms are insubstantial;[20] abandon "aggressive" enforcement against vertical restraints unless the loss from false negatives is relatively large;[21] and find monopolization only if anticompetitive effects are "disproportionate" to any associated procompetitive justification.[22] These arguments

---

[19] *See generally* Warren F. Schwartz, *Legal Error*, *in* 1 ENCYCLOPEDIA OF LAW AND ECONOMICS 1029 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000). For example, a rule change that increases the frequency or cost (penalty) of false positives may increase deterrence, but it could also do the reverse. The latter may occur if more false positives mean that firms no longer obtain enough benefit from staying within the line separating legal and illegal behavior to justify being careful. For this reason, uncertainty about a rule or its application can reduce compliance. *See generally* Hendrik Lando, *Does Wrongful Conviction Lower Deterrence?*, 35 J. LEGAL STUD. 327, 329–30 (2006) (providing a simple technical example); Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1483–84 (1999) (greater accuracy in judicial determinations increases the returns to compliance with legal rules); 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) (a firm's incentive to comply with a rule may fall identically when the probability of either type of error increases).

[20] Evans & Padilla, *supra* note 16, at 95; *see also* Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 ANTITRUST L.J. 469, 525–26 (2001) (using a decision-theoretic framework to argue against a per se prohibition of tying).

[21] James C. Cooper, Luke M. Froeb, Dan O'Brien & Michael G. Vita, *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 662 (2005). The authors also call for using natural experiments to guide enforcement policy. *Id.*

[22] U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 15–18 (2008) (endorsing error cost framework for the evaluation of Section 2 standards), *available at* www.justice.gov/atr/public/reports/236681.pdf, *withdrawn*, Press Release, U.S. Dep't of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), *available at* www.justice.gov/atr/public/press_releases/2009/245710.pdf; *id.* at 45–47 (advocating disproportionality test where a conduct-specific test would not apply); *see also* Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act 9 (June 19, 2013) (proposing guidelines for FTC Section 5 enforcement that would limit use of the statute to conduct with no efficiency justification), *available at* www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-joshua-d.wright/130619umcpolicystatement.pdf; Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, Remarks at the U.S. Chamber of Commerce: Section 5: Principles of Navigation 10 (July 25, 2013) (transcript available at www.ftc.gov/sites/default/files/documents/public_statements/section-5-principles-naviga-

have helped foster a contemporary rhetorical consensus that inappropriately relegates exclusion to antitrust's periphery while placing collusion at its core.[23]

II. ERRONEOUS ERROR COST ARGUMENTS

The error cost framework can be thought of as using the tools of what economists term "decision theory"[24] to evaluate whether legal rules promote "optimal deterrence" (a term used in the economics of penalties to describe economically efficient outcomes).[25] Like microeconomics generally, decision theory is a neutral tool, not an inherently conservative one.[26] In applying that tool to analyze antitrust rules, however, conservatives have made a series of erroneous assumptions, which have collectively imparted a non-interventionist bias to their conclusions.

Antitrust conservatives do not, of course, all think alike. Some would not subscribe to each of the arguments criticized here, and might dismiss some of

---

tion/130725section5speech.pdf) (proposing to limit the application of FTC Act Section 5 to conduct with disproportionate anticompetitive effects). Commentators have also debated in error-cost terms conservative proposals that courts find exclusionary conduct by dominant firms anticompetitive only if the conduct would be unprofitable but for the exclusion of rivals and the resulting market power. *Compare* A. Douglas Melamed, *Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal,* 20 BERKELEY TECH. L.J. 1247 (2005) (advocating profit-sacrifice test), *with* Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 344 (2006) (criticizing profit-sacrifice test).

[23] *See generally* Baker, *supra* note 7.

[24] "Decision theory sets out a *process* for making factual determinations and decisions when information is costly and therefore imperfect." Beckner & Salop, *supra* note 17, at 41–42. *See generally* JOHN W. PRATT, HOWARD RAIFFA & ROBERT SCHLAIFER, INTRODUCTION TO STATISTICAL DECISION THEORY (1995); MORRIS H. DEGROOT, OPTIMAL STATISTICAL DECISIONS (1970). Although the "error cost" analysis is conducted in terms of costs, minimizing total social costs is equivalent to maximizing total social benefits, which is more likely how the analysis would be described in the language of decision theory.

[25] *See* ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 1129–35 (2d ed. 2008) (Sidebar 9-7) (surveying the literature on the economics of penalties and its application to antitrust). The magnitude of expected penalties undoubtedly influences firm conduct, so the penalties assigned to antitrust violations necessarily affect the likelihood that antitrust rules will lead to efficient outcomes. Similarly, as discussed below in Part II.A.5, the error costs of any individual substantive antitrust rule also depend upon other rules governing firm behavior and the litigation process. This and other problems that arise in applying the error cost framework to evaluate legal rules are discussed briefly in Baker, *supra* note 3, at 2178–79. In light of these difficulties, "It is hard to be confident that any particular legal rule will minimize error costs for any of the issues antitrust commentators argue about, like bundled discounts or the unilateral competitive effects of mergers, even with the best of intentions." *Id.* at 2179.

[26] *See, e.g.*, LOUIS KAPLOW, COMPETITION POLICY AND PRICE FIXING (2013) (relying on a decision-theoretic framework to argue that antitrust should employ a broad definition of "agreement" among rivals that would encompass oligopolistic interdependence leading to higher prices); Salop, *supra* note 22, at 344 (discussing the application of decision theory to Sherman Act § 2 standards).

the claimed mistakes as caricatures of their views or as arguments that conservative antitrust commentators were more likely to employ in the past than to offer today. In addition, some of the authors cited in this article might resist the conservative label, or take non-interventionist positions only with respect to some issues.[27] Moreover, most contemporary conservative antitrust commentators accept that antitrust has some useful role to play,[28] so most are unlikely to agree with every one of the views that I describe the antitrust right as holding. (It is hard to see how someone who simultaneously accepted all of them would want to support the antitrust enterprise.) It is nevertheless useful to collect the arguments in a single place in order to show the limits to the revolution in antitrust thinking that the Chicago School commentators launched a generation ago.[29]

A. ERRONEOUS ASSUMPTIONS ABOUT MARKETS

1. *Markets Self-Correct Through Entry*

Antitrust conservatives often presume that markets are self-correcting: that in the event firms exercise market power, entry by new firms or expansion by existing firms will generally restore competition quickly and automatically, even in the oligopoly settings characteristic of antitrust cases. If so, the social costs of market power are limited, and an error cost analysis will generally favor permissive antitrust rules. Judge Easterbrook popularized use of the

---

[27] For example, Justice Stephen Breyer endorsed the "single monopoly profit" theory criticized in Part II.A.4, below, in *Town of Concord v. Boston Edison Co.,* 915 F.2d 17, 23, 32 (1st Cir. 1990), and authored the majority opinion in *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007), which is discussed in Part II.B.4. Yet, as author of the dissent in *Leegin Creative Leather Products, Inc. v. PSKS*, Inc., 551 U.S. 877 (2007), he took issue with the majority's non-interventionist approach. Justice Breyer's antitrust positions reflect concerns about the administrability of legal rules and the capacity of antitrust institutions, and so do not invariably follow the non-interventionist fault line emphasized here. *See generally* Kovacic, *supra* note 2; Leon B. Greenfield & Daniel J. Matheson*, Rules Versus Standards and the Antitrust Jurisprudence of Justice Breyer*, ANTITRUST, Summer 2009, at 87.

[28] *See* Priest, *supra* note 1, at 8 ("The Chicago School tradition sought to constrain antitrust law—chiefly by ridiculing its excesses—but accepted antitrust enforcement as an underlying background condition of market activity."). Some conservatives have called for repealing the antitrust laws, however. *E.g.*, DOMINICK T. ARMENTANO, ANTITRUST POLICY: THE CASE FOR REPEAL (1986); William F. Shughart II, *Don't Revise the Clayton Act, Scrap It!*, 6 CATO J. 925 (1987); *cf.* Thomas G. Donlan, *Who Calls the iTune? Don't Let Government Fiddle with Competition in the E-Book Market*, BARRON'S, July 15, 2013, at 43 (antitrust enforcement violates firms' economic rights); Ryan Young, *Apple's Ebook Ruling and the Absurdity of Antitrust Law*, DAILY CALLER (July 11, 2013), dailycaller.com/2013/07/11/the-apple-ebook-ruling-and-the-absurdity-of-antitrust-law/ (same).

[29] For another effort with a similar goal, though focused more on the specific doctrinal rules the courts have adopted, see HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008). For conservative criticism of that book, see Joshua D. Wright*, Overshot the Mark? A Simple Explanation of the Chicago School's Influence on Antitrust*, COMPETITION POL'Y INT'L, Spring 2009, at 1.

term "self-correcting" in antitrust commentary,[30] though the concept predates him and appears, for example, in Judge Bork's book.[31]

The conservative claim that markets self-correct rests in part on an unobjectionable economic premise.[32] If entry is easy,[33] then the exercise of market power will prompt new competitors to emerge. That development would be expected to counteract any exercise of market power, and its prospect may deter the exercise of market power in the first place.[34] Proceeding to the empirical claim that, as anticompetitive conduct causes prices to rise, "new entrants will emerge to alleviate, or even eradicate, the problem," and then to the conclusion that "[l]etting the guilty go free in antitrust is generally a self-correcting problem,"[35] however, requires reliance on a second, unstated premise. The unstated premise is that entry will generally prove capable of policing market power in the oligopoly settings of greatest concern in antitrust—or at least prove capable of policing market power with a sufficient frequency, to a sufficient extent, and with sufficient speed to make false positives systematically less costly than false negatives.

---

[30] Easterbrook, *supra* note 16, at 2–3 (stating that "judicial errors that tolerate baleful practices are self-correcting" because "[m]onopoly is self-destructive" given that "[m]onopoly prices eventually attract entry"); *id.* at 15 ("A monopolistic practice wrongly excused will eventually yield to competition . . . as the monopolist's higher prices attract rivalry."); *accord* Wright, *supra* note 13, at 248 ("[T]he costs of false convictions in the antitrust context are likely to be significantly larger than the costs of false acquittals, since judicial errors that wrongly excuse an anticompetitive practice may eventually be undone by competitive forces attracted by the presence of monopoly rents.").

[31] BORK, *supra* note 1, at 133 (a dominant position conferring market power will "always be eroded" if not based on superior efficiency).

[32] The possibility of market self-correction through expansion by existing rivals is addressed in Part II.A.2, below.

[33] The antitrust economics literature frequently refers to "ease" of entry and "barriers" to entry, so I have adopted the terms here. These terms mislead, however, to the extent they suggest that entry conditions can be analyzed in the abstract, without reference to a competitive concern. The relevant question for antitrust enforcement and policy is typically whether new competition will counteract or deter competitive harm from the specific business conduct at issue. The answer may vary with the nature of the conduct.

[34] Conversely, as antitrust conservatives properly recognize, if entry is not easy, the self-correcting process can work slowly, giving antitrust enforcement a role to play. Easterbrook, *supra* note 16, at 2 (The "long run may be a long time coming, with loss to society in the interim," so "[t]he central purpose of antitrust is to speed up the arrival of the long run."); Evans & Padilla, *supra* note 16, at 84 ("We are not suggesting that competition cures all anticompetitive ills—only that the forces of competition, and creative destruction, provide some limitation on the magnitude and duration of monopoly profits."); BORK, *supra* note 1, at 311 ("Antitrust is valuable because in some cases it can achieve results more rapidly than can market forces" such as entry); *cf.* Wright, *supra* note 13, at 245 ("The Chicago School neither assumes nor requires conditions of perfect competition, perfect information, or the absence of transaction costs. The Chicago School accounts for real-world frictions.").

[35] Fred S. McChesney, *Talking 'Bout My Antitrust Generation*, REGULATION, Fall 2004, at 48, 50.

Yet there is little reason to believe that entry addresses the problem of market power so frequently, effectively, and quickly as to warrant dismissal of concerns regarding false negatives. The claim that airline markets are "contestable,"[36] once pressed in support of limiting antitrust intervention in that industry, is no longer seriously maintained.[37]

David Evans and Jorge Padilla support the self-correction claim with examples of near-monopolies that eroded over time, "such as General Motors (automobiles), IBM (computers), RCA (television sets), Kodak (photographic film), Xerox (photocopiers), U.S. Steel (finished steel), and Harley-Davidson (motorcycles)"; it is noteworthy, however, that these firms' dominant positions, while not permanent, generally persisted for decades.[38] The antitrust case law supplies other examples of dominant firms that possessed durable market power.[39]

The case law also supplies examples of dominant firms and colluding firms that harmed competition by erecting entry barriers and excluding new rivals, including entrants that sought to introduce new technologies.[40] Microsoft, for example, had durable market power in computer operating systems; it main-

---

[36] In what is termed a "contestable" market, the potential for rapid and inexpensive entry would deter or counteract any exercise of market power, no matter how small the number of incumbent firms. *See, e.g.*, WILLIAM J. BAUMOL, JOHN C. PANZAR & ROBERT D. WILLIG, CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE (rev. ed. 1988). Those suggesting application of this idea to the airline industry pointed out that aircraft were not committed to any particular route and that airlines could readily shift aircraft to new city-pairs in response to profit opportunities. *See, e.g.*, Elizabeth E. Bailey & John C. Panzar, *The Contestability of Airline Markets During the Transition to Deregulation*, LAW & CONTEMP. PROBS., Winter 1981, at 125.

[37] *See* William J. Baumol & Robert D. Willig, *Contestability: Developments Since the Book*, *in* STRATEGIC BEHAVIOUR AND INDUSTRIAL COMPETITION 9, 24–27 (Derek J. Morris et al. eds., 1986) (the "initial enthusiasm" of the authors for viewing airline markets as contestable required "[r]econsideration," as the airline "industry does not conform perfectly to the contestability model"). The reasons and evidence that airline markets are not contestable are surveyed in Jonathan B. Baker, *Mavericks, Mergers and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U. L. REV. 135, 170–72 & n.153 (2002). Moreover, the flawed claim that competition from small rivals and potential entrants prevents competitive harm is at odds with the equally flawed argument made by some conservatives that the exclusion of inefficient entrants does not harm competition. *See* Steven C. Salop, *Economic Analysis of Exclusionary Vertical Conduct: Where Chicago Has Overshot the Mark, in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, *supra* note 29, at 141, 152–55 (criticizing the equally efficient entrant standard).

[38] *Cf.* Evans & Padilla, *supra* note 16, at 84 (acknowledging that these dominant positions were "not ephemeral").

[39] *E.g.*, Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. Dentsply Int'l, Inc., 399 F.3d 181 (3d Cir. 2005); United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam); United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416 (2d Cir. 1945).

[40] *See, e.g.*, Baker, *supra* note 7, at 535–36 (examples of leading antitrust decisions addressing exclusionary conduct); *id.* at 559–60 (examples of antitrust cases addressing the alleged suppression of new technologies, products, or business models).

tained that power by excluding rivals that offered new technologies (rival Internet browsers and the Java programming language) that threatened to erode the "applications barrier to entry" that protected Microsoft Windows from competition from rival operating systems.[41] The *Lorain Journal* newspaper protected its monopoly power by impeding the entry of a rival using a new technology, radio.[42] MasterCard and Visa likewise adopted rules that prohibited banks from issuing rival cards with innovative features.[43]

Similarly, cartels often last more than a decade even when antitrust enforcement cuts short their duration. A recent study of 81 international cartels convicted in the United States or European Union since 1990—most of which were terminated by an antitrust case—found they had an average duration of more than eight years.[44] Indeed, many cartels have lasted for decades.[45] The many examples of long-lasting dominant firms and cartels, along with the theoretical reasons why the exercise of monopoly power need not be transitory or corrected by new rivals attracted by supracompetitive prices,[46] make clear that the exercise of durable market power should be treated as a serious

---

[41] *See generally Microsoft*, 253 F.3d 34.

[42] "Had the newspaper succeeded, and other newspapers followed suit, it is easy to imagine that few radio stations in regions with a dominant newspaper would have succeeded unless they were owned by the newspaper, slowing the growth of the radio industry." Baker, *supra* note 7, at 560 (footnote omitted).

[43] *See* United States v. Visa U.S.A., Inc., 344 F.3d 229, 241 (2d Cir. 2003); Baker, *supra* note 7, at 559–60 & n.160.

[44] Margaret C. Levenstein & Valerie Y. Suslow, *Breaking Up Is Hard to Do: Determinants of Cartel Duration,* 54 J.L. & ECON 455, 463 (2011). The standard deviation of cartel duration in the sample was nearly six years. Eighty percent of these cartels were terminated by antitrust enforcement, *id.* at 466, so many would likely have lasted considerably longer if market forces alone had constrained the exercise of market power. The median lifespan of the cartels in the sample was seven years, *id.* at 463, which was lower than the mean because the distribution of cartel duration had a long right-hand tail. Twenty-eight percent lasted at least a decade, and 10 percent lasted 17 years or more. *Id.* at 463 fig.1; *cf.* Joseph E. Harrington, Jr. & Yanhao Wei, What Can the Duration of Discovered Cartels Tell Us About the Duration of Cartels? (July 26, 2014) (unpublished working paper) (generally supporting the reliability of inferring cartel duration from data on discovered cartels), *available at* economics.sas.upenn.edu/sites/economics.sas.upenn.edu/files/14-042.pdf.

[45] *See* Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?*, 44 J. ECON. LITERATURE 43, 53 tbl.2 (2006) (indicating that a number of cartels lasted at least 40 years).

[46] Ariel Ezrachi & David Gilo, *Are Excessive Prices Really Self-Correcting?*, 5 J. COMPETITION L. & ECON. 249 (2009) (supracompetitive prices only attract entry efforts if they signal that the post-entry price would be high or that the incumbent firms have high costs, and even then entry may not succeed in lowering those prices to competitive levels); Jonathan B. Baker, *Responding to Developments in Economics and the Courts: Entry in the Merger Guidelines*, 71 ANTITRUST L.J. 189, 194–95 (2003) (the price-depressing effects of entry may deter new competition even if a merger raises prices above competitive levels); *id.* (describing the incorporation of economic learning about strategic-entry barriers into enforcement agency merger guidance and judicial opinions); Joseph E. Stiglitz, *Technological Change, Sunk Costs, and Competition*, 1987 BROOKINGS PAPERS ON ECON. ACTIVITY 883, 886 (a very small amount of sunk costs may be sufficient to deter entry).

concern. One cannot simply presume that entry by new competitors will correct the instances of market power that antitrust courts identify.

2. *Markets Self-Correct Because Oligopolies Compete and Cartels Are Unstable*

Markets could be self-correcting even absent the threat of entry if markets with only a few participants—even as few as two or three—typically perform competitively. Judge Bork took this view, stating that "[o]ligopolistic structures probably do not lead to significant restrictions of output."[47] This claim would be defensible if firms in oligopoly settings typically respond to efforts by other participants to exercise market power by expanding output or otherwise competing more aggressively—with sufficient speed and to a sufficient extent to counteract or deter any exercise of market power. Then coordinated arrangements like cartels would break down quickly or never form in the first place.[48]

But contemporary economic scholarship does not support the assertion that oligopolies typically perform competitively. That assertion is inconsistent with the economic literatures relating market concentration to price elevation in static non-cooperative oligopoly models,[49] relating concentration to cartel stability,[50] and empirically relating market structure to the exercise of market power.[51] It is also inconsistent with the studies finding that many cartels have

---

[47] BORK, *supra* note 1, at 196. The exercise of market power would be expected to lead to higher prices and reduced output industry-wide when products are homogeneous. The output standard is properly concerned with industry-wide output, not with the output of the firms alleged to have harmed competition, as firms that exercise market power by excluding rivals and raising price could increase their own output even as industry output falls. (Judge Easterbrook erroneously focuses on the output of the firms alleged to have harmed competition in *The Limits of Antitrust, supra* note 16, at 31.)

[48] *See* POSNER, *supra* note 1, at 53 ("A clandestine cartel is rife with inducements and temptations to cheating, as is confirmed by the history of actual cartels, which are usually quite unstable even when not forced underground by antitrust enforcement.").

[49] *E.g.*, Keith Cowling & Michael Waterson, *Price-Cost Margins and Market Structure*, 43 ECONOMICA 267 (1976); Robert E. Dansby & Robert D. Willig, *Industry Performance Gradient Indexes*, 69 AM. ECON. REV. 249 (1979) (relating changes in aggregate surplus to the Herfindahl-Hirschman Index (HHI) of market concentration in Cournot equilibrium); *see generally* Louis Kaplow & Carl Shapiro, *Antitrust*, *in* 2 HANDBOOK OF LAW AND ECONOMICS 1073, 1083–86 (A. Mitchell Polinsky & Steven Shavell eds., 2007); Carl Shapiro, *Theories of Oligopoly Behavior*, *in* 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 329, 333–36 (Richard Schmalensee & Robert D. Willig eds., 1989).

[50] George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964). *See generally* Jonathan B. Baker, *Market Concentration in the Antitrust Analysis of Horizontal Mergers, in* ANTITRUST LAW AND ECONOMICS 234, 238 & 238 n.20 (Keith N. Hylton ed., 2d ed. 2010) (corrected in a working paper available at ssrn.com/abstract=1092248).

[51] Richard Schmalensee, *Inter-Industry Studies of Structure and Performance*, *in* 2 HANDBOOK OF INDUSTRIAL ORGANIZATION, *supra* note 49, at 951, 988 (Stylized Fact 5.1) (empirical survey); Leonard W. Weiss, *Conclusions* (empirical survey), *in* CONCENTRATION AND PRICE 266–84 (Leonard W. Weiss ed., 1989). For other within-industry examples relating the number

been long-lasting,[52] and the experience of antitrust agencies engaged in cartel prosecution.[53] Economic theory likewise does not support the presumption sometimes advanced by advocates for merging rivals that three (or even two) firms in a market are enough for competition.[54]

3. *Markets Perform Well Because Monopolies Innovate*

Markets could also perform well if oligopolies and monopolies were typically more innovative than markets with many competitors. Justice Scalia raised this defense of monopoly in dicta in the Supreme Court's 2004 opinion in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*.[55] The opinion suggested that monopolies are temporary, hence self-correcting, and that monopolies are not troublesome because they foster market growth.[56]

---

of significant rivals or market concentration with prices, see for example, Timothy F. Bresnahan & Valerie Y. Suslow, *Oligopoly Pricing with Capacity Constraints*, ANNALES D'ECONOMIE ET DE STATISTIQUE, July–Dec. 1989, at 267, and Jonathan B. Baker, *Econometric Analysis in* FTC v. Staples*,* 18 J. PUB. POL'Y & MKTG. 11 (1999).

[52] *See supra* notes 44–45 and accompanying text. These studies contradict Judge Easterbrook's unsupported assertion that cartels "rarely last five years." Easterbrook, *supra* note 16, at 33.

[53] "For those who may be tempted to argue that coordination is too difficult to occur in the real world, I should not have to do more than to point to the large number of multinational cartels we've successfully prosecuted in [the] last seven years to show why such arguments will fall on deaf ears." William J. Kolasky, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dept. of Justice, Address at the ABA Section of Antitrust Law Spring Meeting: Coordinated Effects in Merger Review: From Dead Frenchmen to Beautiful Minds and Mavericks 18 (Apr. 24, 2002), *available at* www.justice.gov/atr/public//.htm.

[54] Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, *supra* note 29, at 235, 253. Shapiro and I did not call for a return to a mechanical, concentration-based approach to merger policy. Instead, we proposed factual showings that should be sufficient, given the modern understanding of the effects of mergers on competition, to create a presumption that a proposed horizontal merger creates adverse coordinated or unilateral competitive effects. *See id.* at 258–66.

[55] 540 U.S. 398 (2004) (holding that a non-antitrust statutory scheme providing for extensive regulation aimed at promoting competition in telephony displaced private enforcement under the Sherman Act).

[56] In the relevant passage from the opinion, Justice Scalia wrote:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. 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. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.

Trinko, 540 U.S. at 407. Justice Scalia could have made his economic point about the role of appropriability as a spur to innovation without referencing monopolies, and he could have noted that competition also spurs innovation. By not formulating his argument this way, Justice Scalia's rhetoric appears to welcome or defend monopolies. *See* Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 44 (2004) (arguing that Justice Scalia's "deliberate goal" in *Trinko* was "to build the case for a more tolerant monopolization standard"); *cf.* Alan Devlin, *Antitrust in an Era of Market Failure*, 33

Similarly, David Evans and Keith Hylton view antitrust's prohibition against monopolization as trading off the consumer harm from the excessive prices charged by monopolists against the benefits monopoly confers in enhancing incentives to innovate.[57]

This "dynamic competition" defense of concentrated markets, or of conduct allowing firms to create or maintain market power, is unconvincing because it ignores several important ways that greater competition enhances incentives to innovate. It does not account for the roles that pre-innovation product-market competition (which firms can seek to escape through innovation) and competition in innovation itself play in fostering innovation. The defense focuses exclusively on the incentive of firms exercising market power to invest in research and development (R&D) arising from their ability to appropriate the gains from innovation, while ignoring the potentially more significant incentive of those firms to increase R&D investment in response to greater investment by their rivals.[58] Nor does the defense account for empirical evidence that greater competition is commonly more important for enhancing innovation incentives than the greater appropriability that a monopoly could confer.[59] The defense also ignores the ability of firms exercising market power to restrict, deter, or eliminate new forms of competition through exclusionary conduct.[60] To relax antitrust rules on the rationale that one firm is enough for competition, in rapidly changing high-technology markets or otherwise, would undermine innovation incentives under the guise of protecting them.

HARV. J.L. & PUB. POL'Y 557, 572–73 & 573 n.73 (2010) ("Whereas the concentration of economic power and obstacles to economic freedom were once viewed as antithetical to a 'healthy and unimpaired competitive process,' courts no longer view these factors as inconsistent." (citing the *Trinko* opinion as the "most dramatic example")).

[57] David S. Evans & Keith N. Hylton, *The Lawful Acquisition and Exercise of Monopoly Power and Its Implications for the Objectives of Antitrust*, COMPETITION POL'Y INT'L, Autumn 2008, at 203, 220 (2008). For a critical response, see Jonathan B. Baker, *"Dynamic Competition" Does Not Excuse Monopolization,* COMPETITION POL'Y INT'L, Autumn 2008, at 243.

[58] Jonathan B. Baker, *Evaluating Appropriability Defenses for the Exclusionary Conduct of Dominant Firms in Innovative Industries*, ANTITRUST L.J. (forthcoming) *available at* papers.ssrn.com/sol3/papers.cfm?abstract_id=2523203.

[59] *See generally* 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); Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575, 579–86 (2007). Antitrust law has long recognized a monopolist's incentive to enjoy a quiet life. United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 427 (2d Cir. 1945).

[60] *E.g.*, United States v. Microsoft Corp., 253 F.3d 34, 76–79 (D.C. Cir. 2001) (en banc) (per curiam) (Microsoft impeded the development of a new method by which applications software could access operating systems, involving the combination of Netscape's browser and Sun's Java programming language, that had the potential to foster increased competition in personal computer operating systems.); United States v. Visa U.S.A., Inc., 344 F.3d 229, 241 (2d Cir. 2003) (Exclusionary conduct by MasterCard and Visa prevented the development of new payment card services.); Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (A newspaper monopolist impeded the entry of a rival using a new technology, radio.).

4. *Monopolists Cannot Obtain More than a Single Monopoly Profit*

Judge Bork argued that antitrust should not automatically prohibit (by treating as illegal per se) certain exclusionary business practices—including vertical mergers, exclusive dealing contracts, and other restrictions on vertically related firms[61]—in part because doing so would make "the simple arithmetical error of counting the same market power twice."[62] He made a similar argument in advocating per se legality for tying.[63]

This basis for declining to challenge dominant-firm behavior is commonly referred to as the theory that there is a "single monopoly profit." Some U.S. courts have cited the single monopoly profit theory as a basis for allowing monopolists to make exclusive vertical agreements.[64] Contemporary conservatives recognize that exceptions to the theory exist; they regard these exceptions as rare and implausible,[65] however, and so effectively accept the single monopoly profit theory in practice.

The "single monopoly profit" theory inverts the claim that markets self-correct by taking the view that there is no middle ground: if a single firm somehow manages to exercise monopoly power, notwithstanding the tendency of markets to self-correct, the firm extracts all possible monopoly profits and cannot harm competition further through the exclusionary conduct

---

[61] The "single monopoly profit" claim is most often made when analyzing restrictions that a dominant firm imposes on vertically related firms. *Cf.* Evans & Padilla, *supra* note 16, at 77 ("A firm with a monopoly at one level of the [vertical] chain [of production] gets all of the monopoly profit if it charges a monopoly price and everyone else in the chain charges a competitive price.").

[62] BORK, *supra* note 1, at 137–38; *see id.* at 140 ("When a court assumes that a firm forecloses its rivals without predatory intent and without creating efficiency, the court also assumes that the firm gets 'something more' without noticing it.").

[63] *Id.* at 372 (antitrust law's theory of tying "is merely another example of the discredited transfer-of-power theory"); *id.* at 380–81 (tying and reciprocal dealing should be legal per se because "we have no acceptable theory of harm," while these practices may benefit competition).

[64] E & L Consulting, Ltd. v. Doman Indus., 472 F.3d 23, 29–30 (2d Cir. 2006); G.K.A. Beverage Corp. v. Honickman, 55 F.3d 762, 767 (2d Cir. 1995); Town of Concord v. Boston Edison Co., 915 F.2d 17, 23, 32 (1st Cir. 1990) (Breyer, C.J.); *see* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 36–37 (1984) (O'Connor, J., concurring). The single monopoly profit argument has also been aimed at monopoly-leveraging claims, under which a monopolist would be found liable if it used its monopoly in one market to gain a competitive advantage in a second, adjacent or complementary market. Schor v. Abbott Labs., 457 F.3d 608, 611 (7th Cir. 2006) (Easterbrook, J.). The Supreme Court has ruled out the possibility that a monopolist can violate Sherman Act Section 2 through monopoly leveraging in the absence of proof that the defendant had a dangerous probability of success of obtaining monopoly power in the second market, *Trinko*, 540 U.S. at 415 n.4, but without reference to the single monopoly profit theory.

[65] *E.g.*, Daniel A. Crane & Joshua D. Wright, *Can Bundled Discounting Increase Consumer Prices Without Excluding Rivals?*, COMPETITION POL'Y INT'L, Autumn 2009, at 209, 209–10 (bundled discounts); David S. Evans, *Tying: The Poster Child for Antitrust Modernization*, *in* ANTITRUST POLICY AND VERTICAL RESTRAINTS 65 (Robert W. Hahn ed., 2006) (tying); J. Mark Ramseyer & Eric B. Rasmusen, *Exclusive Dealing: Before Bork, and Beyond*, 57 J.L. & ECON. S145 (2014).

under review.[66] If so, an error cost calculus would indicate that prohibiting the practice would bring about no social benefits, only costs. Those costs would presumably include transaction costs of litigation, the possibility that judicially ordered injunctive relief would prevent the firm from achieving efficiencies, and the chilling effect that the precedent might have on other firms' pursuit of similar efficiencies.

The single monopoly profit theory is logically valid as a matter of economic theory only in one extreme case, however. If the monopolist (or coordinating firms acting like a monopolist) has literally no rivals and faces no potential entrants, and if buyers have literally no alternative to the monopolist's products, then the monopolist may indeed be unable to increase the rents it derives from exercising market power through (further) exclusionary conduct. Outside such an exceptional circumstance, though, firms can potentially obtain, extend, or maintain their market power through exclusionary conduct that suppresses the alternatives that were just assumed away: fringe rivalry, potential entry, or buyer ability to mitigate the effects of seller market power by substituting other products.[67] Thus, a dominant firm or group of firms coordinating their strategies can exercise additional market power by excluding

---

[66] Put this way, the single monopoly profit theory bears a family resemblance to an argument discussed in the literature on inferring agreement among rivals from circumstantial evidence: the claim that the fact finder should not infer an agreement among firms that are already coordinating on the ground that it would make no sense for them to risk antitrust liability to reach an agreement that would not markedly augment their profits. *See* Jonathan B. Baker, *Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory*, 38 ANTITRUST BULL. 143, 190 & n.95 (1993); KAPLOW, *supra* note 26, at 133–45 (discussing paradox of proof). That claim is unattractive to defendants denying conspiracy, however, as it concedes coordination.

[67] *See* ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, *Note on "Single Monopoly Profit" Theory* (manuscript available at ssrn.com/abstract=2496932), *in* ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY (3d ed. forthcoming); *see also* Salop, *supra* note 37, at 144–48; Louis Kaplow, *Extension of Monopoly Power Through Leverage,* 85 COLUM. L. REV. 515 (1985); Timothy F. Bresnahan, *Monopolization and the Fading Dominant Firm*, *in* COMPETITION LAW AND ECONOMICS: ADVANCES IN COMPETITION POLICY ENFORCEMENT IN THE EU AND NORTH AMERICA 264 (Abel M. Mateus & Teresa Moreira eds., 2010) (demonstrating that a dominant firm threatened by rivals' innovation can profit by blocking those rivals, leading to the failure of the single monopoly profit theory in the case of technologically dynamic industries); Barry J. Nalebuff, *Bundling as a Way to Leverage Monopoly* 2 (Yale Sch. of Mgmt. Working Paper No. ES-36, 2004) ("While there are some special cases in which leverage does not lead to higher profits, in the general case, a monopolist can earn higher profits by leveraging its power into a competitive market."), *available at* ssrn.com/abstract=586648; Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and* Microsoft, 7 GEO. MASON. L. REV. 617, 624–30 (1999) (describing the limiting assumptions required for the single monopoly profit theory to apply and the anticompetitive harms that may otherwise result); *cf.* Daniel P. O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems, in* THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 78 (Swedish Competition Auth. 2008) (The welfare consequences of economic models of vertical agreements between an upstream monopolist and downstream oligopolists depend on assumptions about the nature of contracting, such as whether payments take the form of a linear schedule (a specified unit price), whether the seller makes offers on a take-it-or-leave-it basis,

actual or potential rivals, leveraging market power to a complementary market, or preventing buyers from economizing on products they can use in variable proportions.[68] In general, therefore, and contrary to the implicit presumption of the single monopoly profit theory, poorly performing markets can grow worse. The potential for competitive harm from exclusionary conduct by a dominant firm cannot be ruled out by appeal to economic theory.

5. *Business Practices Prevalent in Competitive Markets Cannot Harm Competition*

The conservative literature employing an error cost framework to evaluate antitrust rules often relies on biased evidence when assessing the likely competitive effects of business practices. The problematic chain of logic begins with the observation, whether derived from casual empiricism or from formal empirical studies, that some forms of business conduct (such as tying, exclusive dealing, and other vertical restraints) are prevalent in competitive markets.[69] The conservative literature mistakenly infers that firms cannot readily use these practices to harm competition, either at all or on balance after accounting for efficiencies, and concludes that antitrust rules should not prohibit such practices.[70]

---

and whether the seller's offer to one distributor can be observed by the distributor's rivals.), *available at* konkurrensverket.se/t/asp/publications.asp.

[68] GAVIL ET AL., *supra* note 67 (providing examples of scenarios in which the single monopoly profit would not prevent firms from enhancing or maintaining market power through restrictive distribution practices). A dominant firm or coordinating firms can also exercise additional market power through exclusionary conduct that permits the evasion of rate regulation, *id.*, or through conduct that facilitates harmful price discrimination.

[69] Cooper et al., *supra* note 21, at 648 (Empirical studies of vertical restraints find little support for anticompetitive theories and much support for procompetitive theories.); *see* Hylton & Salinger, *supra* note 20, at 471 ("[I]n formulating a rule, the prevalence of tying for procompetitive reasons is an important consideration. Because beneficial tying is so pervasive, rules against tying could be harmful even with a small rate of falsely labeling tying as anticompetitive."). *Compare* McWane, Inc., FTC Docket No. 9351, 2014-1 Trade Cas. (CCH) ¶ 78,670, at 129,293 (Jan. 30, 2014) (Wright, Comm'r, dissenting) ("With regard to vertical restraints, it is well-accepted that the economic learning accumulated since *GTE Sylvania* has taught that such restraints, a category that includes vertical territorial restrictions, resale price maintenance, exclusive dealing, loyalty discounts, tying, and other related business practices, rarely harm competition and often benefit consumers by increasing demand and/or creating a more efficient distribution channel."), *with* Steven C. Salop, Sharis A. Pozen & John R. Seward, The Appropriate Legal Standard and Sufficient Economic Evidence for Exclusive Dealing Under Section 2: the FTC's *McWane* Case 53 (Aug. 7, 2014) (unpublished working paper) (criticizing Commissioner Wright for adopting an approach to economic analysis and the law of exclusive dealing that "would lead to excessive false negatives, under-enforcement and under-deterrence"), *available at* ssrn.com/abstract=2477448.

[70] Easterbrook, *supra* note 16, at 15 ("When most examples of a category of conduct are competitive, the rules of litigation should be 'stacked' so that they do not ensnare many of these practices just to make sure that the few anticompetitive ones are caught."); Evans & Padilla, *supra* note 16, at 81–82 ("Practices that generate efficiencies where firms lack market power logically should generate those same efficiencies where firms possess market power. . . . We

The observation that firms in competitive markets employ certain practices, however, does not preclude the possibility that firms can also use those practices to obtain or maintain market power, and that those practices harm competition on balance when employed by firms exercising market power.[71] Indeed, a recent study of a sample of convicted contemporary international cartels concludes that at least one quarter used vertical restraints to support collusion.[72] Nor does the prevalence of certain practices, particularly exclusionary practices, in competitive markets support an inference that the same practices, when challenged by antitrust enforcers, typically have an efficiency motive, which antitrust enforcement would chill.[73] Even if many or most instances of a practice benefit competition or are competitively neutral, that does not mean that the *subset* of instances challenged in court (by virtue of facts suggesting the possibility of competitive harm) typically benefit competition on balance, or even benefit competition at all.[74]

---

therefore presume that these practices are procompetitive, even if practiced by firms with monopoly power, unless shown otherwise.").

[71] *See* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 488 (1992) (Scalia, J., dissenting) ("Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist."). For example, the parallel adoption of simplified and common product definitions, of price lists, and of guarantees to buyers that they will get the best price the seller gives any buyer are each practices that firms can use to facilitate coordination; competitive firms, however, can use these same practices to achieve efficiencies. *See, e.g.*, Jonathan B. Baker & Judith A. Chevalier, *The Competitive Consequences of Most-Favored-Nation Provisions*, ANTITRUST, Spring 2013, at 20 (best-price guarantees). Yet it would be inappropriate to infer from the latter observation that rivals are unable to harm competition by fixing prices or dividing markets, or that they do so with such infrequency as to justify relaxing antitrust's concern with collusion.

[72] Margaret C. Levenstein & Valerie Y. Suslow, *How Do Cartels Use Vertical Restraints? Reflections on Bork's* The Antitrust Paradox, 57 J.L. & ECON. S33 (2014). The vertical restraints allowed the colluding firms to discourage cheating or entry while keeping their collusive horizontal agreement secret.

[73] This mistaken inference may underlie recent calls to specify antitrust rules that tilt toward non-intervention; for possible examples, see *supra* notes 20–22 and *infra* notes 87–90.

[74] The antitrust laws, as enforced today, make it difficult for plaintiffs to prevail in challenging a range of practices that have historically been of concern but that conservative antitrust commentators view as procompetitive. *See supra* note 12. Under such circumstances, only plaintiffs bringing unusually strong cases are likely to succeed; a paucity of successful challenges therefore provides little basis for identifying the incidence of procompetitive conduct—as distinct from harmful conduct, costly to consumers, that fails to clear the high bar for bringing a successful court case today. *But cf.* Pauline M. Ippolito, *Resale Price Maintenance: Empirical Evidence from Litigation*, 34 J.L. & ECON. 263 (1991) (concluding that most resale price maintenance allegations in private litigated cases during a period when the practice was illegal per se were likely weak, but not distinguishing cases in which the practice was one of the plaintiff's primary concerns from those in which it played a supporting role and noting that most government cases with similar allegations settled by consent decree). Moreover, defendants' claims about the efficiencies arising from their conduct may be overstated, particularly when the information needed to verify those claims is largely in defendants' hands. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (2010) [hereinafter 2010 Merger Guidelines] (difficulty verifying claims of efficiencies from merger), *available at* www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

In addition, the empirical evidence underlying the assertion that practices prevalent in competitive markets do not harm competition often comes from settings in which legal rules—including substantive antitrust rules prohibiting anticompetitive instances of the practices at issue—shape firm conduct.[75] Evidence that certain practices often promote competition in these settings, however, provides little information as to whether the same practices would have harmful consequences if antitrust rules constraining their use were relaxed.

To illustrate these points, consider the enforcement and policy implications of studies showing a low incidence of competitive harm arising from vertical restraints. Assuming that the studies correctly measured incidence,[76] their findings might justify an enforcer declining to target for investigation an instance of a vertical restraint that the enforcer selected at *random*. The low overall incidence, however, would not justify the enforcer declining to target instances of a vertical restraint that the enforcer selected based on *additional* information suggesting competitive harm.[77]

Furthermore, a low incidence of competitive harm in the sample would not supply a basis for supplanting the existing rule governing vertical restraints with a rule of per se legality. The low incidence would not do so because it is susceptible of two explanations: harmful conduct may be rare because firms cannot readily use vertical restraints to harm competition, or it may be rare because antitrust rules have deterred firms from using vertical restraints to harm competition.

---

[75] Other relevant background institutions include, for example, antitrust rules governing burdens of proof and remedy determination, the procedural rules governing litigation, state unfair competition laws, and laws granting intellectual property rights. *See generally* Kaplow, *supra* note 18; Abraham L. Wickelgren, *Determining the Optimal Antitrust Standard: How To Think About Per Se Versus Rule of Reason*, 85 S. CAL. L. REV. POSTSCRIPT 52, 54 (2012).

[76] Procompetitive consequences may be systematically more visible than anticompetitive consequences, particularly if firms can take steps to disguise the latter. *See* Stephen W. Davies & Peter L. Ormosi, *The Impact of Competition Policy: What Are the Known Unknowns?* 5 (Ctr. for Competition Policy, Working Paper No. 13-7, 2013) (presenting a "conceptual framework for assessing the full impact of competition policy . . . [that] tak[es] into account the deterred and undetected as well as the detected"); Jonathan B. Baker, *New Horizons in Cartel Detection*, 69 GEO. WASH. L. REV. 824, 825 (2001). To similar effect, Fiona Scott Morton has observed that the firms most willing to share data with academic researchers may be those that are using the practices studied procompetitively. As a result, measurements of the frequency and magnitude of benefits and harms may be biased toward finding benefits to competition. Roundtable Discussion at the FTC and U.S. Department of Justice Workshop on Conditional Pricing Practices: Where Do We Go from Here? Open Questions and Policy Considerations 175 (June 23, 2014) (remarks of Fiona Scott Morton) (transcript available at www.ftc.gov/system/files/documents/public_events/302251/_workshop_transcript.pdf).

[77] *Cf.* Jonathan B. Baker & Timothy F. Bresnahan, *Economic Evidence in Antitrust: Defining Markets and Measuring Market Power*, *in* HANDBOOK OF ANTITRUST ECONOMICS 1, 24–29 (Paolo Buccirossi ed., 2008) (explaining that empirical economic studies of the competitive effects of specific business practices are generally more useful for evaluating conduct in industries similar to those studied than for formulating generally applicable legal rules).

Unless an empirical study compares settings with and without antitrust rules,[78] or provides some other basis for ruling out the deterrence explanation, the study cannot demonstrate (*identify* in the econometric sense) the competitive impact of the business practices that conservatives have targeted for antitrust abandonment. Studies in which all observations of the competitive effects of a practice come from settings in which antitrust rules constrain the ways in which firms employ that practice supply no information about the ways that firms would employ that practice in the absence of those rules. Hence, such studies cannot support proposals that antitrust should discard rules prohibiting that practice.

A recent unpublished study addressed this methodological issue and highlighted the role that antitrust rules play in deterring firms from using vertical restraints to harm competition.[79] The study compared states retaining per se illegality for resale price maintenance after *Leegin* (because of state law) with

---

[78] *See* Baker, *supra* note 18, at 36–38 (showing prevalence of competitive harms in periods of lax antitrust enforcement).

[79] Alexander MacKay & David Aron Smith, The Empirical Effects of Minimum Resale Price Maintenance on Prices and Output (June 16, 2014) (unpublished working paper), *available at* home.uchicago.edu/~/mackay/research.html. This study responds to the call by Cooper et al., *supra* note 21, for the use of natural experiments to guide enforcement policy. Some prior studies of the consequences of resale price maintenance did not address the identification problem highlighted here, and the others did not suggest a uniform interpretation.

A review of litigated cases involving resale price maintenance claims from 1976 to 1982 found that a collusive explanation for the practice rarely appeared plausible while an efficiency explanation invariably appeared plausible. Ippolito, *supra* note 74, at 292. (Ippolito did not consider anticompetitive exclusion, though her data show that monopolization was rarely alleged in addition to vertical price fixing. *Id.* at 270.) Ippolito's study does not account for the background influence of antitrust rules on firm conduct, given that the legal prohibition on resale price maintenance did not vary over her sample period, *id.* at 266, so it does not address the identification issue.

The results of a comprehensive review of empirical studies as of 1983 were far from definitive. THOMAS R. OVERSTREET, JR., RESALE PRICE MAINTENANCE: ECONOMIC THEORIES AND EMPIRICAL EVIDENCE (FTC Bureau of Econ. Staff Report, 1983), *available at* www.ftc.gov/sites/default/files/documents/reports/resale-price-maintenance-economic-theories-and-empirical-evidence/233105.pdf. The majority of studies referenced were price surveys, which cannot discriminate between procompetitive and anticompetitive theories because they do not also study output. *Id.* at 106. Overstreet also surveyed case studies evaluating the impact of resale price maintenance on individual products. In general, the case studies he reviewed addressed the identification problem (by comparing settings with and without antitrust rules prohibiting the practice), but were limited to a single product. Overstreet found the case studies "more useful than the far more numerous 'survey' studies" in identifying probable welfare effects, but observed that they did not uniformly point in one direction. *Id.* at 129. For a critical review of the studies by Ippolito and Overstreet, see Richard M. Brunell, *Overruling* Dr. Miles*: The Supreme Trade Commission in Action*, 52 ANTITRUST BULL. 475, 508–11 (2007).

More recent empirical studies of specific industries affected by legal prohibitions on resale price maintenance also do not point in a single direction. *Compare* PAULINE M. IPPOLITO & THOMAS R. OVERSTREET, JR., RESALE PRICE MAINTENANCE: AN ECONOMIC STUDY OF THE FTC'S CASE AGAINST THE CORNING GLASS WORKS (FTC Bureau of Econ. Staff Report, 1994) (evidence favors efficiency explanations over anticompetitive theories), *with* Stanley I. Ornstein & Dominique M. Hanssens, *Resale Price Maintenance: Output Increasing or Restricting? The* states in which that practice would be reviewed under the rule of reason.[80] The study used Nielsen consumer panel data to analyze changes in the prices and quantities sold for over 1000 categories of branded consumer products.[81] In the 15 states in which the rule of reason standard was most likely to apply, the study found that, when prices changed, they were usually higher, and output usually lower, than in the nine states in which the per se standard was most likely to apply.[82] While resale price maintenance would likely lead to higher prices whether it promoted or harmed competition, the greater reduction in output observed in the rule of reason states indicates that resale price maintenance typically harmed competition in the products studied.[83]

This study suggests that the rule of reason did not deter anticompetitive uses of resale price maintenance that the per se rule deterred.[84] The study's findings are consistent with the view that anticompetitive explanations for resale price maintenance tend to predominate over procompetitive explana-

---

Case of Distilled Spirits in the United States, 36 J. INDUS. ECON. 1 (1987) (evidence of output reduction inconsistent with efficiency theories).

A survey of 12 published empirical studies of the welfare effects of privately imposed vertical restraints generally (exclusive dealing, exclusive territories, tying, resale price maintenance, and sourcing restrictions) found that most benefited consumers or at least did not harm them. Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, *in* HANDBOOK OF ANTITRUST ECONOMICS, *supra* note 77, at 391, 406–08 (discussion of table 10.2). But this survey did not evaluate whether the methodologies in the referenced articles addressed the identification issue highlighted here.

[80] MacKay & Smith, *supra* note 79.

[81] *Id.* at 12–13. Product "modules" (categories) included "light beer" and "sleeping aids." *Id.* at 13.

[82] *Id.* at 15–17.

[83] Industry output is a better indicator of the competitive consequences of minimum resale price maintenance than are industry prices because the practice may raise price regardless of whether it promotes or harms competition. (Under the leading procompetitive theory, the price increase reflects higher product quality or improved service, quality-adjusted prices fall, and industry output increases.) The most likely interpretation of a price increase combined with an output reduction across the group of branded retail products analyzed is the one adopted by the study's authors: that competition was harmed on average. *Id.* at 3, 16, 17–18. It is possible, however, that total output fell, yet consumers in aggregate benefited. This could have happened, for example, if infra-marginal purchasers valued point-of-sale services induced by resale price maintenance a great deal while marginal purchasers did not value such services much.

[84] The study did not determine systematically whether manufacturers of branded consumer products employed resale price maintenance in the states where they were not necessarily prevented from doing so. Some likely did, however; the study reports anecdotal evidence to that effect and notes that a number of products in the sample were sold by manufacturers that had allegedly used resale price maintenance in the past. *Id.* at 4–5, 10, 13 & n.36. Moreover, the results reflect the combined consequences of conduct that would be treated as resale price maintenance under the Sherman Act (including finding an agreement between the manufacturer and distributor) and conduct that has a similar effect but could not have been challenged. It measures the consequences of a more permissive legal environment for all practices that may have been chilled by the per se prohibition against resale price maintenance. *Id.* at 10.

tions.[85] This conclusion is at odds with the views of conservative commentators about the likely competitive effects of vertical practices, including resale price maintenance.[86]

The contemporary conservative authors who have drawn the problematic inference that practices prevalent in competitive markets do not harm competition have deployed that inference, among other things, to oppose an "aggressive enforcement policy" attacking vertical restraints (both non-price restraints and resale price maintenance);[87] to support a rule of reason analysis that evaluates tying "in a manner that puts a high burden of proof on the plaintiff";[88] to support antitrust's use of a "hard to satisfy" test for plaintiffs in predatory pricing cases;[89] and to support per se legality for new product intro-

---

[85] Hence, the study's results caution against abandoning antitrust law's concern with resale price maintenance. *But see* Joshua Wright, Comm'r, Fed. Trade Comm'n, Remarks Before the British Institute of International and Comparative Law: The Economics of Resale Price Maintenance and Implications for Competition Law and Policy 19–21 (Apr. 9, 2014) (transcript available at www.ftc.gov/public-statements/2014/04/economics-resale-price-maintenance-implications-competition-law-policy) (questioning the probative value of MacKay & Smith's study); Thomas A. Lambert & Michael Sykuta, *Why the New Evidence on Minimum Resale Price Maintenance Does Not Justify a* Per Se *or "Quick Look" Approach*, CPI ANTITRUST CHRON., Winter 2013, Vol. 11, No. 1, at 6–8 (same).

[86] *See generally* D. Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, the Rule of Reason and Per Se Legality*, 79 ANTITRUST L.J. 1003, 1004 n.8 (2014). To similar effect, empirical studies of the effects of exclusive dealing in beer distribution do not uniformly favor procompetitive explanations over anticompetitive ones. One study found that exclusive dealing arrangements between certain brewers and their Chicago distributors did not raise the distribution costs of potentially foreclosed brewers. *See* John Asker, Diagnosing Foreclosure Due to Exclusive Dealing (Oct. 14, 2004) (unpublished working paper), *available at* ssrn.com/abstract=609162. Another study found that exclusive distributors sold more beer than non-exclusive distributors. *See* Tim R. Sass, *The Competitive Effects of Exclusive Dealing: Evidence from the U.S. Beer Industry*, 23 INT'L J. INDUS. ORG. 203, 219, 220 (2005). The findings of a third study suggest that exclusive dealing has harmed competition in the beer industry. The study, which addressed the identification issue by exploiting differences in rules across states and within states over time, found that beer sales were lower when rules permitted distributors to engage in exclusive dealing. *See* Jonathan Klick & Joshua D. Wright, The Effects of Vertical Restraints on Output: Evidence from the Beer Industry 20–21 (Nov. 17, 2008) (unpublished working paper), *available at* www.utexas.edu/law/wp/wp-content/uploads/centers/clbe/wright_effects_of_vertical-restraints.pdf.

[87] *See* Cooper et al., *supra* note 21, at 662 (an aggressive policy could only be justified by relatively large costs of false negatives).

[88] Hylton & Salinger, *supra* note 20, at 514. These authors further recommend that the plaintiff "be required to show (subject to a high standard of proof) that tying is profitable to the defendant only if it has an exclusionary effect, and that the cost of tying to the defendant is likely to be recouped through its exclusionary impact." *Id.* at 514 n.138. *See also* Evans & Padilla, *supra* note 16, at 95 (recommending a "structured rule of reason" approach to tying that requires plaintiffs to show that "[o]ffsetting efficiency benefits are insubstantial" in order to prevail).

[89] Kobayashi & Muris, *supra* note 8, at 153. Kobayashi and Muris observe that "little" of the post-Chicago School theoretical modeling demonstrating the possible rationality of predatory pricing has been incorporated into antitrust law, and explain that observation by applying an error cost model: "Absent specific evidence regarding the plausibility of these theories, the courts . . . properly ignore such theories." *Id.* at 166. Their argument gives no weight to recent empirical literature that finds examples of successful price predation during eras in which en-

ductions and unconditional refusals to share intellectual property.[90] These analyses together make a flawed case for downplaying the anticompetitive potential of exclusionary conduct, thereby undermining a core concern of antitrust.[91]

B. ERRONEOUS ASSUMPTIONS ABOUT INSTITUTIONS

1. *Erroneous Judicial Precedents Are More Durable than the Exercise of Market Power*

In arguing that the costs of false positives outweigh those of false negatives, antitrust conservatives often highlight the supposed durability of erroneous judicial precedents. "If the court errs by condemning a beneficial practice," Judge Easterbrook wrote, "the benefits may be lost for good" through the precedential effect of the judicial decision.[92] Judge Easterbrook was particularly concerned by erroneous Supreme Court decisions,[93] presumably because lower courts' errors of law are frequently corrected on appeal.[94]

---

forcement against predatory pricing was lax (during the early 20th century or, more recently, following the Supreme Court's decisions in *Matsushita* and *Brooke Group*). *See* Malcolm R. Burns, *Predatory Pricing and the Acquisition Cost of Competitors*, 94 J. POL. ECON. 266 (1986); Kenneth G. Elzinga & David E. Mills, *Predatory Pricing in the Airline Industry:* Spirit Airlines v. Northwest Airlines *(2005)*, *in* THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY 219 (John E. Kwoka, Jr. & Lawrence J. White eds., 5th ed. 2009); David Genesove & Wallace P. Mullin, *Predation and Its Rate of Return: The Sugar Industry, 1887–1914*, 37 RAND J. ECON. 47 (2006); Josh Lerner, *Pricing and Financial Resources: An Analysis of the Disk Drive Industry, 1980–88*, 77 REV. ECON. & STAT. 585 (1995); Fiona Scott Morton, *Entry and Predation: British Shipping Cartels 1879–1929*, 6 J. ECON. & MGMT. STRATEGY 679 (1997); David F. Weiman & Richard C. Levin, *Preying for Monopoly? The Case of Southern Bell Telephone Company, 1894–1912*, 102 J. POL. ECON. 103 (1994). In a literature survey, Kobayashi recognizes that four of these articles "provide evidence consistent with the use of predatory pricing," but dismisses three of the four on the ground that "we do not know whether these price wars would be unlawful under modern predation standards"—an issue not relevant to assessing their plausibility—"or whether such episodes resulted in reductions to welfare"—a rhetorical device that presumes implausibility and sets a high bar against relying on relevant evidence that suggests otherwise. Bruce H. Kobayashi, *The Law and Economics of Predatory Pricing*, *in* ANTITRUST LAW AND ECONOMICS 116, 127 (Keith N. Hylton ed., 2d ed. 2010).

90 Manne & Wright, *supra* note 16, at 196, 200.

91 *See* Baker, *supra* note 7, at 580–81.

92 Easterbrook, *supra* note 16, at 2; *cf.* William H. Page, *Microsoft and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 33, 47 (2010) ("Perhaps the most important lesson of *The Limits of Antitrust* is that markets are usually better than courts at restoring competition."). Here Easterbrook is concerned with the costs of false positives. The analogous logic applied to the costs of false negatives would have interventionist implications: market power may be slow to dissipate when the erroneous failure of courts to condemn harmful practices is not corrected quickly. Two examples in which overly non-interventionist judicial approaches took at least a decade to correct are discussed below. *See infra* notes 119–125 and accompanying text.

93 *See* Easterbrook, *supra* note 16, at 15 ("There is no automatic way to expunge mistaken decisions of the Supreme Court.").

94 For a recent example in which the Supreme Court corrected the erroneous decisions of multiple appellate courts, see *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013). *Cf.* Michael A. Car-

The claim of temporal asymmetry—that bad precedents take longer to dissipate than market power—is hard to credit.[95] Erroneous precedents may not disappear overnight, but nor do cartels or single-firm dominance. It took seven years for the Supreme Court to overrule *Appalachian Coals* implicitly,[96] and ten years for it to overrule *Schwinn* explicitly.[97] Yet these lengths of time are roughly comparable to the typical duration of cartels cut short by antitrust enforcement, and, in consequence, less than cartels' likely duration if market forces were the sole mechanism for correction.[98] Moreover, even before the Court overrules an erroneous precedent, a number of circumstances may limit its practical effect. Precedents may be undermined by lower courts,[99] abrogated by legislative action,[100] or narrowed, procedurally or substantively, by

---

rier, *Why the "Scope of the Patent" Test Cannot Solve the Drug Patent Settlement Problem*, 16 STAN. TECH. L. REV. 1 (2012) (describing infirmities of the approach that prevailed for a decade until rejected in *Actavis*). Moreover, appellate courts can correct their own errors. *Compare, e.g.*, Blue Cross & Blue Shield United v. Marshfield Clinic, 65 F.3d 1406, 1415 (7th Cir. 1995) (Posner, C.J.) (assuming that a contractual most-favored-nations provision would help a firm bargain with its suppliers for low prices, and deeming the theory that the provision would discourage price cutting "an ingenious but perverse argument"), *with In re* Brand Name Prescription Drugs, 288 F.3d 1028, 1033 (7th Cir. 2002) (Posner, J.) (noting authority for prohibiting industry-wide adoption of most-favored-nations provisions, "which make discounting more costly").

[95] Today, three of the Supreme Court cases described as creating erroneous precedents in this paragraph and the accompanying notes (*Appalachian Coals, Schwinn*, and *Von's*) are widely considered wrongly decided. The merits of a fourth, *Dr. Miles*, remain controversial. *See* Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) (holding that resale price maintenance is illegal per se, without using per se rule terminology), *overruled by* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[96] Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933), *abrogated by* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940).

[97] United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), *overruled by* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). One could argue that *Schwinn* barely lasted at all, given the hostility with which lower courts and commentators received it. *E.g.*, Tripoli Co. v. Wella Corp., 425 F.2d 932, 936–38 (3d Cir. 1970) (en banc).

[98] *See supra* notes 44–45 and accompanying text.

[99] *See Sylvania*, 433 U.S. at 48 & 48 n.14 (describing lower court efforts to distinguish or limit the Supreme Court's questionable decision in *Schwinn*); GAVIL ET AL., *supra* note 25, at 452–55 (Sidebar 5-1) (lower courts are almost surely correct in deviating from 1960s Supreme Court horizontal merger precedents, which the Court has never revisited); Baker & Shapiro, *supra* note 54, at 238 (describing how the lower courts altered horizontal merger analysis by relying on a 1974 Supreme Court decision not thought at the time to alter the 1960s Supreme Court precedents).

[100] *See generally* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317 (2014) (identifying 275 Supreme Court decisions overridden legislatively between 1967 and 2011); *cf.* Deborah A. Widiss, *Identifying Congressional Overrides Should Not Be This Hard,* 92 TEX. L. REV. 145 (2014) (a reasonable alternative methodology would identify fewer overrides); *see also* Victoria F. Nourse, *Overrides: The Super-Study*, 92 TEX. L. REV. 205 (2014) (Congressional overrides are rare, absent issue salience and bipartisan consensus). If the historical per se prohibition on resale price maintenance, overruled in 2007, is considered an error, as today's antitrust conservatives hold, then the decision by Congress to give states the authority to permit resale price maintenance agreements in certain industries, which was in effect between 1952 and 1975, would constitute a form of legislative correction. *See* GAVIL ET AL., *supra* note 25, at 358.

the Court itself.[101] The instances in which the Supreme Court has overruled its own antitrust decisions, the range of mechanisms available for correcting bad court decisions, and the Supreme Court's thoroughgoing adoption of the Chicago School's academic critique of Court precedents that defined antitrust doctrine during the 1970s[102] all call into question Judge Easterbrook's claim that erroneous judicial precedents, even from the Supreme Court, are more permanent than monopolies and cartels, which can last for decades.[103]

2. *Antitrust Institutions Are Manipulated by Complaining Competitors*

Antitrust conservatives also claim that antitrust enforcement institutions make false positives too likely and too expensive, at least with respect to exclusionary conduct violations and cases brought on behalf of classes of consumers. If true, this claim could justify setting a higher bar for establishing those types of cases. There are three main difficulties with this claim, however: it overstates the ability of complaining rivals to manipulate antitrust institutions by alleging anticompetitive exclusion, as discussed in this section; it exhibits oddly selective skepticism about the ability of courts to distinguish

---

[101] The Supreme Court's decision in *Dr. Miles*, which took nearly a century to overturn, was limited substantially after seven years by *United States v. Colgate & Co.*, 250 U.S. 300 (1919), which allowed well-counseled firms to engage in resale price maintenance by announcing a price-maintenance policy in advance and applying it without deviation to discounting dealers. Moreover, during a period when the Supreme Court likely considered the precedent treating resale price maintenance as illegal per se to be wrongly decided, but before the Court overruled that precedent, it raised the burden of proof for plaintiffs in *Monsanto Co. v. Spray-Rite Service Corp.,* 465 U.S. 752 (1984), and *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), and abandoned the per se rule for maximum resale price maintenance. State Oil Co. v. Khan, 522 U.S. 3 (1997). The Supreme Court has also deployed its tools for narrowing past decisions by limiting the per se rule against horizontal agreements to naked restraints, Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979), and by circumscribing the impact of *Aspen Skiing*, a monopolization precedent I do not consider erroneous. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004) (characterizing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), as "at or near the outer boundary of § 2 liability"). If an erroneous precedent that discourages efficient conduct is construed narrowly, its adverse impact may be muted, as the affected firms may find other ways to achieve the desired efficiencies at little additional cost. *See* Devlin & Jacobs, *supra* note 16, at 98 ("[F]irms foreclosed by judicial error from adopting the very best behavior will adopt the next-best behavior, or may even discover a superior one. The loss to society is the difference in value between the best and second-best—a difference that can be very small or even positive.").

[102] Even commentators opposed generally to the Chicago School's program have conceded that the Supreme Court properly reformed prior rules to address ways in which they discouraged firms from achieving efficiencies. *E.g.*, Robert Pitofsky, *Does Antitrust Have a Future?*, 76 GEO. L.J. 321, 323–25 (1987) (finding "much wrong with the overly active antitrust enforcement policies of the 1960s" and commending the Supreme Court for moving "cautiously and thoughtfully in the direction of more lenient antitrust policies" since the mid-1970s through decisions that were "generally more solicitous toward claims of efficiency").

[103] *See supra* notes 38–46 and accompanying text; *see also* Devlin & Jacobs, *supra* note 16, at 98–99 ("[M]istaken legal rules are not irreversible" as "[b]ad [antitrust] precedents . . . have been reversed left and right" and "there are ways to avoid bad precedent without directly overruling it.").

between conduct that harms competition and conduct that benefits competition, as discussed in the next section; and it reflects a one-sided evaluation of the possible transaction costs of private litigation, as discussed in the section that follows.

According to Judge Easterbrook, "The books are full of suits by rivals for the purpose, or with the effect, of reducing competition and increasing price."[104] Such suits, he wrote, impose unnecessary costs and, "given the unavoidable number of erroneous decisions in antitrust cases, the suits bring condemnation on useful conduct."[105] To address the problem, he recommended treating lawsuits brought by horizontal competitors "with the utmost suspicion"[106] and "generaliz[ing]" the antitrust injury doctrine[107] to curtail litigation by plaintiffs who would be harmed if the conduct they challenged promoted competition.[108]

Following the latter prescription, the antitrust injury doctrine has expanded over time,[109] providing courts with a basis for dismissing much of the litigation that concerned Judge Easterbrook in 1984. Suits by terminated dealers, one of Easterbrook's particular concerns,[110] have also been limited by Supreme Court decisions that circumscribed the ability of terminated dealers to challenge resale price maintenance.[111] In the judgment of Herbert Hovenkamp, a leading mainstream antitrust commentator, "while anticompetitive decisions were once relatively common, they are much less frequent today."[112]

Antitrust conservatives nevertheless continue to suggest that a disproportionate number of cases alleging exclusion, particularly those against dominant firms, lack merit. Conservatives claim that these cases are often brought by inefficient and unsuccessful rivals or, when brought by the enforcement

---

104 Easterbrook, *supra* note 16, at 34.

105 *Id.* at 36; *cf.* Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551 (1991) (surveying horizontal-restraint cases filed by competitor plaintiffs between 1973 and 1983 in five federal districts and claiming that, of those cases that alleged exclusionary practices, only a small minority appeared meritorious).

106 Easterbrook, *supra* note 16, at 35.

107 *Id.* at 36. The "antitrust injury" doctrine requires plaintiffs to prove "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

108 *See* Easterbrook, *supra* note 16, at 35–39 (explaining that, while courts had, by the mid-1980s, extended the antitrust injury doctrine beyond mergers, it was "usually put as a restriction on remedies").

109 GAVIL ET AL., *supra* note 25, at 893–904.

110 Easterbrook, *supra* note 16, at 38–39.

111 Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984); Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988). The recent demise of the per se rule against vertical price fixing will likely further reduce the attractiveness of such suits. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

112 HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 71 (2005).

agencies, instigated by such rivals.[113] The main concern is with false positives: if such suits are in fact common[114] and if complaining rivals bringing bad cases tend to have more influence over the enforcement and judicial processes than the wrongly accused defendants, then enforcers will bring unwarranted cases and courts will systematically find violations when they should not, chilling procompetitive dominant-firm conduct. In addition, conservatives could then say, if the courts do not stop such cases, even efficient rivals would have an incentive to commence baseless actions alleging exclusion to discourage vigorous competition from the competitors they name as defendants.

This concern states what is at best an implausible hypothesis.[115] There is no reason to suspect that unsuccessful rivals enjoy systematically better access to the enforcement agencies, or exert systematically greater influence on them or on the courts, than do large firm defendants.[116] Moreover, there is no reason to suspect that the agencies and courts are any less able to understand the possible biases of rivals, and to discount their testimony appropriately, than they are able to do the same for other interested parties, such as the alleged excluding firms themselves.[117] Under these circumstances, a low probability of suc-

---

[113] *See, e.g.*, David J. Theroux, *Open Letter on Antitrust Protectionism,* INDEP. INST. (June 2, 1999), www.independent.org/issues/article.asp?id=483 (linking to "An Open Letter to President Clinton from 240 Economists on Antitrust Protectionism" organized by the Independent Institute suggesting that a spate of high-profile government antitrust cases responded to rival demands for government action); Easterbrook, *supra* note 16, at 34 ("Antitrust litigation is attractive as a method of raising rivals' costs because of the asymmetrical structure of incentives. . . . The books are full of suits by rivals for the purpose, or with the effect, of reducing competition and increasing price."); THOMAS J. DILORENZO, HOW CAPITALISM SAVED AMERICA 236 (2005) (the *Microsoft* case, like other antitrust cases, "was instigated not to protect consumers but at the request of less successful rivals"). *But see* WILLIAM H. PAGE & JOHN E. LOPATKA, THE MICROSOFT CASE: ANTITRUST, HIGH TECHNOLOGY, AND CONSUMER WELFARE 31–32 (2007) (Two conservative antitrust scholars conclude that government decisions to sue, in the *Microsoft* case and in general, are "based on something more than the fact that wealthy, well-organized, and politically connected interest groups have complained," and reject the contrary views of "[l]ibertarian and public choice scholars.").

[114] Government monopolization cases are infrequent: over the long term, the average is less than one per year per agency (DOJ or FTC). *See* William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 449 tbl.4 (2003). But the antitrust laws also allow private suits, and some "big cases" against single firm defendants—most notably, in recent years, *Microsoft*—can take on outsize importance.

[115] The assertion that the enforcement agencies are systematically manipulated by complaining rivals also inappropriately discounts or ignores internal institutional checks within agencies, including layers of internal review and the independent institutional roles of agency economists and lawyers, and discounts or ignores the external constraints imposed on agencies by the prospect of judicial review. On the role of the FTC's Bureau of Economics in "placing a cost-benefit focus on every decision," see Jonathan B. Baker, *"Continuous" Regulatory Reform at the Federal Trade Commission,* 49 ADMIN. L. REV. 859, 861 (1997).

[116] Large-firm defendants in exclusion cases tend to have the resources needed to present an effective courtroom case, make an effective public relations case, and mobilize political support.

[117] *See* 2010 Merger Guidelines, *supra* note 74, § 2.2 (describing circumstances under which individual customer and competitor interests regarding a merger among rivals would and would not be aligned with the public interest); FCC Staff Analysis and Findings ¶ 83 & n.255, *In re*

cess would deter unsuccessful rivals from bringing speculative or unfounded antitrust complaints. In addition, competitor lawsuits can enhance deterrence of anticompetitive conduct, as rivals "often . . . are in the best position to detect and prosecute many antitrust violations early, before they cause significant consumer harm."[118]

Moreover, if the courts are subject to systematic manipulation by complaining competitors, one would not expect to see them adopting legal rules that under-deter harmful practices. Yet, they have done so. For example, until the Supreme Court stepped in,[119] the lower courts consistently ruled in favor of pharmaceutical firm defendants that employed "pay for delay" settlements to prevent the entry of generic rivals,[120] and adopted legal standards that largely insulated such settlements from antitrust lawsuits.[121] In addition, some appellate courts have viewed exclusive dealing as presumptively lawful when

---

Applications of AT&T, Inc. & Deutsche Telekom AG, WT Docket No. 11-65 (Nov. 29, 2011) (describing interests of merging firms and merger opponents and their possible alignment with the public interest), *available at* hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-1955A2.pdf. *Compare* Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1391–92 (7th Cir. 1986)(Posner, J.) ("Hospital Corporation's most telling point is that the impetus for the Commission's complaint came from a competitor . . . ."), *with id.* at 1387 (the FTC could have concluded that colluding hospitals could manipulate certificate of need laws "to delay any competitive sally by a noncolluding competitor").

[118] HOVENKAMP, *supra* note 112, at 70.

[119] FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013).

[120] These cases involve payments made by pharmaceutical firms selling brand-name drugs to prospective producers of generic equivalents to settle challenges by the generic producers to the validity of the brand-name firm's patents. Under the terms of the Hatch-Waxman Act, a statutory scheme regulating generic entry, such settlements delay the entry of generic competition. *See* Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (1984) (codified as amended in scattered sections of 15, 21, 35, and 42 U.S.C.). The challenged settlements have been termed "reverse payment" settlements because they compensate the alleged infringer while eliminating its challenge to patent validity. According to the FTC, drug companies entered into 28 potential reverse-payment arrangements between October 2010 and September 2011 alone, and these arrangements cost consumers approximately $3.5 billion per year. *See* BUREAU OF COMPETITION, FED. TRADE COMM'N, AGREEMENTS FILED WITH THE FEDERAL TRADE COMMISSION UNDER THE MEDICARE PRESCRIPTION DRUG, IMPROVEMENT, AND MODERNIZATION ACT OF 2003: OVERVIEW OF AGREEMENTS FILED IN FY 2011 (2011), *available at* www.ftc.gov/sites/default/files/documents/reports/agreements-filed-federal-trade-commission-under-medicare-prescription-drug-improvement-modernization/1110mmaagree-2.pdf; FED. TRADE COMM'N, PAY-FOR-DELAY: HOW DRUG COMPANY PAY-OFFS COST CONSUMERS BILLIONS (2010), *available at* www.ftc.gov/sites/default/files/documents/reports/pay-delay-how-drug-company-pay-offs-cost-consumers-billions-federal-trade-commission-staff-study/100112payfordelayrpt.pdf.

[121] *E.g.*, FTC v. Watson Pharms., Inc., 677 F.3d 1298, 1312 (11th Cir. 2012) (holding that, "absent sham litigation or fraud in obtaining the patent, a reverse payment settlement is immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent"), *rev'd sub nom. Actavis*, 133 S. Ct. 2223. The excluded, and hence potentially complaining, rival in such a case is the second generic competitor to file an application challenging the brand-name firm's patents, as the first-filer generally defends its settlement with the brand-name firm. The most sustained court challenges to these practices were not brought by complaining excluded rivals, but by the Federal Trade Commission or by classes of

contracts have short terms,[122] and perhaps when excluded firms retain alternative, albeit less efficient, means of reaching customers.[123] To the extent that courts and prospective litigants understand these presumptions as nearly impossible to rebut in practice,[124] and thus as tantamount to conclusions of law, anticompetitive conduct would again be under-deterred. This dangerous possibility appears to be receding, however, with recent appellate decisions finding that plaintiffs have established anticompetitive harm from exclusive dealing arrangements.[125]

3. *Courts Cannot Tell Whether Exclusionary Conduct Harms Competition or Promotes It*

Some antitrust conservatives question enforcement against anticompetitive conduct on the ground that courts are often unable to make the detailed factual assessments required under the Sherman Act to determine whether conduct

---

buyers. *E.g.*, *Actavis*, 133 S. Ct. 2223; *In re* K-Dur Antitrust Litig., 686 F.3d 197 (3d Cir. 2012); Valley Drug Co. v. Geneva Pharm., Inc., 344 F.3d 1294 (11th Cir. 2003).

122 Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp., 592 F.3d 991, 997 (9th Cir. 2010); Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1059 (8th Cir. 2000); Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1163 (9th Cir. 1997); Paddock Publ'ns, Inc. v. Chi. Tribune Co., 103 F.3d 42, 47 (7th Cir. 1996); U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 596 (1st Cir. 1993) ("Normally an exclusivity clause terminable on 30 days' notice would be close to a de minimis constraint (*Tampa* involved a 20-year contract, and one year is sometimes taken as the trigger for close scrutiny)."); Roland Mach. Co. v. Dresser Indus., 749 F.2d 380, 395 (7th Cir. 1984).

123 *See Allied Orthopedic*, 592 F.3d at 996–97 (questioning whether rivals were foreclosed when the challenged conduct provided an incentive as opposed to a requirement for exclusivity); *Omega Environmental*, 127 F.3d at 1163 ("If competitors can reach the ultimate consumers of the product by employing existing or potential alternative channels of distribution, it is unclear whether such restrictions foreclose from competition any part of the relevant market."). Judge Bork recognized that foreclosure could in theory (might "conceivably") occur through disruption of optimal distribution patterns, but suggested that anticompetitive outcomes were implausible. *See* BORK, *supra* note 1, at 156 (noting "limits" set by the costs that such tactics impose on the firms employing them and a "further complication" arising from the capacity of the behavior involved to create efficiencies).

124 *Cf.* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 10.9e, at 487 n.55 (4th ed. 2011) ("[T]he trend is toward approval of shorter term exclusive dealing contracts, particularly where there are multiple contracts with different parties so contracts come up for rebidding frequently."); 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 217 (7th ed. 2012) (listing practices found permissible "when they do not preclude competing sellers from selling to the buyers on whom the arrangements have been imposed"); GAVIL ET AL., *supra* note 25, at 851 ("today it is rare for a court to strike down" exclusive dealing).

125 United States v. Dentsply Int'l, 399 F.3d 181, 185, 193 (3d Cir. 2005) (exclusive dealing harmed competition even though the distribution arrangements were "essentially terminable at will" and some manufacturers without distribution agreements were able to stay in business by relying on direct sales); United States v. Microsoft Corp., 253 F.3d 34, 366–67 (D.C. Cir. 2001) (en banc) (per curiam) (upholding monopolization claim when exclusive-dealing arrangements raised entry barriers by denying rivals access to the most important distribution channels, without denying rivals access to all such channels).

harms or benefits competition.[126] Yet conservatives deploy their skepticism selectively, primarily to question judicial competence in resolving monopolization claims and other exclusionary-conduct allegations.[127] If courts could not reliably determine whether exclusionary conduct is procompetitive or anticompetitive, however, they would have similar difficulty in assessing the competitive effects of collusive conduct like horizontal price fixing and market division, which also can have efficiency justifications.[128] Hence, the oddly selective conservative skepticism about the competence of courts to make factual assessments appears to reflect a reflexive hostility to exclusion cases, rather than a sober response to limits on the courts' institutional competence.[129]

Perhaps conservative skepticism about the ability of courts to apply the rule of reason should be understood instead as an argument for limiting antitrust enforcement across the board to conduct that lacks any plausible efficiency justification or creates little or no procompetitive benefit.[130] If that is the point, conservative scholars need to explain why they believe that a generation of doctrinal reform along Chicago School lines has been a failure,[131] and why a

---

[126] *E.g.*, Wright, *supra* note 17, at 24 ("Where conduct plausibly produces both costs and benefits for consumers it is fundamentally difficult to identify the net competitive consequences associated with the conduct. This is particularly true if business conduct is novel or is being applied to an emerging or rapidly changing industry . . . ." (footnote omitted)).

[127] *See, e.g.*, BORK, *supra* note 1, at 49 (distinguishing between anticompetitive and procompetitive exclusionary practices is "beyond the law's economic competence"); Manne & Wright, *supra* note 16, at 157 (characterizing Easterbrook's analysis as premised in part on the view that "errors of both types are inevitable, because distinguishing procompetitive conduct from anticompetitive conduct is an inherently difficult task in the single-firm context").

[128] *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 916–17 (2007) (Breyer, J., dissenting) (noting the difficulties of assessing whether the benefits of resale price maintenance in preventing free riding outweigh the potential harm of facilitating a dealer cartel, and the difficulties judges and juries may face in evaluating market power); BORK, *supra* note 1, at 429–40 (12-page appendix cataloguing ways that that price fixing and market division among competitors could allow firms to obtain efficiencies).

[129] *See generally* Baker, *supra* note 7.

[130] *Cf. supra* note 22 (proposals for limiting enforcement of various antitrust statutes to conduct with no efficiency or with competitive harm disproportionate to procompetitive benefit). Although such an approach might seem to preserve the antitrust prohibition on naked cartels, it would effectively exempt mergers from antitrust scrutiny and therefore permit firms to collude through merger, as they did around the start of the 20th century. *See generally* NAOMI R. LAMOREAUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904 (1985).

[131] *Cf.* Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 MICH. L. REV. 683, 712 (2011) ("[A]ntitrust jurisprudence has evolved [over the past 30 years] to reduce significantly the likelihood of false positives. The assumption that even more preclusive rules against liability are necessary to protect against investment deterrence and other costs of over-enforcement requires more justification than the Court has offered in light of these developments.").

radical retrenchment of today's reformed antitrust rules—to the point of effectively abandoning antitrust altogether—is necessary.[132]

Some contemporary conservatives argue that firms subject to antitrust claims need broad safe harbors to limit uncertainty about the scope of antitrust rules, as might arise from the difficulty of distinguishing harmful from beneficial or neutral conduct. Conservatives suggest that this uncertainty imposes substantial additional compliance costs, foments fear of false positives, and chills efficiency-enhancing firm conduct.[133]

To be sure, antitrust must routinely balance the advantages and drawbacks of bright-line rules against those of less structured standards.[134] Bright-line rules tend to provide clear guidance to firms subject to those rules and to limit the transaction costs associated with enforcement, while unstructured standards tend to reduce errors (whether false positives or false negatives) by permitting a more careful assessment of business practices' competitive effects.[135] Indeed, a need to reduce false positives and to mitigate their chilling effect on efficient conduct was frequently cited as a ground for abandoning some of the per se rules that prevailed prior to the late 1970s, especially with regard to vertical restraints.[136] If some rules now provide insufficient guidance and predictability, an appropriate response is not to abandon antitrust enforcement by adopting broad safe harbors; after all, restoring per se illegality

---

[132] I discuss the economic benefits of antitrust in Baker, *supra* note 18, the political context of antitrust in Baker, *supra* note 3, and the political costs of abandoning antitrust in Jonathan B. Baker, *Competition Policy as a Political Bargain*, 73 ANTITRUST L.J. 483 (2006).

[133] *See* WRIGHT, *supra* note 22, at 8 (arguing for limiting FTC Act Section 5 challenges to harmful conduct with no efficiency justification, in part because uncertainty "about whether the conduct [firms] wish to engage in will trigger a Commission investigation or worse . . . inevitably results in the chilling of some legitimate business conduct that would otherwise have enhanced consumer welfare but for the firm's fear that the Commission might intervene"); *cf.* Ohlhausen, *supra* note 22, at 1–2, 7–8 (emphasizing that a "sea of uncertainty" surrounding the application of FTC Act Section 5 has been troublesome for some businesses and members of the legal community and proposing to limit challenges under that statute to conduct with competitive harm disproportionate to its benefits).

[134] Bright-line rules condition liability on a limited set of readily observed factors, while unstructured standards condition liability on the full set of factors potentially relevant to evaluating the competitive consequences of firm conduct.

[135] *See* GAVIL ET AL., *supra* note 25, at 206; *id.* at 103–06 (discussing benefits and costs of per se condemnation). *But see* Wickelgren, *supra* note 75, at 54 (noting that, in some settings, more evidence may not improve judicial accuracy, and improved accuracy may not improve firm behavior). To balance these considerations, courts may craft doctrinal rules that fall between the poles of bright-line rules and unstructured standards. *See* FTC v. Actavis, Inc., 133 S. Ct. 2223, 2238 (2013).

[136] *See, e.g.,* Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 283–99 (1975) (discussion of restricted-distribution cases). During the 1960s, the strong presumption of harm to competition from horizontal mergers from high and increasing market concentration was questioned on similar grounds. *E.g.*, United States v. Von's Grocery Co., 384 U.S. 270, 287–88 (1966) (Stewart, J., dissenting).

would provide equally clear guidance.[137] Instead, an appropriate response might be to impart more structure to the rules in question by, for example, developing quick-look approaches.[138]

4. *Courts Cannot Control the Costs of Private Litigation*

Private antitrust enforcement in the United States allows successful plaintiffs to recover treble damages, thereby augmenting the deterrent effect of public enforcement (and providing compensation to victims).[139] Class actions avoid the high social costs of re-litigating common issues in many individual actions, give plaintiffs economies of scale in pursuing their claims when collective action would otherwise be impractical, and confer deterrence benefits by making private enforcement feasible when individual damages are small relative to the transaction costs of litigation.[140]

---

[137] For example, Areeda and Turner argued that a dominant firm's below-cost pricing should create an irrebuttable presumption of monopolization. Areeda & Turner, *supra* note 10, at 712 ("[A] monopolist pricing below marginal cost should be presumed to have engaged in a predatory or exclusionary practice" unless "the price, though below marginal cost, is at or above average cost."); *see* Pac. Eng'g & Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790, 797 (10th Cir. 1977) (describing Areeda and Turner's 1975 article as advocating that price below marginal cost, or in the alternative, below average variable cost, "should be conclusively presumed unlawful"). In addition, during antitrust's structural era, some advocated approaches for breaking up large firms without need to prove anticompetitive conduct. *See* 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, 1137 & 1137 n.202 (1989) (noting proposals for applying "no-fault" theories of monopolization liability).

[138] *Cf. Actavis*, 133 S. Ct. at 2238 (encouraging lower courts to "structure antitrust litigation so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences").

[139] Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases,* 42 U.S.F. L. REV. 879, 880 (2008) ("[P]rivate litigation probably does more to deter antitrust violations than all the fines and incarceration imposed as a result of criminal enforcement by the DOJ."). A substantial fraction of the private cases studied did not follow federal, state, or EU government enforcement actions, and others had a mixed public/private origin. *Id.* at 897. For criticisms of the Lande and Davis study, and the authors' responses to those criticisms, see Gregory J. Werden, Scott D. Hammond & Belinda A. Barnett, *Deterrence and Detection of Cartels: Using All the Tools and Sanctions*, 56 ANTITRUST BULL. 207, 227–33 (2011); DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT 168–72 (2011); and Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 SEATTLE U. L. REV. 1269 (2013).

The private damages remedy has a deterrent effect only to the extent that violators do not anticipate that they will be required to pay antitrust damages in the future. Otherwise, they will pass through the expected damages payment to buyers in advance, in the form of higher prices. *See generally* Jonathan B. Baker, *Private Information and the Deterrent Effect of Antitrust Damage Remedies*, 4 J.L. ECON. & ORG. 385 (1988). For a discussion of whether private damages are too low or too high to achieve optimal deterrence from an economic-efficiency perspective, see GAVIL ET AL., *supra* note 25, at 1129–35 (Sidebar 9-7).

[140] *See generally* ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 259–91 (2003) (surveying benefits and costs of class actions).

Notwithstanding these well-known social benefits of private enforcement, the Supreme Court has questioned the efficiency of private antitrust rights of action. A number of recent Supreme Court antitrust decisions evince a concern with the transaction costs of private antitrust litigation, particularly class actions.[141] These decisions have circumscribed private antitrust plaintiffs' access to the courts, and some have even required that antitrust disputes be resolved outside the courts, by regulators or arbitrators.[142] Yet the Court adopted these measures with little evidence that lower courts are unable to manage private litigation,[143] and without attempting to show that the benefits, if any, that society derives from reduced transaction costs exceed the social costs of restricting both private and public (federal and state) antitrust enforcement.

The two decisions that shift antitrust disputes from courts to administrative agencies, *Trinko* and *Credit Suisse*, are the most surprising, because they are inconsistent with Judge Bork's decided preference for antitrust over regula-

---

[141] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (upholding dismissal of proposed class action because a separate statutory scheme providing for extensive regulation aimed at promoting competition in telephony had displaced private enforcement under the Sherman Act); Credit Suisse Secs. (USA) LLC v. Billing, 551 U.S. 264 (2007) (upholding dismissal of proposed class action because the securities laws implicitly precluded the application of the antitrust laws to the alleged conduct); Bell Atl. Corp v. Twombly, 550 U.S. 544 (2007) (proposed class action complaint alleging market division dismissed for failure to state a claim when allegations were not plausible); Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013) (reversing certification of plaintiff class for failure to show that damages were capable of measurement on a classwide basis); Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (class action alleging antitrust violations dismissed when plaintiffs were contractually obligated to arbitrate all disputes individually, notwithstanding that the prohibitive costs of individual arbitration effectively insulated the defendant from antitrust liability). These decisions are reasonably described as conservative with respect to antitrust because they restrict antitrust plaintiffs' access to court. *Cf. Comcast*, 133 S. Ct. at 1435–36 (Ginsburg & Breyer, JJ., dissenting) (contending that the majority reached beyond the question it had instructed the parties to brief to decide a question that it should have declined to review). *See generally* CRANE, *supra* note 139, at 62–63 (citing a "backlash against private litigation" as a "major . . . cause" of the "retrenchment of antitrust liability norms that began in the late 1970s and has largely carried forward to this day"); David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 619 (2013) ("Critics . . . cast private enforcement as overzealous, uncoordinated, and democratically unaccountable.").

[142] *Trinko* and *Credit Suisse* required regulatory resolution of antitrust disputes; *American Express* relegated antitrust disputes to individual arbitration.

[143] The Court also did not consider whether a wholly different remedial approach of restricting the litigation tactics available to large-firm defendants would address the social costs of private litigation more effectively than the approach it chose, of restricting private plaintiffs' access to the courts. *But cf. Twombly*, 550 U.S. at 560 n.6 (questioning whether judicial case management can address the problem of abusive discovery). For a review of empirical studies of the costs associated with pre-trial civil litigation and the costs of class action litigation, see Daniel P. Kessler & Daniel L. Rubinfeld, *Empirical Study of the Civil Justice System*, *in* 1 HANDBOOK OF LAW AND ECONOMICS, *supra* note 49, at 343, 378–81, 390.

tion.[144] They represent a new direction for the Court[145] and reverse a judicial trend in recent decades toward finding concurrent antitrust jurisdiction in settings where regulators formerly had exclusive jurisdiction.[146] The limitations on access to the courts are less surprising, because the Supreme Court previously took other procedural steps in the same direction;[147] those steps have

---

[144] Bork's concern about the threat government poses to industrial competition did not extend, for the most part, to antitrust institutions. He recognized that the firms may misuse courts to impose costs on rivals, but saw the courts as operating effectively as institutions; he also urged the enforcement agencies to bring enlightenment about competition to the rest of government. *See* BORK, *supra* note 1, at 407 (supporting competition advocacy by antitrust agencies to discourage regulators from permitting cartelization); *id.* at 360–64 (expressing concern that administrative decisions could stifle competition, but expressing no concern that judicial decisions would do so outside of sham litigation).

[145] Andrew I. Gavil, *Antitrust Bookends: The 2006 Supreme Court Term in Historical Context*, ANTITRUST, Fall 2007, at 21, 24 ("[W]ho would have predicted such a lovefest between Justices Scalia and Breyer—whose fingerprints are evident in both *Trinko* and *Credit Suisse*—and the federal regulatory agencies?"). *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), also suggested a new direction, beyond Chicago, but its concern with the role of imperfect information in creating market power—a potential justification for increased antitrust intervention—was not built on by the Supreme Court's and lower courts' later decisions.

[146] Justin (Gus) Hurwitz, *Administrative Antitrust*, 21 GEO. MASON L. REV. 1191 (explaining that courts increasingly reject concurrent jurisdiction in favor of ceding jurisdiction over antitrust issues to administrative agencies, for reasons connected with separation of powers and political accountability concerns of modern administrative law); *see* 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 241c, at 321–22 (4th ed. 2013) ("As a general matter the effect of deregulation is to enlarge the domain of antitrust by removing or narrowing antitrust immunities that had existed before."); Shelanski, *supra* note 131, at 708 ("The *Credit Suisse* analysis is important because it marks the first time in the line of implied-immunity cases that the Court has found regulation to imply immunity from legitimate and nonrepugnant antitrust claims."); *cf.* HOVENKAMP, *supra* note 124, § 19.3b, at 775 ("In the last thirty years the Supreme Court has become much more critical of agency regulation, and much less inclined to see it as a panacea for all the difficulties of the traditional court system. . . . The best explanation [for the broad immunity grant in *Credit Suisse*] is that while the Court is more skeptical about agency regulation than it was in the 1970s, its skepticism about the use of private antitrust litigation is even greater."); Barak Orbach, *The Implied Antitrust Immunity* (Ariz. Legal Studies Discussion Paper No. 14-16, July 1, 2014) (describing an evolution of the antitrust immunity doctrine toward precluding antitrust law). *But cf.* Oneok, Inc. v. Learjet Inc., 2015 WL 1780926 (U.S. Apr. 21, 2015) (federal regulation of wholesale natural gas does not preempt private claims under state antitrust laws alleging anticompetitive conduct affecting retail natural gas sales).

[147] *See generally* CRANE, *supra* note 139, at 59–60; *cf.* Engstrom, *supra* note 141 (evaluating calls to vest administrative agencies with litigation gatekeeper authority, in order to limit non-meritorious private enforcement). The Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.), required, in part, greater judicial scrutiny of "coupon settlements," such as settlements awarding consumers discounts on new purchases from defendant firms. This requirement addressed an agency problem: a concern about the incentive of plaintiffs' attorneys to reach settlements that awarded attorneys' fees that were generous relative to the compensation awarded class members. *See In re* HP Inkjet Printer Litig., 716 F.3d 1173, 1177–78 (9th Cir. 2013); *see generally* Sarah S. Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 TULANE L. REV. 1617 (2006). That incentive could lead counsel to bring non-meritorious suits and settle meritorious cases too cheaply from an optimal-deterrence perspective. *Cf.* BONE, *supra* note 140, at 275–80 (discussing "sweetheart settlements").

included introducing the antitrust injury requirement,[148] raising the standard that a dealer must satisfy to prove that its termination was pursuant to a resale price maintenance agreement between a manufacturer and other dealers,[149] restricting damages claims by indirect purchasers,[150] and elevating the burden that plaintiffs must meet to survive a motion for summary judgment.[151]

These initiatives raise several concerns. Decisions that limit the access of private antitrust plaintiffs to the courts will necessarily discourage some meritorious lawsuits, and reduce antitrust's deterrent effect. Decisions that shift competition enforcement from the courts to regulatory agencies will likely lead to outcomes that prioritize regulatory objectives at antitrust's expense. Moreover, both types of decisions create hurdles for government enforcers seeking to vindicate antitrust principles in the courts,[152] notwithstanding the trust that antitrust conservatives place in the ability of courts and government enforcement agencies to perform effectively when attacking cartels.[153]

Some of the recent Supreme Court decisions, particularly *Twombly*, cite the social costs of private litigation. The majority opinion in that case views private antitrust enforcement, particularly consumer class action lawsuits, as an invitation for plaintiffs with non-meritorious claims to use the threat of expensive litigation to extract wasteful settlements.[154] In addition, the majority opin-

---

[148] *See supra* notes 109–112 and accompanying text.

[149] Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984); Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988). The Supreme Court has not revisited *Monsanto* or *Sharp* since it overruled the per se prohibition against resale price maintenance. That change in the substantive rule, however, reduces the apparent benefits of *Monsanto*'s and *Sharp*'s procedural rules and calls into question whether those rules' benefits continue to exceed the costs of the limits that those rules place on terminated dealers' access to courts. *Cf.* Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1127–39 (1986) (describing the interplay among substantive and procedural rules in antitrust).

[150] Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).

[151] Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

[152] *See* CRANE, *supra* note 139, at 63–67; *see* Shelanski, *supra* note 131, at 714 ("Although the rationales of *Credit Suisse* and *Trinko* apply more to private suits than public enforcement, their precedent could have a preclusive effect on both."); Steven C. Salop, *What Consensus? Ideology, Politics and Elections Still Matter*, 79 ANTITRUST L.J. 601, 635–36 (2014) (describing how *Sharp*, intended to make it more difficult for plaintiffs to prove anticompetitive vertical price-fixing agreements, also had the effect of making it more difficult for plaintiffs to prove anticompetitive horizontal price-fixing agreements).

[153] *See* Michael E. DeBow, *What's Wrong with Price Fixing: Responding to the New Critics of Antitrust*, REGULATION, Summer 1988, at 44 (antitrust law's prohibition against horizontal price fixing is defended by leading Chicago School commentators, and questioned only by Austrian or libertarian commentators to the right of the Chicago School); *cf.* Robert D. Hershey, Jr., *Courts Assailed by Antitrust Chief*, N.Y. TIMES, Nov. 9, 1985 (conservative antitrust official calling for judges to increase sentences for criminal price-fixing convictions).

[154] *See* Bell Atl. Corp v. Twombly, 550 U.S. 544, 559 (2007) (expressing concern over "the potentially enormous expense of discovery" in cases with no reasonably founded hope that discovery will reveal relevant evidence to support plaintiffs' claim) (consumer class action lawsuit).

ion in *Credit Suisse* views private antitrust litigation as imposing added social costs by bringing confusion to the law.[155] Yet the Court has cut back on the litigation of private antitrust claims with little analysis of the magnitude of these costs,[156] without comparing these costs to the social benefits of private antitrust litigation,[157] and without even acknowledging that private antitrust litigation can serve the aims of competition policy by increasing deterrence.

The benefits of antitrust enforcement as a whole almost surely exceed the costs by a wide margin,[158] creating a strong presumption in favor of robust enforcement. To justify continued retrenchment of private antitrust enforcement, therefore, the Court must make one of two showings. First, it could show that private enforcement as a whole is radically less effective than public enforcement—so much less effective at deterring anticompetitive conduct, so much more harmful in chilling beneficial conduct, and so much more costly than public enforcement as to rebut this presumption. In the alternative, the Court could show that the specific ways in which it would curtail private enforcement would reduce social costs by more than they reduce social benefits. Yet, in their hostility to private antitrust enforcement, the recent Supreme Court decisions have only mentioned costs, ignoring benefits. The Court has not even attempted to make either showing.

III. BEYOND ERROR COSTS

Thirty-five years after the Chicago School era began,[159] antitrust's rules as a whole look much more like those that Chicago School commentators like

---

[155] Credit Suisse Secs. (USA) LLC v. Billing, 551 U.S. 264, 281–82 (2007) (expressing concern with the risk of inconsistent court results when "antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries" and with the possibility that courts would make "unusually serious mistakes" in resolving challenges to activity "outside the narrow bounds" of the conduct that was the subject of the instant litigation) (investor class action lawsuit).

[156] *See* Gavil, *supra* note 145, at 25 (Given the costs that extensive discovery imposes on plaintiffs, "few wild-eyed plaintiffs' lawyers could easily and consistently strike gold today bringing truly 'frivolous' cases," calling into question whether "significant numbers of frivolous strike suits are being filed and used to extract unwarranted settlements.").

[157] The argument between the majority and dissent in *Twombly* was over the extent to which case-management tools allow judges to control discovery costs; thus, the argument concerned the magnitude of the costs of private litigation, not the relative magnitudes of its costs and benefits. *See id.* at 25 ("[T]he Federal Rules of Civil Procedure have been systematically amended to enhance the management powers of district courts when it comes to discovery and every other phase of case development—a fact that was handily dismissed by the majority in *Twombly* with little regard for the experience, skill, and savvy of today's federal district court judges."). Similarly, some have questioned whether the antitrust injury doctrine unnecessarily restricts access to the courts. *See* GAVIL ET AL., *supra* note 25, at 903.

[158] *See* Baker, *supra* note 18, at 42–45 (suggesting that the benefits are, at a minimum, 50 times the costs).

[159] Baker, *supra* note 2, at 66 (describing antitrust's Chicago School revolution as beginning in the Supreme Court and the circuit courts in the mid-1970s).

Robert Bork, Frank Easterbrook, and Richard Posner advocated than those they criticized. The Chicago School's antitrust program is now largely complete. Yet today's antitrust conservatives call for substantial additional reforms to limit the application of antitrust rules—sounding at times as though neither antitrust law nor antitrust economics has changed since the late 1970s[160]—and they often justify their proposals by invoking error cost analysis.[161]

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.

Given the receptivity of the Supreme Court to conservative antitrust arguments, the continued misapplication of error cost analysis will likely encourage the Court to push today's antitrust rules in a less interventionist direction, even when the costs of each rule change—mainly the social cost from reduced deterrence of anticompetitive conduct—would exceed the benefits. Even worse, pushing antitrust in a less interventionist direction from a starting point of what are likely the most favorable rules for antitrust defendants in at least seven decades[162] could, over time, threaten the legitimacy and success of the antitrust system as a whole—and thereby threaten the efficiency benefits that society captures by fostering and protecting competitive markets.[163] To protect a robust, effective, and socially beneficial competition

---

[160] For example, this article has pointed out instances where conservatives have ignored or improperly downplayed the modern empirical economic studies demonstrating the potential for anticompetitive predatory pricing to succeed, *supra* note 89, the modern economic literature contradicting the "single monopoly profit" theory, *supra* note 67 and accompanying text, and the way that changes in legal rules have greatly reduced the potential for competitors to bring non-meritorious antitrust lawsuits, *supra* notes 109–112 and accompanying text.

[161] *See, e.g.*, Devlin & Jacobs, *supra* note 16, at 86 (arguing that the error cost framework is particularly suited to antitrust, because "[m]ore than any other area of civil law, antitrust is error-prone"); *see generally* Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1, 2 (1964) ("Laissez faire has never been more than a slogan in defense of the proposition that every extension of state activity should be examined under a presumption of error.").

[162] Gavil, *supra* note 145, at 21. Professor Gavil suggests that today's rules may even be the most favorable for defendants "in all of U.S. antitrust's history." *Id.* There is no reason to think that, as a group, the Chicago School-influenced modifications to antitrust's rules simultaneously relaxed average deterrence but increased marginal deterrence, notwithstanding the theoretical possibility discussed in note 19, above.

[163] Baker, *supra* note 3, at 2185–86. *See generally* Baker, *supra* note 132; Jonathan B. Baker, *Preserving a Political Bargain: The Political Economy of the Non-Interventionist Challenge to Monopolization Enforcement*, 76 ANTITRUST L.J. 605 (2010). A serious challenge to the legitimacy of the antitrust laws based on the error cost arguments questioned here would likely require

policy, antitrust policy must avoid the erroneous application of error cost analysis.

a broad national political realignment, however. A quarter century ago, Joseph Brodley made a similar observation about what he characterized as Judge Bork's "laissez-faire" approach to antitrust reform:

> The trouble with Judge Bork's laissez-faire doctrine is that it is suitable for fair weather sailing only. It may work tolerably well during good economic times (although even then it is not optimal . . .), but in an economic downturn or depression, when confidence in laissez-faire policies is likely to collapse, the antitrust principle upholding interfirm rivalry would no longer be available to shield business or the economy from pervasive regulation. In a time of increased calls for trade barriers and the protection of United States markets from effective competition, the danger in abandoning the interfirm rivalry principle is more than academic.

Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress,* 62 N.Y.U. L. REV. 1020, 1023 n.11 (1987).