CHAPTER 1

SINGLE-FIRM CONDUCT AND SECTION 2 OF THE SHERMAN ACT: AN OVERVIEW

This chapter provides an overview of section 2 and its application to single-firm conduct. Part I describes the elements of the primary section 2 offenses—monopolization and attempted monopolization. Part II discusses the purpose of section 2 and the important role it plays in U.S. antitrust enforcement. Part III identifies key enforcement principles that flow from the U.S. experience with section 2.

I. The Structure and Scope of Section 2

Section 2 of the Sherman Act makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . . ."[1]

Section 2 establishes three offenses, commonly termed "monopolization," "attempted monopolization," and "conspiracy to monopolize."[2] Although this report and most of the legal and economic debate focus specifically on the two forms of monopolization—monopoly acquisition and monopoly maintenance—much of the discussion applies to the attempt offense as well.[3]

A. Monopolization

At its core, section 2 makes it illegal to acquire or maintain monopoly power through improper means. The long-standing requirement for monopolization is both "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[4]

Monopolization requires (1) monopoly power and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Regarding the first element, it is "settled law" that the offense of monopolization requires "the possession of monopoly power in the relevant market."[5] As discussed in chapter 2, monopoly power means substantial market power that is durable rather than fleeting—market power being the ability to raise prices profitability above those that would be charged in a competitive market.[6]

But, as the second element makes clear, "the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct."[7] Such conduct often is described as "exclusionary" or "predatory" conduct. This element includes both conduct used to acquire a monopoly unlawfully and conduct used to maintain a

[1] 15 U.S.C. § 2 (2000).

[2] *See, e.g.*, 1 SECTION OF ANTITRUST LAW, AM. BAR ASS'N, ANTITRUST LAW DEVELOPMENTS 225, 317 (6th ed. 2007).

[3] The conspiracy to monopolize offense addresses concerted action directed at the acquisition of monopoly power, *see generally id.* at 317–22, and is largely outside the scope of this report because the hearings focused on the legal treatment of unilateral conduct.

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

[5] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

[6] *See infra* Chapter 2, Part II.

[7] *Trinko*, 540 U.S. at 407 (emphasis omitted).

monopoly unlawfully. A wide range of unilateral conduct has been challenged under section 2, and it often can be difficult to determine whether the conduct of a firm with monopoly power is anticompetitive.

B. Attempted Monopolization

Section 2 also proscribes "attempt[s] to monopolize."[8] Establishing attempted monopolization requires proof "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."[9] It is "not necessary to show that success rewarded [the] attempt to monopolize;"[10] rather, "when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against the dangerous probability as well as against the completed result."[11]

Attempted monopolization requires (1) anticompetitive conduct, (2) a specific intent to monopolize, and (3) a dangerous probability of achieving monopoly power.

The same principles are applied in evaluating both attempt and monopolization claims.[12] Conduct that is legal for a monopolist is also legal for an aspiring monopolist.[13] But conduct that is illegal for a monopolist may be legal for a firm that lacks monopoly power because certain conduct may not have anticompetitive effects unless undertaken by a firm already possessing monopoly power.[14]

Specific intent to monopolize does not mean "an intent to compete vigorously;"[15] rather, it entails "a specific intent to destroy competition or build monopoly."[16] Some courts have criticized the intent element as nebulous and a distraction from proper analysis of the potential competitive effects of the challenged conduct.[17] One treatise concludes that "'objective intent' manifested by the use of prohibited means should be sufficient to satisfy the intent component of attempt to monopolize"[18] and that "consciousness of wrong-doing is not itself important, except insofar as it (1) bears on the appraisal of ambiguous conduct or (2) limits the reach of the offense by those courts that improperly undervalue the power component of the attempt offense."[19]

The "dangerous probability" inquiry requires consideration of "the relevant market and the defendant's ability to lessen or destroy

[8] 15 U.S.C. § 2 (2000).

[9] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

[10] Lorain Journal Co. v. United States, 342 U.S. 143, 153 (1951).

[11] *Spectrum Sports*, 506 U.S. at 455 (quoting Swift & Co. v. United States, 196 U.S. 375, 396 (1905)).

[12] *See* SECTION OF ANTITRUST LAW, *supra* note 2, at 307 ("The same principles used in the monopolization context to distinguish aggressive competition from anticompetitive exclusion thus apply in attempt cases.").

[13] Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 373 (7th Cir. 1986) (Posner, J.) (citing 3 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 828a (1978)).

[14] United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005) ("Behavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist."); 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 806e (2d ed. 2002).

[15] *Spectrum Sports*, 506 U.S. at 459; *see also* AREEDA & HOVENKAMP, *supra* note 14, ¶ 805b1, at 340 ("There is at least one kind of intent that the proscribed 'specific intent' clearly cannot include: the mere intention to prevail over one's rivals. To declare that intention unlawful would defeat the antitrust goal of encouraging competition . . . which is heavily motivated by such an intent." (footnote omitted)).

[16] Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 626 (1953).

[17] *See, e.g.*, A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1402 (7th Cir. 1989) (Easterbrook, J.) ("Intent does not help to separate competition from attempted monopolization and invites juries to penalize hard competition. . . . Stripping intent away brings the real economic questions to the fore at the same time as it streamlines antitrust litigation.").

[18] AREEDA & HOVENKAMP, *supra* note 14, ¶ 805b2, at 342.

[19] *Id.* ¶ 805a, at 339–40.

competition in that market."[20] In making these assessments, lower courts have relied on the same factors used to ascertain whether a defendant charged with monopolization has monopoly power,[21] while recognizing that a lesser quantum of market power can suffice.[22]

II. The Purpose of Section 2 and Its Important Role in Sound Antitrust Enforcement

The statutory language of section 2 is terse. Its framers left the statute's centerpiece—what it means to "monopolize"—undefined, and the statutory language offers no further guidance in identifying prohibited conduct.[23] Instead, Congress gave the Act "a generality and adaptability comparable to that found to be desirable in constitutional provisions"[24] and "expected the courts to give shape to the statute's broad mandate by drawing on the common-law tradition"[25] in furtherance of the underlying statutory goals.

Section 2 serves the same fundamental purpose as the other core provisions of U.S. antitrust law: promoting a market-based economy that increases economic growth and maximizes the wealth and prosperity of our society. As the Supreme Court has explained:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress . . . .[26]

Section 2 achieves this end by prohibiting conduct that results in the acquisition or maintenance of monopoly power, thereby preserving a competitive environment that gives firms incentives to spur economic growth. Competition spurs companies to reduce costs, improve the quality of their products, invent new products, educate consumers, and engage in a wide range of other activity that benefits consumer welfare. It is the process by which more efficient firms win out and society's limited resources are allocated as efficiently as possible.[27]

Section 2 also advances its core purpose by ensuring that it does not prohibit aggressive competition. Competition is an inherently dynamic process. It works because firms strive to attract sales by innovating and otherwise seeking to please consumers, even if that means rivals will be less successful or never materialize at all. Failure—in the form of lost sales, reduced profits, and even going out of business—is a natural and indeed essential part of this competitive process. "Competition is a

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[20] *Spectrum Sports*, 506 U.S. at 456.

[21] *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 81 (D.C. Cir. 2001) (en banc) (per curiam) ("Defining a market for an attempted monopolization claim involves the same steps as defining a market for a monopoly maintenance claim . . . ."); SECTION OF ANTITRUST LAW, *supra* note 2, at 312–17 (cataloging factors considered by courts, including, most importantly, market share and barriers to entry).

[22] *See, e.g.*, Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1438 (9th Cir. 1995) ("[T]he minimum showing of market share required in an attempt case is a lower quantum than the minimum showing required in an actual monopolization case."); SECTION OF ANTITRUST LAW, *supra* note 2, at 312.

[23] 15 U.S.C. § 2 (2000); *see also* 3 AREEDA & HOVENKAMP, *supra* note 14, ¶ 632, at 49 ("[T]he question whether judicial intervention under §2 requires more than monopoly is not answered by the words of the statute."); ROBERT H. BORK, THE ANTITRUST PARADOX 57 (1978) ("The bare language of the Sherman Act conveys little . . . ."); Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 136 (1984) ("The language of the Sherman Act governs no real cases."); Thomas E. Kauper, *Section Two of the Sherman Act: The Search for Standards*, 93 GEO. L.J. 1623, 1623 (2005) ("Over its 114-year history, Section Two of the Sherman Act has been a source of puzzlement to lawyers, judges and scholars, a puzzlement derived in large part from the statute's extraordinary brevity." (footnote omitted)).

[24] Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360 (1933).

[25] Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978).

[26] N. Pac Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

[27] *See* 2B PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 402 (3d ed. 2007). *See generally* WILLIAM W. LEWIS, THE POWER OF PRODUCTIVITY: WEALTH, POVERTY, AND THE THREAT TO GLOBAL STABILITY 13–14 (2004).

ruthless process. A firm that reduces cost and expands sales injures rivals—sometimes fatally."[28] While it may be tempting to try to protect competitors, such a policy would be antithetical to the free-market competitive process on which we depend for prosperity and growth.

Likewise, although monopoly has long been recognized as having the harmful effects of higher prices, curtailed output, lowered quality, and reduced innovation,[29] it can also be the outcome of the very competitive striving we prize. "[A]n efficient firm may capture unsatisfied customers from an inefficient rival," and this "is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster."[30] Indeed, as courts and enforcers have in recent years come to better appreciate, the prospect of monopoly profits may well be what "attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."[31] Competition is ill-served by insisting that firms pull their competitive punches so as to avoid the degree of marketplace success that gives them monopoly power or by demanding that winning firms, once they achieve such power, "lie down and play dead."[32]

Section 2 thus aims neither to eradicate monopoly itself, nor to prevent firms from exercising the monopoly power their legitimate success has generated, but rather to protect the process of competition that spurs firms to succeed. The law encourages all firms—monopolists and challengers alike—to continue striving. It does this by preventing firms from achieving monopoly, or taking steps to entrench their existing monopoly power, through means incompatible with the competitive process.

III. Principles that Have Guided the Evolution of Section 2 Standards and Enforcement

The history of section 2 reflects an ongoing quest to align the statute's application with the underlying goals of the antitrust laws. Consistent with the law's common-law character, courts have interpreted the Sherman Act's broad mandate differently over time and have revisited particular section 2 rules in response to advances in economic learning, changes in the U.S. economy, and experience with the application of section 2 to real-world conduct. Today, a consensus—as reflected in both judicial decisions[33] and the views of a broad cross-section of commentators—exists on at least seven core principles regarding section 2, each of which is discussed in the sections that follow:

- Unilateral conduct is outside the purview of section 2 unless the actor possesses

[28] Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1338 (7th Cir. 1986) (Easterbrook, J.).

[29] *See, e.g.*, Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 52 (1911) (citing the danger that a monopoly will "fix the price," impose a "limitation on production," or cause a "deterioration in quality of the monopolized article"); Sherman Act Section 2 Joint Hearing: Empirical Perspectives Session Hr'g Tr. 13, Sept. 26, 2006 [hereinafter Sept. 26 Hr'g Tr.] (Scherer) (observing that reluctance to "cannibalize the rents that they are earning on the products that they already have marketed" may make monopolists "sluggish innovators"); Sherman Act Section 2 Joint Hearing: Welcome and Overview of Hearings Hr'g Tr. 25, June 20, 2006 [hereinafter June 20 Hr'g Tr.] (Barnett) (identifying as "a major harm of monopoly" the possibility that a monopolist may not feel pressure to innovate).

[30] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 (1984).

[31] Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004); *see also* June 20 Hr'g Tr., *supra* note 29, at 25–27 (Barnett).

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

[33] Underscoring the degree of consensus on many antitrust matters today, the Justices of the Supreme Court have shown remarkable agreement in recent antitrust matters. The aggregate voting totals for the twelve antitrust cases decided over the past decade show ninety-one votes in favor of the judgment and only thirteen in dissent. Even more striking, and directly relevant to this report, all three cases addressing claims under section 2 were decided without dissent. *See* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069 (2007); *Trinko*, 540 U.S. 398; NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998).

monopoly power or is likely to achieve it.

- The mere possession or exercise of monopoly power is not an offense; the law addresses only the anticompetitive acquisition or maintenance of such power (and certain related attempts).
- Acquiring or maintaining monopoly power through assaults on the competitive process harms consumers and is to be condemned.
- Mere harm to competitors—without harm to the competitive process—does not violate section 2.
- Competitive and exclusionary conduct can look alike—indeed, the same conduct can have both beneficial and exclusionary effects—making it hard to distinguish conduct that should be deemed unlawful from conduct that should not.
- Because competitive and exclusionary conduct often look alike, courts and enforcers need to be concerned with both underdeterrence and overdeterrence.
- Standards for applying section 2 should take into account the costs, including error and administrative costs, associated with courts and enforcers applying those standards in individual cases and businesses applying them in their own day-to-day decision making.

A. The Monopoly-Power Requirement

Section 2's unilateral-conduct provisions apply only to firms that already possess monopoly power or have a dangerous probability of achieving monopoly power. This core requirement's importance as a basic building block of section 2 application to unilateral conduct should not be overlooked. Among other things, this requirement ensures that conduct within the statute's scope poses some realistic threat to the competitive process, and it also provides certainty to firms that lack monopoly power (or any realistic likelihood of attaining it) that they need not constrain their vigorous and creative unilateral-business strategies out of fear of section 2 liability.[34]

As the Supreme Court explained in its 1984 *Copperweld* decision, because "robust competition" and "conduct with long-run anti-competitive effects" may be difficult to distinguish in the single-firm context, Congress had authorized "scrutiny of single firms" only where they "pose[d] a danger of monopolization."[35] The application of the monopoly-power requirement is discussed in detail in chapter 2 of the report.

B. The Anticompetitive-Conduct Requirement

Section 2 prohibits acquiring or maintaining (and in some cases attempting to acquire) monopoly power only through improper means.[36] As long as a firm utilizes only lawful means, it is free to strive for competitive success and reap the benefits of whatever market position (including monopoly) that success brings, including charging whatever price the market will bear. Prohibiting the mere possession of monopoly power is inconsistent with harnessing the competitive process to achieve economic growth.

Nearly a century ago, in *Standard Oil*, one of the Supreme Court's first monopolization cases, the Court observed that the Act does not include "any direct prohibition against monopoly in the concrete."[37] The Court thus rejected the United States's assertion that section 2 bars the attainment of monopoly or monopoly power regardless of the means and instead held that without unlawful conduct, mere "size, aggregated capital, power and volume of business are not monopolizing in a legal sense."[38]

United States v. Aluminum Co. of America re-emphasized *Standard Oil*'s distinction between the mere possession of monopoly and unlawful

[34] *See* John Vickers, *Market Power in Competition Cases*, 2 EUR. COMPETITION J. 3, 12 (2006).

[35] 467 U.S. at 768.

[36] *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993); United States v. Grinnell, 384 U.S. 563, 570–71 (1966).

[37] 221 U.S. 1, 62 (1911).

[38] *Id.* at 10; *see also id.* at 62.

monopolization as a key analytical concept.[39] Writing for the Second Circuit, Judge Hand reasoned that, simply because Alcoa had a monopoly in the market for ingot, it did "not follow" that "it [had] 'monopolized'" the market: "[I]t may not have achieved monopoly; monopoly may have been thrust upon it."[40] The court determined that mere "size does not determine guilt" under section 2 and that monopoly can result from causes that are not unlawful, such as "by force of accident" or where a market is so limited it can profitably accommodate only one firm.[41] Further, the court observed that monopoly can result from conduct that clearly is within the spirit of the antitrust laws. Where "[a] single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry," punishment of that producer would run counter to the spirit of the antitrust laws: "The successful competitor, having been urged to compete, must not be turned upon when he wins."[42]

Twenty years after *Alcoa*, and more than fifty years after *Standard Oil*, the Supreme Court articulated in *Grinnell*[43] what remains the classic formulation of the section 2 prohibition. Drawing from *Alcoa*, the Court condemned "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[44]

C. Assaults on the Competitive Process Should Be Condemned

Competition has long stood as the touchstone of the Sherman Act. "The law," the Supreme Court has emphasized, "directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."[45] The Sherman Act rests on "a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services."[46] Section 2 stands as a vital safeguard of that competitive process. As Assistant Attorney General Thomas O. Barnett emphasized at the commencement of the hearings, "individual firms with . . . monopoly power can act anticompetitively and harm consumer welfare."[47] Firms with ill-gotten monopoly power can inflict on consumers higher prices, reduced output, and poorer quality goods or services.[48] Additionally, in certain circumstances, the existence of a monopoly can stymie innovation.[49] Section 2 enforcement saves

[39] 148 F.2d 416 (2d Cir. 1945) (Hand, J.).

[40] *Id.* at 429.

[41] *Id.* at 429–30.

[42] *Id.* at 430.

[43] 384 U.S. 563 (1966).

[44] *Id.* at 571.

[45] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993).

[46] Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978). As an important corollary, it is now generally accepted that section 2 may not be enforced to achieve other ends, such as the protection of certain kinds of enterprises or the furtherance of environmental, social, or other interests. *See generally* RICHARD A. POSNER, ANTITRUST LAW vii–x (2d ed. 2001). That is not to say that these other interests are not important—they are—but they should be addressed through other tools, not the antitrust laws.

[47] June 20 Hr'g Tr., *supra* note 29, at 35 (Barnett); *see also id.* at 9 (Majoras) (stressing that "private actors can and do distort competition" and that "halting conduct that goes beyond aggressive competition to distorting it is vital to promoting vigorous competition and maximizing consumer welfare").

[48] *See, e.g.*, DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 94–99 (4th ed. 2005); POSNER, *supra* note 46, at 9–32; Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 33 (2004).

[49] *See, e.g.*, Sept. 26 Hr'g Tr., *supra* note 29, at 13 (Scherer) (stating that "firms in dominant positions are almost surely sluggish innovators"); Sherman Act Section 2 Joint Hearing: Refusals to Deal Panel Hr'g Tr. 55, July 18, 2006 [hereinafter July 18 Hr'g Tr.] (Salop) ("Monopolists have weaker innovation incentives than competitors."); AREEDA ET AL., *supra* note 27, ¶ 407; Peter C. Carstensen, *False Positives in Identifying Liability for Exclusionary Conduct: Conceptual Error, Business Reality, and* Aspen, 2008 WIS. L. REV. 295, 306 (arguing that "a monopolist has no incentive to support technological innovation that could undermine its dominant position in the market" and "having sunk investments in existing technology, it may well delay or refuse to pursue work on new technology until it has accounted for its past investments"); *cf.* POSNER, *supra*

consumers from these harms by deterring or eliminating exclusionary conduct that produces or preserves monopoly.

A number of panelists stated that section 2 is essential to preserving competition.[50] They noted that the threat of anticompetitive conduct is real, "far from an isolated event" in the words of one.[51] Section 2 enforcement has played a vital role in U.S. antitrust enforcement for a century.[52] From the seminal case against Standard Oil in 1911,[53] through litigation resulting in the break-up of AT&T,[54] to the present-day enforcement in high-technology industries with the *Microsoft* case,[55] government enforcement of section 2 has benefitted U.S. consumers. Private cases brought under section 2 by injured parties are also important to U.S. businesses and consumers. Equally important, the potential for significant injunctive relief and damages awards provides strong incentives for firms to refrain from engaging in the types of conduct prohibited by the statute.

D. Protection of Competition, Not Competitors

The focus on protecting the competitive process has special significance in distinguishing between lawful and unlawful unilateral conduct. Competition produces injuries; an enterprising firm may negatively affect rivals' profits or drive them out of business. But competition also benefits consumers by spurring price reductions, better quality, and innovation. Accordingly, mere harm to competitors is not a basis for antitrust liability. "The purpose of the [Sherman] Act," the Supreme Court instructs, "is not to protect businesses from the working of the market; it is to protect the public from the failure of the market."[56] Thus, preserving the rough-and-tumble of the marketplace ultimately "promotes the consumer interests that the Sherman Act aims to foster."[57]

The Supreme Court has underscored this basic principle repeatedly over the past several decades. In 1984, it observed in *Copperweld* that the type of "robust competition" encouraged by the Sherman Act could very well lead to injury to individual competitors.[58] Accordingly, the Court stated that, without more (i.e., injury to competition), mere injury to a competitor is not in itself unlawful under the Act.[59] In so stating, the Court cited its 1977 decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* for the proposition that the antitrust laws "were enacted for 'the protection of *competition*, not *competitors*.'"[60]

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note 46, at 20 (explaining that "it is an empirical question whether monopoly retards or advances innovation").

[50] *See, e.g.*, Sherman Act Section 2 Joint Hearing: Business Testimony Hr'g Tr. 12, Feb. 13, 2007 [hereinafter Feb. 13 Hr'g Tr.] (Balto) ("Antitrust enforcement in the generic drug industry is essential."); Sherman Act Section 2 Joint Hearing: Business Testimony Hr'g Tr. 133, Jan. 30, 2007 [hereinafter Jan. 30 Hr'g Tr.] (Haglund) ("The application of Section 2 to [regional forest product, fishing, and agricultural] markets is important . . . ."); *id.* at 159–60 (Dull) ("The antitrust laws have an important role in policing the conduct of firms who would seek to take control of those interconnections so as to eliminate competition and thus harm consumers.").

[51] Feb. 13 Hr'g Tr., *supra* note 50, at 58 (Skitol); *see also* Jan. 30 Hr'g Tr., *supra* note 50, at 158 (Dull) ("Obtaining control of key interfaces through anticompetitive means, or using control of key interfaces to extend a dominant position in one market into other markets, is a real danger in our industry.").

[52] Other provisions of the antitrust laws can play a role in preventing the formation or preservation of monopoly, as when section 7 of the Clayton Act is enforced against mergers to monopoly, or section 1 of the Sherman Act is enforced against certain market-allocation agreements. But section 2 uniquely allows antitrust enforcers to reach conduct engaged in unilaterally by a firm that has achieved, or dangerously threatens to achieve, monopoly power.

[53] 221 U.S. 1 (1911).

[54] United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[55] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

[56] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993).

[57] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 (1984).

[58] *Id.* at 758.

[59] *See id.* at 767–68.

[60] *Id.* at 767 n.14 (quoting Brunswick Corp. v. Pueblo

A year after *Copperweld*, in a decision that it subsequently referred to as being "at or near the outer boundary of § 2 liability,"[61] the Court, in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, found that a firm operating three of four mountain ski areas in Aspen, Colorado, violated section 2 by refusing to continue cooperating with a smaller rival in offering a combined four-area ski pass.[62] The Court considered the challenged conduct's "impact on consumers and whether it [had] impaired competition in an unnecessarily restrictive way."[63]

In a 1993 decision, the Court re-emphasized the importance of focusing on competition, rather than competitors. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, the Court commented on the elements of a predatory-pricing claim, noting that, even where facts "indicate that below-cost pricing could likely produce its intended effect on the target, there is still the further question whether it would likely injure competition in the relevant market."[64] In particular, the *Brooke Group* recoupment requirement was a logical outgrowth of the Court's concern with protecting competition, not competitors. Absent the possibility of recoupment through supracompetitive pricing, there can be no injury to competition: "That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured."[65]

Again, in its 1998 decision in *NYNEX*, the Court reaffirmed that Sherman Act liability requires harm to the competitive process, not simply a competitor.[66] Discon alleged that NYNEX and related entities had violated the Sherman Act by engaging in an unlawful fraudulent scheme that injured Discon and benefitted one of Discon's competitors. While conceding that NYNEX's scheme "hurt consumers by raising telephone service rates," the Court found that any consumer injury "naturally flowed not so much from a less competitive market" for certain services as from "the exercise of market power that is *lawfully* in the hands of a monopolist . . . combined with a deception worked upon the regulatory agency that prevented the agency" from controlling that exercise of monopoly power.[67] The Court explained that a Sherman Act "plaintiff . . . must allege and prove harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself."[68]

E. Distinguishing Competitive and Exclusionary Conduct Is Often Difficult

Courts and commentators have long recognized the difficulty of determining what means of acquiring and maintaining monopoly power should be prohibited as improper. Although many different kinds of conduct have been found to violate section 2, "[d]efining the contours of this element . . . has been one of the most vexing questions in antitrust law."[69] As

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Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962))) (emphasis in original).

[61] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004).

[62] 472 U.S. 585, 606, 610 (1985).

[63] *Id.* at 605; *see also id.* at 605 n.32 ("'[E]xclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." (quoting AREEDA & TURNER, *supra* note 13, ¶ 626b, at 78)). The Court found that the evidence supported the jury's finding that "consumers were adversely affected by the elimination" of the four-area ski pass. 472 U.S. at 606.

[64] 509 U.S. 209, 225 (1993).

[65] *Id.* at 224.

[66] 525 U.S. 128, 139 (1998). While the Court focused its analysis on the section 1 claim, it stated that the section 2 claim in the case could not survive unless the challenged conduct harmed the competitive process. *Id.* at 139–40.

[67] *Id.* at 136 (emphasis in original).

[68] *Id.* at 135.

[69] SECTION OF ANTITRUST LAW, *supra* note 2, at 241; *see also* United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (per curiam) ("Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it."); ANTITRUST MODERNIZATION

Judge Easterbrook observes, "Aggressive, competitive conduct by any firm, even one with market power, is beneficial to consumers. Courts should prize and encourage it. Aggressive, exclusionary conduct is deleterious to consumers, and courts should condemn it. The big problem lies in this: competitive and exclusionary conduct look alike."[70]

The problem is not simply one that demands drawing fine lines separating different categories of conduct; often the *same conduct* can both generate efficiencies and exclude competitors.[71] Judicial experience and advances in economic thinking have demonstrated the potential procompetitive benefits of a wide variety of practices that were once viewed with suspicion when engaged in by firms with substantial market power. Exclusive dealing, for example, may be used to encourage beneficial investment by the parties while also making it more difficult for competitors to distribute their products.[72]

When a competitor achieves or maintains monopoly power through conduct that serves no purpose other than to exclude competition, such conduct is clearly improper. There also are examples of conduct that is clearly legitimate, as when a firm introduces a new product that is simply better than its competitors' offerings. The hard cases arise when conduct enhances economic efficiency or reflects the kind of dynamic and disruptive change that is the hallmark of competition, but at the same time excludes competitors through means other than simply attracting consumers. In these situations, distinguishing between vigorous competition by a firm with substantial market power and illegitimate forms of conduct is one of the most challenging puzzles for courts, enforcers, and antitrust practitioners.

F. Concern with Underdeterrence and Overdeterrence

Experience with section 2 enforcement teaches the importance of correctly distinguishing between aggressive competition and actions that exclude rivals and harm the competitive process. Some basic boundaries are provided by the law's requirements that the conduct harm "competition itself,"[73] that it be

COMM'N, REPORT AND RECOMMENDATIONS 81 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf ("How to evaluate single-firm conduct under Section 2 poses among the most difficult questions in antitrust law."); Sherman Act Section 2 Joint Hearing: Loyalty Discounts Session Hr'g Tr. 110, Nov. 29, 2006 (Muris) (stating that "the scope and meaning of exclusionary behavior remains . . . very poorly defined"); July 18 Hr'g Tr., *supra* note 49, at 21 (Pitofsky) (identifying "the definition of exclusion under Section 2 . . . as about the toughest issue[] that an antitrust lawyer is required to face today"); June 20 Hr'g Tr., *supra* note 29, at 12 (Majoras) ("[I]t is difficult to distinguish between aggressive procompetitive unilateral conduct and anticompetitive unilateral conduct."); Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 978 (2005) ("Much of the 'long, and often sorry, history of monopolization in the courts' has been devoted to attempting to provide an answer to the question at the center of the Supreme Court's formulation—that is, when is monopolizing conduct 'anticompetitive.'" (footnote omitted)); Timothy J. Muris, *The FTC and the Law of Monopolization*, 67 ANTITRUST L.J. 693, 695 (2000) ("Much of the monopolization case law struggles with the question of when conduct is, or is not, exclusionary."); Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435, 438 (2006) ("Over a century since the Sherman Act's passage, and some forty years since the Supreme Court held that Section 2 condemns the 'willful' acquisition or maintenance of monopoly power, great uncertainty persists as to the test for liability under Section 2 of the Sherman Act." (footnote omitted)).

[70] Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 COLUM. BUS. L. REV. 345, 345.

[71] June 20 Hr'g Tr., *supra* note 29, at 17 (Majoras); *see also* Sept. 26 Hr'g Tr., *supra* note 29, at 20 (Froeb) ("[M]echanisms with opposing effects usually appear in a single kind of behavior."); June 20 Hr'g Tr., *supra* note 29, at 29 (Barnett) ("The difficulty lies in cases . . . that have the potential for both beneficial cost reductions, innovation, development, integration, and at the same time potentially anticompetitive exclusion."); A. Douglas Melamed, *Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal*, 20 BERKELEY TECH. L.J. 1247, 1249 (2005) ("In the vast majority of cases, exclusion is the result of conduct that has both efficiency properties and the tendency to exclude rivals.").

[72] *See generally* Benjamin Klein, *Exclusive Dealing as Competition for Distribution "On the Merits,"* 12 GEO. MASON L. REV. 119 (2003); *infra* Chapter 8, Part III.

[73] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447,

"willful,"[74] and that it not be "competition on the merits,"[75] but these maxims offer insufficient guidance to be of much use in many of the hard cases.[76] Failure to make proper distinctions will either unnecessarily perpetuate a monopoly harming consumers or disrupt the dynamic process of competition that is so vital to economic growth and prosperity.

It is important to distinguish correctly between aggressive competition and actions that exclude rivals and harm the competitive process.

Standards of section 2 liability that underdeter not only shelter a single firm's exclusionary conduct, but also "empower other dominant firms to adopt the same strategy."[77] They thereby "seriously undermine Section 2's vitality as a shield that guards the competitive process."[78] And "because it can be so difficult for courts to restore competition once it has been lost, the true cost of exclusion to consumer welfare—and its benefit to dominant firms—are likely to be understated."[79]

Standards of section 2 liability that overdeter risk harmful disruption to the dynamic competitive process itself. Being able to reap the gains from a monopoly position attained through a hard-fought competitive battle, or to maintain that position through continued competitive vigor, may be crucial to motivating the firm to innovate in the first place. Rules that overdeter, therefore, undermine the incentive structure that competitive markets rely upon to produce innovation.[80] Such rules also may sacrifice the efficiency benefits associated with the competitive behavior.

Importantly, rules that are overinclusive or unclear will sacrifice those benefits not only in markets in which enforcers or courts impose liability erroneously, but in other markets as well. Firms with substantial market power typically attempt to structure their affairs so as to avoid either section 2 liability or even having to litigate a section 2 case because the costs associated with antitrust litigation can be extraordinarily large. These firms must base their business decisions on their understanding of the legal standards governing section 2, determining in advance whether a proposed course of action leaves their business open to antitrust liability or investigation and litigation. If the lines are in the wrong place, or if there is uncertainty about where those lines are, firms will pull their competitive punches unnecessarily, thereby depriving consumers of the benefits of their efforts.[81] The Supreme

459 (1993).

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

[75] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993).

[76] As commentators note, for example, the *Grinnell* standard provides little concrete guidance, either to the lower courts or to businesses attempting to conform their conduct to the requirements of section 2, because virtually all conduct—both "good" and "bad"—is undertaken "willfully." *See, e.g.*, SECTION OF ANTITRUST LAW, *supra* note 2, at 242 ("Courts have not been able to agree, however, on any general standard beyond the highly abstract *Grinnell* language, which has been criticized as not helpful in deciding concrete cases."); Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 261 (2003) (noting that the *Grinnell* standard is difficult to apply because "[i]t seems obvious that often firms willfully acquire or maintain monopoly power precisely through business acumen or developing a superior product" and it is difficult to conceive "of cases where a firm really has a monopoly thrust upon it without the aid of any willful conduct").

[77] Carstensen, *supra* note 49, at 321.

[78] Gavil, *supra* note 48, at 5.

[79] *Id.* at 39.

[80] *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407–08 (2004).

[81] *See, e.g.*, Jan. 30 Hr'g Tr., *supra* note 50, at 36 (Heiner) ("[T]here have been cases . . . where decisions were made not to include particular features that would have been valuable to consumers based at least in part on antitrust advice."); *id.* at 95 (Hartogs) (identifying a risk that a lack of clear rules on loyalty discounts and bundled pricing may cause firms not "to always choose what may be the most price friendly, consumer friendly result"); *id.* at 96 (Skitol) ("There are lots of situations I find where a client has in mind doing X, Y, Z with its consumables, which would be of significant consumer value, would enhance the product, and it looks great. But because of *Kodak* and all of the law that's built up

Court has consistently emphasized the potential dangers of overdeterrence. The Court's concern about overly inclusive or unclear legal standards may well be driven in significant part by the particularly strong chilling effect created by the specter of treble damages and class-action cases.[82] Many hearing panelists reiterated this concern.[83]

G. The Importance of Administrability when Crafting Liability Standards Under Section 2

Courts and commentators increasingly have recognized that section 2 standards cannot "embody every economic complexity and qualification"[84] and have sought to craft legal tests that account for these limitations. Then-Judge Breyer explained the need for simplifying rules more than two decades ago:

> [W]hile technical economic discussion helps to inform the antitrust laws, those laws cannot precisely replicate the economists' (sometimes conflicting) views. For, unlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve.[85]

Frequently, courts and commentators dealing with antitrust have employed decision theory,[86] which articulates a process for

around it, this is problematic . . . .").

[82] *See* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 728 (1988) (expressing concern regarding a rule that likely would cause manufacturers "to forgo legitimate and competitively useful conduct rather than risk treble damages and perhaps even criminal penalties"); *Roundtable Discussion: Antitrust and the Roberts Court*, ANTITRUST, Fall 2007, at 8, 11 (roundtable participant stating that "the Court continues to endorse arguments made by the government and by defendants that treble-damages over-incentivize antitrust cases"). *See generally Trinko*, 540 U.S. at 414 ("The cost of false positives counsels against an undue expansion of § 2 liability."); Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993); *id.* at 458 (stating that "this Court and other courts have been careful to avoid constructions of § 2 which might chill competition, rather than foster it"); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986) (stating that mistaken inferences in predatory-pricing cases "are especially costly because they chill the very conduct the antitrust laws are designed to protect"); Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767–68 (1984) (noting that scrutiny of single firms under the Sherman Act is appropriate only when they pose a danger of monopolization, an approach that "reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive [competitor]"); 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, 21 (noting the "wariness of rules that might discourage dominant firms" from "strategies that generally serve to improve consumer welfare" resulting from a "fear that overly restrictive rules will induce a harmful passivity").

[83] *See, e.g.*, Sherman Act Section 2 Joint Hearing: Section 2 Policy Issues Hr'g Tr. 45, May 1, 2007 [hereinafter May 1 Hr'g Tr.] (Willig); *id.* at 46 (Jacobson); Feb. 13 Hr'g Tr., *supra* note 50, at 168 (Wark) ("Given the punitive nature of the antitrust laws and the inevitability of private class action litigation, including the prospect of treble damages, defending ourselves in that situation, irrespective of the courage of our convictions, is high-stakes poker indeed."). Moreover, competitors have incentives to use the antitrust laws to impede their rivals. *See* Sherman Act Section 2 Joint Hearing: Misleading and Deceptive Conduct Session Hr'g Tr. 25–28, Dec. 6, 2006 (McAfee) (contending that, among other reasons, private parties bring antitrust claims to "extort[] funds from a successful rival," "chang[e] the terms of a contract," "punish noncooperative behavior," "respond[] to an existing lawsuit," "prevent[] a hostile takeover," and prevent entry); 2 AREEDA ET AL., *supra* note 27, ¶ 348a, at 387 (2d ed. 2000) (cautioning that "a competitor opposes efficient, aggressive, and legitimate competition by its rivals [and therefore] has an incentive to use an antitrust suit to delay their operations or to induce them to moderate their competition").

[84] Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.); *see also* Kovacic, *supra* note 82, at 36 (noting that both the Chicago and Harvard schools have insisted "that courts and enforcement agencies pay close attention to considerations of institutional design and institutional capacity in formulating and applying antitrust rules").

[85] *Barry Wright*, 724 F.2d at 234.

[86] *See, e.g.*, POSNER, *supra* note 46, at ix (observing that "[a]lmost everyone professionally involved in antitrust today" agrees that "the design of antitrust rules should take into account the costs and benefits of

making decisions when information is costly and imperfect.[87] Decision theory teaches that optimal legal standards should minimize the inevitable error and enforcement costs, considering both the probability and the magnitude of harm from each.[88]

Decision theory identifies two types of error costs. First, there are "false positives" (or Type I errors), meaning the wrongful condemnation of conduct that benefits competition and consumers. The cost of false positives includes not just the costs associated with the parties before the court (or agency), but also the loss of procompetitive conduct by other actors that, due to an overly inclusive or vague decision, are deterred from undertaking such conduct by a fear of litigation.[89]

Second, there are "false negatives" (or Type II errors), meaning the mistaken exoneration of conduct that harms competition and consumers. As with false positives, the cost of false negatives includes not just the failure to condemn a particular defendant's anti-competitive conduct but also the loss to competition and consumers inflicted by other firms' anticompetitive conduct that is not deterred.[90]

It also is important to consider enforcement costs—the expenses of investigating and litigating section 2 claims (including potential claims)—when framing legal tests. Because agency resources are finite, it is important to exercise enforcement discretion to best promote consumer welfare. Enforcement costs include the judicial or agency resources devoted to antitrust litigation, the expenses of parties in litigation (including time spent by management and employees on the litigation as opposed to producing products or services), and the legal fees and other expenses incurred by firms in complying with the law.[91]

In structuring a legal regime, it is important to consider the practical consequences of the regime and the relative magnitude and frequency of the different types of errors. If, for example, the harm from erroneously exonerating anticompetitive conduct outweighs the harm from erroneously penalizing procompetitive conduct, then, all other things

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individual assessment of challenged practices"); Gavil, *supra* note 48, at 66 ("It is rare today in cases where fundamental questions are raised about the 'right standard' that the parties and courts do not assess the[] issues" raised by decision theory.).

[87] *See* C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41, 41–42 (1999) (defining decision theory); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 272 (1974) (applying a decision-theoretic approach to legal rulemaking generally).

[88] *See* Ken Heyer, *A World of Uncertainty: Economics and the Globalization of Antitrust*, 72 ANTITRUST L.J. 375, 381 (2005).

[89] *See* Feb. 13 Hr'g Tr., *supra* note 50, at 170 (Wark) (in-house counsel reporting that his client had altered its conduct "based not on what we thought was illegal, but on what we feared others might argue is illegal" and that "in these circumstances competition has likely been compromised"); June 20 Hr'g Tr., *supra* note 29, at 55 (Carlton) ("[T]he biggest effect of any antitrust policy is likely to be, not on litigants in litigated cases, but rather, on firms that are not involved in litigation at all but are forced to change their business behavior in contemplation of legal rules."); Dennis W. Carlton, *Does Antitrust Need to Be Modernized?*, J. ECON. PERSP., Summer 2007, at 155, 159–60 ("[T]he cost of errors must include not only the cost of mistakes on the firms involved in a particular case, but also the effect of setting a legal precedent that will cause other firms to adjust their behavior inefficiently."); *cf.* May 1 Hr'g Tr., *supra* note 83, at 86 (Jacobson) (stating that the "problem" of overdeterrence "is larger in the eyes of the enforcement community than it is in the real world.").

[90] *See, e.g.*, Gavil, *supra* note 48, at 5 (expressing concern that lax section 2 standards may "lead to 'false negatives' and under-deterrence, with uncertain, but very likely substantial adverse consequences for . . . nascent competition"); William Kolasky, *Reinvigorating Antitrust Enforcement in the United States: A Proposal*, ANTITRUST, Spring 2008, at 85, 86 (stating that "the risk of false positives is now much less serious than it was, thanks in large part to the Supreme Court's rulings over the last fifteen years," and that "if anything, we are now in greater danger of false negatives").

[91] *See* Feb. 13 Hr'g Tr., *supra* note 50, at 47 (Stern) ("It's important to help avoid inadvertent violations and disputes and investigations that end up wasting company time and resources as well as the time and resources of the agencies."); *id.* at 163 (Wark) (in-house counsel commenting that "it diverts a tremendous amount of management attention and company resources" to defend an antitrust lawsuit); Ehrlich & Posner, *supra* note 87, at 270.

equal, the legal regime should seek to avoid false negatives. Some believe as a general rule that, in the section 2 context, the cost of false positives is higher than the cost of false negatives.[92] In the common law regime of antitrust law, stare decisis inhibits courts from routinely correcting errors or updating the law to reflect the latest advances in economic thinking.[93] Some believe that the persistence of errors can be particularly harmful to competition in the case of false positives because "[i]f the court errs by condemning a beneficial practice, the benefits may be lost for good. Any other firm that uses the condemned practice faces sanctions in the name of stare decisis, no matter the benefits."[94] In contrast, over time "monopoly is self-destructive. Monopoly prices eventually attract entry. . . . [Thus] judicial errors that tolerate baleful practices are self-correcting, while erroneous condemnations are not."[95] This self-correcting tendency, however, may take substantial time. As a result, courts and enforcers should be sensitive to the potential that, once created, some monopolies may prove quite durable, especially if allowed to erect entry barriers and engage in other exclusionary conduct aimed at artificially prolonging their existence.[96]

One manifestation of decision theory in antitrust jurisprudence is the use of rules of per se illegality developed by courts. As the Supreme Court has explained, these rules reduce the administrative costs of determining whether particular categories of conduct harm competition and consumer welfare.[97] Per se prohibitions are justified when experience with conduct establishes that it is always or almost always sufficiently pernicious that it should be condemned without inquiry into its actual effects in each case.[98] Rules of per se illegality are not designed to achieve perfection; to the contrary, courts explicitly acknowledge the potential that they could from time to time penalize conduct that does not in fact harm consumer welfare, but the rule is nonetheless warranted so long as false positives are sufficiently rare and procompetitive benefits from conduct deterred by the rules are sufficiently small.

Equally important, if one or the other type of error is relatively rare (and that error is unlikely to result in great harm), the most effective approach to enforcement may be an easy-to-administer bright-line test that reduces uncertainty and minimizes administrative costs. In the antitrust arena, such rules can take the form of safe harbors. Court have long

[92] *See* Kovacic, *supra* note 82, at 36 ("Chicago School and Harvard School commentators tend to share the view that the social costs of enforcing antitrust rules involving dominant firm conduct too aggressively exceed the costs of enforcing them too weakly."); Sherman Act Section 2 Joint Hearing: Conduct as Related to Competition Hr'g Tr. 23, May 8, 2007 (Rule) (stating that "we as a society, given the way we are organized, should be very concerned about the adverse economic effects, the false positives").

[93] Although the Supreme Court has overturned several long-standing per se rules, *see, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (overturning the per se rule against minimum resale price maintenance), it did so only after decades of criticism.

[94] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2 (1984); *see also* Thomas C. Arthur, *The Costly Quest for Perfect Competition:* Kodak *and Nonstructural Market Power*, 69 N.Y.U. L. REV. 1, 18 (1994) ("The principle of stare decisis makes obsolete doctrines hard to overrule, even after their economic underpinnings have been discredited. This has been especially true in antitrust."). *But see* May 1 Hr'g Tr., *supra* note 83, at 89 (Jacobson) (maintaining that false positives are more ephemeral than commonly suggested); *id.* (Krattenmaker) (same).

[95] Easterbrook, *supra* note 94, at 2–3.

[96] *See, e.g.*, May 1 Hr'g Tr., *supra* note 83, at 34–35 (Jacobson) (arguing that monopoly may prove enduring absent effective antitrust intervention); Gavil, *supra* note 48, at 39–41 (same).

[97] *See, e.g.*, Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 n.16 (1977) (explaining that per se rules "minimize the burdens on litigants and the judicial system").

[98] *See* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 133 (1998) ("[C]ertain kinds of agreements will so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances."); State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (Certain "types of restraints . . . have such predictable and pernicious anticompetitive effects, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*.").

recognized the benefits of bright-line tests of legality (also known as safe harbors) when conduct is highly likely to bring consumer-welfare benefits and the threat of anticompetitive harm is remote.[99] The best known example is the section 2 rule applicable to predatory pricing. Building on *Matsushita*,[100] the Court in *Brooke Group* laid out a two-pronged, objective test for evaluating predatory-pricing claims.[101] The Court held that to prevail on a predatory-pricing claim, plaintiff must show that defendant priced below an appropriate measure of its costs and that defendant "had a reasonable prospect, or . . . a dangerous probability, of recouping its investment in below-cost prices."[102] In *Weyerhaeuser*, the Court recently extended these principles to predatory-bidding claims.[103]

In *Matsushita, Brooke Group*, and *Weyerhaeuser*, the Court stressed the importance, in crafting a rule of decision, of taking into account the risks of false positives, the risks of false negatives, and administrability. The Court's 2004 decision in *Trinko* likewise applies decision-theory principles in crafting section 2 liability rules.[104] In reaching its decision, the Court articulated the same policy concerns with false positives that it had raised in previous section 2 cases. The Court observed that it had been "very cautious" in limiting "the right to refuse to deal with other firms" because enforced sharing "may lessen the incentive for the monopolist, the rival, or both to invest in . . . economically beneficial facilities" and obligates courts to identify "the proper price, quantity, and other terms of dealing—a role for which they are ill suited."[105] As the Court further explained:

> Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs . . . . Mistaken inferences and the resulting false condemnations "are especially costly because they chill the very conduct the antitrust laws are designed to protect." The cost of false positives counsels against an undue expansion of § 2 liability.[106]

IV. Conclusion

Section 2 enforcement is crucial to the U.S. economy. It is a vexing area, however, given that competitive conduct and exclusionary conduct often look alike. Indeed, the same exact conduct can have procompetitive and exclusionary effects. An efficient legal regime will consider the effects of false positives, false negatives, and the costs of administration in determining the standards to be applied to single-firm conduct under section 2.

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[99] As then-Judge Breyer explained, such rules conceivably may shelter some anticompetitive conduct, but they avoid "authoriz[ing] a search for a particular type of undesirable . . . behavior [that may] end up . . . discouraging legitimate . . . competition." Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983).

[100] 475 U.S. 574 (1986).

[101] 509 U.S. 209, 222, 224 (1993). *See generally infra* Chapter 4, Part I.

[102] *Id.* at 224.

[103] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069 (2007).

[104] 540 U.S. 398 (2004); *see also* Popofsky, *supra* note 69, at 452 (describing how the Supreme Court used decision theory to decide *Trinko*).

[105] 540 U.S. at 408.

[106] *Id.* at 414 (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)).