IDEOLOGY MATTERS IN THE ANTITRUST DEBATE

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Discussions of modern antitrust often emphasize its evolution, over the last several decades, into a rigorous economic discipline that is largely technocratic and apolitical.[1] The suggestion is that current disagreements within the antitrust community, both on a theoretical level and with respect to practical application, are primarily technical differences regarding methodology and data. On the surface, these observations certainly seem to be true. Economics plays a central role in shaping contemporary antitrust thinking and doctrine;[2] further, there is broad agreement that it should,[3] although some antitrust schol-

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[1] *See, e.g.*, Daniel A. Crane, *Has the Obama Justice Department Reinvigorated Antitrust Enforcement?*, 65 Stan. L. Rev. Online 13, 13–14 (2012), www.stanfordlawreview.org/online/obama-antitrust-enforcement. ("Antitrust enforcement in the modern era is a technical and technocratic enterprise."); Frank H. Easterbrook, *Allocating Antitrust Decisionmaking Tasks*, 76 Geo. L.J. 305, 305 (1987) ("Antitrust law has become . . . a branch of economics."); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. Pa. L. Rev. 925, 948 (1979) ("Differences remain, but increasingly they are technical rather than ideological."); Theodore Voorhees, Jr., *The Political Hand in American Antitrust—Invisible, Inspirational or Imaginary?*, *supra* this issue, 79 Antitrust L.J. 557, 558, 559–63 (2014). *But see* Steven C. Salop, *What Consensus? Why Ideology and Elections Still Matter to Antitrust*, *supra* this issue, 79 Antitrust L.J. 601 (2014) [hereinafter Salop, *What Consensus?*]; Jonathan B. Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 Fordham L. Rev. 2175 (2013) [hereinafter Baker, *Economics and Politics*] (discussing the roles of politics and economics in U.S. antitrust); *see also infra* note 12.

[2] *See generally* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, J. Econ. Persp., Winter 2000, at 43; Timothy J. Muris, *Improving the Economic Foundations of Competition Policy*, 12 Geo. Mason L. Rev. 1 (2003).

[3] *See, e.g.*, Eleanor M. Fox, *Monopolization, Abuse of Dominance, and the Indeterminacy of Economics: The U.S./E.U. Divide*, 2006 Utah L. Rev. 725, 725 [hereinafter Fox, *Monopolization*] (agreeing with the view that antitrust should be grounded in sound economics); Max Huffman, *Marrying Neo-Chicago with Behavioral Antitrust*, 78 Antitrust L.J. 105, 108 (2012)

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ars would preserve a limited role for other values[4] and others challenge the central role of economics more frontally.[5] There is also a general consensus that, as the Supreme Court declared in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, the purpose of federal antitrust law is to protect competition, and not to protect competitors against the rigors of competition.[6] While the over-arching goal of antitrust continues to be debated, arguments are usually framed in economic terms, for example, as a choice between a *total* welfare and a *consumer* welfare standard.[7]

Moreover, the Supreme Court and other federal courts, beginning with *Continental T.V., Inc. v. GTE Sylvania Inc.*,[8] have tended to adopt the language of economics and to ground their decisions in economic reasoning.[9] Enforcement agencies also routinely rely on sophisticated economic tools for analysis. In merger review, for example, econometrics and merger simulations are increasingly applied,[10] and economic concepts such as "diversion ratios,"

("Serious debate ended long ago whether U.S. antitrust policy should be informed by economics—scholars of otherwise massively divergent views appear to agree on that proposition.").

[4] *See, e.g.*, Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979) [hereinafter Pitofsky, *Political Content*] (agreeing that economic considerations should be paramount though arguing for the incorporation of some non-economic values in antitrust analysis). Pitofsky, a former Federal Trade Commission Chairman during the Clinton administration, reaffirmed this view in a keynote speech at an American Antitrust Institute annual conference in 2012. Robert Pitofsky, Keynote Speech Before the 13th Annual Conference: Civil Liberties and Competition, American Antitrust Institute: The Political Content of Antitrust Revisited (June 21, 2012), *available at* www.antitrustinstitute.org/media/Day2RobertPitofsky.mp3 (audio).

[5] *See generally* Maurice E. Stucke, *Should Competition Policy Promote Happiness?*, 81 FORDHAM L. REV. 2575, 2578 (2013) [hereinafter Stucke, *Competition Policy and Happiness*] (arguing that competition policy should not simply pursue an economic goal but should "promote a multidimensional welfare function that includes subjective well-being"); Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551 (2012); Darren Bush, *Too Big to Bail: The Role of Antitrust in Distressed Industries*, 77 ANTITRUST L.J. 277, 281–85 (2010) (arguing that antitrust, in its focus on efficiency, has ignored larger issues contributing to consumer harm, such as firm size and the risk that size may contribute to political and economic power); *see also* Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2543 (2013) (arguing that the shift of antitrust toward technocracy has "sidetracked antitrust from its core mission of preventing concentrations of economic and political power").

[6] 429 U.S. 477, 488 (1977); *see also* Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962); Pitofsky, *Political Content*, *supra* note 4, at 1058 (stating that "protection for small businessmen against the rigors of competition" is not a proper antitrust concern).

[7] *See* Baker, *Economics and Politics*, *supra* note 1, at 2178; Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard?*, 22 LOY. CONSUMER L. REV. 336 (2010).

[8] 433 U.S. 36 (1977).

[9] *See, e.g.*, Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[10] *See* Jonathan B. Baker, *Merger Simulation in an Administrative Context*, 77 ANTITRUST L.J. 451 (2011); Jonathan B. Baker & Daniel L. Rubinfeld, *Empirical Methods in Antitrust Litigation: Review and Critique*, 1 AM. L. & ECON. REV. 386 (1999).

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"value of diverted sales," "critical loss analysis," and "upward pricing pressure" pervade the revised horizontal merger guidelines.[11]

Even in the most contentious areas of antitrust policy—exclusionary conduct (e.g., tying, exclusive dealing, unilateral refusals to deal) and its treatment under Section 2 of the Sherman Act—the intellectual discourse seems to revolve around economic concepts, such as the strengths and weaknesses of the "raising rivals' costs" theory, the single monopoly profit theory, free riding, the competing Schumpeter-Arrow theories on market structure and dynamic efficiency, and the appropriate formulation of standards under decision theory. The debate is usually couched in terms of choices of one analytical theory or method over another, with virtually no discussion of social or political values or any hint that these values play a role in antitrust. Nevertheless, I believe that ideology does matter in the antitrust debate, as some antitrust scholars have long asserted or argued.[12] Arguments in contemporary antitrust are not merely technical but stem from ideological differences between anti-

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[11] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010), *available at* www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

[12] *See, e.g.*, Walter Adams & James W. Brock, *Antitrust, Ideology, and the Arabesques of Economic Theory*, 66 U. COLO. L. REV. 257, 325–27 (1995) (arguing that economic theory is fraught with indeterminacy and that resolving antitrust issues calls for judgment; and judgment is informed by values as much as it is by economics); Eleanor M. Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window*, 61 N.Y.U. L. REV. 554, 576–85 (1986) [hereinafter Fox, *Politics of Law and Economics*] (making the case that our values and view of the world affect our economic analysis in law, including antitrust law); Fox, *Monopolization*, *supra* note 3, at 725 (arguing that antitrust analysis should be anchored in economics, but "economics is not hard science, and . . . within an important range, assumptions, presumptions, and perspective determine the outcome"); First & Waller, *supra* note 5, at 2567–68 (arguing that "there is a strong laissez-faire ideological underpinning" to today's technocratic approach to antitrust); Max Huffman, *supra* note 3, at 106 (suggesting that antitrust debate has not become less politically charged but that debate "has in recent decades been conducted almost exclusively in economic terms"); Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219, 259–65 (1995) (arguing that ideology underlies differences between the Chicago School and the Post-Chicago School using *Eastman Kodak Co. v. Image Technical Services, Inc.* as illustration); Pitofsky, *Political Content*, *supra* note 4, at 1065 ("[A]ntitrust enforcement along economic lines already incorporates large doses of hunch, faith, and intuition."); Salop, *What Consensus?*, *supra* note 1 (suggesting that ideological differences between him and FTC Commissioner Joshua Wright probably explain their disagreements about antitrust cases); Lawrence A. Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CALIF. L. REV. 1, 12 (1980) (arguing that every economic theory "comes linked to a particular view of the world, to a set of convictions about what is important," and that, in choosing a theory, courts are making important social judgments). The question of ideology and economics is not limited to antitrust. *See, e.g.*, Paul Krugman, *Ideology and Economics*, THE CONSCIENCE OF A LIBERAL, N.Y. TIMES BLOG (Jan. 5, 2013), krugman.blogs.nytimes.com/2013/01/05/ideology-and-economics/?_php=true&_type=blogs&_r=0 (reaffirming and explaining his belief that there is a conservative-liberal ideological divide among economists over fiscal policy); Roger Gordon & Gordon B. Dahl, *View Among Economists: Professional Consensus or Point-Counterpoint?*, 103 AM. ECON. REV. (PAPERS & PROC.) 629 (2013) (finding, based on a survey, broad consensus among a panel of economists on many economic questions, and concluding that even the differences that existed did not fall along a conventional conservative-liberal divide).

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trust conservatives and antitrust liberals concerning the economy and markets and the appropriate role of government within them, the virtues of dominant firms, the value of competition, and related social and political issues.

Though I recognize the risks of over-generalizing,[13] for convenience, I apply the labels "conservative" and "liberal" to describe two different antitrust philosophies. As used in this article, a conservative antitrust policy is permissive (or non-interventionist), particularly toward dominant firm conduct and vertical restraints,[14] and is generally associated with the Chicago School;[15] a liberal antitrust approach is more restrictive (or interventionist), and is often associated with the Post-Chicago School.[16] It should be noted that I use the term "ideology," not in a partisan or pejorative sense, but in the sense of one's philosophy about economic, social, and political issues,[17] such as the robustness of free markets, the capability of government institutions, the virtues of

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[13] Generalizing and applying labels to adherents of different economic schools of thought in antitrust risks assuming that each school has monolithic views, when that is not always the case. For a Chicago School theorist's deviation from classic Chicago School thinking on one or more issues, see RICHARD A. POSNER, ANTITRUST LAW 207–13 (2d ed. 2001) [hereinafter POSNER, ANTITRUST LAW] (recognizing that predatory pricing can be profitable and, therefore, more plausible than is assumed under classic Chicago theory); Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969) (recommending stricter treatment of parallel action by oligopolists in the absence of explicit evidence of concert of action). For a Post-Chicago theorist's deviation from antitrust liberal thinking, see Jonathan B. Baker, *Identifying Horizontal Price Fixing in the Electronic Marketplace*, 65 ANTITRUST L.J. 41, 47–48 (1996) (arguing against the inference of an agreement among rivals simply from consciously parallel pricing among oligopolists, and thus taking the conservative side in the Posner-Turner debate).

[14] *See* William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 FORDHAM L. REV. 49, 60–71 (1991) [hereinafter Kovacic, *Reagan's Judicial Appointees and Antitrust*] (listing benchmarks used to determine whether an antitrust decision is considered conservative and including permissiveness toward dominant firm conduct and vertical restraints within the definition of a conservative antitrust decision). Kovacic was a Commissioner and Chairman of the FTC during the George W. Bush administration.

[15] It is somewhat difficult to label the modern Harvard School, of which Phillip Areeda, Donald Turner, Herbert Hovenkamp, and Justice Stephen Breyer are the leading representatives. As Hovenkamp noted in 2012, the Harvard School and the Chicago School have tended to converge over the years and "are now almost indistinguishable on many issues." Herbert Hovenkamp, *Antitrust and the Costs of Movement*, 78 ANTITRUST L.J. 67, 75–76 (2012); *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, 13–15 [hereinafter Kovacic, *Intellectual DNA of Competition Law*] (arguing that U.S. antitrust doctrine on dominant firm conduct derives from a double helix, with one strand drawn from the Chicago School and the other from the Harvard School). The Harvard School shares the Chicago School's mistrust of the capacity of our antitrust institutions to intervene successfully in complex cases involving dominant firm conduct, but may not believe as strongly as Chicago scholars in the robustness of markets. *See* Daniel A. Crane, *A Neo-Chicago Perspective on Antitrust Institutions*, 78 ANTITRUST L.J. 43, 45–46 (2012) [hereinafter Crane, *Antitrust Institutions*].

[16] I also include under the liberal label those who, unlike Post-Chicago School scholars, disagree with the prevailing central role of economics in antitrust. *See supra* note 5.

[17] *See* Paul Krugman, *Everyone Has an Ideology*, THE CONSCIENCE OF A LIBERAL, N.Y. TIMES BLOG (Apr. 13, 2011), krugman.blogs.nytimes.com/2011/04/13/everyone-has-an-ideology/

monopolies, the value of competition, and the meaning and importance of property rights, economic liberty, merit, opportunity, and fairness.

Ideological differences between antitrust conservatives and liberals probably have the greatest impact with respect to Section 2 because the competitive effects of various forms of dominant firm conduct are often unclear, and the theories offered to support either permissive or restrictive standards are inconclusive. In this context, it is almost inevitable that a policymaker's values will influence which theoretical models she will choose, whether her default is to intervene or not intervene if the theories and the evidence are indeterminate, what types of evidence she would consider relevant, and so forth.[18] Her core economic and political beliefs will also likely affect her perspective on the aggregate social costs of false negatives relative to false positives, which will impact her judgment on whether liability should be found in a particular case or, indeed, whether a particular case should be brought in the first place. For this reason, I will focus primarily on whether and how the debate on exclusionary claims might be affected by ideological differences.

In Part I, I discuss three issues, each critical to Section 2 enforcement, where economic theory and empirical evidence are indeterminate. They include the choice of theory among a multitude of theories of exclusionary conduct; the resolution of whether concentrated or competitive markets better spur dynamic efficiency; and the application of a decision-theoretic approach to the shaping of Section 2 policy.

In Part II, I discuss how and why a few ideological differences between antitrust conservatives and antitrust liberals may come into play. One set of differences concerns beliefs about the robustness of markets, the competence of antitrust institutions, and the wisdom of relying on government intervention to control dominant firm conduct. Another set involves differing worldviews on dominant firms and on the value of competition. And, a third set relates to differences in conceptions of property rights and economic liberty and on broader social issues such as merit, fairness, and greater opportunity for non-dominant firms. I conclude in Part III by suggesting that it would be preferable to bring into the open a discussion regarding the different normative visions about antitrust and to discuss what values matter and why they should

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("[E]veryone has an ideology—which is another way of saying that everyone has (a) values and (b) some view about how the world works. And there's nothing wrong with that.").

[18] *See* Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 ANTITRUST L.J. 241, 256 (2012) [hereinafter Wright, *Evidence-Based Antitrust*]. Wright suggests that "evidence-based antitrust" would solve the bias problem, and he believes that empirical evidence supports Chicago School theories, though he eschews attaching "Schools" or labels to any set of views. *Id.* at 256–62; *see also* Adams & Brock, *supra* note 12 (making the case that economics is not value-free and that ideology, as much as economic theory, informs the resolution of antitrust cases).

matter on their own terms, rather than use economics as a proxy for that normative conversation.[19]

I. WHERE ECONOMIC ANALYSIS IS INADEQUATE

Today, where the economic effect of a practice is clear, an impressive core of consensus about its proper antitrust treatment exists in the antitrust community. Thus, where the application of price theory to a practice clearly shows output limitation—e.g., naked horizontal price fixing and bid rigging—most antitrust conservatives approve, not only of antitrust enforcement, but of per se illegality.[20] Conversely, where economic analysis can reliably predict the efficiency of a practice, antitrust liberals tend not to advocate its condemnation even if the practice might have an incidental adverse impact on smaller and less efficient rivals.[21] However, economic propositions in antitrust are not always provable.[22] Analysis can be uncertain because it requires taking into

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[19] Other commentators have made similar suggestions. *See* Daniel A. Crane, *Chicago, Post-Chicago, and Neo-Chicago*, 76 U. CHI. L. REV. 1911, 1928–29 (2009) [hereinafter Crane, *Chicago, Post-Chicago, and Neo-Chicago*] (arguing that Post-Chicago School scholars should engage their Chicago School counterparts on the normative front as to "why antitrust law should exist and what its limits are"); Eleanor M. Fox, Eastman Kodak Company v. Image Technical Services, Inc.*—Information Failure as Soul or Hook?*, 62 ANTITRUST L.J. 759, 766–67 (1994) (arguing that *Kodak* was, at its core, about a dominant firm's abuse of its competitors, not about information failure, and suggesting that the opinion would have been more intellectually honest had it discussed its rationale on its real terms rather adopt the economic language of information failure); Jacobs, *supra* note 12, at 226 (suggesting that "antitrust discourse would benefit from the acknowledgment by policymakers that the current economic debate is theoretically and empirically irresolvable, and from their express recognition that the choice between conflicting economic models constitutes a normative ordering of divergent political beliefs").

[20] *See* ROBERT H. BORK, THE ANTITRUST PARADOX 263–68 (1978); Douglas H. Ginsburg, *The Appropriate Role of the Antitrust Enforcement Agencies*, 9 CARDOZO L. REV. 1277, 1282 (1988); Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, COMPETITION POL'Y INT'L, Autumn 2010, Vol. 6, No. 2, at 3 (endorsing penal sanctions for cartel price fixing, rather than fines); Kovacic, *Reagan's Judicial Appointees and Antitrust*, *supra* note 14, at 62–63 (noting that most conservative antitrust scholars agree with per se condemnation of horizontal price fixing).

[21] *See, e.g.*, Eleanor M. Fox, *Against Goals*, 81 FORDHAM L. REV. 2157, 2160 (2013) (stating that there is substantial consensus that our markets should be "robust," "efficient, effective, lithe, inventive, and adaptable to change" and that the objective of antitrust is to "proscribe acts that significantly undermine robust markets"). Though Fox does not explicitly reject antitrust enforcement against conduct that is clearly efficient, her disapproval is implicit in her discussion of the consensus objective of antitrust. *See also* Pitofsky, *Political Content*, *supra* note 4, at 1058 (suggesting that he would not endorse the condemnation of unambiguously efficient practices when he said that certain non-economic concerns, such as the protection of small firms against the rigors of competition, should not be a consideration in antitrust enforcement).

[22] *See* F.M. Scherer, *Conservative Economics and Antitrust: A Variety of Influences*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK 30, 31 (Robert Pitofsky ed., 2008); Adams & Brock, *supra* note 12.

account incommensurable values; sometimes, the necessary data is simply unavailable or deficient.[23]

A. WHICH THEORIES OF EXCLUSIONARY CONDUCT ARE "POSSIBILITY THEOREMS" AND WHICH ARE "SENSIBLE AND ECONOMICALLY RIGOROUS"?

For dominant firm conduct and vertical restraints, economic analysis is particularly likely to be indeterminate because the strategies in question often have efficient as well as anticompetitive properties, and their effects are both contestable and difficult to quantify. In this context, as FTC Commissioner Joshua Wright has argued, which theories one chooses—procompetitive or anticompetitive—to explain a practice may be "influenced by subjective considerations, prior beliefs, and ideology."[24] Commissioner Wright, a leading antitrust economist and legal scholar (and an antitrust conservative), has strongly advocated "evidence-based antitrust" as the solution to such likely bias. However, while no one could possibly disfavor the use of evidence, model selection based on evidence is not as scientific or as value-neutral as it may sound. *How* one interprets the evidence, and how much and which types of evidence one deems sufficient, will almost certainly be influenced by one's individual values. As Harold Demsetz once wrote: "The old adage 'seeing is believing' contains a double measure of truth, for there also is much merit in the notion that 'believing is seeing.' Facts must be placed into a system of belief before they yield to interpretation."[25]

In the context of Section 2, different economic theories abound regarding the plausibility or implausibility of exclusionary conduct and its likely net effect on competition. In general, Chicago School theorists conclude that improper exclusion rarely occurs because it is an ineffective method of monopolization,[26] and they offer a panoply of benign or procompetitive justifications for the allegedly exclusionary practices. The strategies could, for instance,

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[23] *See* Scherer, *supra* note 22, at 31 ("Economists' subject matter is intrinsically complex, characterized by uncertainty . . . and incommensurable values. Our data is often deficient and our empirical methodologies less than satisfactory (but improving)."); Crane, *Chicago, Post-Chicago, and Neo-Chicago*, *supra* note 19, at 1923–24, 1931 (suggesting that both Chicago and Post-Chicago theories are unempirical); Jacobs, *supra* note 12, at 250–58 (arguing that the empirical evidence for both Chicago and Post-Chicago theories are indeterminate); Stephen Calkins, *Wrong Turns in Exclusive Dealing Law*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, *supra* note 22, at 156, 167 (contending that "[t]here is a lot of speculating about the effects of exclusive dealing but not nearly enough empirical research").

[24] Wright, *Evidence-Based Antitrust*, *supra* note 18, at 256.

[25] Harold Demsetz, *Two Systems of Belief About Monopoly*, *in* INDUSTRIAL CONCENTRATION: THE NEW LEARNING 164, 164 (Harvey J. Goldschmid et al. eds., 1974).

[26] *See, e.g.*, POSNER, ANTITRUST LAW, *supra* note 13, at 194 (stating that "documented cases of genuinely exclusionary practices are rare"); BORK, *supra* note 20, at 309 (arguing that exclusion of competitors without buying them or paying them off is virtually impossible unless the monopolist is more efficient); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 926–33 (1979) [hereinafter Posner, *The Chicago School*] (arguing that tying

prevent free riding or save on transaction costs,[27] or they could simply reflect lawful profit maximization by a dominant firm.[28] This thinking—that foreclosure and leverage are illogical concepts—explains antitrust conservatives' deep skepticism toward exclusionary claims for such conduct as unilateral refusals to deal, predatory pricing, exclusive dealing, and tying arrangements.[29]

Economists and other commentators loosely associated with the Post-Chicago School counter with alternative models to show that exclusionary conduct may not be rare and can be quite anticompetitive.[30] One of the most important Post-Chicago models—"raising rivals' costs"—posits that dominant firms may engage in conduct to raise their competitors' costs, which forces the competitors to raise prices or reduce output, and in turn allows the dominant firm to increase its prices and enjoy supracompetitive profits.[31]

Unfortunately, neither the procompetitive nor the anticompetitive theories can be adequately proven or falsified in the real world. For example, with respect to exclusive dealing, the classic Chicago School theory is that the practice rarely injures competition because a dominant firm must pay the other party for exclusivity and will only do so if it expects efficiencies to be created by the transaction.[32] Among the efficiencies commonly suggested are

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arrangements, resale price maintenance, and pricing below cost are not effective methods to monopolize).

[27] *See* Posner, *The Chicago School*, *supra* note 26.

[28] *See* Richard A. Posner, *Exclusionary Practices and the Antitrust Laws*, 41 U. CHI. L. REV. 506, 508 (1974) ("One of the achievements of the Chicago School has been to show that some practices thought to be exclusionary practices, notably tying, really should be considered as monopoly profit maximization other than by collusion or exclusion . . . .").

[29] *See* Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527 (2013) [hereinafter Baker, *Exclusion as a Core Competition Concern*] (discussing, and challenging, the Chicago School's deep skepticism about exclusionary conduct claims, particularly those against dominant firms).

[30] *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 22, at 141, 143, 145–52 [hereinafter Salop, *Exclusionary Vertical Conduct*] (summarizing the liberal or Post-Chicago rebuttal to the Chicago School on exclusionary conduct). For symposia scholarship on Post-Chicago thought, see Symposium, *Post-Chicago Economics*, 63 ANTITRUST L.J. 445 (1995); Symposium, *Post-Chicago Law and Economics*, 65 CHI.-KENT L. REV. 1 (1989).

[31] *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209, 213–14 (1986) (introducing this theory). Literature on this thesis is extensive. For a partial listing, see Herbert Hovenkamp, *Antitrust Policy, Restricted Distribution, and the Market for Exclusionary Rights*, 71 MINN. L. REV. 1293, 1293 n.2 (1987).

[32] *See, e.g.*, BORK, *supra* note 20, at 309 ("[T]here has never been a case in which exclusive dealing or requirements contracts were shown to injure competition. A seller who wants exclusivity must give the buyer something for it. If he gives a lower price, the reason must be that the seller expects the arrangement to create efficiencies that justify the lower price. If he were to give the lower price simply to harm his rivals . . . [it] would be foolish and self-defeating behavior on his part.").

that the practice can prevent free riding, facilitate relationship-specific investments, and encourage competition for the exclusive dealing relationship.[33] However, even Commissioner Wright, who has concluded that the evidence to date supports the procompetitive theories of exclusive dealing more than the anticompetitive theories,[34] acknowledges that the empirical evidence is "scarce" and "does not conclusively show that exclusive dealing is always or only procompetitive."[35] Nevertheless, he characterizes the procompetitive theories as "a set of sensible and economically rigorous" justifications and refers to the anticompetitive theories as "a set of possibility theorems."[36]

One would imagine, however, that Post-Chicago supporters of the raising rivals' costs theory could argue equally credibly that their theories of anticompetitive outcomes are the sensible and economically rigorous ones, while the procompetitive theories of efficient uses of exclusive dealing are the possibility theorems. Under raising rivals' costs, a theory widely recognized to have made major contributions to antitrust,[37] exclusive dealing can be anticompetitive when it compels a dominant firm's rival to buy costlier or inferior inputs or relegates a rival to an inefficient distribution system, which limits the rival's ability to compete effectively and thereby enhances the dominant firm's power.[38] And, while competition *for* the exclusive contract can neutralize some of the competitive harm of exclusive dealing in a less concentrated market, the benefit to consumers of competition for the relationship is limited where a dominant firm is involved.[39] But supporters of the Post-Chicago School approach to exclusive dealing have also acknowledged that there is not "nearly enough empirical work" on the competitive effects of the practice.[40]

While this article does not focus specifically on other types of exclusionary conduct, the debate about their plausibility and competitive effects is somewhat similar to that for exclusive dealing, with the Chicago School claiming that anticompetitive exclusion rarely occurs and the Post-Chicago School disagreeing. For predatory pricing, for example, the classic Chicago School the-

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[33] *See* Joshua D. Wright, *An Evidence-Based Approach to Exclusive Dealing and Loyalty Discounts*, GLOBAL COMPETITION POL'Y, Summer 2009, Vol. 7, No. 1, at 3 [hereinafter Wright, *Exclusive Dealing and Loyalty Discounts*].

[34] *Id.* at 4 ("[T]he evidence substantially supports the view that exclusive dealing is much more likely to be pro-competitive than anticompetitive.").

[35] *Id.*

[36] *Id*. at 3.

[37] *See* Wright, *Evidence-Based Antitrust*, *supra* note 18, at 249 ("The [raising rivals' costs] strand of literature has become the most influential Post-Chicago contribution and has provided a robust theoretical framework for a number of theories that demonstrate the possibility of anticompetitive effects of various exclusionary business practices.").

[38] Krattenmaker & Salop, *supra* note 31, at 234.

[39] *See* Salop, *Exclusionary Vertical Conduct*, *supra* note 30, at 150–52.

[40] Calkins, *supra* note 23, at 167.

ory, accepted by the Supreme Court,[41] is that the practice almost never occurs because it makes no economic sense.[42] However, the Post-Chicago competing models, based on game theory, suggest that predation is plausible and often effective under some conditions.[43] On tie-ins, the Chicago School thesis is that only a "single monopoly profit" can be extracted from the tying/tied product package.[44] Thus, tying will not cause consumer harm,[45] and the dominant firm also has no motivation to engage in the practice for anticompetitive reasons.[46] The Post-Chicago School's alternative models, however, suggest that the single monopoly profit theory applies only under certain limited conditions,[47] and that tying can be an effective exclusionary strategy where scale economies are

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[41] *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225–27 (1993) (discussing the difficulty of recoupment of losses and reiterating that predatory pricing schemes rarely occur because they tend to be unsuccessful); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589–90 (1986) (asserting that a predatory scheme can only be successful if the predator can maintain monopoly power long enough to recoup its losses and gain additional profits, and explaining that recoupment is very difficult to accomplish because of quick entry by new competitors).

[42] *See, e.g.*, BORK, *supra* note 20, at 144–54 (arguing that below-cost pricing requires the predator to take certain and immediate losses, which it is unlikely to recoup later because it would have difficulty retaining a monopoly long enough after its rival is driven out to do so); Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 268–69 (1981) (concluding that courts need not take predation seriously because every possible predatory strategy, though superficially plausible, is unrealistic because of the risks faced by the predator and the responses available to rivals). *But see* Posner, ANTITRUST LAW, *supra* note 13, at 207–13 (viewing predatory pricing as more plausible, and recognizing that it can be a profitable strategy under some conditions).

[43] *See* Jonathan B. Baker, *Recent Developments in Economics that Challenge Chicago School Views*, 58 ANTITRUST L.J. 645, 649 (1989) [hereinafter Baker, *Recent Developments*] (discussing game-theoretic models suggesting that predation can be rather cheaply accomplished, and thus plausible and effective, if a dominant firm creates a reputation as a predator by its price responses against a few select rivals, which would then cause other rivals to refrain from aggressive competition for fear of becoming the next victim).

[44] *See* Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19, 20, 25–28 (1957); Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281, 290 (1956) (first introducing the theory).

[45] If a monopolist (in the tying market) can capture all its monopoly profits simply by charging a monopoly price for the tying product, leveraging its power in the tying market to gain a monopoly in the second market will not generate additional supracompetitive profits for the monopolist. Under this theory, tying arrangements will generally not cause consumer harm.

[46] Since a monopolist cannot hope to gain additional supracompetitive profits from tying, it is assumed that if it does engage in tying, it must be motivated by efficiency, not anticompetitive, reasons—e.g., for purposes of reducing costs, enhancing product design, or eliminating double marginalization.

[47] *See, e.g.*, Nicholas Economides & William N. Hebert, *Patents and Antitrust: Application to Adjacent Markets*, 6 J. TELECOMM. & HIGH TECH. L. 455, 465 n.39 (2008) (explaining the limited circumstances when the single monopoly profit theory would be correct); Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 525–39 (1985) (showing that leveraging can be anticompetitive); Krattenmaker & Salop, *supra* note 31, at 289–93) (same).

large in the tied market.[48] These models, therefore, predict that tying arrangements by dominant firms are not necessarily benign or procompetitive. The problem with this multitude of theories is that, while they all have sophisticated explanatory logic, they cannot be proven or falsified, and the empirical evidence is usually inadequate or unreliable.[49]

B. THE MARKET STRUCTURE-DYNAMIC EFFICIENCY LINK AND THE IMPACT OF ENFORCEMENT ON INCENTIVES TO INNOVATE

Another issue that features prominently in the debate on Section 2 enforcement relates to dynamic efficiency: specifically, which market structure—monopoly or competitive—is more conducive to economic growth and innovation. While most in the antitrust mainstream would agree that antitrust law should foster (or at least not impede) economic growth and innovation, there is no consensus on the relationship between market structure and innovation. Nor is there consensus on the related issue of how antitrust enforcement might actually impact *incentives* to innovate.

The disagreement on the market structure-dynamic efficiency link dates back to the competing theories of Joseph Schumpeter and Kenneth Arrow.[50] Schumpeter famously hypothesized that dominant firms may be more innovative than firms in competitive markets for various reasons,[51] including their greater facility to fund large research and development projects relative to firms without dominance, and their greater incentives to innovate because their dominance places them in a better position to appropriate the value of their innovations.[52] Arrow, however, theorized that *competition*, not monopoly, provides the greater impetus for innovation.[53] This view holds that monopolists, already extracting maximum profits from their dominance in the market, have less to gain from innovation; in contrast, firms without domi-

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[48] *See* Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837, 838 (1990) (arguing that where scale economies are large in the tied market, tying by the dominant firm is anticompetitive because it prevents rivals in the tied market from attaining sufficient scale to survive).

[49] *See supra* notes 22–23 and accompanying text.

[50] *See* Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575, 578–83 (2007) [hereinafter Baker, *Beyond Schumpeter vs. Arrow*] (discussing the competing arguments of Schumpeter and Arrow and the continuing debate).

[51] JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 81–106 (3d ed. 1950).

[52] The argument is that a monopolist has less concern that rivals, who lack the dominant firm's reputation and dominance, would be able to quickly incorporate its innovative ideas and processes into their products and successfully market them in competition with the monopolist's new products. Thus, a monopolist would be more inclined in engage in research and development. *Id.*; *see also* Baker, *Beyond Schumpeter vs. Arrow*, *supra* note 50, at 577–79.

[53] Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609 (Nat'l Bureau of Econ. Research ed., 1962).

nance have higher expected profits from innovation and, therefore, more incentive to innovate. Furthermore, firms in competitive markets may feel compelled to innovate simply to stay competitive.[54]

If Schumpeter is correct, a permissive monopolization policy might be warranted from a dynamic efficiency perspective because it would likely enhance innovation and economic growth. But if Arrow's hypothesis is correct, a bias against intervention in the face of questionable practices by dominant firms would be undesirable as it may result in less innovation and economic growth. Unfortunately, economic theory does not unambiguously support the views of either Schumpeter or Arrow,[55] and the empirical literature on the relationship between market structure and innovation is inconclusive.[56] In fact, it is not even clear that market concentration has much impact at all on innovation.[57]

Economists and other commentators further disagree on the related issue of how Section 2 enforcement is likely to affect incentives to innovate. Antitrust conservatives tend to argue that antitrust enforcement would deter innovation by reducing the profitability of the innovative activity to the dominant firm.[58] This view was reflected in *Trinko*, where Justice Antonin Scalia wrote that it is the prospect of charging monopoly prices that attracts "business acumen"

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[54] For a survey of the extensive economic literature relating to competition and innovation, see Richard Gilbert, *Looking for Mr. Schumpeter: Where Are We in the Competition-Innovation Debate?*, *in* 6 INNOVATION POLICY AND THE ECONOMY 159 (Adam B. Jaffe et al. eds., 2006).

[55] *See* Richard J. Gilbert, *Competition and Innovation*, *in* 1 ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY 577, 583 (W. Dale Collins ed., 2008) ("Economic theory does not provide unambiguous support either for the view that market power generally threatens innovation by lowering the return to innovative efforts or for the Schumpeterian view that concentrated markets generally promote innovation . . . .").

[56] *See id.* at 600 (drawing this conclusion after examining the body of literature on the subject); Douglas H. Ginsburg & Joshua D. Wright, *Dynamic Analysis and the Limits of Antitrust Institutions*, 78 ANTITRUST L.J. 1, 4–5 (2012) (arguing that the empirical literature supports neither Schumpeter's nor Arrow's hypothesis); Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1, 22 (2007) ("The literature addressing how market structure affects innovation (and vice versa) in the end reveals an ambiguous relationship in which factors unrelated to competition play an important role."). *But see* Baker, *Beyond Schumpeter vs. Arrow*, *supra* note 50, at 583–87 (reading the empirical literature as showing that competition is the more important spur to innovation on average); 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) (same).

[57] *See* J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5 J. COMPETITION L. & ECON. 581, 588 (2009) ("Despite 50 years of research, economists do not appear to have found much evidence that market concentration has a statistically significant impact on innovation.").

[58] *See, e.g.*, Keith N. Hylton & Haizhen Lin, *Optimal Antitrust Enforcement, Dynamic Competition, and Changing Economic Conditions*, 77 ANTITRUST L.J. 247 (2010); 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, Vol. 4, No. 2, at 203; David J. Teece & Mary Coleman, *The Meaning of Monopoly: Antitrust Analysis in High-Technology Industries*, 43 ANTITRUST BULL. 801, 843–44 (1998).

and "induces risk taking that produces innovation and economic growth."[59] The tone of the opinion was particularly solicitous of the need to safeguard the dominant firms' incentives to innovate.

Antitrust liberals are generally skeptical that it is the quest for monopoly profits that drives most firms to innovate.[60] They have further offered competing economic theories to show that that a permissive antitrust policy toward dominant firm conduct could actually *reduce*, rather than increase, aggregate innovation. The argument is that dominant firms facing minimal risk of antitrust sanction may step up their exclusionary activities, which would discourage innovation from fringe rivals.[61] Unfortunately there is no convincing empirical data to support either perspective.[62]

It is difficult to predict reliably the incentive and net innovation effects of antitrust enforcement against dominant firm conduct. Consider, for example, a common discussion relating to unilateral refusals to deal and the essential facilities doctrine. The macro argument generally made in favor of strictly limiting both doctrines is that mandated dealings with rivals would decrease incentives for investment and innovation.[63] The thrust of this argument is that

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

[60] *See* Michael A. Carrier, *Of* Trinko*, Tea Leaves, and Intellectual Property*, 31 J. CORP. L. 357, 364 (2006) (noting the lack of empirical support for the Court's assertion in *Trinko* that what motivates most firms to innovate is the quest for monopoly power and monopoly profits); Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 43 (2004) ("[T]he pipe dream of 'monopoly' can hardly be the major incentive that drives most firms to innovate."); Marina Lao, *Networks, Access, and "Essential Facilities": From* Terminal Railroad *to* Microsoft, 62 SMU L. REV. 557, 594 (2009) [hereinafter Lao, *'Essential Facilities'*] (arguing that "while firms would always *like* maximum profits, even monopolists could be content with less, provided that the returns are sufficient to justify the investment and risk taking" and noting the absence of empirical support on the issue).

[61] *See* Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 GEO. MASON L. REV. 617, 662 (1999); *see also* Baker, *Beyond Schumpeter vs. Arrow*, *supra* note 50, at 593–98 (arguing that, in certain types of high-technology industries, stricter enforcement efforts are particularly important because competition is more likely to encourage innovation in those industries).

[62] *See, e.g.*, ABA Section of Antitrust Law, Comments of the Section of Antitrust Law of the American Bar Association in Response to the Antitrust Modernization Commission's Request for Public Comment Regarding Exclusionary Conduct 8 (2006), www.abanet.org/antitrust/at-comments/2006/03-06/Comments-AMC-ExclusionaryConductFinal.pdf ("Some disagreement exists among experts as to whether the ability to charge monopoly profits indeed induces risk taking, innovation and economic growth."); Jonathan B. Baker, *Promoting Innovation Competition Through the* Aspen/Kodak *Rule*, 7 GEO. MASON L. REV. 495, 512 (1999) [hereinafter Baker, *Promoting Innovation Competition*] ("As a matter of economic theory, it is impossible to say for certain whether enforcement of the antitrust prohibition against monopolization, which might restrict the conduct of a dominant firm, will on balance enhance or reduce aggregate industry innovation in general.").

[63] *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407–08 (2004) ("Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of

compelling a dominant firm to share its advantage with a rival would prevent the dominant firm from fully appropriating the rewards of its investment, leading it to reduce its investment and innovate less.[64] The rival, assured of access to a vital source of the dominant firm's advantage, would be less motivated to find a creative alternative to it.[65] Additionally, the knowledge that they may not be able to reap the full rewards of their investment might adversely affect potential investors' willingness to invest and innovate in the future.[66]

In reality, however, it is difficult to know the actual long-term economic effect of circumscribing a dominant firm's reward through the imposition of a duty to deal in limited circumstances.[67] While reducing returns on investments in innovation (through compulsory sharing) may reduce future investments at the margins, economic analysis cannot reliably tell us by how much, and whether it would actually decrease useful innovation. Moreover, mandatory sharing may unleash innovation and competition from the dominant firm's rivals, particularly in complementary markets, which ought to be taken into account in the calculus of the total effects of compulsory access on incentives to innovate and on actual useful innovation.[68] Economic analysis, no matter how rigorous, is currently inadequate to make these assessments.[69]

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their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities."); *see also* R. Hewitt Pate, Testimony submitted to DOJ/FTC Hearings on Single-Firm Conduct: Refusals to Deal and Essential Facilities (July 18, 2006), *available at* www.justice.gov/atr/public/hearings/single_firm/docs/218649.htm (asserting that "the fact that the defendant has a highly valued facility is a reason to *reject* sharing, not to *require* it," because compulsory sharing will reduce incentives to invest).

[64] *See* Howard A. Shelanski, *Unilateral Refusals to Deal in Intellectual and Other Property*, 76 ANTITRUST L.J. 369, 380 (2009) [hereinafter Shelanski, *Unilateral Refusals to Deal*] ("In discussions of why refusals to deal should be legal, courts and commentators usually emphasize the potential deterrent effect of mandatory dealing on the investment incentives of the would-be defendant and of all others who would see imposition of liability as a signal of what might await them should their business succeed too well.").

[65] *See* Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 549 (9th Cir. 1991) ("Every time the monopolist asserts its market dominance" by refusing to grant access to a resource to its competitor, that competitor "has more incentive to find an alternative supplier, which in turn gives alternate suppliers more reason to think that they can compete with the monopolist.").

[66] Shelanski, *Unilateral Refusals to Deal*, *supra* note 64, at 380.

[67] *Id.* at 381–82 (explaining that there may be cases where mandatory dealing would not interfere with investment incentives and where imposing liability for unilateral refusal to deal would not be economically harmful).

[68] *See* Lao, *'Essential Facilities'*, *supra* note 60, at 593–94 (arguing that, in any calculus of the effects on innovation of compulsory access, it is not enough to consider only the possible disincentive effect on the monopolist forced to share its essential facility; the stimulus to innovation on the part of rivals brought about by mandatory sharing, especially in complementary markets, must also be taken into account).

[69] *See* Shelanski, *Unilateral Refusals to Deal*, *supra* note 64, at 394 ("Because the path of innovation is likely much harder to predict than short-term changes in price and output levels, it

C. ECONOMIC INDETERMINACY IN THE DECISION THEORY APPROACH

Another area where economic analysis is indeterminate involves the application of a decision-theoretic approach to antitrust—adopting rules that minimize the total costs of error. Antitrust economists of diverse inclinations seem to agree, in principle, on the importance of such an approach.[70] On the surface, this consensus seems to support the view that antitrust is largely economic, technocratic and non-ideological. However, fashioning a liability framework to minimize error costs is hardly a mathematical or "scientific" exercise, since there is no way to reliably measure the risk of false positives (type I errors) and false negatives (type II errors) or to estimate their relative aggregate costs.[71] Instead, assumptions are simply made about the risks of both types of error and the magnitude of harm likely caused by each such error.

The Chicago School application of decision theory begins with a presumption that false positives are more costly than false negatives in antitrust cases.[72] It assumes that false positives will deter procompetitive conduct, and the efficiencies of the conduct falsely condemned will be lost forever, producing long-lasting adverse effects.[73] In contrast, the adverse effects of false negatives are assumed to be inconsequential because they will dissipate

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will be impossible in most cases definitively to calculate the comparative static and dynamic welfare effects of economic conduct.").

[70] *See, e.g.*, C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41 (1999); David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 73 (2005); Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 ANTITRUST L.J. 469 (2001); Michael L. Katz & Howard A. Shelanski, *Merger Analysis and the Treatment of Uncertainty: Should We Expect Better?*, 74 ANTITRUST L.J. 537 (2007); Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 153 (2010).

[71] *See, e.g.*, Wright, *Evidence-Based Antitrust*, *supra* note 18, at 248 (acknowledging that "reliable estimation of the relative costs of false acquittals and false condemnations has proven elusive").

[72] *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2–4 (1984) [hereinafter Easterbrook, *Antitrust Limits*]; Wright, *Evidence-Based Antitrust*, *supra* note 18, at 248 ("The error-cost framework begins with the presumption that the costs of false convictions in the antitrust context are likely to be significantly larger than the costs of false acquittals."). For critiques of the Chicago School approach to decision theory in antitrust, see, for example, First & Waller, *supra* note 5, at 2570–72; Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. 75 (2010).

[73] *See* Easterbrook, *Antitrust Limits*, *supra* note 72, at 2 ("If 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."); Frank H. Easterbrook, *When Is it Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 COLUM. BUS. L. REV. 345, 357 [hereinafter Easterbrook, *Exclusionary Conduct*] (alleging that false positives are particularly dangerous in exclusion cases because they chill beneficial conduct); Fred S. McChesney, *Easterbrook on Errors*, 6 J. COMPETITION L. & ECON. 11 (2010); Wright, *Evidence-Based Antitrust*, *supra* note 18, at 248.

quickly as the market self-corrects.[74] A further assumption, though not always explicitly stated, is that the *risk* of false positives is higher than that of false negatives.[75]

These assumptions were emphasized in *Trinko*, which opined that false positives "are especially costly, because they chill the very conduct the antitrust laws are designed to protect."[76] They were also important premises of the controversial Section 2 Report issued by the Antitrust Division of the Department of Justice in the final months of President George W. Bush's second term[77] (and withdrawn within a few months of the Obama administration by the Antitrust Division's new head, Christine Varney).[78]

Empirical support for these assumptions, however, seems weak at best.[79] Antitrust liberals assert that the assumption of a higher frequency of type I relative to type II errors, in particular, is unsupported by the evidence.[80] While the prospect of false condemnations was probably a genuine risk in the Warren Court era, the evolution of antitrust law over the last three decades has drastically diminished the possibility of that occurrence.[81] As various com-

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[74] *See* Easterbrook, *Antitrust Limits*, *supra* note 72, at 2 ("If the court errs by permitting a deleterious practice, though, the welfare loss decreases over time. Monopoly is self-destructive. Monopoly prices eventually attract entry."); Wright, *Evidence-Based Antitrust*, *supra* note 18, at 247–49 (articulating the Chicago School error-cost framework).

[75] *See* Easterbrook, *Antitrust Limits*, *supra* note 72, at 15 ("[B]ecause most forms of cooperation are beneficial, excusing a particular practice about which we are ill-informed is unlikely to be harmful."); *id.* at 16 ("A legal system that errs even a few percent of the time is likely to 'catch' mostly desirable practices. If five percent of 'tying' arrangements are deleterious, and the legal system errs ten percent of the time, it is apt to condemn twice as many beneficial arrangements as it catches anticompetitive ones.").

[76] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) (internal citation omitted); *see also* Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 MICH. L. REV. 683, 711 (2011) [hereinafter Shelanski, *Rebalancing Antitrust and Regulation*] (criticizing the *Trinko* Court's overemphasis on false positives while overlooking the risk and cost of false negatives).

[77] U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008) [hereinafter DOJ, SECTION 2 REPORT], *available at* www.justice.gov/atr/public/reports/236681.pdf (raising the concern that U.S. antitrust institutions will fail to properly distinguish between anticompetitive and procompetitive acts, leading to an over-deterrence of potentially efficient and procompetitive conduct); *see infra* notes 112–115 and accompanying text.

[78] Press Release, U.S. Dep't of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009) [hereinafter DOJ Press Release Regarding Withdrawal of Section 2 Report], *available at* www.justice.gov/atr/public/press_releases/2009/245710.htm.

[79] *See* Baker, *Exclusion as a Core Competition Concern*, *supra* note 29, at 580–81 (analyzing the flaws of the empirical studies); Wright, *Evidence-Based Antitrust*, *supra* note 18, at 248 (acknowledging that reliable estimates of relative costs of false positives and false negatives are not available).

[80] *See* Shelanski, *Rebalancing Antitrust and Regulation*, *supra* note 76, at 711–13 (arguing that the evidence does not support the view that false positives are occurring frequently).

[81] Kovacic, *Intellectual DNA of Competition Law*, *supra* note 15, at 3 ("[A]n examination of U.S. antitrust experience with dominant firms reveals significant changes over time. Since the

mentators have noted, changes in substantive and procedural legal rules in antitrust law since the mid-1970s have made it progressively more difficult for plaintiffs even to survive motions to dismiss or for summary judgment, let alone win at trial.[82] Even the Antitrust Modernization Commission, generally considered a conservative body, concluded in its 2007 Report and Recommendations that "[n]o actual cases or evidence of systematic overdeterrence were presented to the Commission."[83] In fact, a case can be made that, today, the risk of false *negatives* is likely higher than the risk of false positives. As commentators have noted, the Supreme Court decided in favor of the defendant in all 13 antitrust cases that were handed down from 1993 through 2009,[84] although it has since ruled for the plaintiffs in three cases[85] (but also raised antitrust class action bars in two additional cases).[86] Of course, the paucity of wins for antitrust plaintiffs is not conclusive proof of a high incidence of false negatives, since it is theoretically possible that the plaintiffs all lost because their cases lacked merit.

There is also little empirical evidence relating to the cost of harm caused by individual false positives relative to that caused by individual false negatives. The Chicago School assumption that individual false positives have severe and long-lasting effects presupposes that businesses wrongly deprived of one strategy will lack efficient alternatives.[87] In the real world, however, businesses may well be adept at finding effective substitutes. With respect to the predicted effects of individual false negatives, there is also no reliable evi-

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mid-1970s, developments in U.S. antitrust doctrine and enforcement policy have narrowed the range of dominant firm conduct that is subject to condemnation.").

[82] *See* Crane, *Chicago, Post-Chicago, and Neo-Chicago*, *supra* note 19, at 1912–13 (reviewing the Supreme Court's antitrust retrenchment); Shelanski, *Rebalancing Antitrust and Regulation*, *supra* note 76, at 711–12 (summarizing the substantive and procedural changes in antitrust law in the past 30 years that have reduced the likelihood of plaintiffs winning at trial or even reaching trial).

[83] ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 247 (2007), *available at* govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[84] *See, e.g.*, Crane, *Chicago, Post-Chicago, and Neo-Chicago*, *supra* note 19, at 1918 ("[N]o plaintiff has won an antitrust case in the Supreme Court since 1992.").

[85] *See* FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003 (2013); FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013); Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183 (2010).

[86] *See* Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013) (reversing the certification of an antitrust class action); Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (finding that plaintiff merchants were barred by arbitration agreements from bringing an antitrust class action against the defendant, even though the plaintiffs could not effectively vindicate their antitrust claims under the terms of the arbitration clause).

[87] *See* Devlin & Jacobs, *supra* note 72, at 80 ("The law assumes that Type I errors result in the perpetual loss of efficiencies, but what about the second-best solutions that markets will devise in response to Type I errors?").

dence that they will be minimal and fleeting, as is assumed under Chicago School theory.[88]

Ultimately, it is probably impossible to determine with any degree of certainty that any particular rule will minimize total error costs for the various exclusionary practices, because reliable estimates of the risks and costs of either type of error are unavailable. Thus, despite a broad consensus among economists that antitrust rules should strive to minimize the total costs of error, putting decision theory into practice is hardly simply an economic exercise. Rather, it draws heavily on assumptions, and assumptions are necessarily informed by one's ideology.

II. IDEOLOGY AND HOW IT COMES INTO PLAY

Since the economics is unclear on the issues discussed above, it is almost inevitable that, consciously or unconsciously, ideology will come into play in one's approach to exclusionary conduct.[89] General optimism or pessimism about markets, trust or distrust of government institutions, differing intuitions about the virtues of dominant firms or the value of competition, and other social values held by policymakers and commentators are all likely to influence their perspectives on the proper role of antitrust. These beliefs and values also cannot help but shape interpretations of facts as well as judgments on the types of evidence that would be deemed relevant and the quality and quantum of evidence required before approving of antitrust intervention. They will also likely color perspectives on welfare tradeoffs and on the relative costs of false positives and false negatives. Even broader value differences—such as those relating to property rights, economic liberty, merit, opportunity, and fairness—may explain biases toward intervention or non-intervention where the economic evidence is weak. In short, "technical" arguments about the plausibility of exclusion, links between market structure and dynamic efficiency, and the costs of false positives versus false negatives may stem more from ideology than from economics.

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[88] *See id.* (speaking of false negatives: "[I]t is not the case that erroneous rules are perpetual. Nor can the market always be trusted to correct anticompetitive conditions mistakenly condoned.").

[89] *See* Wright, *Evidence-Based Antitrust*, *supra* note 18, at 256 ("[T]he existence of many models provides increasingly plausible cover for regulators to import their intellectual prior assumptions into any given antitrust case. . . . Taken to the extreme, and without an institutional mechanism to guide model selection based upon scientific merit, outcomes may instead become heavily influenced by subjective considerations, prior beliefs, and ideology . . . ."); *see* sources cited *supra* note 12.

A. Optimism or Pessimism About Markets and Trust or Distrust of Government Intervention

One set of ideological differences between antitrust conservatives and antitrust liberals relates to their views on markets and the economy, the competence of government institutions, and the wisdom of trusting government intervention (over markets) to remedy anticompetitive outcomes. At the risk of some overgeneralization, antitrust conservatives tend to see markets as robust and government institutions as infirm.[90] Antitrust liberals, on the other hand, are less trusting of laissez-faire markets and have more confidence in the capacity of government institutions to make the right choices on whether (and how) to control dominant firm conduct.[91]

In general, the Chicago School has great faith in the resilience of markets and in their ability to self-correct, and thus function efficiently over time. It assumes ease of entry and the ability of a dominant firm's rivals and customers to respond to (and blunt) a dominant firm's exclusionary strategies.[92] Naturally, if one believes that free markets will remedy inefficiencies effectively on their own and, therefore, will not go astray for long, there would be less reason for concern over a dominant firm's exclusionary practices.

Combined with a strong faith in the robustness of free markets, antitrust conservatives tend to have serious doubts about the competence of U.S. antitrust institutions.[93] In addition to a general predisposition toward limited gov-

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[90] *See* Crane, *Antitrust Institutions*, *supra* note 15, at 45–46 (describing the beliefs of the Chicago School, including a strong belief in "the good functioning and self-correcting properties of the market" and a mistrust of its antitrust institutions). For a summary of the Chicago School's antitrust precepts, see Posner, *The Chicago School*, *supra* note 26, at 925–33; Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 226–33 (1985).

[91] *See* Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 267 (observing that the Post-Chicago School "has relatively less confidence in markets as such, is more fearful of strategic anticompetitive behavior by dominant firms, and has a significantly restored faith in the efficacy of government intervention").

[92] *See, e.g.*, Easterbrook, *Antitrust Limits*, *supra* note 72, at 2; William J. Baumol, *Contestable Markets: An Uprising in the Theory of Industry Structure*, 72 AM. ECON. REV. 1, 2 (1982); John S. McGee, *Efficiency and Economies of Size*, *in* INDUSTRIAL CONCENTRATION: THE NEW LEARNING, *supra* note 25, at 55, 91.

[93] *See* Crane, *Antitrust Institutions*, *supra* note 15, at 50–53 (discussing the Chicago School's dim view of almost the entire antitrust institutional system—the enforcement agencies, judges and juries, private enforcement, and state enforcers); Easterbrook, *Exclusionary Conduct*, *supra* note 73, at 349 (discussing his skepticism of judicial and administrative ability to "second-guess markets"). It should be noted that the modern Harvard School also has considerable reservations about the competence of U.S. antitrust institutions to formulate and apply antitrust rules in complex antitrust cases. *See generally* Kovacic, *Intellectual DNA of Competition Law*, *supra* note 15, at 36–38 (arguing that the intellectual DNA of contemporary antitrust incorporates the contributions of both the Chicago School and the Harvard School and citing, in particular, the Harvard School's insistence that antitrust rules must take into account the limitations of U.S. institutions).

ernment in national economic life,[94] antitrust conservatives often express deep skepticism about the ability of courts and antitrust enforcers to intervene effectively to address dominant firm conduct. They question the institutions' capacity to distinguish anticompetitive exclusionary conduct from procompetitive activities[95] and to predict accurately the competitive effects of the challenged conduct in what are often complex and nuanced situations.[96] These twin beliefs—that markets are robust while government intervention is too often ineffectual or counterproductive—understandably produce a normative preference for laissez-faire.

In contrast to antitrust conservatives, antitrust liberals tend to believe that markets are often imperfect, making market power durable and less vulnerable to competitive challenges.[97] Thus, they are more skeptical of the notion that markets will "sort themselves out" if they are left alone. Antitrust liberals also have greater confidence in the government's ability to intervene successfully to improve consumer welfare, and do not believe as a matter of course that government (antitrust) action is usually clumsy, inefficient, and counterproductive.[98] Given these foundational beliefs, an antitrust liberal bias toward antitrust enforcement is predictable.

While these differing ideologies may be irrelevant where the economics of a practice is unambiguous, they do matter where economic theories and empirical evidence are indeterminate, as they often are on important issues pertaining to exclusion claims. It is, after all, only natural that people tend to find

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[94] *See* Jonathan B. Baker, *Preserving a Political Bargain: The Political Economy of the Non-Interventionist Challenge to Monopolization Enforcement*, 76 ANTITRUST L.J. 605, 637 (2010) [hereinafter Baker, *Preserving a Political Bargain*] ("The economic ideal for non-interventionist conservatives is a government that simply protects contract and property rights and otherwise stays out of the way of private economic activity."); David Brooks, *A Second G.O.P.*, N.Y. TIMES, Jan. 29, 2013, at A23 (suggesting that the difficulty for the GOP, in coming up with a positive governing program for presidential elections, is the mindset that government is bad, and anyone who starts "talking about what kind of regulations and programs government should promote [is] accused by colleagues of being Big Government conservatives"). Brooks was referring to political conservatives, but antitrust conservatives also share much of the general conservative normative preference for limited government in the economy.

[95] *See, e.g.*, BORK, *supra* note 20, at 137; Easterbrook, *Antitrust Limits*, *supra* note 72, at 26–29.

[96] *See, e.g.*, Easterbrook, *Antitrust Limits*, *supra* note 72; Ginsburg & Wright, *supra* note 56, at 12–20 (discussing the limitations of antitrust institutions—enforcement agencies and courts—in incorporating dynamic analysis).

[97] *See* Baker, *Recent Developments*, *supra* note 43, at 646–52 (arguing that market imperfections, such as information asymmetries and sunk costs, allow market power to persist); Kaplow, *supra* note 47, at 536–37 (arguing that markets do not function perfectly).

[98] On this issue, the modern Harvard School is closer to the Chicago School than to the Post-Chicago School in that its adherents seem to have similar concerns about government institutions, though their concerns are seemingly not as profound as those held by Chicago School adherents. *See supra* notes 15 and 93.

theories that are in tune with their predispositions more persuasive, and interpret ambiguous facts in ways that are in accord with their worldviews.

1. *Biasing Choice of Theory, Interpretation of Evidence, and Other Aspects of Analysis*

Differing ideologies about market efficiency and government institutional competence will likely bias one's choice of theory to explain dominant firm conduct alleged to be exclusionary. Thus, antitrust conservatives, who trust markets more than antitrust intervention, generally express a preference for Chicago School non-intervention models. And antitrust liberals, with a stronger belief in the need for (and the effectiveness of) government intervention to control dominant firm conduct, are more receptive to Post-Chicago's interventionist models. These ideological differences will also likely bias policymakers' interpretations of facts and affect their judgments in ways that impact antitrust outcomes.[99] To antitrust conservatives, antitrust liberals may seem too dismissive of evidence of efficiencies and too receptive to evidence of anticompetitive harm. No doubt, to antitrust liberals, antitrust conservatives may seem biased in the opposite directions. And both sides may well be correct.

Likewise, disagreements on the quality and quantum of evidence that should be required before proceeding with a case probably have less to do with disputes over "economic rigor" than they do with ideology. For example, Commissioner Wright has recommended a safe harbor for exclusive dealing where the level of foreclosure of the market from rivals is less than 40 percent.[100] In addition, he has suggested that that level should be measured using a "but-for foreclosure" method—which entails calculating "the difference between the percentage share of distribution foreclosed by the allegedly exclusionary agreements or conduct and the share of distribution in the absence of such an agreement."[101] The rigor of this requirement means that successful challenges to exclusive dealing would be highly unlikely, which would be in accord with the antitrust conservative belief that the practice is usually efficient. Should this proposal generate a rebuttal from antitrust liberals, the rebuttal will likely be driven as much if not more by concerns about the wisdom of the procedure's strong bias in favor of legality for exclusive dealings as by technical objections to the methodology itself, even if the argument is couched in terms of the latter.

[99] *See supra* note 25 and accompanying text.

[100] Wright, *Exclusive Dealing and Loyalty Discounts*, *supra* note 33, at 5.

[101] Joshua D. Wright, *Moving Beyond Naïve Foreclosure Analysis*, 19 GEO. MASON L. REV. 1163, 1186 (2012).

2. *Biasing the Decision-Theoretic Approach*

As earlier discussed, economic science cannot reliably predict the frequency of false positives and false negatives or estimate the total costs of any such errors.[102] Instead, assumptions are made, and assumptions necessarily draw on values and beliefs. One probable explanation of the antitrust conservative assumption of a high risk of error is the belief that antitrust institutions—enforcement agencies and courts—are prone to making wrong calls, particularly in Section 2 cases.[103] The further conservative assumption of a high risk of false positives relative to false negatives is probably attributable to the antitrust conservative belief that dominant firm conduct is rarely exclusionary.[104]

With respect to antitrust liberals, their rejection of the antitrust conservatives' assumptions regarding the risk of error is probably also attributable to ideology, given the absence of reliable empirical evidence. One explanation of their unwillingness to predict a high probability of error probably lies in their stronger faith in the capability of antitrust institutions to make the right decisions. And their refusal to assume that the risk of false positives is necessarily higher than the risk of false negatives is likely based on skepticism about the Chicago School theory that most exclusionary conduct has efficiency justifications.

Different belief systems about the market and the efficacy of government intervention, likewise, probably affect the calculus on the costs of individual false positives and false negatives. If one believes that the free market is a more efficient mechanism than government intervention in ensuring a robust market and correcting anticompetitive outcomes, then it is reasonable to conclude that the cost of individual false positives is much higher than that of false negatives. For if markets invariably self-correct, as antitrust conservatives tend to believe, harmful effects that might result from an incorrect failure to condemn or pursue an exclusionary conduct claim will indeed be quickly erased by competitive forces. Conversely, consumer welfare harms resulting from false condemnations will likely be great because the lost benefits from the banned efficient strategies are "not offset by equilibrating market forces tending to mitigate their impact."[105]

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[102] *See supra* Part I.C.

[103] *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) ("Under the best of circumstances, applying the requirements of § 2 'can be difficult' because 'the means of illicit exclusion, like the means of legitimate competition, are myriad." (internal citation omitted)).

[104] *See supra* notes 26–29 and accompanying text.

[105] Wright, *Evidence-Based Antitrust*, *supra* note 18, at 248.

On the part of antitrust liberals, doubts about market self-correction and greater confidence in the government's ability to correct anticompetitive outcomes would naturally lead to a different calculation of the magnitude of harm for individual errors. If one believes that market power tends to be enduring because dominant firms are able to erect entry barriers or because of other market imperfections, then the effects of false negatives could be very harmful. And if one believes that government intervention can be effective (at least relative to reliance on market self-correction), then the failure to proscribe exclusionary conduct would have a much greater impact than is assumed by those who believe that the government is likely to do more harm than good.

3. *The Post-2008 Introspection on Antitrust Law and Policy and the Controversy over the Section 2 Report*

Recognition that ideology—on markets and the efficacy of government intervention—does matter in antitrust was probably one reason for some liberal recriminations, in the wake of the 2008 U.S. financial crisis, on the state of U.S. antitrust enforcement.[106] At first blush, the suggestion that the 2008 debacle reflected a failure of antitrust seems incongruous since the financial collapse cannot be attributed to any specific breakdown in antitrust enforcement.[107] But to the extent that the criticism was really about the values that inform and underlie modern antitrust enforcement, the 2008 financial crisis is relevant to the discourse. The financial market collapse clearly shook the faith that some people, including former Federal Reserve Chairman Alan Greenspan and Judge Richard Posner, previously had in unfettered markets.

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[106] *See, e.g.*, Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks as Prepared for the Center for American Progress: Vigorous Antitrust Enforcement in This Challenging Era 4–5 (May 11, 2009), *available at* www.justice.gov/atr/public/speeches/245777.pdf (suggesting that "inadequate antitrust oversight contributed" to the 2008 financial calamity and the ensuing recession, and asserting that antitrust enforcers "cannot sit on the sidelines any longer—both in terms of enforcing the antitrust laws and contributing to sound competition policy" in the national economic recovery); Bush, *supra* note 5, at 279–80 (arguing that "antitrust has contributed to the [2008] economic crisis in several ways," including placing an over-emphasis on efficiencies in antitrust analysis, not being sufficiently skeptical of efficiency claims, and shying away from antitrust enforcement when it is politically unpopular); J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Remarks at the Bates White Antitrust Conference: Antitrust Law Enforcement: What to Do About the Current Economics Cacophony? 6 (June 1, 2009), *available at* www.ftc.gov/public-statements/2009/06/antitrust-law-enforcement-what-do-about-current-economics-cacophony ("With the recent financial crisis . . . one has to wonder if the Chicago School's fundamental presumptions are still tenable.").

[107] *See* Marina Lao, *Editor's Note: Symposium on the Effect of Economic Crises on Antitrust Policy*, 77 ANTITRUST L.J. 213, 213–14 (2010) [hereinafter Lao, *Editor's Note*] (summarizing the reasons for the 2008 financial crisis—a real estate bubble that encouraged major financial firms to create complex, unregulated, financial products to sell to investors; the housing bubble burst that led to widespread delinquencies in the subprime mortgages which, in turn, led to the financial products losing value; the combination of the major financial firms' bad assets and massive liabilities brought about by over-leveraging).

Greenspan, a well-known economic libertarian, famously acknowledged that the financial crisis revealed a flaw in the free market model that he had failed to recognize;[108] and Posner, a leading Chicago School jurist and scholar, attributed the ensuing recession to under-regulation.[109]

The linking by some antitrust liberals of the financial collapse to antitrust failure can best be understood as a challenge to the core articles of faith held by antitrust conservatives that have long supported a policy of non-intervention toward dominant firm conduct.[110] The colossal market failures that brought about the 2008 financial meltdown showed the financial markets in question to be imperfect and resistant to self-correction.[111] If that experience can be extrapolated to markets in general, it would indeed call into question one of the fundamental assumptions that has sustained the prevailing permissive Section 2 enforcement policy—that markets are robust and will expeditiously self-correct. Thus, it should not have been surprising that the 2008 financial crisis touched off introspection on U.S. antitrust law and policy, particularly toward dominant firms, though there was no specific link between the crisis itself and antitrust enforcement (or the lack thereof).

The fervor of the debate over the controversial Section 2 Report[112] can also be better understood when it is seen as a tug of war between two different ideologies about market efficiency, government institutional competence, and indeed the very legitimacy of Section 2 enforcement. The Report, which counseled great tolerance toward dominant firms, was issued by the DOJ over the strong objections of the more ideologically diverse FTC during the final months of President George W. Bush's administration in 2008.[113] A majority of the FTC Commissioners were so opposed to the DOJ Report that they took the unusual step of issuing a sharply critical statement calling it "a blueprint for radically weakened enforcement of Section 2 of the Sherman Act."[114] The

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[108] Patrice Hill, *Congress Rips Greenspan for Crisis*, WASH. TIMES, Oct. 24, 2008, at A1 (reporting that Greenspan, in testimony before Congress, testified that his former faith in self-regulation had been "flawed").

[109] *See generally* RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION (2009).

[110] *See, e.g.*, J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Remarks at N.Y. Bar Ass'n Annual Dinner: Implications of the Financial Meltdown for the FTC (Jan. 29, 2009) (discussing relationship between financial crisis and Chicago School economic theory), *available at* www.ftc.gov/public-statements/2009/01/implications-financial-meltdown-ftc.

[111] *See* Lao, *Editor's Note*, *supra* note 107, at 215–16.

[112] DOJ, SECTION 2 REPORT, *supra* note 77.

[113] *See* Press Release, Fed. Trade Comm'n, FTC Commissioners React to Department of Justice Report, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (Sept. 8, 2008), *available at* www.ftc.gov/news-events/press-releases/2008/09/ftc-commissioners-react-department-justice-report-competition-and.

[114] Statement of Commissioners Harbour, Leibowitz, and Rosch on the Issuance of the Section 2 Report by the Department of Justice (Sept. 8, 2008), *available at* www.ftc.gov/sites/default/

Report was quickly withdrawn only a few months into President Obama's administration, with Christine Varney, Obama's newly appointed head of the Antitrust Division, strongly criticizing the laissez-faire approach that the Report advocated.[115]

Yet the DOJ has since filed only one minor Section 2 case, against United Regional Health Care System.[116] Given the relatively few Section 2 cases that are brought even in Democratic administrations,[117] the intensity of the debate surrounding the Report and the Obama administration's swift reaction to it would have been a bit inexplicable if the disagreement were merely technocratic. But if the Report is viewed as an ideological statement on Section 2 with which the Obama administration disagreed, then it was necessary for the new administration to disavow it explicitly and quickly regardless of whether it intended to "follow through" with a commitment to investigating and bringing more Section 2 cases. In this interpretation, the passion in the debate is understandable.[118]

B. Differing Narratives on Dominant Firms and Competition

Differing intuitions about the virtues of dominant firms and the value of competition also underlie the antitrust conservative-liberal divide on Section 2 enforcement. As earlier discussed, the competing Schumpeter-Arrow theories on market structure and dynamic efficiency often animate the debate on whether a permissive or restrictive Section 2 policy is appropriate, though

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files/attachments/press-releases/ftc-commissioners-react-department-justice-report-competition-monopoly-single-firm-conduct-under/080908section2stmt.pdf. FTC Chairman William Kovacic did not join in the Statement of Commissioners Harbour, Leibowitz, and Rosch but issued a separate statement on the report. *See* Statement of Federal Trade Commission Chairman William E. Kovacic, Modern U.S. Competition Law and the Treatment of Dominant Firms: Comments on the Department of Justice and Federal Trade Commission Proceedings Relating to Section 2 of the Sherman Act (Sept. 8, 2008), *available at* www.ftc.gov/sites/default/files/attachments/press-releases/ftc-commissioners-react-department-justice-report-competition-monopoly-single-firm-conduct-under/080908section2stmtkovacic.pdf.

[115] *See* DOJ Press Release Regarding Withdrawal of Section 2 Report, *supra* note 78.

[116] *See* United States v. United Reg'l Health Care Sys., No. 7:11-cv-00030-O (N.D. Tex. Sept. 29, 2011), *available at* www.justice.gov/atr/cases/f276000/276027.pdf. However, the DOJ in the Obama administration did bring three non-Section 2 exclusionary conduct complaints. *See* Salop, *What Consensus?*, *supra* note 1, at 615.

[117] *See* William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 449 tbl.4 (2003) (showing an average of less than one case per agency filed each year since 1977). Steven Salop's recent compilation of cases shows nine complaints with Section 2 counts brought by the DOJ in the Clinton administration, two during the 12 years of Reagan and G.H.W. Bush administrations, none during the G.W. Bush administrations, and one so far in the Obama administration. Salop, *What Consensus?*, *supra* note 1, at 614–15, 614 n.48.

[118] *See* Salop, *What Consensus?*, *supra* note 1, at 632–33 (stating his view that the Section 2 report "represented a statement of AAG Tom Barnett's ideology regarding proper enforcement of Section 2.").

there is no convincing economic data to support either theory.[119] Therefore, to the extent that judges, policymakers, or commentators tilt in favor of permissive or restrictive standards ostensibly in reliance on one or the other theory, their choice is likely to be influenced to some extent by their ideologies about dominant firms and competition.

1. *Narratives on Dominant Firms*

Again, at the risk of some overgeneralization and oversimplification, it seems that antitrust conservatives generally view dominant firms positively, stressing their many economic contributions to society.[120] A firm's success in achieving market dominance is usually interpreted as evidence of its superior efficiencies, innovation, skill, and performance.[121] And enduring dominance is presumed to be further validation of the firm's superiority over its competitors, and not evidence of improper exclusion.[122] Seen through this lens, the reasonable default position would be to favor the dominant firm since it can usually be counted upon to act in ways that serve the interests of consumers and to follow efficient paths.

This positive mindset toward dominant firms was reflected in the overall tone of the Supreme Court's opinion in *Trinko*, authored by Justice Scalia.[123] In one memorable paragraph, Scalia seemed to extol the virtues of market dominance, describing monopoly power and the ability to charge monopoly prices, at least initially, as "an important element of the free-market system."[124] He suggested that the monopoly structure "attracts 'business acumen' . . . and induces risk taking that produces innovation and economic growth."[125] Respect for dominant firms and emphasis on the benefits of market dominance also infused the DOJ's Section 2 Report.

If dominant firms are generally viewed favorably, then it follows that antitrust enforcement against questionable dominant firm conduct will likely be

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[119] *See supra* notes 55–57 and accompanying text.

[120] *See* Kovacic, *Intellectual DNA of Competition Law*, *supra* note 15, at 21 ("The second trait [of modern Section 2 jurisprudence] is wariness of rules that might discourage dominant firms from pursuing price-cutting, product development, or other strategies that generally serve to improve consumer welfare. This wariness reflects respect for the economic contributions of large firms and fear that overly restrictive rules will induce a harmful passivity.").

[121] *See, e.g.*, BORK, *supra* note 20, at 178, 193–96 (expressing the idea that dominant firms that attained their size through internal growth had presumably succeeded through efficiencies or economies of scale).

[122] *See* Adams & Brock, *supra* note 12, at 297 (describing the antitrust conservative belief that even monopolists are constantly vulnerable to competitive challenges, and that "[i]t is only by virtue of the superior efficiency of a dominant firm that it is able to 'exclude' competition").

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

[124] *Id.* at 407.

[125] *Id.*

regarded with some suspicion, regardless of whether concentrated or competitive markets are more conducive to innovation. In this view, unless an act unambiguously decreases consumer welfare, antitrust intervention would be considered an undesirable intrusion upon a successful company's freedom to innovate and to develop new products and new technologies as it sees fit.[126] This would help explain the antitrust conservative preference for a strong presumption of legality for most forms of dominant firm conduct.[127]

The opposing sentiment on monopolies is probably best expressed in the writings of Justice Louis Brandeis[128] and in *Alcoa*.[129] Brandeis famously warned about the "curse of bigness," arguing that "[h]uman nature is such that monopolies, however well intentioned, and however well regulated, inevitably become, in course of time, oppressive, arbitrary, unprogressive, and inefficient."[130] He was skeptical of the view that market dominance is usually attained through efficiency alone, and was distrustful of enduring private economic power.[131] Similar wariness about monopolies was expressed in *Alcoa*, which said that the "possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy."[132] Monopoly was described as a "narcotic" and it was said that, absent competition, monopolists would be complacent and have "an inevitable disposition to let well enough alone."[133] A recent article by Marc Winerman and William Kovacic has concluded (based on previously unexamined archived material) that *Alcoa*'s broad view of monopolization did not reflect Judge Learned Hand's personal beliefs but rather his perception of his duty to articulate and give effect to the

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[126] *See* Baker, *Preserving a Political Bargain*, *supra* note 94, at 621–22 (describing Microsoft's depiction of the government's Section 2 case against it as an assault on its business freedom to develop new technologies for consumers and other challenges to the legitimacy of antitrust). An extreme view in this vein was expressed by Grover Norquist, who stated that "the antitrust laws, if they ever served a useful purpose, now only exist to stifle productivity growth and development of new products and services." Letter from Grover G. Norquist, President, Americans for Tax Reform, to Deborah A. Garza, Chairman, Antitrust Modernization Comm'n (Sept. 9, 2004), *available at* govinfo.library.unt.edu/amc/comments/americanstaxreform.pdf.

[127] *See, e.g.*, R. Hewitt Pate, Testimony before the Antitrust Modernization Comm'n: Exclusionary Conduct: Refusals to Deal and Bundling and Loyalty Discounts 2–3, 11–12 (Sept. 29, 2005), *available at* govinfo.library.unt.edu/amc/commission_hearings/pdf/Pate_Statement.pdf.

[128] *See, e.g.*, ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE 181 (1946); THOMAS K. MCCRAW, PROPHETS OF REGULATION 108 (1984) ("Early in his career, Brandeis decided that big business could become big only through illegitimate means. By his frequent references to the 'curse of bigness,' he meant that bigness itself was the mark of Cain, a sign of prior sinning.").

[129] United States v. Aluminum Co. of Am., 148 F.2d 416 (1945) (*Alcoa*). *See infra* note 134 and accompanying text.

[130] MASON, *supra* note 128, at 181.

[131] *See* Bush, *supra* note 5, at 281–82 (discussing Brandeis's views on firm size and the "curse of bigness").

[132] *Alcoa*, 148 F.2d at 427.

[133] *Id.*

Sherman Act as envisioned by Congress.[134] Nevertheless, the opinion is important as it sought to reflect the strain in antitrust tradition that is distrustful of dominant firms and private economic power.

Other, more contemporary, antitrust scholars have expressed similar concerns about monopoly power and its potential for abuse.[135] One fear is that dominant firms have incentives to exercise their substantial market power to suppress a smaller rival's new technologies and products (or to otherwise impede the competitive process), and that it is all too easy for them to do so.[136] Antitrust liberals are unwilling to assume that dominant firms will routinely act efficiently and in the interests of consumers; thus, they prefer more antitrust vigilance in controlling dominant firm conduct.

It is reasonable to expect that people with different philosophical starting points on dominant firms would evaluate facts relating to exclusionary claims differently—in a way that is likely to produce results consistent with their values. They may perhaps discount or screen out information that conflicts with, and give more weight to facts that conform to, their narrative of market dominance. Those who subscribe to the positive narrative would probably emphasize the need to preserve a dominant firm's potential efficiencies, and favor a decision or result that accords the firm broad freedom in its selection of business strategies. In other words, antitrust conservatives may be more receptive to the Schumpeter theory that market concentration encourages innovation. And, they may be inclined to presume that reducing a dominant firm's profitability even slightly would diminish its incentive to innovate so drastically that we would see a net reduction in innovation and economic growth.

In contrast, those who are more concerned about potential abuses of market dominance will likely concentrate on the *challengers'* opportunities and incentives, and prefer an outcome that preserves a business environment more conducive to competition from smaller rivals. Thus, they would be more likely to accept Arrow's theory that competitive markets, not monopolies, are

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[134] Marc Winerman & William E. Kovacic, *Learned Hand,* Alcoa*, and the Reluctant Application of the Sherman Act*, 79 ANTITRUST L.J. 295 (2013).

[135] *See* Adams & Brock, *supra* note 12, at 262, 276–77 (discussing the concern that private economic power would be "prone to contravene the public interest" and that structural market power is easily abused); Bush, *supra* note 5 (arguing generally that serious consequences may arise from firm size that are unrelated to efficiencies); Carl Kaysen, *The Corporation: How Much Power? What Scope?*, *in* THE CORPORATION IN MODERN SOCIETY 85, 85–90 (Edward S. Mason ed., 1959) (suggesting that private economic power has to be subject to some control to ensure that its decisions conform to the public interest); William S. Comanor, *Antitrust in a Political Environment*, 27 ANTITRUST BULL. 733, 734 (1982) (speaking of the "strain in the American political tradition which is distrustful of corporate or business power").

[136] *See* Baker, *Exclusion as a Core Competition Concern*, *supra* note 29; Krattenmaker & Salop, *supra* note 31.

more conducive to innovation, and to believe that a permissive Section 2 policy may *reduce* (rather than enhance) incentives to innovate.[137] And, they would be more likely to favor prohibiting dominant firm conduct that excludes competitors and has no legitimate justification, without requiring clear evidence of anticompetitive effects.[138]

2. *Narratives on the Value of Competition*

Different beliefs on the value of competition in its own right may also influence one's approach to Section 2. To antitrust conservatives, the primary goal of antitrust law is to promote efficiency and increase total welfare; competition is valued only as a means toward the achievement of that end.[139] In this view, the absence of competition within a market has little antitrust significance so long as the market is contestable, since competition *for* the market should be sufficient to drive the dominant firm toward efficiency even if there is minimal or no competition within the market. Many antitrust liberals, in contrast, see a value in competition for its own sake.[140] A traditional liberal assumption, expressed in *Alcoa*, was that smaller rivals may be more efficient than dominant firms since they can more quickly detect and take advantage of opportunities for efficiencies as well as shifts in consumer needs.[141]

Antitrust liberals may also value competition for non-efficiency reasons. For example, competitive markets have traditionally been considered important for controlling and diffusing private economic power held by dominant firms.[142] The *process* of competition itself is also deemed important because of its tendency to enhance the competitive opportunities of start-ups and other less established firms.[143] The court in *Alcoa* also spoke explicitly of Con-

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[137] *See, e.g.*, Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497, 512 [hereinafter Stucke, *Should the Government Prosecute Monopolies?*] ("Modern economic studies, in seeking to correct the flaws of earlier studies, find that a 'strengthening of competition policy is likely to have a positive overall effect on innovation,' and contradict the sixty-year-old Schumpeter hypothesis that *Trinko* adopts."); *see also supra* notes 60–61.

[138] *See, e.g.*, Baker, *Exclusion as a Core Competition Concern*, *supra* note 29, at 539–43.

[139] *See* RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 22 (1976) ("[W]e value competition because it promotes efficiency—i.e., as a means rather than as an end . . . .").

[140] For example, competition may increase buyer choice and product variety. It can put pressure on every participant in the market to cut costs, increase productive efficiency, and improve the quality of its product or service in order to stay competitive.

[141] United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (1945) ("[C]ompetitors . . . will be quick to detect opportunities for saving and new shifts in production, and be eager to profit by them.").

[142] *See* CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 14–15 (1959); Adams & Brock, *supra* note 12, at 273.

[143] *See* Fox, *Politics of Law and Economics*, *supra* note 12, at 578; Bush, *supra* note 5, at 289–90.

gress's intention to favor, under the antitrust laws, "a system of small producers" for other social and political reasons.[144]

While few today will likely argue that antitrust law should be applied to protect small businesses from the efficiencies of dominant firms at the expense of consumers,[145] antitrust liberals are likely to still value a business environment that creates opportunities for small rivals to coexist with and compete on the merits against dominant firms. This normative preference would weigh in favor of prohibiting dominant firm conduct that hinders the competitive process—in order to safeguard such an environment—even when the price or output (or other consumer) impact of the conduct is not readily apparent. It would lean toward condemnation of exclusionary conduct that has no efficiency justification even when the net competitive effects are ambiguous, as is often the case in Section 2 claims. Thus, where a dominant manufacturer threatens not to deal with distributors who carry the products of its competitors, and there is no legitimate business justification, finding an antitrust violation would be appropriate from this point of view even if evidence of the practice's competitive impact is opaque.[146] And, where there is no strong evidence to support either Schumpeter or Arrow on which market structure is more conducive to innovation, one's perception of the inherent value of competition (whether or not based on efficiency) will likely help determine which theory one finds more persuasive.

C. Broader Differences: Conceptions of Property Rights, Economic Liberty, and Other Social Values

Broader ideological differences relating to property rights, economic liberty, and other social values may also bias antitrust conservatives and antitrust liberals in their approach to Section 2 enforcement. The concept of property rights could provide a reward-entitlement basis for favoring dominant firms where the economic effects of the dominant firm conduct at issue are unclear. Different visions of economic liberty may also influence one's preference for markets or the government as the mechanism to control dominant firm conduct. And differences on even broader social values, such as merit, fairness, and extending greater opportunities to the less successful, may also be at play.

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[144] *Alcoa*, 148 F.2d at 427 ("[B]ecause of its indirect social or moral effect . . . a system of small producers, each dependent for his success upon his own skill and character, [may be preferred] to one in which the great mass of those engaged must accept the direction of a few.").

[145] Even Robert Pitofsky, an important antitrust liberal voice, does not consider the protection of inefficient small businesses to be an appropriate antitrust objective. *See* Pitofsky, *Political Content*, *supra* note 4, at 1058.

[146] *See* United States v. Dentsply Int'l, Inc., 399 F.3d 181 (3d Cir. 2005); *see also* United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (condemning exclusive dealing by Microsoft that significantly blocked distribution of a competing browser).

1. *Differing Perspectives on Property Rights*

Though the issue is rarely (if ever) explicitly raised, differing perspectives on property rights may influence the normative preferences of antitrust conservatives and antitrust liberals with respect to Section 2 policy, particularly in connection with unilateral refusals to deal (including under the essential facilities doctrine) and tying arrangements. Antitrust conservatives generally make the economic argument that unilateral refusals to deal should enjoy almost per se legality because compelling anyone, even a monopolist, to assist a rival would perversely deter innovation.[147] And, antitrust liberals tend to respond in economic terms as well—contending that a more restrictive standard may be appropriate because, in some situations, the foreclosure effects of denial of access may be worse than any disincentive effect of imposing a duty to deal.[148] However, because economics cannot really settle this issue, other factors likely are at play, one of which is the ideology of property rights.

Take, for example, Phillip Areeda's critique of the essential facilities doctrine in his seminal article urging a severe limitation of the doctrine.[149] Though his main rationale was economic—the need to preserve incentives to invest—the tone of Areeda's essay reveals a more visceral objection to the doctrine based on the doctrine's infringement of the dominant firm's property rights. Areeda disapproved of the idea that "anything one has that another wants may be called an 'essential facility,'"[150] and opined that "[t]he trouble with . . . the essential facilities notion is that [it] start[s] with the assumption that all business assets are subject to sharing." And he further asked rhetorically, "Do we really want to assume that everything we have is up for grabs?"[151] The language of these statements reflects a disdain for the essential facilities doctrine that is evidently based more on a sense of the sanctity of property rights than on the economics of the duty to deal.

Naturally, those with a strong conception of property rights would likely see a dominant firm as *entitled* to appropriate all the value from the exploitation of its innovation, even if the practice engaged in for that purpose (for example, refusal to deal) has potential harmful effects on competition. They would tend to tolerate dominant firm strategies designed to reap full benefits from complementary markets that are made possible through tying, even if it were doubtful that the single monopoly profit theory applies and, thus, the

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

[148] *See, e.g.*, Baker, *Promoting Innovation Competition*, *supra* note 62, at 511–15.

[149] Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1990). While Areeda is generally not considered part of the Chicago School, his views exemplify the antitrust conservative approach to the essential facilities doctrine.

[150] *Id.* at 844.

[151] *Id.* at 852 n.46.

tying arrangement could produce an anticompetitive outcome. A property right focus would also help explain a normative preference for presumptive legality for tie-ins (or for a strong policy against imposing a duty to deal) even in the absence of much empirical evidence that a dominant firm's ability to appropriate *all* value from its innovation is a necessary incentive for investment or that the effects of the practice are more efficient than anticompetitive.

In contrast, those who do not view dominant firm conduct through a property right prism would focus, not on the dominant firm's reward entitlement, but on the need for the rewards and the desirability of limiting the rewards for non-economic reasons. While these arguments are usually couched in economic terms,[152] the evidence offered in support is often deficient. For instance, Jonathan Baker has argued that, because a dominant firm has many incentives to innovate, some limitation of its profitability through a more restrictive Section 2 policy should not deter innovation.[153] But this argument does not explain how we can tell whether these alternative incentives to innovate are important and sufficient to prevent a net reduction in innovation in a specific case. Thus, it seems likely that these economic arguments are influenced in part by an intuitive sense that dominant firms are already richly (and probably disproportionately) rewarded with monopoly profits and other inherent advantages in our economy. From this perspective, placing a few limits on dominant firm profitability would be reasonable; it would also allow their fringe rivals greater opportunities to compete in the market, which may be more democratic.[154]

2. *Differing Visions of Economic Liberty*

Though the discussion of ideology in this article so far has been limited to the values and beliefs of *antitrust* conservatives and *antitrust* liberals, there are some parallels between antitrust conservatives and *political* conservatives and between antitrust liberals and *political* liberals. After all, while there may be exceptions, it is well known that, in recent decades, Republicans tend to be antitrust conservatives while Democrats tend to be antitrust liberals.[155] Thus, I

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[152] *See generally* Jonathan B. Baker, *"Dynamic Competition" Does Not Excuse Monopolization*, COMPETITION POL'Y INT'L, Autumn 2008, Vol. 4, No. 2, at 243.

[153] *See id.* at 248–50 (referring to first-mover advantages, intellectual property rights, and reputational advantages as some of a dominant firm's other incentives to innovate).

[154] *See generally* RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW (rev. ed. 2000).

[155] For example, former FTC Chairmen Timothy Muris and William Kovacic and current Commissioner Joshua Wright are Republicans and antitrust conservatives, while former Chairmen Robert Pitofsky and Jon Leibowitz are Democrats and antitrust liberals. (Former Commissioner Pamela Jones-Harbour is an Independent and an antitrust liberal.) There are exceptions, of course; for example, former FTC Commissioner Thomas Rosch is a Republican but his views on antitrust enforcement are more similar to those of antitrust liberals.

will make some observations about a few overall philosophical differences between conservatives and liberals that may bear on the antitrust debate on Section 2 policy.

In general, conservatives and liberals seem to have differing visions of economic liberty. Conservatives tend to be concerned about possible infringement of economic liberty by the state and profess a desire to get government off their backs.[156] They worry more about "Big Government" and its perceived encroachment upon freedom than about the effect of private economic power.[157] Sharing some of these general conservative fears of government intrusion, antitrust conservatives place more faith in private contracting and see laissez-faire markets as epitomizing economic liberty.

Liberals, on the other hand, are more inclined to see economic liberty as embodying the right of the less privileged to participate in an economic system that is relatively fair for all; and they see the government as a force for reining in private economic power.[158] Reflecting similar values, antitrust liberals tend to see economic liberty as encompassing the right of smaller or weaker firms to compete on the merits in markets that are not skewed in favor of dominant firms, as well as the right of consumers not to be exploited by dominant firms. In this view, antitrust intervention to control dominant firm conduct may enhance rather than limit economic liberty. Compared to conservatives, liberals are more critical of uncontrolled markets, seeing them as conducive to exploitation of the weak and the uninformed by powerful firms. Thus, they are more willing to have the government set limits on a dominant firm's economic freedom, in order to ensure a freer economic system for all.

It is unsurprising that these differing visions of economic liberty would inform one's approach to Section 2. Those who worry about Big Government and its infringement of economic liberty would likely tilt toward non-interventionist antitrust models, when neither the procompetitive nor anticompetitive theories of exclusionary conduct are determinative. In contrast, those who see the government in the role of offering protection against private economic power would probably lean toward more interventionist models in uncertain economic situations. Similarly, we would expect antitrust conservatives to assert Schumpeterian-based theories and antitrust liberals to champion the competing Arrow-based arguments regarding which market

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[156] *See* Salop, *What Consensus?*, *supra* note 1, at 604 ("[C]onservatives seem most concerned about protection from the state itself and place more trust in private contracting.").

[157] Brooks, *supra* note 94 (describing the Republican "Encroachment Story," which is that "voracious government has been steadily encroaching upon individuals and local communities" and that the "core American conflict . . . is between Big Government and Personal Freedom").

[158] *See* Salop, *What Consensus?*, *supra* note 1, at 604 ("Liberals seem most concerned about providing the people with protection from the powerful, and see the state as a way to provide that protection.").

structure spurs innovation, notwithstanding scant empirical evidence supporting either theory.

3. *Differing Perspectives on Merit, Fairness, and Greater Opportunity for the Less-Established Firms*

Broader socially-based value differences may also come into play. Conservatives tend to believe that our economic system is one of substantial meritocracy, and that success derives primarily from individual effort and ingenuity.[159] In this view, winners in the marketplace, by definition, are the most meritorious and therefore probably deserve to enjoy all the benefits and advantages that flow from their success. Government intervention, in this view, is unwelcome as it is seen as perversely rewarding and encouraging sloth, inefficiency and mediocrity, and "punishing" the successful.[160] Applied to antitrust policy with respect to Section 2, the conservatives' views would translate into deference toward dominant firms (the meritorious winners), and tolerance of questionable dominant firm conduct absent unambiguous evidence of substantial harm to consumer welfare.

Liberals generally have more doubts about the full meritocracy of our economic system.[161] They are also more inclined to argue that, even in a meritocracy, the winners cannot take entire credit for their successes because they owe a debt to society for the contributions of past knowledge, the work of others, and other valuable inputs, all of which facilitated their success.[162] This thinking was probably behind President Obama's famous (and controversial) "you didn't build that" comment at a campaign stop during the 2012 presidential election, where he said that successful people and businesses did not achieve successes on their own but benefited from public services, infrastructure, and the help of others.[163] In this view, some limitation of the rewards that

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[159] *See, e.g.*, Fox, *Politics of Law and Economics*, *supra* note 12, at 586 ("Some people believe that individuals in our society have equal opportunity. They believe that individuals face no significant external barriers to upward mobility, and that if they merely work hard and strive to fulfill their potentials, people will succeed.").

[160] *See id.* ("If the system awarded laggers more than they won on their merits, it is thought, then the system would protect the inefficient and the undeserving . . . .").

[161] *See id*. ("Others believe that established groups enjoy entrenched power and that everyone else, particularly minorities and the poor, face serious external roadblocks placed and maintained by those in the inner circle; they believe that there is no meritocracy except for the well born, the well connected, and a few token others.").

[162] *See* GAR ALPEROVITZ & LEW DALY, UNJUST DESERTS: HOW THE RICH ARE TAKING OUR COMMON INHERITANCE (2008) (making the case that society itself—the accumulated knowledge—is the primary source of our national wealth and, therefore, the benefits from our economic progress should be shared more equally).

[163] *See* CNN Wire Staff, *'You Didn't Build That:' A Theme out of Context*, CNN POLITICS (Sept. 1, 2012), www.cnn.com/2012/08/31/politics/fact-check-built-this/ (quoting the text of Obama's campaign speech: "Look, if you've been successful, you didn't get there on your own . . . If you've got a business—you didn't build that . . . Somebody else made that happen. The

flow to the winners would be reasonable and should not be considered an unfair appropriation of the fruits of their labor. It would also serve to advance the opportunities of the less successful and provide a fairer playing field upon which all can compete on the merits.

Applied to antitrust policy toward controlling dominant firm conduct, it would mean an unwillingness to assume that market dominance is entirely attributed to a firm's superiority or that a dominant firm deserves *all* the benefits that can be derived from exploiting its investments (including benefits derived from complementary markets). It may also mean a preference for antitrust intervention as the default choice when evidence of competitive effects or of the impact of enforcement on innovation is unclear. That is because antitrust enforcement to block exclusionary conduct can create opportunities to compete on the merits for newcomers and less established firms, which should be desirable unless the allegedly exclusionary conduct is clearly efficient.

Ultimately, these ideological differences may have important implications for antitrust policy on Section 2. They tend to bias antitrust conservatives toward choosing procompetitive over anticompetitive theories of exclusionary conduct, and antitrust liberals toward making the opposite choices, when the economic evidence in support of either set of theories is indeterminate. They also tilt antitrust conservatives toward Schumpeter and antitrust liberals toward Arrow, when reliable evidence supporting either theory is lacking. Thus, antitrust conservatives stress the need to protect the incentives and autonomy of dominant firms while antitrust liberals want a recalibration of the rules to give more attention to the opportunities and incentives of the challengers. And they predispose antitrust conservatives and antitrust liberals toward differing conclusions on the error-cost approach to Section 2, in the absence of good empirical evidence, by making different basic assumptions about the risks of false positives and false negatives and about the costs of such errors.

Finally, philosophical differences about distributional issues are evident in the debate over whether maximizing total welfare or consumer welfare should be the antitrust goal. Most antitrust conservatives prefer total welfare, which is concerned only with total efficiency (including producer efficiencies), not with the distribution of benefits. Thus, a business strategy would be considered procompetitive so long as it increases aggregate surplus, even if consumers are worse off. Antitrust liberals want efficiencies as well, but are generally also interested in the distribution of the efficiency benefits; thus, they favor a consumer welfare measure, which looks only to a practice's consumer bene-

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Internet didn't get invented on its own. Government research created the Internet so that all the companies could make money off the Internet. The point is, is that when we succeed, we succeed because of our individual initiative, but also because we do things together.").

fits, and would consider a practice procompetitive only if it results in net consumer surplus.[164]

III. CONCLUSION

This article has suggested that economics and empiricism do not provide answers to all questions arising in antitrust law, particularly those pertaining to dominant firm conduct and vertical restraints. The various economic theories offered to support either permissive or restrictive rules are usually inconclusive, with deficient empirical support. In that case, one's ideology almost invariably comes into play, influencing one's choice of economic models or of the default of intervention or non-intervention when the effects are unclear. Ideological differences are also certain to influence how one evaluates the evidence, what kinds of evidence would be considered relevant, and the quality and quantum of evidence one would demand. These differences also matter in the Schumpeter-Arrow debate on whether industry concentration or competitive markets are more conductive to innovation. And they matter in decision-theoretic analysis, where perspectives on the robustness of markets and the efficacy of government intervention drive the assumptions that underlie the analysis.

Some unease over the progression toward greater permissiveness in Section 2 enforcement seems to be percolating in the antitrust community these days. Recent discussions about the FTC's possible use of Section 5 of the FTC Act—which prohibits unfair methods of competition—to challenge dominant firm conduct not reachable under today's reading of the Sherman Act are probably a signal of that dissatisfaction.[165] Additionally, the emergence of behavioral antitrust, which advocates a radical departure from price theory analysis in antitrust based on behavioral economics principles, could reasonably

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[164] *See* Salop, *What Consensus?*, *supra* note 1, at 615; *see also* Baker, *Economics and Politics, supra* note 1, at 2183–86 (characterizing antitrust law as a "political bargain" that tries to balance the goal of capturing efficiencies with concerns that consumers share in the efficiency benefits).

[165] *See, e.g.*, Jon Leibowitz, Comm'r, Fed. Trade Comm'n, Remarks at Section 5 Workshop: "Tales from the Crypt" Episodes '08 and '09: The Return of Section 5 ("Unfair Methods of Competition in Commerce Are Herby Declared Unlawful") (Oct. 17, 2008), *available at* www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/jleibowitz.pdf (expressing the view that the cramped reading of the Sherman Act by the Supreme Court in recent years results in some anticompetitive behavior not being stopped, and that Section 5 of the FTC Act could be used in some categories of cases to fill the gap); Robert H. Lande, *Revitalizing Section 5 of the FTC Act Using "Consumer Choice" Analysis*, ANTITRUST SOURCE, Feb. 2009, www.americanbar.org/content/dam/aba/publishing/antitrust_source/Feb09_Lande2_26f.authcheckdam.pdf. For additional discussion on the possible use of Section 5 of the FTC Act, see Transcript, FTC Workshop on Section 5 of the FTC Act as a Competition Statute (Oct. 17, 2008), www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/transcript.pdf.

be interpreted as a pro-intervention movement.[166] Pleas for treating exclusion as an important antitrust concern have also been made in recent scholarship.[167] The debate about appropriate antitrust policy, particularly toward controlling dominant firm conduct, is likely to continue for some time.

It would be helpful in this discourse to bring to the fore the ideological underpinnings of the conservative and liberal divide, and to have a normative conversation based on these value differences rather than rely on economic theories as a proxy for discussion. What is needed is an honest conversation on what values should matter and why they should matter in Section 2 enforcement, and whose interests are important and how those interests should be reconciled if they conflict. For antitrust liberals, for example, instead of simply dueling with conservatives over economic theory, it may be more persuasive to set forth normative arguments as to why more vigorous enforcement against dominant firm conduct is good policy. In short, a discussion of competing ideological visions, subject to certain economic boundaries, would be informative and helpful.

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[166] Proponents of applying behavioral economics to antitrust have all generally favored stronger antitrust enforcement. *See, e.g.*, Christopher R. Leslie, *Rationality Analysis in Antitrust*, 158 U. PA. L. REV. 261 (2010); Avishalom Tor & William J. Rinner, *Behavioral Antitrust: A New Approach to the Rule of Reason After* Leegin, 2011 U. ILL. L. REV. 805; Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513 (2007); *see also* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Remarks Before the Vienna Competition Conference: Behavioral Economics: Observations Regarding Issues that Lie Ahead 12 (June 9, 2010), *available at* www.ftc.gov/public-statements/2010/06/behavioral-economics-observations-regarding-issues-lie-ahead (observing that critics generally see behavioral antitrust as "liberalism masquerading as economic thinking"). However, behavioral antitrust itself does not necessarily always point toward a more interventionist antitrust policy. *See* Joshua D. Wright & Judd E. Stone II, *Misbehavioral Economics: The Case Against Behavioral Antitrust*, 33 CARDOZO L. REV. 1517, 1527 (2012) (noting that "firm irrationality does not imply more interventionist antitrust policy"). For example, an "irrational" monopolist could act altruistically and not act as a profit maximizer.

[167] *See* Baker, *Exclusion as a Core Competition Concern*, *supra* note 29; C. Scott Hemphill & Tim Wu, *Parallel Exclusion*, 122 YALE L.J. 1182 (2013); Stucke, *Should the Government Prosecute Monopolies?*, *supra* note 137.